

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

In the arbitration proceeding between

MARCO GAVAZZI AND STEFANO GAVAZZI

Claimants

and

ROMANIA

Respondent

ICSID Case No. ARB/12/25

DISSENTING OPINION

Members of the Tribunal

Hans van Houtte, President

V.V. Veeder, Arbitrator

Mauro Rubino-Sammartano, Arbitrator

Secretary of the Tribunal

Ms. Martina Polasek

DISSENTING OPINION

of

Arbitrator Mauro Rubino-Sammartano

Summary of the proceedings

1. These proceedings were introduced by a Request for arbitration filed by Claimant with ICSID on 23 July 2012.
2. The above Arbitral Tribunal was constituted.
3. The parties have exchanged pleadings.
4. Procedural Orders have been issued.
5. By Procedural Order no. 2, the Tribunal has decided to join the Respondent's objections to jurisdiction, and Claimant's objections to the counter claim by Respondents, to issues of liability and to bifurcate issues of quantum to a further stage of the proceedings.
6. A hearing on jurisdiction and liability took place at the ICC Hearing Centre in Paris from 2 to 5 June 2014.
7. Based on Procedural Order no. 5, the parties have filed their post hearing briefs.
8. The first part of the proceedings resulting from the above bifurcation was completed with the post-hearing briefs and the parties' submissions on costs, and the Tribunal has since deliberated on the issues before it.
9. The facts and contentions of the parties and their claims and counterclaims are described in the Tribunal's decision.
10. The Tribunal has unanimously decided in favour of its jurisdiction over the claims, and has held by a majority that there is no jurisdiction over Respondent's counterclaim.
11. The Tribunal has unanimously decided to dismiss Claimants' claims that Romania would have breached the principle of observance of the right to defence, the principle of contradiction, the Claimants' due process right, under art. 2(5) of the BIT between Italy and Romania, whereby each Party has undertaken to provide effective means of "asserting claims and enforcing rights" and that Romania would have committed a denial of justice and an abuse of rights contrary to good faith.
12. In my opinion the other claims by Claimants may not be heard by our Tribunal on the following grounds.

Reasons of the dissent

1. I have asked the Tribunal to consider and the Tribunal has extensively considered the impact upon the present proceedings of the judgment of the Bucharest Court of Appeals of 16 March 2011 in *AVAS v. Marco Gavazzi and Stefano Gavazzi* (which was confirmed by the Court of Cassation of Romania). The Bucharest Court of Appeals first set aside the 2007 Romanian Award, then, on 16 March 2011 issued a decision on the merits and rejected the counterclaim made by Messrs Gavazzi, which was based on conduct and omissions by AVAS, stemming from non-postponement of payments and no waiver of debts of the Company acquired by the Gavazzis. The Court of Appeals found that the Gavazzis were not entitled to such rescheduling and waiver because they were in breach of their commitments to AVAS, and that AVAS was consequently not liable to them for its conduct and omissions.
2. The impact of a state court judgment on international arbitral proceedings (not subject to the domestic law of the former) has to be considered in these circumstances.
3. Foreign judgments are granted effect outside of their jurisdiction on the ground of several principles such as comity, efficiency and to avoid conflicts between decisions¹.
4. Foreign judgments are recognized in another jurisdiction if they comply with requirements, which are also referred to as “foreign judgments principles”, i.e. if they are made by a competent Court, such proceedings have not breached due process and they are not in breach of the forum’s (in our case of international) public policy².
5. The effects produced by such foreign judgments include the doctrines of *res judicata* and/or issue estoppel (i.e. a preclusion to re-examination of a given issue, which has been decided in the foreign judgment).
6. I will deal first with *res judicata* since it sets the frame of this analysis and then with issue estoppel.
7. The effects of *res judicata* have been dealt with extensively. *Res judicata* has been referred to as being one of the “general principles of law recognized by civilised courts”³.
8. In the United States the Draft Restatement on International Commercial Arbitration provides that in post award proceedings foreign judgment principles (including issue estoppel) are to be applied in order to decide whether a US Court “*may re-examine a matter decided at an earlier stage of*

¹ Hock Lai Ho, *Policies Underlying the Enforcement for Foreign Commercial Judgment* (1997) 46 ICLQ 445.

² Cheng Bin, *General Principles of Law as Applied by International Courts and Tribunals* (1953) at 336. Silberman L., *Some judgments on judgments: a view from America* (2008) 19 King’s LJ 235, 237, 38; Einhorn ‘I’, *The Recognition and Enforcement of Foreign Judgments on International Commercial Arbitral Awards* (2010) 12 YB Priv. Int. L. 43; European Union, Parliament and Council Regulation no. 1215/2012 of December 12.

³ Judge Anzilotti’s dissenting opinion in *Chorzow v. Factoring Case* (1977) PCIJ (Sez. A), no. 11 at 27.

*the proceedings ... by a foreign court*⁴ and the Restatement (Second) Judgment § 84 equates the effects of decisions by state courts and arbitrators

“[T]here is good reason to treat the determination of the issues in an arbitration proceeding as conclusive in a subsequent proceeding, just as determinations of a court would be so treated”.

9. There is a large consensus that a final judgment by a state court has *res judicata* effects. This matter has been long discussed amongst writers and by precedents⁵.
10. *Res judicata* produces positive effects (that such decision is taken into account in other proceedings) and/or negative effects (i.e. it prevents that the matter which has been so decided be further litigated).
11. There is also large consensus that these effects are produced also in arbitration, not only when the seat of the arbitral proceedings is in the same jurisdiction where the final award was made, but also when the arbitral proceedings have a different seat and are governed by a different national law or just by international arbitration rules.
12. In the latter case, arbitrators having no *lex fori* do not strictly apply domestic procedural rules, but rather focus on principles like *effet utile* (efficiency of the proceedings), non-contradiction and consistency.
13. It has been held that ignoring the effects of *res judicata* would amount to a violation of public policy. While this argument may be used, in specific situations, as a specific ground for setting aside the award, it is suggested that the principles referred to in § 15 are more general and consequently may be applied to all situations.
14. The conditions required for the operations of *res judicata* are frequently held to consist in the triple identity test (same parties, subject matter and cause of action).
15. However, Recommendation no. 4 of the International Law Association⁶, as to the conclusive and preclusive *res judicata* effects of a previous award (a concept which in my opinion may be applied also to a previous final state court judgment), refers to the facts of a final judgment by mentioning

⁴ Restatement (Third) of the U.S. Law of International Commercial Arbitration (Tentative Draft No. 2, 2012), § 4(8). Although the Draft Restatement concerns arbitration, it affirms a principle which in my opinion also applies to state court judgments.

⁵ G. BORN, *International Commercial Arbitration*, Kluwer, 2009, at 2879 et seq.; DE LY – SHEPPARD, *ILA Interim Report on Res Judicata and Arbitration*, in *Arbitration International*, 2009, at 35 et seq.; A. SHEPPARD, *Res judicata and Estoppel*, in *Parallel state and arbitral procedures in international arbitration*, Dossiers, ICC Institute of World Business Law, 2005, 232 et seq.; P. MAYER, *Litispence, connexité et chose jugée dans l'arbitrage international*, in *Liber amicorum Claude Reymond*, 2004, 185 et seq.; A. PINNA, *L'autorité de la chose jugée invoquée devant l'arbitre*, *Cahiers de l'Arbitrage*, July 2010, no. 3; App. Paris, September 9, 2010, *Marriot v. Inah Développement SAI.*, in *Paris Journal of International Arbitration*, 2010, at 1171; Court of Cassation (France), March 5, 2009, *Lafargue v. Prodim*, in *Rev. arb.*, 2009, at 239; Court of Cassation, March 5 (France), 2009, *Consorts Castagnos v. Prodim*, in *Rev. arb.*, 2009, at 655.

⁶ International Law Association, Committee on International Commercial Arbitration, *Final Report and Recommendations on Res Judicata in International Commercial Arbitration*, in *Arbitration International* 2009, at 83.

“issues of fact, or law” “provided any such determination was essential or fundamental to the dispositive part ...”. Reference has been made also to the “*fait générateur de la responsabilité*” (the fact which has given rise to liability).

16. Issue estoppel is to be distinguished from *res judicata* even if the two doctrines apply common basic principles.
17. One has to distinguish cause of action estoppel from issue estoppel, since the former prevents a party from resubmitting the same claim which was previously decided, while issue estoppel prevents a party from re-litigating a point of law or of fact which was already decided by a previous judgment.
18. The issue estoppel doctrine is applied less frequently than *res judicata* since some jurisdictions concentrate on *res judicata*.
19. However, preclusion is a concept generally known to all jurisdictions. The effects of determination of issues by a previous judgment of a state court have then been dealt with⁷.
20. Although the Recommendations do not have binding effect, they are important guidelines.
21. Issue estoppel does not invest the entire previous decision (claim, *causa petendi* and relief), but only the issues which have been decided by the final state court decision.
22. In my opinion, the conditions required in order to apply an issue estoppel are not as strict as those for *res judicata*, even if one does not accept the widening of the scope of *res judicata* under ILA’s Recommendations, which examine the underlying nature of the dispute and are not based on formalistic concepts. To me the requirements for issue estoppel are the identity of the parties in both instances and identity of the facts and findings on which an issue is based (such as when the claims arise out of the same factual situation).
23. As to the identity of the parties in this case, it is my opinion that, under international law (and not only if one follows an economic approach), a State is liable for the conduct of its agencies and instrumentalities if they act pursuant to the sovereign authority of that State. Because of the attribution of the relevant acts to the State, there is a “sufficient degree of identification between such parties”, *ie* between the agency and the State.⁸ As AVAS’ acts and omissions are attributable to Romania, Romania must be considered as identical to AVAS. There is consequently identity of the parties in the two proceedings.

⁷ *Owens Bank Ltd. v. Bracco* [1992], 2AC 443 (HL) and *House of Spring Gardens Ltd. v. Waite* [1985] FSR 173 (CA). ; See also *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. No. 2* [1967] 1AC H53 (IL).

⁸ P.R. BARNETT, *Res judicata, Estoppel and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law*, Oxford University Press 2001, at 8.

24. The different causes of action in the two sets of proceedings (in the former it is a breach of contract and in the present proceedings it is a breach of the BIT) – if construed as the legal grounds of the claims – do not, in my opinion, prevent the application of issue estoppel.
25. Likewise, even if the law to be applied in deciding the claims is different in the two proceedings (in the former proceedings it is Romanian law while in the present proceedings it is international law), in my opinion issue estoppel can be applied, because it does not affect the appreciation of the facts and of the findings on them, except when the application of domestic law gives a result which is materially different from the one under international law. I see no evidence in this dispute of a material difference arising from the application of these two laws.
26. The importance of the role of facts has been pointed out in several state court decisions.
27. The Swiss Federal Tribunal⁹ has held that

“it is not necessary in principle to include the causa petendi (cause of action) in the object of the dispute, since the identity of the claim which have been made is the result of the requests for reliefs and of the facts alleged to base them, in other words the ensemble of the facts on which such requests for relief...”.

and further

“The authority of res judicata extends to all the facts which existed at the time of the first judgment” (note: the case concerned *res judicata* of another judgment).

28. I have considered the following other precedents:

7.12 ... In *Amco*¹⁰, the tribunal decided: *“The general principle, announced in numerous cases is that 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.”*

7.15 ... *The Pious Fund*¹¹ tribunal (applying *res judicata* in the Permanent Court of Arbitration’s first case and viewed as “[t]he leading early case”) also applied a two-part test, emphasising that *“there are not only the same parties to the suit, but also the same subject-matter that was judged”* in a prior arbitral award.

7.17 ... *whether res judicata in international law includes the broader concept of or akin to issue estoppel, the principle that a party in subsequent proceedings cannot contradict an issue of fact or law not reflected in the dispositif if it has already been*

⁹ Swiss Federal Tribunal, judgment of 27 May 2014 (4A 508/2013).

¹⁰ *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Resubmitted Case, Decision on Jurisdiction (10 May 1988), 27 ILM 1281 (1988).

¹¹ *The Pious Fund of the Californias*, Permanent Court of Arbitration, Award (14 October 1902), at p. 3 (unofficial English translation), The Hague Justice Portal.

distinctly raised and finally decided in earlier proceedings between the same parties (or their privies).

7.18 *It is clear that past international tribunals have applied forms of issue estoppel, without necessarily using the term. Umpire Plumley's award in Orinoco Steamship¹² found that "every matter and point distinctly in issue ... and which was directly passed upon and determined in said decree, and which was its ground and basis, is confirmed by said judgment, and the claimants ... are forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in the said decree." In Professor Lowe's opinion, the tribunal in then resubmitted Amco case "clearly applied the principle of issue estoppel to the determination of specific facts and of the legal characterisations of facts by the previous tribunal." Most recently, the ICSID tribunal in Grynberg v. Grenada¹³ applied issue estoppel (albeit describing it as "collateral estoppel") to foreclose the claimants' efforts to re-open issues decided in an award made in a prior ICSID arbitration.*

7.20 *In so doing, the second tribunal accepted the respondent's submission of issue estoppel arising from the first award, to the effect that the legal and factual contentions on which the new claims depended had already been fully litigated in the first ICSID arbitration. Applying the doctrine to all four claimants as "privies" as a general principle of law recognised in Amco v Indonesia and the Orinoco case, the second ICSID tribunal accepted that "a finding concerning a right, question or fact may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal."*

7.25 *The Permanent Court of International Justice was of like mind in Advisory Opinion No. 11: "It is perfectly true that all the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion. This is clearly stated in the award of the Permanent Court of Arbitration of October 14th, 1902, concerning the Pious Fund of the Californias ... The Court agrees with this statement."*

¹² *Claim of Company General of the Orinoco Case*, Report of French-Venezuelan Mixed Claims Commission of 1902 (1906, Ralston, Jackson H., ed.) at p. 355.

¹³ *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, Award, (ICSID Case No. ARB/10/6) (10 December 2010).

7.31 ... As in the Pious Fund arbitration, tribunals have considered that “all the parts of the judgment or the decree concerning the points debated in the litigation enlighten and mutually supplement each other.”

(emphasis added)

29. The issue estoppel arising from a decision in another jurisdiction has been recognised in *Diag Human SE v. The Czech Republic*¹⁴, in *Chantiers de l’Atlantique S.A. v. Gas Transport and Technigas SAS*¹⁵ and in *Owen Bank Ltd. v. Bracco*¹⁶.
30. In respect of court judgments confirming awards, amongst writers Hill¹⁷ has commented that a judgment of a court of the seat of arbitral proceedings, which has confirmed an award rendered at the seat “can give rise to an issue estoppel ... that may be relied upon in later enforcement proceedings in England”.
31. In my opinion, the facts play a paramount role since the result of the claim and the relief sought depend on the facts and on the related findings.
32. In this dispute, I find that the basic facts which found the premise of the decision in both proceedings, i.e. the lack of rescheduling of payments and the lack of waiver of debts, are the same. The subsequent facts are based on them.
33. In the Romanian proceedings, it was held that the investors were not entitled to the rescheduling and to the waiver of debts since they were themselves in breach.
34. In my opinion, a final decision which has found that the investors were not entitled to the rescheduling and to the waiver, may not be re-litigated as to such finding, i.e. as to such issue.
35. A litigant may not succeed on a treaty claim, based on a breach by the State (or a subdivision of it), stemming from a lack of rescheduling and of waiver of debts, when such conduct has been found, in an earlier final judgment for breach of contract, to be legitimate.
36. The above commentaries and precedents are in the sense that a party may not re-litigate issues which have been finally decided by a foreign court in compliance with foreign judgment principles.
37. In *Marriott v. Jnah*¹⁸, it was held that the effects of *res judicata* are an issue of admissibility of the claim. In my opinion, the same conclusion applies also to issue estoppel and the parties

¹⁴ High Court, England and Wales, 22 May 2014, Case no. 2011, Folio 864.

¹⁵ [2011], England and Wales, High Court 3383.

¹⁶ [1992] 2AC 443 (HL).

¹⁷ J. HILL, *The Significance of Foreign Judgments Related to an Arbitral Award in the Context of an Application to Enforce the Award in England* (2009) 8(2) Priv. Int. L. 159.

¹⁸ See supra note 3. See also Court of Cassation (France), May 28, 2008, *Société G et A Distribution v. Prodim*, Rev. arb., 2008, at 461 ; Ch. JARROSSON, *L’autorité de chose jugée des sentences arbitrales*, in *Procédures*, 2007, Etude 17, 27 et seq.

themselves are prevented from re-litigating that issue. It follows from this that the “second” arbitral tribunal or state court may not readmit the issue.

38. In my opinion this Tribunal is therefore bound by the decision of the Romanian Court of Cassation (which has confirmed the judgment of the Court of Appeals of Bucharest of 16 March 2011), which has finally decided the merits of the dispute.

39. All Claimants’ claims for breach by Respondent of the Italy-Romania BIT, such as art. 2 (Fair and Equitable Treatment) and art. 4.1 (Nationalization and Expropriation), may consequently not be heard because of issue estoppel and are to be declared inadmissible.

40. My learned co-arbitrators have not shared this view.

41. I must consequently dissent from the opinion of the majority of the Tribunal and disagree, on the above grounds, from paragraphs 163 to 174 of their Decision.

42. I also dissent from the majority’s conclusion:

(i) concerning jurisdiction on the Respondent’s counter-claim for the following reasons:

- the BIT, in the second paragraph of its Preamble, indicates that it aims at “*a stable framework ... and maximum effective utilization of economic resources of either country,*” and, in Article 8(1), the BIT refers to “*[a]ny dispute between one Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party*”.
- Article 8(1) of the BIT suggests amicable consultation and negotiations with respect to “*[a]ny dispute between one Contracting Party and an investor*”, while Article 8(2) of the BIT only grants the investor the right to claim against the Host State.
- The absence of an express mention in Article 8(2) that the Host State may claim against the investor has to be interpreted under Article 8(3),¹⁹ in the sense that the Host State may elaborate its defence against the investor’s claim. The question then arises as to why the Host State should be limited to opposing the investor’s claims and not be entitled to install a counterclaim.
- The omission of any express mention of the Host State’s right to file a counterclaim may be due to the fact that the drafters of the BIT focused on the protection of the investor. One has then to consider whether this omission excludes any counterclaim by the Host State against the investor before the arbitration forum provided for by the BIT.

¹⁹ Article 8 (3) of the BIT provides:

The Contracting Party which is a party to the dispute shall at no time whatever during the procedures involving investment disputes, asse[r]t as a defence its immunity as well as the fact that the investor has received compensation under an insurance Contract covering the whole or part of the incurred damage or loss.

- Art. 46 of the ICSID Convention and Rule 40 of its Arbitration Rules provide for counterclaims.
 - The Respondent's counterclaim is for damages caused by the investor, which arise from the investment – or more precisely the failure of investments – and thus allegedly from the same subject matter as the Parties' dispute.
 - Since the counterclaim is an extension of the Respondent's defence against the claim, one has to consider whether counterclaims are included within the consent of the Parties to arbitrate before the Tribunal their dispute arising from the investment.
 - It would be hard to accept that the BIT's Contracting Parties intended to give rise to parallel proceedings before different courts and tribunals, by preventing the Host State from asserting its rights against the investor in a counterclaim.
 - It has also to be considered whether such exclusion would be a breach of natural justice.
 - In my opinion, in the present proceedings a free-standing counterclaim is admissible on the above grounds, due process includes the right to defend a claim and in my opinion natural justice requires that such defence may include making a counterclaim related to such issues. Furthermore the opposite solution would give rise to parallel proceedings which may provide conflicting results and this may not be the purpose of an international convention.
- (ii) concerning the lack of evidence of Claimant's Additional, Subordinate Claim under Article 2 (5) of the BIT in my opinion it is not a matter of want of sufficient evidence, but of lack of evidence. I concur then with the dismissal of such claim, even if I base such decision on the above different ground.

Milan Chambers, 14 April 2015

[signed]

Mauro Rubino-Sammartano