

# *Res judicata* in Setting Aside Proceedings involving State-Owned Companies: A Swiss Perspective

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# The “Ukrainian Railways Decision” of the Swiss Federal Tribunal (140 III 278)



# The Background

- Leading Turkish construction company and contractor under the contract, later Claimant in the arbitration
- Ukrainian state-owned company and employer under the contract, later Respondent in the arbitration
- Contract for substantial construction works in relation to the Bridge, dated 14 November 2004
- Additional Agreement No. 1 increasing contract price, dated 15 May 2007, while works and parties' relationship were current

# The Arbitration

- ICC arbitration, seated in Zurich
- Contractor commences arbitration on 15 June 2010
- Evidentiary hearing May 2012
- Award on 6 September 2013

# Transport Prosecutor Proceedings

- Civil proceedings in Kyiv commercial courts starting on 31 May 2008
- Employer and Contractor named as defendants
- Invalidation of Additional Agreement No. 1
- Decision of the High Commercial Court of 11 April 2012, one month before the arbitration hearing

# The Question

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- Is the Arbitral Tribunal bound by the High Commercial Court's finding as to the invalidity of Additional Agreement No. 1?
- The Arbitral Tribunal says “no” and awards damages to the Contractor.

# The Swiss Federal Tribunal

- Public Policy
- PILS, Chapter 12, Article 190(2)(e):

*“(2) The award may only be annulled:*

*e) if the award is incompatible with public policy”*

# Recognition of the judgment

*“Res judicata also applies internationally and in particular to the relationship between a Swiss arbitral tribunal and a foreign state court. Hence, if a party seizes an arbitral tribunal sitting in Switzerland of a request identical to that which was the object of an enforceable judgment issued between the same parties on a territory other than Switzerland, the arbitral tribunal must hold the request inadmissible.”*  
[decision 4A\_508/2013 at 3.2.]



# Recognition of the judgment II

*“Unless an international treaty states otherwise, the lex fori determines whether the claim raised before a foreign state court and the claim submitted to a Swiss court are identical.”* [decision 4A\_508/2013 at 3.2.]

# The *res judicata* effect and the triple identity test

*“According to the case law of the Federal Tribunal, there is res judicata when the claim in dispute is identical to that which was already the subject of an enforceable judgment (identity of the subject matter of the dispute). This is the case when in both litigations the same parties submitted the same claim to the court on the basis of the same facts.” [decision 4A\_508/2013 at 3.3]*

# A matter of identity: identity of parties

*“[O]ne may seriously consider whether in situations so specific as the one at hand, a less formalistic approach to the concept of identity of the parties would not be called for.” [decision 4A\_508/2013 at 4.2.1.]*

# A matter of identity: identity of facts

*“Therefore, the object of the dispute was not identical, if not the parties, and the Arbitral Tribunal was right to reject the res judicata defense raised by the Appellant. Therefore, it cannot be said that it issued an award inconsistent with procedural public policy. The Appellant’s sole argument based on Art. 190(2)(e) PILA therefore fails.” [decision 4A\_508/2013 at 4.3.]*

# Questions from *Ukrainian Railways*

- Standard of recognition for foreign judgment by Swiss-seated arbitral tribunal
- Fluid identities: looking at the function of various parties
- Upholding the agreement to arbitrate