THE APPLICATION OF THE *HENDERSON v HENDERSON* RULE IN INTERNATIONAL ARBITRATION

The rule in *Henderson v Henderson* prevents parties from raising claims and defences in subsequent proceedings which could and should have been pursued in earlier proceedings but were not so pursued. In this article, the authors explain how the *Henderson* rule finds its origin in early arbitration cases. They discuss how the *Henderson* rule operates in practice where parties have participated in a prior arbitration and then seek to commence fresh proceedings raising matters that could and should have been brought in the earlier arbitration. The authors then consider whether the *Henderson* rule is best characterised as a procedural or substantive rule of law and whether arbitral tribunals should adopt a transnational approach to preclusion rather than applying national preclusion laws.

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I. Introduction

1 In most common law systems, where a given matter becomes the subject of litigation the parties are required to bring forward their whole case in the proceedings which ensue. Those parties or their privies cannot pursue the same subject of litigation in later proceedings in respect of a matter which could and should have been brought forward in the earlier proceedings but was omitted whether by negligence, inadvertence or accident. Absent special circumstances, the plea of *res judicata* applies not only to points upon which the original court was actually required to decide but to every point which properly belonged to the subject of that litigation and which the parties, exercising reasonable diligence, might have brought forward in the initial case.

2 This principle is known in English law as the rule in *Henderson v Henderson*[1] ("*Henderson*"). The principle exists in the laws of many countries in the Asia Pacific region, including Singapore,[2] Hong Kong,[3] Malaysia,[4] Australia[5] and New Zealand.[6] The question to be addressed is whether this principle applies when parties have participated in a prior arbitration and then seek to commence a new arbitration (or new proceedings in a national court) raising matters that could and should have been brought in the earlier arbitration. The first part of this article seeks to explain why the *Henderson* rule does apply in such cases. Support for the authors' conclusion is found in old and modern case law and in the International Law Association's ("ILA") Recommendations on *Lis Pendens* and *Res Judicata* in Arbitration.[7]

3 On the assumption that the *Henderson* rule does apply in such cases, the second part of this article considers which law an arbitral tribunal should apply when faced with an objection based on the *Henderson* rule. Is the rule best characterised as procedural, and therefore governed by the *lex arbitri*, or substantive, and therefore governed by the *lex causae*? The suggestion by the ILA and by some commentators that arbitral tribunals should apply transnational preclusion rules applicable to international arbitration instead of national laws will also be considered. The authors conclude that while there are a number of benefits associated with applying a transnational approach, the uncertainty of its content and its application may persuade some arbitrators to apply national laws.

II. Does the *Henderson* rule apply in arbitration?

A. Historical foundations of the Henderson *rule*

4 There are two justifications for the *res judicata* doctrine, encapsulated by the Latin maxims *nemo debet vexari pro una et eadem causa* – no person ought to be vexed twice by the same cause – and *interest reipublicae ut sit finis litium* – there is a public interest in the finality of litigation.[8] There are compelling reasons why those justifications apply to a cause of action or an issue which has actually

1 *Henderson v Henderson* (1843) 3 Hare 99 at 115.
2 *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453.
3 *China North Industries Investment Ltd v Chum* [2010] 5 HKLRD 1.
4 *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189.
5 *Port of Melbourne Authority v Ashnun Pty Ltd* (1981) 147 CLR 589.
6 *Commissioner of Inland Revenue v Bhanabhai* [2007] 2 NZLR 478.
7 Filip De Ly & Audley Sheppard, "ILA Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration" (2009) 25(1) *Arbitration International* 83.
8 See generally Chester Brown, *A Common Law of International Adjudication* (New York: Oxford University Press, 2009) at p 153.

been adjudicated upon, whether by a court or an arbitral tribunal. The parties have submitted their dispute to a decision-maker, participated in the adjudicative process, presented arguments on behalf of their clients and received a decision on the cause of action or issue. There would be no end to dispute resolution if parties were not bound by the decision on those matters. The pleas of cause of action estoppel and issue estoppel appropriately prevent the re-adjudication in subsequent proceedings of identical causes of action or issues between the same parties or their privies which have been finally adjudicated upon.

5 The two justifications which have been identified above apply with less force where the cause of action or issue has not actually been adjudicated upon in earlier proceedings but which one party wishes to advance in later proceedings. It was omitted from one party's case, the parties did not present argument on the matter and they did not receive a decision from the court or tribunal. Nevertheless, absent special circumstances, the *Henderson* rule prevents the adjudication of matters which properly belonged to the subject matter of the earlier proceedings between the same parties (or their privies) and which could and should have been raised in those proceedings. The rule in *Henderson* in fact predates that decision and was applied in two English cases, both involving arbitrations.

6 In 1812 in *Smith v Johnson*,[9] a ship owner bought and paid for goods which were shipped on board his vessel for the joint account of himself and his master. After the vessel returned to port, disputes arose relating to the voyage accounts. The parties referred all of their disputes to two arbitrators who ordered the defendant to pay certain sums to the plaintiff. The plaintiff applied to the Court of King's Bench for an attachment order against the defendant for non-payment of the sums ordered to be paid. The defendant claimed that he was entitled to a set-off for sums allegedly owed to him by the plaintiff. The defendant did not submit the set-off issue to the arbitrators and it did not form any part of their award. The court held that the defendant could not raise the set-off issue in the court proceedings. Lord Ellenborough said:[10]

> Here is a reference of all matters in difference, and it appears that the subject in respect of which the deduction is now claimed was a matter in difference at the time, and within the scope of the reference, notwithstanding which the defendant contends that he was not obliged to bring forward the whole of his case before the arbitrators, but might keep back a part of it in order afterwards to use it as a set-off. But it was competent to him to have brought the whole under the consideration of the arbitrators; and therefore … I think that where all matters in difference are referred, the party as to every

9 (1812) 15 East Rep 213.

10 *Smith v Johnson* (1812) 15 East Rep 213 at 214.

> matter included within the subject of such reference ought to come forward with the whole of his case.

7 A similar case came before the English courts a few years later in *Dunn v Murray*.[11] The defendant employed the plaintiff to report judicial and parliamentary proceedings for a period of one year for publication in the defendant's newspaper. The defendant dismissed the plaintiff from his employment some five months after he began reporting. The plaintiff sued the defendant for wrongful dismissal. The parties referred all matters in difference between them to arbitration. The arbitrator found the dismissal was wrongful and awarded the plaintiff the relief he sought, namely, wages up to the date he had commenced his claim. When the plaintiff sought to recover further damages (beyond the date of his claim) in a subsequent writ, Lord Tenterden CJ said:[12]

> Now it is clear that the present claim might have been brought before the arbitrator on that occasion; and in the case of *Smith v Johnson* … Lord Ellenborough lays it down, that where all matters in difference are referred, the party, as to every matter included within the scope of such reference, ought to come forward with the whole of his case. So here the present claim was within the scope of the former reference: it was the duty of the plaintiff to bring it before the arbitrator if he meant to insist upon it as a matter in difference, and he cannot now make it the subject-matter of a fresh action.

8 These cases demonstrate that in order for the *Henderson* rule to apply, the matter which the party seeks to raise in subsequent proceedings must fall within the scope of the matters which have been referred to arbitration. Unlike courts, arbitrators of course only have subject-matter jurisdiction to determine matters which have been referred to them for decision. In both of these cases, the parties submitted all matters and differences to arbitration. They entered into a submission agreement for this purpose. The matters which one party sought to litigate in subsequent court proceedings could therefore have been brought in the earlier arbitral proceedings.

B. The applicability of the Henderson *rule in arbitration*

9 In their leading text, Mustill and Boyd doubt whether the rule in *Henderson* applies to "issues which are outside the scope of the matters

11 (1829) 9 B & C 780.

12 *Dunn v Murray* (1829) 9 B & C 780 at 788. Compare *EE & Brian Smith (1928) Ltd v Wheatsheaf Mills Ltd* [1939] 2 KB 302 where the court found that, by agreeing to arbitrate under the rules of the London Corn Trade Association, the parties had excluded the application of the rule that a party must plead all relief to which they might be entitled in one reference. Such was a well-recognised practice amounting to a custom in the trade.

referred to the arbitrator even though they fall within the terms of the arbitration agreement".[13] On this view, if the dispute is not included within the terms of reference for the arbitration, a party may be free to raise the dispute at a later stage. In the analogous context of foreign court proceedings, Peter Barnett has canvassed the arguments against the application of the *Henderson* rule in subsequent proceedings in England where the earlier proceedings took place in a foreign court.[14] And in its Interim Report on *Res Judicata* and Arbitration, the ILA stated that "it is generally assumed that arbitral tribunals do not apply any principle akin to abuse of process".[15] The ILA had earlier observed in its Interim Report that the *Henderson* rule is "considered as a category of the 'abuse of process doctrine' rather than an extension of the principles of estoppel".[16]

10 Others have doubted the view that parties are not equally obliged to raise issues in arbitrations as in national court litigation. Gary Born suggests it is wrong to assume that parties are free in international arbitrations to advance some, but not all, of their claims and then attempt to pursue claims in new proceedings which have been held back from the earlier proceedings.[17] Born draws support for his opinion from the objective of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[18] ("New York Convention") of ensuring the final and binding resolution of international disputes. In his view, permitting parties to advance claims in subsequent proceedings which could and should have been raised in an earlier arbitration "contradicts the parties' objective of a speedy, final resolution of their disputes in a single forum, and instead rewards, and thereby encourages, technical pleadings and multiplicitous dispute resolution proceedings".[19]

13 Michael Mustill & Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (London: Butterworths, 2nd Ed, 1989) at p 413.

14 Peter Barnett, *Res Judicata, Estoppel and Foreign Judgments* (Oxford: Oxford University Press, 2002) at paras 6.133–6.144.

15 International Law Association, International Commercial Arbitration Committee, "Interim Report: *Res Judicata* and Arbitration" (71st Conference, Berlin, 2004) at p 25. The Interim Report does refer to a recent International Chamber of Commerce ("ICC") award where a tribunal applying New York law found that a claim should have been asserted by way of a counterclaim or defence in earlier ICC proceedings.

16 International Law Association, International Commercial Arbitration Committee, "Interim Report: *Res Judicata* and Arbitration" (71st Conference, Berlin, 2004) at p 8. The International Law Association referred in this regard to *Johnson v Gore Wood & Co* [2002] 2 AC 1, a decision of the House of Lords.

17 Gary Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2nd Ed, 2014) vol III at p 3764.

18 (10 June 1958) 330 UNTS 3 (entered into force 7 June 1959).

19 Gary Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2nd Ed, 2014) vol III at pp 3745–3746.

11 The authors are attracted to Born's view, although more persuaded by his analysis that the parties' arbitration agreement is the foundation for such a conclusion as opposed to the principles of preclusion mandated by the New York Convention. The authors do not find the view expressed by Mustill and Boyd to be persuasive. It should not matter whether the particular dispute was omitted from the terms of reference. In both *Smith v Johnson* and *Dunn v Murray*, the parties concluded a submission agreement pursuant to which all matters in difference were referred to arbitration. The matters that one party sought to litigate in the later proceedings were plainly omitted from the terms of reference and yet the courts found that the party was obliged to bring forward those matters in the arbitration. In the authors' opinion, if: (a) the matter falls within the scope of the arbitration agreement; (b) the matter is arbitrable; (c) the party could and should have raised that matter in the earlier arbitration; and (d) there are no special circumstances, then the party should be prevented from raising the matter in subsequent arbitral proceedings. To hold otherwise would elevate the terms of reference above an arbitration agreement and reward the very kind of technical approach to pleadings which, as Born rightly points out, ought to be discouraged in international arbitration.

12 The ILA also appears to have retreated from the caution expressed in its Interim Report. One of the ILA's Recommendations on *Res Judicata* and Arbitration in its Final Report was as follows:[20]

> An arbitral award has preclusive effects in the further arbitral proceedings as to a claim, cause of action or issue of fact or law, which could have been raised, but was not, in the proceedings resulting in that award, provided that the raising of any such new claim, cause of action or new issue of fact or law amounts to procedural unfairness or abuse.

13 In making this Recommendation, the ILA explained that it had sought to balance two principles: the autonomy of parties to determine which claims or issues should be raised during the arbitration; and the policy objectives of efficiency and fairness to protect respondents from being exposed to further arbitration.[21] In the ILA's view, the "doctrines of procedural fairness and abuse … provide an acceptable compromise regarding the private and public interests at stake". Nevertheless, the ILA was cautious not to endorse a "general theory of procedural fairness or abuse in international commercial arbitration".[22] We will return to some

20 Filip De Ly & Audley Sheppard, "ILA Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration" (2009) 25(1) *Arbitration International* 83 at 85.

21 Filip De Ly & Audley Sheppard, "ILA Final Report on *Res Judicata* and Arbitration" (2009) 25(1) *Arbitration International* 67 at 79–80.

22 Filip De Ly & Audley Sheppard, "ILA Final Report on *Res Judicata* and Arbitration" (2009) 25(1) *Arbitration International* 67 at 80.

of the ILA's Recommendations later in this article because they bear upon the applicable law that arbitral tribunals should apply in this context. For now it suffices to note that the modern trend seems to be in favour of arbitral tribunals having the power, in appropriate cases, to dismiss claims advanced in subsequent proceedings based on the *Henderson* rule.

C. Application of the Henderson *rule in the arbitration context*

14 The *Henderson* rule has been applied in a number of reported judicial decisions which have involved related arbitral proceedings. These cases illustrate some of the interesting issues that arise when one party contends that the *Henderson* rule should apply to prevent another party from advancing issues or claims that could and should have been brought in earlier proceedings.

(1) Dallal v Bank Mellat

15 In *Dallal v Bank Mellat*[23] ("*Dallal*"), the plaintiff lost in proceedings brought against the defendant before the Iran-US Claims Tribunal to recover US$400,000 relating to two dishonoured cheques. The tribunal concluded that the transaction was contrary to Iranian foreign exchange law and therefore illegal. In his post-hearing brief, the plaintiff had advanced an alternative argument (based on unjust enrichment) to his primary claim in contract. In its award, the tribunal considered that to admit the plaintiff's alternative argument would have required the plaintiff to amend his claim. The tribunal found that it was inappropriate to allow the plaintiff to so amend at such a late stage.

16 Dissatisfied with his loss before the Iran-US Claims Tribunal, the plaintiff commenced fresh proceedings against the defendant in the English courts seeking to recover US$400,000 based on the principle of unjust enrichment. The defendant applied to strike out the claim on the basis of the *Henderson* rule. The court struck out the plaintiff's claim. Hobhouse J identified the two criteria laid down in *Henderson*: first, there must have been a previous adjudication by "a court of competent jurisdiction"; and second, there must not be "special circumstances" which make it unjust or inappropriate to apply the rule.[24]

17 As to the first criterion, Hobhouse J found that the tribunal could have adjudicated upon all causes of action which were the subject of the plaintiff's claims now advanced in court. Hobhouse J also found that the tribunal was entitled to disallow the plaintiff's late attempt to

23 [1986] 1 QB 441.
24 *Dallal v Bank Mellat* [1986] 1 QB 441 at 455.

introduce an unjust enrichment claim in his post-hearing brief.[25] The arbitral award did not satisfy the requirements for recognition under Art V(1)(a) of the New York Convention because the proper law of the arbitration agreement was Dutch law and the agreement was invalid under Dutch law since it did not comply with the requirements of the Dutch code. Hobhouse J therefore found that, for the purposes of the *Henderson* rule, the tribunal could not have derived its "competence" from the New York Convention.[26]

18 After citing case law which recognised the competence of consular courts in the Ottoman Empire and established by European countries in the 1800s,[27] Hobhouse J held that the tribunal derived its competence from the international treaty between the US and the Republic of Iran (the Algiers Declarations) which established the Iran-US Claims Tribunal and "international comity require[d] that the courts of England should recognise the validity of decisions of foreign tribunals whose competence is so derived".[28] The first criterion in *Henderson* was therefore established.

19 As to the second criterion, Hobhouse J found that the arbitral proceedings were regulated by proper rules of procedure and the claims were decided by applying appropriate rules of law. The plaintiff did not allege the tribunal had breached the principles of natural justice or any circumstances which would justify a court in declining to recognise the award.[29] As the arbitration progressed, the plaintiff may have thought of better ways to formulate his claim but that was beside the point:[30]

> In the arbitration he ought to have presented all the ways in which he sought to sustain his claims. If he omitted to include some of them or left the presentation of some of them too late so that the points he could take were limited by the tribunal, that does not amount to a special circumstance; it is precisely the type of situation for which the *Henderson* principle exists.

20 *Dallal* lends powerful support to the view that the *Henderson* rule applies[31] to prevent a party from attempting to litigate new matters that could and should have been raised in earlier arbitral proceedings. The following general propositions may also be drawn from the decision:

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25 *Dallal v Bank Mellat* [1986] 1 QB 441 at 455.
26 *Dallal v Bank Mellat* [1986] 1 QB 441 at 457.
27 *The Laconia* (1863) 2 Moo NS 161 and *Messina v Petrococchino* (1872) LR 4 PC 144.
28 *Dallal v Bank Mellat* [1986] 1 QB 441 at 461–462.
29 *Dallal v Bank Mellat* [1986] 1 QB 441 at 463.
30 *Dallal v Bank Mellat* [1986] 1 QB 441 at 463.
31 At least in subsequent court proceedings. As a matter of principle there is no reason why the principle should not also apply to subsequent arbitral proceedings.

(a) If an arbitration agreement satisfies the requirements of Art V(1)(a) of the New York Convention, there can be no doubt that the earlier tribunal would be a tribunal of "competent jurisdiction" for the purposes of the first criterion in *Henderson*.

(b) If earlier arbitral proceedings are brought pursuant to a bilateral investment treaty, a similar argument could be made as in *Dallal* that the arbitral tribunal derived its competence from that treaty. In *Republic of Ecuador v Occidental Petroleum & Production Co*,[32] the English Court of Appeal thought that the arbitration conducted under the US-Ecuador bilateral investment treaty in that case was analogous to the "'statutory' arbitration which Hobhouse J identified in *Dallal v Bank Mellat*".

(c) If any of the grounds for refusing recognition and enforcement of an arbitral award under Art V of the New York Convention were established[33] these might amount to "special circumstances" which would make it unjust or inappropriate to apply the *Henderson* rule. For example, if the plaintiff in *Dallal* had argued that the tribunal breached the rules of natural justice by refusing to allow him to amend his claim to introduce the unjust enrichment argument, the court may have been persuaded not to strike out the plaintiff's claim.

(2) Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd

21 In *Denmark Skibstekniske Konsulenter A/S I Likvidation v Utrapolis*,[34] Denmark Skibstekniske Konsulenter A/S I Likvidation ("DSK") commenced arbitral proceedings against Ultrapolis in Denmark. Ultrapolis challenged the tribunal's jurisdiction. The tribunal found it had jurisdiction to hear the dispute. Ultrapolis did not challenge the tribunal's decision on jurisdiction in the Danish courts. Ultrapolis took no further part in the arbitral proceedings on the merits and the hearing proceeded by default. The tribunal awarded damages to DSK against Ultrapolis in the sum of €686,693 plus interest. DSK then successfully applied to enforce the award in Singapore under s 29 of the Singapore International Arbitration Act.[35]

32 [2005] EWCA Civ 1116; [2006] QB 432 at [52].

33 Or equally the grounds for setting aside, such as breach of natural justice, in Art 34 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (GA Res 40/72, UN GAOR, 40th Sess, Supp No 17, Annex 1, UN Doc A/40/17) (1985).

34 [2011] 4 SLR 997.

35 Cap 143, 2002 Rev Ed.

22 With its judgment in hand, DSK served a statutory demand on Ultrapolis requiring payment of the judgment debt. Shortly thereafter, Ultrapolis commenced separate arbitral proceedings against DSK in Denmark claiming €927,850. Ultrapolis did not pay the amount sought in the statutory demand and so DSK applied to the Singapore High Court to liquidate Ultrapolis. Ultrapolis opposed the liquidation order on the grounds that it had a genuine cross-claim against DSK for €927,850.

23 Quentin Loh J referred to the established rule that, in the absence of special circumstances, a court would exercise its discretion to dismiss or stay a liquidation petition where there was a genuine and serious cross-claim which was greater than the claim of the petitioning creditor. However, "the question whether Ultrapolis was previously able to litigate its cross-claim" was said to be a "highly persuasive factor in determining whether the cross-claim is a genuine one".[36] His Honour found that this approach was "merely the specific application of the doctrine of abuse of process in the winding up context". Quentin Loh J referred in that regard to the leading Singapore decision, *Goh Nellie v Goh Lian Teck*,[37] where Sundaresh Menon JC held:

> To put it shortly, a court should determine whether there is an abuse of process by looking at all the circumstances of the case, including whether the later proceedings in substance is nothing more than a collateral attack upon the previous decision; whether there is fresh evidence that might warrant re-litigation; whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and whether there are some other special circumstances that might justify allowing the case to proceed. The absence or existence of these enumerated factors (which are not intended to be exhaustive) is not decisive. In determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant. In the context of cases such as the present, the inquiry is directed not at the theoretical possibility that the issue raised in the later proceedings could conceivably have been taken in the earlier but rather at whether, having regard to the substance and reality of the earlier action, it reasonably ought to have been.

24 That there had been a failure to litigate a claim was but one factor, albeit a weighty one, to be balanced in deciding whether a

36 *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2011] 4 SLR 997 at [31].

37 *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 at [53].

cross-claim was genuine or whether it was an abuse of process or amounted to a collateral attack on a previous decision. Quentin Loh J saw no reason why this factor and the doctrine of abuse of process "should not be extended to encompass previous arbitration proceedings".[38] In support of that finding, his Honour referred to and endorsed Hobhouse J's decision in *Dallal* and then held as follows:[39]

> In my judgment, the framework of the IAA supports the contention that the re-litigation in a Singapore court of an issue which could have been raised in an earlier arbitration can amount to an abuse of process. This is because an arbitral award, with leave of the High Court, 'is enforceable in the same manner as if it was an order made by a court' (see s 12(6) IAA). It is, of course, another matter altogether if the *lex arbitri* somehow prevented the bringing of a claim in abatement or refused to allow cross-claims, but that is certainly not the case here.

25 On the facts, Quentin Loh J found that Ultrapolis could and should have brought its cross-claim some four years earlier, during the first set of arbitral proceedings. Ultrapolis's cross-claim arose out of the same facts and transaction as the earlier proceedings. Yet Ultrapolis had "voluntarily restricted itself to contesting the preliminary issue of jurisdiction before withdrawing from the main oral hearing of the substantive dispute before the Tribunal. Ultrapolis also chose not to challenge the Tribunal's decision on jurisdiction in the Danish Court, which it was entitled to do".[40] Furthermore, Ultrapolis had provided no explanation as to why it did not raise its cross-claim in the first set of arbitral proceedings. Accordingly, Ultrapolis's failure to bring the cross-claim in the earlier arbitral proceedings "clearly showed that the cross-claim was not a genuine one".[41] Ultrapolis was therefore ordered to be wound up.

26 This decision lends support to the view that the *Henderson* rule applies to prevent parties from raising matters in subsequent proceedings which could and should have been brought as a counterclaim in earlier arbitral proceedings. The rule can therefore affect both claimants and respondents in arbitral proceedings. Respondents must therefore think carefully about whether to hold back counterclaims in a reference. Otherwise they run the risk that a

38 *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2011] 4 SLR 997 at [37].

39 *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2011] 4 SLR 997 at [40].

40 *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2011] 4 SLR 997 at [41].

41 *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2011] 4 SLR 997 at [46].

subsequent claim might be dismissed on the basis that it could and should have been raised as a counterclaim in an earlier arbitration.

(3) Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co

27 Until now we have been considering cases where the parties in the earlier arbitration and the subsequent proceedings are the same. What happens if they are different? In *Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co*,[42] Mance LJ explained that the *Henderson* principle applies in relation to previous arbitrations only if all parties to the subsequent litigation were also parties or privies to the earlier reference, whereas the *Henderson* rule can apply in court litigation where the parties to earlier and subsequent litigation are different.

28 In this case, disputes arose between Sun Life (an insurer) and Cigna (a reinsurer) which were referred to arbitration leading to an award. Disputes also arose between Sun Life and Lincoln (another reinsurer). These were also referred to a separate arbitration during the course of which Lincoln sought to rely on the findings made in the Cigna arbitral award, despite the fact that Lincoln was not party to the Cigna arbitration. The Lincoln tribunal had not exercised jurisdiction to refuse to entertain Sun Life's case contrary to the Cigna award on grounds of "abuse of process".

29 The court observed that even if it were to be assumed that a tribunal had power to exercise such jurisdiction, its exercise would be excluded.[43] It was not just or convenient to allow a stranger to enjoy a one-sided entitlement to hold a party to an award or judgment to its terms whenever it appeared favourable to do so.[44] There was a strong element of fortuity about the one-sided benefit for which Lincoln contended: "Why should Lincoln gain any benefit from an award to which they were not party", Mance LJ asked rhetorically.[45]

30 This conclusion may not always arise because the *Henderson* rule applies to parties and their "privies", namely, where there is a sufficient degree of identification between the two persons said to be privies to make it just to hold that the decision to which one was party should be binding in proceedings to which the other was party. In

42 [2005] 1 Lloyd's Rep 606.

43 *Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co* [2005] 1 Lloyd's Rep 606 at [63]–[64].

44 *Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co* [2005] 1 Lloyd's Rep 606 at [66].

45 *Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co* [2005] 1 Lloyd's Rep 606 at [67].

Parakou Shipping Pte Ltd v Jinhui Shipping and Transportation Ltd,[46] the Court of First Instance of Hong Kong held that in order to be a "privy" of one party, the "required commonality is a direct interest in the subject matter of the litigation, a parallel or corresponding interest in that subject matter and not simply a financial interest in the result of the action". The court held that defendants in the case were "privies" of a company called Galsworthy which had been party to an earlier arbitral proceeding with Parakou. On that basis, Jinhui could rely on the earlier award to strike out a subsequent claim brought by Parakou which amounted to a collateral attack on the outcome of the arbitration.[47]

(4) Nomihold Securities INC v Mobile Telesystems Finance SA

31 The final case, which illustrates the potential perils of not advancing arguments in defence to an earlier claim, is *Nomihold Securities INC v Mobile Telesystems Finance SA*[48] ("*Nomihold*"). MTSF was party to two agreements with Nomihold: an agreement for sale and purchase ("SPA") of Nomihold's subsidiary company, Tarino and an option agreement for MTSF to acquire the remaining 49% stake in Tarino and an associated company.

32 Nomihold commenced a London Court of International Arbitration ("LCIA") arbitration against MTSF under the option agreement seeking specific performance of the put option and, in the alternative, damages for breach. A tribunal was constituted to hear the claim. At the same time, MTSF commenced another LCIA arbitration against Nomihold under the SPA seeking an order that it was not bound by the SPA on the grounds of mistake, misrepresentation and breach. No tribunal was constituted under this arbitration.

33 The tribunal in the option agreement arbitration decided that the "SPA issue" should be determined as part of MTSF's defence to Nomihold's claim. The tribunal held that MTSF had failed to establish that the SPA or the option agreement were void or unenforceable for misrepresentation or mistake or that there was any breach of warranty by Nomihold.

34 When Nomihold sought to enforce the award in England, MTSF submitted an "Amended Request for Arbitration" to the LCIA in the SPA arbitration. MTSF maintained its original claims and further claimed that: Nomihold was in the business of money laundering; Nomihold had acquired the Tarino shares by unlawful means; and it was not

46 [2011] 2 HKLRD 1 at [102]–[103].

47 *Parakou Shipping Pte Ltd v Jinhui Shipping and Transportation Ltd* [2011] 2 HKLRD 1.

48 [2012] 1 Lloyd's Rep 442.

obliged to give effect to the award in the option agreement arbitration. MTSF also submitted a new Request for Arbitration under the option agreement. It raised the same money laundering complaints that it had raised in the "Amended Request" in the SPA arbitration.

35 Nomihold sought an anti-arbitration injunction from the English High Court ordering MTSF to discontinue the new arbitrations. Nomihold contended that MTSF could and should have brought the money laundering complaints in the option agreement arbitration but did not do so. It was contrary to the rule in *Henderson* for MTSF to advance these claims in the new arbitrations.

36 The court held that "it was not disputed … that in proper cases an arbitral tribunal could apply the principle [in *Henderson*] or an analogous one to dispose of a case before it".[49] The court did not have enough evidence to decide whether MTSF could have raised the money laundering claim in the first option agreement arbitration and so made no further comment on this matter. The court then observed that:[50]

> [I]n so far as the principle of *Henderson v Henderson* is to be regarded as an aspect of the courts' power to control abuse of process … there is room for debate whether the consensual nature of arbitration gives scope for a tribunal to decide that the reference agreement to which it is itself a party (together with proper consequences of the reference) is an abuse of its own process. For present purposes it suffices to say that, at least where the question is whether a complaint could and should have been raised in an earlier reference, the principle recognised in *Smith v Johnson* is available to a subsequent tribunal as a basis for rejecting the complaint, because it would be entitled to reject a complaint on the basis that it had been abandoned and the *Smith v Johnson* principle is an aspect of the principle of abandonment.

III. What law should a tribunal apply?

37 An international arbitral tribunal could theoretically apply any of a number of different laws when disposing of a case based on the *Henderson* rule. The tribunal could apply the *lex arbitri* of the current arbitration, the *lex arbitri* of the earlier arbitration, the law of the arbitration agreement, the substantive law governing the contract or some other set of transnational rules.[51] What choice of law analysis should a tribunal apply to resolve this conflict of laws problem? This

49 *Nomihold Securities INC v Mobile Telesystems Finance SA* [2012] 1 Lloyd's Rep 442 at [40]

50 *Nomihold Securities INC v Mobile Telesystems Finance SA* [2012] 1 Lloyd's Rep 442 at [43].

51 Gary Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2nd Ed, 2014) vol III at p 3767.

issue has not been addressed in any of the national court decisions in this area. The issue must therefore be decided on the basis of a choice of law analysis. Of course, the parties could agree upon the applicable law for the purposes of *res judicata*. Under the principle of party autonomy, the arbitral tribunal would be bound to apply the law chosen by the parties in such an agreement.[52] But in the absence of such a choice, the tribunal must determine which law to apply. It is to that inquiry which we now turn.

A. A procedural or a substantive rule?

38 It is suggested that the appropriate choice of law analysis to adopt is to ask whether the *Henderson* rule is best characterised as substantive or procedural. The quotation[53] from *Nomihold* suggests that the rule may be an aspect of a court or tribunal's power to prevent an abuse of process. Does this mean that the rule is procedural and therefore governed by the *lex arbitri*? Until recently this was the received wisdom based on the judgment of the House of Lords in *Johnson v Gore Wood & Co*.[54] This decision, and in particular the judgment of Lord Bingham, has been influential in many jurisdictions within the Asia Pacific region.[55] The decision has been taken to have decided that the *Henderson* rule forms part of a court's power to control abuse of process. The ILA was clearly of this view in its Interim Report on *Res Judicata* and Arbitration.[56]

39 The power to dismiss proceedings as an abuse of process is undoubtedly a procedural power.[57] In most common law systems, the court's power to strike out proceedings as an abuse of process is found in the rules of court concerning civil procedure.[58] If this analysis is correct, tribunals should apply the *lex arbitri*. What particular rule would the tribunal apply within the *lex arbitri*?

52 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Melbourne: Wolters Kluwer, 2012) at p 693.

53 See para 36 above.

54 [2002] 2 AC 1.

55 For example, in Singapore, see *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 at [52]–[53].

56 International Law Association, International Commercial Arbitration Committee, "Interim Report: *Res Judicata* and Arbitration" (71st Conference, Berlin, 2004) at p 8.

57 See Tiong Min Yeo, *Choice of Law for Equitable Doctrines* (Oxford: Oxford University Press, 2004) at para 4.104.

58 For example, in New Zealand see Judicature Act 1908, Sch 2 (High Court Rules) r 15.1. In Singapore, see Supreme Court of Judicature Act (Cap 322), Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 18 r 19.

40 If the *lex arbitri* is Singapore or New Zealand law then, unless otherwise agreed by the parties, a tribunal may award any "remedy or relief" that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that court.[59] In the authors' opinion, the words "remedy or relief" are wide enough to include the power to dismiss an arbitration as an abuse of process on the basis of the *Henderson* rule, which would be a power available to the High Court. A less radical approach would be to say that (at least in Singapore and New Zealand) the *Henderson* rule forms part of the common law of the *lex arbitri* and so the tribunal could apply the common law rather than a rule codified in the rules of court.

41 But that is not the end of the matter. There are two potentially applicable laws – the *lex arbitri* of the current arbitration or the *lex arbitri* of the earlier arbitration. In cases where proceedings are based on the same underlying contract with the same arbitration clause specifying the place of arbitration, the *lex arbitri* will be the same. Where the place of arbitration is different, arguments can be made in favour of both laws but there is no stand-out candidate.[60] The authors tend to agree with Gary Born that "the preclusion rules of the arbitral seat have a much less obvious or significant application to awards rendered there" than to national court proceedings.[61] The parties' links to the arbitral seat are often weak and so the *lex arbitri* is not an obvious connecting factor.[62] Rather, the arbitration agreement is the foundation of both the earlier and the later arbitral proceedings. As Born observes, that agreement is also the foundation of the private law rights of preclusion.[63]

42 Does this analysis require the tribunal to apply the law of the arbitration agreement with respect to the *Henderson* rule? Born does not specifically address this question. Even if the tribunal did apply this law, that would give rise to a further conflict of laws issue, namely, what is the law of the arbitration agreement? It is beyond the scope of this article to discuss the difficult issues that arise when parties have not

59 Singapore International Arbitration Act (Cap 143A, 2002 Rev Ed) s 12(5)(*a*) and New Zealand Arbitration Act 1996 s 12(1)(a).

60 See Audley Sheppard, "*Res Judicata* and Estoppel" in *Parallel State and Arbitral Procedures in International Arbitration: Dossiers of the ICC Institute of World Business Law* (Bernardo Cremades & Julian Lew eds) (ICC Publication, 2005) p 219 at pp 229–230.

61 Gary Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2nd Ed, 2014) vol III at p 3769.

62 Luca G Radicati di Brozolo, "Res Judicata" in *Post Award Issues – ASA Special Series No 38* (JurisNet, 2011) p 127 at p 132.

63 Gary Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2nd Ed, 2014) vol III at p 3769.

expressly chosen the law governing their arbitration agreement.[64] Nevertheless, it is suggested that it would be less than satisfactory to adopt such a convoluted and uncertain choice of law analysis which may raise an issue of *renvoi* (*ie*, a transmission to a further possible applicable legal system).

43 Having established that the *lex arbitri* and the law of the arbitration agreement are less than obvious candidates for the applicable law, we must now consider what role the *lex causae* might have. Can the *Henderson* rule be characterised as substantive and therefore governed by the *lex causae*? In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*[65] ("*Virgin Atlantic*"), the UK Supreme Court recently cast doubt on the view that *Johnson v Gore Wood & Co*[66] recategorised the *Henderson* rule as being part of the law of abuse of process rather than the substantive law of *res judicata*. It is necessary to carefully consider *Virgin Atlantic* because the distinctions articulated by the Supreme Court between cause of action estoppel, issue estoppel and *Henderson* are important from a practical standpoint.

44 Lord Sumption, who delivered the leading judgment with whom all members of the court agreed, explained that *res judicata* was a "portmanteau term which is used to describe a number of different legal principles with different juridical origins", namely:[67]

(a) cause of action estoppel;

(b) the rule in *Conquer v Boot*;[68]

(c) the doctrine of merger;

(d) issue estoppel;

(e) the *Henderson* principle; and

(f) the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all

64 See Gary B Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814 and Pierre A Karrer, "The Law Applicable to the Arbitration Agreement – A Civilian Discusses Switzerland's Arbitration Law and Glances Across the Channel" (2014) 26 SAcLJ 849, which discuss the proper law of the arbitration agreement from a common law and a civil law perspective.

65 [2013] UKSC 46; [2014] AC 160.

66 [2002] 2 AC 1.

67 *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 at [17].

68 [1928] 2 KB 336. This case stands for the proposition that where a claimant succeeds in a first action and does not challenge the outcome, he may not bring a second action on the same cause of action, say to recover further damages. The decision in *Dunn v Murray* (1829) 9 B & C 780 could perhaps be explained on the basis of the rule in *Conquer v Boot*.

of the above rules, with the possible exception of the doctrine of merger.

45 Lord Sumption then referred to the "justly celebrated" statement of the law by Wigram V-C in *Henderson* from which the opening paragraph of this article is taken:[69]

> In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

46 Lord Sumption observed that the defendant in *Henderson* had "applied for an injunction to restrain the proceedings, raising what would now be called cause of action estoppel".[70] The reference to "cause of action estoppel" is important because later in his judgment Lord Sumption summarised the law relating to cause of action estoppel and issue estoppel as follows:[71]

> (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.

69 *Henderson v Henderson* (1843) 3 Hare 99 at 115.

70 *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 at [18].

71 *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 at [22].

47 Thus, in its first form, cause of action estoppel applies to all points which were actually decided in a prior proceeding. In its second form, cause of action estoppel applies to all points which were "essential to the existence or non-existence of a cause of action" and which were not decided because they were not raised in earlier proceedings but they could and should have been raised with reasonable diligence.[72] If a party raises a different cause of action in later proceedings, then the matter must be decided on the basis of either issue estoppel or *Henderson*.

48 Later in his judgment Lord Sumption addressed the submission that recent case law had recategorised the principle in *Henderson* so as to treat it as being concerned with abuse of process and to take it out of the domain of *res judicata* altogether. This submission was rejected. Lord Sumption said that the principle in *Henderson* had "always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before".[73] However, there was nothing in the judgments in *Johnson v Gore Wood & Co* to support the idea that "because the principle in *Henderson v Henderson* was concerned with abuse of process it could not also be part of the law of res judicata".[74] In his Lordship's opinion, *res judicata* and abuse of process were juridically very different:[75]

> *Res judicata* is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation.

49 If the *Henderson* rule is regarded as forming part of the substantive law of *res judicata*, it may be more appropriate to characterise it as a substantive rule of law and therefore governed by the *lex causae*. In the authors' view, there is a strong case for characterising the *Henderson* rule as substantive rather than procedural. First, the *Virgin Atlantic* decision lends support to this approach, as does Wigram V-C's judgment in *Henderson* where the rule was expressed as being part of the "plea of *res judicata*".[76] Second, this approach would be consistent with the modern trend in conflict of laws of narrowing the scope of procedural matters and broadening the scope of substantive

72 For a recent illustration of this form of cause of action estoppel see *Gaydamak v Leviev* [2014] EWHC 1167 (Ch).

73 *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 at [24].

74 *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 at [25].

75 *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 at [25].

76 *Henderson v Henderson* (1843) 3 Hare 99 at 115.

matters. In *John Pfeiffer Pty Ltd v Rogerson*,[77] the High Court of Australia observed that matters which affect "the existence, extent or enforceability of the rights or duties of the parties to an action" appear to be concerned with issues of substance rather than procedure. The *Henderson* rule affects the existence or enforceability of rights of one party to advance a claim.[78] If the criteria for the *Henderson* rule are established, the party is not entitled to enforce those rights in an arbitration.

50 Assuming that the parties' contractual agreement contains a governing law clause, would this express choice of law apply to cover claims that a tribunal should dismiss a claim on the basis of the *Henderson* rule? Audley Sheppard observes that "neither Common Law nor Civil Law systems generally regard the governing law of the parties' relationship to be relevant for applying *res judicata*".[79] However, the position must surely depend upon the wording of the clause. If the clause contains wording such as "this agreement and all questions arising in connection with it are governed by and will be construed in accordance with the laws of country X", there would seem to be little doubt that the words "all questions arising in connection with it" would be wide enough to cover the question of whether the proceedings should be dismissed based on the *Henderson* rule.

B. Transnational rules

51 The consequences of applying the *lex causae* rather than the *lex fori* could be significant, especially if one or other of those laws does not recognise a power to dismiss proceedings on the basis of the *Henderson* rule.[80] Faced with that state of affairs, a tribunal may be inclined to apply transnational preclusion rules as opposed to national rules of law.

52 In their Commentary to the Recommendations in the Final Report, the ILA observed that a choice of law approach raises "difficult

77 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 543.

78 See also Luca G Radicati di Brozolo, "Res Judicata" in *Post Award Issues – ASA Special Series No 38* (JurisNet, 2011) at p 132 ("[n]otwithstanding that in national systems it is often considered an issue of procedure, in the international context the force of *res judicata* of the award is a matter that pertains to the conceptual framework and underpinnings of arbitration and which … is affected by the international obligations of States in relation to the effects of awards").

79 Audley Sheppard, "*Res Judicata* and Estoppel" in *Parallel State and Arbitral Procedures in International Arbitration: Dossiers of the ICC Institute of World Business Law* (Bernardo Cremades & Julian Lew eds) (ICC Publication, 2005) at p 230.

80 Some States in the US (and some civil law jurisdictions) do not recognise an equivalent power to the *Henderson* rule. See generally Restatement (Second) Judgments at §27(e). New York law may be less tolerant: see *Wheeler v Van Houten* 12 John Rep 311.

characterisation issues as to the substantive or procedural nature of conclusive and preclusive effects" and "implies a difficult choice" between the possible applicable legal systems.[81] For this reason, the ILA recommended a uniform approach which would bypass these difficult issues and "generally provide more satisfactory answers assuring procedural efficiency and finality than answers provided by domestic law".[82] However, the Committee was cautious to make no specific recommendation regarding the characterisation of *res judicata* and the choice as between the different rules. Rather, the ILA's Recommendation was as follows:[83]

> The conclusive and preclusive effects of arbitral awards in further arbitral proceedings set forth below need not necessarily be governed by national law and may be governed by transnational rules applicable to international commercial arbitration.

53 This approach would give arbitrators flexibility to apply national law rules if the arbitration is anchored to a single legal system (for example a domestic arbitration) or if the *lex fori* and the *lex causae* both contain similar preclusion rules. Arbitrators would also have the choice to adopt a transnational approach. This transnational approach to preclusion appears to be partly aligned with the broader theory of delocalisation;[84] but only "partly" because that theory explains why arbitrators should sidestep the *lex arbitri* but not the *lex causae*.

54 How might this transnational approach operate in practice? Born encourages national courts and tribunals to apply international preclusion standards derived from the New York Convention and the objectives of the international arbitral process. He notes that:[85]

> … these international standards should place a premium on the parties' contractual agreement and expectations regarding finality. Under this analysis, the parties will have presumptively intended, as discussed above, that their disputes would be finally resolved in a single, expeditious proceeding.

81 Filip De Ly & Audley Sheppard, "ILA Final Report on *Res Judicata* and Arbitration" (2009) 25(1) *Arbitration International* 67 at 73.

82 Filip De Ly & Audley Sheppard, "ILA Final Report on *Res Judicata* and Arbitration" (2009) 25(1) *Arbitration International* 67 at 73.

83 Filip De Ly & Audley Sheppard, "ILA Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration" (2009) 25(1) *Arbitration International* 83 at 85.

84 Readers will be familiar with the wealth of literature on this subject. See generally Julian Lew, "Achieving the Dream: Autonomous Arbitration" (2006) 22 *Arbitration International* 179 and Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, 2010). See also Alexander Bělohlávek, "Importance of the Seat of Arbitration in International Arbitration: Delocalisation and Denationalization of Arbitration as an Outdated Myth" (2013) 31 ASA Bulletin 262.

85 Gary Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2nd Ed, 2014) vol III at pp 3769–3770.

55 This approach would avoid the lack of uniformity associated with applying national rules of preclusion (contradicting the parties' objective of choosing to arbitrate their dispute) and would prevent losing parties from forum shopping to find the jurisdiction with "the least effective rules of preclusion".[86] Born's reliance on the New York Convention in support of this approach is undoubtedly correct. The Convention is the supreme constitutional law of arbitration. Article II gives effect to arbitration agreements and Art III requires contracting States to recognise arbitral awards as binding and enforce them under the conditions laid down in, *inter alia*, Art V.

56 Born's interpretation of these Articles as laying down international standards of preclusion is persuasive, particularly where parties seek to re-adjudicate matters which have actually been decided in an earlier award. However, the Convention cannot supply all of the answers where the matter could and should have been raised in the earlier arbitration but, for one reason or another, was not. The obligation to recognise the earlier award as binding does not directly entail the application of *Henderson*-type preclusion rules. Instead, we must look closer at the arbitration agreement and, as Born states, the objectives of the international arbitral process.

57 A question which arises is whether an arbitral tribunal would be empowered to adopt a transnational approach without the agreement of the parties. Of course, Art 28 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration empowers the tribunal to "decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute". Those "rules of law" could include transnational rules applicable to *res judicata*, provided that they have been agreed upon by the parties. But that raises somewhat of a problem, because these transnational rules have not been codified, still less developed in any coherent way by arbitral tribunals or in international instruments. One would hope that national courts will take up Born's suggestion to develop international preclusion rules mandated by the New York Convention. But until that takes place, the transnational approach potentially encounters significant problems in terms of identifying the content and application of these transnational rules.

58 This uncertainty may persuade tribunals to adopt a national law approach. If they do so, it is suggested that the most appropriate law to apply when considering a *Henderson* plea would be the *lex causae* (*ie*, the governing law of the contract). Although the arbitration agreement is the source of the parties' ability to arbitrate their disputes, it has already

86 Gary Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2nd Ed, 2014) vol III at p 3770.

been explained why applying the law of the arbitration agreement would represent an uncertain and unduly cumbersome choice of law. Rather, the substantive law governing the main agreement presents a certain and predictable choice of law for tribunals to apply, prevents opportunistic forum shopping and is supported by the fact that the *Henderson* rule is best characterised as part of the substantive law of *res judicata*.

IV. Conclusion

59 We have seen that the *Henderson* rule is of established pedigree. The rule finds its origin in early English cases involving arbitration. The rule is one of the most powerful tools available to arbitrators when parties seek to advance arguments or claims that they could and should have raised in earlier proceedings. Accordingly, it must be exercised with caution, and not before "a scrupulous examination of all the circumstances".[87] We have also seen how the application of the rule in arbitration presents interesting and difficult conflict of laws questions. The difficult issues of characterisation, and the inconsistent rules contained in national laws, have led some to conclude that tribunals and courts should adopt a transnational approach to preclusion. In the authors' respectful opinion, national law should not be ignored simply because of these difficulties. Equally, transnational rules should not be ignored because they have yet to be fully developed. Tribunals may not be faced with a binary choice between these two alternatives. They could mix-and-match between the two. In the end, the tribunal should be guided by the policies underlying the parties' choice of international arbitration as their method of dispute resolution, namely, the principles of finality and expedition implied by the parties' arbitration agreement and expressed in arbitration legislation and the New York Convention.

87 *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at 590.