

Parallel investment treaty and contract arbitrations

Baltic Arbitration Days 2017



Contents

1. The problem
2. Solutions
3. Conclusion

1. The problem

A. Example

- Company A, registered and doing business in country X, enters into a contract for the *provision of pre-shipment inspection services* with the Ministry of Transport of country Y. The Ministry fails to pay amounts due under the contract and terminates the contract

1. The problem

A. Example

- Under those circumstances, company A:
 - Initiates ICC arbitration proceedings under the arbitration clause contained in the contract (alleging breach of contract)
 - Initiates ICSID arbitration proceedings under the dispute resolution clause contained in the X/Y BIT (alleging a breach of the FET and EXP standards and of the BIT's umbrella clause)

1. The problem

A. Example

- This is an example of parallel investment treaty and contract arbitrations involving, at least in part, identical or similar legal issues
 - The issue of whether the Ministry of country Y breached the contract is relevant in both proceedings

1. The problem

B. Adverse effect of parallel proceedings

- Parallel proceedings may have several detrimental effects:
 - They offer the claimant an unfair advantage (multiple chances)
 - They may lead to overcompensation of the claimant
 - They generate additional costs for the parties (inefficiency)
 - They may lead to conflicting outcomes

2. Solutions

A. Objectives

- (Most of) the detrimental consequences of parallel proceedings can be avoided if:
 - The same tribunal hears both claims OR
 - One tribunal stays proceedings while proceedings before the other are pending (and that tribunal then takes into account the decision rendered by the other tribunal)

2. Solutions

B. Overview of possible tools

- Possible tools notably include:
 - *Lis pendens*
 - Consolidation of proceedings
 - Fork in the road
 - Waiver of right to initiate parallel proceedings

2. Solutions

C. Lis pendens

- Under the principle of *lis pendens*, court A must decline jurisdiction where the dispute brought before it is already pending before court B provided that the two disputes are identical as to (a) the parties, (b) the legal bases, and (c) the reliefs sought (see, *e.g.*, Brussels I Regulation Art. 27)

2. Solutions

C. Lis pendens

- However, it is questionable whether the principle of *lis pendens* is at all applicable in the context of parallel investment treaty and contract arbitrations (what is the source of this rule??) (but see ICSID, *SGS v. Pakistan*, Decision on Jurisdiction, § 182)

2. Solutions

C. Lis pendens

- Assuming that the *lis pendens* rule applies, its requirements would not be met in our case:
 - In the ICSID arbitration the respondent is the State; in the ICC arbitration the respondent is the Ministry of Transport of Y
 - In the ICSID arbitration, the legal basis is the X/Y BIT; in the ICC arbitration it is the contract and the applicable domestic law (or rules of law)

2. Solutions

D. Consolidation

- Consolidation means that two distinct proceedings are merged into one single proceeding

2. Solutions

D. Consolidation

- The possibility to consolidate proceedings is provided for under several sets of arbitration rules and investment treaties
 - *E.g.* ICC Arbitration Rules Art. 10 provides for the consolidation of separate ICC arbitration proceedings
 - *E.g.* US Model BIT Art. 33 provides for the consolidation of two separate investor-state arbitration proceedings

2. Solutions

D. Consolidation

- In our case, consolidation is not possible because the rules do not allow the consolidation of ICSID proceedings initiated under a BIT and ICC proceedings initiated under an arbitration clause contained in a contract

2. Solutions

E. Fork in the road

- Under hypothetical Art. VI(3) of the X/Y BIT an investor may initiate investor-state arbitration provided that he *"has not submitted the dispute for resolution under paragraph 2 (a) [to the host State's domestic courts] or (b) [in accordance with a previously agreed dispute settlement procedure]"*

2. Solutions

E. Fork in the road

- Here, the crucial question is whether the dispute submitted to ICSID is the *same* as the one previously submitted to ICC arbitration under the arbitration clause

2. Solutions

E. Fork in the road

- Most tribunals have held that such sameness requires *identity of parties, legal bases, and reliefs sought*

2. Solutions

E. Fork in the road

- However, in *Pantechniki v. Albania* (ICSID, Award), the sole arbitrator found that an investor who initiated breach of contract proceedings in the Albanian courts could no longer bring his claim before an ICSID tribunal because the ICSID claim had "*no autonomous existence outside the contract*" (§ 64)

2. Solutions

F. Waiver

- A party may waive either its right to initiate investment treaty arbitration or its right to initiate contract arbitration

2. Solutions

F. Waiver

- Some BITs provide that the initiation of investor-state arbitration requires a waiver by the investor of his right to *"initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind"* (Canada/Ukraine BIT Art. XIII(3)(b))

2. Solutions

F. Waiver

- Conversely, a party may also contractually waive its right to initiate investor-state arbitration proceedings (see, e.g., ICSID, *Aguas del Tunari v. Bolivia*, Decision on Jurisdiction, § 118)

3. Conclusion

A. Insufficiency of current legal framework

- Current legislation and arbitration rules do not adequately address the problem of parallel investment treaty and contract arbitrations

3. Conclusion

B. Risk of regulation

- There is a risk that certain tools (*e.g.* waiver; fork in the road; etc.) limit the scope of available remedies (because the *issues* and/or *applicable rules* may not be *exactly* the same)
 - *E.g.* Not every breach of contract necessarily qualifies as a breach of the FET standard
 - *E.g.* A contract claim may fail because the contract is void under the applicable domestic law, but a claim alleging violations of an investment treaty may still be successful