Parallel State and Arbitral Procedures in International Arbitration

Dossiers – ICC Institute of World Business Law

Edited by Bernardo M. Cremades & Julian D.M. Lew

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Foreword

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It is a pleasure and a privilege to introduce this third Dossier of the Institute. *Parallel State and Arbitral Procedures in International Arbitration* raises topical and fascinating issues. It is indeed the Institute’s policy to debate issues of immediate interest to the world of international arbitration at its Annual Meeting. Our approach is both scientific and pragmatic, and the most renowned experts come to share the very latest issues with the floor.

Practitioners of international commercial arbitration are facing growing trends in our global world, one of them being the increasing role of states in the international business world. There is also a frequent tendency to have recourse to delaying tactics, even though arbitral proceedings, being naturally less aggressive and, ideally, more rapid and less costly, should remain different from procedures in State courts.

The considerable increase of Bilateral Investment Treaty (BIT) in particular has led, to use the words of Bernardo M. Cremades, to a confrontation between traditional commercial arbitration and the brave new world of investment arbitration. Whether multilateral or bilateral, their jurisdiction or arbitration provisions increase the number of potential conflicts.

Classical issues such as parallel proceedings, enforcement or annulment of awards, consolidation of procedures, joinders, intervention, *res judicata*, *lis pendens arbitralis*, collateral estoppels, waivers, forum shopping, etc. now have to be viewed from a different angle.

The ICC Institute is therefore extremely grateful to all the contributors, particularly Bernardo M. Cremades and Julian D.M. Lew, the co-editors of this Dossier. We are happy to contribute towards modern international arbitration with the high-level contributions you will find in this book.

As usual, I hope that I will have the pleasure of welcoming you to one of the Institute’s events in the near future.
Introduction

By Bernardo M. Cremades
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This year, the Annual Meeting of the ICC Institute of World Business Law addresses a topic of great current concern for the arbitration world: the parallel existence of arbitral tribunals which gives rise to awards that reach inconsistent conclusions, and which may even be scandalously contradictory. There is a sense that during the past few years we have been living through truly revolutionary times in the normally peaceful world of arbitration. The coexistence of traditional international commercial arbitration with the brave new world of investment arbitration has brought enormous changes. Investment arbitral awards have been few but well reasoned and, because of the involvement of sovereign States, have seen the abandonment of the confidentiality that has traditionally surrounded the world of arbitrators. Awards have been in the news, and have given rise to public debate.

The work of arbitrators frequently overlaps with that of domestic judges and tribunals. International arbitration treaties and, specifically, the 1958 New York Convention established a system of peaceful coexistence, that might now be threatened by the emerging reality of investment arbitration. We can identify five milestones on the road to the current situation:

1. It is considered communis opinio in the arbitral jurisprudence of investment protection that the public offer made by sovereign States in bilateral investment treaties to submit themselves to arbitration, if the investors of the other contracting country so decide, provides an effective basis to establish a true arbitration agreement. The public offer is accepted by an investor dissatisfied with his treatment by the host State, thereby constituting a true arbitration agreement ‘in writing’. In this manner, the undertakings accepted by States in investment protection treaties are binding and effective, even though at times the expression of these undertakings is in general terms, such as ‘just and equal treatment’, non-discriminatory treatment, or ‘most-favoured-nation treatment’. Arbitral tribunals are judging specific State actions in order to draw out their legal consequences, including the necessity to pay compensation.
2. Initially, the concept of investment and of the treaty regime for its protection focused on investments made in natural resources, such as natural gas, petroleum or mining. However, arbitral tribunals have been broadening the concept of investment, understanding as such for treaty purposes investments in concession, or even construction, contracts. The difficulty then arose of differentiating between what has come to be called contractual and treaty claims, the former referring to what was contracted while the latter to the State undertakings relating to the protection of the investments. Certain investment protection treaties include what have come to be called ‘umbrella clauses’, elevating the concept of contractual claims to the category of treaty claims on the basis that the Host State has undertaken by treaty to respect its contractual commitments. The line between contractual and treaty claims is not clearly defined, and there exists an interesting and colourful jurisprudence as to whether arbitral tribunals established pursuant to an investment treaty have jurisdiction over contractual claims pursuant to these umbrella clauses. In one case, an arbitral award was annulled on the basis that the tribunal had accepted jurisdiction over treaty claims but in practice did not exercise it for various reasons, with the annulment panel finding that the arbitral award was invalidated for *infra petita*.

3. The efforts to define the line between contractual and treaty claims have also had their procedural repercussions. It is understood that contractual claims must be decided by the forum agreed for the resolution of these disputes in the contract, be it a concession or a construction contract. On the contrary, the treaty claims must be presented before the arbitral tribunal established pursuant to the applicable investment protection treaty. The lawyers representing the interests of their clients must choose which forum is strategically preferable, thereby increasing the opportunities for forum shopping.

4. It is generally accepted that international treaties have priority over the norms of domestic law. Because of this, there are those who try to impose the primacy of international arbitration over domestic judicial or arbitral solutions. This perspective creates problems in that there is a tendency in many treaty-based arbitral tribunals composed of arbitrators from public international law backgrounds to refuse to accept that contractual questions of concessions or construction are a proper subject for such international arbitration tribunals. The result is to reject purely contractual matters as outside the jurisdiction of such tribunals.
5. All this arbitral activity arising from investment protection treaties has resulted in a true explosion in investment arbitration in Latin America. 60% of the work at ICSID of the World Bank is dedicated to Latin American countries. Likewise, a good percentage of international commercial arbitrations of the International Chamber of Commerce or the American Arbitration Association relate to Latin American countries. In the 1970’s and 1980’s the major arbitrations, relating to petrodollars or the US-Iran Claims Tribunal, resulted in the introduction of many Anglo-Saxon legal concepts and techniques to international arbitration. The peaceful world of arbitration began to familiarize itself with discovery battles, cross-examination, and the proceduralism of litigation lawyers. Today, estoppel, the ‘fork-in-the-road’, the waiver, forum non conveniens, the doctrines of ‘clean hands’ or of international comity, are giving way to the concepts of good faith and abuse of rights, well established in continental law and very far from the Anglo-Saxon mentality. Transnational arbitration in the Americas is not purely a matter of translation, but behind the concepts there exists a very different legal culture.

We are therefore participating in a truly profound change in international arbitration. In our meetings and congresses of the 1980’s, we were concerned with multi-party arbitrations, or immunity of jurisdiction or execution, differentiating the assets of States jure imperi or jure gestionis. Today, economic globalization has brought about the free movement of goods and services, and the free establishment and movement of investments. We use the same traditional terminologies but address radically different issues. For example, when an administrative contract acquires an international nature and both the domestic laws of the country in question and international law are applicable, then we enter into serious contradictions: international law, pacta sunt servanda, does not allow the practice of the so-called extraordinary powers of the public administration, an essential element of the public contract in continental law; to the point that there are internationalists who point out that the expression ‘international administrative contract’ is a contradiction in itself. Investment protection treaties impose obligations on the Contracting States in situations of expropriation, direct as well as indirect. Indirect expropriation is understood to refer to damage to the investor as a consequence of the Host State’s actions resulting in a loss of economic value; the variation, for example, of the fiscal framework may constitute in some cases an indirect expropriation for treaty purposes.
In these circumstances, it is no wonder that there are investors who resort to more than one forum in defence of their interests in the world of international business. At times, a contractually mandated forum is utilised, which normally means an arbitration of a commercial nature. The response of the defendants could be to resort to the ordinary courts of one of the countries in question. There is also the possibility of invoking the arbitral forum foreseen in the investment protection treaties. Practice shows us with enough frequency that these possibilities give rise, on occasion in an orderly way but more often evasively or contradictorily, to the establishment of parallel tribunals for the same or similar issues that result in contradictory awards prejudicial to the legal security of international trade. Common sense should prevail in such circumstances, which for the international jurist leads, in my judgement, to three practical observations that should always be kept in mind:

1. The globalization of the world economy demands a legal, social and economic framework different from what we have known traditionally. It requires moving away from legal formalism towards economic flexibility. At present, when two arbitral tribunals analyse the same State actions, in respect of the same investor, they might reject the defence of *res judicata* or *lis pendens*, on the basis that there is no identity of the circumstances if both tribunals are set up pursuant to different treaties where the claimant in one case is an individual and in another a company owned by this same individual although domiciled in a different country. Undoubtedly it can be formally said that the *causa pretendi* is different. Nonetheless, from the economic point of view, such formalism prevents the law from addressing what can be described as a true abuse of investment protection. Application of *res judicata* or of *lis pendens* cannot be made to be exclusively dependent upon the rules at the place of arbitration.

2. The consolidation of arbitral proceedings, be they investment or of a purely commercial nature, as well as judicial proceedings arising from the same facts, is an imperative necessity for international legal security. Such consolidation might not be an easy task in commercial arbitration cases. The parties have been able to establish their agreements in a mutually acceptable fashion, but one that introduces contradictory criteria for the resolution of the legal disputes. There are other circumstances
where consolidation simplifies matters; such is the case, for example, with corporate arbitration wherein the validity of resolutions adopted during a meeting of shareholders or of directors is disputed, and the legislator establishes criteria for consolidation of all arbitrations set in motion by individual shareholders affected by the contested resolution.

The same thing could occur in investment protection arbitrations where the disgruntled investor challenges the same state decisions in more than one forum. Therefore, legal security requires the consolidation of possible arbitral or judicial proceedings available to investors.

The liability of signatory States to investment protection treaties is based on the principle of the attribution of State responsibility. By this principle, the State is held responsible for the activities prejudicial to the investor by municipal or territorial administrations, or even public companies. This principle is explained by the International Law Commission of the United Nations in its recent work on State responsibility. However, even within the United Nations we find two different organizations working on arbitration matters who should be working in coordination with one another. Whereas UNCITRAL dedicates its efforts to matters of international private law, the International Law Commission is dedicated more to matters of public international law. After the appearance of investment protection arbitrations, it is hard to understand the distinct work of these organs, as both belong to the United Nations.

3. International legal security may be called into question by parallel proceedings of arbitral tribunals and, most importantly, by the existence of contradictory awards. The impact of transnational public policy is evident today in international arbitration, as much in the decision-making process of the arbitrators as in the cooperation between them and the state judges and tribunals.

Arbitrators cannot overlook the requirements of international legal security during their decision-making process. They cannot hide behind the formalism of contractual relationships. In a globalized world, the res judicata and lis pendens concepts cannot be used as excuses to take decisions that put at grave risk international legal security.
Without doubt there exists an osmosis between domestic judges and tribunals and arbitral proceedings when analysing the requirements of transnational public policy. The work of the arbitrators is controlled by state judges, firstly by nullity in the territory where an arbitral award is issued and, afterwards, by exequatur in the country where it is to be enforced. Nullity is controlled by national criteria, while exequatur was internationalised by the 1958 New York Convention. Nonetheless, in both cases where judges and national courts see arbitrators neglecting their duties imposed by transnational public policy will be justified and probably obliged to exercise a greater control in order to make up for the deficiencies of arbitral proceedings. Those arbitrators conscious of their responsibilities before the international legal community will know how to apply the requirements of public policy and, in doing so, will avoid that state courts and judges have to interfere in the world of arbitration in an undesired manner.