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Summary of Young-OGEMID Symposium No. 6: "Double Trouble: Parallel Proceedings in International Arbitration (9-18 October 2017)" by I. Amir

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TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Summary of Young-OGEMID Symposium No. 6: “Double Trouble: Parallel Proceedings in International Arbitration (9-18 October 2017)”

by Ibrahim Amir*

Executive Summary

Young-OGEMID’s sixth virtual symposium advised junior practitioners, academics and law students on the legal and strategic issues associated with parallel (simultaneous) proceedings involving international arbitration. As YO moderator, Professor S.I. Strong noted when introducing the event, “the increasing complexity of cross-border investment and commercial transactions, combined with an aggressive, “never say die” attitude toward certain tactical decisions, have generated rising numbers of parallel proceedings. In these cases, a party will have different parts of a dispute heard in different venues at the same time. These types of proceedings require a large number of resources on the part of the parties as well as a great deal of sophisticated thinking on the part of the lawyers.” This symposium covers a variety of themes relating to parallel proceedings, with panelists from around the world discussing issues of practical and academic importance.

The event featured:

- 1) *Nadja Erk - Senior Associate, ADROIT Attorneys at Law ADROIT Attorneys at Law, Switzerland;¹*
- 2) *Giovanni Zarra - Adjunct Professor of Law, University of Naples, Federico II, Italy;²*
- 3) *Vivienne Bath - Professor of Law, University of Sydney, Australia;³*

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¹ **Nadja Erk** graduated from the University of St. Gallen, Switzerland, in 2006 and was admitted to the bar in Switzerland in 2007. After specializing in corporate and commercial law at the London School of Economics and Political Science (LL.M. LSE), she worked in the litigation and arbitration department of a major Swiss business law firm for several years before she joined ADROIT Attorneys at Law in Zurich, a boutique law firm specializing in business law. Nadja Erk also holds a PhD degree from the University of St. Gallen in the field of international commercial arbitration. Further, she worked for the Secretariat of the ICC International Court of Arbitration in Paris and served as a lecturer on international arbitration at the University of Speyer, Germany.

² **Giovanni Zarra** is adjunct professor of private international law and international litigation at the University of Naples - Federico II. He holds a PhD from the University of Naples Federico II (under the supervision of Professors Massimo Iovane and Loukas Mistelis) and an LLM (with distinction) at Queen Mary University of London. He authored a book on “Parallel proceedings in investment arbitration” and several articles on investment and commercial arbitration, private international law and international litigation. He also worked as a practicing lawyer in international arbitration at a prestigious Italian law-firm where he acted as counsel and as assistant of a well-known Italian arbitrator.

³ **Vivienne Bath** is Professor of Chinese and International Business Law, Director of the Centre for Asian and Pacific Law and Director of Research, China Studies Centre, at the University of Sydney. She has first class honours in Chinese and law from the Australian National University and a Masters of Law from Harvard Law School. Her research interests are in Chinese law, international business and economic law (particularly investment law) and private international law. Professor Bath has extensive professional experience in Sydney,

4) Ignacio Madalena – Counsel, Allen & Overy, Madrid.⁴

Speaker 1: Parallel Proceedings from a Comparative European Perspective

Speaking first, **Nadja Erk**, Senior Associate, ADROIT Attorneys at Law, Switzerland, pointed out that parallel proceedings are said to occur when parties bring the same or a closely related conflict before multiple adjudicators. Motivations behind initiating parallel proceedings, she noted, may be manifold: for tactical reasons, to gain procedural or substantive benefits through forum-shopping, or to enhance the chances of successful enforcement of the award or judgment rendered at the end of the proceedings.

Parallel proceedings are often said to complicate and slow down the settlement of disputes, consuming scarce resources, such as time and money. Also, parallel proceedings in the worst case could result in the issuance of conflicting judgments or awards and hence run the risk of rendering time-consuming and costly proceedings meaningless as a whole.

For these severe implications, Ms. Erk advised parallel proceedings may entail, the laws of most legal forums offer various remedies that can be sought, either to challenge the arbitral tribunal's jurisdiction or to insist on the arbitration agreement's validity and, hence, to contest the national courts' intervention.

Ms. Erk then outlined two remedies in some selected European jurisdictions. She noted that one of the preconditions that parallel proceedings before national courts and arbitral tribunals can exist at all is the international acceptance of the principle of competence-competence. This principle has created the foundation for arbitral tribunals to decide on their own jurisdiction, rendering the conduct of arbitral proceedings independent from judicial support or intervention from a very early stage. The leading arbitral hubs in Europe have incorporated the *positive* effect of competence-competence, i.e., the arbitral tribunal has competence-competence to initially decide virtually all jurisdictional disputes, subject to potential judicial review. There is, however, also a *negative* effect of competence-competence which has been fully adopted by the French Statutory Arbitration Law. Article 1448 of the French Code of Civil Procedure provides that “*the French courts are not permitted to consider jurisdictional objections on an interlocutory basis if the arbitration has already been commenced, but must await the arbitrators' final jurisdictional decision.*” The negative effect doctrine is furthermore applied by the French courts regardless of whether the seat of arbitration is in France or abroad.

New York and Hong Kong, specialising in international commercial law, with a focus on foreign investment and commercial transactions in China and the Asian region. Representative publications include China and international investment policy – the balance between domestic and international concerns in Toohey, Picker and Greenacre (eds) *China in the International Economic Order: New Directions and Changing Paradigms* (2015) Cambridge University Press, New York, 227-224; and *Overlapping Jurisdiction and the Resolution of Disputes before Chinese and Foreign Courts*, (2015-2016) 17 *Yearbook of International Private Law* 111-150. Professor Bath speaks Chinese (mandarin) and German.

⁴ **Ignacio Madalena** is Counsel with Allen & Overy in Madrid, having previously practised in the London and Washington, D.C. offices. Admitted in England, Spain and New York, Ignacio advises corporate and government entities in the infrastructure, energy and natural resources sectors on the resolution of international commercial and investment disputes. Ignacio is currently representing numerous international investors in their ECT claims against Spain. His broader experience includes acting for a range of banking and corporate clients, in international commercial and investment treaty arbitrations under ICC, ICSID, LCIA and UNCITRAL Rules. He has provided advice to clients on a broad range of contentious issues and with respect to a multitude of common and civil law jurisdictions, particularly in disputes in the energy, construction and infrastructure sectors. Ignacio holds LL.M. degrees from Leuven University and Georgetown University Law Centre, and is fluent in English, Spanish and French.

She then pointed to England as a common law country which holds another means of actively restraining a national court's jurisdiction, anti-suit injunctions. If an action for injunctive relief is granted, anti-suit injunctions restrain court proceedings pending in parallel to arbitral proceedings. A failure to comply with the order places the claimant in contempt of court. By its judgment of 10 February 2009, *Allianz SpA and Others v West Tankers Inc* (Case C-185/07), the European Court of Justice, however, declared that anti-suit injunctions issued by member states' courts in support of an arbitration are contrary to the Brussels I Regulation⁵ if proceedings between the same parties and on the same matter had been commenced before the courts of a member state. In other words, The *West Tankers* case was seen as bringing an end to the use of anti-suit injunctions between national courts of member states within the EU to protect arbitration agreements. However, in its judgment of 13 May 2015, *Gazprom* (C-536/13), the Court has relativized its ruling in *West Tankers* in so far as it held that the Brussels Regulation I posed no obstacle to the recognition and enforcement of such injunctions when issued by arbitral tribunals. The judgment did not, however, revisit the decision in *West Tankers*, which was distinguished on the basis of it being in relation to an injunction issued by a court of a member state instead of an arbitral tribunal. She highlighted that after the UK has left the EU, parties may presumably look to the English courts once more to seek immobilizing proceedings brought in member state courts in breach of the arbitration agreement.

Ms. Erk concluded that France and England have developed remedies (at least temporarily) to prevent parallel proceedings from continuing. While, in France, there is a chronological priority in favor of arbitral tribunals to decide on their jurisdiction, English courts are inclined to issue anti-suit injunctions in aid of arbitration (except against other European member states) to protect the smooth conduct of arbitral proceedings. Thus, as these examples show, Ms. Erk stated that national courts and arbitral tribunals – even though deriving their legitimacy from different sources – could be perceived as team players instead of opponents serving different procedural regimes.

Q&A Session

During the Q&A session that followed, **Sébastien Manciaux** noted that article 1448 of the French Code civil de Procédure provides that domestic courts have jurisdiction to rule the case when the arbitral tribunal has not been seized and that the arbitration agreement is manifestly null or manifestly inapplicable (the two conditions being cumulative). He also copied the French version of article 1448(1) which states that "*Lorsqu'un litige relevant d'une convention d'arbitrage est porté devant une juridiction de l'Etat, celle-ci se déclare incompétente sauf si le tribunal arbitral n'est pas encore saisi et si la convention d'arbitrage est manifestement nulle ou manifestement inapplicable.*"

He further explained that there are two elements unclear and raise the following questions:

- 1) when the arbitral tribunal is supposed to be seized (once constituted)?
- 2) when can it be decided that an arbitration agreement is manifestly null or manifestly inapplicable?

He added that there are case-law on these issues but article 1448 still gives place to competition (to a certain extent) between arbitral tribunals and domestic courts under French Law.

⁵ (Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters)

Professor S.I. Strong pointed out that she had never thought about negative competence-competence being used as a means of limiting parallel proceedings. She stated that anti-suit injunctions are a more common means of limiting parallel suits, at least to those in common law jurisdictions. The US is an example of a country well-known for its use of anti-suit injunctions.

Professor Strong drew the attention to the fact that the International Academy of Comparative Law is preparing an international comparative report on anti-suit and anti-arbitration injunctions for its upcoming World Congress in Fukuoka, Japan, in June 2018, which will be very useful in understanding the availability of parallel proceedings in international disputes. She then asked which other common law jurisdictions (other than the US and England) use such mechanisms.

In answering Professor Strong's question, **Ms. Erk** explained that in Switzerland, her home jurisdiction, courts have no tradition in issuing injunctions against a party to Swiss proceedings restraining it from initiating substantive proceedings abroad. The majority of Swiss scholars is of the opinion that Swiss national courts may "passively" decline jurisdiction if the parties to the dispute are bound by a valid arbitration agreement, but they should not be allowed to "actively" compel a party to arbitrate.

She highlighted that most civil law countries consider anti-suit injunctions as an unacceptable intrusion on their jurisdiction. However, the European Court of Justice recently in the *Gazprom* case (C-536/13) held that the comity concerns do not apply to the same extent when the anti-suit injunction is issued by an arbitral tribunal. The Brussels Regulation I "*must be interpreted as not precluding a court of a Member State from recognizing and enforcing, or from refusing to recognize and enforce, an arbitral award prohibiting a party from bringing certain claims before a state court of that Member State.*" She added that it is interesting to see that national courts of a member state and arbitral tribunals are apparently not placed on an equal footing when it comes to anti-suit injunctions within the European Union.

Mark Kantor, Independent Arbitrator, pointed out that some of the most famous, or infamous, international disputes have proceeded in parallel in multiple jurisdictions for decades; among them the *Chevron-Lago Agrio-Ecuador* dispute over environmental pollution allegations; and the *Canada-US softwood lumber* dispute based on allegations that the Canadian lumber industry is unfairly subsidized by federal and provincial governments.

Mr. Kantor explained that the *Lago Agrio*⁶ dispute started in 1993 in the US courts. The class actions were dismissed to Ecuador on *forum non-conveniens* grounds or dismissed on other grounds. Then, there were RICO/Fraud claims against consultants and third-party funders as well as numerous 1782 discovery actions. Several proceedings (fraud allegations, discovery, judgment enforcement) have been involved in the dispute. He provided examples of jurisdictions in which those proceedings have been undertaken such as Ecuador (civil and criminal), Canada (enforcement), Brazil (enforcement), Argentina (enforcement), and Gibraltar (fraud claims against third-party funder and discovery.) He noted that local bar associations are becoming involved, illustratively as the judges on the Grievance Committee of the US District Court for the Southern District of New York have recently submitted a disciplinary complaint against Stephen Donziger, one of the Plaintiffs' counsel, to the New

⁶ https://en.wikipedia.org/wiki/Lago_Agrio_oil_field

York State Bar Association.⁷ The Inter-American Human Rights Commission and the US Securities Exchange Commission were additional forums for complaints related to the dispute. A well-known ISDS tribunal has also been addressing claims of BIT violations as well as issuing orders to halt State support for the various national court proceedings – *Chevron v. Ecuador*. Mr. Kantor noted that all efforts in those jurisdictions to obtain judicial or arbitral orders blocking actions in other jurisdictions have so far failed to gain effective traction.

Mr. Kantor further explained the second example, *softwood lumber*.⁸ He noted that we all think of *softwood lumber* as a bilateral trade dispute, arising before multiple national administrative trade-law tribunals in the US (beginning with the Dep’t of Commerce in 1982, principally.) However, it has also triggered WTO State-State dispute settlement proceedings, several NAFTA Chapter 19 State-State dispute resolution proceedings, several NAFTA Chapter 11 ISDS disputes, proceedings in Canadian administrative tribunals, judicial proceeding in both US and Canadian national courts, and arbitration proceedings administered by the LCIA, not to mention several government-to-government temporary settlement agreements. He stated that up to the late 2000’s, over 30% of the NAFTA Chapter 11 arbitrations involving the US or Canada were softwood lumber disputes. He then asked whether the extent of anti-ISDS feeling among civil society and academia still have been so high but for softwood lumber disputes like *Pope & Talbot*?

Mr. Kantor commented that one important consequence of these two ongoing disputes is that the counsel in those proceedings have taught the rest of the legal world the mechanics of how to engage in parallel actions in multiple forums. Those lessons mean, *inter alia*, that the cost of developing strategies to pursue or defend parallel cases in multiple forums is becoming less expensive and time-consuming, with *Lago Agrio* and *softwood lumber* as trail-blazers. The multiple forums/parallel proceedings strategy makes most sense when the party pursuing the strategy has sufficient resources or the sum at stake is sufficiently large to justify the expenses and time commitments. But, as the costs of developing a multiple forums/parallel proceedings strategy drops, we can expect to see the costs of necessary resources and the threshold sums at stake for mounting such a strategy also dropping.

Ms. Erk agreed that parallel proceedings might be used as a sort of guerrilla tactic to substantially delay proceedings and maybe also to deprive the arbitral award of its successful enforcement. She highlighted that the fact that national laws are still fragmented to such an extent that developing a “universal” multiple forums strategy is considerably aggravated. Should parallel proceedings become more and more “popular” in the future, it is of paramount importance that jurisdictions take a clear stance on a policy level on how they see the interface between state court litigation and arbitration in general.

She stated that arbitration-friendly jurisdictions such as Switzerland and England are less likely to tolerate parallel proceedings where there appears to be a valid arbitration agreement between the parties. One might even think about a common international understanding on how to deal with parallel proceedings following the example of the 1958 New York on the Recognition and Enforcement of Foreign Arbitral Awards. But until then, the doors stand open to play jurisdictions off against each other and thereby take up parties and national courts’ resources. Ms. Erk provided another interesting legal institute - *lis pendens* - which has its origins in domestic litigation in civil law countries. She illustrated that this doctrine calls to exclude court

⁷ <https://lettersblogatory.com/2017/09/21/lago-agrio-sdny-judges-submit-ethics-complaint-against-donziger/>

⁸ https://en.wikipedia.org/wiki/Canada%E2%80%93United_States_softwood_lumber_dispute

jurisdiction in favor of the court first seized when proceedings with the same claim, based on the same legal grounds, and between the same parties are already pending. The decisive and only factor considered to determine which of the courts seized can retain jurisdiction is the timing factor. Meanwhile, the *lis pendens* rule has also extended to cross-border matters as foreseen in multilateral treaties, such as the Brussels Regulation and the Lugano Convention. However, there is no a clear and global transnational principle of *lis pendens*. She added that in common law countries the *forum non conveniens* doctrine prevails. The fact that there are parallel proceedings pending, one of which has been initiated before the other, is merely one factor to be weighed up as part of the overall assessment whether a court should stay the proceedings or continue with them.

She stated that the Swiss legal doctrine suggests that a Swiss national court will stay its proceedings if confronted with arbitral proceedings that were initiated first in Switzerland or abroad, provided that the arbitral award will be capable of recognition under the New York Convention. However, the same rule does not apply vice versa where the arbitral tribunal is the adjudicatory body seized second. She noted that even though being in principle a highly effective approach against parallel proceedings since it follows a mechanical chronological rule, the *lis pendens* rule is maybe too rigid to be applied to the interface of state court litigation and arbitration and furthermore would, paradoxically, again promote forum running and hence the initiation of parallel proceedings.

Adding to the discussion of anti-suit injunctions, **Professor S.I. Strong** advised that there is a book - Injunctive Relief and International Arbitration, by Hakeem Seriki - that has a chapter on anti-suit injunctions and arbitration as well as a chapter on anti-arbitration injunctions. The book discusses the *Gazprom* case that Nadja mentioned as well as various other issues. She also mentioned that Nadja has written a book, Parallel Proceedings in International Arbitration: A Comparative European Perspective.⁹

Speaker 2: Parallel Proceedings in Investment Arbitration

The second speaker, **Giovanni Zarra**, Adjunct Professor of Private International Law and International Litigation, University of Naples, Federico II, Italy, described that parallel proceedings in investment arbitration can be defined as proceedings pending before two (or more) arbitral tribunals, in which the parties, the legal basis and one (or more) of the issues are the same or substantially the same. This implies that parallel claims: (1) have the same purpose; (2) are based on the same facts; (3) have, from the substantial point of view, the same legal basis; and (4) involve parties which, if not substantially identical, represent the same centers of interest (i.e. they are in privity of interests).

He added that in investment arbitration, this phenomenon has arisen in three different scenarios:

- 1) The same party starts, in parallel, a contract and a treaty claim against the host State;
- 2) Various shareholders of the same company operating a foreign investment start several parallel claims against the host State;
- 3) Different companies of the same group (composing a chain terminating with the corporation which actually owns the investment) start parallel claims against the host State.

⁹ Wolters Kluwer, 2014.

He noted that in all the above cases, while in starting multiple claims, investors are exercising their rights arising from contracts and/or treaties, parallel proceedings are highly regrettable in light of several policy considerations, involving the risk of undermining the reliability and legitimacy of the adjudication process, the lack of legal certainty, the prejudice generated to the principle of judicial economy and the absence of finality.

He argued that the legal instruments aimed at avoiding parallel proceedings that are available at the jurisdictional phase are not well suited to remedy this problem. This is because such tools (such as consolidation and joinder) are based on an exercise of party autonomy by the same parties who started the parallel proceedings, and this is, of course, unlikely to occur. Other remedies, such as fork in the road clauses, require the strict identity of parties, *petitum and causa petendi* (so-called triple identity test), which – from the formal point of view – in the above scenarios is also uncommon. Anti-suit injunctions are a risk and ineffective means for solving this problem because they could be simply ignored by the parties (and/or the arbitrators) in the parallel claim. He suggested that a solution to this issue shall be found at the admissibility stage of proceedings, i.e., the phase in which arbitrators may decide that – in the interest of justice – it is inappropriate to exercise a validly conferred jurisdiction. The power to declare a claim inadmissible is inherent in the arbitral function and can be – without any doubt – exercised when a tribunal realizes that the continuance of proceedings runs against certain general principles of international law, such as good faith and *ne bis in idem*.

He argued that a duplicative claim of already existing proceedings may be seen as a violation of good faith and *ne bis in idem* principles. He explained that it is not good faith because it is an abuse of process. In cases where one of the multiple claims already terminated, it is a violation of *ne bis in idem* because it is an attempt to reopen something which is *res judicata*. Regarding the latter point, he noted that – while the traditional civil law view of *res judicata* requires a strict application of the triple identity test – the same principle has been applied both by common law systems and by certain international tribunals (e.g. the Court of Justice of the European Union and the International Tribunal for the Law of the Sea) in a more flexible manner, to include also substantially identical (but formally different) claims. Moreover, common law systems also apply the doctrine of “collateral estoppel,” which might be extremely useful in facing the issue of parallel proceedings.

He noted that while initially there has been a certain reluctance by arbitral tribunals and authors dealing with parallel proceedings in departing from the triple identity test, some recent decisions applied a more “substance-oriented” approach. He illustrated this with reference to some cases. In *RSM v. Grenada* and *Apotex v. United States* cases, the tribunals recognized the applicability of the doctrine of “collateral estoppel” in investment arbitration; In the *Ampal v. Egypt* decision on Jurisdiction, the tribunal stated that “*the mere fact that two parallel investment claims arising from the same facts existed against Egypt is a circumstance that per se was to be seen as abusive, regardless of the existence of bad faith on the side of the Claimants.*”; In the *Ampal v. Egypt* decision on Liability, the same tribunal, after having referred to the *RSM* and *Apotex* cases, affirmed that the relevant findings of a previous ICC tribunal (regarding a dispute among formally different parties which, however, were in privity of interest with the current parties) have a *res judicata* effect in the present proceedings. In the very recent *Orascom v. Algeria* award, the tribunal – through a clear and convincing motivation – declared the inadmissibility of a treaty claim started in parallel to other two treaty claims due to its abusive nature.

He concluded that these awards gave us hope that investment arbitration arbitrators have understood that, if they want to safeguard the legitimacy of investment arbitration, the substance shall prevail over form in matters involving parallel proceedings.

Q&A Session

Velimir Zivkovic joined the discussion and wondered if Professor Zarra has thoughts about the issue of the automatic assumption of bad faith in case of sufficiently similar parallel proceedings. Mr. Zivkovic noted that the issue is more nuanced, especially in the light of the scenario Professor Zarra mentioned, where different shareholders may pursue claims against the host State. He noted that he could certainly envisage a scenario where a hypothetical expropriation of an investment is followed by a rupture between the previous shareholders, and inability to agree on a joint action or even be aware of the existence of others' claim. He then asked Professor Zarra that would the presumption of abuse still be a preferable path in those and similar situations?

In response to Mr. Zivkovic's point, **Giovanni Zarra** noted that such scenario is a possible and deserves particular attention. He noted that, as a matter of principle, there should be a certain diffidence towards the beginning of parallel claims in situations like the one Mr. Zivkovic mentioned, but that, of course, arbitrators may (and shall) consider the particularities of the single dispute. In particular, a tribunal should understand to what extent it is possible to say that the two parallel claimants may be considered as "substantially the same party." While in some cases it is so, in others there is no substantial coincidence of interests. In these last cases, obviously, there is no abuse (provided that there is evidence of the lack of privity). However, the discussion of certain issues may, in any case, be precluded as a matter of "collateral estoppel." In this regard, Professor Zarra suggested reading the decision on the respondent's application under article 41(5), which issued in the *Eskosol v. Italy* dispute (ICSID Case No. ARB/15/50), where the Tribunal precisely applied the line of reasoning mentioned above.

Velimir Zivkovic followed up and noted that his thoughts were mostly along the same lines as to what Professor Zarra mentioned. But a view that occurs to him is situations of what tentatively can be called 'good faith' parallel claims might require a more prominent and explicit counterbalance in insisting on the judicial (or arbitral) economy aspects. In other words, while many shareholders may legitimately bring many separate claims in the same matter, from the host State side, this is merely a multiplication of a costly business of investment arbitration and encumbrance on public budgets. The triple test itself would not seem to accommodate this concern on its own. He then asked would perhaps certain further limiting factors along these judicial economy lines be warranted?

Giovanni Zarra commented that he agrees with Mr. Zivkovic on the necessity to foster a reasoning based on judicial economy (and respect for the sovereign role of Respondent States). He pointed out that the only valuable tool (apart from abuse of process) is collateral (or issue) estoppel. However, the legal status of collateral estoppel in international law is not a settled matter – even if a particular investment arbitral tribunal have applied this rule. Another solution could be the appointment of the same tribunal in parallel claims (so-called "quasi-consolidation"), but this is a remedy only based on a choice of the parties, who can legitimately think that different arbitrators are the right people to hear their cases. On the other hand, joinder and consolidation are viable alternatives in investment arbitration. It is unlikely that parties (i.e., claimants) agree on this possibility. Moreover, in the cases where arbitration is based on BITs, there are also issues of consent due to the lack of the nationality requirement.

Orlando Cabrera joined the discussion and pointed to Article 1121 of NAFTA “Conditions Precedent to Submission of a Claim to Arbitration,” which reads as follows:

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

(a)...

(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

He explained that Mexico had exploited the usefulness of this provision in two cases, *Waste Management I*, and recently *KBR*. This last investment arbitration arises out of the *Commisa vs. Pemex* saga. An ICC panel rendered an arbitral award in favor of *Commisa* for more than US\$300 million. *Commisa* sought to enforce the award in New York and Luxembourg. *Pemex*, the oil state-owned enterprise, moved to set aside the award before the Mexican courts and successfully annulled the award. Dissatisfied *KBR*, the parent company of *Commisa* filed an investment claim. As the proceedings in Luxembourg and New York were pending, and *KBR* did not waive to them, the investment tribunal constituted under NAFTA chapter 11 dismissed the case as *KBR* did not comply with the waiver required by NAFTA.

He then asked Professor Zarra whether he agrees on the usefulness and effectiveness of this provision. And why a useful solution like this is absent in most BITs.

In response to Mr. Cabrera’s points, **Giovanni Zarra** stated that such provision is very useful, but it is isolated in investment treaties framework. He pointed out that he considered it in his book on parallel proceedings but left the question of its usefulness with a question mark for many reasons. First, it is still doubtful in the lack of relevant case law what a “measure” is, (can we arbitrarily interpret this word as encompassing “a range of measures” or shall we refer to “a specific measure”?) Second, an investor, in bad faith, can easily circumvent such provision, by timely amending its corporate structure in view of possible (and still unforeseeable) disputes. Finally, this provision does not help in cases where a minority shareholder starts a parallel claim. In this case, Article 1121 does not apply, and the respondent still must face several parallel claims.

For these reasons, he emphasized that the problem of parallel proceedings should be solved at the level of public international law (applicable at the admissibility stage) bypassing all the issues related to consent (and jurisdiction). And that why he prefers the application of principles such as *ne bis in idem* (i.e., *res judicata* and collateral estoppel) and good faith (i.e., abuse of process).

He then also wondered why such provision is absent in most BITs. The reason, he noted, might be that states did not foresee the explosion of investment arbitrations when they signed BITs before the “baby boom of ISDS,” and therefore did not include such protection in the BITs. He further noted that this is the same reasoning he applies to the so-called “right to regulate.” States

did not imagine that their sovereignty would have been so compromised by ISDS and accepted broadly drafted provisions. Now they are paying the consequences.

Mark Kantor, Independent Arbitrator, noted that parallel treaty arbitration could also be employed for defensive purposes. He identified in this regard the *Ecuador v. United States* state-state PCA proceeding brought by Ecuador against the United States under the State-State dispute provisions of the US-Ecuador BIT seeking an alternative interpretation of provisions of that BIT from the interpretations set forth by several BIT tribunals. Similarly, in *Chevron v. Ecuador*, the ongoing US-Ecuador BIT arbitration, Chevron brought an arbitration seeking to hold Ecuador responsible for alleged State misconduct concerning the *Lago Agrio* Ecuadorian \$9 billion judgment.

Professor S.I Strong stepped in to add that there is a report in the news¹⁰ about a parallel proceeding involving judicial actions in Russia and England as well as an investment arbitration filed at the Permanent Court of Arbitration under the BIT between Russia and France. Part of the dispute involved the question of whether certain trusts created by a Russian ex-senator in New Zealand (a trust is primarily a common law device used as a means of holding and conveying property) could be considered valid. The English court recently ruled that the trusts in question should be considered shams,¹¹ thereby allowing the underlying assets to be seized.

She noted that the decision is noteworthy not only as an example of what has been discussed here but as an example of demonstrating how important trusts are (or are becoming) in the world of international commerce and corruption.

Speaker 3: Parallel Proceedings from an Asian Perspective

The third speaker, **Vivienne Bath**, Professor of Chinese and International Business Law, Director of the Centre for Asian and Pacific Law and Director of Research, China Studies Centre, at the University of Sydney, Australia, shifted the emphasis slightly to parallel proceedings before the courts of different countries. She highlighted that Asia contains many different jurisdictions with different systems of law and that she would focus her discussion on China, the largest economy in the region.

Professor Bath explained that there are a number of possibilities in dealing with the possibility of parallel proceedings before courts in different countries or regions. The first is pre-emptive: opt for arbitration or include an exclusive jurisdiction clause in the contract between the parties. The second is to appeal to one court to refuse to take jurisdiction in a case on the basis that there is already a case of the same dispute before another court. The third is for one party to ask the court to take steps to stop the other party from initiating or continuing its action before another court (or tribunal) where such a remedy is available - in the case of common law courts, an anti-suit injunction. The final issue is enforcement of competing judgments.

In explaining the first possibility, she noted that exclusive jurisdiction clauses do not receive the same treatment as arbitration clauses. Common law courts are not bound to refuse to take

¹⁰ <http://www.rapsinews.com/judicial_news/20171011/280488021.html> accessed on 11/29/2017. JSC Mezhdunarodniy Promyshlenniy Bank & Anor v Pugachev & Ors [2017] EWHC 2426 (Ch) (11 October 2017) <<http://www.bailii.org/ew/cases/EWHC/Ch/2017/2426.html>>

¹¹ <<http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWHC/Ch/2017/2426.html>> accessed on 11/29/2017.

jurisdiction in a case if there is such a clause relating to the dispute between the parties, although there is a strong bias towards honoring the bargain between the parties, and they will generally do so. The Chinese courts, however, will honor an exclusive jurisdiction clause only if there is an "actual connection" between the nominated court and the dispute. As some recent cases have shown, this can cause considerable difficulty where the parties have nominated the law and courts of a neutral third-party jurisdiction such as England, with which the Chinese courts consider the case has no actual connection. (This means the residence of the plaintiff or defendant, the place of execution or performance or the location of the subject-matter of the contract. An actual connection does not include the governing law of the contract.)

Regarding the second possibility - to ask one court to refuse to hear the case on the basis that there are proceedings before another court - she explained that it similarly presents considerable difficulty. Common law judges have discretion to refuse to hear a case on *forum non conveniens* grounds. There are differences, however, between the common law jurisdictions in Asia when it comes to the application of this test to parallel proceedings. Australia applies a strict test whereby a party must show that the Australian court is a clearly inappropriate forum; Hong Kong applies a *forum conveniens* test; New Zealand applies a more appropriate court test and so on.

In the case of China, Chinese courts do not apply the principle of *lis pendens* to cases before foreign courts unless and until a foreign judgment in the case has been recognized in China (which is extremely difficult). She further explained that Chinese courts have, however, developed a very limited concept of *forum non conveniens*, codified by the 2015 Supreme People's Court in 2015. This allows the court to refuse to hear a case if the parties do not include a Chinese citizen, legal person or organisation, the national interests of China are not involved, there is no agreement on Chinese jurisdiction, the dispute is not subject to Chinese law, the facts of the case did not occur in China and it is difficult for a Chinese court to determine the facts and apply the law, and there is a foreign court with jurisdiction. In short, if there is no connection with China at all, the Chinese court may refuse to take the case.

She noted that as some recent cases involving the Chinese and Australian courts, and the Chinese and Hong Kong courts show it is often difficult to persuade any court to give up jurisdiction even if the dispute and the parties before the two courts are genuinely the same.

The anti-suit injunction is an instrument of the common law courts, directed at a party, not a foreign court, and has often been used, particularly by the English and US courts, in various cases involving overlapping proceedings in China. Its efficacy, when directed against a foreign party which genuinely has no connection with the forum court, is questionable, however, as the injunction is effective only within the jurisdiction which issued the injunction.

The Chinese courts have also resorted on occasion to "stop" orders, ordering a Chinese party not to take certain actions relevant to the action in the foreign court (generally by ordering the Chinese entity not to make payment on a specified financial instrument). Other courts will generally only give effect to these orders if the instrument is subject to Chinese law or performance is to take place in China. The English courts, in particular, have ruled that the stop orders have no application where the governing law and place of performance is England.

The Convention on Choice of Court Agreements, ratified by the EU, Singapore and Mexico, and signed by the US, Ukraine, Montenegro and most recently China, among others, would resolve some of these difficulties where parties of ratifying states have signed an exclusive

jurisdiction clause, thus offering (as in the case of an arbitration clause) some assurance to the parties that they can ensure that the agreement on forum will be observed. It does not, however, resolve the issue of overlapping proceedings where only some of the issues are the same, or where the parties are not identical. The limited scope and few accessions to the Convention also limit its usefulness. In Asia, Singapore is the only state to have acceded, although Australia is working towards it. She suggested that Chinese ratification could have a major effect on the approach of Asian states, as it could potentially significantly expand enforcement options against Chinese companies.

She concluded that, generally, however, the increasing number of overlapping cases involving the courts of China and courts and arbitral tribunals of England, Hong Kong, the US, Australia, Singapore and other jurisdictions suggests that parallel proceedings will continue to be a problem in Asia.

Q&A Session

Professor S.I. Strong raised a question as to how would Asian jurisdictions respond if the parties gave a contractual power to the arbitral tribunal to enter an anti-suit injunction against the parties to the arbitration? She noted this would generate a strong version of negative competence-competence, albeit based on contract rather than statute, as would be the case in France, for example. She stated that she is sure how the US or England would respond to this issue, since she is not aware of any cases where the parties have given the tribunal the power to issue anti-suit injunctions specifically, as opposed to injunctive relief generally.

In responding, **Professor Bath** stated that her comment about the common law courts related to the different view of *forum non conveniens* taken by the courts, which continue to develop their own independent approaches to the common law.

In relation to a contractual provision relating to anti-suit injunctions, Professor Bath stated that she is not sure what this would add to existing powers given to arbitrators in relation to the grant of interim relief. The parties have already agreed to arbitrate, and the courts of most jurisdictions are prepared to enforce that agreement by staying the proceedings before them. In that respect, arbitration agreements receive a higher degree of protection than jurisdiction clauses.

She noted that the problem with anti-suit injunctions, even though issued by the court, is that they do not necessarily work. There are some cases, for example, of Australian and US courts issuing anti-suit and anti-anti-suit injunctions against the parties in the same dispute.

In a number of parallel proceeding cases involving China, the Chinese courts took jurisdiction on the basis that there was no arbitration clause, or the arbitration clause was invalid. This essentially provides the party bringing the case with a defense against an order coming from an arbitral tribunal established under the allegedly invalid clause, since the agreement in relation to the power of the arbitral tribunal to issue an anti-suit injunction would presumably also be invalid. As a practical matter, the other party is then in the difficult position of deciding whether to ignore the litigation and proceed with the arbitration (knowing that the award will almost certainly be unenforceable against the defendant in its home jurisdiction) or defend its position before the foreign court, thereby submitting to the jurisdiction of the court and essentially waiving its right to arbitrate. This was the position in the curious case of *Splithoff's Bevrachtungskantoor BV v Bank of China Ltd* [2015] EWHC 999 (Comm), where a Chinese

court found that the arbitration clause in dispute was invalid and the plaintiff argued both jurisdiction and the merits, thus waiving its right to arbitration and resulting in a Chinese judgment against it which was enforceable in the UK. (Fortunately for the plaintiff, the demand guarantee issued by the Bank of China was held to be enforceable notwithstanding a freezing order issued by the Chinese court.)

Speaker 4: Parallel Proceedings in the Americas

Speaking last, **Ignacio Madalena**, Counsel, Allen & Overy, Madrid, Spain, focused his discussion on a recent commercial matter that simultaneously involved: (a) an arbitration seated in Montevideo; (b) court proceedings in Buenos Aires in respect of: (i) an action to set aside a partial award rendered in the arbitration conducted in Montevideo; and (ii) an application before the Argentinean courts that the arbitration proceedings be suspended; and (c) court proceedings in Montevideo seeking: (i) a declaration that the Uruguayan courts were the only competent forum to vacate the award and (ii) an order that the arbitration should proceed notwithstanding the court proceedings in Argentina.

The matter involved *YPF SA*, *AES Uruguaiiana Empreidimientos SA (AESU)*, *Comphania de Gas do Estado do Rio Grande do Sul (SulGas)* and *Transportadora del Gas del Mercosur (TGM)*, all parties to a complex deal involving the export and transportation of natural gas from Argentina to Brazil. Under the relevant contracts, YPF agreed to supply natural gas to SulGas in Brazil, with the latter committing to supply gas to AESU for a project involving the construction and development of a thermal power plant in Brazil. The agreements included an unusual arbitration clause providing for the seat or legal place of arbitration in Montevideo, but for the exclusive jurisdiction of the Argentinean courts regarding appeals seeking interpretation or annulment of the award, all to be decided in accordance with Argentinean law.

A dispute arose between YPF and TGM under one of the agreements and, in 2008, TGM commenced ICC arbitration proceedings against YPF. Shortly after, a dispute arose between YPF and AESU, and AESU commenced parallel arbitration proceedings against YPF. A third arbitration was then started by YPF against AESU, SulGas, and TGM. Subsequently, all parties agreed to consolidate the proceedings (as ICC Case No. 16.232/JRF/CA). The parties also agreed on bifurcation into liability and damages. On 8 May 2013, the tribunal issued a partial award on liability, holding YPF liable for breach of its obligations under the relevant agreements.

Shortly after the award was rendered, YPF sought to challenge the award in Argentina and made a petition to the Argentinean courts seeking the suspension of the arbitration in Montevideo (the arbitral tribunal had temporarily ordered the suspension of the proceedings). The other parties challenged the jurisdiction of the Argentinean courts, arguing that the parties' choice of law and choice of forum was invalid. They also contended that under the applicable international enforcement conventions (including the New York and Panama conventions) only the courts of the seat should have jurisdiction to hear a petition to vacate an arbitral award. However, the Court of Appeal ("*Cámara Contencioso Administrativo Federal*") in Buenos Aires held that it had jurisdiction and noted that even if the courts of the seat are *naturally* competent to hear an application to vacate an award rendered in that jurisdiction, parties are nevertheless free to agree on the exclusive jurisdiction of the courts of another jurisdiction. Subsequently, in 2014, the Court of Appeal set aside the award and ordered that the arbitration should remain suspended. In 2015, the Supreme Court confirmed the decision of the Court of Appeal.

As court proceedings were pending in Buenos Aires against the award, AESU, SulGas, and TGM filed a motion before the courts of the seat in Montevideo, seeking a declaration that the Uruguayan courts were the only competent forum to hear an application to vacate the award. They also sought an injunction from the Uruguayan courts ordering the tribunal to proceed with the arbitration. In contrast with the position of the Argentinean courts, the Uruguayan courts found that they were the competent forum in respect of all applications concerning the validity of the award, as the seat of the arbitration was in Montevideo, and also ordered the arbitration to proceed.

Subsequently, the arbitral tribunal issued a final award on quantum, ordering YPF to pay US\$185m to AESU and SulGas and US\$319m to TGM. YPF pursued the annulment of the award in Argentina, and in April 2016, the Court of Appeal declared that all decisions issued, and proceedings conducted in the arbitration in Montevideo were null and void, including the award on damages. As YPF successfully challenged in Argentina the award on quantum, it was reported that AESU and SulGas had made an application to have the award confirmed in New York. However, the New York courts did not issue a decision as it appears that the parties reached a settlement agreement.

Mr. Madalena pointed out that there are three questions are worth flagging from this case.

First, there is a question as to whether it was valid and enforceable the parties' choice of law and choice of the forum regarding applications to vacate awards. The New York and Panama Conventions appear to contemplate the possibility that the award be "*set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made*" (NY Convention, Art. V(1)(e); Panama Convention, Art. 5(1)(e)). But it is not entirely clear whether this means that parties are free to submit to the courts of any jurisdiction (other than those of the seat) regarding petitions or applications to vacate an arbitral award and to the application of a law other than the law of the seat on questions regarding the validity of the award.

The Argentinean and Uruguayan courts reached entirely different conclusions. He noted that this case is, therefore, a good example as to how parallel court proceedings in the seat of the arbitration and another jurisdiction (largely attributable to the unusual choice of forum in arbitration clause) can lead to inconsistent outcomes (and probably to increased delays and litigations costs for both parties). Parties should, therefore, refrain from submitting to the jurisdiction of the courts of a jurisdiction other than the seat for applications concerning the validity or the interpretation of the award, as this is like to lead to parallel court proceedings over the same or closely connected issues.

Secondly, there is a question as to the jurisdiction of the Argentinean courts to order the suspension of the arbitration and the impact of the anti-arbitration injunction in the arbitration. It is worth noting the little impact that the anti-arbitration injunction issued by the Argentinean courts had on the arbitration proceedings in Montevideo. The fact that the Argentinean courts ordered the suspension of the arbitration did not stop the arbitral tribunal from going ahead with the proceedings and from issuing an award on damages against YPF. Mr. Madalena wondered whether is it that the arbitral tribunal was not bound by the Argentinean court's ruling ordering the suspension of the arbitration. Isn't that only the courts of the seat (Montevideo) were competent to issue such order?

Finally, having the Argentinean courts set aside both the award on liability and the award on damages, but with no ruling from the courts of the seat (Montevideo) on the validity of the award, to what extent are these awards enforceable in other jurisdictions?

Q&A Session

Raul Pereira joined the discussion and commented on the three questions.

Regarding the first question, Mr. Pereira pointed to the argument of the Argentinean court in holding that it had jurisdiction to decide on the challenge. He noted that while the seat of the arbitration was Montevideo, which would normally mean that the award was "made under" Uruguayan law, the Argentinean court relied on the principle of delocalization of arbitral awards and the autonomy of the parties, stating that an international arbitration is not, *prima facie*, "tied to a determined territorial legal system [...] In that context, and as a rule, the parties are the ones to decide the way they want their eventual disputes to be resolved, as a consequence of the exercise of their autonomy." The Argentinean court also relied on the *obiter dictum* in the Paris Court of Appeal case *Le Parmentier et Association Internationale des concours de beauté pour les pays francophones c. Société Miss France, Association Miss France, Miss Europe, Miss Univers*, where this court stated that "we can accept that the set aside recourse be exercised before the jurisdiction chosen by the parties for that purpose, even if it is not the jurisdiction of the seat of the arbitration. Under a more in-depth analysis, the competence of the court of the State of the seat of the arbitration also has its basis in the will of the parties [...] the parties are the ones that agree on the 'seat of the arbitration.'"

He noted that he is not sure whether the principle of delocalization could work for setting aside an arbitral award in a place other than the seat, the same way it works for the "recognition and enforcement." Moreover, the court here expressly recognized that in principle, arbitral proceedings are governed by the *lex fori* and that this principle cannot be waived because of another public policy principle, the one of "jurisdictional unity," and that this latter principle is recognized by both the New York and Panama Conventions. Thus, the autonomy of the parties along with the principle of delocalization of arbitral awards/proceedings seemed to supersede principles of public policy that the Argentinean court itself recognized were applicable because they were contemplated in both the NY and Panama Conventions.

Regarding the second question, he wondered if the practice in the application of the principle of *lis pendens* between national courts and international arbitration tribunals might be comparable here. As it was recognized before by cases and scholars, the principle of *lis pendens*, as one of international law, does not apply with regard to proceedings before national courts, on the one hand, and international tribunals, on the other hand, because an international dispute settlement organ is not considered to be bound by the decisions of national courts.

He noted that the same might be said by national courts that seek to impose anti-arbitration injunctions upon arbitral tribunals. If this is the case, not even an anti-arbitration injunction from the courts of Montevideo would have affected the arbitral tribunal. However, if the anti-arbitration injunction is imposed upon the parties to prevent them from continuing with the arbitral proceedings, that might have a different result.

Regarding the third question, Mr. Pereira noted that Art. VII (1) of the NY Convention might give foreign jurisdictions the power to enforce the liability and damages awards, even if the courts at the seat have yet to rule on them, because it is not entirely clear whether an interested

party should wait for a decision from the courts of the seat (whether positive or negative) in order to seek recognition and enforcement outside the seat.

Mr. Madalena followed up and noted that having read the arbitration clause and the governing law provision (which appears in the Argentinean court judgments), it looks like the parties chose the Argentinean courts to have exclusive jurisdiction to hear challenges against the award. It seems that the only way by which the courts of the seat (in Uruguay) could have jurisdiction would be if the parties' choice of forum was deemed to be invalid or unenforceable, and was not that a matter for the Argentinean courts to decide?

He agreed that the principle of *lis pendens* (and *res judicata*) as probably of little application here. He pointed that another question is whether the Uruguayan courts could have prevented the parallel proceedings as a matter of international comity, by exercising discretion to stay proceedings until the conclusion of the court proceedings in Buenos Aires, given effect to the parties' choice of forum. On the possibility of an anti-arbitration injunction against the parties (retraining them from participating in the arbitration), this would be a difficult one to obtain, unless it can be established that participation in the arbitration is in breach of an agreement to refer the dispute to some other competent forum, which was not the case.

Mr. Madalena then asked whether can we perhaps go a step further and say that the awards could potentially be enforced elsewhere even if the Argentinean courts, having the exclusive jurisdiction to hear a petition to vacate the award, have set aside the award. He noted that there is a growing body of case law confirming that national courts are willing to recognize and enforce awards that have been set aside, yet typically limited to cases where the enforcing court considers that the national court that set aside the award acted improperly.

Mr. Pereira then commented on Mr. Madalena's analysis and noted that the will of the parties regarding the forum and applicable law clauses in international arbitration is always given strong deference. The only issue, in this case, is the fact that the Argentinean court first recognized that as a matter of public policy (the principle of jurisdictional unity), the courts of Montevideo were the appropriate ones to decide the set aside and that this could not be waived by the parties.

Concerning the anti-arbitration injunction, Mr. Pereira noted that maybe if it was issued against the parties, there could be a case for contempt of court, if the parties did not respect the order. However, it was issued against the arbitral tribunal, an international tribunal that did not need to follow that order. But the anti-arbitration injunction could not prevent the parties from pursuing arbitration because that was what they had validly agreed. He then asked whether the anti-arbitration injunction order the parties to suspend the ongoing arbitration.

Lastly, he noted that if a court elsewhere can recognize and enforce an award set aside at the seat (or at the jurisdiction chosen by the parties as in this case), why could not this foreign court recognize and enforce an award which has not yet been brought before the court of the seat (or the jurisdiction chosen by the parties)? This would be a case of "*el que puede lo más, puede lo menos*" (if you can do more, you can do less).

Moderator **Professor S.I. Strong** closed the symposium by thanking the speakers for sharing both their time and expertise with the audience.

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