

# Dossiers

ICC Institute of World Business Law

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## Parallel State and Arbitral Procedures in International Arbitration

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



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World Business Law**

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Bernardo M. Cremades & Julian D.M. Lew**



The world business organization

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## Arbitral forum shopping

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“... agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting.” *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985)

The issue of ‘arbitral forum shopping’ is an ever more topical and problematic one, both in the context of international commercial arbitration generally and in the more specific area of contract-, treaty- or convention-based investment arbitration. It is only appropriate that the topic of forum shopping in the arbitral sphere arises, in today’s programme sandwiched in between, so to speak, a discussion of investor-state arbitration and contract versus treaty claims on the one hand, and more universal issues of consolidation, waiver, *lis pendens*, *res judicata* and estoppel. These problem areas have been present and discussed in both litigation and arbitration for decades. It is only in the last decade or even half decade, however, that they are being studied in a different light as a result of the increasing traffic in transnational dispute resolution and in investment-related arbitration.

The focus of this paper is one narrow, but crucial aspect of the challenges of parallel arbitration and/or litigation proceedings, namely, shopping for an arbitral forum. ‘Arbitral forum shopping’ could be defined in a number of different ways. Its meaning is perhaps not as evident as the concept of ‘forum shopping’ encountered in the civil litigation context. At the same time, the basic notion behind arbitral forum shopping is similar to that in civil litigation. Namely, shopping around for a suitable jurisdiction and venue, or seat, in a contractual or non-contractual situation in which, potentially, more than one option legitimately exists, or indeed more than one has already been invoked or more than one has already been exhausted.

Thus arbitral forum shopping may entail one or more of the following scenarios, among others:

- an absence of contractual privity and an absence of any agreement on arbitration,
- an absence of contractual privity and the existence of multiple treaty-based options of dispute resolution mechanisms,
- the existence of contractual privity but an absence of any agreement on arbitration,
- the existence of both privity and a valid arbitration agreement but an absence of an agreed or a single agreed seat and/or rules,
- multiple contracts with or without an agreed or the same agreed seat and/or rules,
- multiple arbitrations with or without the same agreed or single agreed seat and/or rules, and
- parallel agreements to arbitration and the local courts with or without the same seat or venue.

Against this background, the following issues shall be addressed:

**First**, what is the concept of forum shopping in civil litigation, what are the motivations behind such shopping, and what are the possibilities for controlling or limiting forum shopping to the extent it should not always be allowed to go unchecked?

**Second**, what is the impact of this concept on international arbitration, how do the motivations for the practice in litigation apply to forum shopping in arbitration, and likewise what are the possibilities for controlling such shopping?

**Third**, in light of the development of forum shopping in arbitration in recent years, particularly in the investment context, does it impact negatively on international arbitration, affecting choices parties might otherwise make for or against arbitration? Each of these questions is now taken in turn.

## THE CONCEPT OF FORUM SHOPPING IN CIVIL LITIGATION

### **1. The prevalence of forum shopping in litigation**

Forum shopping is by no means a new concept. It has been widely used for decades, particularly in those countries which, by virtue of their size or the

organization of their court systems, offer multiple geographical and other alternatives for the bringing of suit. The United States is probably the classic example of a court system which, by virtue of its size, structure and jurisdictional bases, offers significant opportunities for forum shopping between and among its state and federal courts, depending upon the basis for jurisdiction over the persons and the issues involved in the litigation. Thus state courts are ‘courts of general jurisdiction’, meaning they have jurisdiction over any claim brought under color of federal law as well as any claim brought under the respective state laws. Federal courts in the United States, on the other hand, have jurisdiction over only a few categories of claims as well as cases involving so-called ‘diversity of citizenship’<sup>1</sup>.

Forum shopping as known in the United States court environment, but also in other court systems with a similar or analogous structure of federal or provincial court districts, can take one or more of at least the following forms:

**First**, a dispute may not be based on contractual privity, and therefore not be based on any express agreement to a choice of forum, choice of law or any other consent to jurisdiction. In such case, where exactly the claimant commences the litigation against the respondent may be a function of various different factors, including (i) the domicile or residence of the respondent, (ii) the location of assets of the respondent, (iii) the place of characteristic performance of the underlying dispute, and (iv) the location of the subject of the dispute or the immovable property.

Where more than one forum may come into consideration based on the foregoing criteria, the forum chosen may depend upon the location of the respondent and the existence of ‘minimum contacts’ or a nexus to him such as to fulfil due process or equivalent requirements imposed by the local statutory or case law. The rationale behind such requirements is, in particular, that the respondent should not be subjected to a forum which it has no reasonable expectation of being haled before, based upon his minimum connections to that forum, such as based on residence, doing business or other consistent or otherwise substantial connections to that forum.

Particularly where the basis for jurisdiction is not a choice of forum, and is therefore involuntary, there must be a discernible and fair foundation for such exercise.<sup>2</sup> At the same time, there must be a proper balance between



the nexus to the defendant and the interest of the chosen forum in adjudicating the particular dispute with that defendant. Thus, among the criteria which have emerged from the landmark case of *Asahi Metal v. Superior Court*, U.S. Sup.Ct., 1987, respecting the requirement of ‘minimum contacts’, in the context of the ‘Due Process Clause’ of the U.S. Constitution, between a chosen forum and a named defendant are the following:

- the extent of the defendant’s purposeful entry into the U.S. state,
- the burden on it of defending in that state,
- the existence of any conflict with the sovereignty of the defendant’s home country,
- the state’s interest in adjudicating the dispute,
- where the most efficient resolution of the suit is deemed to be,
- the importance of the state to the U.S. plaintiff’s interest in effective and convenient relief, and
- the existence of an alternative forum.

As will be seen below, these criteria may also serve as useful checks in the analysis of the appropriateness of an arbitral forum in those cases where arbitration is invoked at a particular seat or under particular rules against a named defendant, particularly where no contractual privity exists.

**Second**, a dispute may instead be based on contractual privity, but still without a choice of forum. In such case, where the claimant commences the litigation against the respondent may be a function of the same factors as above, including the domicile or residence of the respondent, location of assets, place of characteristic performance, etc. While in contracts between sophisticated merchants contracts lacking a choice of forum are not frequent, they do indeed arise.

**Third**, more often than not in contracts between merchants reached at arm’s length, there is an agreement to a choice of forum clause.<sup>3</sup> Providing for the forum or situs, if permissible and practical, may be indispensable, especially in a transnational contractual relationship.<sup>4</sup> The reasons go well beyond the obvious desire to choose a place for proceedings if one has the opportunity to do so. The forum may have a direct and determinative impact upon a number of matters crucial to the litigation. The forum may have a critical influence on the ability to appeal the judgement at that place. It may also help or harm efforts to enforce the judgement at a different location, but in consideration of the laws applicable at the place where the judgement was rendered.

Where the law explicitly regulates domestic jurisdiction (*e.g.*, for status matters), such domestic jurisdiction cannot be created by agreement of the parties. This may extend to contracts of employment where the employee resides in the jurisdiction at issue and to claims arising from consumer contracts where the consumer resides in the jurisdiction at issue. Nor can parties normally agree only on the territorial jurisdiction of a particular court; that is, an agreement is void if it aims to control either the functional competence in relation to the sequence of courts or subject-matter jurisdiction. In other areas, pecuniary disputes in particular, the question of whether jurisdiction requires a ‘minimum connection’ of the parties and/or the matter in dispute depends on the applicable statutory or convention basis.<sup>5</sup>

**Fourth**, forum shopping may occur in the context of multicontract litigations, *e.g.*, in which the choice-of-forum clause from one contract is asserted or deemed to apply as the choice of forum to another, related agreement. The opportunity for shopping in such cases is at least twofold: whether to maintain more than one litigation with more than one forum, or instead to maintain one single, consolidated litigation before one of the forums available to the claimant based on the different choice-of-forum clauses in the contracts.

A potential defendant threatened with a lawsuit in a foreign country may actively attempt to ‘strike first’ by opening proceedings outside of that country. The reasons for doing so can include gaining a perceived ‘home advantage’ in the addressed court, the desire by a defendant to retain its regular local attorneys, language considerations, etc. Both local civil procedure law in some cases and the 1968 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (‘Brussels Convention’) and the 1988 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (‘Lugano Convention’) may apply to prevent parallel proceedings regarding the same subject matter between the same parties in different jurisdictions. From the viewpoint of the judicial system, such proceedings are highly inefficient and also bring about the danger of conflicting judgements.

The situation becomes more complex in the case of international *lis pendens*, where a foreign court litigation is pending involving the same parties over the same subject matter. Such a situation can exist only in matters to which a multilateral convention or a bilateral treaty exists. Where no agreement respecting reciprocal recognition and enforcement of judgements exists,

the problem of *res judicata* or *lis pendens* does not occur, as the binding effect of a decision does not extend beyond the national borders unless reciprocal recognition and enforcement is guaranteed.<sup>6</sup>

**Fifth**, another opportunity for forum shopping is an offshoot of the former one, namely multiple litigations with different choice of forum or jurisdiction, and in which the claimant or respondent seeks consolidation of the various litigations into one action in one forum.

**Sixth**, a discussion of forum shopping in the context of litigation, and as a precursor to a discussion of arbitral forum shopping, would be incomplete without mentioning parallel litigation and arbitration actions with or without the same forum or venue. Thus, the jurisdiction of a local court may be challenged, *e.g.*, under Art.II(3) of the 1958 (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), and Art.8(1) of the 1985 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ('UNCITRAL Model Law'), where applicable, where the matters in issue are already subject to an arbitration clause, whether or not an arbitration has been commenced. Thus local law and legislation, as well as applicable bilateral and multilateral conventions, may provide that a party responding to a court proceeding may seek stay or dismissal of the court action so that the matter may be referred to arbitration before filing any defense on the substantive matters with the court.

Depending on the law or convention applicable, the court will normally be obliged to stay or dismiss the local court proceeding in the face of an assertion of a prior arbitration agreement unless the arbitration clause is null and void, inoperative, or incapable of being performed. This is the standard foreseen in Art. II(3) of the New York Convention and Art. 8(1) of the UNCITRAL Model Law. Obviously, the case law and implementing legislation of the respective jurisdiction concerning these and other bodies of legislation which may apply must be examined closely in the particular case. National courts have given a variety of interpretations to the standard under Art. II of the New York Convention in particular.

In sum, forum shopping in litigation may occur with or without contractual privity, between and among competing courts or between and among competing court and arbitration forums. The question then arises of what the motivation might be for conducting such forum shopping in the litigation context.

## 2. Motivations for forum shopping in the litigation context

While the motivations for forum shopping depend in part on the particular options available, which in turn depend upon the relative limitations of forum shopping in a particular forum, broadly speaking certain principal categories of motivations can be identified.

**First**, the party initiating the action has an interest in choosing the appropriate venue from the standpoint of jurisdiction, as a weak or defective basis for jurisdiction may well vitiate the enforceability of the judgement even if it prevails. In countries such as the United States with its parallel systems of state and federal courts and its twin bases of personal and subject matter jurisdiction, it may not be immediately apparent which court or courts offers the most credible basis for the assertion of jurisdiction. Where more than one option exists or where none of those options appears to be a watertight basis for jurisdiction, it may be imperative to weigh the strengths and weaknesses of each one from the standpoint of jurisdiction.

This is particularly the case in the absence of contractual privity or in the case of contracts which lack any or any valid choice-of-forum provision. Where both parties to a dispute have competing claims and counterclaims, which party takes the initiative of commencing the litigation may be decisive in determining which jurisdiction is called upon and which one asserts jurisdiction, based in part on the location of the named defendant.

**Second**, a principal motivation for forum shopping is to obtain a ‘home advantage’, or at least the perception of such an advantage, with respect to the judge and, where applicable, the jury. If the dispute is able to be heard before a trier of fact who is from the same country, same region or even same city and with the same or a similar background, an advantage may be in the offing, particularly where the defendant is an outsider or even a foreign party. This motivation is self-explanatory, but of course depending upon the sophistication and even-handedness of the jurisdiction involved, and the particular facts and law of the case, such home advantage may in fact not come to fruition.

**Third**, yet another potential home advantage follows from the prior one, namely seeking a venue in which the procedural rules and conventions (both written and unwritten) are intimately familiar to the claimant. This is a mixed question of law, language, culture and custom, and again can be a paramount

motivation, but also one which does not necessarily guarantee smooth sailing to the home-based claimant. Indeed in transnational litigation, in contrast to transnational arbitration in most cases, even the foreign defendant will be obliged to engage counsel with rights of audience in the asserting jurisdiction, so that at least on the level of the legal representation both sides would have an even footing.<sup>7</sup> This would not necessarily be the same analysis in a transnational arbitration in which the applicable rules and law of the seat normally would not require that counsel have local rights of audience, and in fact both counsel may be from jurisdictions other than that of the seat.<sup>8</sup>

**Fourth**, a third kind of potential home advantage in the litigation context is with respect to enforcement of any ultimate judgement. In the case of arbitration, enforcement of an award rendered at the seat is, with some exceptions for ‘non-domestic’ awards rendered under the New York Convention, normally subject to local enforcement regulations and case law. Similarly, enforcement of a court judgement at the place of its rendering is a matter of domestic enforcement, without the involvement of bilateral or multilateral conventions or related case law. Where assets of the defendant are known or presumed to exist in a particular jurisdiction, that fact alone may tilt the scales in favour of bringing the action there as opposed to another viable jurisdiction so that subsequent enforcement can proceed in the same court system.

**Fifth**, a further extension of the concept of home advantage is of course that of the favourable substantive law, favourable remedies, favourable opportunity for being awarded certain kinds of damages, etc., to the extent the substantive law of the forum is applied to the dispute. Such motivation will certainly play a role in the case of disputes lacking contractual privity or in any event lacking a prior valid choice-of-law agreement (*lex voluntatis*).<sup>9</sup> In some cases, such motivation will also play a role even in the presence of such an agreement, on the rationale that the court exercising jurisdiction may be inclined, for various reasons, to ‘look behind’ such choice of law or disregard it,<sup>10</sup> particularly if the law chosen is one with which the court is unfamiliar and/or appears to have little or no nexus to the other points of contact in the dispute.<sup>11</sup> Inasmuch as the substantive law applied to the dispute may have a decisive impact on the rights and duties of the parties, the existence of liability for damages, and the scope of such damages,<sup>12</sup> shopping for an appropriate forum may be just as much about ‘locking in’ a favourable, or even home, law as about locking in a favourable or home trier of fact.

**Sixth**, and certainly not least, are the considerations of convenience, cost and user-friendliness of a location and its facilities. Even where some or all of the foregoing potential motivations are absent, the physical location or accessibility of a particular jurisdiction, and the costs associated with litigation in such jurisdiction, may play a prominent role in deciding where to commence an action if a choice is available. Indeed in many situations this is the only factor which is really taken into consideration in deciding which option to choose, essentially because of the costs associated with litigating in one locale as opposed to another.

In sum, the motivations behind forum shopping are varied and potentially complex, and the one motivation may in fact directly conflict with the other. Priorities may need to be balanced out and there may be no clear-cut answer, as no single jurisdiction always offers all of the attractions which are at the root of these different motivations. Furthermore, the claimant who conducts a forum-shopping analysis, and even ‘expedition’, must be mindful of the fact that even after the choice is made, a kind of reactive or defensive forum shopping may in turn be conducted by the named respondent. Depending upon the jurisdiction involved, there may be options for the respondent to ‘transfer’ the action from the forum chosen by the claimant to another forum which is more appropriate, at least from the perspective of the respondent. This leads into the next aspect of the analysis of traditional forum shopping, namely limitations on such shopping in the litigation context.

### **3. Limitations and checks on forum shopping in the litigation context**

There are various means of ensuring that forum shopping, at least in the litigation context, does not proceed wholly unfettered, and wholly without regard to limitations posed by, *e.g.*, due process, the right to be heard and the right to equal treatment.

**First**, from the defendant’s point of view, particularly the foreign defendant, the jurisdictional reach of the state must normally be subject to a test of ‘reasonableness’. Among the criteria which may be applied are (i) the extent of the foreign defendant’s purposeful entry into the state, (ii) the burden on it of defending in that state, (iii) the existence of any conflict with the sovereignty of the defendant’s home country, and (iv) the state’s interest in adjudicating the dispute. They also include (v) where the most efficient resolution of the suit is deemed to be, (vi) the importance of the state to the

plaintiff's interest in effective and convenient relief, and (vii) the existence of an alternative forum. Here too there has been a recent trend toward expanded application of personal jurisdiction, most particularly in mass tort cases in the United States (*e.g.*, breast implant, asbestos, environmental toxic torts, etc.).

**Second**, forum shopping may be limited in certain jurisdictions not only by their own codified and case-law bases for exercise of jurisdiction, but also by bilateral or multilateral conventions which govern, among other matters, jurisdiction between and among member state courts. In the case of European Union Member States, the Brussels Convention and the Lugano Convention may apply. The questions of forum and domestic jurisdiction are dealt with (mostly simultaneously) by such conventions, essentially displacing the rules of local law. Among the provisions which displace local law for the purposes of the present discussion of jurisdiction are that the main forum shall be the domicile of the defendant (or its seat if it is a company), and that alternatives to the main forum may include, in contract disputes, the place of performance; in matters related to tort, delict or quasi-delict, the place where the harmful event occurred; and in disputes which can be combined with an action *in rem* in immovable property, the court where the property is situated.<sup>13</sup>

**Third**, quite apart from convention bases, local law meant to control forum shopping may be of critical importance. Thus under Art. 15 of the French Civil Code, even if there is no nexus between the transaction and France, so long as the defendant is a French national, the French national can demand that French courts have exclusive jurisdiction to hear disputes arising out of the transaction. A foreign judgement rendered against a French national that has asserted an Art. 15 defence may be unenforceable in France. A French national can waive its Art. 15 defence either contractually or by participating in foreign proceedings without first asserting its Art. 15 rights. The Brussels and Lugano Conventions eliminate the Art. 15 defence in disputes among domiciliaries of Contracting States. At the same time, under the Brussels and Lugano Conventions a party from a Contracting State that is domiciled in France may assert the Art. 15 defence against a party from a non-contracting State.<sup>14</sup>

The general principle of jurisdiction common to both the Conventions and the local civil procedure law of certain of its contracting states is that a person must be sued in the courts of his home country. All other bases of jurisdiction are regarded as exceptions to this general principle and, therefore, interpreted restrictively. In contrast to the concepts of 'minimum contacts'



and ‘due process’ which are embedded particularly in United States procedure, under the Conventions a judge has essentially no discretion to either accept or reject jurisdiction on a *forum non conveniens* basis or with reference to due process requirements of minimum contacts as described above. Rather, the important criterion is whether one of the connecting factors specified in the Convention or in local civil procedure is present or not.

Where local civil procedure provides for a special place of jurisdiction for a certain claim, the plaintiff has an important strategic choice. He can bring his action either in a court at the defendant’s general place of jurisdiction or at the applicable special place of jurisdiction. Where local procedure establishes an exclusive place of jurisdiction, the plaintiff has no strategic choice, but rather must bring his action at such place. Examples of exclusive places of jurisdiction include for claims which assert a right of ownership, encumbrance or possession as to real property, the place where such real property is located and, for claims relating to leased dwellings, the place where such dwelling is located.

**Fourth**, the mere fact that a defendant has assets in the jurisdiction may or may not be sufficient for the courts to exercise jurisdiction over a particular dispute. Moreover, it may not be sufficient that the action brought ‘touches’ or ‘concerns’ the land or property if it does not also have a direct effect on the property itself, its possession or title. In the United States, the existence of real or personal property in a jurisdiction is not alone sufficient, in actions unrelated to the right or ownership of the property, to exercise jurisdiction over a defendant. That is, courts may exercise jurisdiction over a property owner only if the owner has minimum contacts with the applicable forum and the exercise of jurisdiction must be reasonable.

In Brussels and Lugano Convention cases, Art. 5 and Art. 16 of the Conventions offer a forum based on the location of the property (*forum rei sitae*). Under Art. 16(1) of the Conventions, the courts where immovable property is situated have exclusive jurisdiction in proceedings which have as their object rights *in rem* in, or tenancies of, such property. This applies regardless of the domicile of the defendant, *i.e.*, also if it is domiciled outside the geographical area of the Conventions. As a result of the latter rule, national law relating to jurisdiction based upon the presence of immovable property loses most of its importance in respect of international jurisdiction in Contracting States.<sup>15</sup>



**Fifth**, the best-known manner in which to exercise party autonomy over forum shopping is to seek dismissal of the entire action as to all or some parties for *forum non conveniens*. This notion refers to the situation where the forum is seriously inconvenient for, in this case, the foreign defendant, or a more convenient alternative forum exists elsewhere where the foreign defendant may be properly served. It may be that the alternative forum's law can be more or less favourable, as long as it provides at least a possibility of relief.

Among the matters which have been taken into account in relation to discretion to decline to exercise jurisdiction include (i) the strength or weakness of the claims made, (ii) the policy of exercising restraint before subjecting a non-resident to local jurisdiction, and (iii) whether the jurisdiction is a clearly inappropriate forum. Among the relevant factors in the latter case are whether the objective effect of a continuation of the proceedings is vexatious or oppressive in the sense that it is unfairly burdensome, prejudicial or damaging to the foreign defendant. Also considered are the convenience and expense in relation to availability of witnesses and the difficulty of document collection from foreign jurisdictions, the law governing the relevant transaction, the places where the parties respectively reside or carry on business, and whether an appropriate alternative forum for the hearing of the matter is capable of nomination.

In certain countries particularly in Continental Europe, a challenge to jurisdiction may not be based on *forum non conveniens* solely. Rather, the basis would be that the connection specified in the relevant provision of either the Convention, where applicable, or the local civil procedure provisions is nonexistent or that the parties have agreed to exclude local jurisdiction either by a forum or an arbitration clause. Thus the doctrine of *forum non conveniens* is unknown to the Brussels and Lugano Conventions. A court having jurisdiction pursuant to the applicable jurisdictional rules of the Conventions must assume jurisdiction as a matter of law and cannot decline it by reference to considerations of convenience.<sup>16</sup>

**Sixth**, even if all relevant events took place abroad, the local forum may not necessarily be clearly inappropriate if the defendant is resident in the forum, if the plaintiff is resident in the forum and the contract sued upon was entered into in the forum, or if the alternative forum bars or severely

restricts recovery of damages or other relief. The reverse of this principle is that in some jurisdictions the court of first instance or any other instance must deny its own jurisdiction where, even if the defendant has entered an appearance, it becomes apparent that jurisdiction has been lacking from the beginning or disappears. In such case, the court then in charge of the case may annul the proceedings and reject the claim.

**Seventh**, bilateral treaties contain specific provisions whereby the defendant can limit its exposure by raising the *exceptio incompetetiae internationalis*. This defense does not affect the adjudication of the claim, but may limit recognition and enforcement of the judgement to assets in the state of judgement. This defense may be available only if a foreign defendant does not enter an appearance, or when entering an appearance makes explicit reservation as to the *exceptio incompetetiae internationalis*. A decision may then not be enforced outside that country. It should be noted that defendants domiciled in a Brussels/Lugano Convention state cannot plead this exception. Defendants domiciled or resident in non-convention states with a bilateral treaty may make use of it once they are sued in a country which recognizes the defence.

**Eighth**, but not least, to avoid the obvious inconvenience which can arise in parallel proceedings and a ‘rush to judgement’, parties before certain courts may request the issuance of an ‘anti-suit injunction’. Such an injunction, where available, may enjoin the opposite party from proceeding further in a foreign court. It is preferable to apply for such an injunction when proceedings are actually pending in the foreign court and after an attempt to stay those proceedings has failed. As a general rule, the domestic court will not entertain an application for such an injunction if there is no foreign proceeding pending and only if the applicant establishes that some threatened action by the defendant will constitute an actionable civil wrong.<sup>17</sup>

In short, while forum shopping would appear to be an established component of litigation strategy in many jurisdictions and in transnational dispute resolution, there are a number of statutory, treaty-based and case-law-based constraints on such shopping which serve to put it in its proper perspective. These constraints may differ from jurisdiction to jurisdiction and convention to convention, although as set forth above there are certain conceptual generalities which arise again and again respecting the kind of limitations at issue.

## THE IMPACT AND SIGNIFICANCE OF 'FORUM SHOPPING' FOR INTERNATIONAL ARBITRATION

Forum shopping is normally considered to be a litigation phenomenon, and in this context the foregoing overview of the issue is meant to illustrate the many forms which it assumes, the reasons for engaging in it, and the limits to its practice. What is the relevance of the concept to international arbitration?

Preliminarily, a discussion of forum shopping in arbitration requires and hinges in part upon how the concept is defined for this purpose. In the litigation sphere, forum shopping substantially relates to the search for one or more court venues (and their corresponding local rules) where multiple options exist based on privity or other grounds, where the parties have not specified a single forum, where a basis for assertion of jurisdiction by another forum may be present, or where a basis for assertion of jurisdiction notwithstanding an agreement to arbitration may exist.

In the arbitration sphere, forum shopping can relate to the search for one or more seats and/or rules of arbitration (and their corresponding curial law) where multiple arbitration options exist based on privity or other grounds, where the parties have not specified a single seat and/or rules, where a basis for assertion of arbitral jurisdiction at another seat or under other rules may be present, or where a basis for assertion of arbitral jurisdiction notwithstanding a choice of forum may exist. Various of these possibilities shall now be examined in turn, also on the basis of recent arbitral awards in the international and particularly investment areas.

### **1. The prevalence of forum shopping in international arbitration**

Just as forum shopping is by no means a new concept in litigation, it is also not new in arbitration. While it has gained prominence in just the past several years primarily in the investment area, it is an issue which has consistently played a role both in international commercial arbitration and in its precursor, international mixed claims commissions.

#### **■ Absence of contractual privity**

With the foregoing as background, the following broad areas of arbitral forum shopping may be identified and briefly outlined where no contractual privity exists:

**First**, an attempt may be made to commence a commercial arbitration against another party without any basis in contract and without any basis for a specific agreement to arbitration. In fact, these are two different hurdles. The absence of a contract per se does not necessarily constitute an absolute bar to the successful assertion of arbitral jurisdiction over a would-be defendant. While the absence of a document memorialising the rights and duties of the parties may pose a significant obstacle to the proof of a contractual relationship, the existence of such a relationship per se is not a requirement for the assertion of an arbitration claim any more than for the assertion of a claim in litigation without contractual privity. Neither such barometers as the New York Convention nor the UNCITRAL Model Law, nor for that matter institutional arbitral rules such as those of the International Chamber of Commerce, serve to bar the assertion of arbitral jurisdiction over claims in which a written or even oral contract cannot be shown.

Where no contract is present and no agreement to arbitrate is memorialized, the would-be defendant is therefore susceptible of being drawn into arbitration under any one of a number of seats of arbitration and arbitral rules, subject to the arbitral tribunal's affirmation of its own jurisdiction. Should the defendant accept the claimant's choice of arbitral forum and rules without objection, then any doubts as to the basis for the maintaining of the arbitration, including respecting the absence of any writing evidencing the existence of a corresponding arbitration agreement, are dissipated in any event.

**Second**, the trend in recent arbitral legislation, as also reflected in Art. 7(1) of the UNCITRAL Model Law, is not to define 'arbitrable' claims as those which are necessarily contractual in nature. Thus under Art. 7(1), an 'arbitration agreement' is defined as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, 'whether contractual or not'. Accordingly, forum shopping may take place to assert arbitral jurisdiction on the basis of a relationship which is not necessarily memorialized in a contract and whose nexus may be definable not by virtue of specific agreements between the parties, but as a function of the domicile of a party, the location of characteristic performance, etc.

**Third**, the foregoing is to be distinguished from the more common example of a dispute between parties who do not have contractual privity, but based on a relationship which is subject to a contract, and perhaps also to an

arbitration agreement contained therein. Thus case law and commentary too numerous to mention here stand for the proposition that under certain circumstances, arbitral jurisdiction may be asserted by one party which is a signatory to a contract against another entity which is not an original signatory to that same contract containing an arbitration agreement, where the non-signatory may be deemed to have stepped into the shoes of a signatory, become a third-party beneficiary, be the real party in interest, be a member of a group of companies encompassed by the assent to the contract by the signatory, etc.

The forum shopping element which may exist here is that the party asserting arbitral jurisdiction might have been able to bring an action in court against such non-signatory on one or another basis of local court jurisdiction (as discussed above), but shopped and opted to seek to assert the agreement to arbitration over such non-signatory. The non-signatory, once named as a defendant in the arbitration, might in turn engage in shopping by opposing arbitral jurisdiction and seeking its own declaratory or monetary relief against the claimant in the arbitration, but do so in a court of appropriate jurisdiction. That court might in fact be a different jurisdiction than the one in which the arbitral claimant might have sued the defendant had it not opted for arbitration.

**Fourth**, a further permutation is a relationship in which there is no contractual privity, and arbitral jurisdiction is asserted on the basis of an investment treaty between the State of which an investor is a national and the State in which the investor has invested and claims to have suffered damages. Here, there is no issue whatsoever of a contract having arisen between the claimant investor and defendant State on the basis of a private transaction or relationship, but rather by virtue of a public international law commitment entered into between the defendant State and the State of which the investor is a national. Such bilateral investment treaty may have been entered into before the activity at issue in the host State, or afterwards, and such timing may conceivably play a role in the question of whether such assertion of jurisdiction via a BIT should be upheld.

**Fifth**, a variation on the foregoing treaty-based jurisdiction which in fact has more of the element of forum shopping is the assertion of jurisdiction without contractual privity on the basis of a bilateral investment treaty which itself in turn provides the investor with options to choose from when bringing an investment-related claim against the signatory State. Such options may

be contained in a so-called ‘fork-in-the-road’ clause whereby the investor may choose as its forum domestic courts, previously agreed dispute settlement procedures or international arbitration, with such choice then being considered binding.

### ■ **Existence of contractual privity**

Furthermore, the following broad areas of arbitral forum shopping may be identified and briefly outlined where contractual privity does exist.

**First**, an attempt may be made to commence an arbitration against another party without any basis for a specific agreement to arbitration. In such case, the party seeking arbitration may shop around for an advantageous set of rules and/or seat of arbitration, and the named respondent may consent to the assertion of jurisdiction, thereby giving rise to an agreement to arbitrate. As long as the respondent consents to the assertion of arbitration despite the absence of a prior arbitration agreement, it is not likely that the particular rules or seat invoked by the claimant will have a material impact on whether an arbitration agreement is deemed to have arisen after the fact.

**Second**, a variation on the foregoing may arise in the investor-state area whereby the investor has entered into a contract with a specific dispute resolution mechanism with a state entity, but seeks to commence arbitration not against such entity, but against the host State itself on the basis of, *e.g.*, a bilateral investment treaty. It thereby effectively seeks to bypass a prior contractually agreed dispute resolution mechanism with the state entity with which it did have a contract. In such case, the forum shopping which may occur is between the dispute resolution mechanism which could be invoked against the state entity and the dispute resolution options contained in the BIT. Depending upon the provisions in the BIT, reliance on it may in turn provide the investor with ‘fork-in-the-road’ options to pursue, at its choice, the domestic courts, any previously agreed dispute settlement procedures or international arbitration invoked against the State itself. Also depending upon the precise provisions of the BIT, the international arbitration option may itself be broken down into more than one further option, such as UNCITRAL arbitration with a specific seat, ICC arbitration with a specific seat or ICSID arbitration.

**Third**, a further permutation in the investor-state area is the situation whereby the investor has entered into a contract with a specific dispute resolution

mechanism not with a state entity, but with the State itself, and seeks to commence arbitration against the State, but again on the basis of, *e.g.*, a BIT, seeking to bypass the previously agreed dispute resolution agreement with that same State. Again depending upon the exact provisions of the BIT, the investor may have the option to pursue various kinds of dispute resolution against the State, including ICSID arbitration.

**Fourth**, an even further variation of the foregoing is where the investor agreed to a dispute resolution mechanism in a contract directly with the State, and seeks to bring in ICSID arbitration not only treaty-based claims against the State on the basis of a BIT, but also contract-based claims, seeking to bypass the agreed dispute resolution agreement respecting contract claims with the State. In such a case, a core question will be whether an individually negotiated investor-state arbitration agreement, providing for a particular seat and a particular national law, takes precedence over a competing agreement to ICSID arbitration resulting from application of an investment treaty for the purposes of adjudicating contract claims between the investor and that state.

**Fifth**, it is apparent from the foregoing that an additional potential source of arbitral forum shopping, particularly in the investment area, is the possibility and the assertion of multiple arbitrations (and also local court proceedings) in parallel, with different seats, different institutional or ad hoc rules, different substantive and procedural laws, and identical or not wholly identical parties. In such cases, a proverbial ‘race to judgement’ may ensue, multiple inconsistent awards may be rendered, and multiple inconsistent annulment and enforcement proceedings may ensue. The complications in the context of *lis pendens*, *res judicata*, issue and action estoppel are numerous.

**Sixth**, a further variation on the foregoing is the existence or assertion of a single, multicontract arbitration, in which on the basis of a complicated horizontal or vertical consortium or joint venture structure one or more claimants invoke the arbitration agreement from one contract to assert arbitration against parties from other, interrelated contracts. Such other, interrelated contracts may well have their own arbitration agreements which provide for a different seat, different arbitral rules, different substantive law and even different language than the arbitration agreement relied upon by the originating parties. The forum shopping effectively consists of the choice exercised by the claimants to invoke the arbitration agreement in the one contract in order to settle the disputes also arising out of the other,

related contracts, even though they were meant to be subject to different, conflicting arbitral and legal regimes. Depending upon how narrow or broad the arbitration agreement invoked is and whether it does encompass claims arising in relation to the other contracts, the claimants may in fact succeed in imposing a different regime of arbitral rules, curial law and even substantive law on the rights and obligations arising under the related contracts.

The problems posed by the foregoing opportunities for forum shopping, particularly in the investor-state arena, shall be revisited below.

### ■ **Issues related to the seat and/or applicable arbitral rules**

Furthermore, the following additional areas of arbitral forum shopping may be identified in both the commercial and the investor-state area in relation to the seat and the applicable rules:

**First**, a contract with or without State involvement in which non-ICSID arbitration is provided for, or asserted, a specific seat is stipulated, and the claimant seeks to commence the arbitration on the basis of an entirely different seat. As in other cases, should the named respondent consent to the unilateral change of seat, then a new, binding agreement shall have arisen displacing the old seat. Otherwise, depending upon which institutional or ad hoc rules apply to the arbitration, it shall be for the institution, the arbitral tribunal and/or the courts at the seat (either the agreed seat or the newly asserted seat) to confirm that the arbitration may continue only on the basis of the one or the other of the seats.

Where the seat was indeed validly agreed to previously, then the attempt to assert a wholly different seat should normally fail. However, where no arbitral institution or tribunal is able or willing to declare that the previously agreed seat remains the official seat, it is possible that ambiguity on the issue may persist. And indeed even if an arbitral institution or the tribunal should fix the seat at the agreed location, it cannot be ruled out that the claimant (or defendant) seeking to have the seat of arbitration be considered to be elsewhere will not succeed in either maintaining a parallel arbitration at that other seat or obtaining a declaration from the local courts at that other seat that the previous agreement is invalid<sup>18</sup> or even ‘annulling’ or refusing enforcement of any award rendered at the previously agreed seat on the basis that holding the arbitration at that venue was a violation of the parties’ procedural or other agreements.<sup>19</sup>



**Second**, a contract with or without State involvement in which non-ICSID arbitration is provided for, or asserted, a specific seat is stipulated, and the claimant seeks to commence the arbitration on the basis of an entirely different set of institutional or *ad hoc* rules than stipulated. As in the foregoing case, the named respondent is free to consent to such new basis for arbitration. While no ambiguity exists with respect to the seat of the arbitration, depending upon which institutional or *ad hoc* rules apply or are asserted to apply to the arbitration, the institution, the arbitral tribunal and/or the courts at the seat will be called upon to confirm or order that the arbitration may continue only on the basis of one set of rules. Again, it can also not be ruled out that the claimant (or defendant) seeking to have different rules of arbitration apply might not succeed in maintaining a parallel arbitration under those other sets of rules or obtaining a declaration from the courts at the seat that the previous agreement to arbitral rules is invalid or ‘annulling’ or refusing enforcement on the basis that holding the arbitration under those rules was a violation of the parties’ procedural or other agreements.

**Third**, parties may agree to a so-called ‘home and home’ arbitral agreement, whereby the seat of the arbitration is not fixed until the arbitration is commenced and the seat becomes that of the named respondent. Such sanctioned forum shopping is meant to discourage either party from commencing an arbitration by creating the disincentive of having to accept the home jurisdiction of the named defendant as the official seat, for all purposes. While this kind of forum shopping mechanism is clear-cut, it obviously contains an inherent uncertainty with respect to the applicable curial law, standard of annulment and other consequences which flow from the fixing of a seat of arbitration.

#### ■ **Issues related to the applicable substantive law**

In addition to the foregoing multicontract scenario, there are other examples of forum shopping which may have a material influence on the applicable substantive law to be applied to the dispute. Particularly in the investment area, the ability to avail oneself of the substantive law regime dictated or made available by invoking a particular BIT or Convention-based arbitral regime could be the core concern in the forum shopping – and more urgent than the desire to avail oneself of other, more procedural elements of BIT – or Convention-based arbitration, such as the lack of a local standard annulment.

**First**, in particular by shopping for an ICSID Convention-based arbitration, an investor seeks to benefit from the framework established by Art. 42(1) of the Convention, whereby a tribunal is to select the appropriate rules of law for the dispute.<sup>20</sup> In investment arbitration involving a ‘host State’ or a host state instrumentality, references to the domestic law of the host State are infrequent. However, in investment arbitrations which do not rest on a treaty basis, it is seldom the case that the parties have agreed to the exclusive application of the host law. And in investment arbitrations which do rest at least in part on a treaty basis, the treaty invariably refers in one or another manner to principles of public international law – either standing alone or in some stipulated or non-stipulated symbiosis with a body or rules of national law. Thus one of the attractions of shopping for a treaty-based arbitration is in effect shopping not only for a particular ‘forum’, but also for a particular substantive law regime. Indeed, many BITs contain choice-of-law clauses<sup>21</sup> which commonly refer to the BIT itself, the law of the Contracting State, the rules and principles of international law and, sometimes, the provisions of a particular investment agreement.<sup>22</sup>

**Second**, how significant the shopping for an investment-related arbitral regime can be for the application of the substantive law is illustrated by a comparison of the ICSID Convention and the Energy Charter Treaty. Art. 42(1) first sentence of the ICSID Convention refers to ‘rules of law’, as opposed to systems of law or a body of national law. This is consistent with the generally accepted notion that the parties, whether in an investment context or otherwise, are not restricted to accepting an entire system of law, but rather are free to combine rules of diverse origin, including those which do not necessarily derive solely or at all from a national system of laws.<sup>23</sup> The same result may be achieved in certain BITs, depending upon their formulation, and their reference to the law of the host State and international law in a fashion similar to the ‘residual provision’ of Art. 42(1) second sentence of the ICSID Convention.

To be contrasted is the Energy Charter Treaty (ECT), whose Art. 26 Para.4 allows the investor to choose between and among four different modes of arbitration: ICSID, ICSID Additional Facility, UNCITRAL *ad hoc* or Stockholm Chamber. Each one of these four regimes has a slightly different provision respecting choice of law and the manner in which the tribunal selects the law in the absence of party agreement; thus in the ECT scheme, the investor can directly influence the outcome of the law applied, in the

absence of a prior agreement, by its selection of the arbitral regime. Going even further in the realm of forum shopping, if the investor were not happy with the progress of the arbitration path chosen and the law applied under its rules, under the ECT he could bring a local court action or contractual arbitration, and later bring an arbitration under Art. 26 – and this notwithstanding the provisions of Art. II.3 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.

**Third**, in international investment arbitration, particularly under regimes such as ICSID and NAFTA, the parties may be deemed to have directly agreed, by virtue of treaty, to the application of international law, at least in part. From the investor's standpoint in forum shopping, this result may be a way to shield it from an overbearing application of the host State's law. From the host State's standpoint in forum shopping, this result may be a way to avoid the application of a third-country law with no relation to the dispute. Among the BITs containing clauses on applicable law referring exclusively to the BIT and applicable rules of international law are those which served as the foundation for the ICSID proceedings in *AAPL v. Sri Lanka*,<sup>24</sup> *AMT v. Congo*<sup>25</sup> and *Fedax v. Venezuela*<sup>26</sup> as well as the NAFTA proceedings in *Azinian v. Mexico*<sup>27</sup> and *Metalclad v. Mexico*.<sup>28</sup>

**Fourth**, by shopping for and achieving an ICSID-based arbitration, an investor will also have succeeded in shopping for the application of international law, and not any municipal law, to the question of whether the ICSID tribunal has jurisdiction in the first place. In this regard, the interplay between the law applicable to the merits and the law applicable to jurisdiction is also of interest. For example, in ICSID arbitration, matters relating to the tribunal's jurisdiction under Art. 25 of the ICSID Convention are not governed by Art. 42. Specifically, in *CSOB v. Slovakia* jurisdiction was based on an agreement between the parties; and the tribunal there held that the question of 'consent' was to be answered not by reference to national law, but was governed by international law as set out in Art. 25(1).<sup>29</sup>

**Fifth**, by shopping for a Convention-based arbitral regime, the investor may also succeed in having international law apply to issues of rights and obligations in lieu of a national law which might otherwise have applied had a non-Conventional dispute resolution mechanism been applied. At the same time, a question here is the extent to which choice of law provisions such as Art. 26(6) of the ECT<sup>30</sup> exclude the possible application of national law.

The wording does not expressly exclude or prohibit such an application of national law, and there are indeed various scenarios whereby the inter-relationship between international law and national law might arise, including – in the context of forum shopping – the issue of the interplay with the chosen arbitration regime, *e.g.*, the Stockholm Chamber of Commerce Rules. The SCC Rules themselves contain a choice-of-law provision, which trumps any contrary or diverging choice-of-law provision in the Swedish Arbitration Act to the extent the ECT dispute is assigned a Swedish seat and Swedish *lex arbitri*. Here, a conflict between the application of the ECT and the application of a national law or rules of law would be avoided since there is no absence of a choice of law: the parties having chosen the ECT, the ECT provides for a choice of law, namely application of the ECT and applicable rules of international law as per Art. 26(6) ECT.

What about when the investor and the State have actually entered into a private investment contract with the choice of a specific national substantive law? Here, it is conceivable to have the private contractual dispute subjected to private arbitration under ECT Art. 26(2b) or to ECT arbitration under ECT Art. 26(3c). The consequence would be that the choice of a national law in the private contract is not binding for the tribunal in the ECT arbitration. While this may appear odd and not entirely satisfactory depending on the perspective, again the basis for the trumping effect of international law over national law is to protect the investor from abusive application of the host State law to justify inappropriate acts of expropriation and the like which might be permissible under the host state law but not under international law.<sup>31</sup>

**Sixth**, by shopping for an investment-arbitral regime, a party may succeed in having international law enter into the calculation as a result of the lack of an agreement to a national law, in turn leading to a reference to international law while all the while the BIT itself is in fact incorporated into the national law of the host state. The challenge may remain, however, of determining whether the international law principle is part of domestic law, or rather is part of domestic law and supersedes conflicting domestic law. This relates to the parallel challenge of determining which international law principles are truly transnational and overarching in nature, and which are simply law merchant principles deserving of consideration as long as not inconsistent with specific domestic law principles.<sup>32</sup> However, there is

a risk in relying upon the incorporation of international law into the domestic law selected by the parties insofar as the status of international law varies according to the particular national constitution (particularly relevant in this context is the distinction between automatic application and specific legislative incorporation of international law). Furthermore, subsequent domestic legislative enactments may take precedence over international law.

In this regard, where an investor seeking protection under international law is not able to procure a favourable choice-of-law clause that includes international law expressly, the next best thing may be to rely on a provision such as the second sentence of Art. 42(1) of the ICSID Convention. In the case of *Wena v. Egypt*, in the absence of a choice of law by the parties, Art. 42 of the ICSID Convention referred the Tribunal to the law of the host state, Egypt. The Tribunal nonetheless relied upon international law principles to grant a claim for interest. The *ad hoc* committee held that in the absence of party agreement, as Egyptian law and policy and Egyptian state practice in investments widely incorporated international law, the Tribunal had not exceeded its powers, such as would justify annulment under Art. 52(1)(b) of the ICSID Convention, by applying the rules of the UK-Egypt Treaty instead of Egyptian law to decide the dispute concerning a claim to interest.<sup>33</sup>

## **2. Motivations for forum shopping in the arbitration context**

How do the motivations for engaging in forum shopping in arbitration compare with those addressed earlier in the context of litigation?

**First**, as in the case of a court action the party initiating the arbitration has an interest in choosing the appropriate regime, rules and seat from the standpoint of jurisdiction, as a weak or defective basis for jurisdiction will undermine the continuation of the arbitration and the enforceability of any award in its favour.

**Second**, as in litigation a principal motivation for forum shopping is to obtain a ‘home advantage’, or at least the perception of such an advantage, insofar as a particular home seat or a particular home substantive law might give rise to the selection or appointment of arbitrators with a corresponding nationality or background. At the same time, of course, it is entirely possible that one

or more of the members of the arbitral tribunal, unlike the state court judge, will be of a nationality and legal training wholly divorced from the nationality of the arbitral seat.

**Third**, by selecting a particular seat and/or a particular regime, the forum shopper in arbitration influences which mandatory principles of law may apply with respect to the procedure in the arbitration and, more particularly, which local courts at the seat may play a supervisory role. In the investment context, this consideration may not be nearly as prominent since in the case of a delocalised ICSID arbitration, the concept of a seat, and of a local court at the place of arbitration, effectively does not exist in the same manner as a commercial arbitration.

**Fourth**, as in the case of an interest in being able to enforce a judgement locally so also in arbitration a potential home advantage is with respect to enforcement of any ultimate award subject to local enforcement standards and procedures, without the involvement of bilateral or multilateral conventions or related case law and without the application of a foreign law standard of arbitrability, validity or in particular public policy. This must be seen somewhat differently in the context of investment arbitration, where in the case of ICSID arbitration an award is meant to be self-enforcing without the need for compulsory exequatur proceedings.

**Fifth**, and perhaps most important of all, the law of the seat of arbitration normally dictates the legal standard for annulment of any award. While this is comparable to forum shopping in litigation where likewise the law of the forum governs the legal standard for appeal, in international arbitration involving multiple nationalities and bodies of law, the consequence of choosing one particular local standard of annulment which may have no other relation to the nationalities of the parties or even to the agreed or applied substantive law cannot be overstated.<sup>34</sup> Again, in the investment context this may need to be seen somewhat differently, insofar as the annulment standard in an ICSID arbitration is itself somewhat divorced from any local standard of state law.<sup>35</sup> By extension, the choice of the arbitral seat in particular may also dictate the extent to which one or more grounds for annulment of the award may be validly waived by the parties in advance, as is the case under international arbitrations subject to Chapter 12 of the Swiss Private International Law Act.

**Sixth**, the selection of or shopping for an arbitral seat may have a direct impact on whether the arbitration commenced shall prevail in the face of a parallel forum shopping by an opposing party which seeks to commence a litigation on those same issues between the same parties. Thus, whether or not the arbitral forum chosen has enacted the UNCITRAL Model Law or legislation analogous to its Art. 8(2) could be significant in this regard. Under Art. 8(2), where a competing action has been commenced in the local courts in a matter which is the subject of an arbitration agreement, ‘arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.’ At the same time, nothing in the UNCITRAL Model Law prevents the local court from continuing with its own action if, for example, it determines that the arbitration agreement is in fact null and void,<sup>36</sup> with the result that both proceedings would proceed in parallel, and potentially result in contradictory results.<sup>37</sup>

**Seventh**, and certainly not least, are the considerations of convenience, cost and user-friendliness of a location and its facilities.

In sum, the motivations behind forum shopping in arbitration are varied and complex, in some ways arguably far more complex than in the case of litigation forum shopping, and again the one motivation may in fact directly conflict with the other. Furthermore, as in the case of litigation so also in arbitration the claimant who conducts an ‘expedition’ must be prepared for reactive or defensive forum shopping by the named respondent, whether in an arbitral forum or in parallel litigation proceedings. This leads into the next aspect of the analysis of arbitral forum shopping, namely limitations on such shopping in the investment arbitration context.

### **3. Possibilities to hold arbitral forum shopping in check**

As in the case of forum shopping in litigation, so in arbitration there are various means of ensuring or at least attempting to ensure that such shopping does not proceed without any controls or balancing as against other dispute resolution mechanisms which the concerned parties may have agreed to, and also with a view toward such mandates as due process, the right to be heard and the right to equal treatment.



**First**, as is apparent from the foregoing discussion, in the case of an attempt to forum shop between arbitration proceedings and local court proceedings, statutory, convention and case law bases may empower either the tribunal or the court or both to assess their respective jurisdiction and/or to stay or dismiss the action before them in deference to a valid agreement in favour of the other dispute resolution mechanism.

Thus in a commercial arbitration in which, by virtue of the seat of arbitration, the UNCITRAL Model Law applies, the arbitral tribunal may seek to rely on one or more of Art. 5 ('Extent of court intervention'), Art. 8 ('Arbitration agreement and substantive claim before court') or Art. 16 ('Competence of arbitral tribunal to rule on its jurisdiction') either to stay or dismiss the arbitration or to continue with the arbitration for the purposes of affirming or denying its own jurisdiction.<sup>38</sup> In those cases where the New York Convention applies, a court of a signatory state seized of an action in a matter in respect of which the parties have made an arbitration agreement 'shall', whether or not the arbitration has actually been commenced, stay or dismiss the court action unless it finds that the arbitration agreement is 'null and void, inoperative or incapable of being performed.' UNCITRAL Model Law Art. 8(1) is to the same effect.

How well these mechanisms work in practice is of course an entirely different question. It would appear that nothing in the foregoing provisions obliges a local court to summarily dismiss its proceedings in the face of a potentially competing arbitration agreement, but rather the local court will undertake a review of the existence and validity of the arbitration agreement first. As a result, at least during the pendency of that review of the arbitration agreement by the local court, there may be fully competing proceedings in the local court and before the arbitral tribunal, and the arbitral tribunal may likewise be conducting a full review of the arbitration agreement under its prerogatives of competence-competence pursuant to, *e.g.*, Art. 16(1) of the UNCITRAL Model Law.

An additional potential challenge arises with respect to the form in which the tribunal issues its decision on its own competence, particularly where the tribunal denies jurisdiction. In those cases where the tribunal is not obligated to issue its negative decision on jurisdiction in the form of an award, the question arises of how and where such 'negative decision' not in the form of an award can be reviewed by a court at the seat and/or at a



foreign place of recognition and enforcement. Thus query whether in the case of a Model Law jurisdiction a negative decision on jurisdiction not issued in the form of an award, or even if indeed issued in the form of an award, is subject to further recourse before the courts at the seat under Art. 34 of the UNCITRAL Model Law.

**Second**, the foregoing potential competition between an arbitration agreement or pending arbitration proceedings on the one hand and a choice of forum or pending court proceedings on the other hand assumes an additional layer in the context of certain investment-related arbitrations. In particular, it may be that an investor and the host State have entered into a contractual agreement which in turn contains a dispute resolution mechanism purporting or deemed to be an exclusive choice of jurisdiction, *e.g.*, local court proceedings or alternatively local arbitration in the host State.

In the case of a contractual agreement to local arbitration and where both the local arbitration proceedings and a BIT-based international arbitration have been commenced and are in competition, both arbitral tribunals also face the question of whether they respectively can, should or must exercise jurisdiction. The question may then be whether a prior contractual agreement to local arbitration for ‘all disputes’ is the exclusive forum for contractual claims, or whether the ICSID tribunal may adjudicate both BIT-related claims and the contractual claims together.

This was the issue posed in the interim decision in *SGS Société Générale de Surveillance v. The Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (‘*SGS v. Pakistan*’), in which the investor SGS and the host State Pakistan had entered into an Inspection Agreement in 1995 which contained an exclusive jurisdiction clause (‘Art. 11’) referring ‘[a]ny dispute, controversy or claim arising out of, or relating to’ the Inspection Agreement to arbitration in Pakistan, which effectively meant ad hoc arbitration under the Pakistan Arbitration Act 1940. Pakistan brought a local court action in Pakistan to initiate a domestic arbitration under Art. 11 and SGS subsequently brought ICSID proceedings under the Swiss-Pakistan BIT, which had entered into force some seven years after the Inspection Agreement was signed. SGS contended, *inter alia*, that the offer of ICSID arbitration in the BIT took priority over domestic arbitration under Art. 11 and that ICSID jurisdiction included claims both under the contract and the BIT. From SGS’s perspective, it was allowed to forum shop and from Pakistan’s perspective it was not.

Among the various questions and answers which may be extracted from the pleadings and decisions in *SGS v. Pakistan*, the following aspects are particularly relevant for present purposes:

- Art. 11 of the BIT, to the effect that each State Party ‘shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party’, did not have the effect of ‘automatically ‘elevat[ing] to the level of breaches of international treaty’ breaches of investment contracts entered into by the State... contractual claims could only be brought under Art. 11, and thereby in ICSID arbitration, under exceptional circumstances’<sup>39</sup>.
- The expression ‘disputes with respect to investments’ in Art. 9(1) of the Swiss-Pakistan BIT did not include claims of an essentially contractual character, and there was nothing ‘in Art. 9 or in any other provision of the BIT that can be read as vesting... jurisdiction over claims resting *ex hypothesi* exclusively on contract’<sup>40</sup>.
- The ICSID Tribunal’s jurisdiction was limited to claims under the BIT, for breaches of international obligations, and that treaty-based jurisdiction was not affected by the exclusive agreement to local arbitration of claims in Pakistan in the parties’ contract, the Inspection Agreement. The Tribunal did not see the need to consider whether its jurisdiction under the BIT allowed it to override the exclusive jurisdiction clause in the Inspection Agreement, or to consider whether the effect of Art. 26 of the ICSID Convention, which deems the parties’ consent to ICSID arbitration to be exclusive of any other remedy, was to supersede the local arbitration clause. At the same time, the Tribunal expressed doubts that this could have been the intention of the language in Art. 26.<sup>41</sup>
- That the contract claims between the parties were pending before a local arbitration proceeding in Pakistan in parallel to the treaty-based claims between the parties before the ICSID Tribunal should not prevent the ICSID proceedings from going forward with respect to those treaty-based claims.<sup>42</sup>

In short, the ICSID Tribunal in *SGS v. Pakistan* concluded that it had no jurisdiction with respect to claims submitted by SGS and based on alleged breaches of the Inspection Agreement which did not also constitute or amount

to breaches of the substantive standards of the BIT. In so concluding, the ICSID Tribunal considered and declined to accept, at least not completely, the following arguments advanced by SGS for the proposition that the ICSID Tribunal could and should assert jurisdiction over all claims including those which Pakistan wished to submit to local arbitration under the Inspection Agreement:

- That the operation of Art. 26 of the ICSID Convention is conceivably diluted only where the parties, in consenting to ICSID arbitration, ‘state otherwise’ and thereby create an exception to the principle of exclusive jurisdiction, where no such statement or exception was made by Pakistan or SGS. SGS relied upon the case of *Lanco v. Argentina*<sup>43</sup> to the effect that the existence of a forum selection clause in a contract, even a contract entered into with the host State, will not exclude ICSID jurisdiction.<sup>44</sup>
- That even if there were any overlap, or *prima facie* concurrent jurisdiction, between the ICSID arbitration agreement under the BIT and the local Pakistan arbitration agreement under the Inspection Agreement, the ICSID agreement would supersede to the extent of such overlap and must be preferred<sup>45</sup>, as (i) the BIT is based on the higher plane of international and not municipal law<sup>46</sup>, (ii) the BIT in this case was concluded seven years after the Inspection Agreement, (iii) the ICSID agreement was more comprehensive<sup>47</sup> than the local arbitration agreement inasmuch as it encompassed not only treaty and contract claims, but by operation of Art. 46 of the ICSID Convention also counterclaims raised by Pakistan<sup>48</sup>, and (iv) only the ICSID tribunal could conceivably hear SGS’s claims alleging violations by Pakistan of the BIT.
- That it would be proper, even necessary, for the ICSID Tribunal to interpret the Inspection Agreement and performance thereunder in order to determine whether there was a violation of international law, relying on the ad hoc committee’s decision in the *Vivendi Annulment* proceedings and the holding that the ICSID Tribunal therein had manifestly exceeded its powers by refusing to consider issues of contractual performance in its determination of the claimants’ BIT claims.<sup>49</sup>
- That the ICSID Tribunal had jurisdiction over breach-of-contract claims against Pakistan which did not simultaneously allege breach of the BIT on the basis of the terms of Art. 9 of the BIT, which required submission

to ICSID arbitration of ‘disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party’, relying on the decision on jurisdiction in *Salini v. Morocco*.<sup>50</sup>

In short, in *SGS v. Pakistan* the ICSID Tribunal held that contractual claims in the applicable circumstances could not be brought before it, but rather before the parallel local arbitration tribunal agreed between the parties, while simultaneously the BIT-based claims of SGS against the host State Pakistan could be adjudicated by the ICSID Tribunal. In the interim, the dispute between the parties has been settled with the withdrawal of the respective proceedings.

**Third**, in distinction to the foregoing is the case of a contractual agreement to local court proceedings and where both the court proceedings and a BIT-based international arbitration have been commenced and are in competition. In such a case, both the local court and the tribunal face the question of whether they respectively can, should or must exercise jurisdiction. The challenge is particularly thorny from the perspective of the arbitral tribunal, which may be faced with the black-and-white fact that the parties previously contractually agreed to the local courts as the exclusive forum for ‘all disputes’, and that ‘all disputes’ might well encompass ‘all disputes’, *i.e.*, both contractual and so-called treaty-based claims.

This was the issue posed in the January 29, 2004 interim decision in *SGS Société Générale de Surveillance v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (‘SGS Philippines’), in which the investor SGS and the host State Philippines (‘ROP’) had entered into a customs inspection agreement (‘CISS Agreement’) in 1991 which contained an exclusive jurisdiction clause stating that ‘[a]ll actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila’. The ROP brought a local court action in Manila under the CISS Agreement and SGS subsequently brought ICSID proceedings under the Swiss-Philippines BIT, which had entered into force some eight years after the CISS Agreement was signed. SGS contended, *inter alia*, that the offer of ICSID arbitration in the BIT took priority over the local courts under the CISS Agreement and that ICSID jurisdiction included claims both under the contract and the BIT. From SGS’s perspective, it was allowed to forum shop and from ROP’s perspective it was not.

Among the various questions and answers which may be extracted from the pleadings and decisions in *SGS v. Philippines*, the following aspects are particularly relevant for present purposes, including in the light of the previously discussed decision in *SGS v. Pakistan*, which was available to the ICSID Tribunal in the second case and indeed extensively addressed in its decision.

- Art. VIII of the Swiss-Philippines BIT provides for settlement of ‘disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party’, and allows the investor to submit the dispute if unresolved by consultations ‘either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration’, and in the latter case, at the investor’s option to ICSID or UNCITRAL arbitration. The ICSID tribunal held that the phrase ‘disputes with respect to investments’ – which was identical to the phrase in Art. 9 of the Swiss-Pakistan BIT – ‘naturally includes contractual disputes’, as does the phrase ‘legal dispute arising directly out of an investment’ in Art. 25(1) of the ICSID Convention.<sup>51</sup> The Tribunal found additional support for this conclusion in the contrast with other investment protection agreements in which investor-State arbitration is intended to be limited to claims for breach of international standards (as opposed to contract claims or other claims under national law), and which state such limitation expressly, citing the NAFTA Agreement<sup>51</sup> and the *Vivendi Annulment* decision.<sup>52</sup>
- At the same time, making reference to the prior decision in *SGS v. Pakistan*, the ICSID Tribunal agreed with the concern expressed in that earlier decision ‘that the general provisions of BITs should not, unless clearly expressed to do so, override specific and exclusive dispute settlement arrangements made in the investment contract itself’.<sup>53</sup> In the view of the ICSID Tribunal, there were two questions to resolve: (i) the interpretation of the general phrase ‘disputes with respect to investments’ in BITs and (ii) the impact on the jurisdiction of BIT tribunals over contract claims, or the ‘admissibility’ of such claims, in the presence of an exclusive jurisdiction clause in the contract.
- The ICSID Tribunal held that ‘[i]t is not plausible to suggest that general language in BITs dealing with all investment disputes should be limited because in some investment contracts the parties stipulate exclusively

for different dispute settlement arrangements.’<sup>54</sup> On that basis, the Tribunal concluded that ‘in principle (and apart from the exclusive jurisdiction clause in the CISS Agreement) it was open to SGS to refer the present dispute, as a contractual dispute, to ICSID arbitration under Art. VIII(2) of the BIT’, relying on the ‘same conclusion’ reached by the ICSID Tribunal in *Salini v. Morocco*.<sup>55</sup>

- The jurisdiction clause in the CISS Agreement – ‘[a]ll actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila.’ The ICSID Tribunal concluded that this clause was *prima facie* a binding obligation to resort exclusively to either such local court as to disputes ‘in connection with the obligations of either party’ to the CISS Agreement, and that the substance of SGS’s claim for payment under the Agreement was encompassed by this jurisdiction clause.
- The ICSID Tribunal took issue with the suggestion in *Lanco International* that in some legal systems a jurisdiction clause referring to national judicial authorities may be legally ineffective and should be construed as a mere acknowledgement of a jurisdiction that already mandatorily existed.<sup>56</sup> It then declined to hold that the agreement to the ROP courts was a ‘mere acknowledgement which does not impose a contractual obligation upon SGS as to the use of the Philippines courts to resolve contractual disputes’<sup>57</sup>. It stressed that SGS had not disputed that under Philippine law, the law applying to the CISS Agreement, such an exclusive choice of the local ROP courts was valid and binding, and held that ‘courts or tribunals should respect such a stipulation in proceedings between those parties, unless they are bound *ab exteriori*, *i.e.*, by some other law, not to do so. Moreover, it should not matter whether the contractually-agreed forum is a municipal court (as here) or domestic arbitration (as in *SGS v. Pakistan*) or some other form of arbitration, *e.g.*, pursuant to the UNCITRAL or ICC Rules. The basic principle in each case is that a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision’<sup>58</sup>.
- Applying the particular facts, the ICSID Tribunal held that the exclusive choice of the ROP courts in the CISS Agreement was not overridden by the BIT. Relying on the maxim *generalia specialibus non derogant*, it held that it was not to be presumed that such a general provision as

Art. VIII of the Swiss-Philippine BIT overrode specific provisions of particular contracts, freely negotiated between the parties. It also held that a BIT was a ‘framework treaty’, intended ‘to support and supplement, not to override or replace, the actually negotiated investment underlying the particular facts, the ICSID tribunal held that the exclusive choice of the ROP courts in the CISS Agreement was not overridden by the BIT or by the ICSID Convention arrangements made between the investor and the host State’<sup>59</sup>.

- Referring again to the discussion in *Lanco*, the ICSID Tribunal declined to follow the proposition that even where a BIT might not override an exclusive jurisdiction clause in a later investment contract, at least it should have that effect for an earlier contract, by application of the maxim *lex posterior derogat legi priori*.<sup>60</sup> It reasoned that such principle applies only between instruments of the same legal character, which the BIT and the private contract were not.
- The ICSID Tribunal held further that the exclusive choice of the ROP courts in the CISS Agreement was also not overridden by operation of Art. 26 of the ICSID Convention, even though a later agreement between the same parties could in principle override an earlier one, because (i) Art. 26 was not a mandatory rule, (ii) the ‘unless otherwise stated’ phrase in Art. 26 is concerned with consent to ICSID arbitration and not the consent of States Parties to a BIT, and (iii) it could not have been intended that whereas in this BIT the investor opts for ICSID instead of UNCITRAL arbitration, the choice makes a material difference in the exercise of legal rights and an ‘override’ would occur solely in the case of a choice of ICSID but not of UNCITRAL. Relying on the same language in the *Vivendi Annulment* as previously mentioned above (‘the tribunal will give effect to any valid choice of forum clause in the contract’), the Tribunal stated that it could not accept that standard BIT jurisdiction clauses automatically override the binding selection of a forum by the parties to determine their contractual claims.<sup>61</sup>
- Seeking to distinguish between jurisdiction and admissibility, the ICSID Tribunal held that treaty jurisdiction would not be abrogated by a contract unless expressly provided, and that the issue was whether it was admissible for SGS to rely on the CISS contract as the basis for its claim before ICSID when the CISS contract itself refers ‘that claim’ exclusively to



another forum. It held that such a claim would not be admissible ‘unless there are good reasons, such as *force majeure*, preventing the claimant from complying with its contract. This impediment, based as it is on the principle that a party cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction’<sup>62</sup>.

- Referring to the decision in *SGS v. Pakistan* that that dispute was not to be characterized as a merely contractual dispute, the ICSID Tribunal concluded that the dispute with the ROP was primarily about monies owed under a contract and not about expropriation, and also held that an unjustified refusal to pay might violate the standard of ‘fair and equitable treatment in Art. IV of the Swiss-Philippine BIT, but that “that is a matter for the merits.”<sup>63</sup> Again distinguishing between jurisdiction and admissibility, it concluded while SGS had stated a claim under two separate BIT provisions, there being an unresolved dispute as to the amount payable, for the Tribunal to decide on the claim in isolation from a decision by the chosen forum under the CISS Agreement is inappropriate and premature’<sup>64</sup>.
- In short, the ICSID Tribunal in *SGS v. Philippines* concluded that as the Philippine courts were available to hear SGS’s contract claim, until the question of the scope or extent of the ROP’s obligation to pay was clarified, a decision by the ICSID Tribunal on SGS’s claim to payment would be premature.

In sum, the ICSID Tribunal held that it had jurisdiction over the contractual claims submitted by SGS under the ‘umbrella clause’ and the ‘fair and equitable treatment’ standard of the BIT ‘even though it may not involve any breach of the substantive standards of the BIT.’ At the same time, it held that the claims were not yet admissible, were premature and should be stayed in order to allow the ROP court ‘to establish the quantum or content of the obligation’ which, under Art. X(2) of the BIT (the ‘umbrella clause’), the ROP was required to observe. In this connection, the tribunal held that it was not necessary to consider whether the agreement to the ROP local courts was wide enough to encompass a BIT claim and what the legal consequences of an affirmative answer would be.<sup>65</sup>

The existence more or less side by side of the *SGS v. Pakistan* and *SGS v. Philippines* decisions offers an interesting and insightful basis for discussion of various issues posed by arbitral forum shopping, both in the area of



investment arbitration and general commercial dispute resolution. While the precedential or *stare decisis* value of the one for the other or of either one for the future should not be overstated, the similarities and differences in approach are enlightening.

In the case of *SGS v. Pakistan*, it will be recalled that Pakistan contended that the ICSID Tribunal should stay its own proceedings pending determination of the claims of SGS against it in the local arbitration in Pakistan pursuant to the Inspection Agreement. The Tribunal in *SGS v. Philippines* addressed this issue specifically, and noted that there was precedent for the notion that international tribunals have a certain flexibility in dealing with questions of competing forums, citing the *MOX Plant Case (Ireland v. United Kingdom)*, before an Annex VII Tribunal under the Law of the Sea Convention 1982, in which the tribunal stayed its own proceedings pending the outcome of a determination by the European Court.<sup>66</sup>

The ICSID Tribunal in *SGS v. Pakistan* declined to stay its own proceedings, holding that there was no need for ‘the factual predicate of a determination by the [local Pakistani] arbitrator that either party breached [the private contract] in order to enable it to decide the BIT claims’<sup>67</sup>. In short, the Tribunal there did not feel that a determination of issues related to the performance of the private contract, subject to Pakistani substantive law and Pakistani arbitration, was required to enable it to decide whether Pakistan had violated one of its obligations under the BIT related to the investment under that same private contract.

By contrast, the tribunal in *SGS v. Philippines*, relying on a distinction between jurisdiction and admissibility, concluded that it was already empowered to adjudicate SGS’s contract claim to the extent it gave rise to a BIT claim, but that it would be premature to do so until the claim for payment and the quantum of any liability had been decided by the local ROP courts under Philippine law. The ICSID Tribunal in *SGS v. Philippines* sought to find inspiration and support for the notion of staying its own proceedings in the implied view in *SGS v. Pakistan* ‘that an ICSID Tribunal has the power to stay proceedings pending the determination, by some other competent forum, of an issue relevant to its own decision’, and agreed with this view.<sup>68</sup> It relied on Art. 19 of the ICSID Arbitration Rules, granting the tribunal general power to make orders required for the conduct of the proceedings, and Art. 44 of the ICSID Convention to generally the same effect.

To the extent there appears to be a possible dissonance between the two decisions involving SGS, the ‘declaration’ submitted by arbitrator Antonio Crivellaro dated January 29, 2004, in which he declared his disagreement with the stay of the ICSID proceedings, is enlightening. The disagreement was with the conclusion that under Art. VIII(2) of the Swiss-Philippines BIT providing for ICSID arbitration was intended to override an exclusive jurisdiction clause in an investment contract insofar as contractual claims are concerned, and his dissenting view that such an override was indeed intended and possible.

Focusing on the fact that the CISS Agreement was concluded in 1991 and the BIT came into force only in 1999, the dissent concluded that ‘when it undertook to refer contractual disputes to the Philippines courts, SGS cannot have irrevocably waived the right to refer them to one of the alternative forums subsequently offered in the BIT’<sup>69</sup>. The view was that the subsequent BIT created a new law and conferred new or additional rights of forum selection on an investor such as SGS, including the right to select the forum after the dispute has arisen and, through its wording (‘either to the national jurisdiction ... or to international arbitration ...’), to accept an offer by the State of an additional forum option beyond national jurisdiction, left to the investor’s choice.

In fact, the view expressed here with respect to the options afforded the investor by the Swiss-Philippines BIT relates not so much to an ‘overriding’ of a contract dispute clause as a question of concurrent jurisdiction where SGS would be entitled to bring its claim either before the ROP courts or the ICSID tribunal and the ROP could bring its own claim before the ROP courts without SGS being able to have it dismissed solely on the basis that SGS could also bring an ICSID proceeding. Here, the Swiss-Philippines BIT did not provide, for example, that any choice of forum previously agreed in a private investment agreement (such as the CISS Agreement) should remain exclusive for disputes arising out of that investment agreement, and therefore one view would be that effectively concurrent jurisdiction has not been excluded.

Ultimately, the dissent in *SGS v. Philippines* concluded that where concurrent jurisdiction between a treaty-based arbitral forum and a contractually based court or arbitral tribunal might exist, ‘one should retain the meaning which is less restrictive or more favourable to the beneficiary’, namely the investor

who is entitled to more favourable treatment in matters of dispute settlement than a local court or arbitral tribunal.<sup>70</sup> The dissent thereupon took the view that where SGS had claimed that the ROP had violated Art. X(2) of the BIT and such claim did not fall within the scope of the private contract subject to the Philippine courts, the ICSID Tribunal not only had jurisdiction over the claim, but also the claim was ‘admissible’ without first being processed before the domestic courts as to *quantum* matters.<sup>71</sup>

### DOES ARBITRAL FORUM SHOPPING IMPACT NEGATIVELY ON INTERNATIONAL ARBITRATION?

Having explored the possibilities and limitations of forum shopping in both the litigation and arbitration contexts, and in particular in recent investment-related arbitrations, the question arises of whether arbitral forum shopping impacts negatively on international arbitration as a whole, affecting the choice of parties.

Do the uncertainties related to the possibilities of legitimately ‘shopping’ or the unpredictability of successfully limiting overreaching or abusive shopping create more confusion than stability? Are the statutory, convention and case law bases for allowing or regulating forum shopping, especially in international arbitration, so inconsistent and *ad hoc* in orientation that each case must by definition be decided based on its specific facts, and each time potentially establish a new direction?

There is no straightforward answer, particularly when one bears in mind the particularities of investment-based arbitration. Nor is it realistic or practical to assume that transnational norms either in the commercial or the investment arbitration area are likely to be applicable across the board. At the same time, there are certain general observations which can be made based on the foregoing discussion:

**First**, in the general commercial arbitration context, it is apparent that in the case of competing arbitrations or a competing arbitration and litigation, the relevant provisions of the New York Convention and the UNCITRAL Model Law, where applicable, do not necessarily offer satisfactory protection. Indeed precisely because of the cherished doctrine of competence-competence it is entirely possible that two or more parallel actions in arbitration or litigation may proceed in parallel to establish whether an arbitration or

choice-of-forum clause is valid and whether it should supersede a competing valid dispute resolution provision. The *NetSys* and *Gulf Canada* decisions discussed above, and the application of Art. 9(1) of the Swiss Private International Law Act are cases in point of such friction.

**Second**, at the same time there are reasons for optimism. An increasing harmonization of mandatory procedural rules and bases for annulment has taken place through the adoption or application of the UNCITRAL Model Law. Transparency and consistency of approach within one arbitral institution or one set of rules and from one to the other are also increasing, with respect to the application of the competence-competence doctrine, as arbitration rules and legislation experience increasing harmonization and mutual inspiration. At the same time, a competition between two parallel arbitrations which are both subject to UNCITRAL Model Law provisions will also not necessarily be resolved easily or predictably.

**Third**, one manifestation of arbitral forum shopping in very recent years has been the phenomenon of enforcement of a previously annulled award. An extension or variation on this theme has been the purported annulment of an award in a jurisdiction other than its seat and an attempt to use such ‘annulment’ as a basis for blocking enforcement at the seat or elsewhere under Art. V(1)(e) of the New York Convention. It is interesting to note that the phenomenon of *Chromalloy* and its progeny,<sup>72</sup> in which a local standard of annulment was not followed as a ground for refusal of enforcement elsewhere would presumably never happen in the case of litigation. A vacated court judgement would presumably have no prospect of recognition or enforcement in a foreign country if it no longer existed in the jurisdiction in which it was originally rendered.

**Fourth**, while the existence side by side of multiple arbitrations or races to judgement may create certain problems, be likely to lead to more challenges to awards and also encourage double recovery in some instances, the phenomenon is probably not as worrisome as attempts to nullify awards already rendered in jurisdictions which have no authority to do so.

**Fifth**, in the case of BIT-based arbitrations and competing local court or arbitration proceedings, the developments represented by *SGS v. Pakistan*, *SGS v. Philippines* and the prior cases to which they refer are indeed problematic, not so much because of their precedential value, but precisely

because there are in fact too few apposite cases dispositively and consistently answering the main questions of investment-related arbitral forum shopping. At the end of the day, each of every one of such cases is to a certain extent fact-specific with respect to (i) the relationship between the BIT-related arbitration agreement and the local dispute resolution mechanism, (ii) the precise wording of each clause, the timing of the entry into force of the BIT as opposed to the private contract, (iii) the existence or not of an ‘umbrella clause’ or of a ‘fork-in-the-road’ clause, (iv) the nature of the alleged contract- and treaty-based claims, etc. In short, there is no certainty, but there are some guidelines.

**Sixth**, among such guidelines is the notion that BIT claims are usually not subject to local court or local arbitration proceedings agreed to in a private contract, particularly where the BIT entered into force after the private contract entered into effect.

**Seventh**, the situation can arise where a BIT (such as the Swiss-Pakistan treaty) provides solely for ICSID arbitration and no other option for the investor (such as UNCITRAL Rules, ICC Rules or local arbitration), and where there is also no ‘fork-in-the-road’ provision requiring the investor to make a choice among options and then be bound by it. In such cases, the argument may be correspondingly stronger to the effect that even an ostensibly ‘exclusive’ choice-of-forum clause in the private contract with the host State should not actually be considered exclusive. The rationale behind the BIT could then be construed to be to ensure the investor a choice, including the choice of availing itself of a prior private agreement to local arbitration or litigation.

**Eighth**, where a BIT-based claim has been brought before a local court or in local arbitration rather than, *e.g.*, before ICSID, and where jurisdiction in the local proceedings is upheld, such a decision should not normally divest a later constituted BIT-based arbitral tribunal of jurisdiction over the same BIT-based claim. The result may be a conflict between two proceedings, one before ICSID and the other in the local courts or local arbitration, which issue conflicting awards on the treaty-based claims. In addition, one award might be subject to the public international law choice-of-rules of the ICSID regime and the other to the substantive law at the local seat of arbitration.

Such conflict is clearly not desirable, and may indeed give rise to pressure on the part of the ICSID tribunal or the local authority to stay its proceedings pending the outcome of the other action. This was the decision made by the ICSID tribunal in *SGS v. Philippines*, which effectively was a decision adverse to the investor from the standpoint that it was not able to reap the benefits of the preferential dispute resolution mechanism built into the BIT. The decision may also be seen as an indirect affirmation of the doctrine of exhaustion of local remedies insofar as the local dispute resolution provision was upheld over the BIT-based ICSID regime.

**Ninth**, arbitral forum shopping is essentially unavoidable in the presence of BIT provisions referring to, *e.g.*, ‘disputes with respect to investments’ such as in Art. 9 of the Swiss-Pakistan BIT. Such a provision can be broadly construed to include not only treaty-based, but also contract-based claims insofar as the private contract with the host State is itself in respect of an investment.

In this regard, the reasoning and holding in *SGS v. Pakistan* to the effect that the local Pakistan arbitration agreement contained in the private contract with the host State should be deemed valid insofar as concerns contract claims ‘which do not also amount to BIT claims’ is only of limited help. Notwithstanding the attention showered on the issue of distinguishing between treaty-based and contract claims in ICSID arbitration, the ability to consistently and reliably segregate the one from the other and rule out any meaningful existence of overlap is imperfect at the very best.

Indeed the example of the analysis in *SGS v. Philippines* is illustrative. There, a payment claim under the private contract with the host State was on the one hand deemed to be subject to the private contract’s local choice of forum but on the other hand also deemed to constitute ICSID ‘jurisdiction’ on the basis of both the BIT ‘umbrella clause’ and BIT ‘fair and equal treatment’ clause. This shows how imperfect the attempt to segregate such claims for purposes of forum shopping is.

**Tenth**, in the context of forum shopping the question is not so much of ‘elevating’ a contract claim grounded solely in a private contract into a BIT claim, but rather accepting under certain circumstances that the private contract itself is wholly or at least primarily in existence and performed in relation to an investment which is covered by a BIT. This does not mean

that any and all strictly commercial, minor claims for contract performance or payment should be considered treaty claims. But it does mean that artificial parsing between contract and treaty bases must have its limits, especially where the alleged breach by the host State relates to a uniquely sovereign action of abuse, interference, injunction or obstruction.

The concern expressed by the ICSID tribunal in *SGS v. Pakistan* that the benefits of a contractual dispute resolution clause with a State which is also a party to a BIT ‘would flow only to the investor’ and the investor ‘could always defeat the State’s invocation of the contractually specified forum’<sup>73</sup> at the investor’s whim might in fact be true. But that is the purpose of a BIT in the first place to the greatest extent, namely to provide the investor with protective and even preferential treatment, particularly in those cases where the BIT entered into force after the private contract. The host State who agrees to such a BIT after entering into private contracts with investors containing local dispute resolution clauses knows or should know the consequences of such a decision, and the expectation of the investor to be able to avail itself of the BIT-based dispute resolution mechanism. It is not so much a question of balancing the benefits of different agreements located in different legal orders, but rather that the State entered into an arm’s-length choice of agreeing to the BIT subsequent to its private contracts with foreign investors.

**Eleventh**, the decision to stay a BIT-based arbitration may be an effort to control or forestall arbitral forum shopping, but it is not without dangers. The decision to stay in *SGS v. Philippines* appears to have been based on a highly nuanced distinction between jurisdiction and admissibility and between contract claims and treaty claims which does not clearly stand up to scrutiny. It would appear that the ICSID Tribunal in *SGS v. Pakistan* correctly decided that it was obligated to affirm its jurisdiction over the BIT claims of SGS, proceed with the ICSID arbitration, and not stay its own proceedings in deference to the pending local Pakistani arbitration, despite the risk of a race to judgement on substantially overlapping claims. The Tribunal could do so by taking comfort in the fact that the determination by the local Pakistani arbitral tribunal of compliance with the private contract duties would not bind the ICSID tribunal with respect to the issue of compliance of the host State with its BIT duties.

Ultimately, both ICSID tribunals in the SGS disputes declined to decide on the contract claim, whether on the basis of lack of jurisdiction or lack of ‘admissibility’. Thus neither decision stands for the proposition that ICSID BIT-based arbitration can be randomly invoked to have private contract claims adjudicated under public international law principles before international tribunals divorced from local substantive law and local standards of annulment of awards.

At the same time, an uncertainty reigns in the light of both decisions, and the decisions before them. If stays of ICSID arbitration are to become more frequent, then the question arises of whether an ICSID arbitration is worth the effort of bringing, of what the status of the proceedings are once they are suspended, and of how they are meant to be resuscitated. And is the upholding of the jurisdiction of local authorities to adjudicate contract claims at least in the first instance an unacceptable reaffirmation of the exhaustion of local remedies doctrine, or an undermining of the preferential treatment meant to be provided by an ‘umbrella clause’.

In the final analysis, the current forum shopping dilemma may say as much about the shortcomings of drafting certain bilateral investment treaties in recent years as about the imperfections of the decisions which have been based upon them. Clearly, the next few years of experience in both areas, both BIT negotiation and BIT arbitration, will be crucial to ensuring that forum shopping is neither abusive nor is stifled, but rather allowed to function within the proper parameters that have existed, in a different way, in transnational litigation.



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**END NOTES**

- 1 As defined in 28 U.S.C. 1332, part of the statutory law governing the federal court system in the United States.
- 2 In the absence of a choice-of-forum clause, current trends suggest that the kinds of activities which may lead a U.S. court to declare competence over a non-U.S. defendant are expanding. Normally, two requirements must be satisfied: (1) the 'long-arm' statute adopted by the state in which the federal or state court is located and (2) the 'Due Process Clause' of the U.S. Constitution. The benchmark for all parties remains whether the defendant's 'purposeful' contacts and connections with the state are such that it could reasonably anticipate being haled into court in that state.
- 3 Clauses designating a particular court as the forum for disputes (*forum prorogatum*) will generally be upheld even if the foreign defendant has no presence or contacts with that state. Furthermore, even choice-of-law provisions pointing to that state may also lead to exercise of jurisdiction there. Some courts treat forum-selection clauses as all other contractual provisions, and enforce them unless a valid defence exists under the law applicable to the contract, such as unconscionability or fraud. Some take a slightly more flexible approach but treat forum selection clauses as presumptively valid, subject to a few additional defences not typically available under standard contract law. A few jurisdictions treat forum selection clauses as but one factor in the *forum non conveniens* analysis.
- 4 In some jurisdictions, a choice of forum (or choice of jurisdiction) does not require that a specific venue be named. This is particularly the case whether, for example, the parties to a contract agree that the courts of a foreign country shall have exclusive jurisdiction, whereupon the courts of another country decide to stay proceedings pending the outcome of the proceedings brought under the choice-of-forum clause. In other jurisdictions, choice-of-forum clauses, while generally respected, must specifically provide for 'exclusive jurisdiction' over disputes arising from the agreement in question. Absence of the word 'exclusive' before 'jurisdiction' in the clause may indeed be construed as being a deliberate decision by the parties to refrain from doing anything more than giving 'concurrent' jurisdiction to certain courts. The interests of the parties which are considered in determining whether to accept jurisdiction in the face of such a choice-of-forum clause are normally similar to those applied to issues of *forum non conveniens*.
- 5 In the case of the Brussels and Lugano Conventions, Art. 17 waives even this minimum 'connection' requirement. It construes domestic jurisdiction as an automatic result of a valid choice of a specific forum by the parties. Validity of such an agreement, however, requires that at least one of the parties have its domicile in a Contracting State. For non-Convention cases, the requirement of 'minimum connection' for choice of forum and jurisdiction depends on the particular country, and overlaps with the analysis of *forum non conveniens*. Furthermore, while under the Brussels and Lugano Conventions a valid choice of forum between the parties creates exclusive jurisdiction, under local law (*i.e.*, outside the Convention) this may not be the case. As stated, choice-of-forum clauses, unless they explicitly indicate to the contrary, may merely create an optional forum and not exclude other places of available jurisdiction.
- 6 In the case of proceedings taking place in a Brussels or Lugano Convention state, under Art. 21 the court where the proceedings were later instituted must stay its proceedings (on its own motion) until the first court has ruled on its jurisdiction. If the first court has

confirmed its jurisdiction, then the second court must declare itself incompetent; in the event of parallel proceedings when the action is filed, the second court must reject the claim. With respect to non-Convention states in cases where a bilateral treaty exists, local law may provide that proceedings pending before foreign courts will create *lis pendens* in relation to local proceedings between the same parties on the same subject if the decision to be rendered is expected to be enforceable in the local courts by virtue of reciprocal enforcement. As the court will hardly get any notice of proceedings pending abroad, it is up to the parties or the defendant to object on the basis of this legal impediment. Certain courts in non-Convention states will continue to assert jurisdiction over actions properly before them notwithstanding the existence of parallel proceedings in other jurisdictions unless the local proceedings are stayed on grounds of *forum non conveniens*. Where no stay is granted and both proceedings continue, it is likely that the local courts will accept the first decision rendered as being conclusive.

- 7 In most jurisdictions, there is no formal recognition of the position of foreign co-counsel. The *jus postulandi* ('right to plead'), except in some cases for labour courts and courts of small claims and for filing the writ of habeas corpus, is an exclusive prerogative of attorneys affiliated with the federal or respective state section of the Bar. To appear in a court, the practitioner must be properly admitted in the jurisdiction. In other cases, the foreign litigant may 'accompany' the locally admitted attorney to the court and even plead to the fullest extent, usually subject to linguistic fluency, in the presence of such local attorney. In still other jurisdictions, a foreign legal advisor has no foreseen role in litigation. While he may be present at oral hearings, the right to make motions lies strictly with the party's locally admitted attorney. At the same time, even in such cases, judges may informally grant the foreign lawyer a chance to examine witnesses in addition to their locally admitted colleague and to certify the validity and content of foreign law, through affidavit or legal opinion.
- 8 The rights of foreign attorneys from Member States of the European Union are regulated in the Law Implementing the Directive of the Council of the European Union on Facilitation of the Exercise of Free Movement of Services by Attorneys. Foreign attorneys may represent parties in EU Member State courts, acting 'in agreement' with an EU attorney admitted to that particular court. The foreign attorney acts as the representative of the party, without the need to reside in the particular Member State or to be a member of an EU bar association. However, he may do so only together with a local attorney admitted to that particular court. In certain cases, the foreign attorney not only possesses the relevant linguistic skills, but also has a superior factual, technical or other command of the case to that of the local counsel. In such case, pleading by the foreign counsel, if allowed may be advisable, and even appreciated by the court. This may be the case in jurisdictions where a foreign counsel may represent a client in a foreign court under the same conditions as a local colleague. Thus, in Finland for example, which recently acceded to the European Union, there are no differences between counsels from EU and non-EU countries. In other cases, depending on local customs, practices and even prejudices, such a retention of responsibility in the foreign attorney may be inadvisable or even foolhardy.
- 9 Where the parties have not expressed any choice, it is essentially left to the courts to determine the proper law of the contract. In the absence of an express choice of law, and when the terms of the contract do not enable the proper law to be inferred, the proper law of the contract may be determined by ascertaining the law with which the contract has its closest connection. In conducting this inquiry, depending on the jurisdiction the court will be guided by different criteria which tend, even in vastly different

systems, to focus on the 'center of gravity' and the 'characteristic' activity or performance underlying the transaction or the dispute. Among these factors are (1) the circumstances as they were when the contract was formed, (2) the system of law with which the contract has its closest connection, as opposed to the country with which the closest connection exists, and (3) the contract itself as compared to the transaction underlying the contract. In this regard, a distinction may need to be made between the connection between the legal system and the contract and between the legal system and the underlying transaction.

- 10 The Rome Convention, where applicable, expressly imposes certain limitations on party autonomy. Art.3(3) provides that a country's mandatory rules will be applied provided that the contract is connected with that country alone. The appropriate time for testing whether the relevant elements are connected with one country only is at the time of the choice. Art. 7(2) of the Rome Convention superimposes certain rules on the choice of law made by the parties which have to be applied regardless of the normal rule of conflict of laws. Art. 16 of the Rome Convention states that the application of the rule of law may be refused only if such application is 'manifestly incompatible' with the public policy of the forum.
- 11 The choice of proper law can be overridden by the public policy (*ordre public*) of the forum. A rule of foreign law may not be applied if it would lead to a result incompatible with the basic values of the local legal system. In addition, a statute of the forum may provide that it is to apply notwithstanding the choice of proper law without invalidating that choice with respect to matters to which the statute does not apply.
- 12 With respect to certain kinds of claims such as product liability and anti-trust, local law may restrict a plaintiff's right under applicable foreign substantive law to obtain punitive or treble damages. Art.135 and Art.137 of the Swiss Private International Law Statute, for example, provide in essence that even if foreign substantive law applies and would allow a plaintiff to be awarded punitive or treble damages, a Swiss court must not award indemnities going beyond those which would be awarded under Swiss law.
- 13 The Conventions also stipulate certain exclusive forums, regardless of the defendant's domicile. These include in disputes regarding rights *in rem* in immovable property or tenancies of immovable property, where the property is situated; in disputes related to a company, at the seat of the company; in disputes concerned with the registration or validity of patents, trademarks, etc., the place of deposit or registration; and in proceedings concerned with the enforcement of judgements, the court where the judgement has been or is to be enforced.
- 14 The dividing line between local procedural law and the Brussels and Lugano Conventions in those countries where they apply is normally clear-cut. In cases which fall within the scope of the Conventions, the Conventions must be applied. Care must be taken, however, to ascertain whether as a general rule, subject to some important exceptions, there is in fact great similarity between the heads of jurisdiction recognized by local civil procedure and by the Conventions. This may differ from jurisdiction to jurisdiction among the Convention States.
- 15 The implementation of 'property jurisdiction' in German law is one of the most controversial German rules regarding local jurisdiction. Under paragraph 23 of the German Civil Procedure Code (ZPO), lawsuits concerning financial claims against a person with no domicile or residence in Germany come within the local jurisdiction of the German court within whose district the non-domiciliary's property is located. From the court's local jurisdiction follows its international jurisdiction. Furthermore, it is not necessary that the

plaintiff itself be a German resident to be able to assert such international jurisdiction. Art. 3 of the Conventions expressly excludes the application of Para.23 ZPO as a jurisdictional basis for municipal court proceedings. However, under the Convention, Para.23 ZPO remains applicable for interim measures such as prejudgement attachment of property to secure execution of a later judgement. According to its literal wording, Para.23 ZPO contains no minimum requirements as to the value of the prospective defendant's property or any other connection of the dispute to Germany. After decades of essentially unfettered application, in 1991 the German Federal Court of Justice (Bundesgerichtshof) heightened the threshold for Para.23 ZPO by holding that for a German court to assert jurisdiction, the subject matter must have a sufficient connection to Germany. In the aftermath, German lower courts have found a 'sufficient national connection' when, *e.g.*, the plaintiff was a German resident, where contract negotiations took place in Germany, or where contractual obligations by either party were to be fulfilled in Germany. The situation has continued to be in a state of flux in light of two 1996 decisions of the Federal Court of Justice. While in its recent decisions the Federal Court of Justice has taken an increasingly restrictive approach to Para.23 ZPO, it is still a provision with major strategic and substantive consequences for foreign litigants involved in German municipal proceedings.

- 16 In many other jurisdictions, there is likewise no concept of *forum non conveniens*. If the case is foreseen as a basis of local jurisdiction, and local jurisdiction is exclusive, no challenge will be successful. If the jurisdiction of the local and the foreign courts is concurrent and by a valid and acceptable mutual consent the parties elect a foreign forum, the local court may respect such an agreement. If the parties do not waive local jurisdiction by express consent, there are no grounds for challenging jurisdiction. In such a case, even if the cause of action is equally connected to the foreign jurisdiction, and the same suit has been filed abroad, the local judge will examine the litigation.
- 17 In this respect, the anti-suit injunction is unique in that the applicant does not have to establish that the assumption of jurisdiction by the foreign court will amount to an actionable wrong. Moreover, where available although the application is heard summarily and based on affidavit evidence, the order results in a permanent injunction, which ordinarily is granted only after trial. In order to resort to this special remedy consonant with the principles of comity, it is preferable that the decision of the foreign court not be pre-empted until a proceeding has been launched in that court and the applicant unsuccessfully sought a stay or other termination of the foreign proceedings from the foreign court.
- 18 See, *e.g.*, *Four Seasons Hotel and Resorts v. Consorcio Barr*, 267 F.Supp.2d 1335 (S.D. Fla. 2003), in which an AAA award in a contract between a U.S. and a Venezuelan party subject to Venezuelan law and with a Miami seat was enforced as a 'non-domestic' award under the New York Convention by the Florida court despite a ruling by a Venezuelan court purporting to annul the award on the basis that the underlying arbitration agreements were invalid under Venezuelan law; the U.S. court ruled that the 'competent authority' in the context of Art. V(1)(e) of the New York Convention was 'a court of the country that supplied the procedural law used in the arbitration'.
- 19 Recently, a U.S. court, applying the ground for refusal of enforcement under Art. V(1)(e) of the New York Convention ('... the award ... has been set aside ... by a competent authority of the country in which, or under the law of which, that award was made'), held that as it was not the agreed seat of arbitration (which was Switzerland), it was without 'primary jurisdiction' (*i.e.*, a court under whose law the arbitration was conducted), and had no subject matter jurisdiction under the New York Convention to set aside or modify

such arbitral award: *Gulf Petro Trading Company, Inc. v. Nigerian National Petroleum Corporation* (N.D. Tex., October 23, 2003, Civil Action No. 3:03-CV-0406-G). In *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004), a U.S. court rejected a challenge to enforcement of an award made in Switzerland on the grounds that subsequent 'annulment' by the Indonesian courts did not preclude enforcement and that the Indonesian courts had only 'secondary jurisdiction' over the Swiss award and therefore, pursuant to the New York Convention, could not annul it.

- 20 Specifically, Art. 42(1) ICSID Convention provides as follows: 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.' Cf. ICSID Additional Facility Rules, Art. 54(1), which provides: 'The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply (a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable.' And under NAFTA Art. 1131, the approach is the following: 'A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'.
- 21 Antonio R. Parra, 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment', *12 ICSID Review-FILJ* 287, 332 (1997); Ibrahim F.I. Shihata / Antonio R. Parra, 'The Experience of the International Centre for Settlement of Investment Disputes', *14 ICSID Review-FILJ* 299, 336 (1999).
- 22 Schreuer, 'Commentary', id., note 55 on Art. 42. An interesting example of such a provision is the 1991/1992 Dutch-Czech BIT which figured in the partial and final awards in the recently concluded UNCITRAL proceedings between *CME Czech Republic BV* and the *Czech Republic, CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Final Award in UNCITRAL Arbitration Proceedings, 14 March 2003 (available at <http://www.asil.org/ilib/ilib0607.htm#j04>), Paras. 398-99 at p.93. Specifically, Art. 8(6) of that BIT provides: 'The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: the law in force of the Contracting Party concerned; the provisions of this Agreement, and other relevant Agreements between the Contracting Parties; the provisions of special agreements relating to the investment; the general principles of international law'. Art. 3(5) provides that the international law standard prevails in case of contradiction between international law and national law. The tribunal concluded that the choice-of-law provision did not contain any ranking in the application of the national law of the host State versus the treaty provisions versus the general principles of international law, nor did it provide for any exclusivity of application of any one of these sources. The Dutch-Czech BIT to which the parties agreed compelled the tribunal to 'take into account' (not apply) the four sources of law, 'in particular though not exclusively'. *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Final Award, Paras.400-02 at p.400.
- 23 Shihata / Parra, 'Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration Under the ICSID Convention', id., *ICSID Review-FILJ* 183 (1994) at p.189; Georges R. Delaume, 'The Proper Law of State Contracts Revisited', id., *12 ICSID Review-FILJ* (1997) at p.1 et seq. ; Schreuer, 'Commentary', id., note 24 on Art. 42.

- 24 *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/87/3), Award rendered on February 17, 2000, and rectified on June 8, 2000, 15 *ICSID Review-FILJ* 169 (2000).
- 25 *American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo* (ICSID Case No. ARB/93/1), Award of February 21, 1997, 36 *ILM* 1534 (1997).
- 26 *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Award of March 9, 1998; 37 *ILM* 1391 (1998).
- 27 *Robert Azinian and others v. United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/97/2), Award of November 1, 1999, 14 *ICSID Review-FILJ* 538 (1999).
- 28 *Metalclad Corporation v. United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/97/1), Award rendered on August 30, 2000, 40 *ILM* 36 (2001). Among the multilateral treaties providing for ICSID arbitration which contain clauses on applicable law referring exclusively to the relevant treaty and rules of international law are the following: NAFTA, Art. 1131(1) – ‘A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law’ – Energy Charter Treaty, Art. 26(6) – ‘A Tribunal established under Para.4 shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law’ and Cartagena Free Trade Agreement between Mexico, Colombia and Venezuela, Art.17-20, which replicates Art.1131 of the NAFTA.
- 29 ‘The question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out in Art.25(1) of the ICSID Convention.’ (*CSOB v. Slovakia*, Decision on Jurisdiction, 24 May 1999, Para.35, 14 *ICSID Review-FILJ* 251, 263/264 (1999)).
- 30 Energy Charter Treaty, Art.26(6) provides as follows: ‘A Tribunal established under Para.4 shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.’
- 31 Cf. also Thomas W. Wälde, ‘Investment Arbitration Under the Energy Charter Treaty. From Dispute Settlement to Treaty Implementation,’ Conference on Energy Arbitration, Gulf Arbitration Centre, October 1998 (available at <http://www.dundee.ac.uk/cepmlp/journal/assets/images/ECTARB96.pdf>), 45-46: ‘It is, however, difficult to exclude national law from consideration by the tribunal when the arbitration deals with breaches of contractual and related obligations under Art.10 (1) (last sentence). How can the arbitral tribunal exclude national law when, for example, the contract at issue specifically, in its choice of law article, makes national law applicable? Equally, two of the arbitration rules referred to by Art.26 select, with priority, the law chosen by the parties and, in the absence of such choice, national law plus international rules applicable ...The Treaty, however, has primacy over national law when national law would be used to undermine the effectiveness of the Treaty’s investment obligations, for example retroactive negation of the legal character of a contract/concession in order to escape the Treaty’s obligation. While national law may have to be considered and used for some questions, it cannot provide an escape from the Treaty’s obligations. In the main, it is controlled by the more specific Treaty obligations’.
- 32 See, generally, ‘Approaches to the Application of Transnational Public Policy by Arbitrators’, Richard H. Kreindler, Sixth IBA International Arbitration Day, Sydney, February 13, 2003; see also ‘Approaches to the Application of Transnational Public Policy by Arbitrators’, Richard H. Kreindler, *The Journal of World Investment*, Vol. 4, No. 2, April 2003 at pp.239–250.

- 33 Absent any provision on interest in the U.K.-Egypt Treaty, Egypt had argued that the Tribunal should have reverted to Egyptian law which, again according to Egypt, limited the Tribunal's ability to grant an interest component as part of Wena's compensation. The Tribunal had awarded Wena compound interest without referring to Egyptian law, in compliance with the general standards of compensation set out in the U.K.-Egypt Treaty and in accordance with international law standards. *Wena v. Egypt*, Annulment Decision, *International Legal Materials* 933 at 943, Para.53. See also discussion in Emmanuel Gaillard, 'Landmark in ICSID Arbitration: Committee Decision in "Wena Hotels"', *New York Law Journal* 3 at 4 (2002). The *ad hoc* committee concurred with this finding by concluding that 'international law and ICSID practice, unlike the Egyptian Civil Code, offer a variety of alternatives' that are compatible with international law standards. *Wena v. Egypt*, Annulment Decision, *International Legal Materials* 933 at 943, Para. 53. See also discussion in Emmanuel Gaillard, 'Landmark in ICSID Arbitration: Committee Decision in "Wena Hotels"', *New York Law Journal* 3 at 4 (2002).
- 34 Indeed even where the range of options for a seat of arbitration in NAFTA-based investment arbitrations is normally limited to the United States, Mexico or Canada, the history of re-examination of NAFTA awards shows how crucial any one of these seats of arbitration may be for the ultimate enforceability of the award. In the case of two NAFTA Tribunals whose seat was in Canada, the Tribunal remarked that Canada's lack of deference to investment arbitration awards spoke against the holding of NAFTA arbitration proceedings in Canada: *Pope & Talbot v. Canada*, Ruling Concerning the Investor's Motion to Change the Place of Arbitration (Mar.14, 2002), at Para.20; *UPS v. Canada*, Decision of the Tribunal on the Place of Arbitration (Oct. 17, 2001), at Para.11. Cf. also Jack J. Coe, Jr., 'Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA?', *19 Journal of International Arbitration* 185 (2002) at p.187, to the effect that the threat of judicial review on the merits in NAFTA investment arbitration 'encourages participants to "forum shop" [and] promotes inefficiency'.
35. Cf. NAFTA Art. 1136(3)(b), which expressly provides for the possibility of actions in national courts to 'revise, set aside or annul' awards, requiring the award creditor to refrain from enforcement until the award debtor has had an opportunity to pursue such relief. For a view that NAFTA agreements to 'final' and 'binding' arbitration precludes judicial review of the merits of NAFTA awards, even where local law at the seat of arbitration allows a full appeal, see Charles H. Brower, 'Structure, Legitimacy, and NAFTA's Investment Chapter,' *36 Vanderbilt Journal of Transnational Law* 37 (2003) at p.83.
- 36 Thus, in the recent decision of the Swiss Federal Tribunal in *Fomento de Construcciones y Contratas S.A. v. Colon Container Terminal S.A.*, ASA Bulletin (2001), at 555, it was held that a Swiss-based ICC Tribunal and a Panamanian-based national court were equally empowered to address the issue of whether there was a valid arbitration agreement between the parties and that the Swiss-based ICC Tribunal must apply Art.9(1) of the Swiss Private International Law Act if seized of a matter already pending before a national court. It concluded that the ICC Tribunal had violated Art.9(1) by ruling on its own jurisdiction instead of staying the arbitration and that the interim award affirming its own jurisdiction must therefore be set aside. But cf. Elliott Geisinger and Laurent Lévy, 'Lis Alibi Pendens in 'International Commercial Arbitration – Complex Arbitrations', *ICC International Commercial Court of Arbitration Bulletin* (Special Supplement 2003) at pp.65–68, to the effect that Art.9(1) does not serve to effectively control or avoid the competing jurisdiction of a national court and an arbitral tribunal in such circumstances.



- 37 See also the decision of the British Columbia Court of Appeal in *Gulf Canada Resources Ltd./Ressources Gulf Canada Ltée v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2) 113, 120-21 (B.C. C.A.), holding with respect to the relationship between Art.8(1) and 16 of the UNCITRAL Model Law that 'it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal.'
- 38 In the recent case of *NetSys Technology Group AB v. Open Text Corp.*, B.L.R. (3d) 307, [1999] O.J. No. 3134, 43 C.P.C. (4th) 141, a Swedish claimant brought court proceedings against its Canadian contract partner in Ontario, Canada, in response to which the Canadian party commenced arbitration in Canada under the parties' contractual arbitration agreement. The Canadian party then raised the defence of the arbitration agreement and the pending arbitration in its petition for a stay before the Ontario court, while the Swedish claimant asked the same court to enjoin the arbitration. The court relied on Art.5, Art.16(1) and Art.16(3) of the UNCITRAL Model Law to hold that court intervention or involvement with matters which are already the subject of a valid arbitration agreement is limited and that the arbitral tribunal should first determine its own jurisdiction. The court thereupon dismissed the petition for an injunction to limit the scope of the arbitration and granted the petition for a stay of its own court proceedings.
- 39 *SGS v. Pakistan*, Para.172.
- 40 *SGS v. Pakistan*, Para.161.
- 41 *SGS v. Pakistan*, Paras.161, 174.
- 42 *SGS v. Pakistan*, Paras.145, 187-89.
- 43 *Lanco v. Argentina*, Preliminary Decision on Jurisdiction, 8 December 1998, Case No. ARB/97/6, 40 *ILM* 455 (2001).
- 44 For other prior examples of ICSID tribunals which upheld their jurisdiction despite the presence of a contractual forum selection clause, reliance was also placed on, *inter alia*, *Klöckner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports 13 and *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, ICSID Review-FILJ, Vol. 16, No. 2, see also the *Vivendi Annulment Decision* of Annulment of 3 July 2002, ICSID Case No. ARB/97/3, 41 *ILM* 1135 (2002); 6 *ICSID Rep.* 340 (2004); 125 *I.L.R.* 58 (2004). In that regard, Pakistan contended that those decisions did not support the argument that the BIT-ICSID agreement supersedes the contractual arbitration agreement inasmuch as those cases involved only treaty claims, did not involve a complete identity of parties to the contract arbitration clause and the BIT arbitration, and all concerned forum selection clauses providing for local courts (as opposed to arbitration) which would have had jurisdiction even without the forum-selection clause.
- 45 Cf. A. Parra, 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment,' 12 *ICSID Review-FILJ* 287: 'The consent in the BIT of the host State to the submission of investment disputes to arbitration can also be invoked in preference to any applicable previous agreement on the settlement of such disputes, such as might be embodied in the arbitration clause of an investment contract between the investor and the host State. The consent or "offer" of the host State to submit to arbitration in the BIT, when accepted by the covered investor, simply supersedes their previous agreement to the extent of the overlap'.



- 46 The notion that 'international proceedings prevail over internal proceedings' was enunciated in the *Holiday Inns* case: P. Lalive, 'The First 'World Bank' Arbitration (*Holiday Inns v. Morocco*) – Some Legal Problems,' 51 *British Yearbook of International Law* 123 (1980).
- 47 Also at issue was the maxim *generalalia specialibus non derogant*, as discussed in *Southern Pacific Properties Limited (Middle East) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction and Dissenting Opinion of 14 April 1988 (*SPP v. Egypt*), 3 *ICSID Rep.* 131 (1995) at pp.149-50, Para.83. The question was whether this maxim should apply to give the forum selection clause in the Inspection Agreement precedence over the ICSID arbitration clause in the BIT and whether the two dispute resolution mechanisms related to the same or different standards of protection.
- 48 *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002, Para.76; 41 *ILM* 1135 (2002); 6 *ICSID Rep.* 340 (2004); 125 *I.L.R.* 58 (2004). Of considerable importance was the following language in the *Vivendi Annulment* decision, Para. 98: 'In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.'
- 49 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4.
- 50 *SGS v. Philippines*, Para.132.
- 51 *SGS v. Philippines*, Para.132, discussing Chapter 11 of the North American Free Trade Agreement (NAFTA), whereby investors may bring claims only for breaches of specified provisions of Chapter 11 itself.
- 52 *SGS v. Philippines*, Para.132, citing *Vivendi Annulment* Decision, 6 *ICSID Reports* 340, 356 (2002) at Para.55, but also noting that '[t]he issue there was a slightly different one, viz., whether in pursuing ICSID arbitration rather than local proceedings for breach of contract the investor had taken the 'fork in the road' under the BIT,' and stating that nonetheless 'it involved the interpretation of similar general language in the BIT.'
- 53 *SGS v. Philippines*, Para.134.
- 54 *SGS v. Philippines*, Para.134.
- 55 *Salini Costruttori SpA v. Kingdom of Morocco*, 6 *ICSID Reports* 398, 415 (2001) at Para.61.
- 56 *Lanco International, Inc. v. Argentine Republic*, 5 *ICSID Reports* 367, 378 (1998) at Para.26.
- 57 *SGS v. Philippines*, Para.138.
- 58 *SGS v. Philippines*, Para.138. The ICSID Tribunal distinguished *Lanco* by stating that the mere fact in that case Argentine administrative jurisdiction could not be selected by mutual agreement 'does not prevent the investor from agreeing by contract not to resort to any other forum.' It also cited Art. II (1) of the Claims Settlement Declaration, 19 January 1981, between the United States and the Islamic Republic of Iran, which expressly overrides exclusive jurisdiction clauses except for those relating to Iranian courts: 1 Iran-US CTR 9.
- 59 *SGS v. Philippines*, Para.141.
- 60 *SGS v. Philippines*, Para.142, referring to the discussion in *Lanco International, Inc. v. Argentine Republic*, 5 *ICSID Reports* (1998) .

- 61 *SGS v. Philippines*, Para.153.
- 62 *SGS v. Philippines*, Para.154.
- 63 *SGS v. Philippines*, Para.162.
- 64 *SGS v. Philippines*, Para.162.
- 65 *SGS v. Philippines*, Paras.169-70.
- 66 Order No. 3, 42 *ILM* 1187, 1199 (2003).
- 67 *SGS v. Pakistan*, Para.188.
- 68 *SGS v. Philippines*, Para.173.
- 69 *SGS v. Philippines*, Declaration of Dissent, Para.3.
- 70 *SGS v. Philippines*, Para.10.
- 71 *SGS v. Philippines*, Para.11.
- 72 *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp.907 (D.D.C. 1996); *Yusuf Ahmed Alghanim & Sons WLL v. Toys 'R' Us, Inc.*, 126 F.3d 15 (2d Cir. 1997); *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 1999 WL 781594 (2d Cir. Oct. 1, 1999); *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004); *Four Seasons Hotel and Resorts v. Consorcio Barr*, 267 F.Supp.2d 1335 (S.D. Fla. 2003).
- 73 *SGS v. Pakistan*, Para.168.