

## ARTICLE

# *Abuse of Process in International Arbitration*

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### I. INTRODUCTION

Speaking at a conference held at McGill University in 1988, the late Professor Philippe Fouchard observed that the field of international arbitration had become plagued by misconduct and riddled with procedural disputes.<sup>2</sup> He had not seen anything yet. Over the past decades, parties to arbitrations and their lawyers have developed an unprecedented array of procedural tactics designed to undermine and prejudice their opponents and to increase the chances that their claims prevail. The past five years in particular have witnessed the emergence of litigation strategies of the very worst kind, which threaten to undermine the reputation of international arbitration as an effective and reliable means of resolving international disputes.

To take just one example, I act as counsel in an on-going matter involving four parallel arbitrations concerning the same dispute. The arbitrations were brought against our clients, a State and two State-owned companies, for the benefit of the same interests. Shareholders at different levels of a chain of companies initiated two duplicative investment treaty arbitrations against the State under separate investment treaties.<sup>3</sup> The locally incorporated company sought the same relief as its shareholders in two duplicative commercial arbitrations in different fora.<sup>4</sup> Seeking to multiply their chances of obtaining recovery, these related parties dragged our clients through a series of four full-blown proceedings before four different tribunals, each with two-week hearings involving essentially the same fact witnesses and experts.

The tremendous growth of investment treaty arbitration has no doubt contributed to the increasingly litigious nature of international arbitration. Gone are the days when investment arbitrations were largely based on an investment contract between the State and a specific counterparty: today, most investment

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<sup>2</sup> Philippe Fouchard, 'Où va l'arbitrage international' (1989) 34 McGill LJ 435, 436.

<sup>3</sup> *Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No ARB/12/11 [L. Yves Fortier (President), Campbell Alan McLachlan and Francisco Orrego Vicuña]; *Yosef Maiman, Merhav (Mnf) Ltd, Merhav Ampal Group Ltd, and Merhav Ampal Energy Holdings Limited Partnership v the Arab Republic of Egypt*, PCA Case No 2012-26 [Donald McRae (President), J. Christopher Thomas and Michael Reisman]. These cases are discussed further below.

<sup>4</sup> ICC Case No 18215/GZ/MHM (unpublished), CRCICA Case No 829/2012 (unpublished).

arbitrations are initiated under a bilateral or multilateral investment treaty in which a State has offered its advance consent to arbitrate with an anonymous class of investors.<sup>5</sup> Even if this latter variety of investment arbitration is based on State consent, the respondent State will in most cases only discover the identity of a claimant investor when it receives a notice of dispute. As the *intuitus personae* between parties to international arbitrations continue to fade, international arbitration can no longer be immune to the culture of litigiousness that has become prevalent in the courts of many jurisdictions. This is not to say that all arbitrations have become unduly litigious, as many proceedings still provide an efficient, speedy and economical resolution of international disputes. From a sociological standpoint, these diverging trends illustrate how international arbitration is not as homogeneous as it once was, but has instead become more and more complex and fragmented and in some instances, more polarized.<sup>6</sup>

In this context, increasing attention has been paid to the notion of ‘abuse of process’ by arbitral tribunals and commentators on international arbitration.<sup>7</sup> As will be discussed below abuse of process is a particularly difficult topic as it denotes conduct that is not *prima facie* illegal. Of the increasingly creative litigation strategies adopted by parties to international arbitrations, true instances of ‘abuse of process’ therefore pose a significant challenge for arbitrators.

An abuse of process ought to be distinguished from a sheer violation of an established rule. For instance, while it is not uncommon for a party to an arbitration to file large numbers of documents immediately before the start of an evidentiary hearing in order to hinder its opponent’s preparations and one might loosely refer to this conduct as ‘abusive’, such conduct should be properly characterized as a violation of due process and can be remedied under existing procedural rules, for example by a decision that such documents are inadmissible. Similarly, where parties conclude a contract that contains a valid arbitration clause, and one party submits a claim to a national court in order to avoid its adjudication by an arbitral tribunal, that party does not commit any abuse of process *per se*, but rather violates the agreement to arbitrate, which may entitle the other party to seek an anti-suit injunction before a national court or claim monetary damages from an arbitral tribunal.

In contrast to these procedural strategies, a true ‘abuse of process’ does not violate any hard and fast legal rule and cannot be tackled by the application of classic legal tools. An abuse of process can nonetheless cause significant prejudice to the party against whom it is aimed and can undermine the fair and orderly resolution of disputes by international arbitration. For all of these reasons, the increased incidence of abuse of process urgently calls for a reflection on how it can be tackled.

Drawing from arbitral case law and my experience as counsel and arbitrator, I will first describe the different types of abuse of process that have arisen in

<sup>5</sup> As at June 30, 2016, only 16.8% of all cases submitted to ICSID were based on an investment contract between an investor and a host State, while the remaining 83.2% of cases were based on a bilateral or multilateral investment treaty, free trade agreement or an investment law of the host State. See ICSID, *Caseload – Statistics (2016-2)*.

<sup>6</sup> Emmanuel Gaillard, ‘The Sociology of International Arbitration’ (2015) 31 *Arb Intl*, 1–17.

<sup>7</sup> For recent commentary on abuse of process in international arbitration, see John P Gaffney, ‘Abuse of Process’ in *Investment Treaty Arbitration*’ (2010) 11 *JWIT* 515; Eric De Brabandere, ‘Good Faith’, ‘Abuse of Process’ and the Initiation of Investment Treaty Claims’ (2012) 3 *JIDS* 609; Hervé Ascensio, ‘Abuse of Process in International Investment Arbitration’ (2014) *Chinese J Intl L* 763; Daniel Levy, *Les abus de l’arbitrage commercial international* (L’Harmattan 2015).

contemporary arbitral practice, and will then discuss the tools which may provide an effective response to this increasingly serious issue.

## II. THE GROWING PHENOMENON OF ABUSE OF PROCESS IN INTERNATIONAL ARBITRATION

Parties to international arbitrations have developed an array of different litigation tactics that can each be labelled as an ‘abuse of process’. These tactics can be grouped into three general categories.

### A. A First Type of Abuse of Process: Schemes Designed at Securing Jurisdiction under an Investment Treaty

The first type of behaviour that may qualify as an abuse of process arises exclusively in investment treaty arbitration and concerns the manner in which a corporate investor seeks to secure the jurisdiction of an arbitral tribunal.

Contemporary investment treaties and laws on investment protection typically contain liberal definitions of ‘investor’ and ‘investment’, and extend protection to indirect investments made through one or more corporate entities. The policy of protecting indirect investments raises no particular concerns and these types of situations will arise often in arbitral practice.<sup>8</sup> In this context, it is now settled law that a prudent investor may, at the time of making its investment, design its corporate structure in order to maximize its protection, possibly under multiple investment treaties, which in turn increases its options to bring claims in the international arena.<sup>9</sup> Arbitral case law also permits an investor who has re-invested in its home State through a subsidiary company incorporated in a third State to benefit from the protection of an international investment treaty.<sup>10</sup> Of course, a company will choose its place of incorporation based on other specific advantages, such as a low level of taxation.<sup>11</sup>

The permissive terms of investment treaties and the relatively low costs of incorporating a subsidiary abroad or migrating to another jurisdiction has enabled some companies to push the boundaries of legitimate investment protection in the event of a dispute with a host State.<sup>12</sup> An investment treaty tribunal will lack jurisdiction *ratione temporis* where an investor who is not protected by an investment treaty restructures its investment in order to fall within the scope of

<sup>8</sup> See eg Martin J Valasek and Patrick Dumberry, ‘Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes’ (2011) 26(1) ICSID Rev–FILJ 34.

<sup>9</sup> *ADC Affiliate Limited and ADC & ADMG Management Limited v The Republic of Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006) [Neil Kaplan (President), Charles Brower and Albert Jan van den Berg] paras 335–62; *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent’s Jurisdictional Objections (1 June 2012) [VV Veeder (President), Brigitte Stern and Guido Santiago Tawil] para 2.4.5; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v The Republic of Paraguay*, ICSID Case No ARB/07/9, Further Decision on Objections to Jurisdiction (9 October 2012) [Rolf Knieper (President), Philippe Sands and L Yves Fortier] para 93. See also Mark Feldman ‘Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration’ (2012) 27 ICSID Rev–FILJ 281.

<sup>10</sup> *Tokios Tokelės v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) [Prosper Weil (President), Daniel Price and Piero Bernardini] para 21 ff.

<sup>11</sup> *Agua del Tunari, SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent’s Objections to Jurisdiction (21 October 2005) [David Caron (President), José Luis Alberro-Semerena and Henri Alvarez] para 300.

<sup>12</sup> The point at which legitimate treaty planning becomes inadmissible treaty shopping has been considered by a number of arbitral tribunals. For a recent analysis of this issue, see Jorun Baumgartner, *Treaty Shopping in International Investment Law* (Thèse Université de Lausanne 2015).

protection after the date on which the challenged act of the host State occurred.<sup>13</sup> Abuse of process will arise where a corporate claimant makes or restructures its investment in order to gain access to a dispute with the host State that is foreseeable, but may not yet have crystallized. This was the issue before the tribunal in *Pac Rim*, where the tribunal found that the claimant had changed its seat of incorporation from the Cayman Islands to the United States for the principal purpose of gaining access to the protection of investment rights under the Central American Free Trade Agreement (CAFTA).<sup>14</sup> El Salvador objected to the tribunal's jurisdiction on grounds that it had 'abused the provisions of the CAFTA and the international arbitration process by changing Pac Rim Cayman's nationality to a CAFTA Party to bring a pre-existing dispute before [the] Tribunal under CAFTA'.<sup>15</sup> The tribunal considered that the dividing line between legitimate treaty planning and an abuse of process was the point when a party 'can foresee a specific future dispute as a very high probability and not merely as a possible controversy', and that this would almost always 'include a significant grey area'.<sup>16</sup> It ultimately dismissed El Salvador's abuse of process objection based on its finding that the claimant's restructuring had occurred before the dispute had become a high probability. On the facts of the case, this was when the claimant had actually learned of the government's *de facto* ban on mining in El Salvador.<sup>17</sup>

An objection that a claimant's corporate restructuring amounted to an abuse of process led the arbitral tribunal to dismiss the claimant's claims in a recent interim award in the *Philip Morris* case, which concerned Australia's introduction of legislation requiring that tobacco products be sold in plain packaging.<sup>18</sup> Australia had objected to the tribunal's jurisdiction on grounds that Philip Morris had restructured its corporate group in February 2011 with the principal aim of bringing an investment claim under the Hong Kong-Australia BIT in respect of a specific, foreseeable dispute. The tribunal held that there was a 'reasonable prospect' that a specific dispute would arise following the Australian government's announcement in April 2010 of its decision to implement the legislation, and that the dispute was therefore foreseeable 'well before the Claimant's decision to restructure was taken (let alone implemented)'.<sup>19</sup> While the tribunal noted that 'it would not normally be an abuse of rights to bring a BIT claim in the wake of a

<sup>13</sup> See eg *Libananco Holdings Company Limited v. Republic of Turkey*, ICSID Case No ARB/06/8, Award (2 September 2011) [Michael Hwang (President), Franklin Berman and Henri Alvarez] para 121–28; *Vito G Gallo v. The Government of Canada*, NAFTA/UNCITRAL, Award (15 September 2011) [Juan Fernández-Armesto (President), J. Christopher Thomas and Jean-Gabriel Castel] para 328; *Société Générale in Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, SA v The Dominican Republic*, UNCITRAL, LCIA Case No UN 7927, Award on Preliminary Objections to Jurisdiction (19 September 2008) [Francisco Orrego Vicuña (President), R. Doak Bishop and Bernardo Cremades] para 106–7.

<sup>14</sup> *Pac Rim* Decision on the Respondent's Jurisdictional Objections (n 9), para 2.41.

<sup>15</sup> *ibid* para 2.17.

<sup>16</sup> *ibid*.

<sup>17</sup> *ibid* para 2.47, 2.85–2.86, 2.110. An allegation that a claimant's corporate restructuring amounted to an abuse of process was similarly rejected in the *Tidewater* case. In that case, Venezuela alleged that the claimant incorporated a shell entity in Barbados and placed its local Venezuelan business under its ownership in order to gain access to arbitration under the Barbados–Venezuela BIT in respect of acts of expropriation that were already foreseeable at the time of restructuring. The tribunal concluded that the dispute was not reasonably foreseeable at the time of the restructuring and there was no abuse of process. *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA, and others v The Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Decision on Jurisdiction (8 February 2003) [Campbell McLachlan (President), Brigitte Stern and Andrés Rigo Sureda].

<sup>18</sup> *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia*, PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) [Karl-Heinz Böckstiegel (President), Donald McRae and Gabrielle Kaufmann-Kohler].

<sup>19</sup> *ibid* para 586.

corporate restructuring, if the restructuring was justified independently of the possibility of such a claim',<sup>20</sup> it rejected the claimant's argument that the restructuring formed part of a broader, group-wide process that had been underway since 2005 and that would optimize the claimant's cash flow and tax advantages, finding that these arguments were unsupported by the factual and expert evidence.

In other cases, the close temporal proximity between a claimant's restructuring or acquisition of an investment and the dispute with the host State may be redressed through the application of the requirement of jurisdiction *ratione temporis*. In the *STAD* case,<sup>21</sup> for instance, a German company had acquired an ownership stake in a Bulgarian company which was embroiled in ongoing disputes with Bulgaria over the acquisition of a tract of land. Four years after acquiring its interest in the company, the claimant initiated arbitration against Bulgaria under the Germany–Bulgaria BIT, alleging that its investment had been expropriated. The tribunal found that it lacked jurisdiction *ratione temporis* over the claimant's claims, as all of the alleged BIT violations had occurred before the claimant acquired its investment. The claimant's attempt to fabricate a dispute after that date based on the same facts as the dispute between the local company and the host State was unavailing.<sup>22</sup>

A different analysis was applied by the arbitral tribunal in *Mobil Oil*.<sup>23</sup> Mobil and its subsidiaries were incorporated in the USA and in the Bahamas, and held an interest in two local Venezuelan companies. Following the imposition by Venezuela of a series of tax and royalty measures on Mobil's investment, Mobil created a Dutch entity (Venezuela Holdings), which became the indirect owner of the local companies. Venezuela subsequently nationalized Mobil's investment, following which several companies in Mobil's corporate chain initiated arbitration under both the Venezuelan investment law and the Dutch–Venezuela BIT. The tribunal looked to the timing of Mobil's corporate restructuring as the determining factor in assessing its effect on jurisdiction. While finding that the 'sole purpose of the restructuring was to protect Mobil investments from adverse Venezuelan measures [by] getting access to ICSID arbitration through the Dutch–Venezuela BIT', the tribunal held that this conduct was 'perfectly legitimate' in relation to future disputes with the host State over the nationalization of its assets. Conversely, Mobil's corporate restructuring to create jurisdiction over its existing tax and royalty disputes with Venezuela amounted to 'an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs'.<sup>24</sup> The *Mobil* tribunal's conclusion that the investor's restructuring amounted to an abuse of process was not strictly necessary based on the facts of the case. As in the *STAD* case, the *Mobil* tribunal could have assessed the consequences of the restructuring by reference to the rules of jurisdiction *ratione*

<sup>20</sup> *ibid* para 570.

<sup>21</sup> *STAD GmbH v Republic of Bulgaria*, UNCITRAL, PCA Case No 2011-06, Award on Jurisdiction (18 July 2013) [Brigitte Stern (President), J Christopher Thomas and Bohuslav Klein].

<sup>22</sup> *ibid* para 298–333. The tribunal also accepted Bulgaria's jurisdictional objection that the claimant's attempt to repackage an essentially domestic dispute as an international one for the sole purpose of gaining access to international arbitration amounted to 'an abuse of right in making the investment' and an 'abuse of process'. Its reasoning drew heavily from the decisions in *Mobil Oil* and *Phoenix Action*, discussed below.

<sup>23</sup> *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petróleos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana de Petróleos, Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010) [Gilbert Guillaume (President), Ahmed El-Kosheri and Gabrielle Kaufmann-Kohler].

<sup>24</sup> *ibid* para 205.

*temporis*, by finding that it lacked jurisdiction under the Dutch-Venezuela BIT over disputes arising *before* Mobil became an investor with a protected investment, in that case, the date when Venezuela Holdings (the Dutch subsidiary) was incorporated.

In yet other cases, claimants have sought to secure the protection of an investment treaty tribunal through an act of pure fraud. While such conduct is objectionable, it cannot be characterized as an abuse of process, and can be addressed using established legal tools. For instance, in the *Europe Cement* case, Turkey raised an objection that the claimant had committed an abuse of process by failing to prove that it had made any investment at all, and requested the tribunal to declare that its claim to jurisdiction was ‘manifestly ill-founded and has been asserted using inauthentic documents’.<sup>25</sup> The claimant had supplied copies, but not original versions, of transfer agreements by which it had allegedly acquired an interest in two local companies, as well as a statement by a witness who had allegedly sold it the shares. After examining the evidence, the tribunal held that ‘the claim to ownership of the shares at a time that would establish jurisdiction was made fraudulently’ and that ‘there was no investment on which [the] claim can be based and the Tribunal has no jurisdiction to hear [the] dispute’. Having concluded that there was no investment at all, the tribunal was not required to make a determination on the issue of abuse of process. It was only in passing that it stated:

Such a claim cannot be said to have been made in good faith. If . . . a claim that is based on the purchase of an investment solely for the purpose of commencing litigation is an abuse of process, then surely a claim based on the false assertion of ownership of an investment is equally an abuse of process.<sup>26</sup>

Similarly, in *Saba Fakes v Turkey*, a case in which I sat as President of the tribunal, the share transfers on which the claimant’s alleged investment was premised were fictitious and the claimant had not made any investment at all. It was therefore unnecessary for the arbitral tribunal to decide whether the claimants’ conduct was ‘abusive and frivolous’ as Turkey had alleged.<sup>27</sup>

### B. A Second Type of Abuse of Process: The Multiplication of Arbitral Proceedings to Maximize Chances of Success

It is axiomatic that a claimant to an international arbitration will endeavour, wherever possible, to submit its claims to a venue where it considers that it has the greatest chance of prevailing. The strategy of seeking to secure a preferred tribunal or venue is not in itself objectionable, provided that it accords with the terms of the parties’ agreement to arbitrate. On the other hand, a claimant will commit an abuse of process when it initiates more than one proceeding to resolve the same or related dispute in order to maximize its chances of success. This strategy is highly prejudicial to a respondent, who is forced to defend multiple sets of claims before

<sup>25</sup> *Europe Cement Investment & Trade SA v Republic of Turkey*, ICSID Case No ARB(AF)/07/2, Award (13 August 2009) [Pierre Tercier (President), J Christopher Thomas and Marc Lalonde] para 146.

<sup>26</sup> *ibid* para 167. See also the comments of the same arbitral tribunal in *Cementownia ‘Nowa Huta’ SA v Republic of Turkey*, ICSID Case No ARB(AF)06/2, Award (17 September 2009) [Pierre Tercier (President), J. Christopher Thomas and Marc Lalonde] para 159.

<sup>27</sup> *Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award (14 July 2010) [Emmanuel Gaillard (President), Laurent Lévy and Hans van Houtte] para 44.

different arbitral tribunals rather than in a single arbitration. This tactic also fragments the parties' disputes and leads to excessive costs and delays.

Even the simplest arbitration agreement is susceptible to being exploited in this manner. For instance, a contract of sale might contain an arbitration clause providing for the resolution of all disputes between the parties in a given forum under an agreed set of institutional rules and for the appointment of a tribunal president by the designated arbitral institution. The seller might commit various breaches of contract and the buyer might decide to initiate arbitration. In the event the buyer becomes concerned about whether the arbitral tribunal (and in particular the institutionally-appointed president) will be sympathetic to its case, it could decide to 'test the waters' by submitting to arbitration only one of its claims against the seller, but not its other claims. Once the tribunal is constituted, and if the buyer is satisfied with the tribunal's composition, it could amend its initial request for arbitration to include its remaining claims. On the other hand, if the buyer considers that it might have greater chances of prevailing before different arbitrators, it could submit its remaining claims to an entirely new arbitral tribunal pursuant to the same arbitration clause. This type of conduct is increasingly common in construction arbitrations, which typically involve dozens of claims that can be submitted to separate arbitrations by opportunistic claimants.

The risk that a party might abusively multiply arbitral proceedings to secure its preferred venue is compounded where an arbitration agreement creates an incentive to manipulate the arbitral process. For instance, I act as counsel in an on-going case concerning a sales contract containing an arbitration clause that provides for alternative arbitral seats, with the resolution of claims in a first arbitration in the seller's country and a second set of claims in the buyer's country.<sup>28</sup> In that case, the buyer submitted only a minor portion of its claims, an insignificant sub-issue to a first arbitral tribunal constituted in the seller's country, and shortly thereafter, submitted the balance of its true claims (which are valued at more than 300 times the claim presented in the first arbitration and which were ripe when the first arbitration was launched) to a second arbitral tribunal in its own country. The arbitral tribunals in the two fora (which shared the same tribunal president) rendered partial awards holding that the buyer's strategy was legitimate manipulation of the parties' arbitration agreement and that the parallel proceedings were the natural consequence of its agreed wording.<sup>29</sup> However, this multiplication of legal proceedings is unlikely to have been what the parties originally intended when drafting their arbitration clause. Given the parties' express agreement that claims should be submitted to arbitration in the seller's country in the first instance, the arbitral tribunal in the buyer's country could have declined jurisdiction on the basis that all ripe claims were required to be referred to a single tribunal, or alternatively stayed its proceedings pending the outcome of the first arbitration. Following the parties' first exchange of written submissions, each tribunal has affirmed that the written briefing schedule should continue in both arbitrations, while deciding that the tribunal in the first arbitration in the

<sup>28</sup> The arbitration clause in question states: 'Should [a controversy or claim arising out of or in connection with the contract], the first arbitration to be initiated under this Agreement shall take place in [Seller's country], the second one in [Buyer's country] and successive arbitration proceedings shall take place in [Buyer's and Seller's country], alternatively.'

<sup>29</sup> CRCICA Case No 896/2013, Partial Award (7 August 2015); CRCICA Case No 899/2013, Partial Award (7 August 2015).

seller's country will hold an evidentiary hearing and issue an award on the merits before the second tribunal in the buyer's country proceeds to a hearing. While this solution would appear to address the risk of contradictory decisions, it fails to sanction the buyer's strategy of fragmenting the parties' dispute to secure its chances of prevailing on its claims.<sup>30</sup>

In recent years, claimants to investment treaty arbitrations have also sought to secure the preferred venue for their claims through initiating multiple arbitral proceedings. As noted above, State parties to investment treaties often agree to protect direct and indirect investments made by nationals of one State party in the territory of the other State party. As a separate matter, arbitral case law, unlike most domestic laws,<sup>31</sup> grants shareholders who participate in a locally incorporated company standing to claim, under an investment treaty entered into by their home State, any damages resulting from the host State's treatment of their local company. At the same time, investment treaties are concluded bilaterally and multilaterally without any particular regard for coordinating parallel arbitral proceedings under different treaties based on the same dispute.

Thus, for example, a French company who invested in Kazakhstan will be protected under the France–Kazakhstan investment treaty of 3 February 1998. This protection will apply, be it direct or indirect, if the investment was made through a Dutch subsidiary company.<sup>32</sup> Dutch investments in Kazakhstan are in turn protected under the investment treaty concluded between The Netherlands and Kazakhstan in 2002. If a French investor believes that the host State's treatment of its investment violates its obligations under the relevant investment treaties, it might be tempted both to initiate arbitration under the France–Kazakhstan BIT and also to cause its Dutch affiliate to commence arbitration under the Dutch–Kazakhstan BIT about the exact same dispute. In addition, if one of the treaties also provides that a locally incorporated company under foreign control enjoys the protection accorded to the foreign controlling interest, the local company could also initiate investment arbitration against the host State under Article 25(2)(b) of the ICSID Convention.

Taken in isolation, the initiation of none of these proceedings is problematic, as each reflects the ordinary operation of the agreement to arbitrate contained in each investment treaty. It is, however, an abuse of process for an investor to simultaneously initiate multiple proceedings against a host State before multiple arbitral fora with respect to the same dispute in an effort to multiply its chances of securing a tribunal that will render an award in its favour. In these multiple proceedings, the locally incorporated company, its direct foreign shareholder and

<sup>30</sup> The solution adopted by the tribunals may also result in unenforceable awards in light of the fact that the buyer's decision to appoint different arbitrators in the two proceedings has resulted in an unfair situation where the Chairman has been required to consult on procedural matters with two arbitrators appointed by the buyer and only one appointed by the seller.

<sup>31</sup> David Gaukrodger, 'Investment treaties as corporate law: Shareholder claims and issues of consistency' (2013) OECD Working Papers on International Investment, No 2013/3, 15–21; Michael Waibel, 'Coordinating Adjudication Processes' in Zachary Douglas and others (eds), *The Foundations of International Investment Law* (OUP 2014) 12–14.

<sup>32</sup> See eg Treaty on the promotion and reciprocal protection of investments between the Government of the French Republic and the Government of the Republic of Kazakhstan (France–Kazakhstan BIT) (signed 3 February 1998, entered into force 21 August 2000) Article 1(3): 'The term "companies" means all legal persons incorporated in the territory of one of the Contracting Parties in accordance with its laws and having its corporate seat in the territory of that Contracting Party, or being directly or indirectly controlled by the nationals of one of the Contracting Parties or by a legal person with its corporate seat in the territory of one of the Contracting Parties and incorporated in accordance with the laws of that Party' (unofficial translation).

its indirect foreign shareholder would each advance the same claims, arising out of the same facts. To prevail in the overall dispute, the host State must win each of the arbitrations brought against it, while the investor need only succeed before any one of the tribunals to prevail. In the above example of three separate arbitral proceedings, the investor would only need to convince the majority of one arbitral tribunal (ie two of the nine arbitrators) to prevail in its claims, while the host State, in order to escape liability, would have to convince the majority of all three tribunals (ie six of the nine arbitrators).

These concerns are not merely theoretical: in recent years, investment treaty arbitration has repeatedly witnessed this type of procedural tactic. In an ICSID arbitration, OI European Group BV prevailed in a claim against Venezuela,<sup>33</sup> while the local company has initiated claims against Venezuela on the same facts, pursuant to Article 25(2)(b) of the ICSID Convention and Article 1(b)(iii) of the Netherlands–Venezuela investment treaty, which are still pending.<sup>34</sup> A further example is found in the two arbitrations brought against Egypt for the benefit of Mr Yosef Maiman, on the one hand under the US–Egypt investment treaty and the ICSID Convention by Ampal–American Israel Corporation (Ampal),<sup>35</sup> a company controlled by Mr Maiman, and on the same facts under the Egypt–Poland investment treaty in Mr Maiman’s own name and in the name of other companies in the same chain of ownership (including the direct subsidiary of Ampal) in an UNCITRAL arbitration.<sup>36</sup> In a recently published Decision on Jurisdiction, the ICSID tribunal found that while the claimants’ tactics might appear to be abusive, the parallel arbitrations did not amount to an abuse of process *per se*, but were ‘merely the result of the factual situation that would arise were two claims to be pursued before two investment tribunals in respect of the same tranche of the investment.’<sup>37</sup> At the same time, it held that because the tribunal in the parallel UNCITRAL arbitration had already signalled that it had jurisdiction over the claims asserted in that arbitration, the abuse of process had ‘crystallised’. Rather than dismissing the portion of the claims over which the UNCITRAL tribunal had already affirmed jurisdiction, the ICSID tribunal extended an opportunity to the claimants to ‘cure’ the abuse of process by electing whether to pursue those claims in the ICSID proceedings or the UNCITRAL proceedings.<sup>38</sup> The tribunal’s generosity towards the claimants sits somewhat uncomfortably with its concurrent finding that, pursuant to Article 26 of the ICSID Convention, once the claimants had given their consent to ICSID arbitration, they had lost their right to seek relief in another forum.<sup>39</sup> Furthermore, neither the ICSID tribunal nor the UNCITRAL tribunal considered it objectionable when the claimants then opted to divide their overlapping claims between the two arbitrations, rather than pursuing them before one of the two

<sup>33</sup> *OI European Group BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/25 [Juan Fernández-Armesto (President), Alexis Mourre and Francisco Orrego Vicuña].

<sup>34</sup> *Fábrica de Vidrios Los Andes, CA and Owens-Illinois de Venezuela, CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/21, Notice of Arbitration (10 August 2012) [Hi-Taek Shin (President), Alexis Mourre and L. Yves Fortier].

<sup>35</sup> *Ampal* (n 3).

<sup>36</sup> *Mr Yosef Maiman and Others* (n 3).

<sup>37</sup> *Ampal* (n 3), Decision on Jurisdiction (1 February 2016) para 331.

<sup>38</sup> *ibid* para 334.

<sup>39</sup> *ibid* paras 336 to 338.

tribunals, even though this strategy enabled them to continue to hedge their bets and to maximize their chances of obtaining a favourable award.

*C. A Third Type of Abuse of Process: Gaining a Benefit Which Is Inconsistent with the Purpose of International Arbitration*

International arbitration concerns the resolution of disputes by a tribunal which derives its power from a private agreement.<sup>40</sup> One of the main characteristics illustrating the judicial nature of the role of arbitrators is that, in their award, they resolve a genuine dispute between two or more parties which those parties cannot resolve themselves.<sup>41</sup> This is universally recognized in national legal systems and in international conventions. For example, the provisions of the 1958 New York Convention contemplate that the parties submit their ‘differences’ to arbitration.<sup>42</sup> Article 1496 of the French New Code of Civil Procedure states that the ‘[t]he arbitrator shall resolve the dispute’.<sup>43</sup>

In recent years, however, parties have sought to instrumentalize the arbitral process by initiating one or more arbitrations for purposes other than the resolution of genuine disputes, in clear violation of the spirit of international arbitration law. For instance, the ICC arbitration initiated by a wholly-owned entity of the German State of Baden-Württemberg, and the State itself (joined as an additional party) against the French electricity company EDF was brought with the primary purpose of gaining media attention.<sup>44</sup> Following the nuclear disaster in Fukushima, a newly-elected coalition government in Baden-Württemberg (which included members of the Green Party) brought a claim against EDF, arguing that it had overpaid EDF for shares in a local nuclear power company. The clear motive behind the claim was to demonstrate that the previous administration in Baden-Württemberg was misguided in purchasing EDF’s shares in the company immediately before the Fukushima events, which had a dramatic impact on their value. Baden-Württemberg’s goal of gaining publicity was made amply clear when it televised an expert report concerning the value of the shares six months before the report was even submitted to the arbitral tribunal.<sup>45</sup>

Parties to investment treaty arbitrations have also initiated proceedings for purposes other than resolving genuine disputes, such as to evade criminal investigations. In a number of recent examples, individual and corporate investors under investment treaties have brought claims in the international arena and requested provisional measures from arbitral tribunals in order to block on-going

<sup>40</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999), at 9, para 7.

<sup>41</sup> Gary B Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Kluwer Law International 2001) 252.

<sup>42</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) (the New York Convention) art II (1): ‘Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.’

<sup>43</sup> Decree No 2011-48 (13 January 2001) French Code of Civil Procedure, art 1496.

<sup>44</sup> ICC Case No 1815/GFG/FS (unpublished). See Kyriaki Karadelis and Alison Ross, ‘EDF Faces ICC Claim Over German Power Company Purchase’ *Global Arbitration Review* (6 June 2012).

<sup>45</sup> In its Final Award of 6 May 2016, the majority of the arbitral tribunal took this conduct into account in its allocation of costs, and considered that ‘a very substantial part of the arbitration costs’ should be borne by the State-owned entity and the State, namely 75% of the arbitration costs and a further €4 million towards EDF’s legal costs and fees, plus interest. See Alison Ross, ‘EDF Defeats Claim by German Federal State’ (n 44).

investigations against them by a host State. For instance, the question arose before the tribunal in the *Rompetrol* case whether the claimants had initiated arbitration in order to compel the Romanian government to terminate pending criminal investigations against managers of the Rompetrol group.<sup>46</sup>

More generally, a claimant's motivation for initiating arbitration may simply be to harass and exert pressure on another party. For instance, shareholders at various levels of the corporate chain might initiate multiple arbitrations in respect of the same dispute to exert maximum pressure on the host State and to exhaust its resources.

### III. TOOLS FOR REDRESSING ABUSE OF PROCESS IN INTERNATIONAL ARBITRATION

Arbitrators have a number of classic tools at their disposal when faced with certain types of abuse of process described above. For instance, certain investment treaty tribunals have awarded full costs against a claimant who has engaged in improper conduct.<sup>47</sup> In situations where a party initiates multiple proceedings arising out of the same dispute, arbitrators can also apply their wide discretion when assessing what damages are recoverable. For instance, any decision on quantum rendered by a first tribunal could be taken into account in the assessment of damages by a second tribunal seized of the same dispute.

However, the new litigation strategies adopted by parties to international arbitrations cannot be fully addressed by these classic tools. The payment of the costs of an arbitral proceeding would not suffice to deter most parties, particularly claimant companies in investment treaty arbitrations, from engaging in abusive tactics. Likewise, any adjustment of a final award on quantum would at most prevent a party or related parties from recovering more than once for the same claim, which would only be possible if one tribunal seized of the dispute were to postpone any award on quantum until the other tribunal issues its award. In any event, an adjustment of quantum does nothing to address the improper multiplication of chances of success which claimants seek to secure when they initiated arbitration (more than one) in respect of the same claim.

More effective tools are required to redress the different abuses of process that have emerged in contemporary arbitral practice. Three of these possible tools are addressed below.

#### A. *Is lis pendens the answer?*

The doctrine of *lis pendens* has been proposed as a possible solution to the problem of abuse of process that results from the initiation of parallel proceedings concerning the same underlying dispute.<sup>48</sup> As applied by national courts, the *lis pendens* doctrine allows a court to suspend or stay its proceedings or defer to a

<sup>46</sup> *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3 [Franklin Berman (President), Marc Lalonde and Donald Francis Donovan]. The objections by Romania that the claims constituted an abuse of process were subsequently withdrawn during the pleadings stage.

<sup>47</sup> See eg *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) [Brigitte Stern (President), Andreas Bucher and Juan Fernandez-Armesto]; *Cementovnia* (n 26); *Europe Cement* (n 25).

<sup>48</sup> For a general discussion of the doctrine of *lis pendens* in international arbitration, see Campbell McLachlan, 'Lis Pendens in International Litigation' (2008) 336 *Recueil des Cours* 201; August Reinisch, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3 *L. Practice Intl Courts Tribunals* 37; Laurent Lévy and Elliot Geisinger, 'Applying the principle of litispence' (2001) 3 *Intl*

proceeding pending in another forum in order to avoid conflicting decisions on the merits, as well as to avoid the duplication of costs and the inefficiency of litigating before arbitral tribunals in two or more fora that are seized of the same dispute.<sup>49</sup>

In both common and civil law jurisdictions, the application of the doctrine of *lis pendens* assumes that each of the various fora that have been seized has legitimate jurisdiction over the same dispute.<sup>50</sup> For this reason, as a number of commentators have noted,<sup>51</sup> the doctrine of *lis pendens* is not readily applicable to the field of international arbitration, which rests on the premise that a valid arbitration agreement confers exclusive jurisdiction on the arbitral tribunal that has been constituted to hear disputes referred to it.

Furthermore, even if *lis pendens* could be applied to remedy the problem of parallel proceedings, this tool would be insufficient to preclude the types of abuse of process described above. For instance, where a party seeks to secure its preferred venue by submitting only a portion of its claims to a first tribunal and its remaining claims to a second tribunal, each tribunal would be seized of different disputes, such that the conditions for the application of *lis pendens* would not apply.<sup>52</sup>

The doctrine of *lis pendens* has also proven ineffective to redress the problem of parallel investment arbitrations initiated by claimants at different levels of the same chain of companies arising out of the same dispute.<sup>53</sup> The controversial decisions

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Arb L Rev; Pierre Mayer, 'Litispendance, connexité et chose jugée dans l'arbitrage international' in *Liber amicorum Claude Reymond* (Litec, Paris 2004) 195–203.

<sup>49</sup> See Filip De Ly and Audley Sheppard, 'ILA Final Report on *Lis Pendens* and Arbitration' (2009) 25 *Arb Intl* 3. Within Europe, the *lis pendens* principle is embodied in Article 27(1) of the Brussels Regulation (Brussels I Regulation 4/2001/EC), which provides: 'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall by its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.'

<sup>50</sup> For discussion of this requirement under English law, see Lord Collins of Mapesbury and others (eds), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet and Maxwell 2012); Adrian Briggs, *The Conflict of Laws* (1st edn, Oxford University Press 2004). Under French law, see Cass Civ 1, 6 December 2005, Bull 2005, I, n° 466; Cass Civ 1, 26 November 1974, Bull 1974, I, n° 312.

<sup>51</sup> Gary B Born, *International Commercial Arbitration* (Kluwer Law International 2014) 3791; Filip De Ly and Audley Sheppard (n 49); Elliot Geisinger and Laurent Lévy, 'Lis Alibi Pendens in International Commercial Arbitration', *Complex Arbitrations: Perspectives on their Procedural Implications*, Special Supplement—ICC Intl Court of Arb Bulletin (December 2003) 53; Campbell McLachlan (n 48) 342.

<sup>52</sup> Similarly, the doctrine of *lis pendens* offers no assistance in situations of concurrent proceedings where contractual parties have agreed to resolve disputes through arbitration, but where one party seizes a national court to resolve all or part of its claims. This is rather a question of the negative effect of the principle of competence-competence, which safeguards the priority given to arbitrators for the determination of their own jurisdiction without undue interference from the courts. In the 2001 decision *Fomento de Construcciones y Contratas SA v Colon Container Terminal SA*, the Swiss Federal Tribunal misapplied the *lis pendens* doctrine by setting aside an award by a Swiss arbitral tribunal based on a finding that the tribunal had no jurisdiction to decide a dispute that was already pending before the courts of Panama. The basis of the Federal Tribunal's decision was that the arbitral tribunal, by ruling on its own jurisdiction instead of staying its proceedings, had violated the jurisdictional rule contained in Article 9 of the previous version of the Swiss Private International Law Act (PILA). This decision paved the way for parties to bring proceedings in foreign courts prior to the initiation of arbitration in Switzerland, as a tactic to circumvent the arbitration process. The Swiss legislature ultimately remedied the uncertainty created by this decision in 2006, when it adopted a new paragraph to Article 186 of the PILA, which modified the first paragraph of Article 186 of the PILA and which provides that '[t]he arbitral tribunal shall decide on its own jurisdiction without regard to proceedings having the same object already pending between the same parties before another State court or arbitral tribunal, unless there are serious reasons to stay the proceedings'. See Emmanuel Gaillard and Yas Banifatemi, 'Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators' in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards—The New York Convention in Practice* (Cameron May 2008).

<sup>53</sup> Some commentators have argued that the doctrine of *lis pendens* could apply in the context of parallel investment treaty arbitrations, and that parallel treaty arbitration claims by a company and a shareholder relating to the same underlying facts could meet the requirements of identity of cause of action and parties. Campbell McLachlan QC, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration, Substantive Principles* (OUP 2008) paras 4.133–4.143; Campbell McLachlan (n 48) 430–32.

rendered in the parallel arbitrations brought by the US entrepreneur Ronald Lauder under the US–Czech Republic BIT, and Mr Lauder’s Dutch investment vehicle Central European Media (CME), provide an instructive example.<sup>54</sup> The *Lauder* tribunal, which delivered its decision before the *CME* tribunal, rejected the Czech Republic’s argument that *lis pendens* should prevent the parallel arbitrations from proceeding, holding that the requirements for the application of the *lis pendens* doctrine were not present. In particular, the tribunal considered that the causes for action in the two proceedings were different, because each claim had been brought under a separate investment treaty:

The Arbitral Tribunal considers that the Respondent’s recourse to the principle of *lis alibi pendens* to be of no use, since all the other court and arbitration proceedings involve different parties and different causes of action. . . . Therefore, no possibility exists that any other court or arbitral tribunal can render a decision similar to or inconsistent with the award which will be issued by this Arbitral Tribunal, i.e. that the Czech Republic breached or did not breach the Treaty, and is or is not liable for damages towards Mr. Lauder.<sup>55</sup>

### B. *The Duty to Concentrate a Dispute*

Another potential tool to redress abuse of process in international arbitration would be to require parties to raise all arguments or claims relating to the same dispute before the same arbitral tribunal. This duty has been imposed on litigating parties in civil and common law jurisdictions, albeit under different legal doctrines and to different degrees.<sup>56</sup>

French courts have debated extensively whether litigating parties should be required to raise all of their arguments or claims relating to the same dispute in a single proceeding.<sup>57</sup> In the 2006 decision in *Cesareo*, the French Court of Cassation dismissed an appeal by a claimant who brought a claim for the payment of a sum of money in two different proceedings. After its first claim founded on provisions of the French Rural Code was dismissed, the claimant brought a second claim against the same defendant based on principles of unjust enrichment.<sup>58</sup> The Agen Court of Appeal held that the second proceedings were inadmissible based on principles of *res judicata* codified at Article 1351 of the French Civil Code.<sup>59</sup> Appealing these findings to the Court of Cassation, the claimant argued that the condition for *res judicata* of identity of cause of action (*identité de cause*) was not

<sup>54</sup> *Ronald S Lauder v The Czech Republic*, UNCITRAL, Final Award (3 September 2001) [Robert Briner (President), Bohuslav Klein and Lloyd Cutler]; *CME Czech Republic BV v The Czech Republic*, Partial Award (13 September 2001) [Wolfgang Kühn (President), Jaroslav Hándl and Stephen Schwebel].

<sup>55</sup> *Lauder* (n 54) para 171. Similarly, the *CME* tribunal rejected the Czech Republic’s submission that the decision in *Lauder* amounted to *res judicata*, reasoning that the parties in the *Lauder* arbitration were different and that two arbitrations were based on different bilateral investment treaties. *CME* (n 54) para 355.

<sup>56</sup> For commentary on the case law of French and English courts, see Anne-Marie Lacoste, ‘The Duty to Raise all Arguments Related to the Same Facts in a Single Proceeding: Can We Avoid a Second Bite at the Cherry in International Arbitration?’ (2013) 1 *Les cahiers de l’arbitrage* 2.

<sup>57</sup> See Georges Wiederkehr, ‘Étendue de l’autorité de la chose jugée en matière civile: notion d’identité de cause’ (2007) *JCP G* No 17 33–36; Roger Perrot, ‘Chose jugée: sa relativité quant à la cause’ (2006) 10 *Procédures* 10.

<sup>58</sup> Cass Ass Plén, 7 juillet 2006, n° 04-10.672, *Cesareo*. In the first proceeding, the claimant had relied on provisions of the French Rural Code. In the second proceeding, the claimant relied on principles of unjust enrichment.

<sup>59</sup> CA d’Agen, 29 avril 2003, n° 04-10.672; Cass Civ 2, 15 décembre 2005, n° 1958 F-D; French Civil Code, Article 1351: « L’autorité de la chose jugée n’a lieu qu’à l’égard de ce qui a fait l’objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formées par elles et contre elles en la même qualité. » (‘*Res judicata* takes place only with respect to what was the subject matter of a judgment. It is necessary that the thing claimed be the same; that the claim be based on the same grounds; that the claim be between the same parties and brought by them and against them in the same capacity.’)

met on the facts of the case because the first and second claims were based on different legal grounds. Rejecting the appeal, the Court of Cassation held that it was incumbent on the claimant to present in the first set of proceedings all possible submissions that it considered appropriate to justify its claim. Imposing on the litigating parties the duty to concentrate grounds (*l'obligation de concentrer les moyens*),<sup>60</sup> the Court of Cassation held that the *res judicata* effect of a decision would extend not only to grounds that a party actually raised in a first set of proceedings, but also to grounds that it could have raised but did not.

Following the decision in *Cesareo*, French courts considered whether a more extensive duty, the duty to concentrate claims (*l'obligation de concentrer des demandes*), should require litigating parties to raise all of their pending claims (and not simply the grounds underlying a single claim) against an opponent in a single proceeding. This was the conclusion of the Court of Cassation in the 2008 *Prodim* case,<sup>61</sup> in which a franchiser initiated a first arbitration against its franchisee, alleging wrongful termination of the parties' supply and franchise contracts. In the first arbitration, the tribunal declared the franchisee responsible for the termination of the contracts. The franchiser then brought a second arbitration and sought damages for the franchisee's violation of the non-affiliation clause in the contract, which the franchiser had not claimed in the first arbitration. The decision of the Versailles Court of Appeal that the franchiser was entitled to seek damages in a second action<sup>62</sup> was quashed by the Court of Cassation, which held that it is incumbent on a litigant to raise all of its claims against an opponent in a single proceeding, with the result that the franchiser could not seek additional compensation against the franchiser in a second action.<sup>63</sup>

While the *Cesareo* decision indicated that litigating parties in France would be required to concentrate all grounds underlying the same claim and even all claims relating to the same factual background in a single proceeding, French courts have shied away from imposing such a duty in subsequent cases. In the 2011 *Somercor* decision, for instance, the Paris Court of Appeal held that the principle of the duty to concentrate grounds should not apply to international proceedings.<sup>64</sup> Other decisions of the French courts following *Prodim* similarly refused to impose the duty to concentrate claims on litigating parties.<sup>65</sup>

In contrast to the position taken by courts in France, other continental legal systems have squarely adopted the rule that a party has the duty to raise all of its arguments or claims relating to the same dispute in a single proceeding. In Spain, for instance, this rule is codified at Article 400(1) of the Code of Civil Procedure, which provides:

<sup>60</sup> As stated by the Court of Cassation, « il incombe au demandeur de présenter dès l'instance relative à la première demande l'ensemble des moyens qu'il estime de nature à fonder celle-ci. » ('It is incumbent on the claimant to submit in the first instance all of the relevant materials, which it deems appropriate in order to establish its case.')

<sup>61</sup> Cass 1<sup>ère</sup> civ, 28 mai 2008, n° 07-13.266, *Prodim*.

<sup>62</sup> CA Versailles, 30 janvier 2007, no 05/354.

<sup>63</sup> As stated by the Court of Cassation, « il incombe au demandeur de présenter dans la même instance toutes les demandes fondées sur la même cause et il ne peut invoquer dans une instance postérieure un fondement juridique qu'il s'est abstenu de soulever en temps utile. » ('It is incumbent on the claimant to submit in the same instance all the claims based on the same cause of action and he cannot invoke in a later instance any legal basis that he failed to raise in good time.')

<sup>64</sup> CA Paris, 5 mai 2011, n° 10/05314, *Somercor*.

<sup>65</sup> See Cass 1<sup>ère</sup> civ, 1<sup>er</sup> juillet 2010, n° 09-10.364 ; Cass 2<sup>ème</sup> civ, 23 septembre 2010, n° 09-69.730; Cass 2<sup>ème</sup> civ, 16 mai 2012, n° 11-16.973.

Where the claims advanced in the application can be based on different facts, different grounds or different legal arguments, they must be advanced in the application when they are known or can be advanced at the time at which the application is lodged. It is not permissible to defer claims to later proceedings.<sup>66</sup>

The common law has also proven to be more daring than French law in this respect, and has developed far-reaching and flexible tools to preclude certain types of abuses of process. Over the past decades, English courts have developed a flexible and discretionary rule based on the nineteenth century decision *Henderson v Henderson*.<sup>67</sup> While initially expressed as an application of the principle of *res judicata*,<sup>68</sup> in subsequent cases English courts have characterized the *Henderson* rule as a rule of abuse of process that precludes parties from raising matters in a subsequent proceeding that they could and should have raised in earlier proceedings, but did not.<sup>69</sup> Unlike the application by French courts of the principles of the duty to concentrate grounds and the duty to concentrate claims, English courts have applied the *Henderson* rule flexibly without regard to the rigid rules of the triple identity test.<sup>70</sup> More than a century after the *Henderson* case was rendered, Lord Bingham explained the rule in the landmark case *Johnson v Gore-Wood No. 1*:

... the abuse in question need not involve the reopening of a matter already decided in proceedings between the same parties, as where a party is estopped in law from seeking to re-litigate a cause of action or issue already decided in earlier proceedings. ... The bringing of the claim or raising of the defence in later proceedings may, without more, amount to an abuse if the court is satisfied (the onus being on the party raising the abuse) that the claim or defence should have been raised in earlier proceedings if it was to be raised at all.<sup>71</sup>

Despite the notorious reluctance of English law jurists to embrace broad legal concepts, such as good faith, known in continental legal systems, the *Henderson* rule allows a judge to exercise his or her discretion and to take the entire context of the action into account when deciding whether a party could and should have raised a matter or claim in a previous proceeding, and whether the party should subsequently be barred from bringing the matter or claim in the subsequent one.

Given the duty of arbitrators to ensure that the conditions for their jurisdiction are met, it is unclear whether they would be prepared to apply the *Henderson* rule in a systematic way to preclude a party from raising a matter that could and should have been submitted to an arbitral tribunal that was previously constituted

<sup>66</sup> Article 400(1) of the Spanish Code of Civil Procedure.

<sup>67</sup> *Henderson v Henderson* (1843) 3 Hare 100.

<sup>68</sup> In *Henderson v Henderson*, Sir Wigram VC expressed the rule as follows: '[W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time', *ibid* para 115.

<sup>69</sup> For a recent critical account of the judicial roots of the *Henderson* rule and its application by English courts see *Virgin Atlantic Airways Limited (Respondent) v Zodiac Seats UK Limited* [2013] UKSC 46.

<sup>70</sup> *Ya Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581; *Brisbane City Council and Myer Shopping Centres Pty Ltd v Attorney-General for Queensland William Percival Boon* [1978] 3 WLR 299. But see *Virgin Atlantic* (n 69).

<sup>71</sup> *Johnson v Gore-Wood No 1* [2002] 2 AC 1 (HL) 31 paras B, D.

to hear the same dispute.<sup>72</sup> As one commentator has noted, in the context of arbitration ‘there is a logical difficulty in treating the absence of any decision or any reasons in the first award as a ground for precluding a new argument in subsequent proceedings’.<sup>73</sup>

In a recent unpublished ICC case, however, an arbitral tribunal seated in Singapore applied the *Henderson* doctrine to preclude the claimant State from seeking an order that the respondent should refrain from enforcing or attempting to enforce an award rendered in 2009 against that State in a separate investment treaty arbitration.<sup>74</sup> In 2008, the State had initiated a first ICC arbitration requesting that the respondent be ordered to irrevocably withdraw its claims in the investment treaty arbitration, which was still pending at the time. The arbitral tribunal in the second ICC arbitration noted that once the BIT award had been rendered, the State had twice amended its prayer for relief in the first ICC arbitration, including by requesting an order of moral damages for the respondent’s alleged bad faith. In the second ICC tribunal’s view, the respondent could have brought a prayer for non-enforcement of the award in the first ICC arbitration, but did not. The tribunal held the State’s claims had ‘reach[ed] the point in which repeated litigation is unduly repressing to the [r]espondent’ and that it ‘should be barred from bringing its claims’. One would hope that in future cases, arbitral tribunals will continue to assess their jurisdiction in the context of the overall circumstances of the parties’ dispute and will increasingly apply the *Henderson* doctrine to preclude claimants from bringing claims that they could and should have raised in earlier proceedings.

### C. Abuse of Rights and Abuse of Process

While the principle of *lis pendens* and the duty to concentrate a dispute have an uncertain application in the realm of international arbitration, the prohibition of abuse of rights and abuse of process provides a more promising avenue to redress the litigation strategies discussed above.

Broadly speaking, the doctrine of abuse of rights is founded upon the notion that a party may have a valid right, including a procedural right, and yet exercise it in an abnormal, excessive or abusive way, with the sole purpose of causing injury to another or for the purpose of evading a rule of law, so as to forfeit its entitlement to rely upon it.<sup>75</sup> The theory of abuse of rights has its origins in private law and is recognized in the great majority of national legal systems. In France, a general theory of abuse of rights was developed by legal theorists<sup>76</sup> and came to be applied by the French courts as early as the mid-nineteenth

<sup>72</sup> In one recent case, an English High Court considered in obiter dictum that ‘in proper cases, an arbitral tribunal could apply the principle in [*Henderson*] or an analogous one to dispose of a case before it’. *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), para 40.

<sup>73</sup> VV Veeder, ‘Issue Estoppel, Reasons for Awards and Transnational Arbitration’ in *Complex Arbitrations* (ICC Pub No 688E, 2003) 73.

<sup>74</sup> *Country X v XYZ, Court Appointed Insolvency Administrator Regarding the Assets of ABC (In Liquidation)* (ICC Case no unpublished).

<sup>75</sup> For a general account of the principle of abuse of right, see Michael Byers, ‘Abuse of Rights: An Old Principle, A New Age’ (2002) 47 McGill LJ 389.

<sup>76</sup> The main proponent of abuse of rights in French legal theory was Louis Josserand. See Louis Josserand, *De l’esprit des droits et de leur relativité : Théorie dite de l’abus des droits* (Dalloz 1927); Georges Ripert, ‘Abus ou relativité des droits—A propos de l’ouvrage de M. Josserand’ (1929) Rev Crit 33; Louis Josserand, ‘A propos de la relativité des droits—Réponse à l’article de M. Ripert’ (1929) Rev Crit 277; Georges Ripert, *La règle morale dans les obligations civiles* (1926).

century.<sup>77</sup> The principle of abuse of rights is also enshrined in several provisions of the French Code of Civil Procedure.<sup>78</sup> Other civil law jurisdictions recognize a general theory of abuse of right, including Switzerland,<sup>79</sup> Germany,<sup>80</sup> Austria,<sup>81</sup> Italy,<sup>82</sup> Spain,<sup>83</sup> The Netherlands,<sup>84</sup> Québec<sup>85</sup> and Louisiana in the United States.<sup>86</sup>

While common law systems do not recognize any general principle of abuse of right, English courts have long upheld their inherent jurisdiction to sanction a party's exercise of its procedural rights in an abusive manner. For instance, in *Hunter v Chief Constable of the West Midlands Police*, Lord Diplock elaborated on:

[the] inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.<sup>87</sup>

Certain torts developed by English courts, particularly that of malicious process, also impose liability on a party who exercises a procedural right in an unreasonable or excessive manner. While the tort of malicious process has been applied in only a small number of English cases,<sup>88</sup> it is widely applied by courts in the USA to sanction various forms of procedural misconduct.<sup>89</sup>

The principle of abuse of rights also forms part of public international law,<sup>90</sup> and occurs where 'a State avails itself of its right in an arbitrary manner in such a

<sup>77</sup> See eg CA Colmar, 2 mai 1855; CA Chambéry, 21 juillet 1914; Cass 19 décembre 1817; Cass 3 août 1915.

<sup>78</sup> French law recognizes that a party may be liable for abusing its procedural rights (art 32.1 of the French Code of Civil Procedure provides « *Celui qui agit en justice de manière dilatoire ou abusive peut être condamné à une amende civile d'un maximum de 3 000 euros, sans préjudice des dommages-intérêts qui seraient réclamés.* » ('He who acts in justice in a dilatory or abusive manner may be condemned to a civil fine of €15 to €1,500, in addition to the reparation of damages that would be claimed.'). The French Code of Civil Procedure also includes several specific provisions providing for damages where a claimant engages in dilatory tactics: see eg arts 118, 123, 550, 559 and 560.

<sup>79</sup> Swiss Civil Code, art 2.

<sup>80</sup> German Civil Code, art 226.

<sup>81</sup> Austrian Civil Code, art 1295(2).

<sup>82</sup> Italian Civil Code, art 833.

<sup>83</sup> Spanish Civil Code, art 7.

<sup>84</sup> Dutch Civil Code, Property Law, art 13(2).

<sup>85</sup> Civil Code of Québec, art 7.

<sup>86</sup> *Morse v J Ray Mc Dermott & Co* (1976) 344 So.2d 1353 at 1369; *Hero Lands Co v Texaco, Inc* (1975) 310 So.2d 93 at 99.

<sup>87</sup> *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536. The inherent power of an English court to strike out cases that amount to an abuse of its process is expressly stated in Rule 3.4 of the English Civil Procedure Rules. CPR 3.4(2)(b) provides that '[t]he court may strike out a statement of case if it appears to the court ... that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings'.

<sup>88</sup> *Granger v Hill* (1838) 4 Bing NC 212; *Metall Und Rohstoff AG v Donaldson Lufkin & Jenrette Inc & Aml Holdings Inc* [1989] 3 WLR 563. Some authors have argued that the notion of abuse of rights is the basis on which the law of tort developed. According to Hersch Lauterpacht: 'The law of torts as crystallized in various legal systems of law in judicial decisions or legislative enactment is to a large extent a list of wrongs arising out of what society considers to be an abuse of rights.' Sir Hersch Lauterpacht, *The Function of Law in the International Community* (OUP 2011) 303. Michael A Jones and others (eds), *Clerk & Lindsell on Torts* (Sweet & Maxwell 2010) 16–62.

<sup>89</sup> See Restatement (Second) of Torts, s 382 (1965).

<sup>90</sup> See eg Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (CUP 1993) 129, who considers the principle of abuse of rights to be an application of good faith, which is a general principle of law under Article 38(1)(c) of the Statute of the International Court of Justice. Others commentators, notably Hersch Lauterpacht, have argued for a broad interpretation of abuse of rights whose application depends on the circumstances of each case, rather than a rigid legal standard. Sir Hersch Lauterpacht QC, *The Development of International Law by the International Court* (CUP 1982) 162

way as to inflict upon another State an injury which cannot be justified by legitimate considerations of its own advantage'.<sup>91</sup> The notion of abuse of process is considered an application of the abuse of rights principle, and 'consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established'.<sup>92</sup> These principles have frequently been recognized by the International Court of Justice (ICJ).<sup>93</sup>

Being principles common to many national legal systems and recognized under public international law, the prohibitions of abuse of rights and abuse of process may be recognized as general principles of law that may be applied by an arbitral tribunal, irrespective of the seat of the arbitration or the applicable law. Because abuse of rights looks beyond the literal application of the black letter law, it is perfectly suited to tackle circumstances in which parties to international arbitrations engage in tactics that do not violate any hard and fast rules, but which are nevertheless objectionable in the particular circumstances of the case.

In a number of reported cases, investment treaty tribunals have relied on principles of abuse of rights and abuse of process to sanction situations in which claimant investors have exercised their procedural rights in a manner that undermines the arbitral process.<sup>94</sup>

The decision in *Phoenix Action v Czech Republic* was the first award in which an investment treaty tribunal dismissed an entire claim based on a finding that the claimant had committed an abuse of right.<sup>95</sup> In that case, a former Czech national, Mr Beno, created the claimant company Phoenix Action in 2002 under Israeli law and caused it to acquire an interest in two Czech companies, which were ultimately owned by members of his family and which were involved in ongoing disputes in the Czech Republic. Two months after the acquisition, Phoenix Action initiated ICSID arbitration pursuant to the Israel–Czech Republic BIT. One of the companies was subsequently sold back to its original owner for the same price paid by Mr. Beno in 2002. The Czech Republic objected to the tribunal's jurisdiction on the ground that Phoenix Action had not made any 'investment' within the meaning of Article 25(1) of the ICSID Convention or Articles 1 and 7 of the Israel–Czech Republic BIT,<sup>96</sup> and raised a further, alternative objection that the case should be dismissed as Phoenix Action had committed an 'abuse of the corporate structure'.<sup>97</sup>

The *Phoenix* tribunal considered the main issue pertaining to its jurisdiction to be whether the dispute was connected with any investment.<sup>98</sup> After reviewing the criteria for an investment under Article 25(1) of the ICSID Convention set out in *Salini v Morocco*, the tribunal supplemented the test with the further requirement that 'only investments that are made in compliance with the international principle of good faith and do not attempt to abuse the system [should be]

<sup>91</sup> Sir Robert Jennings QC and Sir Arthur Watts KCMG QC (eds), *Oppenheim's International Law* (9th edn, OUP 2009) 407.

<sup>92</sup> Robert Kolb, 'General Principles of Procedural Law' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice, A Commentary* (OUP 2006) 831, para 65.

<sup>93</sup> See eg *Fisheries Case (United Kingdom v Norway)* [1951] ICJ 3; *Case of Certain Norwegian Loans (France v Norway)* [1957] ICJ Rep 9; *Nottebohm Case (Liechtenstein v Guatemala)* [1955] ICJ 1; 12 *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7.

<sup>94</sup> For a recent review of this case law, see *Philip Morris* (n 18) paras 538 to 554.

<sup>95</sup> *Phoenix Action* (n 47).

<sup>96</sup> *ibid* para 38.

<sup>97</sup> *ibid* para 40.

<sup>98</sup> *ibid* para 73.

protected'.<sup>99</sup> According to the tribunal, the 'unique goal' of Phoenix Action's acquisition of the Czech companies 'was to transform a pre-existing domestic dispute into an international dispute' which was 'not a *bona fide* transaction and [could not] be a protected investment under the ICSID system'.<sup>100</sup>

The tribunal invoked the notion of abuse of rights to justify its conclusion that Phoenix Action's purchase of the companies was not an investment within the meaning of Article 25(1) of the ICSID Convention. According to the tribunal, the rearrangement of assets within the same family was 'aimed at creating a legal fiction in order to gain access to ICSID' and '[a]ll the elements analysed lead to the same conclusion of an abuse of right'. The tribunal continued:

If it were accepted that the Tribunal has jurisdiction to decide Phoenix's claim, then any *pre-existing* national dispute could be brought to an ICSID tribunal by a transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT. Such transfer from the domestic arena to the international scene would ipso facto constitute a 'protected investment' – and the jurisdiction of BIT and ICSID tribunals would be virtually unlimited.<sup>101</sup>

Whether the *Phoenix* tribunal was correct that Article 25(1) of the ICSID Convention includes a requirement that investments be made in good faith is beyond the scope of this discussion: it suffices to note here that this requirement does not seem to have been contemplated by the drafters of the ICSID Convention.<sup>102</sup> In light of its finding that Phoenix Action had not made a protected investment, the tribunal's reliance on the notion of abuse of process was not strictly necessary. However, the rearrangement of assets within the same family with the goal of gaining access to ICSID jurisdiction over an on-going domestic dispute would qualify as an abuse of process. As the *Phoenix* tribunal acknowledged, the doctrine of abuse of process would offer a powerful tool to preclude parties from engaging in these types of strategies.

The principle of abuse of process was also applied in the recent case of *Renée Rose Levy*.<sup>103</sup> In this case, a group of companies owned by the Levy family acquired shares in Gremcitel, a local company, which acquired rights to develop tourism and real estate projects on Peru's Pacific coast. Less than one month before the Peruvian government passed a resolution that allegedly frustrated the investment, the family transferred the majority interest in the company to Renée Rose Levy, the only French national in the family. Ms Levy and Gremcitel then initiated ICSID arbitration under the France–Peru BIT.

The tribunal held that Ms Levy's claim fulfilled the jurisdictional requirements under the ICSID Convention and the BIT because she had both the requisite nationality under the French–Peru BIT and had acquired her investment before the dispute had crystallized.<sup>104</sup> The tribunal nonetheless declined jurisdiction based on its separate finding that a 'striking proximity of events' exists between the transfer of shares in Gremcitel to Ms Levy and the issuing and publication of the

<sup>99</sup> *ibid* para 113.

<sup>100</sup> *ibid* para 142.

<sup>101</sup> *ibid* para 144 (emphasis added).

<sup>102</sup> See eg *Saba Fakes* (n 27).

<sup>103</sup> *Renée Rose Levy and Gremcitel SA v Republic of Peru*, ICSID Case No ARB/11/17, Award (9 January 2015) [Gabrielle Kaufmann-Kohler (President), Eduardo Zuleta and Raúl Vinuesa].

<sup>104</sup> *ibid* para 63.

resolution of the Peruvian government. Having reviewed the evidence, it found that ‘the Levys could foresee the 2007 Resolution as a very high probability when Ms Levy was inserted into Gremcitel’s ownership’ and accordingly, ‘the only reason for the sudden transfer of the majority of the shares in Gremcitel to Ms Levy was her nationality’.<sup>105</sup> Noting that the claimants could furnish no reasonable explanation for the timing of the share transfer, the tribunal concluded that ‘the corporate restructuring by which Ms. Levy became the main shareholder of Gremcitel . . . constitutes an abuse of process’ and declined jurisdiction on this basis.<sup>106</sup>

Technically speaking, the notion at play in the *Renée Rose Levy* case was *fraus legis* (*fraude à la loi*), a principle which makes unlawful any act designed to evade a law while in apparent conformity with its letter.<sup>107</sup> In France, the theory of *fraude à la loi* derives from the seminal case of the Court of Cassation, *Princesse de Bauffremont*,<sup>108</sup> where Princesse de Bauffremont acquired German nationality in order to obtain a divorce under German law, at a time when divorces were not permitted under French law. Neither the Princesse’s acquisition of German nationality, nor the transfer of assets to Ms Levy, were illegal *per se*. However, in both cases the claimants acquired their rights in order to obtain a benefit to which they should otherwise not have been entitled, in violation of the spirit of the law. The insertion of Ms Levy into the ownership structure of the family’s investment in Peru was done in contemplation of the dispute and thus qualifies as a *fraus legis*.<sup>109</sup>

The prohibition of abuse of rights and abuse of process is applicable outside the specific context of investment treaty arbitration. For instance, where a party seeks to secure its preferred venue by submitting only a portion of its claims to a first tribunal, and its remaining claims to a second tribunal, the second tribunal could refuse to hear the claims if it concludes that the party’s exercise of its rights had the sole purpose of evading the jurisdiction of the first tribunal, and would be manifestly unfair to the respondent to those claims. As we have seen, such a conclusion could not be reached through the literal application of existing substantive or procedural rules and, at least in the context of international arbitration, could not be remedied through the doctrine of *lis pendens* or by imposing on the parties a duty to concentrate their arguments or claims in a single proceeding. An arbitrator’s recourse to the abuse of process principle could similarly allow for the dismissal of claims initiated for purposes ulterior to the resolution of a genuine dispute, such as for media attention or in order to harass or exert pressure; something that results in the misuse of the arbitral procedure.

<sup>105</sup> Ms Levy also presented evidence to the Tribunal to prove that she had acquired shares in the company two years (instead of one month) before Peru had passed its resolution. The Tribunal held that these documents were ‘utterly misleading’: at the hearing, it was revealed that Ms Levy had asked a notary to backdate her notarization of a corporate resolution that she had fabricated for this purpose. This conduct amounts to pure fraud and need not be addressed using the notion of abuse of process; *ibid* para 194.

<sup>106</sup> *ibid* para 195.

<sup>107</sup> See José Vidal, *Essai d’une théorie générale de la fraude en droit français* (Thèse Toulouse 1957); B Audit, *La fraude à la loi* (Paris 1974); Pierre Mayer and Vincent Heuzé, *Droit international privé* (11th edn, LGDJ 2014) 191 ff.

<sup>108</sup> Cass Civ 18 mars 1978.

<sup>109</sup> The question arises in the context of investment treaty arbitration whether abuse of process should be addressed as an issue relating to the arbitral tribunal’s jurisdiction, or relating to the admissibility of the investor’s claims. The answer will vary depending on the case, and the specific rule whose spirit is alleged to have being violated.

#### IV. CONCLUSION

The panoply of new litigation tactics adopted by parties will continue to call for arbitral tribunals to apply and refine the doctrine of abuse of process in international arbitration. The continued application of the concept is a perfect illustration of how the law evolves in any given field. Where certain types of conduct generate a sense of unease, they are first addressed through the application of general principles such as 'abuse of rights' or 'good faith'. Over time, new legal rules will emerge that are specifically designed to tackle particular types of procedural conduct. One would expect the same development to take place in the field of international arbitration with respect to abuse of process.

In the meantime, the least one could say is that arbitrators should not take parties' allegations at face value and should look beyond the literal application of the law to consider the entire context of a party's conduct. In other words, arbitral naiveté is not in order in contemporary arbitral practice.