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An Introduction to Parallel Arbitration and Solutions to Overcome It

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The ultimate objective of arbitration is realized only when the process is able to finally resolve the dispute between the parties. Thus, the conclusion of the arbitration proceedings must necessarily signify the end of the conflict between the litigants. If, at the time a dispute is under consideration, a similar or identical claim is being reviewed before another arbitral tribunal, or if the possibility of initiating such a claim before another forum exists, arbitration fails to achieve its purpose and mission. Consequently, it must be emphasized that conflict in the enforcement of arbitral awards may not only eliminate the advantages of amicable dispute resolution but may also lead to further complexities in the adjudication and settlement process. In this study, using a descriptive–analytical approach, a comparative analysis was conducted on the issue through the examination of international instruments such as the New York Convention, other international conventions, domestic legal regulations of certain jurisdictions, as well as managerial approaches to the matter. Additionally, cases concerning parallel proceedings in the field of investment arbitration were analyzed.

Keywords: *dispute, international trade, parallel proceedings, arbitration*

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1. Introduction

From the perspective of international investment arbitration, which involves disputes between states and foreign investors, the issue of parallel proceedings is of great importance. This is because parallel proceedings contradict the principle of legal certainty and undermine the credibility of investment arbitration as a form of dispute settlement (Cremades & Madalena, 2008; Rivkin, 2005). The discussion of parallel arbitration proceedings is one of the most intricate and complex topics in international arbitration (Gaillard & Pinsolle, 2010). Addressing this issue requires answering three unavoidable and fundamental questions. First, one may ask whether the existing laws and mechanisms are sufficient and effective in managing this problem (Greenberg et al., 2011). Ultimately, if the answer to this question is negative, then the question arises of how these laws and tools can be improved and their efficiency enhanced. Before addressing these questions, however, it is necessary to clarify why such questions arise in the first place. According to the prevailing approach, parallel arbitration is undesirable for three reasons: the risk of contradictory or inconsistent awards, the waste of resources due to duplication of proceedings, and the potential risk of conflicts between judgments (Janeþková, 2017; Orrego-Vicuna, 2005).

2. Existing Laws and Mechanisms in International Arbitration for Addressing Parallel Claims

At the outset, it is necessary to refer to Article II(3) of the New York Convention. According to this provision, a

court before which a dispute is brought in violation of a valid arbitration agreement must decline jurisdiction unless the arbitration agreement is null, inoperative, or incapable of being performed (Council of International Law, 2004; Dels, 2004). This rule represents a fundamental principle, without which the international arbitration system could not have developed over the past five decades (Darayi, 2006). Second, reference should be made to the doctrine of competence–competence, as provided in several national arbitration laws, which serves as the foundation of Article II(3). Under this doctrine, arbitrators possess the authority and competence to decide on the scope of their own jurisdiction (Schreuer, 2001). Accordingly, arbitrators are entitled to continue their work even in the presence of parallel judicial proceedings, which is known as the positive effect of the competence–competence doctrine (P. Forsten, 2015). In certain jurisdictions—France being the most prominent example—this doctrine also has negative effects. Unlike the positive effect, under the negative effect, it is the courts, rather than arbitrators, that are constrained: courts are prohibited from ruling on the jurisdiction of an arbitral tribunal before arbitrators themselves have made a decision on the matter (Pendens, 2009).

In addition to the legal provisions and doctrines mentioned above, the issuance of anti-suit injunctions must also be noted. An anti-suit injunction is a common law procedural tool that can be used in cases of parallel judicial proceedings (Dugan et al., 2008). Traditionally, the issuance of such injunctions has not been part of civil law proceedings, yet they have been applied in cases of parallel litigation by invoking the doctrine of lis pendens, which is based on the principle of the first-seized court (Ampal-American Israel et al., 2016; Janeþková, 2017). Anti-suit injunctions can be issued by courts either in support of or against arbitration, and arbitral tribunals may also issue them against claims brought before ordinary courts (Cremades & Lew, 2005). Such orders can serve as powerful tools either in favor of or against arbitration. It is noteworthy that, as a last resort, these injunctions can be employed to suspend or annul arbitral or judicial awards rendered through undesirable parallel proceedings. Although the non-enforcement of conflicting awards does not prevent duplication of efforts and wastage of resources, it at least mitigates some of the consequences resulting from contradictory decisions.

3. Effectiveness of Existing Tools and Laws

There are laws and mechanisms intended to mitigate the harmful consequences of parallel proceedings. This brings us to the second question: how do these tools actually function? It is evident that these tools are not sufficient to prevent parallel proceedings in the manner in which we observe them today—but why? Article II(3) of the New York Convention was considered a remarkable and progressive provision at the time of its adoption in 1958. Over time, and despite this, the provision has retained its value. Nevertheless, Article II(3) is not capable of fully addressing the issue of parallel proceedings because it fails to establish the necessary coordination between arbitral procedures and ordinary court proceedings (Council of International Law, 2004; Darayi, 2006). As a general rule, which forum should prevail over the other? Which law should be applied in answering such questions? Similar issues also arise when considering the positive effect of the competence–competence principle, which essentially reflects the perspective of the arbitrator rather than the court. Such perspectives, however, lack the necessary coherence (Dark, 2000).

With regard to the negative effect of competence–competence, the difficulties differ in nature. The absolute priority accorded to arbitrators—even in the absence of a constituted tribunal—imposes significant costs. A party that has never consented to arbitration must wait for the arbitral tribunal's decision and then challenge that decision before the court at the seat of arbitration before it can bring its claim before a competent judicial forum (Schreuer, 2001).

As to anti-suit injunctions and anti-arbitration injunctions, it must be noted that although such orders have strong foundations in certain jurisdictions, they have consistently been subject to criticism due to their infringement of public international law and the fundamental principles of international arbitration (Cremades & Madalena, 2008).

- When an order challenges the proceedings of a foreign court, it infringes upon the sovereignty of foreign states to determine the jurisdiction of their own courts.

- When an order questions arbitral proceedings, it disrespects the competence of arbitrators to determine their own jurisdiction, as well as the supervisory authority of courts in their arbitral capacity.

The problem with anti-suit and anti-arbitration injunctions lies in their one-sided logical foundation. Some have even referred to them as a form of "unilateral adjudication," whereas coordination is required in such contexts. It is evident that some courts, recognizing such challenges, have attempted to adopt appropriate approaches, and the increasing number of courts in the United States and elsewhere that have taken more cautious and conservative stances confirms this trend (Dador, 2020).

One notable case that illustrates the inherent difficulties of anti-suit injunctions is the decision of the European Court of Justice in *Turner*. The Court ruled that a court of one EU member state cannot compel a party to pursue its claim in the courts of another member state. The main rationale is that EU member states are bound by the Brussels Convention on jurisdiction and the enforcement of judgments, which is grounded in mutual trust and equality among the courts of all contracting states. Although the reasoning was entirely judicial in origin, it is equally applicable to arbitration and the New York Convention. Despite some differences, the principle remains the same. Just as Brussels Convention states are bound by uniform rules, so too are New York Convention contracting states, particularly in reference to Article II(3) (Pendens, 2009).

4. Improving and Reforming Parallel Proceedings

Despite the usefulness and growing acceptance of judicial restraint and conservatism to build a coherent regime aimed at eliminating parallel proceedings, such measures are not sufficient. This brings us to the third and final question: what can be done to reform the current unilateral logic governing parallel proceedings? After fifty years since the drafting of the key reference text of international arbitration, is it not time to consider a multilateral solution?

Some may object, insisting that the New York Convention should remain in its current form. However, revising the Convention does not necessarily mean annulling or invalidating it. If the New York Convention is to remain intact, rules addressing parallel proceedings could be included in a separate protocol. Critics may argue that drafting enforceable rules on parallel proceedings is an extremely challenging task. While true, this objection is not decisive, as numerous resources exist that can provide meaningful guidance on the issue. For instance, scholarly debates, concrete proposals, and specific guidelines can be referenced. The 2006 International Law Association Report on *lis pendens* with its valuable recommendations, as well as the 2006 Hague Convention on the Choice of Court Agreements, are useful examples. Exclusive clauses on choice of court may be analogized to arbitration agreements: in both cases, only one forum is designated—either a court or an arbitral tribunal (Cremades & Lew, 2005).

Subsequently, one may ask what the content of parallel proceedings rules should be. This is a time-consuming question. Perhaps it may simply be stated that an effective law would prioritize arbitral awards, thereby limiting the potential delays caused by ordinary court interventions (Dimsey, 2008).

5. Causes of Parallel Arbitral Proceedings

Parallel proceedings arise when two or more claims, contractual agreements, or disputes involving the same or overlapping parties are simultaneously pursued before more than one forum (Gaillard & Pinsolle, 2010). They may occur due to multiple claimants, multiple legal bases for a single claim, or the existence of multiple dispute resolution forums (D. Forsten, 2015). Such proceedings are often unavoidable in projects where numerous interrelated contracts are awarded to subcontractors, and are exacerbated when parties cannot join a third party to the arbitration. Although challenges of parallel or multiple proceedings can occur in every industry, they are especially prevalent in sectors characterized by multi-party and multi-contract transactions, particularly in complex construction projects, joint venture agreements, and even more so in the energy industry (Rivkin, 2005).

In such projects, it is not uncommon for different constellations of stakeholders to initiate multiple claims involving identical or similar facts, issues, and laws under different contracts or treaties related to the same project. For example, parallel proceedings may result from disputes between a project owner and several contractors and subcontractors linked by a chain of

contracts containing divergent dispute resolution clauses. While the facts, issues, and laws giving rise to the disputes may be identical, the dispute resolution procedures differ, which prevents consolidation before a single forum (Dels, 2004).

Parallel proceedings also arise when an international investor brings a claim against a state under a commercial agreement, such as concession or exploration contracts. A classic example is the *SGS v. Pakistan* case, where an ICSID tribunal faced two arbitrations between the same parties: one under a commercial arbitration clause in Pakistan, and another under the Switzerland–Pakistan bilateral investment treaty at ICSID. The tribunal was asked, among other things, to determine whether suspending one arbitration could mitigate the challenges associated with parallel arbitration (Dugan et al., 2008).

Finally, parallel arbitrations may arise when multiple international investors of different nationalities directly or indirectly participate in a foreign investment, or when different investors make separate investments in the same sector, all of which are affected by measures of the host state. In such cases, each investor may initiate separate proceedings and seek protection under the applicable bilateral investment treaty (Ampal-American Israel et al., 2016; Orrego-Vicuna, 2005).

6. Challenges Related to Parallel Arbitration Proceedings

With the growing number of parties involved in complex projects and the globalization of investment, the number of disputes with overlapping factual and legal elements is on the rise (Greenberg et al., 2011). In certain specific cases, the consolidation of parallel proceedings into a single arbitration is possible. However, consolidation generally requires the consent of all parties to the related arbitrations, which in large multi-party, multi-contract investment projects is highly challenging. The failure to secure the consent of all parties leads to the impossibility of consolidating parallel proceedings (Darayi, 2006).

The most complex examples of parallel proceedings are found in commercial arbitration concerning energy-sector projects. In such projects, owners often enter into multiple contracts with contractors, who themselves enter into subcontracts with subcontractors. Each of these contracts in the chain may contain different arbitration clauses, or in some cases, none at all. Where arbitration clauses are inconsistent across the contractual chain, different laws, courts, languages, and arbitral seats may apply. In other words, party consent to arbitration may be based on entirely different arbitral frameworks. In contracts linked to the same project, parties may not agree to arbitration at all, preferring domestic litigation. Even when technical consolidation of parallel proceedings is feasible, the absence of unanimous consent renders consolidation difficult or impossible (Cremades & Lew, 2005).

As a result, the prospect of consolidating parallel arbitration proceedings is not particularly promising. When consolidation efforts fail—or when no such attempts are made—parties and their counsel must mitigate the challenges of parallel proceedings involving overlapping facts, legal arguments, and applicable laws. The risks of parallel proceedings are numerous. First, as in *CMS v. Czech Republic* and *Lauder v. Czech Republic*, parallel arbitrations may result in contradictory factual or legal findings, leading to divergent responsibilities and damages assigned to the parties (Dugan et al., 2008). The contentious nature of these circumstances is self-evident. For example, two arbitral tribunals might interpret identical contractual provisions differently, leading to inconsistent outcomes in an ongoing project. Similarly, one tribunal may award damages to a party, while another tribunal in a related case denies any compensation. In such circumstances, it becomes unclear which award should prevail (Rivkin, 2005).

Second, parallel proceedings require that parties—or at least those engaged in multiple disputes—expend substantial time and resources in different forums. While this may not initially appear significant, the reality is that parties involved in interrelated, multi-claim disputes often devote considerable financial and human resources, especially in construction projects characterized by voluminous documentation and technical complexity (Gaillard & Pinsolle, 2010).

Third, inconsistent findings on damages in parallel proceedings raise the risk of windfall gains and double (or even triple) compensation. For instance, imagine that an owner contracts with a main contractor to build a project, and the contractor in turn subcontracts part of the work. If the owner delays the project, the subcontractor may initiate arbitration against the contractor for damages, and the contractor may, in turn, arbitrate against the owner for the same damages

claimed by the subcontractor. The result could be that the main contractor recovers compensation from the owner for delays, while the subcontractor fails in its claim against the contractor, creating a windfall for the contractor (Cremades & Madalena, 2008).

Likewise, consider a situation where an owner purchases equipment under a contract containing an ICC arbitration clause and separately hires a contractor to install the equipment under a contract with an LCIA arbitration clause. If a fire destroys the facility shortly after installation, the owner may commence one arbitration under the ICC clause, alleging defective equipment, and another under the LCIA clause, alleging improper installation. In both cases, the owner seeks reconstruction costs and lost profits. Conflicting findings regarding the cause of the fire may lead to overlapping or double recovery. This risk is exacerbated by the confidentiality of most commercial arbitration proceedings, which prevents tribunals in one case from being aware of the findings, applicable law, or damages determined in another case. Accordingly, tribunals often exercise caution to avoid double recovery by reducing the damages awarded, anticipating possible overlap with another tribunal's award (Orrego-Vicuna, 2005).

7. Post-Award Solutions

7.1. Jurisdiction and Admissibility: The Legal Basis of Distinction and Its Role in Combating Parallel Proceedings

The distinction between jurisdiction and admissibility is straightforward. Jurisdiction refers to the authority of a tribunal or judge to hear a claim or application, while admissibility concerns the tribunal's power to decide a case at a particular time, considering any temporary or permanent defects in the claim. Thus, whereas jurisdiction relates to the capacity to adjudicate a dispute, admissibility concerns the tribunal's discretion to decline exercising jurisdiction despite having it (Janeþková, 2017).

International tribunals, therefore, are not only authorized to decide a case but also to decide not to decide. It should be noted that, in investment arbitration, the distinction between jurisdiction and admissibility is sometimes ignored because it lacks an explicit legal basis. In other instances, tribunals conflate the two concepts. These criticisms are unpersuasive, however, as numerous legal sources, tribunals, and scholars confirm that the two are as distinct as night and day (Pendens, 2009).

The admissibility stage serves as a tool to prevent parallel arbitration and to select the most appropriate forum, whereas the issue of jurisdiction concerns the authority of each tribunal and the structure of the international adjudicatory system. At this stage, arbitrators, by exercising their inherent powers, may reject claims whose continuation would contravene justice, thereby protecting both their judicial function and the legitimacy of investment arbitration as a whole (P. Forsten, 2015). This means that when arbitrators, at the admissibility stage, determine that continuing parallel proceedings would undermine justice and weaken the arbitral system—contrary to the principles of judicial economy and general principles of international law—they must invoke their inherent powers to prevent such proceedings from going forward (Dimsey, 2008).

7.2. The Application of General Principles of International Law in Investment Arbitration

The application of general principles of international law in investment arbitration, now unanimously recognized, has long been the subject of intense debate (Akhlaghi & Imam, 2020). Accordingly, we briefly turn to the issue of applicable law in international investment arbitration.

When determining the applicable law, the first task of an arbitral tribunal is to confirm whether the parties have made a choice in this respect. Indeed, party autonomy is always the primary source of regulation in arbitration, as expressly recognized in several arbitral laws. For instance, Article 42(1) of the ICSID Convention provides that the tribunal shall decide disputes "in accordance with such rules of law as may be agreed by the parties" (Schreuer, 2001). In recent years, and pursuant to modern investment contracts, the choice of applicable law is made in most—but not all—cases. Such a choice typically refers to a bilateral investment treaty (BIT) or an investment contract between the state and the investor. When BITs specify applicable law, they usually reference the treaty itself, public international law, and sometimes the host state's law. Very few BITs exclude reference to international law, and it is rare to find a BIT that refers solely to the domestic law of the host state. Investment contracts present a different scenario: they

usually refer to the host state's law, though certain contracts explicitly designate international law as the governing law (Dador, 2020).

Where the parties agree on a law other than international law, may arbitrators nevertheless apply principles of international law they deem necessary for resolving the dispute? It must first be noted that international law often permeates domestic legal systems in various ways, becoming part of the internal legal order chosen by the parties, and thus can be applied by ICSID tribunals. Even if international law cannot be applied directly or indirectly, modern practice acknowledges that investment arbitrators have the freedom to invoke general principles of international law that they consider essential to resolve disputes (Dimsey, 2008).

In situations where the parties have not made an express choice of law, which is not uncommon in investment treaties, the tribunal must look to default provisions. For ICSID claims, Article 42(1), paragraph two of the Washington Convention provides: in the absence of agreement by the parties, the tribunal shall apply the law of the contracting state party to the dispute, along with applicable rules of international law (Schreuer, 2001).

For non-ICSID claims, guidance can be found in international arbitral rules. Article 35(2) of the UNCITRAL Rules states: "In the absence of designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate." Similarly, Article 21(1)(2) of the ICC Rules allows tribunals to apply "the rules of law it determines to be appropriate." The conclusion is that international law remains consistently applicable to the resolution of investment disputes (Greenberg et al., 2011). Arbitrators, therefore, must ground their assessment of admissibility in general principles of international law. If continuing duplicative proceedings would contradict such principles, arbitrators must exercise their inherent powers to preserve the integrity of their judicial function and prevent parallel claims from proceeding by declaring them inadmissible (P. Forsten, 2015).

8. Res Judicata

Under the principle of *res judicata* (also known as the principle of finality), a matter that has already been judicially decided cannot be relitigated. This definition of finality is based on the perspective of the judge rather than the parties. Once a decision is rendered, it is final and binding, preventing new discussions of the same case (Rivkin, 2005). This principle is a fundamental response across all legal systems to the public interest in certainty and efficiency of judgments. At the same time, *res judicata* protects the private interests of the parties, ensuring them that once a decision has been made, it is binding and conclusive. It is widely recognized as a principle of international law.

The broad recognition of *res judicata* has led to its application across common law, civil law, commercial law, and criminal law systems, though its interpretation varies. These variations are linked to two main aspects. First, the prevailing view is that *res judicata* requires the application of a three-part identity test: identity of parties, identity of claim, and identity of legal basis. Yet no uniformity exists—either in international law or domestic systems—regarding the content of these requirements (Orrego-Vicuna, 2005). For instance, does identity of parties mean the same formal parties, or does it extend to those with substantive interests? Does identity of claim refer only to the literal claim presented, or to all matters that could have been claimed? And should identity of legal basis be applied narrowly or broadly?

Second, while civil law systems have elaborated *res judicata* to ensure that once a claim has been adjudicated no further litigation on that claim may take place, common law lawyers emphasize the doctrine of issue preclusion (*claim preclusion*), which bars relitigation of facts or legal issues that were part of a broader claim and necessary to its adjudication (Dels, 2004).

9. The Doctrine of Claim Preclusion and Its Role in Securing the Objectives of Judicial Process

Under the principle of claim preclusion (*ne bis in idem*), a party is generally barred from reasserting a claim that has already been finally and validly adjudicated. A judgment governs the entire claim and precludes all issues that were raised or could have been raised in the proceeding (Rivkin, 2005). The doctrine of claim preclusion regards a claim as an indivisible whole and rejects any subsequent arguments concerning it. The prohibition of re-litigation is recognized across all legal systems worldwide, as well as under international law (Schreuer, 2001). Nevertheless, not all jurisdictions apply claim preclusion in the same manner. The principle

therefore contains a central core—namely, that a claim once adjudicated cannot be raised again—but exhibits variations in application depending on legal cultures and international rules (Cremades & Madalena, 2008).

Before addressing divergent applications, it is useful to focus on the features common across all legal systems. First, it is generally accepted that for claim preclusion to apply in both international law and domestic systems, the judgment must be final. Second, for the benefit of claim preclusion to attach, the judgment must be valid, meaning it must have been issued at the conclusion of a proper judicial process. Third, the scope of preclusion clearly extends not only to all issues actually litigated but also to all matters that could have been raised. Finally, with particular regard to international arbitration, the prevailing view is that arbitral awards have the same preclusive effect as judgments rendered by national courts. Thus, matters that were previously adjudicated in arbitration and were the subject of an award cannot be relitigated (Dels, 2004).

Moving forward, we address the non-common aspects of claim preclusion across different legal systems. The main divergence relates to the three-part identity test, under which the application of claim preclusion requires identity of parties, identity of subject matter, and identity of legal basis (Janeþková, 2017). Another issue concerns the scope of the prohibition. While it is generally accepted that operative findings in a judgment are subject to claim preclusion, there is less certainty regarding the underlying reasoning. In this respect, the German approach, which accords preclusive effect only to the operative part of the judgment, is the least flexible, while the French approach, which extends preclusive effect to the underlying reasoning, is the most flexible (Orrego-Vicuna, 2005). Yet it must be emphasized that in most cases, separating the operative portion of a judgment from its reasoning is impossible. If one accepts that only the operative part of a judgment is subject to claim preclusion, one must also acknowledge that the operative portion must be understood in light of the reasoning on which it rests.

Indeed, the European Court of Justice has explicitly stated that the concept of claim preclusion under EU law does not relate solely to the operative part of judgments but also extends to the decision-making process that provides the indispensable foundation for that operative portion, and from which it cannot be separated (Pendens, 2009). It seems that this approach is also applied by international courts and tribunals. Finally, there exist distinct characteristics that some systems apply while others do not. Among the most notable is the distinction between formal and substantive claim preclusion, which is particularly observed in civil law jurisdictions (Darayi, 2006).

10. Conclusion

Cross-border trade interactions and foreign investments have become essential and inseparable components of commerce. At the same time, investment arbitration cases are increasingly becoming routine. This means that the likelihood of parallel proceedings in the field of international arbitration is also on the rise. Therefore, every actor engaged in international arbitration—whether commercial or investment—must adequately take parallel proceedings into account.

Although various methods exist to address some of the problems arising from parallel proceedings, significant shortcomings still remain. Moreover, despite their adverse consequences, parallel proceedings in international arbitration have not received the level of attention and debate they warrant. Given the challenges posed by parallel proceedings and the lack of clear solutions and sufficient theoretical discussion, there is no doubt that this issue requires greater attention from international arbitral tribunals in the future. If neglected, it will lead to fragmentation of judicial unity and render outcomes unpredictable.

Parallel proceedings, by increasing pressure on parties and undermining their efforts to enforce arbitral awards, negatively affect international arbitration as a dispute resolution mechanism. Greater care in drafting "exclusive choice" clauses and "waiver" provisions can produce better results compared to other solutions; however, these must also be supported by strong and consistent theoretical foundations. As a starting point, arbitral tribunals must recognize and embrace the importance of issues arising from parallel proceedings.

Authors' Contributions

Authors contributed equally to this article.

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In order to correct and improve the academic writing of our paper, we have used the language model ChatGPT.

Transparency Statement

Data are available for research purposes upon reasonable request to the corresponding author.

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