

FORUM SELECTION WITHIN THE FRAMEWORK OF GOVERNMENT CONTRACTS

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I. INTRODUCTION

“There are many reasons why the same dispute can have materially different outcomes in different fora. Procedural, choice-of-law, substantive, and other legal rules differ from one country to another. The character, competence, and integrity of tribunals also vary substantially among different fora.”

(G. Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing)

II. FORUM SELECTION CLAUSES VS ARBITRATION AGREEMENTS

1. Forum Selection Clause

- Agreement which allows the parties to pursue their claims in a designated national court
- Exclusive/Non-exclusive
- Offer the strongest party a favorable forum
- Opt out for a neutral third country
- Preclude parallel proceedings in several fora

2. Arbitration Agreement

- Neutral forum to resolve disputes
- Confidentiality or transparency
- Protection of a “weak party”
- Collective protection
- Application of “International Law” and not the law of the host state
- Multiple options opened to Investor

II. FORUM SELECTION CLAUSES VS ARBITRATION AGREEMENTS

Choice between Forum Selection Clauses and Arbitration Agreements:

- Identity and interest of the parties
- Types of disputes likely to arise
- Enforcement
- Importance of confidentiality
- Procedural flexibility

II. FORUM SELECTION CLAUSES VS ARBITRATION AGREEMENTS

Domestic courts cannot offer an effective remedy to foreign investors:

- **Investor's fear of lack of domestic courts' impartiality or independence**
- **Legislation as a cause of complaints : domestic courts are often bound to apply local law**
- **Even if the courts decide in the investor's favor, the executive may ignore their decisions**

II. FORUM SELECTION CLAUSES VS ARBITRATION AGREEMENTS

The third states' courts are not a viable alternative:

- Lack of territorial jurisdiction over investments which have been made in another state;
- Rules of State immunity as an additional obstacle : host States dealing with foreign investors will frequently act in the exercise of sovereign powers (*jure imperii*) rather than a commercial capacity (*jure gestionis*);
- The Act of State Doctrine: the US supreme Court has stated that it would not examine the validity of taking of property by a foreign government in its territory even if its illegality under international law is alleged (*Banco Nacional de Cuba v Sabbatino, 376 US 398, 3 ILM 381 (1964)*).

III. TREATY FORUM VS CONTRACT FORUM

Contract claims – contract based claims when the investor alleges nothing other than a breach of the commercial contract by the state as a party to the contract (should usually not be brought before an Investment Tribunal).

Treaty claims – claims based on a breach of rights granted to the investor by the host State under a Treaty

Three possibilities to bring a contract based claim before an Investment Tribunal:

- (1) The language of BIT including the contract based claims to a BIT Tribunal's jurisdiction**
- (2) The breach of the Contract by the State amounting to a breach of the international law**
- (3) Umbrella clause in BIT elevating the contract claim to a treaty claim**

III. TREATY FORUM VS CONTRACT FORUM

(1) The Language of the BIT including the contract based claims to an Investment Tribunal's jurisdiction:

- Forum shopping or possibility to choose the “right” BIT for Investor

BIT applying broad language - “*any dispute relating to investments*”

Article 9 of Ukraine – The Netherlands BIT: “*Any dispute between either Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Party shall as far as possible be settled by the parties to the dispute in amicable way*”.

- Attribution of a broad meaning to the generally worded provisions of the arbitration agreements – additional risk for the States :

- Salini v. Morocco
- Vivendi I
- SGS v. Philippines

III. TREATY FORUM VS CONTRACT FORUM

(2) The Breach of the Contract amounting to the Breach of the Treaty

- Difficulties to qualify the breach of contract as Breach of Treaty

Parkerings-Compagniet AS v Republic of Lithuania:

- Investor argued that by repudiating the contract, Lithuania destroyed the value of its investment, indirectly expropriating its ownership interest;
- The Tribunal held that the termination of the contract could not be an expropriation under the BIT because three cumulative conditions for the existence of an expropriation were not met:
 - 1) acting in the capacity of sovereign authority;
 - 2) preliminary determination of the existence of a contractual breach under domestic law;
 - 3) the existence of a substantial decrease in the value of the investment.

III. TREATY FORUM VS CONTRACT FORUM

(3) Umbrella clause in BIT elevating the contract breach to a treaty claim

- Risk for the Investor – the BIT does not contain a “good” umbrella clause

i) Article 3 (2) of Ukraine – The Netherlands BIT: *“Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection”*.

ii) Article 2. 2. of Ukraine – Russian Federation BIT: *“Each Contracting Party shall guarantee, in conformity with its legislation, the complete and unconditional legal protection of investments of investors of the other Contracting Party”*.

iii) Article 2. 3. (c) of Ukraine – U.S.A. BIT: *“Each Party shall observe any obligation it may have entered into with regard to investments”*.

- Risk for the State: an expansive interpretation of an umbrella clause would open the floodgates for claims against States as an unlimited number of state contracts would be subject to BIT claims.

IV. DOES THE TREATY FORUM PREVAIL ?

Contractually agreed dispute resolution clauses never deprive a BIT Tribunal of its jurisdiction

- Woodruff case

The contract under which the claim was brought, contained a dispute resolution clause. The American-Venezuelan Mixed Commission held that Woodruff was bound by the clause and could not bring his contractual claim before any other Tribunal but that clause could not preclude a claim by his government in the event that the treatment accorded to him amounted to a breach of international law.

- Lanco case

Article 12 of the Concession Agreement: “For all purposes derived from the agreement and the BID Conditions, the parties agree to the jurisdiction of the Federal Contentious Administrative Tribunals of the Federal Capital of the Argentine Republic”.

The Arbitral Tribunal decision: “Once valid consent to [investment] arbitration is established, any other forum called on to decide the issue should decline jurisdiction”.

IV. DOES THE TREATY FORUM PREVAIL ?

- Vivendi I (Compania de Aguas del Aconquija, SA and Compagnie Generale des Eaux vs Argentina)

- Article 16.4 of the Contract provided: *“For purposes of interpretation and application of this Contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucuman”*;
- some of the claims to be decided by the ICSID Tribunal were closely related to an alleged breach of the concession contract;
- the question was whether the ICSID Tribunal had jurisdiction to decide the respective claims despite the contractually agreed clause;
- the Arbitral Tribunal’s decision: Article 16.4 of the Concession Contract does not divest this Tribunal of jurisdiction to hear this case because that provision did not and could not constitute a waiver of [Claimants’] rights under Article 8 of the BIT to file the pending claims against the Argentine Republic;
- the Annulment Committee found that the AT had manifestly exceeded its powers by not examining the merits of some claims before it and that a particular investment dispute may at the same time involve issues of the interpretation and application of **a treaty and of a contract.**

IV. DOES THE TREATY FORUM PREVAIL ?

- SGS vs Philippines

The Arbitral Tribunal stated that it could not decide the contractual claim brought before it by the investor for the following reasons:

- The general provisions of BITs should not, unless clearly expressed, override specific and exclusive dispute resolution clause made in the contract itself;
- Binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision;
- Arbitration agreement in the applicable BIT did not override an agreed dispute resolution mechanism in the contract;
- The contractual dispute resolution clause was concluded for a specific investment whereas the BIT did not have a specific investment or contract in view;
- The contract between the parties was the more specific provision which prevailed.