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INTERNATIONAL DISPUTE RESOLUTION: WHEN AND WHY SHOULD PARTIES RESORT TO PARALLEL PROCEEDINGS?

By Emma Refuveille

I. INTRODUCTION

On April 19, 2022, #YoungITATalks North America organized a discussion on the challenges of managing parallel proceedings across jurisdictions with a specific focus on Latin America. Sandra Friedrich[1] moderated a discussion between Katharine Menéndez de la Cuesta[2], Jorge A. Mestre[3] and Eve Perez Torres.[4] Guest speakers analyzed the pros and cons of parallel proceedings, and how to mitigate conflicting decisions.[5]

II. WHEN AND WHY DO PARALLEL PROCEEDINGS ARISE?

A. *The Rise of Parallel Proceedings in a Globalized World*

Parallel proceedings refer to "the simultaneous or successive investigation or litigation of separate criminal, civil, or administrative proceedings commenced by different agencies, different branches of government, or private litigants arising out of a common set of facts."[6] Parallel proceedings can arise in domestic courts or arbitration tribunals and are more common in today's globalized and connected world. Parties engage in international transactions, and with parties in multiple forums, issues can arise as to where proceedings should take place in the event of a dispute.

A common type of parallel proceedings occurs when arbitration and litigation proceedings are conducted simultaneously between the same parties and based on a

[1] Lecturer in Law & Director of the International Arbitration Institute and White & Case International Arbitration LL.M. at the University of Miami School of Law.

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[3] Partner and founding member of Rivero Mestre LLP in Miami.

[4] In-house Counsel at Chiquita Brands International, Inc.

[5] #YoungITATalks North America, Transnational Litigation & Arbitration: Managing Parallel Proceedings, April 19, 2022, Miami, Florida. https://www.cailaw.org/Institute-for-Transnational-Arbitration/Events/2022/youngita-miami.html.

[6] MIRIAM WEISMANN, PARALLEL PROCEEDINGS-NAVIGATING MULTIPLE CASE LITIGATION (2011).

different contract or based on the same contract between different parties. Notably, it is common for parties to sign a contract with an arbitration clause and to initiate an arbitration when a dispute arises. Sometimes, a party to the arbitration may commence a court proceeding in another country. This typically happens when there is uncertainty as to the applicability of an arbitration clause or when a party alleges that it never consented to resort to arbitration. It is a well-established principle in arbitration that there can be no arbitration without clear and unambiguous consent. In some cases, not all parties will have consented to arbitration: a third party can be brought into the dispute such as a subcontractor who was not part of the original arbitration agreement and does not agree to arbitrate. International arbitration is a popular means of dispute resolution to handle international disputes. However, the absence of an appeal for arbitral awards is an aspect of the mechanism that some parties are worried about. Bringing the claim to a national court allows for an appeal, and thus such parties find comfort in bringing a claim to a national court rather than before an arbitral tribunal. The non-consenting party will therefore initiate a proceeding in court while consenting parties will initiate an arbitration proceeding.

Parallel proceedings vary, depending on factors such as the laws of the states involved, the contract between the parties, or treaties between countries where applicable. Conflict of laws principles can also lead to the initiation of parallel proceedings because of the courts' exclusive jurisdiction. For instance, there are many parallel proceedings in family disputes involving businesses. Some courts have exclusive jurisdiction on specific personal matters like divorces. If the business is not within the jurisdiction of the divorce court, the divorce case will be adjudicated in one jurisdiction and the sale of the business or repartition of the shares will be adjudicated in another state.

A similar issue arises with real estate assets. It is not uncommon for people to own real estate assets in multiple places. Many states adopt a *lex loci* approach to real estate properties, granting exclusive jurisdiction to the state where the property is located: parallel proceedings may occur when various courts have exclusive jurisdiction and litigate at a concurring time.

Parallel proceedings can also arise out of a single case and decision such as in the context of setting aside and enforcement proceedings related to the arbitration award: often the losing party seeks to set aside an award whereas the winning party seeks to enforce it. Most of the time, courts where enforcement is sought, will stay proceedings until the setting aside proceedings are over to avoid enforcing an award that was set aside at its seat. This scenario is not as problematic as parallel litigation or arbitration proceedings, but contributes to slowing down the dispute resolution process, as it can be costly, both in attorneys' fees or time, particularly for the party seeking monetary damages.

B. *The Dangers of Parallel Proceedings*

The possibility of litigating and/or arbitrating various proceedings at the same time in multiple places can be problematic for several reasons. First, suing or being sued, is a daunting process which can cause stress and inquietude to parties. The stress only increases when parties are involved in more than one proceeding. Second, it is arguably a waste of resources. Parallel proceedings take more time, as parties have to deal with proceedings in multiple places. It is also a financial burden. A party with proceedings in different states might need to use different sets of attorneys for each case, depending on the language of the litigation or arbitration, and the applicable law. It might be necessary to hire teams in each state or country requiring dealing extensively with teams in multiple countries and languages, with different laws applied to each proceeding, and which is not only difficult to manage but can also be costly and time-consuming. Parties that voluntarily engage in parallel proceedings should have a good understanding of the relevant applicable laws (substantive and procedural) should be ready to invest significant resources.

The parties must also consider the potential conflicts of laws between the laws governing the various proceedings and the eventual conflicting outcomes in case the proceedings are maintained in multiple jurisdictions and decisions are rendered. Different laws, even conflicting laws, can lead to drastically different decisions. Parties should carefully contemplate the effect of one proceeding on the other and plan ahead if they decide to pursue parallel proceedings. Parties should specifically

look at the state or country's rules on the setting aside of awards. For example, the UNCITRAL model laws establish that "[t]he arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court."[7]

Recent developments in international arbitration in the United States might lead to different outcomes between proceedings before an arbitration tribunal and a U.S. court. The Supreme Court has recently ruled in *ZF Automotive Us, Inc. v. Luxshare, Ltd*[8] that 28 U.S.C. § 1782, which was drafted and enacted to provide federal court assistance in gathering evidence in foreign and international proceedings, does not apply to private commercial arbitrations. The impact of the decision on international arbitration remains to be determined. The discovery process differs between arbitration and litigation, and discovery can make or break your case. Therefore, parties should carefully consider the type of discovery they need to conduct to obtain their evidence and assess whether an arbitral award and a court decision could be conflicting.

Lastly, parallel proceedings can conflict with the doctrine of *lis pendens* and *res judicata*. Regarding *res judicata*, depending on the rules and countries, a party can raise the issue if it has been litigated and if the party has not had a chance to intervene. If so, another issue arises: is the entire claim precluded or just one issue? A party's position on the issue will depend on whether the result of the first litigation was beneficial. A party that is involved in the first proceeding and would be involved in the second will argue that the entire claim is precluded. Regarding *lis pendens*, there is no uniform approach to *lis pendens*. The European Union functions on a first come first serve basis. The first court seized is the first to decide. The remaining courts will have to wait for the first court's decision. Other countries like England[9] perform a more in-depth analysis and focus on issues like *forum non-conveniens* to

[7] UNCITRAL Arbitration Rules (as revised in 2010), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf.

[8] *ZF Automotive Us, Inc. v. Luxshare, Ltd.* 142 S. Ct. 2078 (2022).

[9] Spiliada Maritime Corp v. Cansulex Ltd, [1986] UKHL 10

resolve lis pendens issues. Additional considerations when dealing with parallel proceedings include: which court had the initial authority? Was that party entitled to file where it did? Is there an arbitration clause? Is there jurisdiction for the court? Because there is a first proceeding doesn't mean a second one cannot survive.

III. REMEDIES

To avoid parallel proceedings, parties should plan ahead of the dispute and draft a detailed arbitration clause in their contract. An arbitration clause strictly defining its scope and the use of arbitration will not always prevent parallel proceedings from happening, but it can set out explicit language that will ultimately go towards protecting your client.

Once parallel proceedings are started, it may be possible to obtain an arbitral injunction if the court finds that the parties did not consent to arbitration. The injunction will stop the arbitration proceedings. Some state laws allow courts to order the claimant not to proceed with the arbitration and issue an anti-arbitration injunction.[10] The situation is more complex when the arbitration is international, as the weight and power of the injunction are unclear.

Consolidation is also an option in case of parallel proceedings. For example, Article 10 of the ICC Rules of Arbitration, which entered into force on 1 January 2021, states that:

> the Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:
> a) the parties have agreed to consolidation; or
> b) all of the claims in the arbitrations are made under the same arbitration agreement or agreements; or
> c) the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible." Consolidation therefore depends on strict criteria, but can save tremendous time and money to parties when it is appropriate to

[10] Jennifer L. Gorskie, *US Courts and the Anti-Arbitration Injunction*, 28 ARB. INT'L, No. 2, 295-323 (2012).

consolidate the proceedings.[11]

Consolidation may sound like an easy remedy; however, in practice, it can be difficult to put in place. Sometimes, arbitrations are in different places or use different rules, which makes it difficult to consolidate. Even when parties agree to consolidate to avoid costly parallel proceedings, a court might not agree to consolidate if the cases do not meet certain criteria. For example, two arbitrations under the ICC rules might not be consolidated if they do not meet the standard of Article 10 discussed above.

IV. CAN PARALLEL PROCEEDINGS BE A STRATEGY?

The complexity of the process is what often motivates powerful parties to initiate parallel proceedings. It is a known technique in the international dispute resolution world: a powerful party will initiate parallel proceedings against a smaller one with fewer resources. This may force the less powerful party to settle for terms that are not ideal because it cannot afford to respond to each proceeding, either because of the financial investment, or the time investment.

Parallel proceedings can be a profitable strategy, but it ultimately depends on what side of the dispute you are on. Parties that initiate parallel proceedings must be creative and clever and know the pros and cons of each law and each jurisdiction. Attorneys should use parallel proceedings ethically and in the best interest of their clients.

V. WHAT CAN BE DONE TO SET GUIDELINES ON PARALLEL PROCEEDING?

Having a set of rules for parallel proceedings is not necessarily the way to manage parallel proceedings. There are existing rules, however, there are disputes on how to apply them. Attorneys must be careful with the use of parallel proceedings: they have an ethical obligation to follow the rules but also to represent the client as best as possible. Ideally, parallel proceedings should not be used to pressure the other side: a party with fewer means to litigate or arbitrate might be forced to dismiss its claim if the other side initiates parallel proceedings as a response to a complaint.

While arbitral institutions like the ICC have rules on consolidation, it could be

[11] ICC RULES OF ARBITRATION, Art. 10 (2021).

useful to have more guidelines or train the arbitrators on how to handle parallel proceedings. The uncertainty of the power of anti-arbitration injunctions in international arbitrations should also be addressed by institutions. Rules are difficult to put in place, but guidelines can help parties understand how to navigate through their dispute.

Born and raised in France, **EMMA REFUVEILLE** graduated with a Bachelor of Laws from the University of Essex, UK, and a Bachelor of Laws and master's degree from the Université Toulouse 1 Capitole in France. She is currently in her final semester of the Joint JD / LLM in International Arbitration at the University of Miami School of Law. Her interests include international dispute resolution, international transactions, and civil procedure issues. In her free time, Emma enjoys playing tennis and golf, travelling, and trying out new restaurants. Emma will join an Am Law 200 firm in Miami after graduation.

INSTITUTE FOR TRANSNATIONAL ARBITRATION
OF
THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

A. MISSION

Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

B. WHY BECOME A MEMBER?

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning - an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

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D. PROGRAMS

The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

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