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**DO INVESTMENT ARBITRATION TRIBUNALS HAVE A BETTER CLAIM TO JURISDICTION IN
FINANCIAL DISPUTES INVOLVING SOVEREIGN ENTITIES THAN COMMERCIAL TRIBUNALS? A
CRITICAL REVIEW OF THE THIN DIVIDE BETWEEN CONTRACT CLAIMS AND TREATY CLAIMS.**

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ABSTRACT

Disputes and claims from commercial and financial transactions involving sovereigns and sovereign entities, like sovereign wealth funds or sovereign debt management authorities, issuing sovereign bonds to individual investors have largely been treated as contract claims and are usually referred to commercial arbitration tribunals.

This is perfectly understandable as even though there is a sovereign element in the fact that these entities are set up by sovereign governments, they are nonetheless involved in strictly open market contractual and commercial transactions just like any other business organisation, and in the case of issuing sovereign bonds, in some countries they are in direct competition with deposit taking banks and financial institutions and offer better coupon and interest rates for investors in the bonds they issue.

The same applies to sovereign wealth funds which are expected to make investment decisions based on sound commercial principles of safety and maximization of returns on funds invested.

It has been assumed that as long as the underlying transaction arises out of a contract and is ordinarily of a contractual nature with the arbitration clause embedded in the contract, the normal course of action when a dispute arises is to refer the matter to a commercial arbitration tribunal regardless of the nature of the parties to the contract

A major departure from the norm however, occurred on August 4, 2011 when the International Centre for the Settlement of Investment Disputes (“ICSID”) established a new precedent in the Arbitration world when it assumed jurisdiction in the case of *Abaclat & others v The Argentine Republic* commonly referred to as the *Abaclat case*.

This decision addressed two major issues: First, whether the dispute that arose out of a sovereign debt restructuring relates to an investment and can be considered to arise out of a Bilateral Investment Treaty (BIT) between the home country of the corporate investors and the host country that issued the debt. Second, whether mass claims arbitration were permissible under both the framework of the Investment Arbitration Tribunal, The International Centre for the Settlement of Investment Disputes (ICSID) and the relevant BIT.

The purpose of this dissertation is to review the issue of whether an Investment or a Commercial Arbitration Tribunal has a better claim to jurisdiction when it comes to disputes and consequential mass claims arising from commercial transactions involving sovereigns and sovereign entities in view of the (ICSID) decisions in the *Abaclat*, and subsequently, the *Ambiente Ufficio case*.

INTRODUCTION

The importance of jurisdiction in any Arbitration and Arbitral hearing cannot be overemphasized. It is usually one of the preliminary issues that an Arbitral Tribunal will have to dispense with before delving into the merits of the Arbitration.

Respondents in Arbitration cases might raise procedural and jurisdictional challenges, and the parties will usually agree on the number of issues the tribunal needs to rule on before proceeding to the merits of the dispute.

It is expected that most disputes involving States and Sovereign Entities and Organisations will be referred to Investment Tribunals like (“ICSID”) where there exists a Bilateral Investment Treaty (“BIT”) between the respective states.

However, with increased globalisation and international trade, where some of these sovereign entities engage in purely commercial activities on behalf of the state and freely prospect for investors in sovereign bonds in the open market, it has been the norm to regard these transactions as purely contractual and commercial with Arbitration clauses inserted therein referring disputes to a commercial arbitration tribunal.

The decision of (“the ICSID”) tribunal on August 4, 2011 in the *Abaclat* case was significant. The Tribunal held that it had jurisdiction to hear claims brought by 60,000 Italian nationals against the Republic of Argentina following Argentina’s default and later partial restructuring of its sovereign debt, thus setting a new precedent for the Arbitration world.¹

¹ Jessica Beess and Chrostin, ‘Sovereign Debt Restructuring and Mass Claims Arbitration before the ICSID, *The Abaclat Case*’ (2012) 53(2) HILJ <<http://www.harvardilj.org/wp-content/uploads/2010/05/HILJ206.pdf>> accessed on 25 June 2013.

This *Abaclat* decision is unprecedented in two respects: (1) It is the first time a decision held that an Arbitral tribunal has the legal authority and jurisdiction to hear claims that a sovereign's default and debt restructuring breached a bilateral investment treaty ("BIT") and (2) *Abaclat* is the first arbitral decision to hold that 60,000 claimants may join in one mass claim arbitration under the institutional rules of the ICSID². It follows therefore, that the *Abaclat* decision is likely to have a significant impact on the future of sovereign debt restructuring, the drafting of arbitration clauses and the scope of ICSID jurisdiction over mass claims arbitration.³

As this is an evolving topic, this dissertation will review existing literature, scholarly work and paper presentations from professional conferences that touch on the subject and in that context will address the following research questions:

(a) "Have most financial disputes and the resultant claims involving sovereigns been decided by commercial tribunals?"

(b) "What is the outlook going forward for similar claims on in view of the ICSID decision in the *Abaclat case* as far as Jurisdiction is concerned?"

(c) "Beyond the *Abaclat* decision, what is the outlook on Mass Claims Jurisdiction involving Sovereigns going forward?"

(d) "Wherein lies the divide between Contract and Treaty claims where Sovereigns and Sovereign Entities are involved?", and

² *ibid*

³ *ibid*

(e) “Beyond the issue of Jurisdiction, do parties to Sovereign Debt Contracts choose Investment Arbitration to circumvent the failure of National Courts in enforcing Commercial Arbitration awards?”

Chapter 1 of this dissertation will examine Arbitration as a means of settling investment and commercial disputes.

Chapter 2 will then look at jurisdiction holistically with an emphasis on challenges to jurisdiction, the Autonomy or Separability of the Arbitration Clause, the Control of the Courts and procedural aspects for resolving issues of jurisdiction as well as options open to Respondents when jurisdiction is being challenged.

Chapter 3 will review case law and decisions in recent International Investment Arbitration and litigation in matters involving sovereigns using the *Abaclat and Teinver cases* as a study, including the dissenting opinion in the *Teinver case* as it concerns jurisdiction.

A closer look at Sovereign Debt and Mass Claims Arbitration with an emphasis on consent in Mass Claims Arbitration and the issue of Procedure, will follow in Chapter 4. Specifically, this chapter will address mass claims jurisdiction beyond the *Abaclat* decision illustrated by a review of the *Ambiente Ufficio S.p.A and others v Argentina case*.

Chapter 5 explores the interface between Investment and Commercial Arbitration by looking beyond jurisdiction to examine the factors for initiating sovereign claims in Investment Arbitration. A review of the *White* and the *GEA V Ukraine cases* are important in this regard followed by an enquiry into whether beyond the issue jurisdiction, parties to disputes arising from Sovereign Debt Contracts will resort to Treaty Arbitration to circumvent the failure of National Courts to enforce Commercial Arbitration Awards.

Chapter 6 will conclude the dissertation making recommendations and highlighting possible areas for further research on the subject.

CHAPTER 1

SOVEREIGN ENTITIES AND ALTERNATIVE DISPUTE RESOLUTION

States and Sovereign Entities are involved in business and commercial transactions with private individuals, organisations or with other States or Sovereign entities. It is expected that disputes will normally arise in the course of these transactions, and the parties will have a choice of going before regular courts in the form of litigation or to Arbitration or another form of Alternative Dispute Resolution including Mediation, Conciliation or a hybrid called Mediation/Arbitration or (Med/Arb.)

The term Alternative Dispute Resolution (ADR) has often been used to describe other methods of resolving disputes other than the courts, which is a system of justice established and administered by the state.⁴

In this regard, Arbitration is classified as a method of alternative dispute resolution (ADR) since it is an alternative to the courts. However, in practice, the term ADR is not always used in this sense⁵ and thus Arbitration is regarded as a standalone concept distinct from other methods of ADR

1.1 Reasons for Recourse to Arbitration and Alternative Dispute Resolution

A major reason for going to Arbitration and other forms of ADR is the prohibitive cost of litigation. This includes lawyers' fees and expenses, management and executive time of the judges. Litigation is often compounded by procedural delay tactics, overcrowded court lists and the jury trial of civil cases which can lead to the award of hugely excessive damages

⁴ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*(4th edn, Sweet & Maxwell 2004)

⁵ *ibid*

against major corporations (and their insurers), thus prompting the need for a quicker and cheaper method of dispute resolution.⁶

Whereas all these methods can be grouped together under ADR, some come close to Arbitration in its conventional sense while others particularly Mediation and Conciliation are seen as first steps to be followed in the settlement of a dispute⁷.

Accordingly “Arbitration is said to present an alternative to the judicial process in offering privacy to the parties as well as procedural flexibility”⁸. However the role of the Arbitrator and that of the Judge is fundamentally the same. The function of the Judge and the Arbitrator is not to decide how the problem resulting in the dispute can most readily be resolved as much as to apportion responsibility for the problem.⁹

There are other forms of ADR including the Mini Trial which is a form of Mediation used primarily in the United States of America (USA), the purpose of which is to put two high – level executives, one from each party, into an environment in which the strengths and weaknesses of their respective cases as well as the risks inherent therein are drawn to their attention with the hope that this will induce the parties to reach a compromise rather than going to litigation.¹⁰

There is also Mediation/Arbitration (Med/Arb), which is where the parties agree that if Mediation does not produce a negotiated settlement, the Mediator will change identity and adopt the role of Arbitrator to decide the dispute. This process is also commonly used in the

⁶ ibid
⁷ ibid
⁸ ibid
⁹ ibid
¹⁰ ibid

USA¹¹ and has lately been introduced in China by the China International Economic and Trade Arbitration Commission (CIETAC) in its rules introduced in May 2012, which allows the Arbitral Tribunal to conduct Conciliation during the Arbitration proceedings,¹² and in Hong Kong through the passing of the new Arbitration Ordinance (CAP 609) of June 1, 2011, which makes provisions for Mediator-Arbitrators.¹³

Another method which doesn't involve the route of bringing the parties to an agreed settlement is the Expert Determination. This method is commonly used in Valuation or Assessment of houses or buildings or accounting books and increasingly the Expert is seen as a decision maker whose determination may well bring a dispute to an end.¹⁴

Alternatively, the ADR and Arbitration processes may be combined in such a way that the same person is not called upon to fulfil both the role of mediator and arbitrator as in Med/Arb.¹⁵

1.2 – Arbitration as a Means of Settling Disputes

Arbitration can be ad hoc which in its simplest form can be before a Sole Arbitrator, and the Arbitration Clause does not specify a particular set of rules for the conduct of the Arbitration. Usually in Ad hoc Arbitration, the clause will include a reference to the rules, such as UNICTRAL Arbitration rules, or for a trade such as commodity Arbitration, the rules of the relevant association like the Law Society of the UK or the American Bar Association may apply¹⁶.

¹¹ *ibid*

¹² Robert Rhodes, 'Mediation-Arbitration(Med-Arb)'(2013) 79 *Arbitration*, Issue 2 , p.116

¹³ *ibid*

¹⁴ *Ibid.*

¹⁵ Redfern and Hunter(n4) p.46

¹⁶ *ibid*

Conversely, an Institutional Arbitration is one that is administered by a specialist Arbitral Institution under its own rules, like the ICSID, the International Chamber of Commerce (ICC), and the London Court of International Arbitration (LCIA) amongst others.

1.2.1 Arbitral Institutions

There are numerous institutions set up to administer International Arbitrations. Some of them like the Maritime Associations in London, Beijing or Paris serve a particular Trade and Industry. The China Maritime Arbitration Association, founded in Beijing on January 22 1959 is the sole Professional Arbitral Institution in China which handles Maritime cases.¹⁷ Some Arbitral Institutions like the Hong Kong Arbitration Centre or the London Centre for International Arbitration(LCIA) are Country or Regional based, while others like World Intellectual Property Organisation (WIPO) Arbitration Centre based in Geneva, or the International Centre for the Settlement of Investment Disputes(ICSID) based in Washington DC USA offer their services for particular types of disputes, which as their names suggest will be in the areas of Intellectual property and Investments respectively.

Some Organisations like the American Arbitration Association (AAA) which was set up in 1926 to study, promote and administer procedures for the resolution of disputes of all kinds through the use of Arbitration and other private techniques of dispute settlement had as a result of considerable growth in International Commercial Arbitration opened its first Centre in New York in 1996¹⁸. It had since branched out across the Atlantic by opening its European Centre known as International Centre for Dispute Resolution (ICDR) in 2001.The physical

¹⁷ Guowei Gu, ' Development of Maritime Arbitration in China' (2012) 78 Arbitration ,Issue 3, 260

¹⁸ Redfern and Hunter(n4) p.54

centre was however closed in 2010 in the wake of the financial crisis and a virtual centre operates in its place¹⁹.

Basic requirements that an Arbitral Institution should meet include the following:

A degree of permanency: This is due to the fact that disputes usually arise many years after the original agreement or treaty. If for any reason the institution is no longer in existence when a dispute arises, the only recourse will be to the National Courts which goes against the purpose of choosing arbitration over litigation in the first place. In this regard Institutions or Centres that have a long track record might be preferred as the Arbitration Centre.

The Staff must be qualified: This will ensure the smooth and efficient conduct of Arbitration including explaining the rules, ensuring that time limits are observed and advising on appropriate procedures by applying the benefits of past experience.

Use of modern rules of Arbitration: Due to the changing nature of International Arbitration with the introduction of new Laws and Procedures both nationally and internationally, it is essential that the rules of Arbitral Institutions should respond to these changes accordingly. Parties are entitled to expect that Institutional Rules will be reviewed and if necessary revised at regular intervals.

Reasonable charges: Some Arbitral Institutions assess their administrative fees, expenses and arbitrators fees by reference to a sliding scale based on the amounts in dispute. Others like the LCIA assess their costs and expenses and arbitrators fees by reference to the time

¹⁹ Allison Ross, 'ICDR Closes Dublin HQ in favour of Virtual Office' (2010) 1 GAR <http://globalarbitrationreview.com/news/article/19987accessed> 3 July 2013.

spent on the case (with an upper and lower limit). Whatever method is adopted, parties to arbitration will expect the charges to be reasonable.

1.2.2 – Arbitrations involving a State or Sovereign Entity

Disputes between states traditionally belong to the realm of public international law²⁰. However states are increasingly getting involved in commercial activities, either by itself or through a sovereign entity, with private parties. Any disputes arising from such transactions or relationships are likely to be referred either to the courts of the concerned state or to international commercial arbitration²¹.

Following the example of the former socialist states, Nationalisation resulted in states owning and operating businesses like Airlines, Oilfields, Refineries and Process Plants as well as Banking, Investment and Trading Corporations. This state ownership was somewhat encouraged by the resolutions of the United Nations directed to the establishment of a New International Economic Order which led to the privatisation of previously state owned corporations and businesses²²

Nonetheless, States and Sovereign Entities are still very much involved in businesses, and States are increasingly opting to submit business disputes to Arbitration.

There are different considerations that determine the decision by states to submit disputes to arbitration. (i) Political considerations, such as the effect a refusal to submit to arbitration might have on relations with state of the foreign claimant. (ii) There are also economic considerations such as loss of foreign investment arising from a refusal to

²⁰ Redfern and Hunter (n4) p.55

²¹ *ibid*

²² *ibid*

arbitrate and (iii) legal considerations such as instituting a court action to compel arbitration, going ahead with the arbitration without the second state and getting an award *in absentia* as in the Libyan Oil Nationalisation Arbitrations²³.

It is a popular saying that the right of a state to claim immunity from legal proceedings forms part of its sovereign dignity. Conversely, Lord Denning, the Master of Rolls was quoted thus “it is more in keeping with the dignity of a foreign sovereign to submit himself to the rule than to claim to be above it²⁴”.

Although arbitration in which one of the parties is a state or sovereign entity may take place under the rules of any of the institutions mentioned earlier, there are two international arbitral institutions in disputes where one of the parties is a sovereign entity. These are the International Centre for the Settlement of Investment Disputes (ICSID) in Washington DC and The Permanent Court of Arbitration (PCA) at The Hague. This dissertation will be focussing on the ICSID.

1.2.3 – ICSID - An International Institution

The ICSID was established by the Washington Convention of 1965²⁵. This was formally known as the “Convention on the Settlement of Investment Disputes between States and Nationals of other States,” or commonly as the “ICSID Convention” and became effective on October 14 1966. It was formulated by the Executive Directors of the International Bank for

²³ *ibid*

²⁴ *ibid*

²⁵ *ibid*

Reconstruction and Development (the World Bank Group) and submitted to the governments of the member states²⁶.

The establishment of the ICSID gave both private and corporate investors in a foreign state, the opportunity to bring legal proceedings against the state before an international arbitral tribunal directly instead of relying on their own government to take it up at the inter-state level.²⁷

At the onset, only cases where both parties were party to the Convention could be brought before the ICSID Tribunal. This has changed since 1978 by the creation of the “ICSID Additional Facility” which permits recourse even if only one party meets this requirement provided they both consented to submit to the ICSID.²⁸

The ICSID Arbitration is governed by an international treaty rather than by national law and so it is truly delocalised or denationalised.²⁹The delocalisation theory states that International Commercial and Investment Arbitration should be free from the influence of the *lex arbitri* which in national arbitration means that the procedural laws of the country within which the seat of arbitration is located will govern the arbitral process.³⁰

The exclusion of national laws from any control of an ICSID Arbitration is contained under Article 3 of the ICSID Convention which states that, the award of ICSID Arbitrators is binding on the parties, and not subject to an appeal or any other remedy, except those provided for in the Convention itself³¹. These remedies include; in Article 50, the interpretation of the

²⁶ Ibid p56

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

³⁰ Masood Ahmed, ‘The influence of the delocalisation and seat theories upon judicial attitudes towards international commercial arbitration’ (2011) 77 Arbitration, Issue 4 p.406

³¹ Ibid

meaning or scope of the award³²; in Article 51 it pertains to remedies of the revision on the ground of discovery of a previous unknown fact of decisive importance and in Article 52, it is the remedy of an annulment by an ad hoc committee³³.

1.2.4 – The ICSID Procedures

ICSID promotes the settlement of investment disputes by means of two different procedures – Conciliation and Arbitration through its base at the principal office of the World Bank in Washington.³⁴

The Rules of Procedure for the institution of Conciliation and Arbitration Proceedings (The Institution Rules) of the ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1) (b) of the ICSID Convention³⁵.

The ICSID procedures are available on four conditions: (i) the parties must have agreed to submit their dispute to the ICSID;(ii) the dispute must be between a contracting state (or one of its subdivisions or agencies) and a national of another contracting state;(iii) it must be a legal dispute and (iv) it must arise directly out of an investment³⁶

The term “Investment” is not defined in the Washington Convention, but in practice it has been taken to cover the investment of services and technology as well as more traditional forms of capital investment³⁷.

³² *ibid*

³³ *ibid*

³⁴ *ibid*

³⁵ ICSID Convention, Regulations and Rules, ‘Rules and Procedures for the Institution of Conciliation and Arbitration Procedures’ ICSID/15,(2006)http://icsid.worldbank.org/staticfiles/basicdocuments/CRR_English-final.pdf accessed July 8 2013.

³⁶ Redfern and Hunter(n4), ‘ICSID Procedures, Washing ton Convention Art 25(1)’ p. 56-57

³⁷ *ibid*

The ICSID has full international legal personality; and persons appointed to act as arbitrators enjoy immunity from all legal process with respect to acts performed by them in the exercise of their functions, unless the ICSID has waived this immunity³⁸

An ICSID award is enforceable in a contracting state as if it were a final judgement of a court in that state, without the possibility of revision or review under the law of that state,³⁹ while execution of awards shall be governed by the laws of the states or territories where the execution is sought⁴⁰

The Institution Rules of the ICSID are supplemented by the Administrative and Financial Regulations of the Centre in particular, by Regulations 16 on Fees for lodging requests; Regulations 22(1) on the duty of the Secretary General to appropriately publish information about the operation of the Centre; Regulation 23 on the Secretary General maintaining separate Registers for requests for Conciliation and Arbitration respectively; Regulations 24 on the means of communication during the course of an arbitration proceeding; Regulation 30 on the means of filing supporting documentation and Regulation 34(1) on the official languages of the institute which shall be English, Spanish and French.⁴¹

1.3 – Arguments for Investment Arbitration

In the course of any business relationship, disputes can naturally arise regardless of the fact that one of the parties is a state or sovereign entity and the other party is an individual or private corporation from another state. The parties will normally have the choice of referring such disputes to either the courts of the host state or to international investment

³⁸ Ibid Article 21

³⁹ Ibid Article 54(1)

⁴⁰ Ibid Article 54(3)

⁴¹ ICSID Convention ,Regulation and Rules,(n39), ‘Administrative and Financial Procedures’ Reg 16,22(1),23,24.30, and 34(1)

arbitration. Invariably; the private party will prefer to submit to arbitration as a neutral process rather than to the courts of the state with which it has a dispute.

1.3.1 – Protecting the Interest of Investors

Even though developed and developing countries have not always agreed on the standards for the treatment of foreign investment or even the content of the international law that governs it, one area that is not in dispute is the necessity for it⁴². Since the 1970s, there has been a consensus concerning the standards for the treatment of foreign investment and the need for the host state to ensure that the interests of investors are protected. These include the following clauses which are usually inserted into international investment agreements like the US Model Bilateral Investment Treaty (US Model BIT):

- National Treatment - This can be ensured by stating that “ each party shall accord to investors of the other party as well as to covered investments, treatment no less favourable than that which it accords in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory”⁴³. In summary, this is a commitment to provide treatment as favourable as that provided to the host country’s citizens⁴⁴
- Most Favoured Nations Treatment - Each party shall accord to investors of the other party as well as to covered investments treatment no less favourable to investors of

⁴² R. Doak Bishop, James Crawford and W Michael Reisman, *Foreign Investment Disputes* (KLI 2005) p7

⁴³ US Model Bilateral Investment Treaty 2012, sA (Article 3) <http://ustr.gov/sites/BI> Accessed 9 July 2013.

⁴⁴ Bishop, Crawford and Reisman (n46) p.10

any non - party with respect to investments as described above⁴⁵.In summary it commits to give treatment as favourable as that given to citizens of other countries.

- Fair and Equitable Treatment - includes the obligation not to deny justice in criminal, civil ,or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world⁴⁶

1.3.2 – Protecting the Interests of Sovereigns

The requirement to protect the interest of investors also comes with a corresponding requirement to protect the interest of sovereigns. This is usually in the form of performance requirements regarding the investment, such as restricting the investor from supplying workers exclusively from its home country to the detriment of the host state or importing raw materials from its home state. The aim here is to strike a balance that is mutually beneficial to the investor, their home state and the host state. One of the objectives of the 2012 US Model BIT is the “encouragement and reciprocal protection of investments”⁴⁷

1.3.3 – Bilateral Investment Treaties

Bilateral Investment Treaties (BITs) are negotiated by two sovereign governments to define the mode of international foreign investments between the governments or between nationals of one country with the government of the second. Since the 1970’s the US and other Governments like the United Kingdom, The Netherlands, Germany, France, Spain amongst others have entered into BITs with developing countries⁴⁸. The US has since developed a model treaty which has been refined and changed over time the latest revision

⁴⁵Ibid (Article 4)

⁴⁶ Ibid (Article 5)

⁴⁷ US Model Investment Treaty 2012(n47)

⁴⁸Bishop, Crawford and Reisman(n46) p10

being made in 2012. The first BIT was concluded between the Federal Republic of Germany and Pakistan in 1959.

In the United States, the typical BIT includes obligations that each government undertakes towards investors from the other country. These fall into four categories: (i) general obligations towards the investment; (ii) standards of expropriation; (iii) currency transfer standards and (iv) dispute settlement procedures⁴⁹.

1.4 – Arguments in Favour of Commercial Arbitration

There is some agreement as to why arbitration is preferred to national courts, at least as far as international commercial disputes are concerned. First, Arbitration gives the parties the opportunity to choose a neutral forum and a neutral tribunal, and second, arbitration if carried out to the end leads to a decision which is enforceable against the losing party not only in the place where it is made but internationally under the provisions of such treaties such as the New York Convention⁵⁰. Some key issues in this regard include:

1.4.1 – Clauses in Contract Treaties

Most international commercial contracts contain clauses referring disputes to arbitration. The signing of the contract by the parties connotes consent to this referral clause. This clause is very important because whereas in a domestic context, parties will usually have an effective choice between a national court and national arbitration, in international commercial disputes, since there are no international courts to deal with such disputes, the real choice is between a national court and international arbitration⁵¹. A state or sovereign

⁴⁹ *ibid*

⁵⁰ Redfern and Hunter(n4)p22

⁵¹ *ibid*

entity will most likely not wish to submit to the national courts of the private party. Also, it will probably object to submitting to the jurisdiction of any foreign court which makes international commercial arbitration the obvious choice.

1.4.2 – Sovereign Immunity in International Commercial Arbitration

“It is a basic principle of International law that one sovereign state does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the process of the sovereign state. This immunity extends to both criminal and civil liability”⁵²

A State or Sovereign Entity that is legally part of the State can waive immunity either expressly or implicitly by a contractual provision or an arbitration clause in a contract with another party. An agreement to arbitrate is generally considered as an implicit waiver of the Sovereign Immunity⁵³. There seems to be no agreement on this principle. However where the law of sovereign immunity is not the same for jurisdiction and enforcement purposes and its restrictive approach applies to actions to enforce an award, the “purpose” test will be applied to determine whether the immunity can be invoked for state or sovereign entity owned property. The answer will be **no** if the property against which enforcement is sought is held for commercial purposes and will ordinarily be brought before commercial arbitration rather than for sovereign or public purposes⁵⁴.

1.4.3 – The State View of Immunity

State practice suggests that for the purposes of a state seeking immunity from jurisdiction or from execution against state owned property, the state and any wholly owned sovereign

⁵² Lord Browne-Wilkinson, *R V Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*(No3)[2000] 1 AC 147, at 201

⁵³ A.F.M. Maniruzzaman, ‘State Enterprise Arbitration and Sovereign Immunity Issues’ (2005)60(3) DRJ <http://www.academia.edu/58774> accessed 9 July 2013.

⁵⁴ *Ibid* p5

entity are considered to be functionally the same⁵⁵. In line with this principle and definition, a legal action or arbitration commenced against a sovereign entity or instrumentality would be considered to be against the state itself⁵⁶. As stated by Mark Weidemaier in his paper on Sovereign Lending at the 2nd Atlanta Arbitration Society (AtlAS) Conference in April 2013, the drafting of waivers of immunity by Sovereigns in Arbitration Agreements will still have to contend with the issue of different interpretations when it comes to enforcement in different jurisdictions.

1.4.4 – Determining the Nature of Acts and Transactions-

Under a functionalist approach to sovereign immunity, a State or a Sovereign entity can claim sovereign immunity only for *actua jure imperii* (government or sovereign acts) but not for *acta jure gestionis* (acts of a private or commercial character). There has been some divergence of opinion in the courts in Europe and the USA for instance on whether the exploration and exploitation of natural resources like gas are sovereign or commercial acts. Regardless of whatever side of the divide one is on, there is some agreement that the distinction between *actus jure imperii* and *actus jure gestionis* is seen to revolve around the “nature” and “purpose or motive” of the act concerned. The nature test has been increasingly endorsed in both case law and recent legislation⁵⁷ and seems to turn on whether the act is taken pursuant to a public law or a private law contract. If the contract can be characterised as public, immunity will be granted⁵⁸.

⁵⁵ Ibid p2

⁵⁶ Ibid

⁵⁷ Velmir Zivkovic, ‘Contracts, Treaties and Umbrella Clauses: Some Jurisdictional Issues in International Investment Arbitration’, (2012)(4)BLR <http://www.papers.ssrn.com/id=2119681> accessed August 28 2013.

⁵⁸ Maniruzzaman(n53) p3

1.4.5 – Have Most Disputes Involving Sovereigns been decided by Commercial Arbitration-

It is not definite what proportion of disputes before commercial arbitration involves states and sovereign entities. An abstract in the conference brochure covering of one of the major topics at the AtlAS Conference, estimated that sovereign and state disputes make up about 50% of the case load of some International Arbitration Institutions. One thing is clear however, that the nature and purpose of the contract, and whether it can rightly be classified as investment will determine whether it should be brought before Commercial or Investment Arbitration. The divide between a Treaty Clause and a Contract Clause is definitely getting thinner and thinner and requires more factual analysis as to the nature, type and purpose of the underlying act, transaction or contract. This is obviously a subject for further study.

Chapter 2

JURISDICTION IN ARBITRATION

Jurisdiction is of extreme importance in all matters brought before an Arbitral Tribunal and proceedings in International Arbitration are no exceptions to this rule. In most arbitral hearings, the issue of jurisdiction or the lack of it will have to be dispensed off at a preliminary hearing before going into the merits of the claim. Most respondents will usually challenge the jurisdiction of the Arbitral Tribunal to proceed with the case.

2.1 – General Issues Regarding Jurisdiction

It is a general rule that an Arbitral Tribunal may only validly determine those disputes that the parties have agreed that it should determine⁵⁹. This is an inevitable and proper consequence of the voluntary nature of arbitration. As a result of the consensual nature of arbitration, this authority or competence comes from the agreement of the parties. In International Commercial Arbitration, it is derived from a Clause in the Contract while in Investment Arbitration, it is derived from a Clause in the enabling Treaty, either Bilateral or Multilateral. So in effect, it is the parties who give the arbitral tribunal the authority to decide disputes between them and the tribunal has a duty to stay within the terms of its mandate. This rule can also be expressed with the same meaning by stating that an arbitral tribunal must not exceed its jurisdiction⁶⁰.

⁵⁹ Redfern and Hunter(n4)p248

⁶⁰ ibid

2.2 – Challenges to Jurisdiction

Challenges to Jurisdiction – A challenge to the jurisdiction of an Arbitral Tribunal can be partial or total.

2.2.1 - Partial Challenge: This occurs where the challenger asserts that some of the claims (or counterclaims) that have been brought before the tribunal do not properly come within its jurisdiction⁶¹.

Challenges to jurisdiction have been tested in International Investment Arbitrations before ICSID, where there is usually a requirement to notify disputes for the purpose of seeking an amicable settlement before the right to submit to arbitration crystallises. Respondent states have also often argued that certain claims fall outside of the originally notified dispute when challenging jurisdiction.⁶²

The remedy to a partial challenge to jurisdiction lies with the parties. They may agree that items of claims and counterclaims, which were outside the scope of the initial reference to arbitration, may be brought within the arbitration. They can do this by signing a memorandum to that effect which effectively brings these new claims within the jurisdiction of the tribunal.⁶³ In practice, the arbitration tribunal is the only body empowered to admit new claims once the arbitral process has commenced. The second party may also object to new claims being brought before the tribunal. Usually the arbitral tribunal in this case will proceed with caution, especially if it seems that it may be exceeding its jurisdiction as this is

⁶¹ Ibid p249

⁶² Ibid

⁶³ Ibid

one of the few grounds under which it is possible to challenge an international award as is the case in French Law.⁶⁴

2.2.2 – Total Challenge

Total challenge like partial challenge has become quite common in recent times. However unlike partial challenge which usually does not raise fundamental and intractable problems, the same cannot be said of total challenge which raises the more fundamental question of whether there is a valid arbitration agreement.⁶⁵

Total challenges to jurisdiction are most likely to occur where the authority (or purported authority), as the case may be, of the arbitral tribunal is derived from the arbitration clause rather than where the authority is derived from a submission agreement by the parties.⁶⁶

In a total challenge to the jurisdiction of the arbitral tribunal, key questions are asked like who decides the challenge to jurisdiction?, Whether it is the arbitral tribunal or a national court as well as whether a national court has the authority and control to review a ruling on jurisdiction and when⁶⁷?

2.3 – The Autonomy (or Separability) of the Arbitration Clause

Two key questions often arise as to whether the arbitration clause can be have an independent existence of its own, or whether it can only be part of the transactional contract in which it is contained?

⁶⁴ ibid

⁶⁵ ibid

⁶⁶ ibid

⁶⁷ Ibid p251

These questions are of particular importance where there is a challenge to an arbitration clause based on an allegation that the substantive contract is invalid for a variety of reasons. These may include the contract not being signed by one of the parties amongst others. Whatever the reason, it needs to be determined if the arbitration clause is still effective or not when this situation occurs.

The answers to these questions are found in the doctrine of separability which regards the arbitration clause as having the effect of and constituting a separate and autonomous contract. It means that the validity of arbitration clause does not depend on the validity of the contract as a whole⁶⁸.this allows the tribunal to decide its own jurisdiction by first assuming jurisdiction.

Beyond this autonomy however comes another question of who determines the challenge to the jurisdiction of an arbitral tribunal? Is it the arbitral tribunal itself, an arbitral institution, an appointed authority or a court of competent jurisdiction⁶⁹?

2.3.1 – Who Determines Jurisdiction?

The Arbitral tribunal has the power to investigate and determine its own jurisdiction. This power is inherent in the appointment of an arbitral tribunal⁷⁰ and enables it to decide whether or not a particular claim or series of claims comes within its jurisdiction. The fact that a tribunal's decision on its own jurisdiction can be overruled subsequently by a

⁶⁸ ibid

⁶⁹ ibid

⁷⁰ ibid

competent court does not in any way impede the ability of the tribunal to make this decision⁷¹.

There are different scholarly opinions in this regard. Lew, Mistelis and Kroll are of the opinion that the doctrine of separability strengthens the jurisdiction of the arbitral tribunal while Rubino-Sammartano opines that the doctrine of separability actually results in the arbitrators having jurisdiction to determine its jurisdiction⁷².

Generally, when the jurisdiction of an arbitral tribunal is challenged, they are entitled to decide based on the merits of the case whether they should dispense with the issue of challenge to their jurisdiction as a preliminary matter or whether they should go ahead and determine the matter in dispute, thereby leaving the matter of jurisdiction to be held over until it is determined by a competent court. The choice is entirely that of the tribunal⁷³.

- Competence of an arbitral tribunal to determine its own jurisdiction – This competence or power or jurisdiction is usually incorporated into the model law of most countries. An example is in the English Arbitration Act of 1996 where this competence of an arbitral tribunal to rule on its own jurisdiction is contained in Section 30 while the separability of the arbitration clause is in Section 7⁷⁴. It was held in the *SNE v JOC Oil* case, that even if there was no valid contract which in essence means no agreement to arbitrate, due to the fact that the contract was signed by one official instead of two as provided for by Russian law, the test here is for the agreement to have come “into existence” even if it became void *ab initio* as distinct

⁷¹ *ibid*

⁷² Saksham Chaturvedi and Chanchal Agrawal, ‘Jurisdiction to determine Jurisdiction’(2011) 77 Arbitration, Issue 2 p.206

⁷³ Pierre Lalive, ‘Some objections to Jurisdiction in Investor- State Arbitration’(2002)ICCA <http://www.arbitration-icca.org/media> accessed August 20 2013

⁷⁴ Redfern and Hunter(n4) p.254

from “never existed” in which case there was never an agreement⁷⁵. This is a classical case of the doctrine of *separability* at work.

- Limitations on jurisdiction – Even though it is generally accepted that in International Arbitration governed by one of these conventions or rules like UNICTRAL or ICSID, it is that international source that determines the jurisdiction of the arbitrators, even where these will be contrary to the law of the place where the arbitration takes place⁷⁶. In practice however, parties may not by themselves agree on rules that are contrary to the place (*lex arbitri*), as whereas the conventions and rules referred to above may define the “jurisdiction of the arbitrators”, that jurisdiction itself is derived from the arbitration agreement which can only confer powers that are permissible under the law applicable to the arbitration agreement and under the *lex arbitri*⁷⁷.
- Award made without jurisdiction – An award made without jurisdiction is a nullity. This is recognised in both national laws and in the international conventions governing arbitration for example in French law, an award can be challenged in court where the arbitrator either gave judgement in the absence of an arbitration agreement or on the basis of a void or expired agreement. Also under the New York Convention, recognition and enforcement of an award can be refused, if the arbitration agreement is not valid either under the law the parties have subjected it or under the law of the country where the award was made⁷⁸.

⁷⁵ Ibid p255

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Ibid p256

2.4 – Control of the Courts

The courts have the final say on any decision given by an arbitral tribunal regarding its jurisdiction. This process varies from country to country and sometimes within countries. In practice this recourse to the courts can take place either (i) at the beginning of an arbitral process ;(ii) during the actual arbitral process or (iii) following the award⁷⁹.

2.4.1 – Concurrent Control – This is the system whereby a national court is involved in the question of jurisdiction before the arbitral tribunal issues a final award on the merits. This process is not applicable to cases before ICSID where the internal annulment process only applies in respect of final awards, which must deal with every question submitted to the tribunal and can only be open in respect of cases where the tribunal lacked jurisdiction when the matter was finally disposed of.

Arguments in favour of concurrent control point to the ability of the parties to know where they stand .This will save time and money if the proceedings are eventually found to be groundless unless of course the tribunal decided to continue with the proceedings pending a decision from the courts on jurisdictional challenge.

Arguments against concurrent control point to the issue of interference with the arbitral proceedings as well as the potential to encourage delaying tactics by the reluctant respondent.

2.4.2 – Choices Open to the Arbitral Tribunal -The increased sophistication in the practice of international arbitration has led to the corresponding increase in the frequency of the challenges to the jurisdiction of arbitral tribunals.

The choices available to a tribunal when faced with a jurisdictional challenge are

⁷⁹ ibid

- To decide at the outset that it has no jurisdiction
- To issue an interim award on jurisdiction or
- To join the issue of jurisdiction to the merits.

In the event that the tribunal decides that it has no jurisdiction, the arbitral proceedings and the existence of the arbitral tribunal comes to an end. The only remedy available for the claimants or (counterclaimant) is to seek recourse to the national courts. This happens only in an “open and shut case”⁸⁰.

However, the usual course of action is for the tribunal to receive the submissions of the parties, both as to facts and law, and then issue a reasoned interim award on the issues of jurisdiction raised which will be binding on the parties ,subject of course to any right of recourse to a competent court by the losing party.

The third scenario is where the issue of jurisdiction depends on facts which are so closely related to the merits of the case, in such a way that it is almost impossible to determine one, without determining the order.

ICSID Rules 41(3), (4) and (5) deal with these respectively as follows; Section 3 deals with when an objection is raised formally regarding the dispute and as to jurisdiction, the proceedings on merit shall be suspended and the Tribunal President shall after consulting with other members fix a time-limit within which parties may file observations to the objections,; In Section 4, the tribunal shall decide whether further procedures relating to the objection shall be oral or not and may either deal with it as a preliminary question or join it to the merits of the case and in Section 5 the tribunal may, if it decides that the dispute is not within its jurisdiction, render an award to that effect.

⁸⁰ Ibid p.257

In the event that a respondent refuses to take part in the proceedings because it has raised the issue of jurisdiction, the tribunal can decide to proceed with the plaintiff *ex parte* but however runs the risk of being unable to enforce any award obtained, as was the case in the Libyan oil nationalisation cases where the awards were adjudged a nullity because the respondent did not make any submissions or even participate in the proceedings⁸¹.

2.5 – Other Issues Affecting Jurisdiction in International Arbitration

There are many other issues that affect jurisdiction in international arbitration. These include:

2.5.1 – Issues of Procedures - It is almost certain that objections to the jurisdiction of the arbitral tribunal are raised by a respondent at the early stages of the arbitration. It is highly unlikely that a claimant will make this challenge in the course of the determination of the very claims he submitted to arbitration unless he is raising an objection to the jurisdiction in respect of counterclaims brought forward by the respondent.

To prevent the abuse of this right to raise objections to jurisdiction, different laws have set time limits for when this can be done. The English Act for instance, provides that this objection must be raised at the time the challenger takes the first step in the proceedings to contest the merits while in Venezuela; it must be raised within five business days of the procedural hearing. In any case, there is some degree of flexibility such as under the UNICTRAL Rules, where the losing party can still raise issues of jurisdiction as a ground for resisting the recognition or enforcement of the award. Also under the English Act of 1996,

⁸¹ Ibid.

failure to raise the objection within the stipulated time only precludes the resultant award from being enforced by English courts in exceptional circumstances⁸².

2.5.2 – Options Open to the Respondent - There are four options open to a respondent seeking to challenge the jurisdiction of an arbitral tribunal

- Boycott the arbitration – this is the first and most extreme option. When this happens, the tribunal will proceed on an *ex parte* basis without taking the respondents' submissions. The respondent can then seek to set aside the resultant award or resist its enforcement as was the case in the ICSID tribunal case of *Letco v Liberia* and the Libyan Oil Nationalisation cases.
- Raise objections with the arbitral tribunal – As discussed earlier in 2.3.1, this is the most conventional course of action, and the tribunal will usually schedule an exchange of written briefs followed by a preliminary hearing at which the parties can make their respective cases orally.
- Application to a national court – As discussed earlier in 2.4.1, this can be done in several ways (i) by the respondent seeking an injunction to restrain the tribunal from proceeding; (ii) the respondent may seek a declaration to the effect that the tribunal does not have any jurisdiction in respect of the claims brought before it; or (iii) the respondent may actually go on the offensive and commence litigation in respect of the matters in dispute. such challenges are usually made to the courts at the seat of arbitration, but a reluctant respondent can also apply to another national court if that court has the jurisdiction to entertain the application which might result to one

⁸² *ibid*

party to the dispute seeking to arbitrate in one country and the other party is seeking to litigate in another country as in the *Hubco v WAPDA* case⁸³.

- Attacking the award – This takes place when the respondent participates in the arbitration and then waits for the final award to be issued, after which they may either challenge the award in the competent court or refuse to implement the award and wait for the successful claimant to attempt to enforce it. The courts frown at this method as an undignified way of using technicalities to avoid settling obligations.
- The combined approach - Finally, a combination of boycotting the arbitration, then applying to the national court to resolve the issue as well as challenging the award once it has been made can be used.

2.5.3 – International Agreements on the Jurisdiction of National Courts

There are potential conflicts where there are treaties in place for instance under the Protocol to the Treaty for the European Union (TFEU) which stipulates that legal action shall be instituted in the courts where the persons are domiciled while the extant arbitration agreement may specify for Arbitration in a different member state. In the *Marc Rich* case, it was held that the exclusion of Arbitration from the Brussels Convention extended to a national court in respect of the Arbitrator. Therefore in this case, the English courts by virtue of the arbitration clause in the arbitration agreement had jurisdiction in the hearing regarding the appointment of an arbitrator notwithstanding the domicile of the defendant in Italy⁸⁴.

⁸³ Ibid p 260

⁸⁴ Ibid p262

2.6 – Specific Issues Affecting Jurisdiction in Investment Arbitration Concerning Sovereigns

An Investor - state Tribunal is a judge of its own authority to hear the dispute brought before it⁸⁵. Its competence to hear the matter will often depend on a number of factors including the applicable treaty or treaties, definition of covered “investors” and “investments”, the nature of disputes the states have agreed to arbitrate and whether they are any prerequisites which investors must comply with before initiating actions.

2.6.1 Existence of an applicable treaty – to be able to determine whether an investor enjoys investment treaty protection, there must be in existence, an applicable treaty between the host state of the investment and the home state of the investor⁸⁶. The most reliable and accurate means of verifying the existence of a BIT and /or whether it is in force is by contacting the Trade/Treaty section of the relevant government or embassy or at ICSID’s website. A key provision of a BIT is the effective date and duration of the treaty. The Argentine – US BIT provides that investments existing at the time of entry into force as well as investments made or acquired thereafter shall be afforded protection under the treaty. The ICSID tribunal in *Tecnicas Medioambientales Tecmed S.A v The United Mexican States*⁸⁷ however clarified the distinction between the application of a BIT to an investment made and alleged breaches prior to the treaty coming into effect. It held that whilst the concerned investment was eligible for protection under the BIT, The same BIT could not have retrospective application to host state actions including breaches prior to the commencement date of the BIT.

⁸⁵ Nathalie Bernasconi-osterwalder and Lise Johnson(ed), *International Investment Law and Sustainable Development: Key cases from 2000-2010*(IISD 2011)

⁸⁶ Redfern and Hunter (n4) p477

⁸⁷ ICSID Case No.ARB(AF)/00/02, Award May 29 2003

2.6.2 – Protected Investors – The definition of protected investor in a BIT is important in determining their protection under the treaty. Key terms here include (i) natural persons who are generally nationals of the country of the investing party; (ii) legal entities which includes companies, corporations under the law of the contracting party and are located within the territory of the same party and (iii) legal entities established by the law of any country which are directly or indirectly, controlled by nationals of the contracting party or having their seat in the territory of the same party. Where issues of dual nationality exist, they should be resolved in line with general principles of international law. In *CMS V Argentina*, it was held that the issue of the investors being minority shareholders does not affect jurisdiction.

2.6.3 – Protected Investments – To be able to rely on and seek protection under an investment treaty, the investor must establish that it has made a protected investment⁸⁸. The definition of investment has evolved over time and includes direct and indirect investments and other modern contractual transactions as confirmed by ICSID in *Fedax N.V v Venezuela*⁸⁹ where it held that promissory notes issued by Venezuela, and acquired by the claimant from the original holder in the secondary market by way of endorsement were an investment under the Netherlands-Venezuela BIT. Also in *Abaclat and others v Argentina*, under preliminary issue No 9, the ICSID tribunal held that Article 1(1) c of the Argentine-Italy BIT seemed to explicitly include financial instruments such as bonds⁹⁰. Similarly in *Ceskoslovenska Obchodni Banka, A.S v The Slovak Republic*, the

⁸⁸ Ibid p480

⁸⁹ ICSID Case No.ARB/96/3, Decision on objection to Jurisdiction, July 11 1997, 5 ICSID Rep 186(2002)

⁹⁰ Beess and Chrostin(n1) p511

ICSID tribunal held that a loan may constitute an investment if it contributes substantially to the economic development of a state⁹¹.

2.6.4 – Other Jurisdictional Issues – Relevant issues raised with respect to jurisdiction in international investment agreements include the impact of treaties on investors' decisions to bring legal actions against host states. Whereas some treaties specify some "cooling off period" before bringing forward disputes before arbitral tribunals, ICSID Decision in *Occidental v Ecuador*⁹² where the respondent objected to the tribunals jurisdiction until the investor has complied with the applicable waiting periods specified in the BIT was rejected by the tribunal and the claims were allowed to proceed. Tribunals have also allowed states to bypass provisions in the contract that allow for host state jurisdiction by allowing investors to pursue treaty based arbitration instead of, or parallel to, claims before the contractually agreed forum. These decisions were made in *Occidental v Ecuador* above and *Vivendi v Argentina*⁹³.

Even though this development has been viewed by some scholarly writers as worrisome and brings about the possibility of host states having overlapping litigation in multiple fora⁹⁴, I am of the opinion that the obvious advantages of a treaty based, neutral forum international investment arbitration far outweighs any concerns about host states losing control of cases in their domain. The increasing referrals and popularity of these treaty based arbitrations can be further attested to by the fact that as at 17 July, 2013, 269

⁹¹ ICSID Case No ARB/97/4, Decision on Jurisdiction, May 24, 1999, 14 ICSID Rev-FILJ 251 (1999)

⁹² ICSID Case No. ARB/06/11, Decision on Jurisdiction, 9 September 2008 <http://icsid.worldbank.org/ICSID> accessed 17 July 2013.

⁹³ *Compania de aguas del Aconquija S.A and Vivendi Universal S.A v Argentina*, ICSID Case No ARB/97/3, Award, 21 Nov 2001, 16 ICSID Re.- FILJ 641(2001), Decision on Annulment, 3 July 2002, 17 ICSID Rev.- FILJ 168(2002).

⁹⁴ Bernasconi-osterwalder and Johnson(n96)

cases have been concluded by the ICSID Tribunal with 165 pending cases at various stages of hearing⁹⁵.

⁹⁵ ICSID Website, Search List of Cases as at 17 July 2013 ><http://icsid.worldbank.org/ICSID/Frontserve>>accessed 17 July 2013.

CHAPTER 3

CASE STUDIES

A review of case law in sovereign debt arbitration will be carried out here using the *Abaclat* case where the tribunal unanimously assumed jurisdiction. In the *Teinver S.A* case where the tribunal also assumed jurisdiction, there will be a focus on the separate opinion of the Arbitrator appointed by the respondents, Dr Kamal Hossain.

3.1 – The *Abaclat* Case

Facts of the case

60,000 Italian nationals out of a total of about 300,000 who had invested in Argentine Government bonds held out and refused the bond exchange offer from Argentina after it restructured its debt sequel to an earlier default. These bondholders filed mass claim arbitration under the Argentina- Italy BIT. The parties agreed at the first session to divide the case into the jurisdictional and merits phases⁹⁶.

The Claim

Three of the eleven questions raised were critical for resolution at the jurisdictional phase as follows: (i) Does the consent of Argentina to the jurisdiction of the ICSID include claims presented by multiple claimants in a single proceeding? If so, are the claims admissible? (ii) Is the declaration of consent signed by the individual claimants submitted for this proceeding valid; and what is the role of the Task Force Argentina(TFA) set up by the eight Italian banks (if any) in this proceedings? (iii) Do the bonds in question satisfy the definition

⁹⁶ *Abaclat*, ICSID Case No ARB/07/5, Decision on Jurisdiction August 4 1011

of “investment” under Article 1(1) of the Argentina- Italy BIT with respect to the provisions on investment “in the territory” of Argentina?

Regarding question i above, the tribunal held that since the “ICSID” rules do not expressly address the question of mass claims, the tribunal interpreted this from the provisions of Article 44 of the ICSID Convention which states as follows” if any questions of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the tribunal shall decide the question⁹⁷” and Rule 19 of the ICSID Arbitration Rules which states “the tribunal shall make the orders required for the conduct of the proceedings⁹⁸”. In filling this gap ,the tribunal made a series of inferences based on its findings regarding the purpose and scope of the subsisting treaty as follows(1) the relevant BIT covered investments that are likely to involve a large number of claimants if violated;(2) such investments were likely to require collective relief in order to provide effective protection of investments;(3)BITs are intended to protect investments they cover in their definition of “investment”;(4) the ICSID is intended to promote and protect investments such as those made pursuant to BITs;(5)it would be contrary to the spirit of ICSID to interpret the silence as qualified and thus the treaty’s silence on mass claims was a gap ,giving the tribunal the power to step in⁹⁹ .

Regarding question ii above, within the context of BIT Arbitration, consent is generally considered to have been given when the ICSID proceedings are initiated, which in essence amounts to an investors acceptance of the state’s offer to arbitrate claims as provided under the relevant BIT.

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Ibid

In cases of mass arbitration claims, every investor does not have to file a request for arbitration. In this regard, the TFA sent a TFA Mandate package to each potential claimant. This included the TFA Instruction Letter, the Power of Attorney, the TFA Mandate and the additional questionnaires and instructions. The tribunal held that it had to find both the existence of a written document incorporating a valid consent to the ICSID Arbitration as well as evidence that the statement of consent reflected the claimants' sincere intention in order to determine whether the claimants' consent was valid. The tribunal however noted that it would give due regard to the fact that none of the claimants themselves have attempted to invoke a claim of invalid consent. The tribunal would therefore "impose a higher standard of proof than if the mistake or fraud is invoked by the affected party itself¹⁰⁰"

Consequently the tribunal found that the claimants validly consented to the mass claim. None of the claimants themselves claimed a lack of consent and they were in a position to appreciate the scope and meaning of their commitment to the ICSID Arbitration through the TFA Mandate Package¹⁰¹.

Regarding question iii above, on whether the bonds satisfy the definition to be investment, the tribunal firstly determined that the claims raised in *Abaclat* were not pure contractual claims, but were claims covered by the terms of the Argentina- Italy BIT. Additionally, the tribunal determined that the claims would establish the tribunal's jurisdiction under the BIT as long as they actually arose out of an investment within the meaning of Article 1 of the Argentina- Italy BIT and Article 25(1) of the ICSID Convention¹⁰².

¹⁰⁰ *ibid*

¹⁰¹ *ibid*

¹⁰² *ibid*

Argentina had argued that the security entitlements of the type at stake in *Abaclat* did not constitute “investments” due to their not meeting criteria set forth in the *Salini* case which include things like (a) substantial contribution to the investor, (b) certainty of duration, (c) the existence of an operational risk among others. They also pleaded the fact that the claimants were too far removed from the actual investment as the Italian bondholders had purchased the bonds from Italian banks that had provided the actual investment in a lump sum before re-selling the relevant bonds. The tribunal however, held that the claimants bonds and security entitlements fit within the definition of investment under the relevant BIT, which in turn set forth the limits of Argentina’s consent to ICSID Arbitration. Therefore, the Argentina-Italy BIT’s definition of investment fit the meaning of investment under the ICSID rules¹⁰³.

3.2 – The *Teinver S.A & Autobus S.A v Argentina Case*

This concerns the Investment made by *Teinver S.A and others* who were shareholders of Air Comet, a private enterprise which bought out SEPI (an investment holding company) for Spanish governments’ *investments* in the Argentine Airline industry which suffered a downturn in the late 1990’s and early 2000’s in the face of the economic crisis in Argentina. This resulted in one of the airlines “ ARSA” filing for bankruptcy reorganisation in the middle of 2001 and reaching a debt restructuring settlement with most of its creditors in Dec 2012¹⁰⁴.

In December 2008, *Teinver* brought a request for arbitration before ICSID claiming expropriation by Argentina as a result of both the formal nationalisation of two Airlines,

¹⁰³ *ibid*

¹⁰⁴ *Teinver S.A, Transportes de Cercanias S.A. and Autobuses Urbanos del SUR S.A v The Argentine Republic* (2012) ICSID Case No ARB/09/1 <://www.icsid.worldbank.org=cases=docid DC7692>accessed July 24 2013.

“ARSA” and “AUSA” where it had investments in December 2008 by the approval of the Argentine Congress as well as creeping expropriation that had started since October 2004 or earlier. It invoked the USA - Argentina BIT and the Most Favoured Nation principle¹⁰⁵.

Argentina challenged the jurisdiction of the ICSID to hear the claims on the following grounds:

(i) The tribunal lacked jurisdiction because *Teinver* failed to meet the requirements contained in Article X of the treaty, regarding attempting to settle amicably within six months of the dispute and attempting to settle in local courts for eighteen months before referral to an international arbitral tribunal

(ii) The tribunal lacked jurisdiction because *Teinver* lacked the legal position to claim for legal rights that belong to another legal person Interinvest and Argentine Airlines

(iii) The tribunal lacked jurisdiction to entertain allegations by *Teinver* that concern the acts of non state entities which cannot be attributed to *Argentina* as the actions of the two labour unions in the Argentina Airline Industry APTA and APLA are not necessarily actions of the Argentine government as these unions are neither state organs nor do they exercise elements of governmental authority.

(iv) The tribunal lacked jurisdiction because the investment invoked by the claimants is not an investment protected by the treaty as they have allegedly by some of their actions, violated Spanish and Argentine laws as well as other misdeeds¹⁰⁶.

¹⁰⁵ *ibid*

¹⁰⁶ *ibid*

The claimants counterclaimed on each of the four points above and the tribunal after listening to both sides of the arguments and after careful analysis of the evidence, issues and facts there from, disagreed with all the reasons for the four jurisdictional objections and assumed jurisdiction on the matter and joined to the merits of the case, the determination of *Argentina's* responsibility for the acts of non sovereign or state entities¹⁰⁷.

- **The Dissenting Opinion in the *Teinver S.A* Case on Jurisdiction**

A striking peculiarity in the *Teinver* decision stated above is that whereas all the arbitrators were agreed on the **substance** that they could assume jurisdiction, there was a dissenting opinion by the Arbitrator appointed by *Argentina*, Dr Kamal Hossain on the **form** and he clearly set these out in a separate opinion as follows-

Facts relevant to jurisdiction: – (i) Dr Hossain saw some inconsistencies in the majority decision regarding the identity of the claimants as members of the **Grupo Marsans** which is different from their submission that they purchased the airlines **in their own rights** in **2001** until the nationalisation in **2008**. He however thought that this will be resolved at the merits stage¹⁰⁸.

(ii) Dr Hossain also picked some holes in the majority decision which stated that *Teinver* purchased the Argentine Airlines in **2006** which is fundamentally different from the actual claim that it was purchased in **2001**.

In the light of these, Dr Hossain was therefore of the opinion that the questions of “who are the parties to the claim” and “which shares can be described as theirs”, still remain

¹⁰⁷ *ibid*

¹⁰⁸ *Teinver S.A and Autobuses v Argentina*, (n116), Doc id 2793, Separate opinion of Dr Kamal Hossain>accessed July 25 2013.

unresolved and unanswered and do not align with the claimants assertion, that “this is a straightforward case of formal expropriation without compensation by the Government of Argentina” and will indeed require some consideration of evidence at the merits stage.

Jurisdictional Objections: - On the objections to jurisdiction by *Argentina* and the counterclaims by *Teinver*, Dr Hossain dealt with these one after the other as follows;

1st Objection – regarding the failure to amicably settle and submitting to local courts before recourse to arbitration listed as i in the previous page, *Teinver* in their response assert that they are entitled to invoke the MFN clause in Article IV(2) in order to benefit from the more favourable dispute settlement *provisions* of other BITs negotiated by *Argentina*, failing which they believe they should be excused from those requirements for reasons of futility, Dr Hossain went in depth from case law and concluded as follows “once a local-remedies rule is lawfully provided for in the BIT “,it becomes a condition of *Argentina’s* consent to arbitrate disputes under the BIT, but only upon **acceptance and compliance** by the investor(*Teinver*).This amounts to(approbating and reprobating at the same time).In effect, he disagreed that *Teinver* can have recourse to the MFN cause in this regard¹⁰⁹.

2nd Objection – on the status of the investment and on *Teinver* being an indirect shareholder and therefore is unable to benefit from the protection under the Argentina - Spain BIT amongst others, Dr Hossain disagreed with the precedence and case law relied upon in arriving at the majority decision. While agreeing with the majority decision that the respondents assertion could have relevance at the merits stage rather than at the jurisdictional stage, he however disagreed with the views expressed in the majority decision to the effect that *Teinver* **have the standing to recover for damages** ,and also the finding

¹⁰⁹ *ibid*

that *Teinver* are not deprived of standing by the fact that their investment were made through Air Comet. Dr Hossain was of the opinion that relevant provisions of Argentine law would need to be considered before a definitive decision can be made on this issue. On *Teinver's* other investments, Dr Hossain agreed with the majority decision that the tribunal cannot address this at the jurisdictional stage but disagreed with the definitive finding that the tribunal finds that *Teinvers* indirect shareholdings constitute an “investment” under the treaty, without due consideration to other factors that can affect this position such as illegality or fraud committed in the course of performance amongst others which have not been thoroughly analysed¹¹⁰.

Dr Hossain basically agreed with the majority decision regarding the 3rd and 4th Jurisdictional objections by *Argentina*¹¹¹.

3.3 – A Critical Analysis of the Investment/Commercial Divide in Disputes Involving Sovereigns Following from the *Abaclat* and *Teinver* cases

It is becoming increasingly difficult to distinguish between Investment and Commercial Disputes and Treaty and Contract claims. This is largely due to the growth of international trade amongst countries and also due to the greater participation of states and sovereign entities in otherwise private endeavours. The growth of public private partnerships (PPP)s and Private Finance Initiatives (PFI)s where states are partnering with funding organisations across borders in order to provide much needed infrastructures and attract the necessary foreign investments and/ or expertise has even raised the bar in this private-public corroborations.

¹¹⁰ *ibid*

¹¹¹ *ibid*

It is in principle admitted that with respect to a BIT claim, an arbitral tribunal has no jurisdiction where the claim at stake is a pure contract claim. An exception to this principle is where the BIT provides for an “umbrella clause” where a states’ breach of a contract with a foreign investor or where the breach of an obligation under another treaty or law becomes a breach of a BIT actionable through the mechanism provided under the treaty which in the *Abaclat* case is ICSID Arbitration. Even though there was no umbrella clause in the *Abaclat case*, the circumstances and action of *Argentina* in altering the bond repayment conditions seems to derive from its exercise of sovereign state power. In fact Argentina relied and justified its non performance based on its situation of¹¹² insolvency which had nothing to do with any specific contract.

Regardless of this increasing thin line between contract and treaty claims, one thing that is incontrovertible from the two cases is that there must be in existence, **a treaty** between the countries of the **investor and the host nation**; that **the parties must consent to arbitration** and that the disputed transaction **must qualify as an investment** which as we can see from both cases have very broad ramifications whether **they are direct or indirect investments** etc.

As was shown in both cases, some issues of jurisdictional challenge can indeed only be resolved at the merits stage and therefore shouldn’t preclude the tribunal from assuming jurisdiction and dispensing of these issues on their merits down the line.

This explains why more sovereign disputes are being submitted to investment arbitration. Indeed, it has been argued that the consent to International arbitration given by governments in BITs is a key factor accounting for the recent explosion of foreign

¹¹² *Abaclat v Argentina*, [2011] ICSID Case No Arb/07/05, para 316-326 ><http://italaw.com/>>accessed July 31 2013

investment disputes¹¹³. It is up to the tribunal ICSID or any other to annul proceedings if they feel they do not have jurisdiction.

It will be interesting to see how the *Abaclat and Teinver claims* are decided at the merits phase but one thing is clear, both cases have changed the landscape regarding the investment/commercial divide in disputes involving sovereigns and their arbitrability in investment tribunals and will surely shape the way future arbitration clauses are drafted. I am of the opinion that the last has surely not been heard of these decisions.

¹¹³ Bishop, Crawford and Reisman,(n46) p10

CHAPTER 4

SOVEREIGN DEBTS AND MASS CLAIMS IN INTERNATIONAL ARBITRATION

Beyond resolving the issue of whether Argentina’s unilateral modification of its payment obligation towards creditors was an expression of state power, rather than of contractual rights and obligations, the second most contentious issue the tribunal addressed in the *Abaclat* case was whether mass claims brought by approximately 60,000 claimants were permissible under the ICSID framework¹¹⁴.

4.1 – Consent in Mass Claims Arbitrations

The ICSID tribunal’s decision to assume jurisdiction in the *Abaclat* case clearly set the pace for mass claims arbitration. The issue of consent as far as the claimants were concerned was resolved by the tribunal which found that the TFA mandate package signed by the claimants showed that they understood how this would affect their rights. It was *prima facie* evidence “that they knew what they were doing”¹¹⁵. Regarding Argentina’s consent, the tribunal held that through the Argentina – Italy BIT particularly Article 8(3); Argentina generally consented to ICSID Arbitration for disputes falling within the scope of the treaty. It also assumed that it had jurisdiction over each of the individual claims and did not think that it could justify losing its jurisdiction simply because the number of claimants was unusually high¹¹⁶.

¹¹⁴ Beess and Chrostin,(n1) P509,512

¹¹⁵ Ibid P513

¹¹⁶ ibid

4.1.1 - Mass Claims under ICSID

Apart from interpreting whether silence in the ICSID rules regarding mass proceedings was “qualified” and intentional or if it was an unintended gap, which the tribunal addressed by making a series of inferences as stated in Paragraph 3.1 in the earlier chapter, the tribunal in *Abaclat* also found that the necessary modifications to hear mass claims concerned only the method of examination and the manner of presentation that is the **form** rather than the **substance** or **object** of the claim¹¹⁷.

It reasoned in the *Abaclat case* that even though it will be impracticable for each claimant to present a full case or for Argentina to respond to each individual claim, the mass proceedings remained the best option given the circumstance, as neither party would be put at an *unfair* disadvantage given that it will just amount to the procedural rights of all parties being curtailed slightly which is far less challenging than the alternative of conducting 60,000 separate proceedings¹¹⁸.

The tribunal also reasoned that mass proceedings were justified in this case, due to the identical or sufficiently homogenous nature of the claims, since they all arose from the same type of financial instrument and found the same fault with Argentina’s post- default behaviour¹¹⁹.

¹¹⁷ Ibid P514

¹¹⁸ Ibid P515

¹¹⁹ Ibid P515

4.1.2 – Procedure

Given the peculiar position of *Abaclat* as a pacesetter in mass claims arbitration, the tribunal had to tinker carefully with the procedure to adopt. It therefore decided to defer selecting a method of examination until a hearing on the overview of the merits of the case.

The hearing on the merits will be phased out so that the core issues of a general nature will be separated from those that though generally applicable, may require some sub groups classification and distinction and may require some sampling. There are yet others that may require a case by case analysis. As a consequence of these, the tribunal will only set out the precise arbitration procedure at the end of the first period of the merits phase¹²⁰.

4.2 – Beyond the *Abaclat* Decision what is the Outlook on Mass Claims Jurisdiction in Disputes Involving Sovereigns Going Forward

As the *Abaclat* case goes through the merits phase, it remains to be seen what effect the tribunals decision will have on mass claims jurisdiction on disputes involving sovereigns going forward. If the decision stands, it means that individual bondholders will be able to join their claims and bring mass arbitrations in cases that would have previously fallen by the wayside due to the costs of arbitrating each individual claim¹²¹.

The peculiarity of the *Abaclat* situation which as aptly stated by Dr Klint Alexander in his paper at the recent conference of the Atlanta Arbitration Society was as a result of **poor drafting** of the arbitration agreement, which was silent on the issue of mass claims. In his opinion and rightly so, it will make parties to future agreements to be more thorough and dexterous in the finite wording of clauses in those agreements.

¹²⁰ *ibid*

¹²¹ *Ibid* P517

There are various schools of thought as to the real impact this decision will have in the future. On one hand, it is believed that it may increase the number of mass claims in arbitral proceedings and eventually lead arbitral institutions to address the question of mass claims expressly in their procedural rules¹²², while on the other hand it might trigger a raft of lawsuits in mainstream courts and could even result in other novelties like the claiming of reliefs based on equal or *parri passu* rights between exchange bondholders and holdouts¹²³.

I am of the opinion that we have to wait till the merits phases of both *Abaclat* and the recent decision in the *Ambiente Ufficio* case on jurisdiction which will be reviewed next is dispensed of to reach any factual opinions and conclusions on this issue of mass arbitration.

4.3 – A Review of the Ambiente Ufficio S.p.A and others v Argentine Republic Case

Background and Facts

This is another arbitration initiated by 90 claimants before the ICSID as a result of *Argentina's* default in repaying its national bonds claiming a breach of *Argentina's* obligations under the Argentina- Italy BIT¹²⁴.

Argentina raised preliminary objections to the tribunal's jurisdiction, arguing that it had not consented to multi-party proceedings in ICSID Arbitration.

Decision

The tribunal in a majority decision assumed Jurisdiction and Admissibility and dismissed *Argentina's* preliminary objections in their entirety. In doing this, it created a distinction

¹²² *ibid*

¹²³ W.Mark C. Weidemaier, 'Sovereign Debts After *NML V Argentina*' (2012) CMLJ<http://ssrn.com/abstract=2199655> accessed July 1 2013.

¹²⁴ *Ambiente Ufficio S.p.A and others v Argentine Republic*, [2013] ICSID Case No Arb/08/9 cases accessed June 28 2013.

between the multi-party dimension in the *Ambiente* case from the class-action or mass claim type collective proceedings in *Abaclat* as proportionately; one is only one thousandth of the other which is quite negligible¹²⁵.

On the other hand the tribunal as it did in *Abaclat* rejected the suggestion that the number of claimants, might call for the modification or adaptation of procedures to guarantee the manageability or fairness of the case¹²⁶.

The tribunal's approach after due clarifications of what it called "terminological imbroglio" as far as multi-party proceedings are concerned, and after firmly refusing to accept the arbitration involved a "mass claim" or "class action" was to review its jurisdiction by asking the following pertinent question: "whether, within the framework of the ICSID Convention, the original submission of a multi party claim requires an act of consent on the part of the respondent beyond the general jurisdictional requirement of written consent pursuant to Art 25(1) of the Convention?"¹²⁷

The tribunals answer to this question was **No**.

They had considered the following in reaching this conclusion:

(i) Article 25 of the ICSID Convention is silent on the admissibility of multi-party proceedings which makes it prone as in *Abaclat* to either being interpreted as a qualified or unintended silence.

(ii) Argentina's claim challenging jurisdiction on multi –party proceedings on the basis that it goes contrary to the intentions of the drafters of the ICSID Convention, cannot hold as

¹²⁵ P Hodges Kaplan and P Godwin 'Ambiente Ufficio S.p.A and others v Argentine Republic'(2013) Lexology <http://lexology.com/library=e2580083> accessed June 28 2013.

¹²⁶ ibid

¹²⁷ ibid

preparatory works to the Convention indicated that discussions on multi-party proceeding were inconclusive.

(iii) At the point of signing the Argentina- Italy BIT, multi- party proceedings were a common feature in the civil procedure laws of both countries.

(iv) Cases involving multiple claimants were not unusual in ICSID Arbitration prior to this time.

(v) Notable commentators on the ICSID Convention like Professor Schreuer had accepted the admissibility of multi-party proceedings in their commentaries.

(vi) The peculiarity of bonds which involves a high number of investors will generally require collective relief and therefore a high number of potential claimants.

It is noteworthy that like in *Abaclat*, the tribunal felt that even though there were differences between the claimants regarding the dates and serial numbering of the bonds, there was nonetheless sufficient homogeneity between the claims to justify a single proceeding¹²⁸

I find this analogy quite interesting given the obvious manageable size of the actual claimants when compared to *Abaclat* and it will be good to know the outcome at the merits phase of the proceedings.

¹²⁸ Ibid P3

CHAPTER 5

REDEFINING THE INTERFACE BETWEEN COMMERCIAL AND INVESTMENT ARBITRATION

As the divide between Contract and Treaty claims gets thinner and thinner due to the increasing involvement of States and Sovereign entities in hitherto exclusively commercial transactions especially of an ordinarily contractual nature like sovereign debts and bonds, so also does the demarcation between commercial and investment arbitration get more and more blurred.

Consequentially, it has become necessary in some instances to redefine the interface between Commercial and Investment Arbitration as there are cases where parties who have made successful Contract claims may resort to a Treaty claim to be able enforce their Commercial award.

5.1 – Initiating an Investment Arbitration Action to Enforce a Commercial Arbitration Award

It is **trite** that enforcement of a foreign arbitral award can be a daunting task. The national courts of the host country may overtly or covertly frustrate efforts by causing delays in enforcing an award against a private organisation which is a national of that country and the claimant might initiate a claim of a breach of treaty to circumvent this impediment as illustrated in the case below.

5.2 - The Decision in *White Industries Australia Limited v the Republic of India*

Background and Facts

The original dispute was from a 1989 contract that *White* had with *Coal India Limited* for the supply of equipment and technology for the development of a coal mine in India. Both parties raised claims against each other. *White* demanded payment for its performance bonus, while *Coal India* demanded a penalty based on poor quality products.

White filed a request for ICC Arbitration in Paris in 1999, and on May 27, 2002, the ICC tribunal awarded an amount of \$4 million Australian Dollars to *White*.

White then applied before the High Court of New Delhi to have the award enforced in India, while *Coal India* filed an application before the High Court of Calcutta also in India to have the award set aside.

Despite the fact that the seat of arbitration was Paris, Both the Calcutta High Court and its Appellate Division assumed jurisdiction to hear the setting aside application and the Delhi High Court stayed the enforcement proceedings pending the outcome of the setting aside proceedings¹²⁹.

In 2004, *White* appealed against the decision of the Calcutta Courts to the Supreme Court of India. In 2010, still no date had been set for the appeal and no reasonable estimate of when the appeal might be heard was available.

¹²⁹ Stephen Balthasar, '*White Industries Australia limited v Coal India*, [2002] ICC Award :Redefining the Interface between Commercial and Investment Arbitration' [2012] 78, Arbitration Issue No 4, P395-396

The Case

White then initiated UNICTRAL Investment Arbitral proceedings against the *Republic of India*, on the basis that the conduct of the enforcement and the setting aside proceedings in India violated the guarantees contained in the India- Australia BIT on the following grounds

(i) that *White* satisfied both prerequisites under the BIT of being an Investor, and its claims in respect of rights under the contract, in relation to the bank guarantee and in respect of the original ICC Award were all “investments” under the BIT

(ii) *India* has not accorded it Fair and Equitable Treatment as enshrined in the BIT

(iii) the delay in enforcing the ICC Award amounted to a breach of *India’s* obligation to secure “effective means of asserting claims and enforcing rights with respect to investments”

(iv) *India* has expropriated *White’s* Investments

(iv) *India* has breached the obligation to permit investors to transfer funds freely and without reasonable delay

India on the other hand disputed the tribunal’s jurisdiction as well as each of *White’s* substantive claims.

The Award

The Tribunal held that the rights under the ICC award constitute part of *White’s* original Investment, being a crystallisation of its right under the contract. As such, they are protected under the BIT just like the rights under the contract.

On the issue of expropriation, the Tribunal did not agree that the simple delay in court proceedings amounted to expropriation. It however agreed with *White* that India had breached the requirement to “provide effective means of asserting claims and enforcing right with respect to investments”

Finally the tribunal held that as a result of the breach in the BIT guarantee, *White* was entitled to be restored to the position it would have enjoyed had the breach not occurred and was therefore entitled to the amount it would have enforced under the original ICC Arbitral Award which was 4 million Australian Dollars plus interests and costs¹³⁰.

5.3 – The Decision in *GEA v Ukraine*

The decision here in which *GEA*, a German Company sought to claim under the German-Ukraine BIT in respect of its inability to enforce a earlier ICC Award, obtained by its predecessor in respect of debts against *Oriana*, a Sovereign entity of the Ukrainian Government was rejected by the ICSID Tribunal on the grounds that an award “in and of itself” does not constitute an investment. The tribunal reasoned that even if the award determined the rights and obligations arising out of an investment, it remains “analytically distinct”¹³¹.

In a separate analysis as to whether the award itself met the requirements of the BIT and Article 25 of the ICSID Convention, the tribunal found that the award involves no contribution to or relevant economic activity with Ukraine and therefore concluded that the

¹³⁰ *White Industries Australia Limited v Republic of India*, [2011] UNICTRAL AWARD <http://www.ciarb.org/blast/issue4/whiteindustries.pdf> accessed 7 August 2013.

¹³¹ *GEA v Ukraine*, ICSID Case No. ARB/08/16. Award, March 31, 2011, paras 161-162 > <http://icsid.worldbank.org/ICSIS/Frontserv>accessed> August 8 2013.

award was not an Investment.¹³²This is completely at variance with the decision at the UNICTRAL Tribunal in *White Industries* above.

5.4 – Referring Disputes from Sovereign Debt Contracts to Investment Arbitration to Circumvent the Failure of National Courts to Enforce Commercial Arbitration Awards

The decisions in *White Industries* and *GEA v Ukraine* might create the impression that litigation is a preferred option to arbitration in disputes involving Sovereign Contracts.

It might be misleading to jump to this conclusion as enforcement of awards in local courts is an important and indispensable aspect of the Arbitral process.

The fact that the Investment Arbitration tribunal assumed jurisdiction in the *White* case might not necessarily throw open such enforcement actions under BIT,s for the inability of national courts to enforce Commercial Arbitration Awards as was shown in the *GEA* case for the following reasons –

- The BIT protection in the *White* case was possible because the contractual rights are an investment located in the jurisdiction where the debtor is domiciled or resides, in this case *India*.It will probably have a different effect if the rights a and awards were to be enforced in a third country, in which case the ICC Award would not be classified as an Investment.
- As can be seen from the decision in *White*, it was difficult to prove expropriation simply because of existing defects in local courts. The peculiarities of the case made the tribunal to take this line of action and even where an award is set aside or refused enforcement as one may argue like in the New York Convention, BITs do not

¹³² ibid

confer on investors a blanket and general guarantee that the host state will abide by all its international obligations in all circumstances.

- The decision in *White* was based on the tribunal's findings that, without the breach of the BIT guarantees, the award creditor would have enforced the award. This conclusion was easy to arrive at as both parties had agreed that the tribunal should determine whether the award was enforceable in India and the answer would have been different if such an agreement was not contained in the contract.
- Fourthly, any award obtained in BIT Arbitration will still have to be enforced against the host state. This requires both the investor obtaining an *exequatur* from the sovereign allowing such enforcement. This requirement must be compliant with the host states law of immunity and can create an escape route against the enforcement of a BIT Award in favour of foreign investors.

Having regards to the issues raised herein, I am of the opinion that whereas the decision in *White* is a welcome development as far as conferring BIT protection to Contract Arbitral Award rulings on Rights from Investments, it is unlikely to have a far reaching effect on Investment Treaty Arbitration as the peculiarities in *White* make it exceptional as can be seen from the decision in *GEA*. The costs of the BIT Arbitration can also be an inhibiting factor if the principal sum awarded in the original arbitration is not substantial. In the case of *White* for instance, the BIT Arbitration costs was about 50% of the original award¹³³.

¹³³ Stephen Balthasar (n141) p 400

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.1 – Conclusion

It is obvious that Arbitration with its obvious advantages, such as the ability of the parties to choose the arbitrators and the neutral nature of the forum and proceedings is becoming very popular in international commercial and financial transactions.

The increase in cross border investments and the globalisation of the international financial markets have resulted in States and Sovereign entities using public private partnerships and private finance initiatives which sometimes involve debt instruments in financing critical infrastructural and other investments in their home countries.

This may involve joint venture and other partnerships with private individuals and corporations sometimes from other countries and are usually based on contracts which ordinarily will contain clauses conferring jurisdiction for the resolution of any disputes arising there from to commercial arbitration tribunals.

The question of whether an arbitral tribunal has jurisdiction or not is a key issue to be resolved either by bifurcation where they are looked at separately or during the merits phase. The tribunal can also go ahead and give its ruling and the dissatisfied party can seek to set aside the ruling based on lack of jurisdiction. In any case, the arbitral tribunal has the competence to determine its own jurisdiction. Also the arbitration clause is autonomous and separable from the contract in which it is contained.

A major development in disputes involving states and sovereign debt was in the *Abaclat v Argentina* case where ICSID assumed jurisdiction in an ordinarily contractual dispute where there were mass claimants.

It is not certain at this point how this decision will shape the amount of mass claims arbitration going forward as the decision to assume jurisdiction was based on the peculiarities of the case including being silent on the issue of admissibility of mass claims.

One fact that is obvious however is that Investment Arbitration involving Sovereigns is gaining some traction as ICSID had decided 269 cases with another 165 ongoing as at the end of July 2013.

The case and others like the *Teinver v Argentina* case where although the tribunal assumed jurisdiction, there was a dissenting opinion on the form rather than the substance of the decision, are still going through the merits phase and we have to wait for the outcome to be able to draw a definitive conclusion.

Regarding the outlook for mass claims arbitration after *Abaclat*, even though ICSID assumed jurisdiction on a couple of others like the *Ambiente Ufficio* case, it nevertheless made a clear distinction between this being a multi party and the mass claim type in *Abaclat*.

Whilst we await the outcome of the merits and substantive claims in these cases, one thing is clear, for a mass claim arbitration to get through the jurisdiction phase there must be homogeneity and the nature of the transaction giving rise to the claim must be one that ordinarily involves a lot of parties.

In view of the increasingly thin divide between contract claims and treaty claims, certain conditions must exist for a dispute involving states and sovereign entities to qualify as a

treaty claim. These include the transaction must qualify as an investment, the existence of a treaty between the host country of the investment and home country of the investor and the parties must have consented to arbitration. Also the action giving rise to the claim must have been taken by the exercise of the sovereign power or authority of the host state.

Finally, even though it is possible to have recourse to investment arbitration to compel the national court to enforce a commercial arbitration award as in the *White v India* case, it cannot work in all cases as conditions like the investment being located in the same state must exist for it to be enforceable and the cost of another arbitration can be prohibitive

6.2 – Recommendations and Areas for Further Study

A major recommendation is the need to undertake further study on the proportion of disputes involving sovereigns that are before international arbitration. A remark in the abstract the conference brochure of the recent International conference of the Atlanta Arbitration Society put this figure at 50 percent. A detailed and concise work that will give a breakdown of the figures as well as demarcate same between contract and treaty claims is necessary.

Also following from *Abaclat*, *Ambiente Ufficio* and other recent decisions, it will be necessary at the end of proceedings on the substantive claims to undertake a study based on the final decisions on the merits of the cases and regarding mass claims.

Finally, another area worthy of further study is the enforceability of arbitral awards with particular reference to the ability to invoke the existence of Bilateral Investment Treaties to institute investment arbitration action based on delays or failures of national courts to enforce purely Contractual Commercial Arbitration Awards.

APPENDIX

LIST OF CASES

Appeal Court Decision

Lord Browne-Wilkinson v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No3) 2000 1 AC 147 at 201

Supreme Court Decision

Hubco v Wapda, (PLD 2000 SC 841)

European Court of Justice Decision

Marc Rich & Co.A.G. v Societa Italiana Impianti P.A, ECJ Case No C-1 90/89, Judgement 25 July 1991

UNICTRAL Case

White Industries Australia Limited v Republic of India, UNICTRAL Award 2011

ICSID Cases

Abaclat v Argentina, ICSID Case No ARB/07/05 Decision on Jurisdiction August 4 2011

Ambiente Ufficio S.p.A and others v The Argentine Republic, ICSID Case No. ARB/08/09

Campania de aguas del Aconquija S.A and Vivendi Universal S.A v Argentina, ICSID Case No ARB/97/3. Award 21 Nov 2001, 16 ICSID Rev –FILJ 641(2001), Decision on Annulment, 3 July 17 ICSID Rev-FILJ 168(2002).

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