Multi-Fora Disputes

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I. THE TERM 'MULTIFORA DISPUTES'

Many disputes with which internationally practising lawyers are concerned have ramifications in several jurisdictions. Often the same dispute – or aspects of it – is tried in several jurisdictions or fora. Such multi-fora disputes raise difficult legal and practical questions, especially in an international context.

While issues relating to the plurality of parties in the same proceedings, and in particular issues relating to multi-party arbitrations, have been discussed and analyzed on many occasions,¹ the inverse situation, plurality of fora for the same dispute, seems to have been neglected. Although certain partial aspects are discussed occasionally, the overall phenomenon of multi-fora disputes received surprisingly little attention.

The expression ‘multi-fora disputes’ is not, or at least not yet, a term of art. It is suggested that it be used as a description for all those disputes where the same or related facts or issues are tried before several different fora. ‘Forum’ is to be understood to include both court and arbitration proceedings. Other types of proceedings also may be relevant, such as those relating to the acts of public administration: administrative proceedings, commissions of enquiry or the like. In some situations, the issues tried in different fora will arise in disputes between one party and different adversaries. However, there are also cases where closely-related issues between the same parties are tried in different fora.

II. CONSTELLATIONS IN WHICH MULTI-FORA DISPUTES ARISE

Before examining some of the procedural issues which arise in multifora disputes, it is helpful to consider the situations in which such disputes arise.

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¹ See, for instance, the ICC Guide on Multi-party Arbitration under the rules of the Court of Arbitration, 1982, publication No. 404, and the reports of the Working Party on Multi-party Arbitration of the ICC Commission on International Arbitration formerly chaired by the late Me Tandeau de Marsac and now by Me Jean-Louis Delvoulé.
(a) Construction Projects

One of the classic cases of multi-fora disputes relates to a main contract and one or several sub-contracts for the same construction project. In international construction projects the main contract frequently provides for a dispute settlement procedure different from that of the sub-contracts.

In some cases, the sub-contract provides that disputes under the sub-contract which relate to a dispute between the main contractor and the employer are referred to arbitration under the main contract. However, the main contractor often does not wish his sub-contractors to be party to the proceedings for the settlement of disputes under the main contract, nor does he wish the employer to be party to the proceedings under the sub-contract. Indeed, there have been cases where the main contractor in the dispute with his sub-contractor adopted a restrictive position towards the sub-contractor’s claims but presented the same or very similar claims as part of his action against the employer. Understandably, the main contractor in such a situation will try strenuously to avoid in the sub-contract arbitration that any relationship be established with his claim under the main contract.

A situation related to the main contract/sub-contract constellation is that where the parties conclude a basic or framework agreement for a large scale project and then provide for its implementation in a series of further contracts either between themselves or with third parties. The basic agreement itself may be concluded under the auspices of an international treaty, so that potential disputes concern not only the companies involved in the project’s implementation but also their respective Governments.

A particularly noteworthy example is that relating to construction and operation of the tunnel under the English Channel – the Channel Fixed Link. The 1986 Treaty between France and the U.K. provides for arbitration of disputes between the two Governments and between the Governments and the Concessionaires. In all such disputes, each Government appoints an arbitrator; in the latter kind of dispute, the Concessionaires are entitled to appoint two additional arbitrators (Article 19 of the Treaty and Clause 40 of the Concession Agreement). Contracts concluded by the Concessionaires with sub-contractors and suppliers as well as other contracts related to the project’s implementation provide different arbitration clauses.

It would seem desirable that, at least in the contracts between the same parties and for the same project, the dispute settlement mechanism should be identical. However, this does not always happen in practice. It not infrequently happens – probably as a result of an oversight – that the parties in successive contracts related to the same project insert different arbitration clauses, in particular with different places of arbitration.

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A significant example of a case where conflicting dispute settlement clauses caused complications in the proceedings is the Holiday Inns/Occidental Petroleum dispute with the Government of Morocco where the Basic Agreement provided for ICSID arbitration, while some of the implementing contracts provided for the jurisdiction of the Moroccan courts. When a dispute arose, it was brought both before international arbitration – it was indeed the first World Bank arbitration – and before several Moroccan courts.

A similar conflict arose in the dispute between the Indian Organic Chemicals Limited and Chemtex Fibres Group. Two of the subsidiaries of Chemtex, in two separate agreements, had provided for design and supply of equipment for a polyester staple fiber plant to be erected in India. One of the two contracts provided for ICC arbitration in London and the other in India. A third agreement to which the two subsidiaries and the mother company were party together with Indian Chemicals provided for ICC arbitration in London.

In the context of the main contract/sub-contract constellation, another situation of potential multi-fora disputes may arise: sub-contract and supply contracts for construction projects often stipulate that the sub-contractor or supplier provides guarantees running directly to the employer. Indeed, the employer often requires under the main contract that such guarantees be provided in the sub-contracts. If the works are defective the employer will pursue the main contractor in the forum having jurisdiction for the main contract.

As to the claims under the guarantees by the sub-contractor, the question arises whether the choice of forum or arbitration clause under the sub-contract also binds the employer to whom the guarantees run. In a number of jurisdictions, the arbitration is taken as a modality of the guarantee commitment. In other words, the employer, if he wishes to rely on the guarantee stipulated in the sub-contract, must observe the choice of forum or arbitration clause in the sub-contract. In other jurisdictions, the arbitration clause is taken to be autonomous, i.e. independent of the contract in which it is contained and it binds the beneficiary of the guarantee only if this was expressly agreed with the sub-contractor. In his dispute with the sub-contractor, the employer would thus have to proceed in the ordinary courts having jurisdiction.

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4 All India Reporter (1978), Bombay 106; extracts in 4 Yearbook Commercial Arbitration (1979), pp. 271–274.
6 For France, see Cour de cassation in Bisatti v. Sefimo, 4 June 1985, Revue de l’arbitrage (1987), pp. 139; see also F. Godin-Hénoc in La réforme de l’arbitrage à l’intérieur (1987), paper by Opposit
In any event, the forum for claims under the guarantees stipulated in the sub-contract for the benefit of the employer and the forum for claims under the main contract in most cases are likely to be different.

(b) Guarantees
Another classical constellation for multi-fora disputes arises when the performance of certain contractual obligations is guaranteed by a third party. Whether the guarantee is legally dependent on the validity of the guaranteed obligation and its breach or whether it is abstract, as for instance in the case of on-demand performance guarantees, the two instruments, i.e., the contract and the guarantee, almost invariably provide for different dispute settlement mechanisms.

A typical example of abstract guarantees are the on-demand performance guarantees which are normally given by a bank. Banks have reservations against arbitration. Therefore, bank guarantees provide for the jurisdiction of a court,\(^6^8\) whereas the contract in which the guaranteed obligation is contained in many cases provides for arbitration.

When the guarantee depends on the validity of the guaranteed obligation and on the beneficiary showing that this obligation has been breached, it might be argued that the guarantee should be subject to the same jurisdiction as that of the guaranteed obligation. However, normally, a contrary position is taken.\(^7\) In any event, the two agreements often provide for different fora.

In the context of guarantees, the problem of different fora is particularly acute in export risk guarantees and similar insurance provisions. The export risk guarantee schemes (such as ECGD, COFACE, Hermes, etc.) generally provide an indemnity to the exporter only if he has pursued his contractual remedies and established breach of his export contract in the forum competent for such breach. Disputes with the insurer normally are tried before a different forum.

As an example of the conflicts resulting from different fora in this context, one may mention some of the disputes between American firms which invested abroad and the Overseas Private Investment Corporation (OPIC). Perhaps the best known of these cases relates to the Bauxite Production Levy imposed by the Jamaican Government on bauxite mining companies. Some of these companies,

\(^{68}\) Arbitration clauses in bank guarantees still would seem to be rather exceptional. Such an exception is the bank guarantee which gave rise to ICC case no 5639: it provided for payment against a report by an expert from the International Centre of Expertise of the ICC and for ICC Arbitration. Extracts of the 1987 award and comments by Jarvin in 6 ICLR (1989), pp. 417–423.

\(^{7}\) Rüede/Hadenfeldt, op. cit., pp. 70, and Jolidon op. cit., pp. 141. See also Supreme Court of New York, Appellate Division, 19 June 1986, in Internar Overseas Inc. (Liberia) v. Argocean (Argentina), 13 Yearbook Commercial Arbitration (1988), pp. 609 seq. at 611, where it was held that the guarantor in case of a charter party was not bound to arbitrate under the charter party arbitration clause since the guarantee did not contain such an arbitration clause.
in their agreements with Jamaica, had agreed on ICSID arbitration and brought the dispute before this forum.8

Revere had not provided for such an arbitration clause and had to bring the case before the Jamaican courts. The Jamaican Supreme Court, relying primarily on English precedent, held that, under Jamaican law, the Government could not be bound by a commitment not to impose further taxes.9 Revere then claimed compensation from OPIC. The OPIC insurance policy prescribed arbitration under the rules of the American Arbitration Association (AAA). In the AAA arbitration, the arbitrators did not question that the decision of the Jamaican Supreme Court was correct under Jamaican law, but held that, in the relationship between Revere and OPIC, international law principles should be applied so that Revere was entitled to compensation.10

The constellations described until now concerned primarily triangular relationships. As such they are still relatively simple compared to some other mutli-fora disputes.

(c) Major Industrial Projects
The legal arrangements for large industrial projects, for example, often consist of a great number of contracts with a variety of parties. These contracts concern the design of the project and may require patent and trade-mark licences, as well as technical services. They usually involve a series of contracts for construction of the works and supplies of equipment and materials. The financing of the project requires contracts with banks, equity investors and sometimes public authorities. Different insurance policies for various aspects of the project or a global insurance for the entire project are also required. Finally, the legal arrangements may relate to the post-completion phase of the project and may include technical assistance in the operation of the venture, its management, long-term delivery contracts of the products or components and materials and other agreements.

In the course of the implementation of such projects, triangular disputes as described above are not unusual but often can be kept in the relatively narrow framework of the triangular relation. But this is not always the case. Especially, when for one reason or another the project fails, the entire structure collapses and the many parties involved find themselves in an almost inextricable net of court and arbitration proceedings, often in quite a variety of fora.

(d) Defective Products
Another constellation in which multi-fora disputes arise in a particularly complex manner concerns defective products. Claims on grounds of product

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liability can be brought against the different links in the chain from the producer to the consumer. Each consumer affected by a defective product has a variety of fora at his disposal. In addition to court proceedings on claims for product liability, a defective product is likely to give rise to contractual claims between those enterprises involved in the production and distribution of the product. It is most likely that various claims will then be submitted to different court or arbitration procedures.

(e) Commodity Transactions
As another possible constellation for multi-fora disputes one may mention successive transactions concerning the same commodity sold over and over again. Lord Justice Kerr’s witty account of the legendary Macao Sardine case comes to mind: A Macao company producing tins of sardines had difficulties in meeting a large order under a long-term contract and decided to fill the tins with mud. The buyer resold the consignment which thereafter continued to be sold many times over. When the true contents were finally discovered, over a hundred buyers had to sue their sellers up the string. In Lord Justice Kerr’s story, an ingenious solution was found to try all but one case in an efficient procedure before the Hong Kong Commercial Court, while the arbitration under the first sales contract had a most extraordinary fate.

When successive transactions in commodities are involved, such simplified procedures are not always available. An event which gave rise to a great number of arbitrations and court proceedings was the embargo on soya and some other commodities which the U.S. Government imposed in 1973 after disastrous floods on the Mississippi. The legal departments of some commodity trading companies were fully occupied for many years following up the numerous proceedings dealing with the effect of this embargo on their soya contracts.

(f) Ancillary Procedures
Finally, mention must be made of some multi-fora constellations which are due to procedural reasons.

One of these concerns interim measures of protection, injunctions and the like. Even if there is only one forum for the dispute, such measures may have to be requested in a number of different other jurisdictions. Similarly, the enforcement of a judgement or an arbitral award may give rise to proceedings in

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11 See e.g. Michael and Maria Lippus v. Dahlgren Manufacturing Company (US), Royal Zenith Corp. (US), Veb Polygraph (GDR), Druckmaschinen Werk Planeta (GDR), US District Court E.D., New York, 26 September 1986, 644 F Supp. 1475 (1986); extracts in 14 Yearbook Commercial Arbitration (1989), pp. 758–763; the case is a product liability action for injury caused by a machine. The defendants, manufacturers and distributors of the machine having caused the injury, asserted cross-claims against each other and commenced third-party actions against some other companies. The relations between some of these companies resulted from contracts containing arbitration clauses.

a number of different jurisdictions; famous examples are the 1956 SEEЕ v. Yugoslavia award\textsuperscript{13} or the 1977 LIAMCO v. Libya award\textsuperscript{14}

The enforcement of an award can create further complications when third parties, holding assets of the award debtor, are brought into the proceedings. A telling example is the dispute in the English courts between Shell International Petroleum Co. Ltd. (Sitco) and Deutsche Schachtbau- und Tiefbohrgesellschaft mbH (DST): DST sought to enforce in England a 1980 ICC award made in Geneva against Ras Al Khaima National Oil Co. (Rakoil); it obtained a garnishee order by which Sitco had to pay the award debt out of funds it owed to Rakoil. The State of Ras Al Khaima, claiming that, in their contract with Sitco, Rakoil had acted on its behalf, pursued Sitco before the Civil Court of Ras Al Khaima. The Civil Court found against Sitco and, in order to enforce the State’s claim, the Court ordered the arrest of a vessel which was owned by a Panamanian corporation unconnected with Sitco, was mortgaged to a New York bank and chartered to a company of the Shell group. In England, where the Court of Appeal had found that Sitco had to make payment to DST, the House of Lords considered the serious risk that Sitco would have to pay its debt twice over and decided that Sitco did not have to make payment under the garnishee order.\textsuperscript{15}

But disputes ancillary to arbitration not only arise when it comes to enforcing the award; the formation of the arbitral tribunal and its jurisdiction may itself lead to a multi-fora dispute. Thus, several fora may be involved when the place of arbitration is not specified: in Oil Basins v. Broken Hill Proprietary Company Limited (BHP), a contract for Australian offshore petroleum simply provided that disputes were to be determined by arbitration. After several court proceedings in Australia, New York and Texas, arbitration in Australia was finally ordered.\textsuperscript{16}

In a number of other cases where the place of arbitration had been fixed in the arbitration clause, the parties’ choice of the place was challenged in court proceedings, especially in the U.S.A. and India, on grounds mainly of forum non conveniens. However, such challenge rarely succeeded.\textsuperscript{17}

\textsuperscript{13} Text of the award in 86 Cluett (1959), p. 1074–1081; enforcement proceedings were brought in Switzerland, France and Netherlands; see also comments by J.-L. Delvolvé in Revue de l’arbitrage (1978), pp. 364–369.

\textsuperscript{14} Text of the award in 20 ILM (1981), pp. 1–87; enforcement proceedings were brought in France, Sweden, Switzerland and United States until the parties finally reached a settlement (see e.g. Greenwood: State Contracts in International Law – The Libyan Oil Arbitrations, 53 BYBIL (1982), pp. 27–81 at 38 and 78).


III. PROCEDURAL ISSUES

Multi-fora disputes raise a number of difficult procedural questions. Their in-depth analysis would require a vast investigation into comparative procedural, and occasionally also substantive, law. The present article does not attempt such an analysis. It simply indicates some of the most frequently encountered issues and places some signposts, indicating orientations for possible solutions.

(a) Competing Jurisdictions

The first issue arises when several courts have jurisdiction over the dispute. Since the law of judicial organization normally provides a variety of factors by which jurisdiction is established (e.g. domicile of the defendant, situation of assets, place where the contract was made or the tort committed), such situations arise frequently and domestic legal systems provide solutions. In international disputes difficulties arise from the fact that these solutions vary from one system to another.

Among these solutions two principal approaches may be distinguished: in the legal systems of the European Continent, a time-oriented approach prevails which is generally referred to by the concept of *lis alibi pendens*, often shortened to *lis pendens*. Once the dispute has been brought before a court having jurisdiction, the pending proceedings bar the action in all other courts. On the international level, the solution has been adopted for the European Community in Articles 21–23 of the 1968 Brussels Convention\(^\text{18}\) and extended to the EFTA countries by the 1988 Lugano Convention.\(^\text{19}\)

The other approach prevails in the Anglo-American legal systems. It takes into account considerations of convenience and judicial economy, and attempts to have the dispute settled in the most suitable forum. *Lis pendens* is one, but not the only, consideration which the court takes into account.\(^\text{20}\) This approach is more flexible than the Continental solution adopted in the Brussels and Lugano Conventions which, to English lawyers, has appeared as 'somewhat crude'.\(^\text{21}\) But the more flexible English solution also creates some degree of uncertainty. Within the scope of the Brussels and Lugano Conventions, the strict *lis pendens* approach now applies in common law countries.

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\(^{18}\) See 8 ILM (1969), p. 229 seq. and 18 ILM (1979), p. 21 seq. for its amendment upon accession by Denmark, Ireland and the U.K.

\(^{19}\) In 28 ILM (1989), pp. 620 seq.; article 21 reads as follows: "Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of the court." Similar rules apply in case of "related actions" (Article 22) and exclusive jurisdiction of several courts (Article 23).


One can easily imagine the difficulties which arise when an international dispute is brought both before a court of a country following the *lis pendens* approach and before one guided by criteria of suitability or convenience. Even between courts of different countries following the same approach, difficulties may arise because the time at which the dispute becomes pending before a court may differ\(^{22}\) or the criteria for determining the most suitable forum may not be the same.

Furthermore, when faced with the objection that the dispute is already pending or should be brought before the courts of another State, a court will have to consider whether the judgement made by such other court can be enforced within its own jurisdiction.\(^{23}\) If this is not the case, the court may have to try the case even though it is pending already in another State or the court of such other State may be more convenient on all other grounds.

For all these reasons it is possible – and indeed it has occurred on a number of occasions – that the same dispute is tried in several fora with no guarantee against conflicting judgments.

(b) *Joinder and Third Party Intervention*

The next issue concerns what I suggest calling joinder and third party intervention. Most laws of procedure contain rules which make it possible under certain circumstances to join a third party as a party to the proceedings or to allow such a third party to intervene: other terms used are impleader, third party complaint, vouching-in; or, in French, *dénonciation du litige, appel en cause, assignation en garantie, intervention*; in German: *Streitverkündung, Intervention*. Joinder and third party intervention are not necessarily limited to parties which can be found within the jurisdiction of the court.

In international disputes difficulties arise, for instance, from the fact that the rules of different countries are not always compatible; an *assignation en garantie* by a French court or an impleader by an American court in principle require that the court has jurisdiction over the impleaded party. In a German *Streitverkündung* this is not required. However, the French and American courts may give a judgment against the third party thus joined, whereas the effect of the decision of a German court in a case of *Streitverkündung* would be only that the findings of fact can be opposed against the third party.

Further complications arise when the dispute between the impleading and the third party is subject to arbitration. In many countries the arbitration clause

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\(^{22}\) In some countries (e.g. France, Germany, Italy, Luxembourg and the Netherlands), an action is considered pending only from the date of service of proceedings. In others (such as England and Belgium), an action is pending once proceedings are issued (*ibid*). In Switzerland, the date from which an action is pending will be determined by reference to the first act necessary for the introduction of the proceedings (Article 9 (2) of the 1987 Private International Law Act).
prevails and it is not possible to join the third party as a party to litigation of the principal dispute. However, there have been some cases where the interest in consolidating court procedures prevailed and a party was joined despite an arbitration clause.24

Conversely, if the dispute between the parties is subject to an arbitration clause, a third party can be joined only if it has agreed to arbitration.25

As a result, it is normally impossible to consolidate multi-fora disputes when some of the parties have concluded arbitration clauses and others have not—unless, of course, all the parties agree, which in such situations is rather unlikely.

An interesting solution to this dilemma was found by an American court: In a dispute between six companies from Japan and the U.S., some of the parties were bound by contracts containing arbitration clauses, others not. The court before which the dispute was brought noted that arbitration had been commenced which involved some but not all of the parties before the court. It expected that in the arbitration 'every issue that is raised here will be vigorously pressed. In such circumstances a stay is appropriate even though it affects parties who are not bound to arbitrate'. The court added, however, the following condition:

The motion to stay is granted on condition that all defendants agree in writing within thirty days to submit to the pending arbitration proceedings and to be bound by any award granted by the arbitrators and to allow Dale [one of the claimant companies before the court but not party to the arbitration] to participate as a party in the arbitration if it wishes. In the event

24 Paris Court of Appeal in BRGM v Patino, 11 December 1981, Revue de l'arbitrage (1982), pp. 311–320, with critical notes by Rubellin-Devic; Paris Court of Appeal in Bummeister v. Cresoul Loire, 21 December 1979, Revue de l'arbitrage (1981), pp. 155. The latter decision has been set aside by the Cour de cassation, 8 November 1982, in Revue de l'arbitrage (1983) pp. 177. In Belgium, some courts have admitted that in related disputes the arbitration clause can be disregarded (see Huys/Keuten: L'arbitrage en droit belge et international (1981), pp. 145 seq. with critical comments). The Italian Court of Cassation (decisions of 4 August, 1969, Nr. 2949 and 11 February 1969, Nr. 457) and, subsequently, the Court of First Instance of Milan (Sopac v. Bukoma, 22 March, 1976, in 2 Yearbook Commercial Arbitration (1977), pp. 248) held that an arbitration agreement ceases to have effect when two connected claims, one subject to arbitration, the other subject to the jurisdiction of the courts, are brought before the court. In: Colandra v. Government of Malta and Ambassador of Malta in Italy, the Tribunal of Naples held that, in such a situation, the arbitration clause becomes inoperative in the sense of Article II (3) of the New York Convention; decision of 19 May 1985, 137 Giurisprudenza Italiana (1985) 1, 2, p. 513; 14 Yearbook Commercial Arbitration (1989), p. 682.

25 In Italsempione v. Sopac and Agenzia Marittima Italiano-Scandinava, the Magistrate's Court of Genoa found that the arbitration clause in the bill of lading between Italsempione and Agenzia extended also to the connected dispute with Sopac. The Corte di Cassazione (Supreme Court) reversed, holding that there can be no 'attrazione' on the basis of connexity; but suspension of the court case, pending arbitration seems to be possible (decision of 18 March 1988), No 2488, 14 Yearbook Commercial Arbitration (1989), p. 675–679; see also the same court, 2 November 1987, No 8050, Bos v. Ocon and Ahrenkiel, the same Yearbook, 1989, p. 677 seq. at 679.
defendants do not accept the conditions stated, the motion to stay will be denied upon further application.26

In a later case, the same court was faced with a refusal of the defendants to participate in an arbitration in Singapore to which they had not agreed. The court was prepared to order a stay of the proceedings, but required an express commitment from the defendants. These defendants were the collective corporate parents of Turner (East Asia) Pte. Ltd. (TEA), one of the parties engaged in the Singapore arbitration; they had to agree that they

will regard themselves as bound by any award rendered in the Singapore arbitration against TEA, as to merits and quantum, precisely as if defendants had participated in that arbitration as parties from its inception.

In addition, the court, ‘in an exercise of its equitable powers’, directed:

that the defendants take no steps which would hamper the progress of the Singapore arbitration, or serve to impede its completion within a reasonable time. In making that direction, I do not mean to preclude such litigation steps as TEA, may be advised by their Singapore counsel to pursue. My focus will be upon possible bad-faith obstructionism generated by the corporate parents...27

However, it is not always the best solution to stay the entire action, including that on the non-arbitrable claims. When the principal liability is not subject to arbitration, as it is the case for instance in product liability disputes, there are normally good reasons to proceed with the court action without awaiting the outcome of the arbitration proceedings on derivative liability and indemnity.28

(c) Suspension of Proceedings
The next issue concerns suspension of proceedings: in those situations where proceedings cannot be consolidated, there is a risk that several proceedings are conducted in parallel and the common elements of the dispute are decided in a conflicting manner.

If it is unavoidable that the dispute is subject to several jurisdictions, one might consider whether it is possible that the case goes ahead first in one forum and the dispute in the other fora is suspended until the ‘lead forum’ has made its decision. With respect to domestic multi-fora disputes, in particular in situations where related issues are subject to different categories of courts, e.g., civil and administrative tribunals, or in situations where related cases are tried in courts

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26 US District Court for the Southern District of New York, 27 December 1977, in Dale Metals Corp. and Overseas Development Corp. (USA) v. KIWA Chemical Industry Co. Ltd. et al. (Japan), 442 F. Supp. 78 (1977), quoted from 4 Yearbook Commercial Arbitration (1979), pp. 333 seq. at 334. Similarly, but without the condition quoted, a stay of proceedings pending arbitration was ordered for the related action against a defendant who was not party to the arbitration agreement in Rhône Méditerranée Compagnia Fratron di Assicurazioni e Riassicurazioni v. Achille Lauro et al., US District Court, Virgin Islands, District of St. Thomas and St. John, 4 October 1982, 555 F. Supp. 481 (1982), extracts in 9 Yearbook Commercial Arbitration (1982), 133.
and in arbitration, one can find occasional municipal law provisions requiring or permitting suspension of one or the other action. For this latter type of situation, for instance, a California statute permits a stay of arbitration, pending resolution of related litigation between a party to the arbitration agreement and parties not bound by it. In a recent decision this statutory provision has been found not to be incompatible with the Federal Arbitration Act.\textsuperscript{29} However, such provisions with respect to purely domestic situations seem to be rather the exception.

Even more exceptional are provisions on suspension in case of several pending court and arbitration proceedings or in case of several court actions pending in different jurisdictions when the \textit{lis pendens} bar does not apply. Indeed, one may ask, why an English judge should suspend proceedings to see what the French judge makes of related aspects of the case? Why should, for instance, a Japanese judge await the determination by an American court? In principle, all jurisdictions are equal and the courts of one country cannot claim precedence over those of another and require them to suspend a case.

Nevertheless, we have seen in the previous section that there are circumstances where, for considerations of procedural economy or convenience, a court may decide to suspend proceedings until certain issues or a related case have been determined by another court. At present, this still seems to be the exception. Perhaps one should try to develop further rules on voluntary suspension of a case by a court as one of the possible solutions for the complex problems of international multi-fora disputes.

There are, however, at least two situations in which a tribunal \textit{must} suspend proceedings to await the outcome of those before another forum:

One of these situations concerns the case where the forum has jurisdiction over certain aspects of the dispute only. A typical situation is that of set-off. When a defendant in court proceedings declares set-off with a disputed claim which is subject to arbitration, the court in principle must respect the arbitration agreement and, if the defendant insists on arbitration, the court cannot determine the defendant's claim. The court may proceed with the principal claim and may find liability of the defendant for it; but if set-off would be admissible in principle, a judgment against the defendant, or at least enforcement of such a judgment, would have to be suspended until the defendant's claim is determined by the competent jurisdiction.

A comparable rule sometimes, but not always, applies in arbitration. Such a rule has been expressed in article 29 of the Swiss Intercantonal Arbitration Convention (the Concordat) but gave rise to some misunderstandings there.\textsuperscript{30}


\textsuperscript{30} The uncertainty related to the question whether, once set-off had been invoked, the tribunal could continue to proceed with the principal claim until it reached a decision and set-off became relevant. Rüede/Hadenfeldt say it could and should (pp. 253) and I believe they are correct; in this sense now also P. Lalive, Poudret, C. Reymond: \textit{Le droit de l'arbitrage interne et international en Suisse}, 1989, p. 159.
Chapter 12, on International Arbitration, in the new Swiss Private International Law Act, does not contain such a provision. Thus, it may be argued that in Switzerland, as in Germany, an international arbitration tribunal has jurisdiction also with respect to the defendant’s claim with which he declares set-off.

There may be other cases where the forum is deprived of jurisdiction over an issue which is necessary for making its decision. In an action on a guarantee, for instance, the court or arbitration tribunal may not have jurisdiction over the question whether a breach of the guaranteed agreement occurred. But it does not seem possible to state any general principles in this respect since much depends on the way in which the guarantee is framed.

The second situation in which suspension is required concerns tribunals of a different hierarchical level. In international commercial disputes, the issue normally does not arise because the courts of different States, as just explained, are of the same rank. Between courts and arbitration tribunals, too, there is no difference of level.

The exceptional case occurs when the State, as an international person, is party to the arbitration commitment. In particular, in an arbitration under the World Bank Convention on the Settlement of Investment Disputes (the ICSID Convention), the arbitration tribunal is hierarchically superior to the State’s own courts.

The principle has been stated quite clearly in the Holiday Inns/Occidental Petroleum v. Morocco arbitration, mentioned above. In this case certain aspects of the dispute had been brought before Moroccan courts. These courts had jurisdiction under the loan contracts which the local subsidiaries of Holiday Inns and Occidental Petroleum had made with the Moroccan lending agencies in implementing the Basic Agreement with the Government. The ICSID Arbitral Tribunal considered the situation in which these courts would be faced with questions which also were before the Arbitral Tribunal. This Arbitral Tribunal, then composed of such eminent international lawyers as the late Sture Petrén, then Judge at the International Court of Justice, Professor Paul Reuter and Sir John Foster, decided:

In such a hypothetical situation the Moroccan tribunals should refrain from making decisions until the Arbitral Tribunal has decided these questions or, if the Tribunal had already decided them, the Moroccan tribunals should follow its opinion. Any other solution would, or might,

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31 The position is not undisputed in Germany; see K.H. Schwab: Schiedsgerichtsbarkeit, 4th ed. (1990), p. 22, with further references.

32 For Rüede/Hadenfeldt, loc. cit., this rule applies generally outside the scope of application of the Concordat. Lalive/Poudret/Reymond find Article 29 of the Concordat to be an unfortunate provision (no. 159 and 382 sec.) but they seem to believe that under the new Act, too, the arbitral tribunal may
put in issue the responsibility of the Moroccan State and would endanger the rule that international proceedings prevailed over internal proceedings. This finding confirms the particular status of arbitration under the ICSID Convention and the usefulness of its mechanism.

A situation similar to that under the ICSID Convention arises before the Iran–U.S. Claims Tribunal. In *E-Systems, Inc. v. The Islamic Republic of Iran and Bank Melli Iran*, the Full Tribunal held:

Not only should it be said that the award to be rendered in this case by the Tribunal, which was established by inter-governmental agreement, will prevail over any decisions inconsistent with it rendered by Iranian or United States courts, but, in order to ensure the full effectiveness of the Tribunal's decisions, the Government of Iran should request that actions in the Iranian Court be stayed until proceedings in this Tribunal have been completed.

### (d) Effect of Decisions in Other Fora

#### (i) Binding Effect

The next issue arises once one of the forum concerned with the dispute has made its decision: Is this decision binding in other fora? When the dispute before another forum is between the same parties and concerns the same issue, one may derive such a binding effect from the principle of *res judicata*, provided of course the decision is recognized by this other forum. When the decision is an arbitral award, recognition is widely assured in the more than eighty Contracting States of the New York Convention of 1958, however, some of the important Latin American and Middle Eastern States have not yet adhered to the Convention.

Nevertheless, the principle of *res judicata* is more easily stated than applied in practice. One may wonder whether and in which form this principle, developed in judicial proceedings, can be applied to arbitral awards. In any event, the scope of the decision to which this effect attaches is appreciated differently from one country to another.

With respect to court decisions, recognition and binding effect abroad must rely on a different basis. Where no multilateral conventions as those of Brussels (1968) and Lugano (1988) are available, one must look to bilateral treaties or

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54 Award No ITM 13–388-FT of 4 February 1983, 2 *Iran-U.S. CTR* p. 51–57, concurring opinions of Holtzmann and Mosk, *ibid.* pp. 57–67; in that case the Iranian Ministry of Defence, after E-Systems had initiated arbitration proceedings before the Claims Tribunal, brought an action before the courts of Iran relying on a contract clause providing for dispute settlement 'via referring to the competent Iranian Courts'.
56 In view of the reservations of many Latin American countries against international arbitration, the recent accession of Argentina (14 March, 1989) to the New York Convention is particularly noteworthy.
57 See above notes 18 and 19; for the Lugano Convention, see also Volken in *44 Schweizerisches Jahrbuch für internationales Recht* (1988), pp. 561–599, with the French text of the convention.
municipal law provisions which generally require reciprocity.

Difficult issues arise in the relationship between decisions of the European Court of Justice (ECJ) and the courts of the Member States of the European Communities. The ECJ's decision on the compatibility of legislative or administrative acts of the Member States with Community law binds the courts of the Member States. But the ECJ does not annul acts contrary to this law and it is for the courts of the Member States to draw the consequences in their respective legal systems.  

A different type of difficulty arises in the context of guarantee, export risk and other insurance agreements. The guarantor's obligation, as explained already, often arises only when a breach of the guaranteed commitment is established. In principle, the issue is decided in proceedings according to the contract containing the guaranteed obligations. However, the beneficiary of the guarantee may believe that he did not get a fair hearing in these proceedings. Sometimes he may persuade the guarantor, or the body deciding the dispute with the guarantor, to reconsider the findings of the previous forum. This is a delicate matter because, before the new forum, the case is heard *ex parte* and neither the defendant nor the body having decided in the previous case are heard in the proceedings under the guarantee.

Other situations where, in the absence of a *res judicata* effect *stricto sensu* a court is bound by the finding of another body, arise in the context of the ICSID Convention where, as just explained, the courts of member States have to give effect to the findings of arbitration tribunals established under the Convention.

(i) Other Effects

In those situations where the forum is not bound by the decision of another forum, the question may arise whether it may or should give some effect or weight to the findings of this other forum. At least when the same questions of fact have been tried before one forum, another forum may attribute weight to the findings of fact, provided both parties had full opportunity to present evidence and argument before the other forum. However, it must be taken into account that the same facts, when considered in a differing legal or contractual context, may lead to different conclusions in law.

When it comes to questions of law, a distinction must be made between cases where the first court applied its own law and those where it referred to a foreign law: when the issue is subject to the law of the forum where the issue first arose, one might argue that a forum abroad should follow the first court's reasoning. When the first court's decision creates a binding precedent (forming part of the

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38 For a case where an export restriction and its effect on a sales contract were considered in three fora, see the Alivar case: arbitration between buyer and seller (*Alivar v. Santero*); proceedings before the European Court of Justice (*Commission v. France* decision of 6 March 1977, ECR, p. 515 with submission Capotorti); proceedings before the French administrative tribunals (*Ministère du Commerce extérieur v. Société Alivar* Conseil d'État, 23 March 1984. *Droit administratif* (1984), n. 396. with
applicable law), the foreign court will be bound to do so. When the second court is not so bound, one might raise objections against the unquestioned application of the first court's findings in those situations where the issue was decided in the absence of the party against which operates the construction of the law adopted by the foreign court. But even in such situations one may expect that the foreign court will adopt a solution different from that of the first court only when there are very serious reasons to do so.

The situation is somewhat different when the law of a third State applies. In such a situation the second court will have less inhibitions to apply the law differently than it would in the previously described situation. However, when the first court considered the matter in depth, possibly with the help of foreign legal experts, there would normally be little justification for another court to second-guess the first one on an issue of law which is foreign to both.

These considerations do not, or should not, apply in arbitration. Here, one cannot speak of domestic or foreign law. International commercial arbitrators are expected to know the law applicable to the dispute for which they have been appointed (although this law may not always be known in advance). An international arbitration tribunal, therefore, should not consider the applicable law as a foreign law and it should not treat it merely as a matter of fact as many national courts do. Nevertheless, if a question of law arises which in the same dispute has been decided already by a court of the country whose law is applicable, international arbitrators, even if they are not bound by the decision qua res judicata or qua precedent, are likely to follow the first court. They will adopt a different solution only if there are serious grounds to do so.

(iii) Interim measures of protection
When discussing the effect to be given by one forum to findings and decisions of another, special attention should be paid to interim measures of protection and to similar provisional decisions. Such decisions are neither judgments nor arbitral awards. Therefore, they are not enforceable abroad under provisions applicable to these instruments. Indeed, in view of territorial limitations in a State's jurisdiction, they would seem to be altogether unenforceable abroad. Nevertheless, they are not completely without effect.

When a party requests a court to order certain interim measures, it is likely to stand a better chance of success if it can point out that the court of another State has considered the matter already and granted the same or similar measures.

This effect applies in particular in arbitration. When the parties have entrusted the settlement of their dispute to a person of their choice and this person is empowered to order or recommend interim measures of protection and has done so, the courts before which the same issue is brought subsequently should give particular weight to his recommendations or orders. Of course, in strict law the courts are not bound by his orders\(^9\) but, since the person of the

\(^9\) One must point out, however, that the 1987 Swiss Private International Law Act provides for assistance by the courts in the enforcement of orders by the arbitral tribunal (article 183 (2)). But this provision obviously is directed only to Swiss courts.
parties' choice has first and most closely considered the dispute, his conclusions should be followed, unless there are overriding reasons not to do so.

In this context, the new ICC Rules for a Pre-arbitral Referee Procedure deserve particular mention. Under this procedure, the Referee may order conservatory measures or measures of restoration or make certain other orders which do not prejudge the substance of the case. The parties have agreed in advance to carry out his orders without delay. The rules also provide that the parties 'waive their right to all means of [...] opposition to a request to a Court or any other authority to implement the order'. In other words, when the Referee's order requires the intervention of a court or other authority, such an authority will be requested without opposition to order in its own jurisdiction the measures previously ordered by the Referee. It can be expected that in most jurisdictions such a request without opposition from the other side will normally be granted.

In a more general manner it may be said that, when the parties have agreed to grant to an arbitrator, Referee or the like, power to decide provisionally or permanently their disputes, they have (subject to remedies available under the law) a contractual duty to cooperate in assuring effect to the decision. This duty is particularly important in multi-fora disputes.

IV. MANAGEMENT OF THE DISPUTE

Multi-fora disputes require careful management and planning. The parameters for such management and planning are numerous and the process becomes most complex and difficult. Unfortunately, these questions seem to have attracted little interest in international debate. Practitioners, when facing the problems, often have to invent the solutions on their own and frequently extrapolate from their past experience in one particular jurisdiction.

Rather than attempting a general dispute management theory or a comprehensive description of the issues arising, I shall try to point out some of the principal aspects to be considered.

(a) Strategy of the Dispute

First, it is of course necessary to develop a strategy for the management of the dispute. In its basic elements, such a strategy in an international multi-fora

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40 Rule 6.6; the Rules are in force as of 1 January 1990 (ICC Publication No 482).
41 Issues of dispute management have received particular attention in the United States (see, e.g., the papers of the Symposium on Litigation Management in 53 University of Chicago Law Review (1986), pp. 305–560). However, the discussion there, as that in other jurisdictions, remains rather parochial; the November 1989 San Diego conference of the American Bar Association on 'A New Look of Managing
dispute is not fundamentally different from that which must be developed when the dispute is purely national: The objectives have to be clearly identified — is the objective merely the maximization of an amount of money to be paid or is it intended to compel an opponent to act in a certain way? Do the parties wish to continue on the project or to co-operate otherwise once the dispute is over? What type of adjudicatory body is most suitable and in what sequence should the action be conducted? In such a strategy, litigation or arbitration is only one of the means employed to reach the objective. Thus, it has to be connected with a possible negotiation process. To vary an expression by Mnookin and Kornhauser: the parties are ‘bargaining in the shadow of arbitration or litigation’.

However, these questions of litigation strategy, as they arise in any dispute, give rise to additional complications when they have to be considered in an international multi-fora context.

**(b) Effect of Commencing Proceedings**

The decision to commence court or arbitration proceedings in international disputes must take account of considerations different from those in purely domestic disputes. Apart from various legal aspects, it must be borne in mind that the commencement of such proceedings is appreciated differently in different societies and in different industries. In some countries, litigation is a current fact of life and accepted as part of a negotiation strategy. In others, the commencement of proceedings may be taken as an offence and could seriously prejudice the negotiations.

Similarly, there are some industries where business is conducted between a small number of internationally-operating firms, where the actors keep close contact. Commencement of arbitration, and even more so of court proceedings, in such a constellation can easily be taken as an unfriendly act, and business partners in these industries resort to such action only in extreme situations.

**(c) Choice and Communication**

When the decision is made to conduct proceedings in a foreign jurisdiction, choice of foreign counsel and the relations with him have to be considered. Of course, many of the considerations in this context are not specific to multi-fora disputes; but in such disputes they are compounded by the need for co-ordination and integration into a global strategy.

The principal problem is that of choice and communication. The two issues are closely related: the chosen counsel should be effective in his own system. Effectiveness within the system follows its own rules and the ability to

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communicate with foreign lawyers and to speak foreign languages is not
indispensable for success within the system; in some societies, too much foreign
association may even be a handicap. Thus, the most effective local counsel is not
necessarily the one with whom a foreign lawyer could communicate most easily
and who can readily be integrated in the overall strategy.

The issue is particularly noticeable when the case reaches higher levels in the
court structures, especially when it comes to the Supreme Court. In many
countries, the lawyers admitted to plead before high-level courts form a select
group of highly respected and knowledgeable specialists, often in close contact
with the judges on the courts before which they plead. When dealing with the
matters before them, they follow the approach and the written or unwritten
rules adopted within the system. Their effectiveness indeed depends, to a large
extent, on their ability to express the position of a party in terms readily
accessible to the frame of mind in which the court thinks.

The difficulties of communication which occur in such circumstances go far
beyond language. They arise also from concepts and ways of thinking. Accordingly, the type of ‘translation’ needed here is one not just of language but
of legal culture. Such translation is a very difficult but vitally important task
which, in the management of international disputes, is often underestimated.

Difficulties of a similar nature can also arise in arbitration. There are
a number of relatively closed communities of arbitration circles with their own
rules of conduct and idiosyncrasies.

Particularities are noticeable in specialized arbitrations as for instance in
commodities or shipping, but to some extent they can be found even in more
‘open’ communities as that involved in international commercial arbitration in
general or in arbitration before certain institutions such as the ICC or ICSID.
In most of these communities, there is what one may call an inner circle of
specialists who frequently act as counsel or arbitrator. Their approaches or
manners of handling the procedure in many respects are quite different from
those to which, for instance, a trial lawyer is accustomed.

The particular problem which arises in multi-fora disputes consists in
coordinating these different approaches and mentalities in a manner which
preserves or even strengthens their effectiveness in their respective jurisdictions.
This requires from the coordinating team a high degree of knowledge and
experience in comparative law and practice. Although, with the increasing
international involvement of many lawyers, such experience is beginning to
grow, it is often still quite insufficient. Great efforts must be made to improve our
qualifications in this respect.

(d) Seeing the Dispute as a Whole
Another difficulty arises from the fact that counsel handling the cases in various
fora are dealing only with part of the dispute. It is important that they are
properly briefed on the general context of the dispute and on the evolutions on
important that counsel pleading certain aspects of the dispute in one jurisdiction should not consider this case simply as an offshoot of a case handled by others. Although he is concerned only with part of the dispute, he should be made to feel integrated in the general strategy.

(e) Practical Considerations
In addition to these cultural, relational and psychological matters, a number of practical aspects must be considered.

Here, the establishment and management of documentation and other evidence are of particular importance. When building up the evidence, in particular in selecting relevant documents and questioning potential witnesses, their relevance and compatibility with all jurisdictions which may be involved in the case must be considered. In the preparation of evidence on technical issues in the wider sense it must be borne in mind that the role of technical experts differs considerably from one jurisdiction to another; in some systems, expert opinions are introduced as part of a party’s evidence, in others experts are appointed by the court.

Statements and argument in various jurisdictions must be centrally recorded. In large cases, computerization of the file is probably the most appropriate solution. When establishing the programme and the items of information for a database on the file, all those should be consulted who in various jurisdictions will be involved with the case, so that the system is compatible and provides the information required in these various jurisdictions.

Computerization or indexing is necessary also for the pleadings so as to avoid that conflicting positions are taken in different proceedings and to detect and exploit conflicting positions of the opponents.

In order properly to plan and manage the dispute, it is essential that, at the very beginning, a complete analysis of the factual and legal issues be made. Too often proceedings are started in one jurisdiction without such analysis, simply because management in the client’s organization has decided that ‘something must be done’.

The temptation to start action first and analyze the issues afterwards is particularly great in those jurisdictions which provide for pre-trial discovery. First proceedings are started, and discovery is requested; the case is properly constructed only later, as and when the documents are disclosed and digested. At such a late stage, it may become necessary to make costly adjustments in the organization of the procedure or change the line of argument.45 Such change in

45 Particularly severe criticism has been voiced in this respect by Ian Duncan Wallace. He stresses that ‘the hard work and principal expenditure (for counsel) has to be incurred at the beginning (of the case). If it is done well at that stage, then all the future tactics and strategy flow from the original long hours put into the initial researching of the case’. He deplores that such efforts often are not made and in complex construction cases he often found at the beginning ‘[m]assive copying as a substitute for detailed editing and analysis [and] relatively small initial investment in professional time by [the lawyers], and little or no analysis of tactics, strategy or prospects of success’; letters to Mr. Justice Alvin B. Rosenberg in 26 C.L.R. 299 quoted from the 5 Construction Law Letter (Toronto), No 5 (May/June, 1989), Supp., p. 3 seq.
the line of argument can be quite damaging to the case and the credibility of the argument presented. Of course, it can never by excluded altogether that later revelations require an adjustment of the argument but careful initial analysis greatly reduces this risk.

Such an early analysis enables the action to be properly structured. In the light of the relative strengths and weaknesses of the case it can be decided which aspects should be tried first and before which forum. The nature of the case and its strengths and weaknesses may indeed be one of the criteria on which the forum is chosen: It seems obvious that international commercial arbitrators will look at a case differently than a jury of laymen might do and that a court of the general judiciary may look at it differently than a specialized commercial court – not to mention differences resulting from national mentalities, idiosyncrasies or even prejudice.

The initial analysis will also facilitate a decision whether it is preferable to attempt a consolidation of the proceedings before a single forum or whether the issues should be tried separately. Consolidation may simplify matters and reduce costs for trying a dispute which otherwise would be spread over several jurisdictions. However, it also can produce immense complications, confusion of issues and increase in cost and time.

In some instances, the safest and the most appropriate solution may be a strategy of piecemeal resolution of the dispute. Costs and risk may be reduced by trying, in a first stage, a clearly circumscribed issue. If things go well, opponents may be more easily prepared to settle. If things go wrong, other fronts remain open. In some cases it may be highly desirable to mark some points rapidly; an issue and a jurisdiction will have to be chosen, which provide good chances for this to be achieved. In other situations, the principal concern will be the final outcome – but this is often very difficult to predict.

There is indeed, in any procedure, an important part played by chance; there are clear limits in the extent to which a dispute can be planned and managed. But this should not prevent one from examining ways and means for a more rational and efficient conduct of international multi-fora disputes.

Clearly, this requires the concerted efforts of practitioners in many different jurisdictions. Hopefully, these lines have shown how important and stimulating a task lies before us in this field and have indicated the directions for further useful work.