Vienna Arbitration Days 2022

Shareholder and Corporate Disputes

World Café Sessions - Friday 25 February 2022, 11:00 a.m. - 12:30 p.m.

Organizers:

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- NIAMH LEINWATHER | Secretary General, VIAC
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Table Moderators:

- CĂTĂLIN ALEXANDRU | Filip & Company, Bucharest
- DANIEL BUSSE | Busse Disputes, Frankfurt am Main
- MIKLÓS BORONKAY | Szecskay Attorneys at Law, Budapest
- GÁBOR DAMJANOVIC | Forgó, Damjanovic & Partners, Budapest
- RAFAŁ KOS | Kubas Kos Gałkowski, Warsaw
- FLORIAN KREMSLEHNER | DORDA, Vienna
- JAE SUNG LEE | UNCITRAL, Vienna
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- SAMUEL MIMNAGH | Cerha Hempel, Vienna
- AMANDA NEIL | Freshfields Bruckhaus Deringer, Vienna
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- SHEILA SCHWAIGHOFER| Pitkowitz & Partners, Vienna
- ALFRED SIWY| Zeiler Floyd Zadkovich, London, Vienna
- GISÈLE STEPHENS-CHU | Stephens Chu, Paris
- ELISABETH TRETTHAHN-WOLSKI | Binder Groesswang, Vienna
- ROBERT WACHTER | Lee & Ko, Seoul

Co-Moderators:

- SOPHIE AULITZKY | DORDA, Vienna
- PHILIP EXENBERGER | DORDA, Vienna
- GABRIEL FUSEA | Freshfields Bruckhaus Deringer, Paris
- DAVID GAUKRODGER | OECD, Paris (Kick-Off Speaker)
- MANUEL GYARMATI-BUCHMÜLLER | Busse Disputes, Frankfurt am Main
- JOHANNA KATHAN-SPATH | Pitkowitz & Partners, Vienna
- KATHARINA PLAVEC | Jones Day, Frankfurt
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- ARBENITA RRMOKU | Specht & Partners, Vienna
- IRINA SUĂTEAN | Filip & Company, Bucharest
- TADEUSZ ZBIEGIEŃ | Kubas Kos Gałkowski, Warsaw

1. Organization

The Arbitration World Café was first introduced at the Vienna Arbitration Days 2016 by Nikolaus Pitkowitz in order to facilitate interaction between the audience and top arbitration experts. The main purpose was to create a suitable platform to discuss necessary changes, develop new concepts and find common ground. The World Café was extremely well received from the outset and has since become a fixed component of the Vienna Arbitration Days. For 2022 we will have at least 19 tables, each dealing with a distinct subject related to the topics presented during the Kick-off Presentations and is presided by one moderator who may be supported by an experienced young practitioner as a "co-moderator". There will be two discussion rounds (each 40 minutes). After a first round of discussion, the participants will move to another table of their choice whereas the table moderators remain seated at their designated table and then the second round of discussion starts. Each table has eight seats available.

Before the first round of discussion starts, each table moderator (together with the co-moderator) will provide a short teaser introducing the topic to be discussed at their table and then moderate the discussion. The outcome of the discussions will be presented by the table moderators (together with the co-moderator) in their contribution to the Austrian Yearbook of International Arbitration 2023.

2. Tasks of Table Moderators and Co-Moderators

The task of the table moderators is to introduce the table topic, to structure and lead the discussion as well as to ensure a continuous flow of discussion. The moderators prepared issues connected to the topic in advance to trigger thought provoking discussions. The goal of the World Café Session is to further develop issues discussed during the Kick-Off Presentations (see the program of the 2022 Vienna Arbitration Days) but also to introduce further issues.

3. Follow-Up Publication

The discussions that take place at the individual World Café sessions should be well documented since the outcome will be used as a basis for an article that will be published in the Austrian Yearbook on International Arbitration 2023 (available at Manz Verlag as a hardcover book and online via Kluwer). It is the task of the moderator to document the discussions - where there are two moderators, the moderators should agree who is responsible for the documentation.

We ask each moderator & co-moderator to provide us with a summary of the outcome of their table discussions within four weeks after the conference.

4. Conference Material

Albeit possible, it is not necessary to distribute any conference material for the individual World Café Sessions. In the past years, some table moderators have prepared questionnaires or outlines which were included in the conference materials so that the participants could prepare for the sessions.

In order to give conference participants an overview of the table topics and the allocation of moderators and co-moderators, we distribute a schedule for the World Café. This will facilitate the choice of tables for the participants.

5. Agenda of the World Café Session

Start: 11:00 am CET

Introduction: 11:00 – 11:10

First round of discussion: 11:10 – 11:50

- Participants will leave the table and join a new table, possibly at another floor while the moderators remain seated at their table -

Second round of discussion: 11:50 – 12:30

End: 12:30

Followed by an **informal get-together**: 12:30 – ?

6. Allocation of Topics

INTRODUCTION: Nikolaus Pitkowitz, Johanna Kathan-Spath, Niamh Leinwather, Veronika Macha

NO	Table Topic	Moderator	Co-Moderator
Floor 1: Joinder & Multiparty in Arbitration			
1	The weight to be afforded to an existing party's objection to joinder	MIMNAGH Samuel	
2	Spotlight on Joinder & Consolidation in the ICC Rules 2021 – Efficient Case Management Tool or Multi-Headed Beast?	PRANTL Désirée	ROHMANN Stephanie
3	Protection of (Minority) Shareholders (Parties to a Shareholders' Agreement) through Multiparty Proceedings, Joinder and Emergency Measures	RIHAR Petra	
4	Joinder of Third Parties under the Vienna Rules	SIWY Alfred	
5	Arbitrability II decision of the German BGH from 2009 (BGH Arb II) – a mistaken resolution and its harmful effects on domestic and international corporate arbitration practice	KOS Rafał	ZBIEGIEŃ Tadeusz
6	Joinder & Multiparty Arbitration	BUSSE Daniel	GYARMATI-BUCHMÜLLER Manuel
Floor 2: Res Judicata & Lis Pendens			
7	Lis pendens and arbitration, or "who defers to whom?"	BORONKAY Miklós	EXENBERGER Philip
8	Res Judicata & Lis Pendens: Bifurcation and Procedural Efficiency	SCHWAIGHOFER Sheila	KATHAN-SPATH Johanna

NO	Table Topic	Moderator	Co-Moderator
9	Res Judicata: Different concepts, conflicting decisions and 3rd party effects of awards in representative standing cases	TRETTHAHN-WOLSKI Elisabeth	RRMOKU Arbenita
10	Res Judicata: Claims that could have been brought in a first proceeding, but were not brought until a second proceeding.	WACHTER Robert	LEE Han Ah
Floor 3: Corporate & Shareholder Disputes in Commercial Arbitration Private Clients, Private Foundations			
11	Private Clients, Private Foundations	KREMSLEHNER Florian	AULITZKY Sophie
12	Confidentiality v. Disclosure – Dealing with Disputes and Awards (Court Decisions) in M&A Transactions	DAMJANOVIC Gábor	
Floor 4: Shareholder and Corporate Claims in Investment Arbitration			
13	Reflective Loss - Necessary Evil or Fundamental Unfairness?	ALEXANDRU Cătălin	SUATEAN Irina
14	UNCITRAL/OECD response to shareholder claims for reflective loss	LEE Jae Sung	GAUKRODGER David (Kick-off Speaker)
15	Shareholder and corporate claims in investment arbitration: policy pros and cons	NEIL Amanda	FUSEA Gabriel
16	Recent Treaties and Reform Proposals on the Standing and Rights of Shareholders and Companies in Investment Treaty Arbitration	SANDS Oonagh	
17	Is it time for a more restrictive approach to shareholder standing?	STEPHENS-CHU Giséle	
18	Shareholder and Corporate Claims in Investment Arbitration	LOTFI Courtney	PLAVEC Katharina

7. COLLECTION OF OUTLINES of the World Café Table Topics

Floor 1: Joinder & Multiparty Arbitration

1. MIMNAGH: The weight to be afforded to an existing party's objection to joinder

Table Moderator: Samuel Mimnagh

The weight to be afforded to an existing party's objection to joinder

The question of how and when to permit the joinder of a third party to an ongoing arbitration is a matter that has recently become more uniform. As an example of the generally accepted approach, the Vienna Rules (2021) provide that the matter is to be decided by the arbitral tribunal (on the request of a party or the to-be-joined third party) after considering all the relevant circumstances (Article 14(1)).

The ICC Rules used to be an outlier among institutional rules and demanded a stricter approach that required all parties to consent to the joining of a third party in ongoing arbitral proceedings (ICC Rules 2017, Article 7(1)). However, in its latest iteration, the ICC Rules (2021) forego this unanimity requirement and permit the arbitral tribunal to decide on a request for joinder, taking all relevant circumstances into account, subject only to the consent of the to-be-joined third party (Article 7(5)).

With this greater uniformity, it has become all the more important to consider the scope of the "relevant circumstances" that must be considered by the Arbitral Tribunal. In particular, this 'Table Discussion' will focus on considering the extent to which the specific wishes of the existing parties ought to serve as an overriding interest. After all, the addition of a third party to the proceedings could shift the balance in the proceedings and cause the party in the minority to be confronted with a more significant challenge than might have existed had the arbitration remained between merely two parties.

This 'Table Discussion' is designed to assist all arbitration practitioners, both arbitrators and counsel alike. The discussion will address the various considerations at play and, perhaps, draw attention to some more often overlooked considerations that serve a more nuanced and thorough assessment of the appropriateness of joinder. After the discussion, all attendees will have a more considered perspective on the mechanism of joinder that may facilitate future application of the method in their arbitral practice.

Questions that will be discussed include:

1) What are some generally appropriate factors that arbitrators must consider as part of the "relevant circumstances"?
2) What are the most important considerations within these "relevant circumstances"?
3) To what extent does the agreement of an existing party play a role in the assessment of the "relevant circumstances"? Is there an informal hierarchy of circumstances?
4) How can a party seeking to avoid joinder best utilise the "relevant circumstances" to prevent unwanted joinder?
5) Is it desirable for individual parties to have a (considerable) role in the question of joinder?

2. PRANTL|ROHMANN: Spotlight on Joinder & Consolidation in the ICC Rules 2021 – Efficient Case Management Tool or Multi-Headed Beast?

Table Moderator: Désirée Prantl
Co-Moderator: Stephanie Rohmann

Spotlight on Joinder & Consolidation in the ICC Rules 2021 – Efficient Case Management Tool or Multi-Headed Beast?

1. Status quo: **Hard facts on multi-party arbitration**

2. Revision of the ICC Rules 2021: **Joinder & Consolidation – Can you lead the horse to water and make it drink?**

3. Comparison: **The revised Vienna Rules 2021 as the better approach?**

4. User perspective: **Preferences**

5. The way forward: **Keep calm and join & consolidate?**

3. RIHAR: Protection of (Minority) Shareholders (Parties to a Shareholders' Agreement) through Multiparty Proceedings, Joinder and Emergency Measures

Table Moderator: Petra Rihar

Joinder & Multiparty Arbitration

Protection of (Minority) Shareholders (Parties to a Shareholders' Agreement) through Multiparty Proceedings, Joinder and Emergency Measures

Our World Café round table will address the following key topics:

- Typical shareholder and corporate disputes involving multiple parties
- Joinder under the various institutional rules:
    - preconditions
    - timing
    - joinder on the claimant's and/or respondent's side
- In what situations does joinder really make sense?

We will look at a concrete case with one majority and three minority shareholders.

- The existing shareholders' agreement contains various provisions to protect minority shareholders, in particular to protect their right to be adequately represented on the board of directors.
- But are minority shareholders really protected against changes of mind by the majority shareholder?
- How should they defend themselves if the majority shareholder suddenly wants to change the company's business strategy, thereby disregarding the protective provisions of the shareholders' agreement?

4. SIWY: Joinder of Third Parties under the Vienna Rules

Table Moderator: Alfred Siwy

Joinder of Third Parties under the Vienna Rules

- Intentions of a party requesting a joinder of a third party: **in what role can third party be joined to arbitration proceedings** (party / "*Nebenintervenient*" / *amicus curiae* / other forms of third-party participation?)

- **Requirements for joinder**
  - What are the "relevant circumstances" that an arbitral tribunal has to consider when deciding on a request for joinder (cf Article 14(1) Vienna Rules)

- **Two mechanisms of a request for joinder** under Article 14 Vienna Rules:
  - Joinder made with a Statement of Claim
  - Joinder made after Statement of Claim has been filed

- **Focus: Joinder made with a Statement of Claim**
  - **Case example**: A Claimant files a Statement of Claim, requesting a) payment from the Respondent b) the joinder of a third party and c) a declaratory award against the third party.
    The third party disputes the arbitral tribunal's jurisdiction and requests the dismissal of Claimant's request for joinder.
    - Is this a request for joinder made with a Statement of Claim? Or is the third party already a party due to the request for declaratory relief?
    - What is the procedure in accordance with Article 14(3)(1) and (2)?
    - What happens if the arbitrator decides to dismiss the request for joinder?
      - Procedural mechanism of Article 14(3)(3) ("to be treated in separate proceedings")

- **Costs**: If a request for joinder is dismissed, can the third-party claim cost reimbursement even though it has not become a party to the arbitration?
  - Compare with cost reimbursement in case of an award declining jurisdiction.

5. KOS|ZBIEGIEŃ: Arbitrability II decision of the German BGH from 2009 (BGH Arb II) – a mistaken resolution and its harmful effects on domestic and international corporate arbitration practice

Table Moderator: Rafał Kos
Co-Moderator: Tadeusz Zbiegień

Arbitrability II decision of the German BGH from 2009 (BGH Arb II) – a mistaken resolution and its harmful effects on domestic and international corporate arbitration practice

1. **Arbitrability II decision of the German BGH**

- **Why did it take so long? BGH decisions from:**

  - 1951 (the lack of settleability of corporate disputes)
  - 1996 (Arbitrability I, an issue of the *ultra partes* effect of an annulment award)
  - 2009 confirmation of the arbitrability of corporate disputes

- **Why is the indication of "Arbitrability" in BGH Arb II misleading?**

  - In fact the decision does not deal with the arbitrability of corporates disputes at all, it deals with the applicability of *ultra partes* effects of court decisions to arbitral awards

- **What are the main "in merits" mistakes of BGH Arb II?**

  - This is a pure example of a law making decision, a competence reserved for the legislator, not for public courts
  - It interferes in the legal definition of an arbitration agreement, changing its substantive scope, contrary to black letter law
  - The alleged invalidity of an arbitration agreement in the case of a lack of specific rules of procedure dedicated to corporate disputes ?
  - Procedural protection for shareholders, ensuring their participation in corporate disputes, is a prerequisite for recognition of an arbitral award, and not prerequisite of the validity of an arbitration agreement (!)

2. **Harmful effects of BGH Arb II (or how the arbitrating of corporate disputes jumped out of the frying pan and into the fire…)**

  - All valid arbitration clauses in articles of associations become allegedly invalid after the issuance of BGH Arb II
    and now
  - After 50 years of the debate on the arbitrability of corporate disputes it will likely take another 50 years to resolve the issue regarding what majority of votes is necessary do adopt the existing arbitration clauses to the new minimum standard set up by BGH Arb II

6. BUSSE|GYARMATI-BUCHMÜLLER: Joinder & Multiparty Arbitration

Table Moderator: Daniel Busse
Co-Moderator: Manuel Gyarmati-Buchmüller

Joinder & Multiparty Arbitration

This table allows for an open discussion on the topic of Joinder & Multiparty Arbitration and develops further the issues presented in the Kick-Off Presentations. Please feel free to use this space for your personal notes.

Floor 2: Res Judicata & Lis Pendens

7. BORONKAY|EXENBERGER: Lis pendens and arbitration, or "who defers to whom?"

Table Moderator: Miklós Boronkay
Co-Moderator: Philip Exenberger

***Lis pendens* and arbitration, or "who defers to whom"?**

"Lis pendens" (or *"lis alibi pendens"*) refers to a situation where the same action between the same parties is already pending elsewhere. The question is whether any of the *fora* should stay the procedure or even decline to hear the dispute due to the parallel proceedings. There is no simple or universally accepted answer to this question. Rather, different courts and tribunals have adopted various approaches based on diverging policy considerations. As a soft law instrument, the International Law Association adopted recommendations on *lis pendens* and *res judicata* (Resolution no. 1/2006).

The World Café roundtable will aim to discuss the main issues related to *lis pendens* with the help of the below model cases.

Case no. 1.

Claimant and Respondent entered into a contract for works, which contained an arbitration clause (arbitration in country "A"). A dispute arose between the parties and both of them terminated the contract. Against this background, the parties initiated the following proceedings:

(i) First, Respondent initiated a **litigation** against Claimant in **country "B"** (its home country). In that litigation, Claimant relied on the arbitration agreement and disputed the jurisdiction of the court, however it is unclear whether this was done in a timely manner. The courts in country "B" have yet to decide on their jurisdiction.

(ii) Second, Claimant initiated an **arbitration** against Respondent in **country "A"** based on the arbitration clause in their contract. In the arbitration Respondent argued that Claimant waived its rights under the arbitration clause when failing to raise its objection in the court proceedings in Country "B".

Questions:

- What should the arbitral tribunal in country "A" do?
- Does the situation change if both proceedings (litigation & arbitration) take place in country "A"?
- Does it make a difference if the arbitration proceedings were initiated prior to the ordinary court proceedings?

– What factors should the arbitral tribunal take into account when deciding on the relevance of the court proceedings in country "B"?

Case no. 2.

There is an arbitration between Claimant and Respondent. One of the key pieces of evidence is a document allegedly signed by Respondent's managing director. Respondent alleges that the document is **forged** and files, during the arbitration, a **criminal complaint** with the police. The criminal investigation is ongoing.

Question: Should the tribunal stay proceedings pending the outcome of the criminal investigation?

Case no. 3.

Claimant secured an arbitral award against Respondent ordering Respondent to pay a certain amount. The place of arbitration was in country "A", the law applicable to the parties' contract *(lex causae)* was the law of country "B". Against this background, the parties initiated the following proceedings:

(i) First, Respondent initiated a **setting aside action** in country **"A"** (place of arbitration) relying on the alleged invalidity of the arbitration clause. The first instance court dismissed the claim. It held that the law of country "A" *(lex arbitri)* is the law applicable to the arbitration agreement. Respondent appealed, the case is before the Supreme Court of country "A".

(ii) Second, Claimant initiated **recognition and enforcement** proceedings in countries **"B"** and **"C".** In these proceedings, Respondent also relied on the alleged invalidity of the arbitration clause.

(α) The first instance court in country **"B" denied recognition** of the award. It considered that the law of country "B" (being the *lex causae*) is applicable to the arbitration clause, and the clause is in fact invalid.

(β) The court in **country "C"** has not yet decided on the recognition of the award.

All countries are Contracting States of the 1958 New York Convention.

Questions:

– What should the court in country "C" do?

– Does it make any difference which law the court in country "C" believes to be the law applicable to the arbitration agreement?

– Does the situation change if Respondent relies on different legal grounds in (a) the setting aside and in (b) the recognition proceedings?

Case no. 4.

An investor ("**Investor"**), based in country "**A**", decided to invest in country "**B**". To do so, the Investor founded a holding company ("**HoldCo**") in country "**C**". HoldCo in turn owned 100% of the shares in the operating company ("**OpCo**"), established in country "**B**". After a few years, the Investor alleged that country "B" had taken illicit government measures against the OpCo. Against this background, the following proceedings were initiated:

(i) First, the **HoldCo** initiated an ad hoc arbitration under the **UNCITRAL** Arbitration Rules **against country "B"** under the **C/B-Bilateral Investment Treaty**.

(ii) Second, the **Investor** initiated an **ICSID** arbitration **against country "B"** under the **A/B-Bilateral Investment Treaty.** The claims raised by the Investor and the claims raised by the HoldCo in the UNCITRAL arbitration concerned the **same measures** taken by country "B" against the OpCo. Country "B" requested the ICSID tribunal to dismiss the case due to *lis pendens*.

Questions:

– Is this a case of *lis pendens*?

– What should the ICSID arbitral tribunal do?

– What factors should the ICSID arbitral tribunal take into account when deciding on the relevance of the UNCITRAL arbitration pending between the HoldCo and country "B"?

8. SCHWAIGHOFER|KATHAN-SPATH: Lis pendens and arbitration, or "who defers to whom?"

Table Moderator: Sheila Schwaighofer
Co-Moderator: Johanna Kathan-Spath

***Res Judicata* & *Lis Pendens*: Bifurcation and Procedural Efficiency**

The discussion at the round table will focus on the impact of *res judicata* and *lis pendens* claims on the procedural aspect of an arbitration, specifically whether such claims warrant the bifurcation of the arbitration proceedings. Considering that *res judicata* and *lis pendens* claims are usually raised by parties as a first ring of defence, a party might request a tribunal to separate the proceedings so as to first decide on the *res judicata* or *lis pendens* claims, in the hopes of putting an early end to the proceedings and without the need to address further claims.

Participants are invited to share their experience with bifurcation with regards to *res judicata* and *lis pendens* claims, as well as their broader experiences with bifurcation proceedings and procedural efficiency. The following issues will *inter alia* be discussed:

1. When is it efficient to bifurcate proceedings due to *res judicata* and *lis pendens* claims (or more generally)?
    - Is there a distinction between *res judicata* claims and *lis pendens* claims as to the manner of approaching bifurcation requests?
    - What weight should one put on the effectiveness requirement? What are the other relevant criteria?
    - Is the tribunal required to follow the parties' submissions or can it rely on its own criteria to base its decision?
    - *Lis pendens*: if request for bifurcation is granted, and *lis pendens* is admitted, must the tribunal suspend the proceedings? If yes, is this still effective?
2. When considering bifurcation, whose interests prevails: the requesting the party, the opposing party or the tribunal's?
3. How far should the issue of *res judicata* or *lis pendens* be assessed in the bifurcation proceedings?
    - How much of their case should the parties disclose at this stage of the proceedings?
    - How extensive should the tribunal's *prima facie* review be?
    - How can the tribunal make sure not to prejudice the parties' other claims in its *prima facie* review?
    - Is the tribunal bound by its *prima facie* declarations in the decision on bifurcation?
4. Opposing party's strategy: automatic objection to requests for bifurcation or is there room for reaching an agreement on bifurcation?
    - Agreement prior to arbitration proceedings?
    - Agreement during arbitration proceedings?
5. Extent and limits to the arbitral tribunal's discretion?
    - Can the parties limit such discretion? If so, how?

- Is the arbitral tribunal bound by any limits imposed by common agreement between the parties?

6. With regards to the decision following bifurcation: to what extent is a tribunal bound by its own findings in the ongoing proceedings?
   - How to deal with claims raised subsequently pertaining to *res judicata* or *lis pendens* after the dismissal of the claims in the first phase of the arbitration?
   - What if the parties agree to continue litigating on *res judicata* or *lis pendens*, should the arbitral tribunal follow the parties' agreement or is it bound by its prior findings?

9. TRETTHAHN-WOLSKI|RRMOKU: Res Judicata: Different concepts, conflicting decisions and 3rd party effects of awards in representative standing cases

Table Moderator: Elisabeth Tretthahn-Wolski
Co-Moderator: Arbenita Rrmoku

Res Judicata: Different concepts, conflicting decisions and 3rd party effects of awards in representative standing cases

We intend to discuss how to increase efficiency in international commercial arbitration by limiting risks of parallel and subsequent proceedings involving the same or related claims between the same or related parties and by ensuring the finality of arbitral awards.
The list below aims to give you a better idea of possible discussion topics. However, we are very curious to hear your thoughts, the list merely intends to spark discussions rather than setting out any limitations.

- How should parties deal with situations in which (i) a court and an arbitral tribunal or (ii) several arbitral tribunals refuse to accept jurisdiction or render conflicting decisions?

- Should tribunals in international arbitrations apply transnational or national concepts of *res iudicata*? Does your jurisdiction allow arbitral tribunals to apply *res iudicata* what differ from the prevailing concept in your jurisdiction?

- What are the practical consequences of different national interpretations / concepts of *res judicata* under national laws? Are these rules adequate for international arbitration? How can gaps be closed?

- We see more and more that commercial providers (intend to) offer to act as claimants on behalf of the actual (economic) owner of a claim. Is the concept of representative standing common in your jurisdiction? What would be the effect of an award rendered against such representative on the actual owner of the claim?

- Is a transnational body of rules or recommendations on *res judicata* as proposed by the ILA Committee better equipped than national laws to address issues that arise in connection with parallel or subsequent proceedings?

10. WACHTER|LEE: Res Judicata: Claims that could have been brought in a first proceeding, but were not brought until a second proceeding.

Table Moderator: Robert Wachter
Co-Moderator: Han Ah Lee

Res Judicata: Claims that could have been brought in a first proceeding, but were not brought until a second proceeding.

At this table, we will consider differences in the breadth and scope of the *res judicata* principle in various jurisdictions, as well as how courts and tribunals have applied these principles in international arbitration. We will discuss the following questions, among others:

1. What is the rule of *res judicata* in your jurisdiction?
   - Is it broad? Or is it narrow?
   - Does it follow the "triple identity test"?
2. In what situations have you seen the principle of *res judicata* become an issue in internationa l arbitration?
   - A second arbitration that includes a claim similar to a claim adjudicated in an earlier arbit ration;
   - Attempts to seek new relief in a second proceeding based on the outcome of a first proc eeding; or
   - A third party starts an arbitration to make the same claim as arbitrated and determined i n a previous arbitration between different parties.
3. How should a tribunal determine the applicable law of *res judicata*?
   - Law of the seat?
   - Transnational principles?
   - What is the basis for applying transnational principle?
4. What is the scope of *res judicata*?
   - Is the *res judicata* principle limited to the operative part of the award? Or does it extend to the reasoning?
   - Does *res judicata* extend to claims that could have been raised?
5. Do you agree or disagree with the following proposition: **"***Indeed, the better view is that pres umptively broader preclusion rules are required, as between the parties, for international arbi tral awards than for national court judgments, given the obligations of Contracting States un der the Convention and the objectives of international arbitration agreements*." – Gary Born

Floor 3: Corporate & Shareholder Disputes in Commercial Arbitration
Private Clients, Private Foundations

11. KREMSLEHNER: Private Clients, Private Foundations

Table Moderator: Florian Kremslehner

Private Clients, Private Foundations

Foundations are not only the source of conflicts - they can also help to prevent or resolve conflicts. The table will discuss, without limitation, the potential and the limitations of arbitration in the following settings:

- Conflicts of interest to which directors/trustees are exposed;
- Structures that allow to address and resolve conflicts within the family;
- Sanctions against disobedient beneficiaries;
- Disputes about the (in)validity of trusts and foundations.

Table Moderator: Gábor Damjanovic

Confidentiality v. Disclosure – Dealing with Disputes and Awards (Court Decisions) in M&A Transactions

One of the main advantages of commercial arbitration is its confidential nature. In Corporate & Shareholder Disputes; however, the need to disclose such proceedings and their outcomes may be necessary/vital when shareholdings are sold. Failure to disclose them may result in a breach of representation/warranty and thus liability of the seller(s), whereas disclosing them may result in a breach of confidentiality. How can these two aspects be reconciled? Shall a shareholder rather avoid arbitration (any form of confidential ADR) to be free to disclose or maybe draft the arbitration clause to allow for limited disclosure?

Floor 4: Shareholder and Corporate Claims in Investment Arbitration

13. ALEXANDRU|SUATEAN: Reflective Loss - Necessary Evil or Fundamental Unfairness?

Table Moderator: Cătălin Alexandru
Co-Moderator: Irina Suatean

Reflective Loss - Necessary Evil or Fundamental Unfairness?

- **Is the system of reflective loss justified in investment arbitration?**

- **Are there better alternatives to achieve investor protection without sacrificing the host State (through double recovery) or other stakeholders?**
    - Would a form of derivative action afford a more balanced system of protection than direct shareholder claims?

- **Do tribunals have any tools to mitigate the risks and disadvantages associated with reflective loss claims?**
    - Is **consolidation** a practical means of avoiding multiplication of proceedings and contradictory
    - outcomes?
    - Should ***res judicata*** be extended to affiliates / single economic units / investors at different levels of the corporate chain?
    - Could tribunals use the theory of ***lis pendens*** or more generally their power to manage the case in order to stay the proceedings or postpone the award?
    - Would setting a **cut-off point** (such as requiring a *reasonable causal link*) be a solution to the multiplication of claims?
    - Is the theory of **abuse of rights** a practical means of preventing unjust outcomes?
    - Where investment arbitration is available to the company, can and should tribunals require the investor to **prove that it could not cause the company to file a claim before asserting its own direct claim for a reflective loss?**
    - Is there a principle of international law pursuant to which **the wrongdoer cannot be made to pay more** than the total amount of loss caused? If so, how can it be applied in proceedings brought by different claimants?
    - Should tribunals **deduct** from the value of damages any compensation already awarded by local courts or investment arbitration tribunals or received under a settlement?
    - Should tribunals **pierce the corporate veil** for the purpose of valuating the loss and treat all affiliates as a single economic unit?

- **Do other stakeholders have any means of protecting their interests?**
  - What should **domestic investors** and **locally incorporated companies** (investment vehicles) do to protect their interests against reflective loss claims by foreign shareholders?
  - What should the company's **creditors** do to protect their interests?

- **Conclusions**
  - Which is the most pressing issue raised by reflective loss claims in investment arbitration and how should tribunals address it?
  - How should states structure their international agreements in order to better protect the various interests involved while remaining attractive for investment?

14. LEE|GAUKRODGER: UNCITRAL/OECD response to shareholder claims for reflective loss

Table Moderator: Jae Sung Lee
Co-Moderator: David Gaukrodger (Kick-Off Speaker)

UNCITRAL/OECD response to shareholder claims for reflective loss

A number of reform proposals are being discussed at UNCITRAL and OECD, including (a) provisions generally barring such claims and restoring the claim to the injured company and (b) provisions on denial of benefits, consolidation or stays. Calls have been made for a multilateral approach and that it should be possible to apply any reforms retroactively.

- Do such reform options go in the right direction? Any preference?
- What is the rationale for treating foreign/domestic shareholders in the same company differently?
- Should we return to general corporate law principles? If so, what regime should apply to foreign-controlled companies?

15. NEIL|FUSEA: Shareholder and corporate claims in investment arbitration: policy pros and cons

Table Moderator: Amanda Neil
Co-Moderator: Gabriel Fusea

Shareholder and corporate claims in investment arbitration: policy pros and cons

International investment law and domestic legal systems typically differ in their approach to shareholder and corporate claims. Whereas international investment law allows shareholders to make claims for injury suffered both directly (that is, injury caused by a third party directly to the shareholder) and indirectly (that is, injury caused by a third party to the company, which results in loss to the shareholder, or "reflective loss"), domestic legal systems usually only allow the former. What, if any, policy reasons inform these different positions? Does the difference in approach make sense in light of these policy reasons? Or would it be better to harmonise the regimes?

1. Are claims for reflective loss permitted in your jurisdiction?

2. What policy reasons inform this position?
   - Efficiency
   - Predictability
   - Avoidance of double recovery
   - Fairness to all stakeholders - the company is best placed to make the claim

3. Do you think this position is justified?

4. Why are claims for reflective loss permitted in investment arbitration?
   - The express language of the treaty usually allows claims for reflective loss because the definition of "investment" typically includes "shares" and may also encompass "indirect investments".

5. Do you think this position is justified?

6. Do the policy reasons informing the position at domestic law also apply under international investment law? That is, does allowing claims for reflective loss in investment arbitration:
   - Foster inefficiency?
   - Make the situation unpredictable for States?
   - Create a risk of double recovery?
   - Lead to unfairness as between stakeholders?

7. Are there are any additional policy reasons which would speak for allowing claims for reflective loss in investment arbitration?
   - There are cases where a company cannot bring the claim itself (eg expropriation).
   - There are cases where the company will not bring the claim itself and investment treaties typically do not contemplate derivative claims.
   - The position is consistent with the object and purpose of investment treaties.

- Tribunals should not make policy decisions but should apply the rules of treaty interpretation.

8. Are there are additional policy reasons which would speak against allowing claims for reflective loss in investment arbitration?
   - Avoidance of treaty shopping
   - Facilitation of settlement

9. Does it matter that the position regarding reflective loss is different under international investment law and at domestic law?

10. What alternatives might exist to a wholesale acceptance or rejection of claims for reflective loss in investment arbitration?
    - Objections based on admissibility or jurisdiction in appropriate cases
    - Clearer rules on multiple claims
    - Clearer rules on double recovery

16. SANDS: Recent Treaties and Reform Proposals on the Standing and Rights of Shareholders and Companies in Investment Treaty Arbitration

Table Moderator: Oonagh Sands

Recent Treaties and Reform Proposals on the Standing and Rights of Shareholders and Companies in Investment Treaty Arbitration

- Foreign investments are often structured through companies incorporated in the host State.
- The definition of "investor" and "investment" in international investment agreements ("IIAs") determine which investors are protected and can bring claims against host States.
- Investor-State dispute settlement ("ISDS") has generally gone beyond property rights protections in domestic legal systems. Interpretations by investment treaty tribunals have generally extended broad protection to shareholders.
- The ICSID Convention and most IIAs do not expressly address shareholder reflective loss claims.
- Some IIAs do have provisions preventing certain claims by certain types of investors. E.g.:
  - Some IIAs have provisions on the level of direct ownership (or degree of influence in management) required for a shareholder to acquire standing.
  - NAFTA established an explicit regime for covered shareholder claims. Covered shareholders could either claim on their own behalf (Article 1116) or through a derivative suit, which allowed a controlling shareholder to claim on behalf of the company, with recovery accruing to the company (Article 1117).
    - Tribunal decisions reached varying results.
  - Other recent IIAs have adopted similar approaches. E.g., DR-CAFTA, CETA, CPTPP, KORUS.
- Some recent IIAs give greater interpretative power to States. Ex., USMCA, CETA.
- Other recent IIAs preclude ISDS entirely or limit it significantly. Ex., USMCA, RCEP, EU-Japan Agreement, UK-Canada Agreement.
- The OECD has published papers on reforming shareholder reflective loss in ISDS. This includes barring shareholder reflective loss claims, subject to limited exceptions (e.g., expropriation, denial of justice).
- UNCITRAL Working Group III ("WGIII") papers have identified concerns with the current ISDS system. E.g., multiple proceedings, inefficiencies, treaty shopping, double-recovery, departure from customary international law rule on shareholder reflective loss.
  - WGIII has also identified limiting reflect loss claims by:
    - Prohibiting claims by investors where the company itself is pursuing a remedy in a different forum;
    - Permitting submission of a claim by an investor only if the investor and the local company withdraw any pending claim and waive their rights to seek remedy before other forums; and
    - Limiting forum selection options to claims not yet asserted elsewhere.
- What are the pros and cons of the above approaches? If reform proposals are adopted (by way of multilateral agreement or otherwise), what will be the impact on existing IIAs and claims advanced by shareholders and corporate entities? How will investors respond when structuring their investments or bringing claims? What lies in store for future IIAs and ISDS as a whole?

17. STEPHENS-CHU: Is it time for a more restrictive approach to shareholder standing?

Table Moderator: Gisèle Stephens-Chu

Is it time for a more restrictive approach to shareholder standing?

Introduction: Investment tribunals often presume shareholders' standing to bring a claim from the inclusion, as a protected investment, of shares or other interests in companies. While such a provision undoubtedly establishes jurisdiction, should it suffice to admit a claim for harm sustained to the company? Can a more restrictive approach to shareholder standing help address current concerns about shareholder claims for reflective loss?

- In Barcelona Traction,[1] Belgium's diplomatic protection claim for reflective loss was dismissed on the basis of lack of standing: the ICJ notably held that only the company, as the entity whose rights had been infringed, could claim reparation for the injury caused to it (save in exceptional circumstances that justify lifting the corporate veil). This decision has regularly been dismissed by investment tribunals as confined to the context of diplomatic protection. Yet it raises potentially relevant questions in the context of current calls for ISDS reform.

- Are/should municipal law concepts of separate legal personality and standing be relevant to the analysis of standing under an investment treaty?

- Does the mere inclusion in investment treaties of shares as protected investments suffice to disregard the distinction between the company and its shareholders, and the separation of respective property rights (as recognized in Barcelona Traction and later Diallo)?

- If the distinction is relevant, what types of injury to shareholder rights would engage the State's responsibility under an investment treaty?

- Is the availability of remedies to the company relevant to the shareholder's standing?

- Should the possible impact of a shareholder claim on the rights of third parties (such as the company's creditors) be taken into account?

- Can the treatment of these questions at the admissibility stage comprehensively address concerns around claims for reflective loss?

[1] Belgium, acting on behalf of the Belgian shareholders in Barcelona Traction, a Canadian company, sought reparation from the Spanish government for the harm caused to the company. The claim was dismissed, as the ICJ found the harm was directed at the company, rather than its shareholders, who thus lacked standing.

18. LOTFI|PLAVEC: Shareholder and Corporate Claims in Investment Arbitration

Table Moderator: Courtney Lotfi
Table Co-Moderator: Katharina Plavec

Shareholder and Corporate Claims in Investment Arbitration

This table allows for an open discussion on the topic of Shareholder and Corporate Claims in Investment Arbitration and develops further the issues presented in the Kick-Off Presentations. Please feel free to use this space for your personal notes.