Abaclat: An Aberration?
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The jurisdictional award in *Abaclat and Others v. Argentine Republic*, by arbitrators Professor Pierre Tercier (President) and Professor Albert Jan van den Berg,1 and the dissent by Professor Georges Abi-Saab,2 guarantee that the role of investment treaty arbitration in resolving sovereign debt disputes is a topic of considerable discussion. Sovereign debt disputes, however, are commonly subject to binding dispute resolutions in national courts outside the host State under a “foreign” governing law. In this Essay, I consider how resolution of sovereign debt disputes in ICSID arbitration differs, if at all, from resolution of those disputes in New York or English courts. In general, I conclude that the barriers to a successful claim by an investor for non-payment by a State issuer of international bonds in ICSID arbitration are substantially higher than in the New York or English courts. Nevertheless, five factors may entice a holder of defaulted sovereign debt into ICSID arbitration:

- the desire to avoid the application of mandatory host State law (for example, exchange control regulations prohibiting payment in a currency other than the local currency); and
- for mass claims such as *Abaclat*,
  - the negotiating power derived from aggregating individual claims into a large class of organized holders,
  - the use of a single forum to hear the claims rather than forums distributed throughout the world;
  - the ability to “finance” such a mass claim by means of contingent fee counsel or third-party funding; and
  - the comparative advantages under the ICSID Convention for enforcement of an ICSID arbitration award.

If a national court presented with a sovereign debt default claim is located in the issuer State, then that court will naturally apply any mandatory forum law.

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1 Decision on Jurisdiction and Admissibility, 4 August 2011, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic).
2 Dissenting Opinion, 28 October 2011.
Debt moratoriums and other exchange control regulations are, of course, mandatory law. Consequently, the defaulting State’s courts will be obligated to give effect to that mandatory law and therefore decline to enforce a debt covered by the exchange controls, unless the law in question contravenes constitutional requirements in that State. That is the reason why international bondholders and other lenders do not wish for the debt documents to specify the courts of the issuer State as the enforcement forum.

Even if the court in question is not located in the issuer State, the same result will occur if the court determines that the law governing the sovereign debt instrument is the law of the State imposing the mandatory exchange control. That is the reason why international bondholders and other lenders do not wish for the debt documents to specify the law of the issuer State as the substantive governing law for the obligation.

Investment treaty arbitration avoids both of these problems, from the perspective of the bondholder. The tribunal is an international body, normally sited outside the issuer State. Accordingly, the courts of the issuer State are not the primary supervisors of the arbitral process.

In fact, ICSID arbitration is particularly favorable in that regard, as it is intended to be a self-contained system with awards not generally subject to national court review. Article 53(1) of the Convention implements this self-contained nature of the ICSID process by excluding any appeal or other remedy for an award except for those provided for in the Convention itself.

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

Moreover, the body of law applied in ICSID arbitrations is international law, not national law (except in the case of the “umbrella clauses” discussed within). National law is generally not a defense to international law duties. Illustratively, Article 32 of the International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Conduct states that a State in breach of the duty to provide reparation for an internationally wrongful act may not rely on its own national law to excuse that breach.

3 See Baldwin, Kantor & Nolan, Limits to Enforcement of ICSID Awards, 23 Journal of International Arbitration 1 (February 2006).