

CZU: 341.241.8 + 341.632

**EFFECT OF FORUM SELECTION CLAUSES IN INVESTMENT ARBITRATION***Sorin DOLEA**Moldova State University*

The conclusion of contracts between investors and host States is a common feature in international investment law. In many disputes, such investment agreements play a major role. The existence of such contractual agreements and the claims arising in the investment disputes surrounding them, have given rise to a plethora of legal issues, which will be addressed in this contribution. Initially, it is necessary to distinguish between breaches of a treaty and breaches of contract. Not every breach of a contract by a State amounts to a breach of international law. There is a large body of case law setting out the line at which a breach of contract under domestic law amounts also to a breach of international law. This can either be due to the specific circumstances of the breach or to the existence of an umbrella clause. Cases involving breaches of contract invariably also have given rise to complex disputes about the jurisdiction of the treaty-based tribunal deciding on them. The main questions have focused on whether such tribunals can hear claims based on the breach of a contract as a preliminary question to determining a breach of a treaty, the jurisdiction of treaty-based tribunals to hear claims for the breach of contracts not amounting to breaches of international law and the relevance of contractually agreed dispute resolution provisions. None of the above questions have yet produced uniform answers. There are, however, certain approaches depending whether the applicable investment treaty provide for an "umbrella clause", or the investment treaty has a limited *rationae materiae* scope of protection. These aspects will be discussed in this article.

**Keywords:** *investment protection, contract claims, observance of investment undertakings, investment arbitration, scope of protection.*

**EFFECTUL CLAUZEI DE SELECȚIE A FORULUI ÎN ARBITRAJUL INVESTIȚIONAL**

Încheierea contractelor între investitorii străini și statele-gazdă este o practică comună a dreptului internațional al investițiilor. Existența raporturilor contractuale în disputele investiționale au dat naștere la o mulțime de probleme juridice, care vor fi abordate în acest articol. Inițial, este necesar să se facă distincția dintre încălcarea unei obligații prevăzute de un tratat investițional și încălcarea obligațiilor contractuale încheiate între investitorul străin și statul-gazdă. Nu orice încălcare a unui contract de către un stat reprezintă o încălcare a dreptului internațional. O parte din jurisprudența investițională stabilește abordarea, conform căreia o încălcare a contractului în conformitate cu legislația internă echivalează cu o încălcare a dreptului internațional. Acest lucru poate fi cauzat fie de circumstanțele specifice ale încălcării, fie de existența unei clauze umbrelă. Cazurile care implică încălcări ale contractului au generat, de asemenea, invariabil dispute complexe cu privire la competența tribunalului bazat pe un tratat investițional care decide asupra unei pretenții contractuale. Principalele probleme sunt dacă aceste tribunale pot examina cereri bazate pe încălcarea unui contract ca o problemă preliminară pentru determinarea încălcării obligațiilor ce reies dintr-un tratat investițional, competenței tribunalelor bazate pe tratate de a soluționa pretențiile contractuale care nu constituie încălcări ale dreptului internațional și aplicabilității clauzei de selecție a forului în materie de soluționare a litigiilor contractuale. Niciuneia dintre întrebările de mai sus nu i s-au dat deocamdată răspunsuri uniforme. Există, totuși, anumite abordări care depind de faptul dacă tratatul investițional aplicabil prevede o „clauză umbrelă” sau dacă scopul de protecție *ratione materiae* a tratatului prevede anumite limitări. Aceste aspecte vor fi discutate în articol.

**Cuvinte-cheie:** *protejarea investițiilor, pretenții contractuale, respectarea angajamentelor investiționale, domeniu de protecție.*

**Introduction**

Foreign investments are sometimes made through a contract between the investor and an entity of the host State which may contain forum selection clauses. Those clauses provide that the disputes arising out of the contract are settled by the national courts or arbitration. In these cases, investors may invoke provisions in treaties to access an investment tribunal, while the host States may argue that the investor excluded the possibility of submitting a dispute to international arbitration by concluding the forum selection clause contained in the contract.

This situation leads to parallel proceedings in the *fora* designated by investment treaty, and the *fora* designated by the contract. The same refers to situations where the disputes are linked in some way, or which have some similarities are brought before different adjudicators. Investment treaties contain a unique mechanism that

tries to limit the undue proliferation of proceedings, such as *umbrella* clauses. Umbrella clauses, which are provided by many investment treaties, effectively turn the contract claims into the treaty claims. An umbrella clause, therefore, extends the scope of the treaty's protection for the investor, thereby facilitating the filing of multiple claims before the same forum. The scope of the paper is to analyze the effect of forum selection clauses in investment arbitration.

### I. Distinction between contract and treaty claims

The first cases dealing with the distinction between contract and treaty claims were decided at the beginning of XX century [1-3]. Generally, an investor may bring an investment claim arising out of a contract if the dispute resolution clause in the investment treaty is broad. If the dispute resolution clause is narrow, then the tribunal does not have jurisdiction to adjudicate a contract claim.

The issue of whether the contract claims may be submitted to investment tribunal appears in the cases when the contracts concluded between a foreign investor and the host state contains a forum selection clause. If the investment treaty contains a broad dispute resolution clause, and it does not contain a forum selection clause, then there are two approaches to this matter. Some scholars consider that if a claim arising out of a contract which has a forum selection clause is submitted to an investment tribunal, then the arbitral tribunal shall decline its jurisdiction [4, p.355]. Others consider that where the tribunal has determined that the legal foundation of the claim is an investment treaty obligation, and the object of that claim is the vindication of contractual rights forming part of the claimant's investment, and there is a bona fide dispute concerning the existence or scope of those rights, then the tribunal should generally stay its jurisdiction otherwise established in favour of a judicial or arbitral forum stipulated in the contract, as having exclusive jurisdiction in relation to disputes arising out of the contract (except of denial of justice). If the existence or scope of these contractual rights is in dispute, then such incidental contractual issues must be determined in accordance with the law governing the contract. Also, where the tribunal has determined that the legal foundation of the claim is a contractual obligation, the tribunal should reject on the basis of admissibility in favour of a judicial or arbitral forum stipulated in the contract as having exclusive jurisdiction in relation to disputes arising out of the contract. However, the tribunal should exercise its jurisdiction over the contractual claim if the tribunal is satisfied on the basis of compelling evidence that the claimant will be subjected to a denial of justice in the forum stipulated in contract [5, p.234-240].

In determination whether the submitted claim is a contract or treaty claim, the arbitral tribunal shall apply the objective characterization of the legal foundation of the claim. In *Vivendi Annulment Decision*, in which this matter was addressed in length, the Committee stated that a particular dispute might at the same time involve issues of interpretation of a contract and interpretation of the relevant Bilateral Investment Treaty (*BIT*). Also, a State may breach an investment treaty without breaching a contract and vice versa, each of these claims being determined by its own proper or applicable law. It is one thing to exercise contractual jurisdiction, and another to take into account the terms of a contract in determining whether there has been a breach of an international law standard. The Committee held that a treaty establishes an independent standard by which the conduct of the parties is to be judged. The existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent State or one of its subdivisions cannot operate as a bar to the application of the treaty standard, or recourse in additional jurisdictions. The tribunal in *CMS* took the same approach reasoning that "*as contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for breach of contract, this would have not prevented submission of the treaty claims to arbitration*" [6, para.80].

### II. The Umbrella clauses

Some investment treaties require that host State observe any obligations or commitments undertaken towards investment. This type of clause is called umbrella clause [Art.2 of UK Model BIT]. For some scholars, the clause imposes a substantive treaty obligation on the host State to comply with all contractual commitments [7, p.250] [4, p.18-21]. Others interpret the clause narrowly as not targeting any commercial conduct [8, p.437-466].

If the treaty contains an umbrella clause, and the contract contains a forum selection clause, then the issue of contract claims in investment treaty arbitration is clarified according to the following approaches.

#### A. Restrictive approach: *SGS v. Pakistan*

The first arbitral decision dealing with the substantive scope of an umbrella clause was *SGS v. Pakistan*, which interpreted the clause narrowly. The case concerned an inspection agreement entered between SGS and the Government of Pakistan, with an ad-hoc arbitration clause in Islamabad. Pakistan terminated the

agreement. Following that, SGS commenced proceedings under Swiss-Pakistan BIT, and the Government commenced the arbitration in Islamabad according to the contractual arbitration agreement. The investment tribunal found that it did not have jurisdiction over SGS claims regarding the breach of the agreement by Pakistan [9, para.190]. The tribunal admitted that the ordinary meaning of the *umbrella* clause would impose an obligation on Pakistan to comply with its undertakings towards investments, including contractual obligations [9, para.166]. However, because of the formulation of the relevant article of BIT, it did not support the argument that breaches of contract are automatically elevated to the level of breaches of international law. Also, the expansive approach would mean that the investor could submit any contractual breaches to investment-treaty arbitration, overriding contractual dispute settlement clause. The tribunal took a narrow reading of the umbrella clause, effectively rendering its presence in a treaty irrelevant.

In *Joy Mining*, the tribunal rejected the argument that the mere commercial breaches of contract would create international responsibility for breaches of the observance of undertakings clause, unless there would be a clear violation of the treaty rights and obligations or a violation of contract rights of such magnitude as to trigger the treaty protection [10, para.81]. The same approach was taken in *Sempra* [11, para.311].

This approach divests the umbrella clause provision of its meaning by requiring supplemental evidence as to the clause's interpretation and disregarding the provision's plain language, which is inconsistent with Articles 31 and 32 of Vienna Convention on the Law of Treaties of 1969.

#### **B. Enforcement approach: *SGS v. Philippines***

In *SGS v. Philippines* [12], SGS and Philippines state authority entered into a service contract containing a forum selection clause of Philippine's courts. Claiming a failure of payment, SGS sought ICSID arbitration under Switzerland-Philippines BIT 1997. The Philippines asserted that the tribunal had no jurisdiction given that SGS's essential claim was an alleged failure of payment under the contract, which contained a forum selection clause. The tribunal held that the umbrella clause encompassed the contract claims and that the claimant had specifically alleged breaches of the treaty. It, therefore, concluded that it had jurisdiction. It considered that Art. X (2) of that BIT [It reads "Each Contracting Party shall observe any obligations it has assumed with regard to specific investments", 12 paras.113-129] makes a breach of the BIT for the host State to fail to observe commitments, including contractual commitments regarding specific investments [12, paras.113-129]. However, it did not accept that a BIT would *automatically override the binding selection of a forum which determines their contractual claims* and that as long as the essential basis of the claim is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract [12, para.98]. The tribunal rejected the theory, that the umbrella clause would convert the questions of contract law into questions of treaty law. The umbrella clause did not change the law applicable to contract to international law. Also, it stated that the umbrella clause addressed the performance of the investment and not the scope of the commitments assumed by the State in connection with that investment. The tribunal held that even if it has jurisdiction, the claimant's reliance on the contract as the basis of its claim is premature because such claim shall be examined by the forum referred in the contract. Only if the competent court were to establish that a given amount was due, but its decision was then disregarded by respondent, the claim before the ICSID tribunal would be admissible.

The approach of the majority in *SGS v. Philippines* was endorsed in *BIVAC v. Paraguay* [13] and *TOTO v. Lebanon* [14]. In *BIVAC*, the tribunal interpreted the clause before it as establishing an international obligation to observe any contractual obligations concerning investors. It concluded that the umbrella clause formulation "*any obligation*" appeared without apparent limitation concerning commitments, which included contractual arrangements between BIVAC and the State. Since the umbrella clause imported all the obligations under the contract into the BIT, this included the obligation to ensure that the designated court by the contract would resolve any dispute arising under it. Therefore, the tribunal stayed the proceedings until the competent *fora* designated by the contract will adjudicate the contractual claims.

In *TOTO*, the tribunal held that it lacked jurisdiction because of the of contract's dispute resolution clause. The tribunal stated that umbrella clauses might form the basis for treaty claims without transforming contractual claims into treaty claims [14, para.200]. The tribunal characterized the umbrella clause as a mechanism for the enforcement of claims; it does not elevate pure contractual claims into treaty claims. The contractual claims remain based upon the contract and are governed by the law of the contract. For that case, this means that they remain subject to contractual jurisdiction clause and have to be submitted exclusively according to the dispute settlement clause provided in the contract.

This approach maintains the distinction between contract claims and treaty claims. Thus, the contractual provisions remain applicable and binding between the parties to the contract. Only the performance, not the scope of the contract, is relevant under international law because the umbrella clause is an *extra mechanism* for the enforcement of claims. Under the *enforcement* approach, international law and municipal law are distinct, but the municipal law still plays a role that an investment tribunal must take into account.

### C. The "Automatic" Interpretation: *SGS v. Paraguay*

Another approach taking the opposite position from *SGS v. Pakistan* submits that an umbrella clause automatically transforms an obligation between a State and an investor into an international obligation.

In *SGS v. Paraguay* [15], the tribunal concluded that the umbrella clause establishes an international obligation for the parties to the BIT to observe contractual obligations. Having established its jurisdiction over a claim stemming from a violation of the umbrella clause, the tribunal had to determine whether to hear the claim or to remand it to the forum indicated in the contract. The tribunal heard the claim because: (i) The claimant's claim was not only contractual, since there were other alleged commitments relied by SGS and therefore not all the umbrella clause claims would fall into the contractual forum selection clause; (ii) the enforcement of the forum selection clause would result in limitation of the investment tribunal's jurisdiction to *empty shell and depriving the BIT dispute resolution process of any meaning* [15, paras.173-176].

In *Fedax* [16], the underlying claim by the investor was that Venezuela failed to honor certain of its promissory notes. The Tribunal held that Venezuela is under the obligation to honor the specific payments established in the issued promissory notes. The tribunal held that a breach of contract was a breach of treaty, without explaining in any detail the reasoning behind this holding.

In *Noble Ventures* [17], the reasoning of the award led to support the broad interpretation of umbrella clause [Art. II (c) of Romania-US BIT 1992 reads: "Each party shall observe any obligation it may have entered into with regard to investment"]. The tribunal found that the clause was intended to create obligations beyond those specified in other provisions of the BIT itself. The umbrella clause was *naturally be understood as protecting investors also regarding contracts with the host State generally in so far as the contract was entered into regarding an investment* [17, para.52]. The same approach was taken in *Eureko*, where the tribunal found that the umbrella clause must be interpreted to mean something in itself [18, paras.244-260]. The tribunal thus held that Poland had breached the clause by failing to comply with its contractual commitments.

The automatic approach has been supported by scholars who consider that the mere presence of an umbrella clause would transform the contractual obligation between the State and the investor into an international obligation between the Contracting States [7, p.231] [19, p.868]. This reasoning would lead to the fact that the relationship between the State and the investors is simply doubled by the undertakings between the host State and the State to which the investor belongs.

### D. Governmental breach approach: *The "iure imperii" interpretation.*

Another approach advances the view that a tribunal constituted under BIT containing an umbrella clause has only jurisdiction over treaty claims, including claims based on the violation of an investment agreement entered into by the foreign investor and the State as a sovereign, but not claims where the State acted other than as a sovereign.

The tribunals in *Pan American Energy* [20] and *El Paso Energy* [21], ruling on jurisdiction in two similar cases and applying the umbrella clause in the same BIT [The Article (2)(c) of the US-Argentina BIT 1991: "Each Party shall observe any obligation it may have entered into with regard to investments"], reached the same conclusions, and rejected the approach of construing the umbrella clause simply to mean a transformation of a contract claim into a treaty claims. Under this approach, a State's violation of an investment agreement that it entered into in its capacity as a sovereign could give rise to treaty claims [20, para.113]. Thus, the tribunals stated that only governmental breaches of contracts, not commercial breaches, are covered by the umbrella clause.

This approach narrows the *ratione materiae* scope of the umbrella clause and applies the umbrella clause only to contracts entered into by the State, or breaches committed by the State in the exercise of its sovereignty. This approach is criticized because, if one seeks to apply the criterion *acta iure imperii* versus *acta jure gestionis*, there would be difficulties in the characterization of the governments' conduct. Unless the breach is committed, there is no possibility of determining whether act is qualified as a breach of the umbrella clause and consequently,

of the investment treaty [22: the PICJ noted that in the presence of a clear text, a "restrictive interpretation" would be contrary to the plain terms of the article and would destroy what has been clearly granted.]. Also, this approach disregards Article 12 of the ILC's Articles which states that the difference between *acta iure imperii* and *acta iure gestionis* is irrelevant for the purpose of attributing the act of a State organ.

### State entities and attribution of obligations to the State

When the contract is concluded with the State entity, with a separate personality from the State, the question is whether the obligations of the State entity is attributable to the State itself. Also, the question is whether the umbrella clause is applicable to the undertakings granted by the State's instrumentality.

In *Alex Genin* for instance, the tribunal concluded that the umbrella clauses applies to the undertakings granted by the Bank of Estonia, and therefore the State is bound by such undertakings [23].

Whether or not the breach of contract by a State entity or State-owned enterprise be attributable to the State, is a matter of merits. In international law, acts not committed by the State itself, can under certain circumstances (provided by Art.4, 5 and 8 of ILC's Articles) be attributable to the State. However, for the ILC's Articles to be applicable, there needs to be an international wrongful act. Where is no violation of an international law obligation, the rules on State responsibility cannot be invoked [24]. In *Azurix*, the tribunal held that none of the contractual claims as such refer to a contract between the parties to arbitration, and there are no other undertakings taken by Argentina other than those under the BIT [25, para.384]. The tribunal in *Siemens* took the same approach [26, para.204].

In order to determine whether the breach of the contract is attributable to the state, it shall be determined: a) If the breach of the contract constitutes a prima facie breach of the Investment Treaty. The tribunal shall characterize the claim in order to answer this question; b) Whether there is an impediment for the Tribunal to exercise jurisdiction (e.g. the contract has a forum selection clause; and c) Whether there is a situation covered by Art.4, 5 or 8 of ILC's Articles.

### III. Concurrent jurisdictions

An investor's claim against the host State for breach of contract may be actionable as a contractual claim before contractually agreed forum or as a claim for breach of the observance of undertakings clause in Investment Treaty arbitration. This gives rise to the problem of overlapping and concurrent jurisdiction.

In *SGS v. Philippines*, the claim was submitted both as a purely contractual claim and also as a claim for BIT breach. The tribunal noted that the essence of claims was contractual [12, paras.157-169]. The tribunal decided that it holds over SGS's claims under BIT, but regarding the contractual claims, it must await the determination of the amount payable according to the contractually agreed process. Thus, the tribunal identified an admissibility impediment on the basis of the *pacta sunt servanda* (compliance with the contract which is the foundation of the claim) and implicitly that of *generalia specialibus non derogant* (deference to fora with more specific jurisdiction on the underlying dispute) [Arbitrator Crivellaro dissented on the decision to stay the proceedings, considering that BIT conferred on SGS an additional right to select the forum after that the dispute has arisen. BIT was posterior to the contract and granted more favorable treatment to the investor than the contract.].

A stay of proceedings was expressly rejected in *Impregilo*[27] and *Bayindir* [28] cases. The cases concern the standards of treatment and expropriation of contractual rights. Tribunals considered that there was no overlap between treaty and contract claims because it was not obvious that the contractual dispute resolution mechanisms in such case will be undermined in any substantial sense by the determination of separate and distinct treaty claims.

#### A. Fork in the road

Investment treaties have no uniform approach to dealing with the prospect of parallel proceedings. Some treaties provide "*fork in the road*" provisions which require an election of a forum, and others provide exhaustion of local remedies as a precondition to commencing treaty arbitration. Some treaties require waiver of potentially competing claims. Each of these approaches is an overarching question about the balance between investor rights and efficiency.

The purpose of fork in the road clauses is to prevent parallel proceedings concerning the same investment dispute from being conducted in different fora [29]. The purpose of fork in the road clauses largely resembles that of the procedural principle *lis pendens*, which is also intended to prevent identical parallel proceedings [30].

The fork in the road clause is not triggered unless national proceedings and arbitration concern the same *dispute*. The real problem is assessing the scope of fork in the road clauses lies in determining whether the dispute is actually *the same*. The wording of the fork in the road clauses refers only to *dispute* itself and does not provide any further clues. A familiar fact pattern involves a foreign shareholder in a company incorporated in the host state. The local company sues in host state's courts advancing contract or administrative claims, but foreign investor commences arbitration under the BIT. An example is *Enron* case, where US investors, who were shareholders in local Argentinian company, on one hand triggered BIT proceedings, and the local company, on another hand, started administrative proceedings before Argentinian courts. Accordingly, the BIT claims and the administrative claims continued on their separate paths [31].

It appears that despite the existence of parallel litigation, the States did not successfully invoke a fork in the road defence to a BIT claim. This is because arbitral tribunals have consistently held that a dispute is defined by: a) the parties to it; b) the claims asserted in it; c) its subject matter. These elements constitute "triple identity" criteria developed largely in municipal law of *lis pendens* and *res judicata*. If an arbitration and national court litigation are not identical in all three respects, then tribunals have found that commencement of the court has not triggered the fork in the road [32]. Given the requirements mentioned above for the application of fork in the road clause, in the arbitral jurisprudence, the tribunals did not find applicable such provisions. The first time the fork in the road clause was applicable was *Pantechniki v. Albania* [33]. The tribunal decided that such clause gives to investor an irrevocable choice of whether, in the event of dispute, he wants to take action by way of initiating investment arbitration proceedings or whether he wants to seek relief in the domestic courts of the host state. The investor in this case, first unsuccessfully commenced proceedings before domestic courts, and following that filed a claim under Albania-Greece BIT which contained a fork in the road clause.

The arbitral tribunal first relied on the "fundamental basis" test envisaged by *Vivendi Annulment Committee* [34, para.101] to discern whether disputes in different fora were the same, and whether the same dispute has been submitted to both national and international fora. Second, it rejected the arbitral practice which relies heavily on the dichotomy between treaty claims and contract claims in its interpretative approach to fork in the road clauses.

The tribunal rejected the essential basis of the claims test suggested by Albania which relied on the criteria "same factual predicates" and "request the same relief". In interpretation of fundamental basis test, in order to identify whether the fork in the road clause applied to in that case, the tribunal rejected the contract / treaty claim distinction, and considered that the fork in the road clause was applicable. It found that the claimant's grievance arises out of the same purported entitlement that it invoked in the contractual debate with Albanian authorities. The claimant chose to take this matter to the Albanian courts. It cannot now adopt the same fundamental basis as the foundation of treaty claim [33, para.67].

The application of fork in the road clauses is strongly linked to the scope of the umbrella clauses and subsequently, the effect of contract/treaty claim distinction. The fundamental test is decisive in determination of the dispute and the applicability of fork in the road clauses. If tribunals would apply the *identity of the legal basis* test, then the fork in the road clauses will never be applicable [Particularly in jurisdictions that follow a dualist approach to the reception of conventional international law, where the investor's rights arising out of a BIT could not be pursued in domestic courts.] and effective. This is because the investor will always rely on national law before national courts, and on international law before international tribunals.

Therefore, the legal basis of the claim should not be made the decisive factor for the question of the identity of claims. While the distinction between contract claims and treaty claims may provide a first indication that claims are not identical, it does not seem *per se* suitable for determining the scope of fork in the road clauses.

### **B. Application of MFN clause to dispute settlement**

Some investment treaties provide that neither contracting State shall submit the investors of the other State to treatment less favourable than that which it accords to investors of any third country (*MFN Clauses*). The question is whether such treatment also applies to the dispute settlement options. In *Maffezini v. Spain* [35], the tribunal decided whether the more favourable dispute settlement provision contained in one treaty, can be extended to the beneficiary of another treaty by operation of the MFN clause. The tribunal decided affirmatively on the ground that procedural and substantive rights were intimately connected, stating that dispute settlement arrangements are directly related to the protection of foreign investors. Thus, if a third party treaty contains

provisions for the settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the MFN clause as they are fully compatible with the *ejusdem generis* principle.

By contrast, in *Plama v. Bulgaria* [36], the tribunal did not extend the MFN clause to arbitration. Claimant argued that it was entitled to select ICSID arbitration mechanism included in another treaty. The tribunal did not accept this substitution of dispute resolution systems because it was not clear from doubt that such an extension or incorporation of language from a third treaty reflected the intent of the contracting States. In other words, the contracting States did not intend to extend the MFN clause to dispute resolution provisions. The tribunal in *Salini v. Jordan* [37] shared the same view expressing fears over treaty shopping.

#### IV. Issues of inconsistency as result of forum selection clauses in investment arbitration

As it is described above, the issue regarding the forum selection in investment arbitration was addressed differently by the arbitral tribunals, sometimes even in cases where facts were basically the same [9,12,15]. This situation leads to uncertainty regarding to whether certain claims may or not be covered by investment treaties.

The tribunals which followed the *restrictive approach* denied jurisdiction and referred parties to settle their disputes according to dispute settlement clause inserted in their contracts. This approach is criticized as it completely disregards the umbrella clauses inserted in international treaties, giving no effect to them. Other tribunals, which followed the *automatic approach* considered that international treaty covered all the claims referred to investments, including contractual claims. Thus, such tribunals accepted jurisdiction in adjudicating the contract claims. This approach is criticized because it transforms all the contract claims into treaty claims, placing the respondent State in obvious disadvantage. Thus, the investor may merely disregard the forum selection clause provided by the contract and rely only on the international treaty.

The balanced position was taken by the tribunals which followed *enforcement approach*. Those tribunals considered from one hand that umbrella clauses are applicable, from another hand however, it should be made the distinction between contract claims and treaty claims. The competent tribunal according to forum selection clauses provided by contract shall adjudicate contract claims, and investment tribunals shall adjudicate treaty claims. In some cases, the effect of forum selection clauses leads to suspension of proceedings, until the competent *fora* would decide the contract claims [12].

The effect of forum selection clauses in investment arbitration involves the issue of plurality of fora, the risk of conflicting decisions and double recovery. In the present state of law, it appears to be an unavoidable feature of investment arbitration. However, consistency and coherence of results, as well as legal certainty will benefit if the distinction between contract and treaty claims will be rigorously applied [30]. Therefore, the *enforcement approach* of the umbrella clauses in the context of the effect of forum selection clauses in investment treaties seems to be the most practical solution.

#### Conclusion

In the case of treaty-based arbitrations and contractual designated court or tribunal, the developments represented by the case law are indeed problematic, because of the contradictory solutions given by the arbitral tribunals. Nevertheless, each of these cases is fact-specific with respect to: (i) how broad the dispute settlement inserted in investment treaty is; (ii) the precise wording of the forum selection clause, and the timing of the entry into force of the BIT as opposed to the private contract; (iii) the existence or not of an 'umbrella clause' or of a 'fork-in-the-road' clause in the IT; and (iv) the legal foundation of the claim.

In conclusion, the relevance of a breach of contract in investment treaty remains controversial. The particular treaty's wording, carries primary importance in considering whether a breach of contract must be characterized as a violation of the relevant treaty. The main concern of the forum selection clause in investment arbitration is the difficulty in determining whether or not the *umbrella clauses* can work as a bridge to bring claims arising out of contractual relations into the sphere of investment treaty protection.

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*Prezentat la 05.02.2019*