ARBITRATION AND ADMINISTRATIVE LAW DISPUTES:
PROCEDURAL PRESSURE POINTS

Emmanuel Giakoumakis – Speaking Points, Friday 15 May 2026
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Mr. President, honourable Judges, distinguished colleagues, it is a great pleasure and an honour to take part in this conference, and to speak on the relationship between arbitration and administrative law disputes.

This is a topic that is quite topical. Investment treaty arbitration very often turns to the legality of administrative decisions adopted by the host State *vis-à-vis* a foreign investor. NATO also has experience in this field, as it does not generally submit itself to the jurisdiction of domestic courts, seeking to preserve its privileges and immunities. Instead, NATO has established a specialized tribunal to assess the legality of its administrative decisions (similar to other IOs), and in some cases resorts to arbitration for disputes with private parties, contractors or vendors in the civilian and military structure.

A. Introduction

[Note to interpreters: *May summarize this paragraph if already discussed in previous panel.*]

Now, I found it particularly interesting to read the General Report synthesising the replies to the questionnaire on alternative methods for resolving administrative disputes. As far as arbitration is concerned, three broad conclusions emerge from that report.

- The first is that most of the surveyed jurisdictions remain cautious when it comes to the arbitration of administrative disputes. In many countries, arbitration is not permitted in administrative disputes as such. In others, it is accepted only exceptionally, most often in the field of private-law contracts concluded by public authorities — where the State does not exercise public authority as sovereign, but acts as *fiscus*.
- The second conclusion is that, where arbitration is permitted, it is generally not the result of a free-floating principle of party autonomy. When the administration consents to arbitration, consent is itself governed by public law considerations. It must be given by the competent authority, in the prescribed form, within the limits of the statutory powers conferred upon that authority.
- The third conclusion is that arbitral awards involving public entities remain subject to judicial review particularly on issues such as jurisdiction, arbitrability, public policy, procedural fairness, and the protection of the public interest.

In my presentation today, however, I would like to take a slightly different perspective. I will not focus on the legislative frameworks described in the national reports. Rather, I would like to examine how arbitral tribunals themselves have approached disputes with an administrative-law dimension through the prism of international arbitration and tease out possible pressure points.

I will be talking today about 'international arbitration', because it is here that the tensions are most apparent. An administrative dispute may nonetheless also be subject to domestic arbitration rules, in which case national legislatures have a wider margin to address tensions.

My central argument is this: choosing arbitration rather than administrative adjudication is not merely a matter of procedural form. It has substantive consequences for the settlement of the dispute. Arbitration brings with it a particular institutional logic, which informs the way the dispute is framed and ultimately resolved. While domestic law may dictate a particular solution, it does not necessarily follow that arbitral tribunals will follow it.

I will focus on two key examples that show pressure points between international arbitration and administrative law: **parallel proceedings and "impermissible" arbitration proceedings.**

- *First*, how have arbitral tribunals dealt with parallel proceedings before themselvess and national administrative courts?
- *Second*, to what extent may a public entity rely on its own constitutional, legislative, or administrative rules to deny its capacity to consent to international arbitration?

B. Parallel proceedings (before arbitral tribunals and administrative courts)

Parallel proceedings have become a familiar feature of international arbitration. This is unsurprising. Public contracts, concessions, public-private partnerships and investments are legally complex. The same facts may give rise to different causes of action before several fora.

A large project, for example, may generate proceedings before domestic administrative courts, contractual arbitration under a commercial arbitration clause, and investment arbitration under a bilateral or multilateral investment treaty, if the claimant qualifies as a protected investor.

From the perspective of the claimant, this may be attractive. Pursuing multiple claims may increase the prospects of success. It may also increase pressure on the State, as commercial counterparty, to comply with its contractual or financial obligations.

But from a systemic point of view, parallel proceedings represent important complexities. They multiply costs and procedural burdens. They create a risk of contradictory decisions. They create a risk of double recovery. They may also be used tactically, not to resolve a dispute efficiently, but to frustrate or delay the primary proceedings.

In domestic litigation, this problem is usually addressed through doctrines such as *lis pendens*, *res judicata*, abuse of process, or related mechanisms. But in international arbitration, the position is more fragmented. There is no general doctrine of *lis pendens* across arbitral tribunals and national courts.[1] Arbitral tribunals therefore approach the problem through the specific terms of the jurisdictional instrument at hand: the arbitration agreement or the relevant rules.

Broadly speaking, arbitral tribunals have dealt with parallel proceedings in two main ways.

- *First*, they ask whether the relevant instrument contains a limitation clause requiring exclusivity, waiver, or discontinuance of other proceedings.
- *Second*, they ask whether the relevant instrument contains a fork-in-the-road clause, requiring the claimant to choose between domestic courts and international arbitration.

I will take each in turn.

(i) Limitation clauses

The most important limitation in this regard is set out in the ICSID Convention, which regulates the international settlement of investment disputes. The ICSID Convention is relevant to our discussion, because investment treaty arbitration very often involves the legality of administrative decisions.

While investment disputes often originate from contracts (where the State acts as a *fiscus*), they may well relate to administrative measures (and the lawful exercise of sovereignty), such a wrongful expropriation or discriminatory administrative measures. A recent pending example is *Ruby River v Canada*, which turns on the legality of an environmental impact assessment for a liquefied natural gas facility, and the refusal of a construction permit.

Other examples may concern the termination of a concession, tax assessments, regulatory sanctions, public procurement decision, or regulatory acts affecting a foreign investment.

Article 26 of the ICSID Convention provides that '[c]**onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration <u>to the exclusion of any other remedy</u>**.'

This is aimed at protecting 'the right to exclusivity of the ICSID proceedings (...) to the exclusion of any other remedy, whether domestic or international, judicial or administrative'.[2]

Noticeably, this provision applies not only upon the actual <u>commencement</u> of parallel proceedings at ICSID and elsewhere, but from the moment where the parties <u>consent</u> to ICSID jurisdiction.[3] Thus, Article 26 has been applied to preclude parallel proceedings even if the foreign investor was <u>not</u> contemplating the pursuit of ICSID proceedings.

The case of *MINE v Guinea* illustrates the point well. In this case, a foreign investor had agreed with the Government of Guinea to ICSID arbitration in a commercial agreement. MINE filed a petition in a US Federal District Court to compel arbitration under the Federal Arbitration Act. The US court ordered commercial arbitration in the US, ***instead of ICSID arbitration***.[4]

[1] *Certain German Interests in Polish Upper Silesia (Preliminary Objections) 1925, PCIJ, Series A, No. 6*, pp. 19-20.
[2] *Quiborax S.A., Non-Metallic Minerals SA. and Allan Fosk Kaplun v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, para. 127.
[3] Staminir Alexandrov, "Article 26" in Christophe Schreuer et al., *Schreuer's Commentary on the ICSID Convention* (3rd ed.), Oxford University Press, 2022, p. 584, paras. 170 et seq.
[4] *MINE v. Guinea (II)*, ICSID Case No. ARB/84/4, Award, 6 January 1988, paras. 30-34.

When the arbitral tribunal issued an *ex parte* award, Guinea challenged the award. Upon appeal, the US Court of Appeals held that the District Court had no jurisdiction to order Guinea to arbitrate, based on Article 26 of the ICSID Convention. When MINE attempted to enforce the arbitral award abroad, Belgian and Swiss courts blocked the enforcement procedures, holding that Article 26 of the ICSID Convention precluded a foreign investor from pursuing 'other remedies', because ICSID arbitration was the exclusive remedy.[5] Once MINE filed its claim at ICSID, the competent ICSID tribunal issued an interim measure ordering MINE to dissolve existing attachments and seek no new remedy before national courts.[6]

The facts of *MINE* concerned parallel arbitrations rather than domestic court proceedings. But the same logic can apply to national courts, including administrative courts. Article 26 is broad enough to preclude proceedings before local fora where those proceedings concern the same dispute and interfere with ICSID arbitration. It is thus important, when addressing contractual disputes, to examine whether an exclusivity clause could affect the enforceability of an administrative court judgment.

A similar result can be achieved through waiver clauses. Many investment agreements concluded by the EU (including CETA, amongst others) require claimants to “withdraw or discontinue any existing proceeding before a tribunal or court under domestic law (…) with respect to a measure alleged to constitute a breach referred to in its claim; and to waive its right to initiate any claim or proceeding” in the future.[7]

A waiver clause may therefore require the claimant to abandon proceedings before the domestic administrative courts in order to pursue the international claim before a tribunal.

Arbitral tribunals have generally enforced this condition. The case of *Waste Management v. Mexico* is instructive in that regard. The dispute arose out of the alleged violations of a 15-year concession. The claimant filed an arbitration claim but expressly excluded from its waiver *'any dispute settlement proceedings'* against Mexico under the domestic law of Mexico. Shortly afterwards, the claimant pursued parallel proceedings against the federal government of Mexico before Mexican administrative courts.

The arbitral tribunal found that it lacked jurisdiction, as the claimant had breached the waiver condition.[8] It interpreted the waiver clause as seeking to avoid 'the imminent risk that the Claimant may obtain the double benefit in its claim for damages' when 'both legal actions have a legal basis derived from the same measures'. On that basis, the tribunal. The company could not therefore pursue the same claim at two different fora. The point is interesting because domestic proceedings were predicated on administrative law, a different source of law from the applicable international treaty.

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[5] For a summary analysis, Alexandrov (*supra*), pp. 544-546.
[6] *MINE v. Guinea (II)*, ICSID Case No. ARB/84/4, Decision on Provisional Measures, 4 December 1985, final clause.
[7] A prime example is Article 8.22 of CETA (“1. An investor may only submit a claim pursuant to Article 8.23 if the investor: (…) f. withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim; and g. waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim.
[8] *Waste Management, Inc.v. Mexico*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000, paras. 6,25, 30. *See also* section IV and para. 27.

In short, waiver clauses do not merely regulate procedure. They allocate institutional authority. They decide whether a dispute over an administrative measure will be addressed by domestic administrative courts, by an international arbitral tribunal, or by both.

(ii) Fork-in-the-road clauses

Another way of regulating parallel proceedings is through what is commonly known as 'fork-in-the-road' clauses. Such a clause provides that once the investor has chosen one forum — e.g. administrative courts—it may no longer bring the same dispute before the tribunal. Conversely, once it chooses arbitration, it may be precluded from pursuing the same matter elsewhere.

This clause seeks to prevent duplication, contradictory judgments, and strategic litigation. But its effectiveness depends heavily on how one defines the 'same dispute' or the 'same claim".

When determining the 'sameness' of parallel proceedings in a fork-in-the-road clause, ISDS tribunals have almost invariably applied the 'triple identity' test (identity of parties, cause of action and object of the dispute).[9] The test is well known from the doctrine of *lis pendens.*

CMS Gas v. Argentina is a well-known example. The US-Argentina BIT gave investors the right to submit an investment dispute either to domestic courts or to international arbitration. The investor brought a contract-based action before administrative courts, and initiated parallel proceedings under the BIT. The tribunal held that contractual claims were distinct from treaty claims as they relied upon a different legal basis; thus, even if the investor had submitted a contractual dispute to local courts, this would not trigger the fork-in-the-road clause against the claimant, as the cause of action would be different.[10]

This is not a technical formality but a matter of substance: in the contract claims, Argentina was acting as a fiscus; in the BIT claims, the claimant was questioning the legality of its contractual conduct, so the dispute was essentially the same.

The 'identity' of the subject may seem conceptually neat, but the lines tend to blur in some cases. Consider the example of so-called 'umbrella clauses' under investment treaties.

Umbrella clauses

An umbrella clause is a provision in a treaty that requires host States to observe any obligations, commitments, or undertakings they have entered with foreign investors. By incorporating this requirement into the treaty, the State "elevates" contractual breaches from the contract level to the international level, allowing investors to bring claims under the BIT for contract breaches.[11]

The scope of umbrella clauses *ratione materiae* is nonetheless heavily contested. While some tribunals have held that 'umbrella clauses' are limited to contractual undertakings (*SGS v. Philippines)*, others have taken a much more expansive approach: in *Noble Energy v. Ecuador*,

[9] Enron Corporation et al., LP v. Argentina, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 98.
[10] *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award on Jurisdiction, 17 July 2003, para. 80.

[11] As a rule, an ordinary breach of contract by a state does not constitute an internationally wrongful act – per ILC ARSIWA: "the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party."

for example, the tribunal held that an 'umbrella clause' also applies to statutory obligations arising from national laws or regulations.[12]

The case of *Khan Resources v Mongolia* is instructive. The dispute arose from Mongolia's cancellation of mining and exploration licences. The tribunal found that Mongolia had breached obligations under the domestic Foreign Investment Law and that this breach also engaged Article 10(1) of the Energy Charter Treaty through the umbrella clause. Although the claim was framed in treaty terms, its substance required the tribunal to assess the legality of **administrative decisions** concerning mining licences under domestic law.

Here too, the dividing line between distinct causes of action becomes exceptionally thin.

A different approach to 'fork-in-the-road' clauses?

This raises the question whether the narrow interpretation of fork-in-the-road clauses can be qualified to allow tribunals to decline jurisdiction in favour of administrative courts.

The analysis in the case of *Pantechniki v Albania* offers a different and, in my view, more intriguing approach, which could support the argument that the identity of the cause of action is less relevant where parallel proceedings share the same 'fundamental basis'. The dispute arose out of the overrun and ransack of the investor's road construction site during civil disturbances in 1997. The treaty gave investors the right to submit an investment dispute either to domestic courts or to arbitration. Upon advice from several Ministers, the claimant submitted its contract claims before Albanian (administrative) courts, and subsequently filed its claims before ICSID over the exact same facts. The tribunal rejected its claims as inadmissible, as the parallel proceedings shared the 'same fundamental basis' and the contractual claims were not 'autonomous' from those presented to ICSID. By contrast, the investor's claims concerning a denial of justice by local courts was found admissible.[13]

The *Pantechniki* approach has not prevailed in arbitral practice. Most tribunals continue to rely on some version of the triple identity test. But *Pantechniki* is important because it recognises an essential principle of public law: the legal characterisation of a dispute is not just a matter of form, but of substance. A single administrative measure may be disaggregated into several legal claims, but the substance of the claim remains the same, having regard to the relief sought.

C. Public-law limits on consent: can the State invoke its own law to escape arbitration?

I now turn to the second pressure point between administrative law and arbitration: the capacity of States and State entities to conclude arbitration agreements, where domestic law places limitations on them.

As stated in the General Report, in many legal systems, public authorities do not have unlimited freedom to consent to arbitration. Their power may be restricted by legislation, such as budgetary rules, procurement rules, or requirements of prior approval.

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[12] *Noble Energy v. Ecuador,* Decision on Jurisdiction, 5 March 2008, para. 157.

[13] *Pantechniki S.A. Contractors & Engineers v. Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, paras. 67-68.

Some restrictions may be constitutional. A prominent example is Article 139 of the Iranian Constitution, which requires approval by the Council of Ministers, notification to Parliament, and, in cases involving foreign parties, parliamentary approval.[14]

Various other national legal regimes also place restrictions on the capacity of states, or state-related entities, to agree to international arbitration.[15]

From a domestic administrative-law point of view, these restrictions make sense. They protect legality, parliamentary control, they ensure the sound management of public funds, and the principle that the administration cannot dispose freely of powers entrusted to it by law.

But from the perspective of international arbitration, the problem looks different.

Consider the situation where a State entity signs an international arbitration agreement with a foreign company, inducing reliance by its counterpart. Subsequently, however, it changes its mind, and invokes its own domestic law that it lacked the capacity to do so. Is there a valid arbitration agreement, despite the breach of statute? Or does that breach invalidate consent?

This problem has been addressed through different analytical lenses: competence-competence, capacity to conclude the agreement, arbitrability, and international public policy.[16]

1. Competence-competence

A preliminary question is one of institutional authority: who has the competence to decide the tribunal's competence in such a situation. National jurisdictions take divergent approaches.

In most jurisdictions, it for the arbitral tribunal to decide, in the first instance, whether a valid arbitration agreement exists. National courts perform a reviewing role at the stage of annulment and enforcement, as reflected in Article V(1)(a) of the New York Convention.[17]

Other States are more inclined to allow national courts to decide questions of capacity at the outset. While the jurisprudence is not consistent, some US courts have treated lack of mental capacity as a question going to the very making of the arbitration agreement, and therefore as a matter for judicial determination through interlocutory judgments.[18]

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[14] This provision was not given effect by the UK High Court in *Gatoil International Inc. v National Iranian Oil Co.*, High Court of Justice, Queen's Bench Division, 21 December 1988, ICCA Yearbook Commercial Arbitration 1992 - Volume XVII, p. 587ff.

[15] For example, in Venezuela, the Commercial Arbitration Act 1998, s. 4 provides that when one of the parties to the arbitration agreement is a state entity (or an entity in which the state holds a stake of at least 50 per cent), the arbitration agreement must be specifically approved by the relevant minister. Similar restrictions are contained in the Iranian Constitution, Art. 139 and the Saudi Arabian Law of Arbitration (Royal Decree No. M/34 of 16 April 2012), s. 10.

[16] N. Blackaby, C. Partasides & A. Redfern (eds.), *Redfern and Hunter on International Arbitration* (7th ed. 2023) ¶2.43; E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) ¶¶533-534. It is interesting to note in this context that the Swiss Private International Law Act, s. 177(2), refers both to 'capacity' and to 'arbitrability', so that—at the very least—the two concepts may merge.

[17] It provides that: "Recognition and enforcement of the award may be refused" if "[t]he parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity".

[18] See, e.g., *Chaudhri v. StockX, LLC,* 19 F.4th 873, 887 (6th Cir. 2021) ("this court has treated a mental-capacity challenge as a challenge based on a contract's formation and, thus, one that should be decided by a court"). Other U.S. courts, however, have taken a different view and have not interfered through interlocutory awards.

Support for this argument can be found in Article II(3), which provides that national courts may not enforce an arbitration agreement if it is "incapable of being performed".

Each of these two approaches reflects an underlying preference for the institutional allocation of authority between courts and arbitral tribunals. It essentially boils down to a national system's broader posture *vis-à-vis* the autonomy of international arbitration.

2. States' capacity to conclude international arbitration agreements

In general terms, the State's ability to consent to international arbitration is conceptualised as an issue of capacity.

The dominant position in international arbitration is that a State or State entity may not invoke its own domestic law to deny its capacity to arbitrate once it has agreed to arbitration. This position is reflected in several arbitral awards.[19]

The first notable attempt to address this problem on a multilateral basis was made in the European Convention on International Commercial Arbitration of 1961. Article II provides that persons considered by the law applicable to them to be 'legal persons of public law' should have the right to conclude valid arbitration agreements, unless States signatories place limits or conditions to that right upon accession.

- The effect of Article II of the European Convention was considered in the landmark case *Benteler v. Belgium*. While the former version of Article 1676 of the Belgian *Code Judiciaire* prevented the Belgian State from submitting itself to arbitration, the tribunal held that Article II(1) confirmed generally-applicable principles of international law and that Belgium was not entitled to rely on its domestic legislation to invalidate its own agreement to arbitrate.[20]

Certain countries have dealt with the problem in their legislation.

- Section 177(2) of the Swiss Private International Law Act (as amended) provides that: "If a party to the arbitration agreement is a state or enterprise or organisation controlled

[19] See, e.g., Award in ICC Case No. 7375, 11(12) Mealey's Int'l Arb. Rep. A-1 (1996); Award in ICC Case No. 7373, discussed in Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Recueil des Cours 9, 78-79 (2001) ("it is now well-established that the rule expressed in several judicial and arbitral decisions is the expression of an international principle by virtue of which prohibitions or restrictions envisaged by internal legislation cannot be an obstacle to the validity of arbitral agreements concluded by States or their substitutes or State-owned companies concerning their participation in arbitral proceedings"); Interim Award in ICC Case No. 7263, XXII Y.B. Comm. Arb. 92, ¶23 (1997) (states and public bodies "cannot avail themselves of the incapacity and lack of authorization deriving from their national laws"); Award in ICC Case No. 5103, 115 J.D.I. (Clunet) 1206 (1988); Partial Award in ICC Case No. 3896, 110 J.D.I. (Clunet) 914 (1983); Interim Award in ICC Case No. 2521, 103 J.D.I. (Clunet) 997 (1976); Award in ICC Case No. 1939, 1973 Rev. Arb. 122, 145; Award in ICC Case No. 1526, 101 J.D.I. (Clunet) 915 (1974); *Revere Copper & Brass v. Overseas Private Inv. Corp.*, Award in AAA Case No. 16-10-0137 76, 17 I.L.M. 1321 (1978); IBM v. Ecuador, Decision on Jurisdiction in ICSID Case No. Arb/02/10 of 22 December 2003, ¶¶71, 85 (the tribunal rejected argument concerning lack of constitutional provision for Ecuador to enter into arbitration agreement under BIT); *Elf Aquitaine Iran v. Nat'l Iranian Oil Co.*, Preliminary Award in Ad Hoc Case of 14 January 1982, XI Y.B. Comm. Arb. 97, ¶24 (1986) ("It is a recognized principle of international law that a State is bound by an arbitration clause contained in an agreement entered into by the State itself or by a company owned by the State"). Similarly, a Resolution of the Institut de Droit International, provides that '[a] State, a state enterprise, or a state entity cannot invoke incapacity to arbitrate in order to resist arbitration to which it has agreed' (1989).

[20] *Benteler v State of Belgium*, Ad Hoc Award, 18 November 1983; Award in ICC Case No. 4381, 113 J du Droit Intl 1102 (1986).

by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement." The Spanish Arbitration Act reflects the same concept.[21]

- A more complex picture exists in French law, which has historically taken a conservative approach to the use of arbitration in administrative law disputes. The traditional position is reflected in Article 2060 of the French Civil Code, whereby "[o]ne may not enter into arbitration agreements in matters (…) relating to (…) disputes concerning public bodies and institutions.".[22]
- French courts have nonetheless gradually qualified this prohibition:
  - In the seminal case of *Galakis* in 1966, the *Cour de cassation* excluded from the scope of this prohibition the arbitration of international disputes.[23] The Court held that "the State is not prohibited from concluding arbitration agreement in international matters".
  - In 1975, Article 2060 of the Civil Code was amended to add that "certain categories of public entities of an industrial and commercial character can be authorised to arbitrate by decree".[24]
  - Despite this, the picture in French law remains complex. As I will explain in a moment, the *Conseil d'État* has, in some contexts, insisted that French public entities may enter into arbitration agreements only where authorised by statute.
- In the interests of time, I will not delve into further details. But the key point here is that even the different branches within a single judicial system may take divergent approaches to the enforceability and arbitrability of administrative law disputes.

3. Domestic and international public policy

Another way of framing this problem is through the lens of public policy—or *ordre public*.

It should be noted, however, that public policy is a double-edged sword and can be used in different ways. The capacity of public bodies to consent to arbitration aptly illustrates this.

On the one hand, arbitral tribunals have often relied on international public policy (and the related concepts of good faith and estoppel) to reject attempts by State entities to escape arbitration by invoking internal law.

[21] Article 2(2) of the Spanish Arbitration Act (Ley 60/2003) (SAA) mandates that in international arbitration, a state or state-controlled entity cannot invoke its domestic law to avoid obligations from an arbitration agreement.
[22] In 2007, the Labetoulle Report proposed to abolish the prohibition contained in Art. 2060 and a draft law was prepared in order to 'broaden the possibility for recourse to arbitration for public bodies and to clarify the procedural regime of arbitrations involving public law': Groupe de travail sur l'arbitrage en matière administrative, Rapport, 13 March 2007. However, no amendments have yet been made to Art. 2060.
[23] *Cour de cassation*, 1re civil chamber, 2 May 1966, *Galakis*.
[24] However, pursuant to an opinion given by the *Conseil d'Etat*, this provision is applied in a very restrictive manner and only authorises such entities to enter into an arbitration agreement after the dispute has arisen (*compromis d'arbitrage*).

A representative example is an ICC award involving an Iranian State entity.[25] The entity argued that, under Article 139 of the Iranian Constitution, it could not enter into arbitration without the required governmental authorisation. The tribunal accepted that, under Iranian law, such approval may have been required. But it held that the defect had not been brought to the knowledge of the claimant at the time the agreement was entered into. Crucially, it found that

> "international public policy would strongly oppose the fact that a government entity, while dealing with a party not belonging to its country, might knowingly and willingly enter into an arbitration agreement which creates confidence in the other contracting party and that later, once the arbitration proceedings or the enforcement proceedings are in process, it might avail itself of the nullity of its own commitment and that the defendant, in its capacity as State company, has manifestly failed in its duty to mention the requirements of the Iranian law concerning the conclusion of contracts by public entities."

Thus, the tribunal did not deny the existence of domestic public-law limitations. Rather, it refused to allow the State entity to rely on those restrictions against its counterparty in circumstances where this would be inconsistent with good faith.

On the other hand, public policy may also be used to refuse enforcement or recognition of arbitral awards issued in circumvention of the statutory limitations on capacity to sign.

A representative example is the 2023 judgment in *Ryanair and AMS v* SMAC. The *Conseil d'Etat* dismissed Ryanair's appeal and confirmed that the arbitral awards rendered by the London Court of International Arbitration could not be granted enforcement in France. The central reason was that the dispute was **not arbitrable under French public law**, because it involved a French public legal entity, the Joint Syndicate of Charente Airports, and no valid exception permitted that entity to submit the dispute to arbitration.

The *Conseil* held that an arbitral award arising from a contract between a French public legal entity and a foreign entity, cannot be enforced by the administrative courts if enforcement would be contrary to public policy, **even where the contract concerns international trade**.

The underlying contracts were not purely domestic in character: they concerned Ryanair, Airport Marketing Services, and the development of an international air route between London and Angoulême. Nevertheless, the Court treats the involvement of international commerce as insufficient, by itself, to override core rules of French public law.

Thus, the Conseil d'État refused to treat the international character of the transaction as sufficient, by itself, to displace the public-law prohibition on arbitration by French public entities. In that respect, the decision sits in tension with the more liberal line of authority in the ordinary courts, as epitomised in the Cour de Cassation's decision in *Galakis*.

[25] Award in ICC Case No. 4381, 113 J.D.I. (Clunet) 1102, 1106 (1986).

The same concept— public policy — is therefore operating in diametrically opposite directions in two different legal orders.

Concluding remarks

The two issues I discussed today — parallel proceedings and the capacity to consent to arbitration — show that arbitration changes the way administrative disputes are conceptualized.

Parallel proceedings fragment the dispute across fora and legal regimes. Capacity objections reveal the tension between domestic public-law limits and international arbitral effectiveness.

In both situations, the same underlying question appears: can arbitration accommodate the public-law character of the dispute without bypassing the principle of legality?

My answer is that it can, but only if we remain attentive to the distinction between three things: the State as commercial actor, the State as a trustee of public authority, and the State as subject to the rule of law. While arbitration is comfortable with the first aspect, it can manage the second only imperfectly. And it must never be allowed to weaken the third.

Thank you for your kind attention.