Parallel Proceedings in International Arbitration

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International arbitration has become the preferred mechanism for settlement of cross-border commercial disputes. This has led to new problems of forum shopping and issues concerning the interrelation between arbitration and litigation, with parallel proceedings being one of them. In recent years, scholars and practitioners have put considerable effort into finding sound solutions to problems of *lis pendens* in contemporary arbitration.

Parallel proceedings may occur between a number of adjudicatory bodies. This paper mainly focuses on parallel proceedings in international commercial arbitration. It discusses *lis pendens* between (i) state courts and arbitral tribunals and (ii) two arbitral tribunals.

1. Introduction

This section briefly introduces the concepts, terminology and recent development in order to provide a backdrop for the following sections.

1.1 Concepts and terminology

In the works of legal scholars, as well as in practice, the term *lis pendens*, *i.e.* "lawsuit pending elsewhere", is often used to denote a solution to parallel proceedings. For example, when a second seised forum should dismiss its proceedings due to the simultaneous pendency of the same case elsewhere, it

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is commonly coined *lis pendens*. When discussing the term from a comparative law perspective, such use is somewhat misleading as "the term denotes only the notion of a dispute, a *lis*, already pending before another court or tribunal. That is a factual phenomenon, not a legal solution to it."[1] Hence, in this paper, *lis pendens* is used to denominate the situation when two or more adjudicatory bodies are simultaneously seised of the same dispute.[2]

The doctrine of *lis pendens* has evolved in national legal systems in order to prevent that two equally competent *fora* simultaneously exercise jurisdiction over the same case.[3] That can never be the case when litispendence occurs between an arbitral tribunal and a state court, since national *lis pendens*

> "presupposes that the two courts have equal jurisdiction. In arbitration, on the other hand, there can be no question of two equally competent bodies: the jurisdiction of an arbitral tribunal requires a valid arbitration agreement, and one of the main legal consequences of such an agreement is precisely that it evicts the jurisdiction of national courts."[4]

However, an arbitral tribunal and a state court may both have competence to consider jurisdiction at the same time, which creates potential for parallel proceedings. The situation where a national court and an arbitral tribunal simultaneously exercise jurisdiction over a case is very akin to the national perception of *lis pendens, i.e.* two *fora* both with *prima facie* competence. This is because litispendence denotes the situation when a case, a *lis*, is already pending elsewhere, *alibi pendens*. Applied between an arbitral tribunal and a

1 Campbell McLachlan, *Lis Pendens in International Litigation* (Martinus Nijhoff, Leiden, 2009), 36.

2 J. J. Fawcett, General Report, in J. J. Fawcett (ed.), *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law, Athens, August 1994* (Clarendon Press, Oxford, 1995), 27; Elliot Geisinger & Laurent Lévy, Lis Alibi Pendens in International Commercial Arbitration, in *ICC Special Supplement 2003: Complex Arbitrations: Perspectives on their Procedural Implications* (2003), 53; Jean-François Poudret, Concluding Remarks on Relationship Between State Courts and Arbitral Tribunals, in Pierre A. Karrer (ed.), *Arbitral Tribunals or State Courts: Who Must Defer to Whom?* (Swiss Arbitration Association, ASA Special Series No. 15, January 2001), 147 and 153; Bernardo Cremades & Ignacio Madalena, *Parallel Proceedings in International Arbitration* (Arbitration International, 2008, Volume 24, No. 4, 507), 509.

3 Christer Söderlund, *Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings* (Journal of International Arbitration, Kluwer Law International, Volume 22, Issue 4, 2005, 301), 302.

4 Geisinger & Lévy, *supra* n. 2, at 53.

state court, *lis pendens* thus occurs when the case is pending on the merits or merely on jurisdiction.[5]

To determine the identity between parallel claims, state courts and arbitral tribunals generally consider three elements, namely (i) parties, (ii) grounds and (iii) object.[6] Grounds and object is a subdivision of the requirement "identical issue" (or subject-matter) of the proceedings – a distinction clearly made in international law.[7] It is evident that international adjudicatory bodies tend to apply this "triple identity test" rigorous and that the criteria are cumulative. Accordingly, the identity criteria must all be met in order for *lis pendens* to apply.[8]

1.2 Recent development

Over the last ten years, parallel proceedings and the different solutions adopted to resolve them have made up some of the most intensively debated cases within the international arbitration community. In *Fomento v. Colon*,[9] the Swiss Federal Supreme Court decided that a Swiss arbitral tribunal should have deferred to a Panamanian court and therefore annulled an arbitral award on jurisdiction. The decision was widely criticised and it ultimately led to an amendment of the Swiss Statute on Private International Law. In the *CME* case,[10] two investment arbitration tribunals seated in Stockholm and London, respectively, reached completely contradictory out-

[5] Poudret, *supra* n. 2, at 153.

[6] Judge Anzilotti spoke of the "three traditional elements for identification, persona, petitum, causa petendi" in *Interpretation of Judgments Nos. 7 and 8 Concerning the Case of the Factory at Chorzów (Germany v. Poland)*, December 16, 1927, P.C.I.J., Ser. A, No. 13, para. 57 (dissenting opinion). See also, *inter alia*, *Trail Smelter Case (United States v. Canada)*, Award of April 16, 1938, and March 11, 1941, 3 UNRIAA, 1906, at 1952; *Buyer v. Seller*, Partial Award, ICC Case No. 9787, 1998, in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 2002 – Volume XXVII (Kluwer Law International 2002, 181–188), at 186; *Licensor v. Licensee*, Final Award, ICC Case No. 6363, 1991 in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 1992 – Volume XVII (Kluwer Law International 1992, 186–211), at 197.

[7] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons, London, 1953), 343; August Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes* (The Law and Practice of International Courts and Tribunals, Volume 3, 2004, 37), 61.

[8] *Ibid.*

[9] *Fomento de Construcciones y Contratas S.A. v. Colon Container Terminal S.A.*, Decision of 14 May 2001, (DSFSC) 127 [2001] III 279, hereinafter "Fomento v. Colon".

[10] *Infra*, section 4.1.

comes on virtually the same factual grounds. The Swedish Svea Court of Appeal was requested, *inter alia*, on the grounds of *lis pendens* and *res judicata*, to set aside the arbitral award rendered by the Stockholm tribunal, but the petition was denied. It resulted in a situation with two valid but irreconcilable arbitral awards.

Given this development, scholars and practitioners have in recent years put considerable effort into finding sound solutions to *lis pendens* problems in international arbitration. The International Law Association's ("**ILA**") committee on international commercial arbitration issued recommendations to arbitrators in 2006 which addressed the question on how arbitrators should handle *lis pendens* and *res judicata*.[11]

Within the EU, the question of parallel proceedings in an arbitration context has been immensely discussed in relation to the Brussels Regime. The discussion and criticism culminated with the *West Tankers* case,[12] in which the European Court of Justice ("**ECJ**") held that the issuance of anti-suit injunctions in aid of arbitration was inconsistent with the principle of mutual trust on which the EC Regulation 44/2001 (the "**Brussels Regulation**") is based. This led to an extensive discussion and examination of the arbitration exception in said regulation. An issue raised by parallel proceedings in relation to arbitration was thus at the heart of the debate. In late 2012, the EU revised the Brussels Regulation and a new Recital 12 reaffirms that arbitration is clearly outside its scope.[13] Given that the Brussels Regulation has been amended, all references in the following are made to the recast regulation unless stated otherwise.

2. *Compétence-compétence* as point of departure

The arbitral tribunal ought to decide its competence autonomously, by virtue of the arbitration agreement and according to the doctrine of *compétence-compétence*. If a party has initiated arbitration proceedings based on an arbitration agreement, "it will be a necessary *prima facie* indication that the tri-

[11] *ILA Recommendations on Lis Pendens and Res Judicata and Arbitration*, published in Arbitration International (Kluwer Law International, Volume 25, Issue 1, 2009), 83–85.

[12] Case C-185/07 *Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc.* [2009] ECR I-00663.

[13] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). The recast regulation applies from 15 January 2015.

bunal, and not the court which accepted the case for consideration or rendered the judgment, has jurisdiction to adjudicate the dispute."[14]

Article II(3) of the United Nations Convention on the recognition and enforcement of foreign arbitral awards (the "**New York Convention**") stipulates a rule of priority as between state courts and arbitral tribunals, providing as follows:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." (emphasis added)

The rationale underpinning Article II(3) in the New York Convention is to ensure that an agreement to resort to arbitration cannot be avoided simply by bringing the claim to court. However, Article II(3) permits a court to consider jurisdictional issues in relation to the arbitration agreement. This follows from the wording that courts should refer parties to arbitration when parties have agreed to arbitrate the dispute unless the agreement is void, inoperative or incapable of being performed (or where the subject-matter is not arbitrable). Such decision requires the court to consider and decide upon the pertinent issues in relation to its jurisdiction.[15]

Hence, both state courts and arbitral tribunals may consider and decide on jurisdiction under the New York Convention. However, the New York Convention does not say anything on the allocation of the power between the *fora* to address these issues. The question of allocation raises two questions, one of timing and one of extent of the judicial review.[16] These issues can be analysed by examining the effects of the *compétence-compétence* doctrine. The doctrine of *compétence-compétence* has two effects – the positive and negative effects – which will be discussed in turn.

[14] Söderlund, *supra* n. 3, at 306.

[15] Gary B. Born, *International Commercial Arbitration* (2nd ed., Kluwer Law International, Alpheen aan den Rijn, 2014), 1051.

[16] William W. Park, The Arbitrator's Jurisdiction to Determine Jurisdiction: The Limits of the Language, in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics?, ICCA Congress Series, 2006 Montreal, Volume 13* (Kluwer Law International, 2007, 56), 56.

2.1 Positive effect

The positive effect of *compétence-compétence* – almost universally accepted – implies that an arbitral tribunal has jurisdiction to rule on its jurisdiction. Hence, it also has the competence to dismiss the dispute should it find that it lacks jurisdiction.[17] The purpose of conferring this competence to an arbitral tribunal is to prevent obstructive tactics from a party in bringing the action to court. Also, it serves to make the arbitral proceedings more efficient.[18] However, the jurisdiction of an arbitral tribunal may subsequently be subject to court review, both at the seat for challenge and enforcement.

An example of the positive effect of *compétence-compétence* can be found in Article 16(1) of the UNCITRAL Model Law (the "**Model Law**"), providing that the "arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." Further, Article 8(2) of the Model Law stipulates as follows:

> "Where an action referred to in paragraph (1) of this article has been brought [an action brought to court], arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

Since Article 8(2) of the Model Law permits an arbitral tribunal to continue and to render an award while a parallel claim is concurrently pending before a court, "[i]t thus envisions the possibility of simultaneous proceedings regarding the competence of the arbitral tribunal."[19] Under this provision, arbitral tribunals are not required to stay or decline jurisdiction if the same claim is pending before a court in parallel.

17 Emmanuel Gaillard & John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999), para. 658; Julian D. M. Lew, Loukas A. Mistelis, & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003), para. 14-13; Alan Redfern & Martin Hunter *et al.*, *Redfern and Hunter on International Arbitration*, (5th ed., Oxford University Press, Oxford, 2009), para. 5-98; Frédéric Bachand, *Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?* (Arbitration International, Kluwer Law International, Volume 22, Issue 3, 2006, 463), 466. The doctrine of *compétence-compétence* has been affirmed in a substantial body of arbitral awards, see Born, *supra* n. 15, at 1076 n. 171.

18 Gaillard & Savage, *supra* n. 17, at para. 660.

19 Howard M. Holtzmann & Joseph E. Neuhaus, *A guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers, Deventer, 1989), 306.

The interpretation of Article 8(2) is by no means consistent. In some countries, it has been construed to imply that the arbitral tribunal should be the first to decide on its jurisdiction.[20] If such interpretation is adopted, courts should await to scrutinise the jurisdiction of the tribunal until the award is rendered. However, in most countries (for example in Switzerland and in England) courts seised of the substance of the matter are fully entitled to verify whether or not there is a valid arbitration agreement.[21] Under Article 8(2) of the Model Law, a court has no power to stay the concurrent arbitration proceedings.[22]

But this position is by no means a standard. On the contrary, it is a much-disputed question if courts are entitled to conduct a full or even a *prima facie* review of the validity of the arbitration agreement.[23] The advantage of a full review at the pre-award stage is that courts can pronounce a final decision on the validity of the arbitration agreement. A full review at an early stage of the proceedings ensures that parties do not waste time and resources on an arbitration which may later prove to be useless as the arbitral award risks to be set aside or declared invalid.[24]

In *Rakoil*,[25] an arbitral tribunal seated in Switzerland applied *compétence-compétence* faced with concurrent arbitration and court proceedings pending in different jurisdictions. The facts of the case were as follows. In 1973, a group of companies that formed a consortium ("**DST**") concluded a concession agreement with the government of the state of R'as Al Khaimah and the state-owned exploration company, R'as Al Khaimah National Oil Co. ("**Rakoil**"), to search for oil and gas in the territorial waters of R'as Al Khaimah. The concession agreement contained an ICC arbitration clause.

A dispute arose and DST initiated ICC arbitration pursuant to the arbitration clause in the concession agreement against the government and Rakoil on 7 March 1979. In the beginning of April 1979, the respondents in

20 Peter Schlosser, Arbitral Tribunals or State Courts – Who Must Defer to Whom?, in Pierre A. Karrer, (ed.), *Arbitral Tribunals or State Courts: Who Must Defer to Whom?* (Swiss Arbitration Association, ASA Special Series No. 15, January 2001), 26.

21 *Ibid.*, at 26.

22 Holtzmann & Neuhaus, *supra* n. 19 at 306.

23 Bachand, *supra* n. 17, at 463.

24 Bachand, *supra* n. 17, at 464.

25 *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH ("DST") et al. v. The Government of the State of R'as Al Khaimah (UAE), The R'as Al Khaimah Oil Company ("Rakoil")*, Final Award, ICC Case No. 3572, 1989, published in Collection of ICC Awards 1986–1990, 154–165, hereinafter "Rakoil".

the arbitration proceedings filed a lawsuit against DST in a court of R'as Al Khaimah. The respondents in the arbitration proceedings objected to the jurisdiction of the ICC arbitral tribunal, they denied liability and did not participate further in the arbitration proceedings. The proceedings thus continued in parallel. In the end, the two adjudicatory bodies delivered contradictory judgments on the merits.

In the award, the arbitral tribunal reasoned that it had "competence and jurisdiction to determine its own jurisdiction with regard to the validity of the arbitration clause."[26] As a consequence, it held that "the action instituted in the courts of R'as Al Khaimah at the beginning of April 1979 [...] cannot stay the competence and jurisdiction of this arbitration tribunal to proceed with the arbitration and to award on the merits of the case."[27] Ultimately, the arbitral tribunal concluded that since it had established itself competent, it was under no duty to defer to a court outside the seat of the arbitration. In *Rakoil*, the arbitration proceedings were commenced prior to the initiation of the court proceedings. However, since the power of the arbitral tribunal to establish jurisdiction follows from the positive effect of *compétence-compétence*, the time sequence should not be decisive on the question whether an arbitral tribunal has jurisdiction.[28] The *Rakoil* case is a good illustration of how *compétence-compétence* can be used to handle *lis pendens*.

2.2 Negative effect

The negative effect of *compétence-compétence* prevents national courts from reviewing the jurisdiction of the arbitral tribunal until an award is rendered and later challenged or enforced.[29] Hence, it gives the arbitral tribunal initial exclusivity to determine its jurisdiction. As such, it is a far-reaching rule of priority between arbitral tribunals and state courts. If the negative effect of *compétence-compétence* is adopted, many of the problems with parallelism between state courts and arbitral tribunals are avoided, since the arbitral tribunal has an exclusive right to decide on its jurisdiction at a pre-award

[26] *Ibid.*, at 115.
[27] *Ibid.*, at 115–116.
[28] Söderlund, *supra* n. 3, at 315.
[29] Stavros Brekoulakis, *The Negative Effect of Compétence-compétence: The Verdict has to be Negative* (2 Austrian Arbitration Review, 2009, 237), 239; Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (2nd ed., Sweet & Maxwell, London, 2007), para. 458.

stage.[30] The negative effect of *compétence-compétence* can be found in Article VI(3) of the European Convention on International Commercial Arbitration of 1961 which provides the following:[31]

> "Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary."

The negative effect of *compétence-compétence* has been widely debated and called into question.[32] Those in favour argue that it is as important as the positive effect since it serves to "allow the arbitrators to be not the sole judges, but the first judges of their jurisdiction."[33] On the contrary, those opposing to the negative effect argue that to "confer exclusive jurisdiction on a forum whose validity is at stake, defies not only logic but also any principle of legitimacy."[34] Nevertheless, the negative effect of *compétence-compétence* can be found in several states.[35]

3. Theories of *lis pendens* in national law

As argued above, the positive side of *compétence-compétence* is to be the point of departure when an arbitral tribunal is faced with parallel court proceedings. However, an alternative solution to *lis pendens* in international arbitration is to transpose principles established in national law – that applies between a domestic and a foreign court (or two domestic courts) – into an

[30] Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (2nd ed., Sweet & Maxwell, London, 2007), paras 458 and 521.

[31] It should be noted that Article V(3) of the European Convention on International Commercial Arbitration comprises the positive effect of *compétence-compétence*.

[32] See, *e.g.*, Brekoulakis, *supra* n. 29, at 250 *et seq*.

[33] Gaillard & Savage, *supra* n. 17, at para. 660.

[34] Brekoulakis, *supra* n. 29, at 253.

[35] This is discussed by Gaillard & Savage, *supra* n. 17, at para. 676, stating that "although it was at one time relatively isolated, the rule found in French law and in the 1961 European Convention has recently gained substantial acceptance."

international setting.[36] From a comparative law perspective, it is possible to discern four ways in which state courts generally handle *lis pendens*:[37]

- to decline jurisdiction or stay its own proceedings;
- to restrain foreign proceedings;
- to allow both sets of proceedings to continue; and/or
- to adopt mechanisms encouraging parties to opt for adjudication in only one forum.

To transpose national *lis pendens* solutions into an international setting does not avoid divergent solutions worldwide, since different jurisdictions adopt a wide variety of solutions. Moreover, national doctrines of *lis pendens* are not developed to consider parallelism between arbitral tribunals and state courts when commenced in two (or more) jurisdictions. This section makes an inventory of the various national solutions and addresses the shortcomings of applying them in international arbitration; this serves to reaffirm that the point of departure when faced with concurrent proceedings should be the positive side of *compétence-compétence*.

3.1 Tolerance of parallel proceedings

One theory of *lis pendens* is to tolerate that an action is pending elsewhere and allow both sets of proceedings to continue simultaneously. Such approach is the preferred in many United States jurisdictions.[38] Questions relating to conflicting judgments could then later be handled by the rules on recognition and enforcement of a judgment by applying the doctrine of *res judicata*.[39] This approach was applied in *Laker Airways*, where the judge held that

> "the fundamental corollary to concurrent jurisdiction must ordinarily be respected: parallel proceedings on the same i*n personam* claim should ordinarily

[36] ILA Final Report on *Lis Pendens* and Arbitration, published in Arbitration International (Kluwer Law International, Volume 25, Issue 1, 2009, 3), para. 4.6.

[37] Fawcett, *supra* n. 2, at 28; Gary B. Born, *International Civil Litigation in United States Courts: Commentary & Materials* (3rd ed., Kluwer Law International, The Hague, 1996), 459–460.

[38] Born, *ibid*. at 460.

[39] McLachlan, *supra* n. 1 at 60; ILA Final Report on *Lis Pendens* and Arbitration, *supra* n. 36, at para. 2.4.

> be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other."[40] (emphasis added)

But to allow parallel proceedings to continue is contrary to the rationales underpinning the application of *lis pendens*. The result is that parties will have to pursue actions before multiple *fora*, which is a waste of both time and resources. Moreover, the potential for irreconcilable judgments would considerably rise. As described by one scholar, "as a matter of legal logic it would be inconsistent to permit parallel proceedings between the same parties in the same dispute before different dispute settlement organs up to the point where one of them has decided the case and then prevent the other ('slower') one from proceeding as a result of *res judicata*."[41] In conclusion, simply tolerating that different *fora* concurrently proceed is not a sensible approach to take towards *lis pendens* in international arbitration.

3.2 The first-to-file rule

The mechanical first-to-file rule can be found in international law as well as in domestic law. A typical example of this approach is found in Article 27 of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "**Lugano Convention**"), which provides that:

> "1. Where proceedings involving the same causes of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
> 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

On balance, while a mechanical first-to-file rule might be appropriate in national law, where the only rationale is to prevent duplication, it is not an appropriate solution to adopt towards *lis pendens* in an international setting. For example, it creates potential for "Italian torpedoes" – an issue that will not be addressed in this paper.

[40] *Laker Airways Ltd v. Sabena, Belgian World Airlines*, 731 F.2d 909, United States Court of Appeals, D.C. Circuit (1984), 926–927. However, the judge noted that proceedings *in rem* are generally restricted to one forum, see *ibid*., n. 47, with further references.

[41] Reinisch, *supra* n. 8, at 50.

The strict first-to-file rule was also the unsatisfactory solution to parallelism under the Brussels Regulation,[42] but has been amended in the recast Brussels Regulation. Article 31(2) of the recast regulation contains an exception to the first-to-file rule, providing that if the parties have agreed on an exclusive jurisdiction clause, any other court "shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement." Consequently, the court which has been conferred exclusive jurisdiction may proceed to hear the dispute even if it was not first seised.

An interesting and intensively debated case where an arbitral tribunal was held to be under a duty to defer to a foreign state court first seised is *Fomento v. Colon*.[43] The Fomento case concerned a construction contract containing an arbitration clause. The facts of the case can be summarised as follows. On 12 March 1998, Fomento brought court proceedings against Colon in Panama. The respondent raised an objection based on the arbitration agreement. On 26 June 1998, the court of the first instance held that Colon had waived its right to invoke the arbitration agreement since the objection was made too late. The court held that it had been properly seised and decided to continue its proceedings. The respondent appealed the decision.

Despite the ongoing court proceedings in Panama, Colon initiated arbitration pursuant to the arbitration clause on 30 September 1998. The proceedings were conducted according to the ICC Rules and the tribunal was seated in Geneva. In the arbitration proceedings, Fomento argued that Colon had waived its right to invoke the arbitration agreement since it had not raised a timely objection thereof before the court in Panama. For these reasons, Fomento considered that the arbitration agreement had been revoked due to the parties' respective courses of conduct and thus, the courts of Panama had jurisdiction to hear the case.

Subsequently, the Panamanian Court of Appeal held that the respondent had raised its jurisdiction objection in time and thereby quashed the decision of the first instance. As a consequence, it held that Panamanian courts lacked jurisdiction. On 30 November 2000, the arbitral tribunal declared itself competent in a partial award, explicitly referring to the decision of the Court

[42] Case C-116/02 *Erich Gasser GmbH v. MISAT Srl* [2003] ECR I-14693.

[43] *Fomento v. Colon*, *supra* n. 9. For an unofficial English translation of the decision, see ASA Bulletin (2001), p. 555 *et seq.* The decision in *Fomento v. Colon* was in line with an earlier decision of the Swiss Bundesgericht, see *United Arab Emirates v. Westland Helicopters Ltd*, Judgment of the Swiss Federal Supreme Court on April 19, 1994, DFT 120 II 155.

of Appeal in Panama. However, on 22 January 2001, the Supreme Court of Panama ruled that the arbitration defence had in fact been made too late and ordered the state court proceedings to continue. At this time, by their respective decisions on jurisdiction, two *fora* were competent to rule on the merits of the case.

Fomento eventually challenged the award on jurisdiction to the Swiss Federal Supreme Court, which granted the petition on 14 May 2001. The Swiss Federal Supreme Court had in essence to decide if (i) the arbitral tribunal was entitled to rule on its jurisdiction or (ii) the tribunal should have stayed its proceedings according to the *lis pendens* principle. In its decision, the Swiss Federal Supreme Court referred to Article 9 of the Swiss Private International Law Statute ("**PILS**"), which provides that a Swiss court must stay its proceedings if the same matter is already pending before a court abroad. The Swiss Federal Tribunal held that the first-to-file rule in PILS should, by way of analogy, be applied in international arbitration. The rationale put forward by the Swiss court for that solution was that *lis pendens* should be treated in the same way as *res judicata*, which is widely acknowledged in international arbitration.[44] It held as follows:

> "As it is clear that the Panamanian Courts were seized first of a case on the merits between the parties and that the case was apparently about the same facts, the Arbitral Tribunal should in principle have stayed the proceedings. […] As the case is still pending in the Panamanian Courts (based on a final decision on jurisdiction), the Arbitral Tribunal would only be able to resume its proceedings based on a finding that it is not entertaining the same action or that the foreign jurisdiction is not in a position to issue, within an appropriate time frame, a decision which may be enforced in Switzerland."[45]

The Swiss Federal Supreme Court thus concluded that an arbitral tribunal seated in Switzerland must stay its proceedings given that three criteria are met. First, both actions must regard the same subject-matter between the same parties. Second, it should be likely that the foreign court would pronounce its judgment within reasonable time. Three, it should be expected that the foreign judgment rendered by the court would be enforceable in

[44] Christian Oetiker, *The Principle of Lis Pendens in International Arbitration: The Swiss Decision in Fomento v. Colon* (Arbitration International, Volume 18, Issue 1, 2002, 137–146), 138.

[45] *Fomento v. Colon*, ASA Bulletin (2001), *supra* n. 43, at 555 para. 2(d) (unofficial translation).

Switzerland, *i.e.* the technique based on a recognition prognosis.[46]

The Swiss court had to decide whether the very nature of an arbitral tribunal allows the arbitrators "to come to a decision on their jurisdiction prior to any court or other judicial authority, and thereby limits the role of the courts to the review of the award",[47] *i.e.* the negative effect of *compétence-compétence*. The Swiss court held that neither *fora* had priority to decide upon the jurisdiction of an arbitral tribunal, since both adjudicatory bodies have an "equal vocation". According to the Swiss court, any conflicts had to be resolved by the *lis pendens* rule provided in PILS which required the forum second seised to stay its proceedings, pending resolution of the first-filed action. Consequently, under Swiss law, there was no priority rule that would give the arbitral tribunal precedence to decide upon the validity of the arbitration agreement (and thus also upon the jurisdiction of the arbitral tribunal).[48] Further, the Swiss court clearly emphasised that this was not a question of discretion, but one of jurisdiction.

The proposition that follows from the Fomento decision is that an arbitral tribunal, in line with a mandatory first-to-file rule, has an *ex officio* duty to stay its proceedings awaiting the outcome of foreign court proceedings. However, such solution is incompatible with the fundamental principles of procedure in arbitration. This is so because an arbitral tribunal does not owe allegiance to any foreign court. On the contrary, it owes allegiance to the parties' arbitration agreement and should thus decide on its jurisdiction irrespective of court proceedings concurrently pending in a foreign jurisdiction.[49] As held by one commentator, there is no principle that "dictates to a tribunal to suspend the proceedings due to such external issues as concurrent court proceedings."[50]

Moreover, a rigid first-to-file rule would be unfortunate from a practical point of view. In order to frustrate the arbitration agreement it would suffice to institute court proceedings first and then request the arbitrators to stay the arbitration. If such tactic would be successful before the foreign court, the litigant would then simply demand the arbitral tribunal to endorse the judgment based on the notion that the court was seised first.[51]

46 *Infra*, section 3.4.
47 Gaillard & Savage, *supra* n. 17, at para. 660.
48 Oetiker, *supra* n. 44, at 143.
49 Söderlund, *supra* n. 3, at 313–314.
50 *Ibid.*, at 312.
51 McLachlan, *supra* n. 1, at 213.

The *Fomento* case was subject to severe criticism.[52] The Swiss legislator acted quickly and overturned the Fomento ruling in a statute enacted on 6 October 2006. The legislator added a paragraph in the statute that reaffirmed the arbitral tribunal's jurisdiction to rule on its own jurisdiction, providing the following:

> "[The arbitral tribunal] shall decide on its own jurisdiction without regard to proceedings having the same object already pending between the same parties before another State court or arbitral tribunal, unless there are serious reasons to stay the proceedings."[53]

This provision reflects the positive effect of *compétence-compétence*, as it sets out that the arbitral tribunal shall decide on its own jurisdiction regardless of the fact that a parallel action is pending elsewhere. However, it contains a possibility to decide that the proceedings be stayed in case of "serious reasons", *i.e.* a discretionary right to stay.

3.3 *Forum non conveniens*

Forum non conveniens allows courts to use its discretion in declining to exercise jurisdiction in favour of courts in another jurisdiction where the case is already pending if that would be more convenient for the parties.[54] When the doctrine of *forum non conveniens* is applied, *lis pendens* is but one of several factors taken into account when a court assesses its jurisdiction.

Under the doctrine of *forum non conveniens*, the order in which two *fora* are seised of the claim is not decisive to establish jurisdiction. For example, an English court has a discretionary power to stay its proceedings when the case is pending before a competent forum in a foreign jurisdiction which is deemed clearly more appropriate to hear the case, and where it is not unjust to deprive the claimant the right to trial in England.[55] If a claim falls under the Brussels Regulation/Lugano Convention, courts' discretionary power is

[52] *See* Born, *supra* n. 15, at 3800 n. 363, with references to the substantial criticism.

[53] Article 186(1bis) PILS.

[54] Ronald A. Brand & Scott R. Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (Oxford University Press, New York, N.Y., 2007), 1. It is mainly applied in common law countries, see *ibid.*

[55] The leading authority on the doctrine of forum non conveniens in English law is *Spiliada Maritime Corp v. Cansulex Ltd*, [1987] A.C. 460. For an in-depth analysis of the case, see Brand & Jablonski, *supra* n. 57, at 21 *et seq*.

restricted, and the application of *forum non conveniens* has been clouded due to certain provisions in the Regulation.[56]

The doctrine of *forum non conveniens* is a flexible technique to handle parallel proceedings. If the action abroad has been commenced for tactical reasons and is at an early stage, the court may consider itself to be the appropriate forum. On the other hand, if the foreign proceedings are well advanced, the parallel proceeding might be seen as an important factor on the consideration of appropriate forum. Its application in international arbitration can, however, be called into question. An initial question raised when adopting *forum non conveniens* is whether another adjudicatory body has jurisdiction over the claim. Since an international tribunal only has jurisdiction if the parties have consented and that such tribunals tend to be placed in neutral locations, it would be difficult for a respondent to argue that for reasons of fairness, the case ought to be heard by another tribunal.[57] However, if a tribunal is seised with a case which is clearly more appropriate to be heard before a different forum, *forum non conveniens* may be a useful technique to apply.[58]

3.4 Recognition prognosis

A fourth approach is the recognition prognosis technique. It comprises that a state court or an arbitral tribunal seated in country A should decline jurisdiction or stay proceedings when an adjudicatory body in country B, already seised of the same dispute, is likely to pronounce a judgment which is enforceable (and/or recognisable) in country A.[59] The recognition prognosis is thus linked to the enforceability of the foreign judgment or award and is based on states' treaty obligations,[60] for example the Brussels Regulation or the Lugano Convention.

The recognition prognosis was commented upon in *Minera Condesa*.[61] In

56 Brand & Jablonski, *supra* n. 54, at 25.

57 Andrea Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is Not Working* (Hastings Law Journal, Number 59, 2007, 241–307), 305–306.

58 *Ibid*. A justified reason may be that the subject matter requires particular expertise.

59 Fawcett, *supra* n. 2, at 36.

60 Söderlund, *supra* n. 3, at 302.

61 *Compañia de Minera Condesa S.A. and Compañia de Minas Buenaventura S.A. v. BRGM-Pérou S.A.S.*, Judgment of 19 December 1997, BGE 124 III 83, hereinafter "Minera Condesa".

short, the facts of the case were as follows. A dispute arose concerning an alleged violation of a right of first refusal provided in the bylaws of a Peruvian company. With respect to that provision, some of the parties were bound by an arbitration clause and others were not. At first, certain parties brought an action to a Peruvian court in Lima, seeking a declaration that all conditions of the exercise of the right of first refusal were met. The respondent disputed the jurisdiction of the court, invoking the agreement to arbitrate their disputes. However, under Peruvian law, an arbitration clause is operative only if *all* litigants are parties to the arbitration agreement. According to the Peruvian court's reasoning, *none* of the parties could make an arbitration objection and it therefore rejected the arbitration defence and declared that it had jurisdiction to hear the case.

Meanwhile, the respondents in the Peruvian court proceedings initiated arbitration in Switzerland in line with the arbitration clause. The respondents in the arbitration proceedings challenged the arbitral tribunal's jurisdiction and raised the issue of *lis pendens* between the arbitration proceedings and the action in the Peruvian court. In an interim award, the tribunal considered itself competent. It reasoned, in line with negative effect of *compétence-compétence*, that no litispendence could exist between the proceedings since the validity of the arbitration agreement was to be assessed in priority by the tribunal.[62] The respondents in the arbitration proceeding filed a complaint with the Swiss Federal Supreme Court, reiterating the *lis pendens* defence.

The Swiss court dismissed the application on the following grounds. It held that the pending court proceedings could exclude the jurisdiction of the arbitral tribunal in Switzerland only if the Peruvian judgment could be recognised in Switzerland according to PILS. According to PILS, a foreign court judgment was recognisable if, *inter alia*, the foreign court had jurisdiction to decide the dispute in question. The Swiss court noted that both Switzerland and Peru were contracting parties to the New York Convention. Further, the Swiss Federal Supreme Court concluded that the Peruvian court violated Article II(3) of the New York Convention when not enforcing the arbitration agreement.[63]

[62] See further, François Perret, Parallel Actions Pending Before an Arbitral Tribunal and a State Court: The Solution Under Swiss Law, in Pierre A. Karrer (ed.), *Arbitral Tribunals or State Courts: Who Must Defer to Whom?* (Swiss Arbitration Association, ASA Special Series No. 15, January 2001), 70.

[63] Article II(3) in the New York Convention cannot be qualified as a provision on interna-

The Swiss court clarified that since the Peruvian court did not refer the parties to arbitration, even though the prerequisites of Article II(3) of the New York Convention were met, the court in Lima lacked indirect jurisdiction under PILS. Consequently, the decision by the Peruvian court could not have been recognised in Switzerland, save for situations in which the Swiss arbitral tribunal found that it did not have jurisdiction or if a reviewing court determined that the arbitral tribunal lacked jurisdiction.

The Swiss court observed that the court in Lima had rejected the arbitration defence primarily on the ground that some of the parties had not signed the arbitration agreement. Thus, the Swiss court concluded that the Peruvian court could have asserted jurisdiction only in relation to those parties, and that the risk of inconsistent decisions was not a valid ground to find the arbitration clause void or inoperative under the New York Convention. Accordingly, it held that the Peruvian court was not the competent court according to PILS and therefore, the Peruvian judgment could not be recognised in Switzerland, unless it would turn out that the arbitral tribunal had wrongly assessed its jurisdiction.

3.4.1 Recognition prognosis and the Brussels regime

For quite some time, it has been unclear if an arbitral tribunal should terminate its proceedings should the case be pending before a court in a Brussels/Lugano jurisdiction. The Brussels/Lugano have identical arbitration exceptions. The arbitration exception, as well as its scope, has been immensely discussed in recent years and the ECJ case law on the matter is not consistent.[64] The uncertainty regarding the scope of the arbitration exception in the Brussels Regulation has led to a new Recital 12 of the Brussels Regulation. Recital 12, second and third paragraphs, clarifies the exception by stating that:

> "A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should

tional jurisdiction and it can thus be called into question if the mere infringement of the article can be a ground to refuse recognition, see *ibid.* at 72.

64 See, *inter alia*, Case C-198/89 *Marc Rich & Co. AG v. Società Italiana Impianti PA* [1991] ECR I-3855, Case C-391/95 *Van Uden Maritime BV, trading as Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line and Another* [1998] ECR I-07091. For commentary, see Hans van Houtte, *May Court Judgments that Disregard Arbitration Clauses and Awards be Enforced under the Brussels and Lugano Conventions?* (Arbitration International, Kluwer Law International, Volume 13, Issue 1,1997, 85), 85 *et seq*.

> not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.
>
> On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the [New York Convention], which takes precedence over this Regulation." (emphases added)

There is an immanent conflict if a court pronounces a judgment on the merits after an objection based on an arbitration agreement is made and a court of another Brussels/Lugano-country considers that the arbitration agreement is valid.[65] A contracting state should in such a situation on the one hand enforce the judgment under the Brussels/Lugano but on the other, it is under a duty to refer the parties to arbitration according to Article II of the New York Convention.

According to Recital 12, a decision by a court of an EU member state which declares that an arbitration agreement is not binding will, under the Regulation, not be recognised in another member state. As a consequence, suppose that a court in Germany has declared an arbitration clause, providing for arbitration in Stockholm, invalid. In that situation, a Swedish court may nevertheless decide that the arbitration agreement is valid and should be enforced. Further, the decision by the German court does not prevent an arbitral tribunal seated in Sweden to declare itself competent.

Since the Brussels Regulation entitles two *fora* to declare themselves competent, the risk of irreconcilable judgments on the same cause of action is palpable. There will be no problem should the two decisions on the merits be the same but if inconsistent, it will trigger a competition for recognition of the respective decisions.

Recital 12 further states that a decision by a court which considers an arbitration clause invalid does not preclude recognition and enforcement on the substance matter of the judgment. According to Recital 12, it is without prejudice to the competence of the courts to decide on recognition and

65 See further, van Houtte, *ibid.*, at 87.

enforcement in accordance with the New York Convention (which all EU member states have acceded).

Suppose, again, that a German court decides that an arbitration clause is invalid and pronounces a judgment on the merits. Suppose, also, that an arbitral tribunal seated in Sweden declares itself competent (and that a Swedish court agrees), and renders an award on the merits, completely contrary to that of the German court. If the parties subsequently turn to the courts of a third member state seeking recognition, there will be a situation of two irreconcilable decisions on the merits. The merits of the German judgment will be recognisable and enforceable in accordance with the Regulation and the arbitral award likewise, but it will be under the New York Convention.

In this situation, Recital 12 states that the court of the third EU member state ought to reach its own conclusion on whether the arbitration agreement is valid and binding under the New York Convention. If the court finds that the arbitration agreement is invalid, the only remaining decision would be the court judgment. If, however, it reaches the opposite decision, declaring the arbitration agreement valid, there is indeed a conflict between the Brussels Regulation and the New York Convention. Perhaps the arbitral award has prevalence over the court judgment in such a situation since the New York Convention clearly has precedence over the Brussels Regulation according to the Brussels Regulation's Recital 12 and Article 73(2). Ultimately, it would be up to the ECJ to rule on the interrelation between the New York Convention and the Brussels Regulation and thus also the primacy between court judgments on the merits and an arbitral award.

3.5 Anti-suit injunctions

A technique, generally confined to common law countries,[66] is to vest judges with judicial power to restrain foreign court proceedings by issuing an anti-suit injunction against a party.[67] Given the historical use of anti-suit injunctions in England, it is not surprising that this technique has been employed in contemporary case law in relation to arbitration, in order to prevent duplicative proceedings. On 12 June 2013, the UK Supreme Court held that Eng-

[66] There are recent cases where courts in civil law jurisdictions have issued injunctions against foreign arbitrations, see Born, *supra* n. 15, at 1206.

[67] Fawcett, *supra* n. 2, at 40; McLachlan, *supra* n. 1, at 72. For a summary of the general principles governing the grant of injunctions, see Thomas Raphael, *The Anti-suit Injunction* (Oxford University Press, Oxford, 2008), para. 4.01.

lish courts may grant anti-suit injunctions when proceedings outside a Brussels/Lugano jurisdiction are brought in violation of an English law arbitration agreement.[68] The issue that has caused much controversy and debate is the issuance of anti-suit injunctions when proceedings are brought before a court in a Brussels/Lugano jurisdiction. This situation is discussed briefly below.

The other side of the coin is injunctions ordered to enjoin parties from pursuing (or continuing) arbitration proceedings. Such anti-arbitration injunctions, with the sole purpose of restraining arbitration, have been issued in a couple of cases over the last years.[69] However, they have been used in order to frustrate arbitration agreements and not to resolve or avoid issues of parallel proceedings. Consequently, the issuance of anti-arbitration injunctions will not be further developed in this article.

3.5.1 Anti-suit injunctions in aid of arbitration under the Brussels regime

The issuance of anti-suit injunctions in relation to arbitration was addressed by the ECJ in *West Tankers*.[70] In that case, the ECJ ultimately held that the issuance of an injunction to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement, was inconsistent with the principle of mutual trust on which the Regulation is based.[71] Thus, an injunction issued by the English court was found to be incompatible with the Regulation itself.[72] Perhaps the most important part of the judgment was that "a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application."[73] The result of the judgment is that there can be parallel determinations, by a state court and a tribunal, on the validity of an arbitration agreement. This can lead to inconsistent judgments on the merits within the EU.

68 *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP*, [2013] UKSC 35.

69 For an overview and discussion of these cases, see Julian D. M. Lew, Control of Jurisdiction by Injunctions Issued by National Courts, in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics?, ICCA Congress Series, 2006 Montreal, Volume 13* (Kluwer Law International, 2007, 185), 185 *et seq*.

70 Case C-185/07 *Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc*. [2009] ECR I-00663, hereinafter "West Tankers".

71 *Ibid*., at paras 29–30.

72 *Ibid*., at para. 32.

73 *Ibid*., at para. 26.

In the recast Brussels Regulation, the principle of mutual trust has remained intact. As a consequence, EU member states will not be able to issue injunctions in aid of arbitration under the recast Regulation. Thus, the issuance of anti-suit injunctions in aid of arbitration remains a controversial issue within the EU. However, the most obvious flaw of the *West Tankers* case has, however, been corrected through the recast Regulation. Recital 12 provides that if a court of a member state rules on the validity of an arbitration agreement, it "should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question."

4. Parallel arbitration proceedings

There are two situations of parallelism in the context of parallel arbitration proceedings. First, it is possible that the same parties to the same contract and, consequently, the same arbitration clause, commence arbitration proceedings concerning the same claim. Such situation may, for example, arise should the respondent in the first proceeding dislike the constitution of the arbitral tribunal and initiate an additional arbitration. This gives rise to parallel and identical arbitrations – *lis pendens*.[74] Second, and more likely, would be a situation where two arbitrations are simultaneously pending between the same parties but concerning different claims, albeit closely related. These two situations will be discussed in turn.

The potential for *lis alibi pendens* between two arbitral tribunals may be illustrated by the *Arthur Andersen* case. In that case, a jurisdictional dispute arose from the fact that two standard contracts between the Andersen firms contained successive but different, and conflicting, arbitration clauses. The majority of the Andersen Consulting member firms initiated ICC arbitration against the majority of the Arthur Andersen firms. This first arbitration was commenced based on what was then the most recent arbitration agreement (ICC arbitration clause, with seat in Switzerland), which had not yet been signed by all member firms.

Later, one Arthur Andersen firm brought separate arbitral proceedings against one Andersen Consulting firm, based on an earlier arbitration clause, which provided for *ad hoc* arbitration, seated in Switzerland. The respondent

[74] ILA Final Report on *Lis Pendens* and Arbitration, *supra* n. 36, at para. 4.47; Born, *supra* n. 15, at 3806.

firm in the second arbitration refused to appoint an arbitrator, arguing that the same dispute was already pending before an arbitrator, namely in the ICC arbitration. The Geneva court was then asked to judicially appoint an arbitrator and the same respondent relied on *lis pendens* and argued that the ICC arbitrator had priority to rule on its jurisdiction. The court dismissed the request for appointment and concluded that the

> "arbitrator [in the ICC proceedings] will have to decide, as a preliminary issue, on the effect of the arbitration agreement, so that the fate of the clause, 1989 or 1994 version, will be definitively sealed by the ICC arbitrator, with the possibility of a challenge before the [Swiss] Federal Tribunal. [T]he present petition is therefore premature and may possibly be filed again only after the ICC arbitrator sitting in Geneva has decided which of the two arbitral clauses in fact binds the parties."[75]

The Geneva court did not expressly rely on *lis pendens* when deciding on the appointment issue, but "its approach is clearly, albeit implicitly, based on a *lis pendens*-type reasoning."[76] Since the Geneva court refused to appoint an arbitrator, the arbitral tribunal did not deal with the *lis pendens* question. The dispute was only finally resolved when the Swiss Supreme Court upheld the jurisdiction of the first arbitral tribunal.

In *Arthur Andersen*, the two rival tribunals were both seated in Switzerland. The issue of parallel arbitral proceedings becomes more complicated should the tribunals be seated in two different jurisdictions. That was the situation in *Tema v. Hubei*,[77] where the Milan Court of Appeal was faced with a *lis pendens* defence when enforcing an arbitral award. The facts of the case were, in brief, as follows. An Italian seller ("**Tema**") and a Chinese buyer ("**Hubei**") had agreed upon an arbitration clause, contained in their sale of goods contract. The arbitration clause provided that claims filed by Tema were to be settled by arbitration at the Arbitration Institute of the Stockholm

[75] *AA v. AC*, Court of First Instance of Geneva, September 30, 1998, (9 Revue suisse de droit international et droit européen, 1999, 628), 629. Quotation translated from French original by Geisinger & Lévy, *supra* n. 2, at 66.

[76] *Ibid.*, at 66.

[77] *Tema-Frugoli SpA v. Hubei Space Quarry Industry Co. Ltd.*, Corte di Appello [Court of Appeal], Milan, 2 July 1999 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2001 – Volume XXVI* (Kluwer Law International 2001, 807), hereinafter "Tema v. Hubei".

Chamber of Commerce, whereas, if instituted by Hubei, they were to be heard by China International Trade Arbitration Commission ("**CIETAC**").

A dispute arose and Tema filed first in Stockholm, seeking a declaration from the tribunal that it had performed in line with its contractual obligations. Both parties participated in the proceedings in Stockholm, which led to an award in favour of Tema. A few weeks after Tema filed its request for arbitration in Stockholm, Hubei also commenced arbitration at CIETAC for breach of contract. Tema was duly notified of the CIETAC arbitration proceeding but did not appear, which eventually resulted in an award in favour of Hubei.

Tema sought and obtained enforcement of the Swedish award in Rome, Italy. Subsequently, Hubei sought enforcement of the Chinese award against Tema in Milan, Italy. Tema opposed the enforcement, alleging that once the first arbitration was commenced, the arbitration agreement precluded the parties from instituting arbitration proceeding in China – "in essence a plea of *lis pendens*."[78] Further, Tema argued that the Chinese award was contrary to the Swedish award which had already been recognised in Italy. As a consequence, Tema argued, the CIETAC award was not to be enforced in Italy.

The Milan Court of Appeal disagreed, construing that the arbitration agreement did not rule out the possibility to commence parallel arbitration proceedings, as the sole criterion for jurisdiction was the identity of the claimant.[79] It held that the alleged inconsistency between the arbitral awards was not a ground for refusing to enforce the Chinese award under the New York Convention.[80] The objection based on the irreconcilability between the awards had to be made, if available, when challenging the award before the courts at the seat of arbitration.

The result in *Tema v. Hubei* was unsatisfactory. The position taken by the Milan Court of Appeal, that it was Tema's obligation to raise the *lis pendens* objection at CIETAC and, if necessary, in subsequent challenge proceedings before Chinese courts, may be correct. However, "the resulting enforcement of both awards in Italy is a nonsense, since the courts could not at one and the same time give effect to an award declaring Tema to have met its contractual obligations, and an award declaring that it had not."[81]

[78] McLachlan, *supra* n. 1, at 216.
[79] *Tema v. Hubei*, *supra* n. 77, at 808–809.
[80] *Ibid.*, at 809 n. 4.
[81] McLachlan, *supra* n. 1, at 217–218.

In *Tema v. Hubei*, the recourse to arbitration in Stockholm appears to have been a case of using the possibility of a negative declaratory relief as a way to anticipate the Chinese proceedings. It could thus be said that Tema was forum shopping between the available arbitration institutions.[82] Nevertheless, the Stockholm tribunal undoubtedly had jurisdiction and both parties participated in the proceedings, which resulted in an award on the merits. The position taken by the CIETAC tribunal, that it *too* had jurisdiction, is not a very persuasive argument and much less a sound solution to the situation.

4.1 The CME case

On 19 August 1999, Mr Lauder, an American investor, initiated arbitration in London in accordance with the UNCITRAL Arbitration Rules. Mr Lauder claimed that the Czech Republic (the "**Republic**") had violated the US/Czech bilateral investment protection treaty ("**BIT**") through acts and omissions in 1993, 1996 and 1999. The arbitral tribunal rendered a final award on 3 September 2003.[83] In the London Award, the tribunal unanimously held that the respondent had breached its obligations under the BIT in relation to the events taking place in 1993. However, the tribunal concluded that this breach did not give rise to any liability on behalf of the Republic.

On 22 February 2000, CME, a company in The Netherlands, which Mr Lauder indirectly controlled and partially owned, resorted to arbitration against the Republic on the basis of the Netherlands/Czech BIT. These proceedings were also conducted according to the UNCITRAL Arbitration Rules, and the tribunal was seated in Stockholm. In essence, CME alleged the same breaches and referred to the same facts as Mr Lauder in the London proceedings.

On 13 September 2001, only ten days after the London Award was rendered, the majority of the Stockholm tribunal adopted a Partial Award.[84] On the merits, the Stockholm tribunal reached an opposite decision to the London tribunal. It held that the respondent had not breached its obligation

[82] *Ibid.*, at 217.

[83] *Ronald S. Lauder v. The Czech Republic*, Final Award of 3September 2001, <italaw.com/documents/LauderAward.pdf> (retrieved on 24 November 2014), hereinafter "London Award".

[84] *Ibid.*

attributable to the events in 1993. In respect to the events in 1996 and 1999, the tribunal held that the respondent was liable, and the quantum was subsequently settled in an Award rendered on 14 March 2003.[85]

Both tribunals addressed the possibility of irreconcilable findings in the arbitrations and did argue in consensus on this issue. Mr Lauder requested (repeatedly) that the two proceedings should be consolidated. The Republic did not agree to a *de facto* consolidation of the treaty proceedings but did, on the contrary, insist that a different arbitral tribunal ought to hear CME's claims.[86] The tribunals concluded that, since the Republic asserted that the two claims were to be determined separately, there was a risk of inconsistent decisions. However, as the two claims were based on two separate BITs, each granting "remedies to the respective claimants deriving from the same facts and circumstances, this does not deprive one of the claimants of jurisdiction, if jurisdiction is granted under the respective Treaty."[87]

Before the Final Award on quantum was rendered by the Stockholm tribunal, the Republic challenged the Stockholm Award, requesting the Swedish Svea Court of Appeal to declare it invalid or set aside. The Svea Court of Appeal pronounced its judgment on 15 May 2003, rejecting the petition.[88] In essence, their focus was on the identity of the two Claimants in the arbitrations. Before the Court, it was never argued that there was any formal identity of the Claimants. However, the Republic argued that for all practical purposes, Mr Lauder and CME must be deemed to be the same Party on the basis of either piercing the corporate veil or the concept of privity according to English law. The Court noted that any equivalent to the concept of privity does not exist in Swedish law and thereby it rejected its applicability. Further, the Court held that the Republic had failed to present any international cases where "in an actual situation of *lis pendens* and *res judicata*, a controlling minority shareholder has been equated with the company."[89] Finally, it dismissed the Republic's claim on the grounds of *lis pendens* and *res judicata*, holding that:

85 *CME Czech Republic B.V. v. The Czech Republic*, Final Award of 13 March 2003, <italaw.com/documents/CME-2003-Final_001.pdf> (retrieved on 24 November 2014), hereinafter "Final Award".

86 *London Award*, para. 173; *Stockholm Award*, paras 302 and 412.

87 *Stockholm Award*, para. 412. See also *London Award*, para. 175.

88 *The Czech Republic v. CME Czech Republic B.V.* (RH 2003:55). For an unofficial English translation of the decision, see Stockholm Arbitration Report ("**SAR**") 2003:2, 187 *et seq*.

89 SAR 2003:2, at 188 (unofficial translation).

> "According to Swedish law, one of the fundamental conditions for *lis pendens* and *res judicata* is that the same parties are involved in both cases. As far as is known, the same condition applies in other legal systems which recognize the principles in question. Identity between a minority shareholder, albeit a controlling one, and the actual company cannot, in the Court of Appeal's opinion, be deemed to exist in a case such the instant one. This assessment would apply even if one were to allow a broad determination of the concept of identity."[90]

In summary, the Svea Court of Appeal rejected the petition based on *lis pendens* for two reasons. First, it held that there was no identity between the parties, which led to the conclusion that the doctrine of *lis pendens* did not apply to the Stockholm tribunal. This amounts to the conclusion that when assessing the identity of the parties, the Swedish approach is to apply the same criteria in domestic and international arbitration as in national court proceedings.[91] Second, by refraining from an objection on the grounds of *lis pendens* before the Stockholm tribunal, the Republic had waived its possibility to invoke this ground in the challenge proceedings.

5. Summary and conclusions

The positive effect of the doctrine of *compétence-compétence* is accepted in virtually all jurisdictions worldwide.[92] Even where courts are given the mandate to engage in a full review of the arbitration agreement, the *compétence-compétence* doctrine does not automatically require the arbitral tribunal to stay its proceedings pending the court decision. In line with the positive effect of *compétence-compétence*, the arbitral tribunal should proceed with the arbitration and decide on its jurisdiction if it considers itself to be *prima facie* competent, and this should be done irrespective of whether the same claim is pending before a state court elsewhere.[93] By way of example, this is the

[90] SAR 2003:2, at 189 (unofficial translation).

[91] Kaj Hobér, *International Commercial Arbitration in Sweden* (Oxford University Press, Oxford, 2011), para. 7.129.

[92] Born, *supra* n. 15, at 1047.

[93] This accords with Recommendation 1 of the ILA Recommendations on *Lis Pendens* and Arbitration, *supra* n. 11. See also Poudret & Besson, *supra* n. 30, at para. 521; Cremades & Madalena, *supra* n. 2, at 539; Söderlund, *supra* n. 3, at 321; Douglas D. Reichert, *Problems with Parallel and Duplicate Proceedings: The Litispendence Principle and International Arbitration* (Arbitration International, Volume 8, Issue 3, 1992, 237), 254; Norah Gallagher, Parallel Proceedings, Res Judicata and Lis Pendens, in Loukas A. Mistelis & Julian

position taken in the amended Swiss Private International Law Statute, which provides that:

> "[The arbitral tribunal] shall decide on its own jurisdiction without regard to proceedings having the same object already pending between the same parties before another State court or arbitral tribunal, unless there are serious reasons to stay the proceedings."[94]

In fact, there is no need for new provisions in any international conventions to come to this conclusion. The reason for this is that the solution can be derived from the priority for arbitration expressed in Article II(3) of the New York Convention, along with the positive effect of *compétence-compétence*. ILA has perspicaciously summarised the arguments for the solution based on the positive effect of *compétence-compétence* as follows:

> "First, the arbitral tribunal in most jurisdictions is authorised and even obliged to determine its own jurisdiction. Second, the arbitral tribunal often will be informed by the parties regarding the parallel court proceedings abroad and will be able to give appropriate weight to a respondent's arguments contesting jurisdiction. Third, parallel court proceedings abroad may take a long time before coming to a final decision and may provide compelling reasons not to stay the arbitration until such time. Fourth, the recognition of a foreign decision on jurisdiction may not be available at the place of arbitration."[95]

However, where concurrent court proceedings are pending at the place of the arbitration, the arbitral tribunal must consider *lex arbitri* since the court at the seat of the arbitration will always have the final saying on the validity of the arbitration agreement and consequently, the power to set aside the arbitral award.[96] For example, in Sweden, the arbitral tribunal is entitled to continue its proceedings even where a declaratory relief on the jurisdiction of the arbitral tribunal is brought before a Swedish court. Should, however, a Swedish court decide that the arbitral tribunal lacks jurisdiction, the court decision would obviously render any subsequent arbitral award subject to annulment in Sweden, since the decision will have legal force in subsequent challenge proceedings. As a consequence, it may be sound to terminate the

D. M. Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International, The Hague, 2006), para. 17-37.

[94] PILS Article 186(1bis).

[95] ILA Final Report on *Lis Pendens* and Arbitration, *supra* n. 36, at para. 5.9.

[96] Söderlund, *supra* n. 3, at 321.

arbitration proceedings after a court at the seat of the arbitration has decided that it has jurisdiction.

This position can, however, also be challenged. It can be argued that the arbitral tribunal should not discontinue its proceedings even where a court at the seat of the arbitration has determined that there is no valid or applicable arbitration agreement. The reason for this is that an arbitral award which has been set aside in the country of rendition could still be enforced outside the arbitral seat.[97] For example, in *Hilmarton*,[98] the French Supreme Court held that "the award rendered in Switzerland is an international award which is not integrated in the legal system of that state, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy."[99] Such order is based on the structure of the international regime for arbitration, *e.g.* the New York Convention, and would perhaps be the "true" international solution. However, there is no consensus on the proper treatment of annulled international awards in other jurisdictions.[100]

There are some situations where an arbitral tribunal should recognise that to avoid conflicting decisions, costly duplication and dilatory tactics, it may be appropriate to stay its proceedings if a party so requests.[101] In the *Fomento* case, the Swiss court held that the forum second seised (the arbitral tribunal) was *required* to stay its proceedings, pending resolution of the first-filed action. Consequently, there was no priority rule that would give the arbitral tribunal precedence to decide upon the validity of the arbitration agreement (and thus also upon the jurisdiction of the arbitral tribunal).[102] Such mandatory stay would not be a very wise solution, but a *discretionary* stay may in some situations be sensible. For example, if there is *prima facie* evidence that

[97] Born, *supra* n. 15, at 3623 *et seq.*

[98] *Hilmarton Ltd. v. Omnium de traitement et de valorisation – OTV*, Cour de Cassation [Supreme Court], 23 March 1994 in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 1995 – Volume XX (Kluwer Law International, 1995, 663).

[99] *Ibid.*, at para. 5. For the same line of reasoning, see The Arab Republic of Egypt v. Chromalloy Aeroservices, Inc., Cour d'Appel [Court of Appeal], Paris, 14 January 1997 in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 1997 – Volume XXII (Kluwer Law International, 1997, 691). It deserves to be noted that this is not just a French approach. Born, *supra* n. 15, at 3628–3629, argues that the same approach has been taken by Belgian, Austrian, Dutch and English courts.

[100] Born, *supra* n. 15, at 3625.

[101] Recommendation 2 of the ILA Recommendations on *Lis Pendens* and Arbitration, *supra* n. 11; Reichert, *supra* n. 93, at 254.

[102] Oetiker, *supra* n. 44, at 143.

the claimant in the arbitration proceedings has waived its right to arbitrate based on its conduct before a foreign state court, it may be appropriate to stay the proceedings. Since there are compelling reasons in favour of the position that a question of waiver should be assessed based on the procedural rules at the place of the court proceedings,[103] it may be suitable for the arbitral tribunal to stay its proceedings pending the outcome on that question.[104]

If the same claim is pending before two arbitral tribunals, it may be reasonable that the arbitral tribunal second seised declines jurisdiction or better, that it exercises discretionary power to stay the proceedings, as the arbitral tribunal did in *SPP v. Pakistan*.[105] It may very well be that the jurisdiction of one tribunal does not automatically deprive another arbitral tribunal of its jurisdiction. However, "in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal."[106] Consequently, there is a difference between the *existence* and *exercise* of jurisdiction and it is therefore argued that arbitral tribunals in some situations should consider the possibility to stay its proceedings, perhaps on only some of the issues in a case. The discretion should be exercised sparsely but may in some situations be an efficient technique to manage parallel proceedings.

[103] Söderlund, *supra* n. 3, at 306–307 and 313.

[104] Recommendation 4 of the ILA Recommendations on *Lis Pendens* and Arbitration, *supra* n. 11.

[105] *Southern Pacific Properties (Middle East) Limited, Southern Pacific Properties Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Decision on Jurisdiction of 27 November 1985, published in ICSID Reports, Vol. 3, 1995. See also ILA Final Report on *Lis Pendens* and Arbitration, *supra* n. 36, at para. 4.48; Born, *supra* n. 15, at 3808; McLachlan, *supra* n. 1, at 217; Söderlund, *supra* n. 3, at 321.

[106] *SPP v. Egypt*, *ibid.*, at 126. For the same line of reasoning, see *The MOX Plant Case (Ireland v. The United Kingdom)*, Procedural Order No. 3: Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures of June 24, 2003, published in Lise Bosman & Heather Clark (eds), *The MOX Plant Case (Ireland-United Kingdom): Record of Proceedings 2001–2008* (Permanent Court of Arbitration Award Series, Volume 7, Permanent Court of Arbitration 2010, 47), para. 28, where the Annex VII Tribunal stayed its proceedings based upon an anticipation of EU proceedings, and argued that "bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, the Tribunal considers that it would be inappropriate for it to proceed further with hearing the Parties on the merits of the dispute. […] Moreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties."