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Lis Alibi Pendens in
International Arbitration
Reflections on the Swedish Position in the
Context of International Trends and Approaches

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Abstract

How should State courts and arbitral tribunals handle a case, when the same claim is already pending before an adjudicatory body in a different jurisdiction? This question, on *lis pendens* in an international context, has been controversial for a long time. Economic globalisation has driven a rapid proliferation of international arbitrations, leading to new problems of forum shopping and issues concerning the interface between arbitration and litigation. During the last decade, parallel proceedings, and the different solutions adopted thereto, have made up some of the *causes célèbres* within the international arbitration community. In recent years, scholars and practitioners have put considerable effort into finding sound solutions to problems of *lis alibi pendens* in contemporary arbitration.

Parallel proceedings may occur between a number of adjudicatory bodies. The thesis focuses on parallel proceedings in international commercial arbitration and investment treaty arbitration and discusses *lis pendens* between (i) State courts and arbitral tribunals and (ii) two arbitral tribunals. The purpose of the thesis is to advocate two propositions on how *lis pendens* in international arbitration should be resolved under Swedish law, in the context of international trends and approaches.

Discussion and conclusions are made throughout the text, and serves as a background to the propositions that will be put forward and argued in the final chapter. Thus, the last chapter summarises and reinforces the conclusions made in previous chapters into propositions. First, it is proposed that the solution to parallel proceedings in international commercial arbitration is found in the adoption of the positive effect of *compétence-compétence*, combined with the arbitral tribunal's discretion to stay its proceedings. Second, it is suggested that, in parallel treaty arbitration, the triple identity test should be relaxed, in order to diminish the current potential for irreconcilable judgments and costly duplication of proceedings.

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Abbreviations

| | |
|---------------------|--|
| Act on Arbitrators | Swedish Act on Arbitrators, sw. Skiljemannalag (SFS 1929:145) |
| BIT | Bilateral Investment Protection Treaty |
| Brussels Convention | Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters |
| Brussels Regulation | Council Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) |
| CJP | Swedish Code on Judicial Procedure, sw. Rättegångsbalken (SFS 1942:740) |
| DCFR | Draft Common Frame of Reference |
| ECJ | European Court of Justice |
| IBA | International Bar Association |
| IBA Guidelines | IBA Guidelines on Conflicts of Interest in International Arbitration, adopted 2004 |
| ICC | International Chamber of Commerce (in reference to the Arbitration Institute) |
| ICC Rules | Rules of Arbitration of the International Chamber of Commerce (in force as from 1 January 2012) |
| ICJ | International Court of Justice |
| ICSID | International Centre for Settlement of Investment Disputes |
| ICSID Convention | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) |
| ILA | International Law Association |
| ILC | International Law Commission (established by the United Nations General Assembly in 1948) |
| Lugano Convention | Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters |
| Model Law | The UNCITRAL Model Law on International Arbitration |
| New York Convention | United Nations 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards |
| NAFTA | North American Free Trade Agreement, signed by United States, Mexico and Canada (entered into force on January 1, 1994) |
| PCIJ | Permanent Court of International Justice |
| Prop. | Government Bill, sw. Proposition |
| SAA | Swedish Act on Arbitration, sw. Lag (SFS 1999:116) om skiljeförfarande |
| SAR | Stockholm Arbitration Report |
| SCC | Stockholm Chamber of Commerce (in reference to the Arbitration Institute) |
| SCC Rules | Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (in force as from 1 January 2010) |
| SOU | Official Swedish Government Reports, sw. Statens offentliga utredningar |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNRIAA | United Nations Reports of International Arbitral Awards |

1. Introduction

How should State courts and arbitral tribunals handle a case, when the same claim is already pending before an adjudicatory body in a foreign jurisdiction? This question – on international *lis pendens* – has been controversial for a long time. The Permanent Court of Justice addressed the question in 1925, holding that:

“It is a much disputed question in the teachings of legal authorities and in the jurisprudence of the principal countries whether the doctrine of litispendance, the object of which is to prevent the possibility of conflicting judgements, can be invoked in international relation, in the sense that the judges of one State should, in the absence of a treaty, refuse to entertain any suit already pending before the courts of another State, exactly as they would be bound to do if an action on the same subject had at some previous time been brought in due form before another court of their own country.”¹

Some ninety years later, one would think that this problem would have been adequately addressed and resolved. On the contrary, economic globalisation has driven a rapid proliferation of international tribunals leading to new, even more complex problems, including forum shopping and issues regarding the interface between courts and arbitral tribunals. During the last decade, this vacuum in international arbitration law has taken on renewed importance as State courts and arbitral tribunals have increasingly been faced with international *lis pendens*.²

Over the last ten years, parallel proceedings and the different solutions adopted thereto have made up some of the *causes célèbres* within the international arbitration community. In *Fomento v Colon*,³ the Swiss Federal Supreme Court decided that a Swiss arbitral tribunal should defer to a Panamanian court and thus, it annulled an ICC award on jurisdiction rendered by the tribunal. The decision was widely criticised and subsequently, it led to an amendment of the Swiss Statute on Private International Law. In the *CME* case,⁴ two investment arbitral tribunals, seated in Stockholm and London respectively, reached completely contradictory outcomes on virtually the same factual dispute. The Svea Court of Appeal was requested, *inter alia*, on the grounds of *res judicata* and *lis pendens*, to set aside the arbitral award rendered in Stockholm but denied the request. It resulted in a situation with two valid, but irreconcilable arbitral awards.

In recent years, scholars and practitioners have put considerable effort into finding sound solutions to *lis pendens* problems in contemporary arbitration. The International Law Association’s (“ILA”) Committee on International Commercial Arbitration issued recommendations to arbitrators in 2006, addressing the question on how arbitrators should handle *lis alibi pendens* and *res judicata*.⁵ Over the last couple of years, the arbitration exception in the Brussels Regulation has been extensively discussed and examined.⁶ The discussion and criticism culminated with the *West Tankers* case,⁷ in

¹ *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v Poland)*, 1925 PCIJ, Series A, No. 6, hereinafter “Certain German Interests”, para. 54.

² ILA Final Report on *Lis Pendens* and Arbitration, published in *Arbitration International*, Kluwer Law International, Volume 25, Issue 1, 2009, pp. 3-34, para 1.7.

³ *Fomento de Construcciones y Contratas S.A. v Colon Container Terminal S.A.*, Decision of May 14, 2001, (DSFSC) 127 [2001] III 279.

⁴ *Infra*, section 5.3.

⁵ ILA Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration, published in *Arbitration International*, Kluwer Law International, Volume 25, Issue 1, 2009, pp. 83-85.

⁶ See, e.g., Hess, Pfeiffer & Schlosser, *The Brussels I Regulation 44/2001* (2008), commonly referred to as the “Heidelberg Report”; Commission’s Report COM(2009) 174; Green Paper COM(2009) 175; Commission’s Proposal COM(2010) 748.

⁷ *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.*, Case C-185/07.

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 Regulation is based. An issue raised by parallel proceedings in relation to arbitration was thus at the heart of the debate. During the examination of the arbitration exception, a number of solutions were considered, for example that the arbitration exclusion should be wholly or partially deleted from the Regulation.⁸ In the end, the exception remained unchanged and in late 2012, the EU revised the Brussels Regulation and a new Recital 12 reaffirms that arbitration is clearly outside its scope.

A party may bring an action, which is already pending before an arbitral tribunal, to a State court because it has a genuine concern that there is no arbitration agreement. Such conduct is permitted in several jurisdictions, for example in Sweden, where an arbitral tribunal are allowed to continue its proceedings should a declaratory relief, on the jurisdiction of the arbitral tribunal, be brought before a Swedish court.⁹ Hence, the policy maker has determined that in some situations, there may be advantages to parallel proceedings.

However, a party may also bring an action to a State court for the sole purpose of frustrating the arbitration agreement. Such dilatory tactics, resulting in duplication of the proceedings, is, obviously, an illegitimate reason to commence court proceedings. Parallel proceedings between two arbitral tribunals may arise in a number of situations, for example where a party has initiated proceedings under two separate agreements, concerning the same legal relationship.

Evidently, parallel proceedings may occur between a number of adjudicatory bodies, in a number of situations. This thesis focuses on parallel proceedings in international commercial arbitration and investment treaty arbitration. The text will discuss *lis pendens* between (i) State courts and arbitral tribunals and (ii) two arbitral tribunals.

1.1. Purpose and Research Inquiries

When two or more *fora* face resolving the same matter or closely related claims, it raises complex issues. The purpose of this thesis is to identify and analyse how *lis alibi pendens* is dealt with in Swedish arbitration, in international contexts. Based upon the analysis, the aim is to put forward two propositions on how arbitral tribunals, seated in Sweden, ought to resolve *lis pendens* in international arbitration. Further, the intention with the study is that the solutions advocated should be compatible with a developing international practice. First, the thesis suggests that the solution to parallel proceedings in international commercial arbitration is found in the adoption of the positive effect of *compétence-compétence*, combined with the arbitral tribunal’s discretion to stay its proceedings. Second, it is argued that, in parallel treaty arbitration, the triple identity test should be relaxed. In order to achieve the purpose of this study, the following research inquiries have been identified and formulated.

The primary research inquiry investigates: how should an arbitral tribunal, seated in Sweden, handle its proceedings, should the same claim be pending before another adjudicatory body in a different jurisdiction? To investigate this inquiry, the following issues will be analysed. First, the legal and practical issues, which arise when parallel proceedings occur, will be identified. Second, solutions applied for the resolution of parallel proceedings will be identified, investigated and evaluated. These research inquiries are explored in the context of international arbitration law and practice, both in commercial and investment arbitration. The study considers Swedish law and practice and investigates solutions that are compatible with international trends and approaches.

⁸ Hess, Pfeiffer & Schlosser, *The Brussels I Regulation 44/2001* (2008), paras. 122-123.

⁹ Swedish Act on Arbitration (“SAA”), Section 2(1).

In conclusion, the purpose of this thesis is to explore how *lis pendens* is dealt with in Swedish arbitration and based on the analysis, find an approach, consistent with international trends and approaches, on how arbitral tribunals, seated in Sweden, ought to resolve *lis pendens*. In order to achieve the purpose, the primary research inquiry investigates: how should an arbitral tribunal, seated in Sweden, handle its proceedings, should the same claim be pending before another adjudicatory body in a different jurisdiction?

1.2. Methodology and Materials

Since the aim of the thesis is to provide practice-driven solutions to real problems, a pragmatic oriented methodology has been applied. Friedrich von Hayek portrayed law as a continuously adapting process, arguing that “[f]ew facts show more clearly how prevailing conceptions will bring about continuous change, producing measures that in the beginning nobody had desired or foreseen but which appear inevitable in due course, than the process of the change of law.”¹⁰ Further, he considered that every step in the process of law-making is determined by problems, which arise when principles laid down by earlier decisions are adopted to unforeseen circumstances.¹¹

Such methodological perception of the change of law is a particularly good way to describe international arbitration law, in which there is no overarching authority that provides a “right legal answer” to new and complex problems, brought about by the ever-growing economic globalisation. The issues raised by parallel proceedings are problems that have arisen where transnational trade has demanded speedy mechanisms for conflict resolution. Since there has been an unprecedented rise of international tribunals and courts, the law applicable to resolve such issues has not been able to keep up with the rapid development. Thus, principles, often domestic, have been transposed into an international setting where it was not originally intended to be employed. That is the nub of the problem when it comes the problem studied in this thesis, since *lis pendens* has undoubtedly evolved within national legal orders,¹² and subsequently been applied in an international setting. As will be argued, national solutions often fail to resolve international problems.

Throughout the text, a pragmatic problem solving approach will be thus be taken, since part of the aim of the thesis is to advocate two propositions. The methodological position, articulated by von Hayek, has served as a backcloth and inspiration to the methodological standpoint taken in this thesis. It has affected the text mainly in two different ways. First, the current legal position has been perused from a *de lege lata* perspective, which can be said to be the investigation of the current state of the law. In addition, since law-making is a continuously changing and adapting process, solutions *de lege ferenda* to the issues raised has been identified and derived from the analysis *de lege lata*. Thus, the practical problems attached to the solutions *de lege lata*, has served as a foundation and basis for the formulation of solutions *de lege ferenda*; this being the practice-driven pragmatic approach. Second, a comparative law approach has been utilised, which has offered a possibility to illustrate the issues raised and solutions adopted to *lis pendens arbitralis* from an international perspective.

1.2.1. De Lege Lata

The sources of Swedish law are, in roughly descending order of importance; EU Law, the Swedish Constitution, Swedish statutes and regulations, Supreme Court and

¹⁰ Hayek (1973), p. 65.

¹¹ *Ibid.*

¹² *Infra*, chapter 2 and section 3.1.

Supreme Administrative Court precedents, *travaux préparatoires* and scholarly work.¹³ When conducting the research for this thesis, a broader spectrum of legal sources has been employed. The reason for this is that the aim of the thesis is to find an approach that will be compatible with international trends and approaches. A brief comment will thus be given to why the legal sources applied have been considered relevant.¹⁴

(i) *EU Law*. In 2001, the Council's Regulation 44/2001 entered into force, superseding the Brussels Convention of 1968. Arbitration has perpetually been placed outside the Brussels regime. Still, issues have arisen regarding the interface between arbitration and litigation. The arbitration exception has been extensively debated since its adoption, culminating with the ECJ judgment *West Tankers* in 2009.¹⁵ There have been two major practical implications with the Regulation of 2001, concerning parallel proceedings and arbitration. These are (i) the dilatory tactic known as an "Italian torpedo",¹⁶ which, briefly put, infers that a party tries to delay and derail the arbitration proceedings by instituting court proceedings and (ii) the Regulation's exception of arbitration set out in Article 1(2)(d).¹⁷

On 12 December 2012, the Regulation was amended,¹⁸ and a recast form applies from January 10, 2015. The recast form of the Brussels Regulation addresses both problems discussed in above and thus, references and discussion will, throughout the text, be made to the recast version of the Brussels Regulation, where it is not expressly informed otherwise. Given the novelty of the recast Regulation, scholarly opinions addressing the revision have not yet been published to a great extent. Consequently, the discussion on the recast Regulation will be more freely conducted based on a systematic and linguistic analysis.

(ii) *International conventions and treaties*. The United Nations 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which expresses a clear priority for arbitration in Article II(3), was ratified by Sweden on the 28 January 1972, without availing any reservations open to Contracting States.¹⁹ The Convention was transformed into the Code on Foreign Arbitration Agreements and Arbitral Awards (1929:147), which ceased to be valid when the SAA entered into force. Rules corresponding with the provisions in the Convention can now be found in Sections 52-60 of the SAA. The Swedish Supreme Court has, in a number of cases,²⁰ held that the provisions of the SAA on enforcement should be construed considering the goal to facilitate enforcement of foreign arbitral

¹³ Bernitz (2012), pp. 29-30 also points out customary law as a supplementary source of law, especially in commercial law.

¹⁴ In addition, the arbitration agreement along with arbitral rules and laws of the dispute, *i.e.* procedural orders and agreements between the parties, will be discussed when relevant, *cf.* Strong (2009), para. 3.03.

¹⁵ *Supra*, fn. 7.

¹⁶ *Cf. Erich Gasser GmbH v MISAT Srl*, Case C-116/02.

¹⁷ *See, inter alia, Marc Rich & Co. AG v Società Italiana Impianti PA*, Case C-190/89, *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another*, Case C-391/95. For commentary, *see* Houtte (1997), p. 85 *et seq.*

¹⁸ Council Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), hereinafter "Brussels Regulation".

¹⁹ SOU 1994:81, p. 61; Prop. 1998/99:35, p. 33. Sweden has the system of dualism regarding the relationship between international and national law, *see* Bring, Mahmoudi & Wrangé (2011), p. 43 *et seq.*

²⁰ *Götaverken Arendal AB v General National Maritime Transport Co.* (NJA 1979 p. 527); *Forenede Cresco Finans AS v Datema AB* (NJA 1992 p. 733); *Kalle Bergander i Stockholm AB v Planavergne S.A.* (NJA 2003 p. 379); *Lenmorniiproekt OAO v Arne Larsson & Partner Leasing AB* (NJA 2010 p. 219). *See also* Heuman (2003), p. 720.

awards enshrined in the New York Convention. As will be argued, the Convention is of crucial importance when assessing solutions in international commercial arbitration.

(iii) *National laws, including travaux préparatoires*. If the place of the arbitration, *locus arbitri*, is Sweden – the SAA becomes *lex arbitri*. The SAA entered into force on April 1, 1999, replacing the Swedish Act on Arbitrators, and applies to arbitration commenced after that date. Sweden did not implement the Model Law on International Arbitration (“Model Law”) drafted by the United Nations Commission on International Trade Law (“UNCITRAL”), but its provisions were taken into consideration when the SAA was formulated.²¹

Since the Model Law was taken into account when the SAA was formulated, the provisions that govern aspects of parallel proceedings in the Model Law will be discussed and referred to when pertinent. The SAA does not contain any provisions on *lis pendens* and arbitration, which its predecessors did. However, *lis pendens* and its application in arbitration was discussed in the preparatory works and thus, these are relevant to grasp the legal position on parallel proceedings and arbitration in Sweden. Since references to *travaux préparatoires* will be made to a great extent, a brief comment on the role of preparatory works in Swedish law in general, and arbitration law in particular, will be made.

In Sweden, *travaux préparatoires* are of great importance when interpreting statutes, but it varies between different areas of law.²² The Council of Legislation held that the detailed views given in the Government Bill and Government Report on the SAA, were well reasoned and could be seen as good guidance for courts, arbitrators and practitioners.²³ The Council also stated that, by way of exception, the preparatory works could be questioned but as always with *travaux préparatoires* in Swedish law, such questions were to be solved through case law.²⁴ Professor Heuman has interpreted these commentaries by the Council of Legislation as implying that “statements in the *travaux préparatoires* should carry considerable weight in the many cases where they have been cogently thought out.”²⁵ However, the preparatory works “lose much of their guiding power in the exceptional cases where they can be called into question.”²⁶ However, it is not clear in what cases the *travaux préparatoires* are open to question.

Since the SAA is applicable to both domestic and international arbitration, and is therefore frequently applied by foreign practitioners, the role of the preparatory works (which is available only in Swedish) can lose some of its authority when the Act is construed.²⁷ Nevertheless, the views presented in the *travaux préparatoires* will be analysed and taken into account when appropriate, to achieve a thorough assessment of the subject.

(iv) *Case law*. In Sweden, judgments from the highest instances, *i.e.* the Supreme Court and Administrative Supreme Court, are precedents. Lower judiciary instances rarely deviate from precedents, but they are not obligated to follow them.²⁸ Although Sweden is not a common law jurisdiction, precedents are highly valued. A problem with the subject of this thesis is, however, that Swedish State courts have not dealt with the problem sufficiently to establish an exact legal position derived from case law. As a consequence, scholarly opinions will be discussed to a great extent.

²¹ SOU 1994:81, p. 74; Prop. 1998/99:35, p. 46.

²² Leijonhufvud (2010), p. 110.

²³ Prop. 1998/99:35, pp. 306-307.

²⁴ *Ibid.*

²⁵ Heuman (2003), p. 23.

²⁶ *Ibid.*

²⁷ *Cf.* Madsen (2007), p. 53; Shaughnessy (2005), p. 265.

²⁸ Heuman (2010), p. 131.

The sparsely but yet existing case law of the Supreme Court on the subject has addressed the role of *res judicata* in arbitration. The only case, which has explicitly dealt with *lis pendens* and arbitration, is the *CME* case,²⁹ where an arbitral award was challenged before the Svea Court of Appeal. The *CME* case, which is still the most fully argued case on *lis pendens* in investment treaty arbitration, will be thoroughly analysed.

(v) *Arbitral awards*. An arbitral tribunal renders its final decision in an arbitral award. The arbitral awards are only binding upon the parties to that particular arbitration and therefore, there is no place for the doctrine of *stare decisis* in international arbitration. As a consequence, arbitral awards have no *de jure* precedence.³⁰ However, it can be argued that it exists a *de facto* doctrine of *stare decisis* in international arbitration, not because arbitral tribunals have a legal obligation to follow prior decisions, but in the meaning that prior holdings offer insight into how specific issues previously have been adjudicated.³¹ References to prior decision by arbitral tribunals thus offer a possibility of consistency and predictability in international arbitration.³² Further, “[...] arbitral awards have played significant roles in the development of fundamental aspects of the international arbitral process.”³³ Arbitral awards are often considered in the research and practice of international arbitration, as they can offer persuasive legal reasoning on particular issues. Hence, arbitral awards will be referred to throughout the text.

(vi) *Soft law*. In a number of cases,³⁴ the Swedish Supreme Court has referred to what can be defined as “non-legal soft law”, for example non-binding recommendations, principles and codes of conduct drafted and agreed upon by international or regional organisations.³⁵ Although not binding upon States, “non-legal soft law” will be discussed in this thesis. The International Commercial Arbitration Committee of the International Law Association (“ILA”) expressly addressed *lis pendens* in relation to arbitration and issued recommendations to arbitrators on how to handle such issues.³⁶ Naturally, the recommendations, and the report attached to it, have been relevant when researching the subject and will be referred to throughout the text.

1.2.2. *De Lege Ferenda*

The purpose of the thesis is clearly normative. Consequently, the thesis will, based on the investigation and discussion *de lege lata*, put forward two propositions *de lege ferenda*. However, there will not be strict line between the *de lege lata* and *de lege ferenda* approaches in the text. Discussions, focusing on the appropriateness of the solutions adopted *de lege lata*, will be conducted throughout the text. This approach has been chosen, since it offers a possibility to address and fully argue one solution or issue at a time, from both perspectives. If the approach *de lege ferenda* and *de lege lata* had been strictly divided, there would have been numerous iterations on several issues, which has now been avoided.

²⁹ See, *infra*, section 5.3.

³⁰ Rosenne (1984), p. 91.

³¹ Bhala (1999), pp. 937-938; Strong (2009), para. 5.21.

³² Kaufmann-Kohler (2007), p. 378.

³³ Born (2009), pp. 2965-2966.

³⁴ The Swedish Supreme Court has referred to the ICC Rules, the SCC Rules and the IBA Guidelines, stating that albeit not formally binding they could be taken into consideration due to their similarity with Swedish domestic rules and the commonly existing international characteristic of arbitration procedures, see, *inter alia*, *A. Jilkén v Ericsson AB* (NJA 2007 p. 841) and *Korsnäs AB v AB Fortum Värme samägt med Stockholms stad* (NJA 2010 p. 317).

³⁵ Chinkin (1989), p. 851; Boyle (1999), p. 901 *et seq*; Senden (2004), pp. 112-113. See also Gruchalla-Wesierski (1984), p. 48 that enunciate that the difference between “soft law” and customary international law is that the latter need no recorded form.

³⁶ *Supra*, fn. 5.

In the final chapter, which mainly takes a *de lege ferenda* perspective, outlooks will be made into other areas of law. Thus, the argumentation will be more freely conducted, which has been done in order to find and put forward pragmatic, practice-driven, solutions. The discussion and conclusions made throughout the text, serves as a background for the two propositions that will be put forward and argued in the final chapter. Thus, the last chapter summarises and build up the interim conclusions made in previous chapters into propositions on how to resolve *lis pendens*.

1.2.3. Comparative Methodology

Needless to say, *lis pendens* is not just a Swedish phenomenon, but rather a doctrine known in virtually all developed jurisdictions. As the legal issue dealt with in this text does not just exist in Swedish law, but also in foreign law, a comparative law approach has been adopted. This has been considered relevant, since arbitrators seated in Sweden, or possibly even a Swedish State court, might turn to foreign law to find sensible solutions. For example, the Swedish Svea Court of Appeal held that it had reason to address public policy from an international perspective, where a case brought before it concerned an international arbitration and a party invoked the invalidity ground set out in Section 33 of the SAA, which focuses on the Swedish legal system.³⁷ It is not asserted that a State court in Sweden would treat public policy and *lis pendens* equally in this respect. However, the example shows the importance of a comparative approach, since foreign and international law might affect Swedish law.

In addition, to fulfil the purpose of the thesis, it has been required to find solutions that will fit well with international trends and approaches. The comparative perspective has been fruitful to utilise as it offers a possibility to compare how *lis pendens* has been resolved in different jurisdiction. Foreign material, for example judgments, has been selected from a relevance criterion.³⁸ The comparisons have been especially relevant when discussing *de lege ferenda*, since the comparative approach in that context offers a possibility to find a sound and preferable solution to the research inquiry.³⁹ One could argue that this is not comparative law. It might, therefore, be fair to say that this thesis is not comparative law; it is research with the use of a comparative methodology, in order to gain broader and deeper knowledge on the issue.⁴⁰

1.3. Key Terms

Already at the outset of the thesis, the terms “international commercial arbitration” and “investment treaty arbitration” have been used numerous times, and it will be used throughout the text. In this section, these denominations will be briefly explained. In addition, it will be discussed why there exists an inherent potential for parallelism in both these sets of mechanisms for dispute resolution.

1.3.1. International Commercial Arbitration

Four fundamental principles can be identified in order to define “arbitration”:⁴¹

- The parties have chosen to arbitrate and therefore, arbitration is both selected and controlled by the parties;

³⁷ *National Joint-Stock Company “Naftogaz of Ukraine” v Italia Ukraina Gas S.P.A*, Judgment of the Svea Court of Appeal on July 2, 2012 (Case No. T 611-11), p. 15. See also *CME Czech Republic B.V. v The Czech Republic* (RH 2003:55), where the Svea Court of Appeal argued that “a couple of arbitral awards have been invoked from which it at least is evident, that the dispute has been considered to be the same in different arbitration proceedings which were brought under two different treaties.”, SAR 2003:2, p. 186 (unofficial translation).

³⁸ See further, section 1.4, addressing the delimitations of the thesis.

³⁹ Bogdan (1994), p. 22.

⁴⁰ Cf., *ibid.*, pp. 23-24.

⁴¹ Lew, Mistelis & Kröll (2003), paras. 1-7 to 1-12.

- Arbitration is an alternative to national courts since the parties have obviated the jurisdiction of State courts by their agreement to arbitrate;
- It is a private dispute resolution mechanism, in contrast to public court proceedings;
- Based on the arbitration agreement, parties have accepted that the arbitrator will resolve the dispute in a final and binding decision.

The most sensible way to define the term “commercial” would be in its broadest sense, including all aspects of international business,⁴² focusing on the nature of the underlying transaction.⁴³ The term “international” is used in the thesis to distinguish between arbitration that is domestic or national, from the ones that transcend national boundaries and thus are international.⁴⁴ A more proper way to define the latter would perhaps be “transnational arbitration”. Nevertheless, the term international will be used, since “international commercial arbitration” is the established term,⁴⁵ used by scholars and practitioners.

Arbitration is consensual in its nature. Thus, it might be thought that parallel proceedings between State courts and arbitral tribunals would be avoided when parties have agreed to arbitrate their disputes, since one of the main consequence of an arbitration agreement is to oust the jurisdiction of national courts. However, such conclusion rests on the view that the parties have a complete consensus on the validity of the arbitration agreement as well as its application to the dispute, which is not always the case. A legitimate uncertainty as to the validity of the arbitration would be a perfectly good reason for a party to bring an action to court. However, parallelism may also occur as a result of dilatory tactics, in order to frustrate the arbitration agreement and prevent its enforcement.

1.3.2. *Investment Treaty Arbitration*

Foreign investors are able to protect their investment in various ways. Investors may negotiate and agree upon contracts with the host State, which may contain arbitration clauses. Such provisions may provide for arbitration before an *ad hoc* tribunal, but can also refer the parties to settle their disputes under the auspices of the International Centre for Settlement of Investment Disputes (“ICSID”) Convention. The possibility to initiate proceedings under the ICSID Conventions is confined to situations where both the host State of the investor and the host State are party to said Convention.⁴⁶

Individual contracts are not, however, the only way for an investor to pursue a claim against a host State. Second, there exist thousands of multi- and bilateral investment treaties,⁴⁷ which commonly contain investor-State provisions on mechanisms for dispute settlement. Simply put, such investment protection treaties can be said to imply a standing offer to submit disputes to arbitration, should specific conditions be satisfied.⁴⁸ When such conditions are met, investors from a State that has an investment treaty with the host State may choose to accept the offer to resort to international arbitration.⁴⁹

There are at least three characteristics of investment treaty arbitration, which contribute to an increased potential of parallel proceedings. First, investment arbitration was instituted as an alternative forum to the courts of the host State. The courts of the host State are, however, rarely excluded from adjudicating a foreign investment dispute. On

⁴² Redfern & Hunter (2009), para. 1.36.

⁴³ Lew, Mistelis & Kröll (2003), para. 4-4.

⁴⁴ Redfern & Hunter (2009), para. 1.16.

⁴⁵ See, *inter alia*, the New York Convention and Article 1(1) of The Model Law.

⁴⁶ Further, for ICSID arbitration, specific jurisdictional requirements must be met.

⁴⁷ Throughout the text, examples will be given to bilateral investment treaties, not multilateral.

⁴⁸ Bjorklund (2007), p. 252; Cremades & Cairns (2005), p. 25.

⁴⁹ *Ibid.*

the contrary, under most bilateral investment treaties (“BITs”), an investor would be equally entitled to submit its claim to the courts of the host State, as to arbitration under the treaty.⁵⁰ Thus, investment treaty arbitration is, in lack of specific BIT provisions, a non-exclusive venue for the settlement of foreign investment disputes.

Second, most BITs do not require an investor to exhaust all local remedies, but the investor would be free to submit its case to an international arbitral tribunal at once,⁵¹ should the treaty be silent on this issue.⁵² Hence, the investor may simultaneously pursue a claim before an international tribunal as well as before a national court of the host State. Third, “investment” has a somewhat broad definition under many bilateral treaties,⁵³ thereby enabling different entities in an investment chain to pursue with substantially the same claim under separate treaties against the same host State.⁵⁴ Since there is a myriad of applicable BITs, there is an evident risk of investors pursuing the same factual dispute under two separate treaties that would result in two international investment tribunals simultaneously seized of the same claim.

1.4. Delimitations

The comparative approach taken in the thesis should not be seen as an attempt of a full inventory on foreign countries’ entire law regime in relation to *lis pendens arbitralis*. Instead, the comparative approach should be seen as a way to review cases and commentary that are widely discussed and referred to in international practice and doctrine. The choice of relevant jurisdictions has been based mainly on two variables. First, some of the major arbitration jurisdictions are, in alphabetical order, England, France, Switzerland and the United States. Consequently, the research has especially focused on these jurisdictions. Second, given the linguistic limitations of the author, primary sources in French have not been able to be considered. However, there exist an abundance of scholarly comments on French and Swiss arbitration law, which has been employed in order to grasp the relevant features of central issues and cases.

The thesis has its emphasis on the approach taken by arbitral tribunals. Consequently, the position on how State courts ought to handle a case simultaneously pending in a different jurisdiction has been somewhat secondary. A result of this delimitation is that the propositions solely address how arbitral tribunals should handle *lis pendens*. Moreover, the chapter focusing on Swedish law swiftly addresses how courts are to handle a case concurrently pending before an arbitral tribunal.

Chapter four specifically addresses *lis pendens* in investor-State arbitration. When discussing the current legal position in investment treaty arbitration, it has not been possible, due to the limited space, to give examples of, and refer to, specific treaties. Moreover, State-to-state (also termed interstate) arbitration will not be discussed in the thesis in any detail. However, a few references will be made to case law concerning interstate arbitration, since it may also affect other areas of international arbitration law. An example is the *MOX Plant* dispute,⁵⁵ which is highly interesting in relation to

⁵⁰ McLachlan (2009), p. 254.

⁵¹ Crawford (2009), p. 2; McLachlan (2009), p. 254.

⁵² Article 26 of the ICSID Convention stipulates “A Contracting State may require the exhaustion of local [...] remedies as a condition of its consent to arbitration [...]”

⁵³ McLachlan (2009), p. 255; McLachlan, Shore & Weiniger (2007), para. 6.04 *et seq.*

⁵⁴ A text-book example of this is the *CME* case, *see, infra*, section 5.3.

⁵⁵ The *MOX Plant* dispute between Ireland and United Kingdom was, to say the least, a lengthy and extensive litigation affair that involved proceedings before a number of international courts and arbitral tribunals. For a summary and comment, *see* Schrijver (2010), p. 1-18. All decisions and orders issued in the *Mox Plant* case is published in Bosman, Lise & Clark, Heather (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.

parallel proceedings and might have effect to a wider range of cases. Consequently, some brief comments will be made to interstate arbitration cases in the final chapter.

Given the limited format, it will not be possible to present a discussion on *lis pendens* in relation to provisional measures in international arbitration.

1.5. Structure

The second chapter will provide a brief presentation on *lis pendens* and its role in international arbitration, in order to provide a context for the research inquiry.

In chapter three, solutions adopted to handle parallel proceedings in relation to international commercial arbitration will be presented. The fourth chapter will focus on parallel proceedings in investment treaty arbitration. These two chapters thus identify and distinguish the issues raised by parallel proceedings in an international context and more importantly, how they have been resolved.

In chapter five, the legal position on *lis pendens* and arbitration in Swedish law will be considered. In the final chapter, two propositions are put forward, taking a *de lege ferenda* approach.

2. *Lis Pendens Arbitralis*: a Brief Presentation

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. By way example, where a second seised forum should dismiss its proceedings due to the simultaneous pendency of a claim, it is coined *lis pendens*. When discussing the term from a comparative law approach, such use is somewhat misleading, since “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.”⁵⁶ In this thesis, *lis pendens* is used to denominate the situation when two, or more, adjudicatory bodies are simultaneously seised of the same dispute. Professor James Fawcett applies such definition, concluding that:

“[i]t is widely accepted that it is undesirable to have a situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different States at the same time (*lis pendens*).”⁵⁷ (emphases added).

The doctrine of *lis pendens* has undoubtedly evolved within national legal systems in order to prevent that two equally competent *fora* simultaneously exercise jurisdiction over the same case.⁵⁸ This can never be the case when litispendence is applied 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.”⁵⁹

However, both an arbitral tribunal and a State court may have competence to consider jurisdiction at the same time, which creates a potential for parallel proceedings. Such situation, where a State court and arbitral tribunal simultaneously exercise jurisdiction over a case, is very akin to the traditional, national, perception of *lis pendens*, i.e. two *fora* both with *prima facie* competent jurisdiction. This is so because litispendence denotes the situation when a case, a *lis*, is already pending elsewhere, *alibi pendens*. Applied between an arbitral tribunal and a State court, *lis pendens* thus occur should the case be pending on the merits or merely on jurisdiction.⁶⁰

Perhaps the most frequent rationale put forward for avoiding parallel proceedings is that, should the proceedings continue, it may result in conflicting judgments.⁶¹ This argument is closely linked to that of *res judicata*, especially the notion of *ne bis in idem*. However, *lis pendens* arises in a situation where no judgment exists. The rationale can thus be seen as a way to anticipate the *res judicata* effect in order to avoid inconsistent judgments.⁶² As a consequence, one can argue that this aim would be more

⁵⁶ McLachlan (2009), p. 36.

⁵⁷ Fawcett (1995), p. 27. For a similar definition, see Geisinger & Lévy (2003), p. 53; Poudret (2001), p. 147 and p. 153; Cremades & Madalena (2008), p. 509.

⁵⁸ Söderlund (2005), p. 302.

⁵⁹ Geisinger & Lévy (2003), p. 53.

⁶⁰ Poudret (2001), p. 153.

⁶¹ The ECJ has expressed avoidance of irreconcilable judgements as the main objective of *lis pendens*, see, for example, *Gubish Maschinenfabrik KG v. Palumbo*, Case 144/86, hereinafter “Gubish Maschinenfabrik”, para. 8; *Dumez France and Tracoba v Hessische Landesbank and Others*, Case C-220/88, paras. 18-19; *Overseas Union Insurance Ltd v. New Hampshire Insurance Co*, Case C-351/89, para. 15.

⁶² *Gubish Maschinenfabrik*, para. 8, where the ECJ stated that the *lis pendens* rule in the Brussels Regulation is designed to preclude “the possibility of a situation arising such as that referred to in Article 27(3)”. See also Redondo (2010), p. 1131.

efficiently realised by applying the doctrine of *res judicata*, once a judgment is pronounced.⁶³

There are, however, particular considerations to why *lis pendens* should be avoided. First, litigation and arbitration is costly and time-consuming. In order to prevent such waste of resources, solutions to parallel proceedings may be adopted. Second, parallel proceedings are occasionally commenced for illegitimate reasons. An efficient way to protect parties from such obstructing tactics is to adopt techniques to resolve *lis pendens* situations.

2.1. The Identity Requirements

When determining whether there is identity between two claims in relation to both *res judicata* and *lis pendens*, State courts and international arbitral tribunals have generally considered three elements, namely (i) parties, (ii), grounds and (iii) object.⁶⁴ Grounds and object is a subdivision of the requirement of an identical issue (or subject-matter) of the proceedings concerned, which is a distinction clearly made in international law.⁶⁵ It is evident that international adjudicatory bodies tend to apply the “triple identity test” strictly, in the meaning that for *lis pendens* or *res judicata* to apply, all conditions must be met.⁶⁶ In this section, the three conditions of identity will be succinctly discussed and thereafter, the triple identity, as assessed by the ECJ, will be briefly presented.⁶⁷ Finally, the section will introduce the main issue of the triple identity test in investment arbitration.

(i) *Same parties* (personae). “Same parties” is unequivocally held as a condition for the application of *lis pendens* in virtually all published international cases. International tribunals have construed the condition same parties rather narrowly and the dominant test has been that of “virtual identity” or that parties are considered to be essentially the same.⁶⁸

(ii) *The cause/ground on which the action is brought* (causa petendi). The meaning of the *causa petendi* condition is that the same rights and legal arguments are relied upon in different proceedings. In international law, it appears that where new rights are asserted, there is a new case, which should not be barred by a previous decision even if the parties and relief should be the same.⁶⁹ Consequently, and by way of example, an object based on a distinct injury would be seen as asserting a new right and would thus be considered as a new case.

(iii) *Same object/relief* (petitum). Identical object implies that the same type of remedies is sought in different proceedings. International tribunals have construed the identity of object broadly.⁷⁰ The rationale underpinning a broad interpretation of the

⁶³ Cf. McLachlan (2009), p. 25.

⁶⁴ 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, PCIJ, 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, hereinafter “Trail Smelter Case”, p. 1952; *Buyer v Seller*, Partial Award, ICC Case No. 9787, 1998, p. 186; *Licensor v Licensee*, Final Award, ICC Case No. 6363, 1991, p. 197. For commentary, see Cheng (1953), p. 336 *et seq.*; Born (2009), p. 2885; Sheppard (2005), p. 231.

⁶⁵ Cheng (1953), p. 343; Reinisch (2003), p. 61.

⁶⁶ *Ibid.*

⁶⁷ The triple identity test will be discussed in more detail in chapter 6.

⁶⁸ Reinisch (2003), p. 55 *et seq.*

⁶⁹ Cheng (1953), p. 345.

⁷⁰ Bjorklund (2007), p. 302. It has also been argued that international tribunals have not, at all, applied the *petitum* as an element of *res judicata*. Cheng (1953), p. 343.

petitum is probably that a party should not be able to re-litigate a claim by a minor modification of the relief sought, a phenomenon known as claim splitting.⁷¹ Further, if the *petitum* were construed too restrictive, the risk is that *lis pendens* or *res judicata* would rarely apply.

The ECJ has also favoured a strict application of the triple identity test when construing the Brussels Regulation. In *Gubish Maschinenfabrik*, the ECJ held that the concept of “the same cause of action” should be given an independent interpretation.⁷² Further, it has stated that two claims, based on the same contractual relationship and thus the same cause of action, have the same subject matter even where they are not entirely identical.⁷³ In *Tatry*,⁷⁴ the ECJ held that actions should be considered to have the same object when the results are essentially the same. In the same case, the ECJ argued that two cases concern the same cause of action when the facts and rule of law, which the actions are based upon, are the same.⁷⁵

Further, the prerequisite “same parties” has, by the ECJ, been held to apply where there is identity of interest as between the parties. Consequently, the ECJ has argued that “it does not appear that the interests of the insurer of the hull of the vessel can be considered to be identical to and indissociable from those of its insured, the owner and the charterer of that vessel.”⁷⁶ It concluded that the test of identity and indissociability of interest should be assessed and applied by the national court.⁷⁷

The requirement of triple identity between disputes has turned out to be highly problematic in the area of investment arbitration.⁷⁸ Regarding the requirement of *causa petendi*, it is common that acts of States are subject to more than one investment treaty and thus also more than one dispute settlement mechanism. By way of example, an expropriation of property belonging to a foreign investor, may entitle to proceedings under separate treaty instruments.

In addition, the same parties condition raises difficult questions in investment arbitration, since it may be unclear whether, for example, the holding company of an investor operating through various subsidiaries, can be held identical to its other legal entities. Taken together with the complex criterion of *causa petendi*, this creates a potential for, e.g., different shareholders in the investment chain to pursue with substantially the same claim under separate treaties against the same host State. While some international tribunals take the position that the decisive test for determining identity between claims is legal and not factual, it can be argued that such distinction is somewhat artificial, since it enables a foreign investor to re-litigate the same factual dispute under separate treaties.⁷⁹

⁷¹ See, for example, *Piagentini v Ford Motor Company*, 387 Ill.App.3d 887, 891 (2009), p. 891, where the Appellate Court of Illinois, U.S., held that the rule against claim-splitting is “based upon the principle that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of lawsuits.”

⁷² *Gubish Maschinenfabrik*, para. 11.

⁷³ *Ibid.*, paras. 14-17.

⁷⁴ *The owners of the cargo lately laden on board the ship ‘Tatry’ v The owners of the ship ‘Maciej Rataj’*, Case C-406/92, para. 35.

⁷⁵ *Ibid.*

⁷⁶ *Drouot Assurances SA v Consolidated Metallurgical Industries*, Case C-351/96, para. 23.

⁷⁷ *Ibid.*

⁷⁸ It has also gained renewed importance in interstate arbitration, since States may also take recourse to different dispute settlement mechanisms under different treaties, see, for example, the *MOX Plant* case, *supra*, fn. 56 and *Southern Bluefin Tuna* case, *infra*, fn. 466.

⁷⁹ The contemporary problems of the triple-identity test in investment arbitration will be further discussed and analysed in sections 4.3 and 5.3. Further, the proposition in relation to parallel treaty arbitration will specifically address this issue, see, *infra*, section 6.2

2.2. Principles of Preclusion in International Arbitration

The *lis pendens* doctrine has a close relationship with the *res judicata* effect of a judgment.⁸⁰ It has been argued that:

“[...] the rule of *lis pendens* is a natural and rational complement to the rule of *res judicata*, more particularly to the negative effect side of the rule (*ne bis in idem*). [...] The relation between the two institutes may also be expressed by saying that where the *lis pendens* effect ceases, the *res judicata* effect commences.”⁸¹

As a consequence, preclusion principles in international arbitration will be presented in this section, in order to provide a context for the following chapters.

One of the fundamental principles in arbitration is to provide a final, binding decision on the dispute between the parties. If parties are not bound by the resolution of the dispute and are permitted to relitigate their previous disputes, an arbitral award loses its purpose and thus its practical value. In order to uphold the finality and binding effect of arbitral awards, the preclusive effect is of crucial importance.⁸² Such preclusive effect has a wide recognition in virtually all jurisdictions.

The preclusive effect of judgments is considered a general principle of law,⁸³ upheld by public policy considerations.⁸⁴ Principles of preclusion can, on an abstract level, be found in all developed jurisdictions but there is, however, little agreement on the details of the preclusive principles between jurisdictions.

It is a generally accepted that the doctrine of *res judicata* applies, to some extent, to arbitral awards. In addition to provisions on *res judicata* in municipal law, which might be applied analogously, preclusion principles are recognised as either a general principle of law or a rule of customary international law.⁸⁵ In its final award of 1941, the *Trail Smelter* arbitral tribunal stated that:

“the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law. If it is true that international relations based on law and justice require arbitral or judicial adjudication of international disputes, it is equally true that such adjudication must, in principle, remain unchallenged, if it is to be effective to that end.”⁸⁶

In order to systematise, the issue of preclusive effect of judgments and arbitral awards in international arbitration will be presented as follows. First, the general principles of preclusion adopted in civil law and common law jurisdictions will be discussed. Second, the preclusive effect of arbitral awards in subsequent national litigation will be discussed. Third, the preclusive effect of arbitral awards and court judgments in subsequent arbitration will be presented. Since the focus in this thesis lies on litispendence and not *res judicata*, this brief presentation on preclusion in international arbitration merely serves to put the discussion on *lis pendens arbitralis* in its context.

⁸⁰ In this thesis, *res judicata* is employed to describe the overarching doctrine of preclusion of a decision.

⁸¹ Pålsson (1970), p. 68.

⁸² These are the “two sides” of *res judicata*; namely the negative side often expressed in the Roman maxim *ne bis in idem* and the binding effect on the parties to what has been finally decided by an arbitral tribunal, cf. Hanotiau (2003), pp. 43-44; Cheng (1953), pp. 337-339.

⁸³ In his authoritative work on general principles of law as applied by international courts and tribunals, Cheng (1953), p. 336, stressed that “[t]here seems to be little, if indeed any question as to *res judicata* being a general principle of law or as to its applicability in international judicial proceedings.” See also Hanotiau (2003), p. 43; Reinisch (2003), p. 44 *et seq.*

⁸⁴ Born (2009), p. 2880; Brekoulakis (2005), p. 179.

⁸⁵ Hanotiau (2006), para. 538; Born (2009), p. 2886; Sheppard (2005), p. 227.

⁸⁶ *Trail Smelter Case*, pp. 1950-1951.

2.2.1. Res Judicata in Civil and Common Law Jurisdictions

For a judgment to qualify as *res judicata* it must, sweepingly put, be a final and conclusive judicial judgment on the merits of a claim, rendered by a judicial tribunal of competent jurisdiction.⁸⁷ In most common law jurisdictions, two basic *res judicata* principles are recognised: cause of action estoppel (also termed “claim preclusion”) and issue estoppel (also termed “collateral estoppel” or “issue preclusion”).⁸⁸ Foreign judgments can have preclusive effect just as national judgments, but it requires that the foreign judgment has *res judicata* effect in the jurisdiction where it was rendered and that it must be recognised in the country where it is relied upon.⁸⁹

In common law systems, cause of action estoppel provides that a judgment on a cause of action (or claim) is binding upon the parties to that proceeding. A party is thus precluded from bringing the same cause of action against the same counter-party in subsequent judicial proceedings.⁹⁰ However, the claim, or cause of action, subject to preclusion also include all claims or rights of legal action arising from a single set of facts or a single transaction. Consequently, the preclusive effect of cause of action estoppel extends further than the claim actually adjudicated, including closely related claims or causes of action that might have been litigated (irrespective of whether or not they have).⁹¹

Separate from cause of action estoppel in common law jurisdictions is the doctrine of issue estoppel (also termed issue preclusion or collateral estoppel). Issue estoppel has a broader preclusive effect than cause of action estoppel and serves to prevent relitigation of factual or legal issues, which has previously been distinctly raised and finally adjudicated between the same parties.⁹² The issues must have been previously litigated and significant to the previous judgment.⁹³ In summary, issue estoppel can be described as an “authoritative determination of the whole ‘story’ of the dispute.”⁹⁴

The third principle of preclusion is often referred to as merger in judgment, which gives rise to the preclusive plea of “former recovery”. The plea of former recovery presupposes a judgment on a cause of action and operates against the party “in whose favour a judicial tribunal of competent jurisdiction has pronounced a final and conclusive judgment *granting recovery or relief* upon that claim or cause of action.”⁹⁵ If such situation is at hand, the cause of action has been previously affirmed and thus, the cause of action is merged into the judgment. The prior decision, which granted the recovery or relief, operates as a bar for the claimant to seek it again, if the claimant has already recovered against the same respondent upon the same claim.⁹⁶ Consequently, a party that has already been granted a relief is precluded from reasserting the same cause of action in order to seek further relief.

In addition to the preclusion principles discussed above, there is an extended doctrine of *res judicata* based on abuse of process. Such plea serves to “preclude a party from

⁸⁷ Bower & Turner (1969), para. 20; Barnett (2001), para. 1.18; Born (2009), p. 2881.

⁸⁸ Born (2009), p. 2881; Hanotiau (2003), p. 45; Redfern & Hunter (2009), para. 9.140.

⁸⁹ Sheppard (2005), p. 224.

⁹⁰ Barnett (2001), para. 1.39; Sheppard (2005), p. 224.

⁹¹ Born (2009), p. 2882.

⁹² Barnett (2001), para. 1.40; Veeder (2003), p. 74; Brekoulakis (2005), p. 182; Sheppard (2005), p. 224. In some jurisdictions, for example the United States, the preclusive effect might even extend to non-parties of a prior litigation against a party to the prior litigation, *see further* Born (2009), p. 2883.

⁹³ Barnett (2001), para. 1.40. This excludes preclusion of *obiter dictum* and issues not previously adjudicated, *see* Born (2009), p. 2882.

⁹⁴ Brekoulakis (2005), p. 182.

⁹⁵ Barnett (2001), para. 1.41.

⁹⁶ *Ibid.*

raising, in a subsequent litigation, an issue or claim that could have been asserted in earlier litigation against the same party, but was (improperly or inequitably) not so asserted.”⁹⁷ The rationale for applying such plea is that the whole case should be brought before the court in order to finally decide all aspects of the case. Parties, which do not bring the whole case before the court will, consequently, be precluded to return, “only because they have, from negligence, inadvertence, or even accident, omitted part of their case.”⁹⁸

In most civil law countries, principles of preclusion are subject to codification.⁹⁹ Being equivalent to cause of action estoppel in common law jurisdictions, the preclusive effect is generally less extensive in civil law countries. The preclusive effect will only extend to the operative part of the judgment, not the reasons.¹⁰⁰ Thus, it is usually held that there is no issue estoppel in civil law jurisdictions. While this may seem clear-cut at the surface, it might be more complicated since “the reasons for a decision may partake of the *res judicata* effect that applies to the operative part.”¹⁰¹

2.2.2. Preclusive Effect of Arbitral Awards in National Courts

While there is general acceptance that *res judicata* applies to international arbitral awards, there is no uniformity in municipal law on the details of the preclusive effect.¹⁰² Article III of the New York Convention contains a provision recognising *res judicata*:¹⁰³

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in the following articles.” (emphasis added).

Under United States law, arbitral awards have similar preclusive effect to that of judicial judgments¹⁰⁴ In England; arbitral awards are considered to have the preclusive effect of both cause of action and issue estoppel.¹⁰⁵ However, for an arbitral award to have *res judicata* effect in England, it must meet the same criteria as a foreign judgment: there must be a final award on the merits, rendered by an arbitral tribunal of competent jurisdiction and it must be recognised in England.¹⁰⁶

The Model Law does not contain a specific provision on *res judicata*, save for Article 35(1), stipulating that once an arbitral award has been rendered it should be recognised as binding. Some countries, for instance Germany, Belgium and Japan, have added specific provisions on *res judicata* when implementing the Model Law.¹⁰⁷

Arbitration acts in some civil law jurisdictions provide that the award will have *res judicata* effect from the moment it is rendered.¹⁰⁸ If an arbitration statute does not provide for *res judicata*, provisions on civil procedural law will normally apply by way of analogy. In Sweden, arbitral awards are considered, by way of analogy to the

⁹⁷ Born (2009), p. 2883. The origin of the doctrine abuse of process is *Henderson v Henderson* [1843] 3 Hare 100, 67 ER 313, hereinafter “Henderson v Henderson”.

⁹⁸ *Henderson v Henderson*, p. 115.

⁹⁹ Born (2009), p. 2884. In Swedish civil procedural law, *res judicata* is codified in the Swedish Code on Judicial Procedure (“CJP”), Chapter 17, Section 11.

¹⁰⁰ Söderlund (2005), pp. 301-302; Sheppard (2005), p. 226.

¹⁰¹ Hanotiau (2006), para. 534.

¹⁰² Söderlund (2005), p. 303; Redfern & Hunter (2009), para. 9.140.

¹⁰³ For commentary, see Born (2009), p. 2888 *et seq.*; Hanotiau (2006), para. 542.

¹⁰⁴ Born (2009), p. 2894; Sheppard (2005), p. 226.

¹⁰⁵ *Ibid.*, pp. 2903-2905; Bower & Turner (1969), para. 218.

¹⁰⁶ Sheppard (2005), p. 225.

¹⁰⁷ Born (2009), pp. 2893-2894; Gaillard & Savage (1999), para. 1419; Lew, Mistelis & Kröll (2003) para. 24-63.

¹⁰⁸ Hanotiau (2006), para. 533; Gaillard & Savage (1999), para. 1419.

Swedish Code on Judicial Procedure (“CJP”), to preclude subsequent proceedings on the grounds of *res judicata*.¹⁰⁹ A claim already adjudicated should thus be dismissed.¹¹⁰ In Swedish arbitration law, it is considered that questions outside the arbitration agreement do not have preclusive effect should an arbitral award be rendered.¹¹¹ This is so because an arbitral tribunal has no jurisdiction beyond the arbitration agreement. However, if parties have brought claims before an arbitral tribunal and no objection regarding jurisdiction is timely raised, the parties have expanded the arbitration agreement.

2.2.3. Preclusive Effect of Arbitral Awards and Court Judgments in Arbitration

In international commercial arbitration, the preclusive effect is not limited to court judgments, but do also extend to arbitral awards.¹¹² An arbitral tribunal has an obligation to consider the preclusive effect of a prior judicial decision, but it does not have to take note of prior awards *ex officio*.¹¹³ Where a party raises an objection based on *res judicata*, failure by the tribunal to apply rules of preclusion “would be subject to serious enforceability challenges in many jurisdictions.”¹¹⁴ As put by one arbitral tribunal, “[w]here there is, cumulatively, identity as regards parties, subject matter of the dispute *petitum*, and *causa petendi*, between a prior judgment and a new claim, the new claim is barred by the principle of *res judicata*.”¹¹⁵

It can be argued that an arbitral tribunal, when faced with a prior judgment of a foreign State court, ought to consider whether or not the judgment was pronounced despite a valid arbitration agreement.¹¹⁶ The reason for this is that the arbitral tribunal should rule on its jurisdiction autonomously, irrespective of whether a State court has previously considered itself competent.¹¹⁷ It would be different if an arbitral tribunal rendered the prior decision. In such situation, the prior arbitral award would preclude subsequent arbitration proceedings since the “mere existence of the award will be enough to constitute a procedural bar based on *res judicata* against a second arbitration.”¹¹⁸

However, this begs further questions, one of them being the choice-of-law treatment when applying *res judicata*. Traditionally, arbitrators have applied national rules when assessing the preclusive effect of a prior award in international arbitration.¹¹⁹ When determining the applicable law, arbitral tribunals normally apply either “(i) the law of the State of the prior award, and/or (ii) the law of the seat of the second arbitration.”¹²⁰ The most favoured choice between them seems to be that of the arbitral seat.¹²¹ However, it can be called into question how appropriate this choice-of-law treatment really is within the context of international commercial arbitration. Arbitral tribunals seem to take a more pragmatic view and have developed a *sui generis* approach to international preclusion principles.¹²²

¹⁰⁹ See, *infra*, section 5.1 with further references to relevant case law and scholarly opinions.

¹¹⁰ Heuman (2003), p. 357.

¹¹¹ *Ibid.*, p. 358.

¹¹² Born (2009), p. 2914.

¹¹³ Söderlund (2005), p. 303.

¹¹⁴ Born (2009), p. 2914.

¹¹⁵ *Licensor v Licensee*, Final Award, ICC Case No. 6363, 1991, p. 197.

¹¹⁶ Söderlund (2005), p. 305 *et seq.*

¹¹⁷ Leboulanger (2007), pp. 16-17; Park (2007), p. 56.

¹¹⁸ Söderlund (2005), 309. See also Born (2009), pp. 2913-2914.

¹¹⁹ Hobér (2011), para. 7.134.

¹²⁰ *Ibid.*, para. 7.135.

¹²¹ Born (2009), p. 2916.

¹²² *Ibid.*, p. 2917; Sheppard (2005), p. 229.

3. *Lis Pendens* in International Commercial Arbitration

As noted before in this thesis, the principle of *lis pendens* does not refer to only one solution to parallel proceedings. From a comparative perspective, it is possible to point out four ways in which a court may generally handle *lis pendens*, namely:¹²³

- to decline jurisdiction or stay its own proceedings;
- to restrain foreign proceedings;
- both sets of proceedings can be allowed to continue; and/or
- mechanisms to encourage parties to opt for trial in only one forum can be adopted.

However, the possible solutions are somewhat different when it comes to parallel proceedings between an arbitral tribunal and a State court (or two arbitral tribunals) in an international setting. This chapter begins by examining theories of *lis pendens* employed in domestic law. To transform national solutions into an international setting has the disadvantage of not avoiding divergent solutions worldwide, since different jurisdictions adopt a wide variety of *lis alibi pendens* principles. Moreover, national doctrines of *lis pendens* are not developed to consider parallelism as between arbitral tribunals and State courts. Hence, it will be argued that to transpose municipal *lis pendens* principles into an international setting is inappropriate. Rather, the chapter argues that a sound solution begins by examining the priority for arbitration enshrined in the New York Convention and implied by the positive effect of the *compétence-compétence* doctrine.¹²⁴

State courts can order the parties over which it has jurisdiction, not to pursue before another forum, and such an order may be issued in aid of arbitration. The use of such anti-suit injunctions in order to control parties not to pursue (or continue) foreign proceedings will finally be discussed.

3.1. Theories of *Lis Pendens* in Domestic Law

A first solution to *lis pendens* in international arbitration is to transpose principles established in domestic law, applicable between a domestic and a foreign court (or two domestic courts), into the relationship between an arbitral tribunal and a State court.¹²⁵ The theories that will be discussed in the section is (i) tolerance of parallel proceedings (ii) the mechanical first-seised approach, (iii) *forum non conveniens* and (iv) the technique of recognition prognosis. These theories are not uniform but are applied in national law to decline jurisdiction due the simultaneous pendency of the same claim.

3.1.1. *Tolerance of Parallel Proceedings*

A first theory of *lis pendens* is to simply tolerate that an action is pending elsewhere and allow both sets of proceedings to continue simultaneously. Such approach is the generally preferred in many United States jurisdictions.¹²⁶ Questions relating to conflicting judgments could then subsequently be handled by the rules on recognition

¹²³ Fawcett (1995), p. 28; Born (1996), pp. 459-460.

¹²⁴ Albeit established in scholarly writing, the German legal term *Kompetenz-Kompetenz* refers to an extreme degree of the arbitrators' power to establish their jurisdiction and will thus not be employed in this text. The French term *compétence-compétence* is therefore used to denote that the arbitral tribunal are competent to rule on its own jurisdiction, which may be subject to judicial review. On this issue, see Gaillard & Savage (1999), paras. 650-651; Schlosser (2001), p. 25; Brekoulakis (2009), p. 238, fn. 2.

¹²⁵ Cf. ILA Final Report on *Lis Pendens* and Arbitration, para. 4.6.

¹²⁶ Born (1996), p. 460.

and enforcement of a judgment, by applying the doctrine of *res judicata*.¹²⁷ This approach was adopted in *Laker Airways*, where the judge held that:

“the fundamental corollary to concurrent jurisdiction must ordinarily be respected: parallel proceedings on the same *in personam* claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as *res judicata* in the other.”¹²⁸ (emphasis added).

To allow both proceedings to continue is completely contrary to the rationales underpinning the application of *lis pendens*. The result would be that parties have to pursue before multiple *fora*, which is certainly a waste of time and resources. Moreover, the potential for irreconcilable judgments would considerably rise. As put 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*.” Consequently, to simply tolerate that different *fora* concurrently proceed with their proceedings, is not advised.

3.1.2. *The Mechanical First-Seised Approach*

In Swedish procedural law, a pending action constitutes a procedural impediment and generally, the court second seised should dismiss the claim. Chapter 13, Section 6 of the CJP provides that “[w]hile an action is pending, a new action involving the same issue between the same parties may not be entertained.” This is a typical example of a first-to-file rule.

Another typical example of the first seised approach is found in Article 27 of the Lugano Convention, which provides that:

“1. Where proceedings involving the same cause 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.”

This, rather simplistic approach to *lis pendens*, creates potential for something known as “Italian torpedoes”. Suppose that two parties have agreed to submit all disputes between them to the courts of a country party to the Lugano Convention, here referred to as country A. The parties have thus agreed on a perfectly valid choice of forum clause, but have not yet initiated proceedings in Lugano country A. Under Article 27 of the Lugano Convention, all that a recalcitrant party has to do to frustrate the forum clause, is to submit the dispute to Lugano country B. The respondent would, in such situation, obviously invoke the choice of forum clause. Suppose, also, that the courts of Lugano country B would, in the end, reach the conclusion that the choice of forum clause is valid. That could, however, take several years. In the meantime, any other court – even the court provided for in the choice of forum clause – must stay its proceedings according to Article 27 of the Lugano Convention. This creates a race to the courthouse, which is one of the reasons to why the first-to-file solution works poorly in an international context.

¹²⁷ McLachlan (2009), p. 60; Fawcett (1995), p. 28; Born (1996), p. 460; ILA Final Report on *Lis Pendens* and Arbitration, para. 2.4.

¹²⁸ *Laker Airways Ltd v Sabena, Belgian World Airlines*, 731 F.2d 909, United States Court of Appeals, D.C. Circuit (1984), pp. 926-927. However, the judge noted that proceedings *in rem* is generally restricted to one forum, *see, ibid.*, fn. 48 with further references.

This was also the unsatisfactory situation under the Brussels Regulation 44/2001,¹²⁹ but has been changed in the revised version. Article 31(2) of the recast Brussels Regulation contains an exception to the previous, absolute 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 where it was not first seised.

This is an improvement from Regulation 44/2001, but the situation is still the same under the Lugano Convention. According to Article 73(1) of the revised Brussels Regulation, it “shall not affect the 2007 Lugano Convention”. Hence, if a dispute concerns a Swiss party or should a contract confer exclusive jurisdiction upon a Swiss court, such dispute falls under the Lugano Convention. Consequently, the problematic approach to *lis pendens*, set out in the Lugano Convention, would apply and it would thus be possible to “torpedo” in such situation. What this shows is that, while a mechanical first-to-file rule might be appropriate in municipal law, where the only rationale is to prevent duplication, its use in an international context is highly problematic and is thus not an appropriate solution to *lis pendens* in an international setting.

3.1.3. Forum Non Conveniens

Forum non conveniens confers a discretion upon courts to decline exercising its jurisdiction in favour of courts in another jurisdiction where the case is already pending.¹³⁰ When the doctrine of *forum non conveniens* is applied, *lis pendens* is one several factors that is taken into account when the court will make an assessment on its jurisdiction. Under the doctrine of *forum non conveniens*, it is not decisive which of the two *fora* that was first seised of the claim. For example, an English State 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 try the case and where it is not unjust to deprive the claimant the right to trial in England.¹³¹ If a claim falls under the Brussels Regulation/Lugano Convention, the courts’ discretionary power is restricted, and the application of *forum non conveniens* has been clouded due to certain provisions in the Regulation.¹³²

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 might consider itself to be the appropriate forum. On the other hand, where the foreign proceedings is 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 where the parties to the proceedings 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.¹³³ However, where a tribunal is faced with a case, which is clearly more appropriate to be

¹²⁹ Cf. *Erich Gasser GmbH v MISAT Srl*, Case C-116/02.

¹³⁰ Brand & Jablonski (2007), p. 1. It is mainly applied in common law countries, *see, ibid.*

¹³¹ 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 (2007), p. 21 *et seq.*

¹³² Brand & Jablonski (2007), p. 25.

¹³³ Bjorklund (2007), pp. 305-306.

heard in a different forum, for example if the subject matter requires particular expertise, *forum non conveniens* may be a useful technique to apply.¹³⁴

3.1.4. Recognition Prognosis

A third approach is 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 enforceable (and/or recognisable) in country A.¹³⁵ Thus, such *lis alibi pendens* solution is linked to the enforceability of the foreign judgment or award. This technique is based on States' treaty obligations,¹³⁶ e.g. the Brussels Regulation or the Lugano Convention. The recognition prognosis is thus more of a mechanical rule than a discretionary rule, since it should be adopted by analysing if a foreign judgment is enforceable, rather than deciding the most appropriate forum.¹³⁷

The technique is found in some bilateral treaties on enforcement of foreign judgments.¹³⁸ A good example of the enforcement approach to *lis pendens* can be found in the multilateral Convention on the Contract for the International Carriage of Goods by Road ("CMR") of 1956. Article 31(2) *in fine* of said Convention provides that "no new action shall be started between the same parties on the same grounds unless the judgement of the court or tribunal before which the first action was brought is not enforceable in the country in which the fresh proceedings are brought." However, this does not extend to arbitration proceedings but is nevertheless one of few examples of a rule based on the recognition prognosis approach.

The rationale behind the adoption of the recognition prognosis technique is thus as follows. A party should not be prevented from pursuing a claim in a jurisdiction, where it has no possibility to enforce the judgment, in order to obtain a possibility of a local enforcement.¹³⁹ However, the recognition prognosis is not easily adopted and contains obvious difficulties. For example, it is unclear if such prognosis should take into account, *inter alia*, the possibility to subsequently refuse recognition of a judgment due to public policy.¹⁴⁰ More importantly, an arbitral tribunal ought to decide its competence autonomously, by virtue of the arbitration agreement and according to the doctrine of *compétence-compétence*, irrespective of whether foreign proceedings may be enforced at the place of arbitration.¹⁴¹ If a party has initiated arbitration proceedings based on an arbitration clause, "it will be a necessary *prima facie* indication that the tribunal, and not the court which accepted the case for consideration or rendered the judgment, has jurisdiction to adjudicate the dispute."¹⁴²

3.2. Jurisdiction of the Arbitral Tribunal

A more appropriate solution is to give priority to arbitration, which accords with the principle of *compétence-compétence*. Article II(3) of the New York Convention stipulates a rule of priority between State courts and arbitral tribunals, providing that:

"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

¹³⁴ *Ibid.*

¹³⁵ Fawcett (1995), p. 36.

¹³⁶ Söderlund (2005), p. 302.

¹³⁷ Fawcett (1995), p. 36.

¹³⁸ See Houtte (2001), p. 37, fn. 5, for references to specific bilateral treaties.

¹³⁹ Söderlund (2005), p. 302.

¹⁴⁰ *Cf.* Fawcett (1995), p. 39.

¹⁴¹ Söderlund (2005), p. 305 and p. 312.

¹⁴² *Ibid.*, p. 306.

the said agreement is null and void, inoperative or incapable of being performed.”
(emphasis added).

The rationale of Article II(3) in the New York Convention is to ensure that when parties have agreed to arbitrate a dispute, it cannot simply be avoided by bringing the claim to court. Article II(3) permits a court to consider jurisdictional issues in relation to the arbitration agreement, which follows from the provision requiring that courts should refer parties to arbitration when parties have agreed to arbitrate the dispute unless the agreement is null and void, inoperative or incapable of being performed (or the subject-matter is not arbitrable). Such decision requires the court (it) to consider and decide (finds) the pertinent issues in relation to jurisdiction.¹⁴³ Thus, both State courts and arbitral tribunals may consider and decide jurisdictional disputes under the New York Convention. However, the Convention does not say anything on the allocation between the *fora* of the power to address these issues. The question of allocation raises two questions, namely that of timing and extent of the judicial review.¹⁴⁴ These questions can be addressed by examining the effects of the *compétence-compétence* doctrine. The principle of *compétence-compétence* has two effects, namely the positive and negative, which will be discussed in turn.

3.2.1. Positive Effect

The positive effect of *compétence-compétence*, almost universally accepted, implies that the arbitral tribunal has jurisdiction to rule on its jurisdiction, and thus also has the competence to dismiss the dispute should it find that it lack jurisdiction.¹⁴⁵ Arbitral tribunals have, consequently, adopted the principle, since it “has long been recognized, in general, that in international matters the arbitrator has jurisdiction over his own jurisdiction.”¹⁴⁶ The purpose of conferring this competence to the arbitral tribunal is to prevent obstructing tactics from a party in bringing the action to court, but also to make the arbitral proceedings efficient.¹⁴⁷ However, the jurisdiction of an arbitral tribunal may subsequently be subject to court review, at both the seat for challenge and enforcement.¹⁴⁸

An example of the positive effect of *compétence-compétence* can be found in Article 16(1) of the Model Law,¹⁴⁹ 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 UNCITRAL Model Law stipulates that:

”[w]here 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.”

¹⁴³ Born (2009), p. 857.

¹⁴⁴ Cf. Park (2007), p. 55.

¹⁴⁵ Gaillard & Savage (1999), para. 658; Lew, Mistelis & Kröll (2003) para. 14-13; Redfern & Hunter (2009), para. 5.98; Born (2009), p. 855; Bachand (2006), p. 466; Heuman (2003), p. 347. In Swedish arbitration law, the principle is expressed in Section 2(1) of the SAA, providing that “arbitrators may rule on their own jurisdiction to decide the dispute.”

¹⁴⁶ *Exclusive Agent v Manufacturer*, Final Award, ICC Case No. 8938, 1996, p. 174. The doctrine of *compétence-compétence* has been affirmed in a substantial body of arbitral awards, see Born (2009), p. 870, fn. 103.

¹⁴⁷ Gaillard & Savage (1999), para. 660; Heuman (2003), p. 348.

¹⁴⁸ According to Section 36 of the SAA, a Swedish State court may also review the arbitrator’s decision to dismiss the arbitration, see *Petrobart Limited v Kyrgyz Republic* (NJA 2008 p. 406); *OAO Arkhangelskoe Geologodobychnoe Predpriyatie v Archangel Diamond Corporation*, Judgement by the Svea Court of Appeal on November 15, 2005 (Case No. T 2277-04).

¹⁴⁹ Rules on *compétence-compétence* can also be found in, e.g. Article 41(1) of the ICSID Convention and Article 36(6) of the Statute of the International Court of Justice.

Since Article 8(2) of the Model Law permits an arbitral tribunal to continue and to render an award while the claim may be concurrently pending before a State court, "[i]t thus envisions the possibility of simultaneous proceedings regarding the competence of the arbitral tribunal."¹⁵⁰ The effect of the provision is that arbitral tribunals are not required to stay or decline jurisdiction if the same claim is concurrently pending before a State court.¹⁵¹

The interpretation of Article 8(2) is by no means consistent and in some countries, it has been construed as to imply that the arbitral tribunal should be the first to decide on their jurisdiction.¹⁵² If such interpretation is adopted, courts should await the scrutiny of the jurisdiction of the tribunal until the award is made. However, in most countries, for example Switzerland and England, courts seised of the substance of the matter are fully entitled to verify whether or not there is a valid arbitration agreement.¹⁵³ According to Article 8(2) of the Model Law, a court has no power to stay the concurrent arbitration proceedings.¹⁵⁴

It is a much-disputed question if courts should be entitled to do a full or a *prima facie* review of the validity of the arbitration agreement.¹⁵⁵ 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.¹⁵⁶ To require that courts fully review the jurisdiction of the arbitral tribunal ensures that parties will not waste time, money and other resources on an arbitration proceeding, which may be challenged and set aside.¹⁵⁷ The disadvantage is that a party may obstruct the proceedings by bringing a claim to court.¹⁵⁸ As put by one scholar, the issue of the extent to which the court may review the validity of the arbitration agreement "is directly linked to the issue of whether priority ought to be given to economy of means considerations or rather to the prevention of dilatory tactics."¹⁵⁹ Such dilatory tactics can, for example, be avoided by (i) granting both the court and arbitral tribunal to simultaneously deal with the question of jurisdiction – as Article 8(2) of the Model Law – or (ii) to grant the principle of *compétence-compétence* a negative effect.

3.2.2. Negative Effect

The negative effect of *compétence-compétence* refrains national courts from reviewing the jurisdiction of the arbitral tribunal, until an award is rendered and challenged or enforced.¹⁶⁰ It initially gives the arbitral tribunal exclusive jurisdiction to determine its jurisdiction and is thus the most far-reaching rule of priority between arbitral tribunals and state courts.¹⁶¹ If the negative effect of *compétence-compétence* would be adopted, many of the problems with parallelism between State courts and arbitral tribunals would be avoided.¹⁶² The reason for this is simply that courts would not be allowed to review the jurisdiction of the arbitral tribunal until an award has been rendered and subsequently challenged or enforced. The negative effect of *compétence-compétence*

¹⁵⁰ Holtzmann & Neuhaus (1989), p. 306.

¹⁵¹ Redfern & Hunter (2009), para. 14-21.

¹⁵² Schlosser (2001), p. 26.

¹⁵³ *Ibid.*, p. 26.

¹⁵⁴ Holtzmann & Neuhaus (1989), p. 306. Without support in legislation, a Swedish court cannot intervene in arbitration proceedings; see Heuman (2003), p. 704.

¹⁵⁵ Bachand (2006), p. 463.

¹⁵⁶ Redfern & Hunter (2009), para. 14-50.

¹⁵⁷ Bachand (2006), p. 464.

¹⁵⁸ *Ibid.*, p. 465; Redfern & Hunter (2009), para. 14-51.

¹⁵⁹ Bachand (2006), pp. 468-469.

¹⁶⁰ Brekoulakis (2009), p. 239; Poudret & Besson (2007), para. 458.

¹⁶¹ *Ibid.*

¹⁶² Poudret & Besson (2007), para. 458 and para. 521.

can be found in the European Convention on International Commercial Arbitration of 1961, which, in Article VI(3), provides that:¹⁶³

“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.¹⁶⁴ 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.”¹⁶⁵ 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.”¹⁶⁶

Nevertheless, the negative effect of *compétence-compétence* can be found in the municipal law of several States.¹⁶⁷ The most restrictive approach on court-reviews of the arbitration agreement on a pre-award stage is found in French procedural law, where courts are not allowed to engage in a *prima facie* review of the validity of an arbitration agreement if the claim has already been brought before an arbitral tribunal.¹⁶⁸ This approach is based on the somewhat extreme perception of the arbitration agreement as autonomous; “[i]n French law the arbitration agreement is conceived as a sort of ‘watertight compartment’ placed in a spaceship flying in the stratosphere, where it escapes almost all influence from the earth.”¹⁶⁹

3.2.3. *Certain Cases on Compétence-compétence and Lis Pendens*

This section contains a discussion on certain relevant cases, which are among the few cases on *lis pendens arbitralis* that have been reported. Consequently, these cases have attracted significant discussion by commentators. The cases clearly show why it is important to consider *compétence-compétence* when faced with *lis pendens* between an arbitral tribunal and a State court.

(i) *Minera Condesa*. In *Minera Condesa*,¹⁷⁰ international *lis pendens arbitralis* and Article II(3) of the New York Convention was at the heart of the dispute. In 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. In respect to the 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 State court in Lima, seeking a declaration that all conditions of the exercise of the right of first refusal were met. The

¹⁶³ It should be noted that Article V(3) of the European Convention on International Commercial Arbitration confers the positive effect of *compétence-compétence*.

¹⁶⁴ See, e.g., Brekoulakis (2009), p. 250 *et seq.* In Sweden, the negative effect of *compétence-compétence* is not accepted, see, *infra*, section 5.2.1.

¹⁶⁵ Gaillard & Savage, para. 660.

¹⁶⁶ Brekoulakis (2009), p. 253.

¹⁶⁷ This is discussed by Gaillard & Savage (1999), 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.”

¹⁶⁸ The negative effect of *compétence-compétence* is, since the 2011 reform of French arbitration law, codified in Article 1448 of the Code of Civil Procedure, see Carducci (2012), p. 133. See also Lew, Mistelis & Kröll (2003) para. 14-56; Gaillard & Savage (1999), para. 672.

¹⁶⁹ Leboulanger (2007), p. 3.

¹⁷⁰ *Compañía de Minera Condesa S.A. and Compañía de Minas Buenaventura S.A. v. BRGM-Pérou S.A.S.*, Judgment of December 19, 1997, BGE 124 III 83, hereinafter “*Minera Condesa*”. For a deeper analysis of the case, see Perret (2001), pp. 65-84.

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 the arbitration defence and thus, it 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 State court. In an interim award, the tribunal considered itself competent. It reasoned, in line with negative effect of *compétence-compétence*, that no litispence could exist between the proceedings since the validity of the arbitration agreement was to be assessed in priority by the tribunal.¹⁷¹ The respondents in the arbitration proceedings filed a complaint with the Swiss Federal Supreme Court (Bundesgericht), 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 the Swiss Private International Law Act ("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 Federal 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.¹⁷²

The Bundesgericht 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 State court in Lima lacked indirect jurisdiction under PILS. Thus, the decision by the Peruvian State court could not be recognised in Switzerland, save for in 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 State 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 Bundesgericht concluded that the Peruvian State 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. Thus, 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. However, it should not be decisive whether the foreign judgment or decision is enforceable at the place of arbitration.

(ii) *Fomento v Colon*. An interesting and intensively debated case, where parallel proceedings were initiated and an arbitral tribunal was held to be under a duty to defer to a foreign state court, is *Fomento v Colon*.¹⁷³ The Fomento case concerned a

¹⁷¹ See further Perret (2001), p. 70.

¹⁷² Article II(3) in the New York Convention cannot be qualified as a provision on international jurisdiction and it can thus be called into question if the mere infringement of the article can be a ground to refuse recognition, see Perret (2001), p. 72.

¹⁷³ *Fomento de Construcciones y Contratas S.A. v Colon Container Terminal S.A.*, Decision of May 14, 2001, DSFSC 127 [2001] III 279, hereinafter "Fomento v Colon". 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 April 19, 1994, DFT 120 II 155.

construction contract containing an arbitration clause, and the facts 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. Further, 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. 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 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. Hence, it 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 May 14, 2001. The Swiss Federal Supreme Court had, in essence, to decide (i) if the arbitral tribunal was entitled to rule on its jurisdiction or (ii) if the tribunal should have stayed its proceedings according to the *lis pendens* principle. In its decision, the Swiss Federal Tribunal 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 abroad before a State court. The Swiss Federal Tribunal held that the first-to-file *lis pendens* rule in PILS should, by way of analogy, be applied in international arbitration. The rationale for that solution, put forward by the Swiss court, was that *lis pendens* should be treated in the same way as *res judicata*, which is widely acknowledged in international arbitration.¹⁷⁴ It held that:

“[a]s 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.”¹⁷⁵

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

¹⁷⁴ Oetiker (2002), p. 138.

¹⁷⁵ *Fomento v Colon*, ASA Bulletin (2001), p. 555, para. 2(d) (unofficial translation).

recognition prognosis.¹⁷⁶ The *Fomento* case has been subject to severe criticism and eventually led to an amendment of the PILS.¹⁷⁷ The criticism and the Swiss legislator's solution will be discussed in turn.

(a) *Priority to rule on jurisdiction*. The court had to decide whether the particular 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,"¹⁷⁸ *i.e.* the negative effect of *compétence-compétence*. The Swiss court held that neither *fora* has priority to decide upon the jurisdiction of an arbitral tribunal, since both adjudicatory bodies have an "equal vocation". According to the Swiss court, any conflict had to be resolved by the *lis pendens* rule provided in PILS, which requires 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).¹⁷⁹ Further, the Federal Supreme Court clearly emphasised that this was not a question of discretion, but one of jurisdiction.

(b) *Lis pendens as part of public policy*. The Swiss Federal Tribunal reasoned that to avoid irreconcilable judgments is a concern of *ordre public*. Since one technique to avoid contradicting decisions is to adopt a first-to-file rule, the principle of *lis pendens* was a matter of Swiss public policy that the arbitrators were bound to respect. Under Swedish law, *res judicata* and *lis pendens* is not considered to be a part of *ordre public*.¹⁸⁰

(c) *Waiver and choice-of-law*. The Swiss State court had to consider whether the right to arbitrate had been waived in the Panamanian court proceedings. However, the initial question for such consideration would be to determine the applicable law under which the waiver should be assessed. Such question could be adjudicated according to the law at the place of the arbitration or to the law in the jurisdiction where the court proceedings are pending. The Swiss Federal Supreme Court held that this question was to be settled under *lex fori* of the foreign court proceedings, *i.e.* Panamanian law. There are good reasons for such approach, being that "a party which enters an appearance in a court of competent jurisdiction (save for the arbitration agreement) must be subject to the procedural rules of that forum as any other respondent in the same situation."¹⁸¹

(d) *Amendment of PILS*. The proposition, which follows from the *Fomento* decision, is that an arbitral tribunal, in line with a mandatory first-to-file rule, should have an *ex officio* duty to stay its proceedings, awaiting the outcome of foreign court proceedings. Such solution is incompatible with fundamental principles of the arbitration proceeding. First, an arbitral tribunal does not owe allegiance to any foreign State court. On the contrary, it owes allegiance to the parties' agreement to arbitrate their dispute and should thus decide on its jurisdiction irrespective of court proceedings are concurrently pending in some foreign jurisdiction.¹⁸² Second, there is no principle that, based on the agreement to arbitrate, "dictates to a tribunal to suspend the proceedings due to such external issues as concurrent court proceedings."¹⁸³

In addition, and perhaps most fundamental, such solution would be unfortunate from a practical point of view. In order to frustrate the arbitration agreement it would suffice

¹⁷⁶ *Supra*, section 3.1.4.

¹⁷⁷ See Born (2009), p. 2941, fn. 291 with further references to the substantial criticism.

¹⁷⁸ Gaillard & Savage, para. 660.

¹⁷⁹ Oetiker (2002), p. 143.

¹⁸⁰ Söderlund (2005), p. 312.

¹⁸¹ *Ibid.*, p. 307. See also McLachlan (2009), p. 213.

¹⁸² Söderlund (2005), p. 313-314.

¹⁸³ *Ibid.*, p. 312.

to institute court proceedings first, and then request the arbitrators to stay the arbitration proceedings. If such tactic would be successful before the foreign State court, the litigant would then simply demand the arbitral tribunal to endorse the judgment based on the notion that the court was first seised.¹⁸⁴

The Swiss legislator acted quickly, and overturned the Fomento ruling in a statute enacted on October 6, 2006, which came into force on March 1, 2007. The statute added a paragraph that reaffirmed the arbitral tribunals' jurisdiction to rule on their own jurisdiction, which reads as follows:

“[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.”¹⁸⁵

(iii) *Rakoil Affair*. In *Rakoil*,¹⁸⁶ an arbitral tribunal seated in Switzerland took a more appropriate position on the relationship between concurrent arbitration and court proceedings pending in different jurisdictions. The facts of the case were, in brief, as follows. In 1973, a group of companies that formed a consortium (“DST”) concluded a concession agreement, which included an arbitration clause, with the government of the State of Ras Al Khaimah and the state-owned exploration company, Ras Al Khaimah National Oil Co. (“Rakoil”), to explore for oil and gas in the territorial waters of Ras Al Khaimah.

A dispute arose and DST filed a request for arbitration against the government and Rakoil with ICC on 7 March 1979, in accordance with the arbitration clause in the concession agreement. However, in the beginning of April 1979, the respondents in the arbitration proceedings filed a lawsuit against DST in the court of Ras Al Khaimah. The respondents in the arbitration proceedings objected to the jurisdiction of the ICC arbitral tribunal, denied liability and did not participate further in the arbitration proceedings. The proceedings thus proceeded concurrently and in the end, the adjudicatory bodies delivered contradictory results on the merits.

In the award, the arbitrators reasoned that “the arbitration tribunal finds and holds that it has competence and jurisdiction to determine its own jurisdiction with regard to the validity of the arbitration clause.”¹⁸⁷ As a consequence, it held that “[t]he arbitration tribunal will add that the action instituted in the courts of Ras Al Khaimah at the beginning of April 1979, or the order by the Ras Al Khaimah court of 3 December 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.”¹⁸⁸

Ultimately, the arbitral tribunal thus held 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 before 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.¹⁸⁹

¹⁸⁴ Gaillard (2010), para. 85; McLachlan (2009), p. 213.

¹⁸⁵ Article 186(1bis) PILS.

¹⁸⁶ *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH (“DST”) et al. v The Government of the State of Ras Al Khaimah (UAE), The Ras Al Khaimah Oil Company (“Rakoil”)*, Final Award, ICC Case No. 3572, 1989, hereinafter “DST v Rakoil”.

¹⁸⁷ *Ibid.*, p. 115.

¹⁸⁸ *Ibid.*, pp. 115-116.

¹⁸⁹ Söderlund (2005), p. 315.

3.3. Parallel and Related Arbitration Proceedings

This chapter has so far been concerned with the relationship between State courts and arbitral tribunals. This section will discuss an area that is sparsely commented upon in the works of legal scholars and where there exist few reported cases, namely parallel proceedings between arbitral tribunals in international commercial arbitration. It is possible to discern two separate situations of parallelism between arbitral tribunals. First, it is possible that the same parties to the same contract and the same arbitration clause commence arbitration proceedings concerning the same claim. Such situation, which for example may arise should the respondent in the first proceedings not like the constitution of the arbitral tribunal, gives rise to parallel and identical arbitration – *lis alibi pendens*.¹⁹⁰ 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 situations will be discussed in turn.

3.3.1. Parallel and Identical Proceedings

The potential for *lis alibi pendens* between two arbitral tribunals is 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. Subsequently, 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, with seat in Switzerland. The respondent firm in the second arbitration refused to appoint an arbitrator, arguing that the same dispute was already pending before another arbitrator, namely the ICC arbitration. The Geneva court was then asked to judicially appoint an arbitrator and the same respondent relied on *lis alibi pendens* and argued that the ICC arbitrator had priority to rule on its jurisdiction. The court dismissed the request for appointment, concluding 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.”¹⁹¹

The Geneva court did not expressly rely on *lis pendens* when deciding upon the appointment issue, but “its approach is clearly, albeit implicitly, based on a *lis alibi pendens*-type reasoning.”¹⁹² Since the Geneva court refused to appoint an arbitrator, the arbitral tribunal did not deal with the *lis alibi pendens* question. The dispute was only finally resolved when the Swiss Supreme Court, on appeal, 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

¹⁹⁰ ILA Final Report on *Lis Pendens* and Arbitration, para. 4.47; Born (2009), p. 2948.

¹⁹¹ *AA v AC*, Court of First Instance of Geneva, September 30, 1998, (1999) 9 *Revue suisse de droit international et droit européen* 628, p. 629. Quotation translated from the original French by Geisinger & Lévy (2003), p. 66.

¹⁹² *Ibid.*, p. 66.

seated in two different jurisdictions. That was the situation in *Tema v Hubei*,¹⁹³ 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 Stockholm Arbitration Institute, 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 arbitration proceedings but did not appear in the CIETAC proceedings, 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 against the enforcement, alleging that once the first arbitration was commenced, the arbitral clause precluded the parties from instituting arbitration proceeding in China – “in essence a plea of *lis pendens*.”¹⁹⁴ 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 should not 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.¹⁹⁵ 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.¹⁹⁶ The objection based on 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 Frugoli* is, to say the least, 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 court, 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.”¹⁹⁷

In *Tema v Frugoli*, the recourse to arbitration in Stockholm, appears to be 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.¹⁹⁸ 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. What, then, should the Chinese arbitral tribunal have done?

¹⁹³ *Tema-Frugoli SpA v Hubei Space Quarry Industry Co. Ltd.*, Milan Court of Appeal on July 2, 1999, hereinafter “*Tema v Hubei*”.

¹⁹⁴ McLachlan (2009), p. 216.

¹⁹⁵ *Tema v Frugoli*, pp. 808-809.

¹⁹⁶ *Ibid.*, pp. 809, fn. 4.

¹⁹⁷ McLachlan (2009), pp. 217-218.

¹⁹⁸ *Cf., ibid.*, p. 217.

Should two parallel and identical claims, between the same parties, be brought before separate arbitral tribunals, there are compelling reasons suggesting that the secondly constituted tribunal should stay its proceedings.¹⁹⁹ As put by the ILA Committee in its final report on *lis pendens* and arbitration:

“In the situation of a true *lis pendens*, the issue arises as to whether one of the tribunals is entitled to stay its own proceedings. It is argued by some commentators that the tribunal is mandated to determine the dispute referred to it by the claimant, and should proceed to do so. The Committee disagrees. [...] The Committee submits that the second tribunal should stay its proceedings.”²⁰⁰

Lis pendens is recognised in virtually all developed jurisdictions as a protection against dilatory tactics, duplication of proceedings and as a way to protect *res judicata* and related preclusion principles.²⁰¹ However, a rigid first-to-file rule may be inappropriate and thus, the arbitral tribunal second seised should have a considerable discretion to order a stay of its proceedings.²⁰²

3.3.2. Consolidation of Related Proceedings

Consolidation of arbitration proceedings is a technique to deal with closely related parallel proceedings.²⁰³ This solution enables disputes that arise out of the same incident, or with substantially the same underlying facts, to be adjudicated once in a single forum.²⁰⁴ Article 6 of the Brussels Regulation expresses a strong policy within the community to consolidate related proceedings. While this is a sensible legal technique applicable under the Brussels Regulation, its use in international arbitration is somewhat limited.

Arbitration is a consensual form of dispute resolution. Since the arbitral tribunal derives its jurisdiction from the will of the parties, the arbitration agreement must be construed in order to establish the intent of the parties. Accordingly, when an arbitral tribunal is faced with questions on consolidation between closely related proceedings, it must ultimately decide its jurisdiction based on consent of the various parties to the proceedings.²⁰⁵

Several arbitration institutes have carefully considered the possibility to consolidate related disputes when drafting their arbitration rules. For example, Article 10 of the ICC Rules provide:²⁰⁶

“The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where: a) the parties have agreed to consolidation; or b) all of the claims in the arbitrations are made under the same arbitration agreement; or c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.”

Consolidation is sometimes discussed as a solution to *lis pendens*. However, *lis pendens* occurs when there is identity in two concurrent claims, *i.e.* the same action is brought before two adjudicatory bodies. It would not be possible to resolve this

¹⁹⁹ ILA Final Report on *Lis Pendens* and Arbitration, para. 4.48; Born (2009), p. 2948; McLachlan, p. 217; Söderlund (2005), p. 321.

²⁰⁰ ILA Final Report on *Lis Pendens* and Arbitration, para. 4.48.

²⁰¹ Born (2009), p. 2948; ILA Final Report on *Lis Pendens* and Arbitration, para. 5.10.

²⁰² *Ibid.*

²⁰³ A related but distinct technique is joinder of parties in arbitration proceedings.

²⁰⁴ McLachlan (2009), p. 218.

²⁰⁵ Hanotiau (2006), para. 230.

²⁰⁶ The ICC Rules also provide a possibility of joinder of parties in arbitrations. The SCC rules have a provision on consolidation in Article 11, but do not have provisions on joinder.

problem by way of consolidating the claims. Accordingly, consolidation of claims can be employed when the actions are related but its use can be called into question should the parallel proceedings concern *the same action*.

3.4. Anti-suit Injunctions

A technique, generally confined to common law countries,²⁰⁷ is to vest judges with judicial power to restrain foreign proceedings by issuing an anti-suit injunction against a party.²⁰⁸ Anti-suit injunctions have a long history particularly in English law. The first record of case law where a party sought an injunction to restrain litigation outside England can be traced back to the middle of the seventeenth century. In *Love v. Baker*,²⁰⁹ the court found that it was not entitled to direct an injunction to a foreign court.²¹⁰ The earliest reported and fully argued case where proceedings outside the British Isles were restrained was in *Beckford v. Kemble* in 1822.²¹¹ 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 control duplicative proceedings.²¹² Further, the issuance of anti-suit injunctions in relation to arbitration has recently become the subject for adjudication by the ECJ, in *West Tankers*.²¹³ Thus, it is a question of much controversy and discussions by scholars and practitioners. Accordingly, it will be sensible to briefly discuss the current legal position on anti-suit injunctions in arbitration.

An injunction may only be addressed to an actual or potential litigant and will have no effect upon the foreign court.²¹⁴ Injunctions have been granted against arbitrators personally, but such order is unlikely to be granted today.²¹⁵ An injunction is made effective in two ways, depending on whether the respondent is within or outside the jurisdiction of the issuing forum. The respondent may be fined (or imprisoned if issued against an individual) if within the jurisdiction.²¹⁶ When the respondent is outside the jurisdiction and disobeys the injunction, the respondent may nonetheless have assets that can be seised in the jurisdiction.²¹⁷ The legal basis is that non-compliance with an injunction constitutes contempt of court.

3.4.1. *Anti-suit Injunctions in Aid of Arbitration*

In England, anti-suit injunctions as a technique to enforce arbitration agreements are used more liberally than in other common law jurisdictions, for example in the United States.²¹⁸ Thus, the issuance of anti-suit injunctions in England will be at the centre of this discussion. Within the EU, anti-suit injunctions are a controversial issue, including

²⁰⁷ There are recent cases where courts in civil law jurisdictions have issued injunctions against foreign arbitrations, Born (2009), p. 1049.

²⁰⁸ Fawcett (1995), p. 40; McLachlan (2009), p. 72. For a summary of the general principles governing the grant of injunctions, see Raphael (2008), para. 4.01. For a definition with further references to case law, see, *ibid.*, para. 1.05.

²⁰⁹ *Love v Baker* [1665] 1 Ch Ca 67.

²¹⁰ However, the case rested on the incorrect view that an injunction is directed to the foreign court, not the parties. See further McClean (1969), p. 936.

²¹¹ *Beckford v Kemble* [1822] 1 Sim & St 7. However, in *Bushby v Munday* [1821] 5 Madd. 297, an English court considered itself to be the most appropriate forum, and thereby issued an injunction to restrain proceedings in Scotland.

²¹² The issuance of anti-suit injunctions in international arbitration is, however, a new trend; see Gaillard (2006), para. 10-2.

²¹³ *Infra*, fn. 220.

²¹⁴ Raphael (2008), para. 1.05.

²¹⁵ *Ibid.*, paras. 11.23-11-26.

²¹⁶ Collins (2001), p. 86.

²¹⁷ *Ibid.*, pp. 86-87.

²¹⁸ McLachlan (2009), p. 224.

the situation in which a court may issue an injunction to protect an arbitration agreement. A passage by Lord Hoffman can illustrate the position in England on the use of injunctions supporting arbitration:

“It is generally regarded as an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration. It promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court.”²¹⁹

This approach towards injunctions in aid of arbitration was quashed by the ECJ in 2009, when it decided the *West Tankers* case,²²⁰ which triggered an extensive discussion on the interface between court and arbitration proceedings under the Brussels Regulation. In August 2000, the *Front Comor*, a vessel owned by West Tankers Inc (“West Tankers”) and chartered to Erg Petroli SpA (“Erg”) collided, and caused damage, with a jetty owned by Erg in Syracuse (Italy). The charter-party was governed by English law and contained a clause providing for arbitration in London. Erg claimed compensation up to the limit of its insurance cover upon its insurers, Ras Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA (the “Insurers”). For the excess amount, Erg initiated arbitration against West Tankers according to the arbitration clause. West Tankers denied liability for the damage caused by the collision.

Having paid compensation to Erg, on 30 July 2003, the Insurers brought court proceedings against West Tankers in Italy before the Tribunale di Siracusa. The Insurers wanted to recover the sums they had paid to Erg under the policies and thus, it brought a delictual claim by virtue of its statutory right of subrogation to Erg’s claims under Article 1916 of the Italian Civil Code. West Tankers raised an objection to the court’s jurisdiction based on the existence of the arbitration agreement. In parallel, West Tankers, on 10 September 2004, commenced proceedings against the Insurers in England, seeking a declaration that the dispute between itself and the Insurers were to be settled by arbitration. In addition, it sought an injunction to restrain the Insurers from continuing the dispute, except by way of arbitration, and in particular to order them to discontinue the proceedings in Syracuse.

The anti-suit injunction was granted in a judgment on 21 March 2005. It was subsequently appealed to the House of Lords.²²¹ The Insurers argued that the injunction was inconsistent with the Brussels Regulation. The House of Lords, which held that the issue before them was one of considerable practical importance on which national judges and scholars disagree,²²² decided to refer the following question to the ECJ:

“Is it consistent with EC Regulation 44/2001 for a court of a Member State to make an order 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?”²²³

In submissions before the ECJ, both West Tankers and the United Kingdom Government argued that an injunction such as issued in the case was not inconsistent with the Brussels Regulation since Article 1(2)(d) excludes arbitration from its scope

²¹⁹ *West Tankers Inc v Ras Riunione Adriatica di Sicurtà SpA and others* [2007] EWHC 2184, hereinafter “West Tankers before the House of Lords”, para. 19.

²²⁰ *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.*, Case C-185/07 hereinafter “West Tankers”, para. 21.

²²¹ As of October 1, 2009, the Supreme Court of the United Kingdom has assumed the judicial functions of the House of Lords, see The Constitutional Reform Act 2005 (Commencement No. 11) Order 2009 <http://www.legislation.gov.uk/ukxi/2009/1604/pdfs/ukxi_20091604_en.pdf> (retrieved on April 13, 2013).

²²² *West Tankers before the House of Lords*, para. 22.

²²³ *Ibid.*, para. 23.

of application.²²⁴ The ECJ answered the question referred to it by beginning with an examination on whether the court proceedings in Italy were within the scope of the Brussels Regulation. Having answered this first question affirmatively, it held that the arbitration defence raised in the Italian proceedings was an incidental question and falls within the scope of the Regulation. This led to the conclusion that the Italian court had exclusive power to rule on its jurisdiction, which included the examination on the validity of the arbitration agreement.²²⁵ The ECJ reasoned that according to the Regulation each court rules on its own jurisdiction, and stated that:

“[t]he use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction [...]”²²⁶

Ultimately, the ECJ held that the issuance of the injunction was inconsistent with the principle of mutual trust on which the Regulation is based.²²⁷ Thus, the injunction issued by the English court was found to be incompatible with the Regulation itself.²²⁸ 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.”²²⁹ 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.

Unsurprisingly, the judgment in the *West Tankers* case has been criticised and not only by common law jurists.²³⁰ The *West Tankers* case is, however, not a textbook case of parallel proceedings.²³¹ Nevertheless, it affects a wide range of cases. It will, for example, not be possible to order injunctions in aid of arbitration even where court proceedings constitutes a clear violation of the arbitration agreement. In the recast Brussels Regulation, the principle of mutual trust has remained intact. As a consequence, Member States will not be able to issue injunctions in aid of arbitration under the revised 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, should a court of a Member State rule 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”.²³²

3.4.2. *Anti-arbitration Injunctions*

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.²³³ However, they have been used in order to frustrate arbitration agreements and

²²⁴ *West Tankers*, para. 21.

²²⁵ *Ibid.*, paras. 26-27.

²²⁶ *Ibid.*, para. 28.

²²⁷ *Ibid.*, paras. 29-30.

²²⁸ *Ibid.*, para. 32.

²²⁹ *Ibid.*, para. 26.

²³⁰ For an overview of the criticism with further references, see McLachlan (2009), p. 231.

²³¹ *Cf., ibid.*, pp. 231-234.

²³² See, *infra*, section 5.2.2, for further comments on recital 12 of the recast Regulation.

²³³ For an overview and discussion of these cases, see Lew (2007), p. 184 *et seq.*

not to resolve or avoid issues of parallel proceedings. Consequently, the issuance of anti-arbitration injunctions will not be further developed in this text.

3.4.3. *Anti-suit Injunctions Issued by Arbitrators*

Orders issued by arbitrators to desist parties from bringing the dispute elsewhere is controversial.²³⁴ Do arbitrators have jurisdiction to issue anti-suit injunctions that attempt to restrain parties from pursue or continue a parallel action? Professor Gaillard has argued that the competence to issue anti-suit injunctions is derived from well-established principles in international arbitration:

“the jurisdiction to sanction violations of the arbitration agreement and the power to take any measure necessary to avoid the aggravation of the dispute or to protect the effectiveness of the final award.”²³⁵

Professor Gaillard’s argumentation can briefly be described as follows. Since the arbitral tribunal is competent to determine its own jurisdiction, it is competent to decide disputes relating to the arbitration agreement.²³⁶ An arbitral tribunal thus has jurisdiction to decide upon breaches of the obligation to arbitrate and accordingly, it also contains competence to sanction breaches thereof.²³⁷ This view is, perhaps, one of the more far-reaching effects derived from the principle of *compétence-compétence* and has (not surprisingly) been criticised.²³⁸ The approach towards the issuance of anti-suit injunctions by arbitrators is probably rooted on his theory that international arbitration exists in an autonomous transnational legal order “that could be labelled the arbitral legal order, and not in a national legal system, be it that of the country of the seat or that of the place or places of enforcement.”²³⁹

Despite the controversial basis for issuing anti-suit injunctions, arbitral tribunals have, in a few cases, restrained parties from pursuing parallel proceedings in different *fora*.²⁴⁰ An illustrative case is *ICC Case No. 8307*.²⁴¹ In brief, the case can be summarised as follows. Arbitration was commenced according to an arbitration clause in a Shareholders’ Agreement. Under the course of the arbitration proceedings, one of the parties instituted court proceedings in a different country. The sole arbitrator, Pierre Tercier, was asked to issue an anti-suit injunction. The arbitrator found that the parties, the claims and the subject-matter of the concurrent proceedings were, in essence, the same.²⁴² Tercier concluded that pursuing court proceedings violated the agreement to arbitrate, which confers jurisdiction to the sole arbitrator to decide the questions under the agreement.²⁴³ Tercier then went on to consider if he had “the power to order the

²³⁴ The terminology in relation to orders issued by arbitrators in an attempt to prevent parties from bringing or continuing parallel proceedings is not consistent, *see* Moloo (2009), p. 676. In this thesis, I have chosen to employ the term “anti-suit injunction” when referring to the order issued by arbitral tribunals as well as by State courts, since that term is frequently used by scholars and is thus established in legal writing.

²³⁵ Gaillard (2007), p. 236.

²³⁶ Gaillard (2007), p. 236; Moloo (2009), pp. 677-678.

²³⁷ Gaillard (2007), p. 236.

²³⁸ For a sceptical approach to these arguments, *see* Lévy (2005), p. 123. For an overview, discussion and answer to the criticism, *see* Gaillard (2007), pp. 239-244.

²³⁹ Gaillard (2010), p. 35.

²⁴⁰ *An Indian Cement Company v a Pakistani Bank*, Second Preliminary Award, ICC Case No. 1512, 1970; *French Construction Company A v Iranian Government Organization B*, Partial Award, ICC Case No. 3896, 1982; *Contractor v Employer*, Final Award, ICC Case No. 5650, 1989. *See further* Gaillard (2007) pp. 251-261 for references to unpublished arbitral awards.

²⁴¹ *ICC Case No. 8307*, Interim Award of May 14, 2001, published in Gaillard (ed.) (2005), p. 308.

²⁴² *Ibid.*, paras. 5 and 7.

²⁴³ *Ibid.*, para. 8.

particular conservative measure of refraining from initiating or pursuing an action in state courts²⁴⁴. In his decision, referring to earlier ICC practice,²⁴⁵ the sole arbitrator ordered the party to desist from continue court proceedings on the following grounds:

“[i]t is not contested that an arbitrator has the power to order the parties to comply with their contractual commitments. The agreement to arbitrate being one of them, its violation must be dealt with in the same manner when it is patent that the action initiated in a state court is outside the jurisdiction of such court and is therefore abusive. This is also a guarantee of the efficiency and credibility of international arbitration.”²⁴⁶

However, the issuance of anti-suit injunctions by arbitrators is rarely found in arbitration practice and when adopted, it is done cautiously.²⁴⁷

3.5. Interim Conclusions

The doctrine of *compétence-compétence* is, save for details regarding timing and scope of the judicial review of the arbitration agreement, accepted in virtually all jurisdictions.²⁴⁸ Where courts are given the mandate to engage in a full review of the arbitration agreement, it does not automatically require an arbitral tribunal to stay its proceedings pending the court decision.

A first solution to parallel proceedings in international commercial arbitration is thus found in the doctrine of *compétence-compétence*, and, in particular, in its positive effect.²⁴⁹ Where courts are allowed to engage in a full review of the arbitration agreement, it is advised, as the position under Swedish law is,²⁵⁰ that such order does not prevent an arbitral tribunal to proceed with its proceedings. Should the respondent in the arbitration proceedings object that the tribunal is not competent and request a dismissal on the grounds of *lis pendens*, the tribunal would nevertheless be competent to rule on its jurisdiction.

In conclusion, the only court, which an arbitral tribunal should defer to, is to the courts at the seat of the arbitration, since such court has the last word in deciding the competence of the arbitral tribunal.²⁵¹ The reason why it should not defer to any other court in a foreign jurisdiction is that “the tribunal is not bound by whatever decision any foreign court—outside the place of arbitration—may render in respect of its jurisdiction or in any other respect.”²⁵²

Should two parallel and identical claims, between the same parties, be brought before separate arbitral tribunals, it has been argued that the secondly constituted tribunal should exercise discretion and stay its proceedings.²⁵³ *Lis pendens* is recognised as a protection against dilatory tactics, duplication of proceedings and as a way to protect *res judicata* and related preclusion principles.²⁵⁴ Consequently, in order to achieve a

²⁴⁴ *Ibid.*, para. 9.

²⁴⁵ *See, supra*, fn. 240.

²⁴⁶ *ICC Case No. 8307, supra*, fn. 241, paras. 9-10.

²⁴⁷ McLachlan (2009), p. 221. However, the confidentiality that covers most awards and procedural orders issued by arbitral tribunals makes it hard to grasp how often, and in what way, it is used in international commercial arbitration.

²⁴⁸ Born (2009), pp. 862-863.

²⁴⁹ *Cf.* ILA Final Report on *Lis Pendens* and Arbitration, para. 5.4

²⁵⁰ *Infra*, section 5.2.1.

²⁵¹ *See* Recommendation 3 of the ILA Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration; Söderlund (2005), p. 321.

²⁵² Söderlund (2005), p. 308. *See also* Poudret & Besson (2007), para. 521.

²⁵³ ILA Final Report on *Lis Pendens* and Arbitration, para. 4.48; Born (2009), p. 2948; McLachlan, p. 217; Söderlund (2005), p. 321.

²⁵⁴ Born (2009), p. 2948; ILA Final Report on *Lis Pendens* and Arbitration, para. 5.10.

fair result between the parties, it may be appropriate to wait for the outcome of concurrent proceedings.²⁵⁵

The use of injunctions to protect arbitration agreement is, in some jurisdictions, viewed as a “valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration. It promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court.”²⁵⁶ Following the judgment in *West Tankers*, it will not, under the Brussels regime, be possible to order injunctions in aid of arbitration even where court proceedings constitutes a clear violation of the arbitration agreement. The ECJ considered such injunctions to be inconsistent with the principle of mutual trust on which the Regulation is based. Since the principle of mutual trust is unchanged, the position under the recast form of the Regulation would, almost certainly, be the same.

²⁵⁵ ILA Final Report on *Lis Pendens* and Arbitration, para. 5.10.

²⁵⁶ *West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA and others* [2007] EWHC 2184, para. 19.

4. *Lis Pendens* in Investment Treaty Arbitration

In international law, the triple identity test, requiring identity between parties, *petitum* and *causa petendi*, has traditionally been accompanied by a fourth criterion. The fourth criterion has focused on whether the concurrent proceedings are pending before an international or domestic adjudicatory body and has been referred to as “the same legal order” requirement.²⁵⁷ As put by the umpire in the 1903 *Selwyn Case*, “[i]nternational arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations.”²⁵⁸ In essence, the same legal order condition implies that *lis pendens* and *res judicata* effect of, or proceedings before, will only apply between one international tribunal on another international tribunal.

The characterisation espoused in international law, of arbitral tribunals as international and State courts as national and thus not on “the same plane”, has gained acceptance in investment treaty arbitration. Since investment tribunals are constituted in accordance with investment treaties and can be argued to exist on an “international level”, there will rarely be any true parallelism and hence no *lis pendens* between investment arbitration and State court proceedings. Thus, the chapter begins by distinguishing between contract and treaty claims, which is the starting point for a distinction between international and national law. It has been said that “[n]o issue in the field of investment arbitration is more fundamental, or more disputed, than the distinction between treaty and contract.”²⁵⁹ To address the question in this thesis, in some depth, would be simply impossible. However, the section aims to provide an introduction and to communicate the issues relevant to grasp the features of parallelism in investment arbitration.

Parallel proceedings have been anticipated and regulated by way of treaty provisions, in order to prevent parallelism between State courts and international tribunals. Such provisions may, however, in addition to its aim of preventing parallel proceedings, affect the division of international and national law. The impact of these provisions is complex and hence, it has not been possible to discuss their application in detail. However, a brief explanation and overview of their use in current treaty arbitrations, and on their effect on the distinction between contract and treaty claim, will be provided.

Finally, the chapter will discuss parallel treaty arbitration, *i.e.* when two or more international investment tribunals are seised of the same dispute. Since these claims are brought to *fora*, which both can be argued to exist on an international level, there is a real potential for *lis pendens* as it is usually conceived. An example of parallel treaty arbitration is the *CME* case, which will be discussed in greater detail in the next chapter, focusing on the Swedish approach.²⁶⁰

4.1. Distinction Between Contract and Treaty Claims

Rights that are brought into existence by treaty exist on a level of international law. Hence, a party in a dispute based on a right created by treaty, cannot generally raise its defence based on its national laws.²⁶¹ In particular, a State cannot invoke provisions in its internal law, which comprises not only the constitution but also statutory and

²⁵⁷ ILA Final Report on Res Judicata and Arbitration, para. 29; McLachlan, Shore & Weiniger (2007), para. 4.13; Reinisch (2003), p. 50; Yannaca-Small (2008), p. 1017.

²⁵⁸ *Selwyn Case* (interlocutory), published in 9 UNRIAA 380, p. 381. *See also Certain German Interests, supra*, fn. 1, p. 20.

²⁵⁹ Crawford (2009), p. 1.

²⁶⁰ *Infra*, section 5.3.

²⁶¹ This fundamental principle is enshrined in, *e.g.*, Article 27 of the Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980).

ordinary legislation, to justify its failure to perform a treaty.²⁶² The rationale underpinning such order is that a State should not be able to unilaterally free itself of its treaty obligations by its own legislative actions.²⁶³ The distinction between national and international law was addressed by the tribunal in *GAMI Investments Inc. v Mexico*,²⁶⁴ holding that:

“[...] ultimately each jurisdiction is responsible for the application of the law under which it exercises its mandate. It was for the Mexican courts to determine whether the expropriation was legitimate under Mexican law. It is for the present Tribunal to judge whether there have been breaches of international law by any agency of the Mexican government.”²⁶⁵

Consequently, it will have to be determined if the alleged conduct constitutes a breach of contract or a breach of treaty, in order to distinguish between remedies of national law and international law.

A breach of contract is not, in itself, a breach of a treaty obligation. Thus, the question of whether an alleged conduct constitutes a breach of treaty is not answered by assessing whether the conduct is a breach of contract. It will only be a violation of a BIT, should the host State act in the exercise of its governmental or sovereign authority (*puissance public*), a behaviour which goes beyond that of an ordinary contracting party.²⁶⁶ In *Impregilo v Pakistan*, the arbitral tribunal held that even if a treaty and contract claim should perfectly coincide, “[...] they remain analytically distinct, and necessarily require different enquiries.”²⁶⁷

If the conduct would constitute a breach of treaty, such a claim would be exclusively governed by international law. Consequently, such claim ought to be treated separately from a breach of the national laws. What, then, is the effect of a contractual clause between investor and State, conferring jurisdiction upon the host State courts? This question was firmly answered, by the tribunal as to jurisdiction and the *ad hoc* Committee as to the merits, in the *Vivendi* case,²⁶⁸ which is a leading case on the distinction between contract and treaty violations. In that case, a French company along with its Argentine affiliate (together “CGE”) entered into a concession contract with Tucumán, a province of Argentina (the “Province”). The Republic of Argentina was not a party to the contract. The concession contract contained an exclusive jurisdiction clause, providing that “[f]or purposes of interpretation and application of this Contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán.”²⁶⁹

²⁶² Villiger (2009), Article 27, paras. 4-5.

²⁶³ *Ibid.*, para. 5.

²⁶⁴ *GAMI Investment, Inc. v Government of the United Mexican States*, Final Award of November 15, 2004.

²⁶⁵ *Ibid.*, para. 41.

²⁶⁶ *Impregilo S.p.A. v Islamic Republic of Pakistan*, Decision on Jurisdiction of April 22, 2005, ICSID Case No. ARB/03/3, hereinafter “*Impregilo v Pakistan*”, para. 260; *Joy Mining Machinery Limited v Arab Republic of Egypt*, Award on Jurisdiction of August 6, 2004, ICSID Case No. ARB/03/11, para. 72.

²⁶⁷ *Ibid.*, para. 258.

²⁶⁸ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, Award of November 21, 2000, ICSID Case No. ARB/97/3, hereinafter “*CGE Award*”; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, Decision on Annulment of July 3, 2002, ICSID Case No. ARB/97/3, hereinafter “*Vivendi Annulment*”.

²⁶⁹ Clause 16.4 of the concession contract; see Appendix 1 to the *CGE Award*. The concession contract did not make references to either the Argentine/French BIT or the ICSID Convention.

The Province terminated the contract after several disputes between the parties. CGE then commenced arbitration against Argentina, under the Argentine/French BIT, claiming that it had violated the treaty obligations by not ensuring that the Province performed the contract.²⁷⁰ Prior to the termination of the contract, the Argentine Republic had assisted the Province in the negotiations with CGE.²⁷¹ With reference to the contractual jurisdictional clause, the Republic objected to the tribunal's jurisdiction.²⁷² The tribunal rejected the objection to its jurisdiction, holding that "a suit by Claimants against Tucumán in the administrative courts of Tucumán for violation of the terms of the Concession Contract would not have foreclosed Claimant from subsequently seeking a remedy against the Argentine Republic as provided in the BIT and ICSID Convention."²⁷³ However, it denied the claim on the merits, holding that "unless and until" CGE had denied its rights in the courts of the Province, the Republic could not be held liable.²⁷⁴

CGE then challenged the award by way of annulment proceedings. The reasoning of the Annulment Committee has been adopted in a number of subsequent awards.²⁷⁵ It held that a State may breach a treaty without breaching a contract, and *vice versa*, because treaties set "an independent standard",²⁷⁶ and "[i]n accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions."²⁷⁷ Consequently, according to the Annulment Committee, each claim should be determined with reference to its proper law; "[...] in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán."²⁷⁸

If the essential basis of a claim brought before an international tribunal is contractual, the tribunal will, unless the treaty in question stipulate otherwise, give effect to any valid choice of forum clause in the contract.²⁷⁹ However, where the fundamental basis of the claim "[...] is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard."²⁸⁰ The *ad hoc* Committee concluded that a State could not rely on a contractual jurisdiction clause in order to avoid the "characterisation of its conduct as internationally unlawful under a treaty."²⁸¹

4.2. Treaty-Based Regulation/Prevention of Parallelism

The distinction between international and national law, described above, may seem rather straightforward. This is, unfortunately, not the case. Certain treaty provisions

²⁷⁰ *CGE Award*, paras. 30-31.

²⁷¹ Before the tribunal it was undisputed that Argentine officials had, in various degrees, assisted the Province, *CGE Award*, para. 35.

²⁷² This was one of the grounds invoked by the Republic, *CGE Award*, para. 41. However, the contract clause is the pertinent issue to discuss in this context.

²⁷³ *CGE Award*, para. 55.

²⁷⁴ *Ibid.*, para. 78.

²⁷⁵ For references to these arbitral awards; see McLachlan (2009), p. 260, fn. 649.

²⁷⁶ *Vivendi Annulment*, para. 95, citing Article 3 of the ILC Draft Articles on State Responsibility <http://untreaty.un.org/ilc/texts/9_6.htm> (retrieved on May 2, 2013). On this issue, see Schreuer (2004), p. 250.

²⁷⁷ *Vivendi Annulment*, para. 96.

²⁷⁸ *Ibid.*, para. 96.

²⁷⁹ *Ibid.*, para. 98.

²⁸⁰ *Ibid.*, para. 101.

²⁸¹ *Ibid.*, para. 103.

are, undoubtedly, blurring the somewhat clear image. This section will provide a brief and simplified introduction into three types of treaty provisions, namely (i) fork in the road provisions, (ii) waivers and (iii) umbrella clauses. These provisions are by no means uniform but do share a common feature, being that they all regulate the relationship between international arbitration and adjudication in national courts. Fork in the road clauses and provisions on waivers, have been developed and drafted in order to diminish or lessen the potential for parallel proceedings.²⁸² Thus, both these provisions are formulated to limit jurisdiction.²⁸³ Umbrella clauses are, on the other hand, jurisdiction-conferring clauses.²⁸⁴ However, they will all potentially affect the distinction between national and international law and thus, the *lis pendens* application.

4.2.1. *The Fork in the Road*

Some bilateral investment treaties require investors to choose a single forum for relief. Once the investor has made its choice, it is final, and consequently the investor has lost its option to bring the claim to international arbitration.²⁸⁵ Such provision, coined “fork in the road”, is a typical and common treaty clause (especially in United States BITs).²⁸⁶ Violation of such clause may result in the investor being barred from seeking identical relief in investment arbitration. However, the enforcement of a fork in the road clause will depend on “the juridical nature of the claims asserted”²⁸⁷. Thus, not all appearances in court of before an arbitral tribunal will preclude the investor from international arbitration since “not every appearance before a court or tribunal of the host State will constitute a choice under a fork in the road provision.”²⁸⁸

The fork in the road clause will not preclude the investor from recourse to international arbitration under a treaty provision, should the claims brought before the courts of the host State be purely contractual. This follows from the distinction between claims essentially based on contract or claims based on treaty. Since these should be treated separately, “even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration.”²⁸⁹

The situation is different should the applicable law of the two claims be parallel.²⁹⁰ The choice made by an investor will be final if the claim brought to a local court (or another *fora* contained in the fork in the road clause) is substantially the same as subsequently asserted before the investment tribunal. Consequently, if an investor brings a contractual claim to provided *fora* in the relevant clause, it will then be precluded from subsequently asserting the same claim before an investment tribunal. The same reasoning applies should the investor submit a treaty claim to local courts (or other relevant *fora*). It may then be precluded to invoke the treaty right before an investment tribunal. In these situations, the fork in the road provisions succeed with its aim, namely to limit the jurisdiction to one forum.

²⁸² Cremades & Cairns (2005), p. 18.

²⁸³ McLachlan, Shore & Weiniger (2007), para. 4.35.

²⁸⁴ *Ibid.*, para. 4.38.

²⁸⁵ Schreuer (2004), pp. 239-240; Bjorklund (2007), p. 296.

²⁸⁶ Schreuer (2004), p. 239.

²⁸⁷ McLachlan (2009), p. 262.

²⁸⁸ Schreuer (2004), p. 241.

²⁸⁹ *CMS Gas Transmission Company v Argentine Republic*, Decision on Objections to Jurisdiction of July 17, 2003, ICSID Case No. ARB/01/8, para. 80. The same line of reasoning was adopted in, for example, *CGE Award*, para. 55.

²⁹⁰ McLachlan (2009), p. 262.

Several arbitral tribunals have, in recent years, dealt with the application of fork in the road clauses. In *Genin v Estonia*,²⁹¹ the Respondent State objected to the tribunal's jurisdiction, invoking a fork in the road clause in the relevant BIT. In the arbitration proceedings, Estonia asserted that, "by choosing to litigate their disputes with Estonia in the Estonian courts, [...] Claimants have exhausted their right to choose another forum to relitigate those same disputes."²⁹² The question then was whether the actions in Estonia were to be characterised as a "choice" under the fork in the road provision.

The arbitral tribunal concluded that the proceedings in Estonia did not preclude the Claimant to pursue its claim before the investment tribunal. First, the parties in the claims were not the same. Second, it held that the cause of action was different in the proceedings, as the proceedings in Estonia (a challenge claim against the Bank of Estonia regarding the revocation of a banking licence) could not be litigated elsewhere.²⁹³ The arbitral tribunal held that "[a]lthough certain aspects of the facts that gave rise to this dispute were also at issue in the Estonian litigation, the 'investment dispute' itself was not, and the Claimants should not therefore be barred from using the ICSID arbitration mechanism."²⁹⁴

In most case, where arbitral tribunals have addressed fork in the road provisions, there has been some deficiency in identity between the claims. If, however, the claims are between the same parties, concerning the same object on the same cause of action, a fork in the road clause would be triggered and thus preclude a party from resort to international arbitration, where actions have previously been submitted to local courts of the host State.²⁹⁵

4.2.2. Waiver

A waiver is characterised by a unilateral renunciation of a party's rights, which may be done spontaneously or by choice, e.g. when choosing to resort to a treaty claim or contractual claim.²⁹⁶ It may be done expressly or be inferred by a party's conduct, the latter known as an "implicit waiver". In investment treaty arbitration, a waiver of determined rights is sometimes a prerequisite to submit a claim to an international tribunal.²⁹⁷ Consequently, it requires a party to waive all other claims before submitting the claim to an international tribunal. The effect of such a clause is thus that (i) it will be possible for the international tribunal to peruse the entire conduct of the host State (including municipal proceedings), and (ii) that it will obviate parallel proceedings in between the international tribunal and the courts of the host State.

In *Waste Management I*,²⁹⁸ the arbitral tribunal was faced with a waiver set out in Article 1121(2)(b) of the North American Free Trade Agreement ("NAFTA"), which requires, as "conditions precedent to submission of a claim", both the investor and enterprise to:²⁹⁹

"waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings

²⁹¹ *Alex Genin and others v Republic of Estonia*, Award of January 25, 2001, ICSID Case No. ARB/99/2, hereinafter "Genin v Estonia".

²⁹² *Ibid.*, para. 321.

²⁹³ *Ibid.*, para. 332.

²⁹⁴ *Ibid.*, para. 332.

²⁹⁵ Schreuer (2004), p. 247; McLachlan (2009), p. 265.

²⁹⁶ Baptista (2005), p. 130.

²⁹⁷ *Ibid.*, p. 133.

²⁹⁸ *Waste Management, Inc. v United Mexican States*, Award and Dissenting Opinion of June 2, 2000, ICSID Case No. ARB(AF)/98/2, hereinafter "Waste Management I".

²⁹⁹ In this respect, "enterprise" implies that the waiver should comprise the whole economic investment unit (not only the investor itself).

with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.” (emphases added).

Before the tribunal, the Claimant argued that the waiver did not include certain proceedings in Mexico, in which the NAFTA provisions were not expressly invoked. Rather, it argued that since the claim was based on a breach of Mexican legislation, those proceedings were outside the scope of Article 1121 of NAFTA. First, the tribunal held that the waiver was effective from the date the investor submitted its request for arbitration, as “it was from this date onwards that the Claimant was thus obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals with respect to those measures pleaded as constituting a breach of the provisions of the NAFTA.”³⁰⁰

With respect to the Claimant’s assertion that the waiver was limited to breaches of NAFTA, it held that “when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages. This is precisely what NAFTA Article 1121 seeks to avoid.”³⁰¹ Consequently, the assessment of waiver will focus on the “measure of the disputing Party”, as set forth by Article 1121, and not “on the juridical nature of the cause of action.”³⁰²

4.2.3. *Umbrella Clauses*

Some investment treaties also contain an “umbrella clause”,³⁰³ which broadens the subject-matter jurisdiction, *ratione materiae*.³⁰⁴ Umbrella clauses might be drafted quite differently but in principal, it serves to guarantee any obligations, by contract or otherwise, undertaken by the host State with investors of the other contracting State.³⁰⁵ Such provisions thereby protects the investors contractual rights against interference from the host State, be it a breach of contract or legislative acts and is hence a jurisdiction-conferring type of clause.³⁰⁶ Thus, the reason to include an umbrella clause in a treaty is that “it is not entirely clear under general international law whether such measures constitutes breaches of an international obligation.”³⁰⁷

Some BITs provide that the treaty will comprise only “obligations under this agreement”, *i.e.* the provisions in the treaty. Further, there are clauses in treaties providing that “any disputes relating to investments” between an investor and a host State can be brought to arbitration under the treaty provision. When applied, the latter of these clauses will in principle include contractual claims. However, the cause of action would still be the violation of a contract, not a breach of treaty. The impact of such a clause is thus merely to confer jurisdiction to a treaty tribunal, but the claim itself would remain a contractual claim.³⁰⁸ Accordingly, it would still be possible to distinguish between breach of treaty and breach of contract.

An umbrella clause raises a fundamentally different question. As put by one scholar, the question then is “whether the inclusion of such a clause in the treaty transforms the nature of the obligation being enforced, so that it may be said that the tribunal is now

³⁰⁰ *Waste Management I*, para. 19.

³⁰¹ *Ibid.*, para. 27.

³⁰² McLachlan (2009), p. 268.

³⁰³ Around 40 % of BITs contain some kind of umbrella clause, Crawford (2009), p. 18.

³⁰⁴ Schreuer (2004), p. 249.

³⁰⁵ Dolzer & Stevens (1995), p. 81; Bjorklund (2007), p. 298.

³⁰⁶ Dolzer & Stevens (1995), pp. 81-82; McLachlan, Shore & Weiniger (2007), para. 4.38.

³⁰⁷ Dolzer & Stevens (1995), p. 82.

³⁰⁸ McLachlan (2009), p. 270.

concerned with a breach of treaty and not a breach of contract *simpliciter*.³⁰⁹ Since the analysis of parallelism rests on the fundamental division between breach of contract and breach of treaty, umbrella clauses may potentially affect such distinction. This is why it is both relevant and important to discuss umbrella clauses in this thesis.

Arbitral tribunals have applied umbrella clauses significantly different, and the debate has essentially concerned the scope of such clauses, and as a consequence its effect on obligations.³¹⁰ In *SGS v Pakistan*,³¹¹ the Claimant argued that an umbrella clause elevated its purely contractual claims into claims grounded on the BIT.³¹² The tribunal rejected the assertion, holding that “[t]he text itself of [the umbrella clause] does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically ‘elevated’ to the level of breaches of international treaty law.”³¹³ Further, it held that the Claimant’s interpretation of the clause:

“would amount to incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments [...] Any alleged violation of those contracts and other instruments would be treated as a breach of the BIT.”³¹⁴

The tribunal in *SGS v Pakistan* thus read the umbrella clause restrictive.³¹⁵ Another tribunal, in *SGS v Philippines*,³¹⁶ addressed the very same issue (in depth) half a year later. However, it took a radically different view, arguing that the reasons given by the tribunal in *SGS v Pakistan* were not just unconvincing; it also failed to clarify the meaning of the relevant umbrella clause.³¹⁷ In relation to the “transformation” of obligations, the tribunal in *SGS v Philippines* held that an umbrella clause does not convert a claim of contract into a claim of treaty.³¹⁸ However, an umbrella clause may provide a ground for a substantive treaty claim. The tribunal summarised its position, holding that “[t]he extent of the obligation is still governed by the contract, and it can only be determined by reference to the terms of the contract.”³¹⁹ Thus, an umbrella clause will not affect the proper law of the contract (including provisions on dispute settlement contained therein). For these reasons, it concluded that the relevant umbrella clause:

“makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law.”³²⁰ (emphasis added).

³⁰⁹ McLachlan, Shore & Weiniger (2007), para. 4.97. *See also* Bjorklund (2007), p. 298.

³¹⁰ Sasson (2010), p. 179; Bjorklund (2007), p. 298.

³¹¹ *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, Decision on Objections to Jurisdiction of August 6, 2003, ICSID Case No. ARB/01/13, hereinafter “*SGS v Pakistan*”.

³¹² *Ibid.*, para. 165.

³¹³ *Ibid.*, para. 167.

³¹⁴ *Ibid.*, para. 168.

³¹⁵ Sasson (2010), 179; Schreuer (2004), p. 254.

³¹⁶ *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, Decision on Objections to Jurisdiction of January 29, 2004, ICSID Case No. ARB/02/6, hereinafter “*SGS v Philippines*”.

³¹⁷ *Ibid.*, para. 125.

³¹⁸ *Ibid.*, para. 126.

³¹⁹ *Ibid.*, para. 127.

³²⁰ *Ibid.*, para. 128.

What, then, is to be made of these irreconcilable views?³²¹ Well, a first observation, somewhat blurred by the inconsistent opinions set forth in the reasons of the awards, is that both tribunals reached similar functional conclusions. Both tribunals allowed contractual claims pursued in national *fora* to proceed since the parties to the contracts had agreed to exclusive jurisdiction clauses.³²² The view taken by the tribunal in *SGS v Philippines* is evidently more favourable towards investors. Where the investor cannot demonstrate that a substantive BIT provision has been violated, it can rely on a breach of contract.³²³ The umbrella clause would thus ensure enforcement of claims, save that the basis for the transaction would remain the same.³²⁴

4.3. Parallel Treaty Arbitration

This chapter has so far addressed concurrent adjudication between State courts and international investment tribunals. Since the applicable law will be different in these situations, true parallelism will rarely occur. If, however, two or more international tribunals are simultaneously seized of the same factual dispute, they will both apply international law, *i.e.* the bilateral investment treaty. Consequently, parallel treaty arbitration raises a different question, since there is a real potential for identity between the parallel claims. This, rather unsatisfactory and problematic state, is a result of the myriad of BITs, each entitling investors (also indirect) to resort to international arbitration against host States.

The *CME* case provides the most thorough examination of *lis pendens* in parallel treaty arbitration and will hence be commented in detail below since it was challenged before the Swedish Svea Court of Appeal.³²⁵ The reasons adopted by the tribunals, and the Svea Court of Appeal, did not appear in a vacuum. This section serves to put the *CME* case in its context and thus describes the considerations relevant to the application of *lis pendens* in parallel treaty arbitration.

In *SPP v Egypt*,³²⁶ the investor initiated ICC arbitration proceedings against Egypt. The respondent state objected to the jurisdiction of the tribunal, arguing that it was not bound by the relevant arbitration clause. The ICC tribunal rendered an award on the merits, holding that Egypt was a party to the arbitration agreement. Egypt challenged the award, and on 12 July 1984, the Court of Appeal of Paris granted the petition and annulled the award on the ground that Egypt was not a party to the arbitration agreement. SPP appealed the decision. On 24 August 1984, SPP filed for ICSID arbitration against Egypt. The investment tribunal rendered a first decision on jurisdiction on 27 November 1985, holding that:

“When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising 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.”³²⁷

³²¹ Due to the limited space, this text will just briefly deal with these two “schools of thought”. However, at least four approaches to umbrella clauses have been identified in arbitral awards, *see* Crawford (2009), p. 18 and Sasson (2010), p. 179-184.

³²² *Cf.* Crawford (2009), p. 3.

³²³ Schreuer (2004), p. 255.

³²⁴ Crawford (2009), p. 21.

³²⁵ *Infra*, section 5.3.

³²⁶ *Southern Pacific Properties (Middle East) Limited, Southern Pacific Properties Limited v The Arab Republic of Egypt*, Decision on Jurisdiction of November 27, 1985, ICSID Case No. ARB/84/3, hereinafter “SPP v Egypt”, p. 129.

³²⁷ *Ibid.*, p. 129.

It therefore decided to stay its proceedings, until “the French courts have finally resolved the question of whether the Parties agreed to submit their dispute to the jurisdiction of the International Chamber of Commerce.”³²⁸ On the contrary, the arbitral tribunal in *Benvenuti and Bonfant v Congo*,³²⁹ which confronted a similar situation as in *SPP v Egypt*, did not rule out the applicability of *lis pendens*, but held that the identity criterions were not met and thus continued its proceedings.³³⁰

SPP v Egypt is interesting since the tribunal decided to stay its exercise of jurisdiction, pending the outcome of a decision by the courts at the seat of the parallel arbitration proceeding. Both arbitral tribunals in the *CME* case rejected that the doctrine of *lis pendens* ought to apply, since the two claims had no identity as to the cause of action. When the Stockholm tribunal in its final award reasoned that the competence of one tribunal does not “necessarily affect the authority of another tribunal constituted under a different agreement,”³³¹ it referred to the findings in *SPP v Egypt*. In addition, it relied on *Certain German Interests and American Bottle Company*, whereas in the latter, the arbitral tribunal held that there is “no rule in international law, nor no provision in the Conventions entered into between the [parties] or in the rules of this Commission, that precludes [the Claimant] from presenting a claim to this Commission because of its having been previously filed”³³².

However, while the invoked substantive provisions were different in the *CME* case, “both obligations operate upon the same plane of public international law,”³³³ and thus, it “is not a question of the *jurisdiction* of the tribunal. Rather, as the Tribunal correctly observed in [*SPP v Pakistan*], it is a question of whether the tribunal should stay the exercise of its jurisdiction.”³³⁴ The tribunals in *SPP v Pakistan* were, as in the *CME* case, two separate international tribunals constituted under different legal regimes. The rationale for the decision to stay its proceedings, put forward by the tribunal in *SPP v Pakistan*, namely the interest of international judicial order, would thus be equally relevant and valid in the *CME Case*.

4.4. Interim Conclusions

The resolution to litispendence problems in investment treaty arbitration can, in most cases, be resolved by way of analysing its very nature. A first step will be to determine whether the alleged conduct constitutes a breach of contract or a breach of treaty, in order to distinguish between remedies of national law and international law. In relation to conflicts between State courts and international investment tribunals, the distinction between national and international law will result in different causes of action and thus, there will be no *lis alibi pendens* between these *fora*. When the arbitral tribunal in *SGS v Pakistan* held that it had not jurisdiction over the contractual claims, it eloquently concluded that:

“the *lis pendens* has no application in this case. [The Respondent] asserted that the doctrine of *ne bis in idem* dictates a dismissal; however, if the claims are not *idem*,

³²⁸ *Ibid.*, p. 127.

³²⁹ *S.A.R.L. Benvenuti and Bonfant v People's Republic of the Congo*, Award of August 8, 1980, ICSID Case No. ARB/77/2.

³³⁰ *Ibid.*, para 1.14. Professor Sacerdoti relied on this in his Expert Opinion submitted to the Svea Court of Appeal in *The Czech Republic v CME Czech Republic B.V.* (RH 2003:55), published in *Transnational Dispute Management*, Volume 2, Issue 5, November 2005, pp. 111-112.

³³¹ *Infra*, fn. 395, para. 435.

³³² *American Bottle Company (U.S.A.) v United Mexican States*, April 2, 1929, published in 4 UNRIAA 435, p. 437.

³³³ McLachlan (2009), p. 288.

³³⁴ McLachlan, Shore & Weiniger (2007), para. 4.158.

bis does not arise. As the causes of action are not identical, the doctrine of *lis pendens* cannot operate to preclude us from exercising jurisdiction over the BIT claims.”³³⁵

The distinction between international and national law is, however, blurred by the use of certain BIT provisions, especially the umbrella clauses to which there is exist consensus in neither case law nor scholarly work. Arbitral tribunals have applied umbrella clauses significantly different, and the debate has essentially concerned the scope of such clauses and thus, its effect on the underlying obligations.

The main issue arises in parallel treaty arbitration, since there will not be possible to distinguish between national law and international law. Applying the triple identity test in the same way that has been done so far will result in further examples of irreconcilable judgements, since the cause of action will be different. This is the main argument for the proposition put forward in the final chapter. While the triple identity test may be suitable in a national setting, it is not sound to adopt in contemporary investment treaty arbitration.

³³⁵ *SGS v Pakistan*, para. 182.

5. Swedish Law

Chapter 13, Section 6, of the Swedish Code of Judicial Procedure (“CJP”) provides that “[w]hile an action is pending, a new action involving the same issue between the same parties may not be entertained.” In Swedish procedural law, a pending action constitutes a bar to try the case on its merits and generally, the court second seised should dismiss the action *sua sponte*.³³⁶

The provision in CJP regulates *lis pendens* between two Swedish state courts, both having local jurisdiction. The general question is, however, whether the provision on *lis pendens* in the CJP, by way of analogy or as inspiration, could or should apply in arbitration proceedings. This chapter investigates the legislative history and describes and discusses the current legal position on *lis pendens arbitralis* in Swedish law.

5.1. Legislative History

Sweden had provisions on *lis pendens* in its previous Arbitration Acts. Section 1(1) of the 1887 Arbitration Act provided that a claim pending in court could not be brought to arbitration.³³⁷ Further, according to the 1887 Act, an arbitration agreement was not valid if the claim was pending before a State court.³³⁸

In 1929, the Swedish Act on Arbitrators was adopted. In Section 1(2), it provided that an arbitral tribunal was not entitled to try a case simultaneously pending before a court. The provision on invalidity of the arbitration agreement on basis of court pendency was abandoned.³³⁹ According to the Act of 1929, it was possible to commence arbitration by notifying the presiding judge in court that the suit was withdrawn.³⁴⁰ The rationale of the provision stemmed from the national *lis pendens* rule in Swedish procedural law, namely that irreconcilable judgments should be avoided. Accordingly, an arbitral tribunal, just as state courts, was generally not allowed entertaining a case already pending in court.³⁴¹ In addition, when a case was already pending before a court, other courts were not allowed to assist arbitration proceedings.³⁴²

If an objection of *lis pendens* was raised in the arbitration proceedings, the tribunal were to try the objection. Should the tribunal find that the case was *lis pendens*, it was bound to discontinue its proceedings and dismiss the case.³⁴³ If an award was rendered and the claim in subsequent challenge proceedings was considered *lis pendens*, the award could be declared invalid before a court.³⁴⁴ However, an award could only be declared invalid if the court proceedings were pending when the award was rendered.³⁴⁵ Consequently, an award would not be deemed invalid if the court proceedings were terminated before it was rendered.

In the preparatory works to the SAA, the *lis pendens* rule in the 1929 Act on Arbitrators was discussed. The legislator held that a rule such as it was formulated in the previous Acts opens a possibility to block arbitral proceedings, albeit claims

³³⁶ Ekelöf, Bylund & Edelstam (2006), p. 266.

³³⁷ Legislative history, NJA II 1887 nr. 4, p. 16 *et seq.*

³³⁸ Dillén (1933), p. 89 *et seq.*; Hassler (1989), fn. 12; Lindskog (2012), p. 552, fn. 86.

³³⁹ *Ibid.*

³⁴⁰ Hassler (1989), p. 26.

³⁴¹ Legislative history, NJA II 1929 nr. 1, p. 10; Arbitration in Sweden (1984), p. 84; Dillén (1933) p. 87. Proceedings already pending were thus seen as a procedural hindrance, *see* Hassler (1989), p. 23.

³⁴² Hassler (1989), p. 26.

³⁴³ Gärde (1945), p. 294.

³⁴⁴ This was also the procedure under the 1887 Act; *see* Gärde (1945), p. 294.

³⁴⁵ SOU 1994:81, p. 171; Prop. 1998/99:35, p. 140; Arbitration in Sweden (1984), p. 145.

brought to a court for the sole purpose of obstruction may be disregarded.³⁴⁶ In the *travaux préparatoires*, the legislator argued that the versatile meaning of the doctrine of *lis pendens*, as well as the problem to pin down its scope of applicability in different contexts, made a provision hard to formulate.³⁴⁷ Thus, a provision on court proceedings as an absolute bar to arbitration was not integrated in the SAA.³⁴⁸ Nevertheless, the legislator held that the doctrine of *lis pendens* should be upheld in the future, and that questions related to parallel proceedings should be resolved through case law.³⁴⁹

The Supreme Court has stated that the principle of *res judicata*, as expressed in the CJP, is generally applicable in arbitration and that deviations from the principle must be based on strong reasons.³⁵⁰ Accordingly, a court or tribunal seised with a dispute that has already been adjudicated, ought to dismiss the claim on grounds of *res judicata*.³⁵¹ An arbitral tribunal should, unlike a Swedish State court, only dismiss a dispute where a party so requests.³⁵² A previous judgment can, in addition to the preclusive effect, have positive legal force in a subsequent arbitration. If a preliminary issue has been previously adjudicated, the tribunal should make its assessment on the issue based on the previous judgment or award, if requested by a party.³⁵³ Should an arbitral tribunal render an award in spite of an objection based on *res judicata*, the award could be set aside according to Section 34 of the SAA.³⁵⁴ It has been argued that arbitral tribunals seated in Sweden, just as State courts, ought to dismiss a dispute should a foreign arbitral award be recognised in Sweden.³⁵⁵

However, two objections can be raised towards the conclusion that the national principle of *res judicata* would be generally applicable in international arbitration. First, the Supreme Court has stated that courts and arbitral tribunals should have some discretion to take into account the distinctive characteristics of arbitration proceedings when applying principles of *res judicata* and *lis pendens*,³⁵⁶ “provided that such adaptation is justified by compelling reasons.”³⁵⁷ Second, the case law concerning *res judicata* and arbitration has only dealt with domestic arbitration. It has been argued that to uphold municipal rules on *lis pendens* and *res judicata* would be less compelling in international arbitral proceedings, given its particular characteristics.³⁵⁸

5.2. Current Legal Position on *Lis Pendens* and Arbitration

If arbitration proceedings are pending and the claim is brought to a Swedish court, the court should dismiss the case.³⁵⁹ This is simply because an arbitration agreement

³⁴⁶ SOU 1994:81, p. 136; Prop. 1998/99:35, p. 104.

³⁴⁷ SOU 1994:81, p. 137; Prop. 1998/99:35, p. 104.

³⁴⁸ Cf. Madsen p. 186.

³⁴⁹ SOU 1994:81, p. 137; Prop. 1998/99:35, p. 105.

³⁵⁰ *Aktiebolaget Skånska Cementgjuteriet v Motoraktiebolaget i Karlstad* (NJA 1953 p. 751); *Esselte AB v Allmänna Pensionsfonden* (NJA 1998 p. 189); Legislative history, NJA II 1929 nr. 1, pp. 10-12. For commentary and further references to case law, see Bolding (1962), p. 51, fn. 82; Hassler (1964), p. 317 *et seq.*; Heuman (2003), p. 357, fn. 279; Hobér (2011), para. 7.104.

³⁵¹ *Ibid.* On the issue of *factum superveniens* in arbitration, see Hassler (1964), pp. 321-326.

³⁵² Hobér (2011), para. 7.106; Ekelöf, Bylund & Edelstam (2006), p. 266.

³⁵³ Hassler (1964), pp. 328-329; Heuman (2003), p. 357; Hobér (2011), para. 7.106; Arbitration in Sweden (1984), p. 36. However, such “positive” *res judicata* effect of arbitral awards has not yet been confirmed in Swedish case law, Hobér (2011), para. 7.104.

³⁵⁴ *Aktiebolaget Skånska Cementgjuteriet v Motoraktiebolaget i Karlstad* (NJA 1953 p. 751); *Esselte AB v Allmänna Pensionsfonden* (NJA 1998 p. 189); Hobér (2011), para. 7.106.

³⁵⁵ Heuman (2003), pp. 706-707; Hobér (2011), p. 7.107.

³⁵⁶ *Esselte AB v Allmänna Pensionsfonden* (NJA 1998 p. 189).

³⁵⁷ Hobér (2011), para. 7.118.

³⁵⁸ Hobér (2011), para. 7.119.

³⁵⁹ This does, obviously, not apply to requests for interim measures.

constitutes a ground for dismissal under Swedish procedural law, and therefore bars a party to bring the claim to court,³⁶⁰ also in a situation where foreign law applies to the arbitration agreement.³⁶¹ If a party invokes the arbitration agreement in due time before the court, it should thus dismiss the case. However, if the court finds the arbitration agreement invalid or concludes that the claim does not come under the invoked arbitration clause, it would be competent to pronounce a judgment on the merits.³⁶² Put differently, it is the arbitration agreement that constitute the bar to judicial proceedings, not the claim that is already pending before an arbitral tribunal.³⁶³ It would thus be indifferent if the arbitration proceedings were commenced in Sweden or abroad.

5.2.1. *Declaratory Relief on the Jurisdiction of the Arbitral Tribunal*

Section 2(1), first sentence, of the SAA enshrines the positive effect of *compétence-compétence*, i.e. the ability of an arbitral tribunal to rule on its own jurisdiction. Sweden does not grant the negative effect of *compétence-compétence*. On the contrary, Section 2(1) of the SAA provides that:

“The arbitrators may rule on their own jurisdiction to decide the dispute. The aforesaid shall not prevent a court from determining such a question at the request of a party. The arbitrators may continue the arbitral proceedings pending the determination by the court.” (emphases added).

Section 2(1) of the SAA thus stipulates that a party has the right to bring an action, at any time during the arbitration proceedings, to a Swedish State court for a determination of the jurisdiction of the arbitral tribunal.³⁶⁴ The State court, to which the determination has been brought, is, under Section 2 of the SAA, entitled to pursue a full review of the existence and validity of the agreement to arbitrate. Moreover, a Swedish court seised of such action is not merely entitled to decide on the validity of the arbitration agreement, but may also, for example, rule on whether the dispute submitted to arbitration is within the scope of an admittedly valid arbitration clause, since that question relates to the jurisdiction of the arbitral tribunal.³⁶⁵ State courts will always have the final word on the question on jurisdiction of the arbitral tribunal and a decision of the arbitrators on their jurisdiction is thus not binding.³⁶⁶

As is evident from Section 2(1), third sentence, an arbitral tribunal will not be prevented from continuing its proceedings, pending the outcome of the determination by the State court. Since a State court will not have any reason to abide the decision on jurisdiction of the arbitral tribunal, parallel proceedings before courts and arbitral tribunals are allowed under said Section. Without support in legislation, a Swedish court cannot intervene in arbitration proceedings.³⁶⁷ In absence of specific provisions thereof, Swedish State court judges are not vested with power to restrain, order a stay or terminate parallel arbitration proceedings. The advantage of the Swedish approach is

³⁶⁰ Chapter 10, Section 17(a) of the CJP; Section 4(1) of the SAA. For commentary, see Heuman (2003), p. 159; Hobér (2011), para. 7.105; Pålsson (1994), p. 22; Lindskog (2012), p. 552, fn. 89 *in fine*.

³⁶¹ Section 49 of the SAA; SOU 1994:81, pp. 231-232; Prop. 1998/99:35, pp. 195-196.

³⁶² Pålsson (1994), p. 22; Heuman (2003), pp. 161 and 167.

³⁶³ Ekelöf, Bylund & Edelstam (2006), p. 266, fn. 348; Lindskog (2012), p. 553, fn. 91.

³⁶⁴ The jurisdiction of a State court in such situation is not codified in the SAA. Thus, to establish whether a Swedish court may consider a declaratory relief with respect to the jurisdiction of the arbitrators, a court must rely on the general principles for determining when a Swedish court may have jurisdiction in relation to such issues, cf. *Russian Federation v RosInvestCo UK Ltd* (NJA 2010 p. 508), hereinafter “Russia v RosInvest”. For commentary, see Hobér (2011), para. 5.21 *et seq.*

³⁶⁵ Lindskog (2012), p. 283; Seppälä (2006), p. 46.

³⁶⁶ Shaughnessy (2006), p. 297; Lindskog (2012), p. 287 and p. 553, fn. 91; *Russia v RosInvest*.

³⁶⁷ Heuman (2003), p. 704.

that a party may institute court proceedings at any time for a determination of the jurisdiction of the arbitral tribunal, and will thus find out at an early stage if the parties should proceed with the arbitration proceedings.³⁶⁸

If a party would bring a declaratory relief on the jurisdiction of the arbitral tribunal to a Swedish court at a late stage of the arbitral proceedings, it may result in parallelism between the declaratory action and subsequent challenge proceedings. That question was addressed by the Supreme Court in *Russia v RosInvest*, where it held that a declaratory relief may be brought to court at a late stage of the arbitration proceedings, at least where the award cannot be reasonably expected to be rendered within a near future.³⁶⁹ Further, the Supreme Court stated that where a declaratory action and challenge proceedings are concurrently pending, the Svea Court of Appeal (as the first instance for challenge proceedings) ought to stay its proceedings pending the outcome of the declaratory action on the jurisdiction of the arbitral tribunal.³⁷⁰

5.2.2. Parallel Proceedings Between State Courts and Arbitral Tribunals

How, then, should an arbitral tribunal seated in Sweden handle the case when it is simultaneously pending before a State court. Professor Heuman has argued that when an arbitral tribunal and a state court is simultaneously seised of the same dispute, “the question is most often one of jurisdiction, not *lis pendens*.”³⁷¹ The *travaux préparatoires* to the SAA stated that *before* a court has ruled on its jurisdiction, there are no reasons to generally preclude an arbitral tribunal to commence and continue its proceedings.³⁷² A prerequisite must, however, be that the respondent in the court proceedings has made an objection regarding the court’s jurisdiction based on an arbitration agreement. Moreover, a court would not be prevented to assist the arbitral proceedings by,³⁷³ *inter alia*, appointing an arbitrator according to the provisions in the SAA.³⁷⁴

If the respondent in the arbitration proceedings objects that the tribunal is not competent and request a dismissal on the basis of *lis pendens*, the tribunal is nevertheless competent to rule on its jurisdiction.³⁷⁵ The arbitral tribunal is thus entitled to continue its proceedings if it find itself competent and decline jurisdiction should it find the arbitration agreement inapplicable or invalid.³⁷⁶ In addition, it can be noted that under Swedish law, a State court has no power to stay the arbitration proceedings.³⁷⁷ Thus, *before* a court has established its jurisdiction, the solution to parallel proceedings

³⁶⁸ Seppälä (2006), pp. 47-48.

³⁶⁹ *Russia v RosInvest*, p. 515.

³⁷⁰ *Ibid.*, p. 515. The Supreme Court relied and referred to the *travaux préparatoires* on this issue, *see* Prop. 1998/99:35, pp. 77-78.

³⁷¹ Heuman (2003), p. 703. This is, on the contrary, a question of *lis pendens* in relation to jurisdiction; *see, supra*, chapter 2. However, the statement clearly expresses the positive effect of *compétence-compétence* as a probable *solution* to a situation where two *fora* are simultaneously trying their jurisdiction.

³⁷² SOU 1994:81, p. 137; Prop. 1998/99:35, p. 103. The rationale put forward for this is that a party should not be able to preclude arbitration merely by initiating court proceedings, *see ibid.*

³⁷³ SOU 1994:81, p. 137; Prop. 1998/99:35, pp. 103-104.

³⁷⁴ Heuman (2003), p. 704.

³⁷⁵ Heuman (2003), p. 704; Shaughnessy (2006), p. 297. *Cf. Investor v Republic of Kazakhstan*, Jurisdictional Award rendered in 2003 in SCC Case 122/2001, p. 136, where the arbitral tribunal held that “Under Swedish law there is no doubt that these Kazakh court decisions are not binding upon the Arbitral Tribunal, and that the Tribunal is empowered to determine its own competence.”

³⁷⁶ It has been held that an arbitral tribunal should not take *lis pendens* into account *sua sponte*, *see* Lindskog (2012), p. 553.

³⁷⁷ Holtzmann & Neuhaus (1989), p. 306. Without support in legislation, a Swedish court cannot intervene in arbitration proceedings; *see* Heuman (2003), p. 704.

between a state courts and an arbitral tribunal lies in the adoption of the positive effect of *compétence-compétence*.

The situation is different and less clear if a court and an arbitral tribunal have found themselves competent. In such situation, two *fora* are simultaneously trying the case on its merits. A Swedish State court is not deemed to have found itself competent until a decision on jurisdiction of the court becomes legally binding. Needless to say, court proceedings may take several years and thus, it is likely that an arbitral tribunal has already rendered an award on the merits before the court pronounces its judgment. However, if two *fora* have established themselves competent, there is an immanent risk for incompatible judgments on the merits.

As discussed above, the *travaux préparatoires* to the SAA argued that arbitration proceedings may continue *before* the court has established its jurisdiction. However, it did not make a statement on how to solve the situation when a court and an arbitral tribunal are simultaneously trying the case on its merits, *i.e.* when they both have established jurisdiction. Professor Heuman has argued that the preparatory works should not be construed *e contrario*, as implying that the arbitral tribunal must decline jurisdiction if a court has found itself competent.³⁷⁸

In Swedish law, it is possible to discern two grounds where an arbitral tribunal ought to dismiss the case due to *lis pendens*. First, the tribunal should take into account if the court ruling on the validity of the arbitration agreement has legal force in subsequent challenge proceedings.³⁷⁹ Since a foreign court determination on the validity of the arbitration agreement is often pronounced in a decision, and not a judgment, it may lack legal force.³⁸⁰ Second, it has been argued that an arbitral tribunal should take into account if the foreign court's judgment on the merits will be recognised in Sweden,³⁸¹ *i.e.* the technique of recognition prognosis. A recognition prognosis is based on a States' treaty obligations and in lack thereof, foreign court judgments are not recognised and enforceable in Sweden. If an arbitral tribunal considers that a judgment following from court proceedings abroad will not be recognised in Sweden, it should not terminate its proceedings.³⁸²

The argument based on the recognition prognosis, put forward in the preparatory works of the SAA and by commentators, was made in relation to Sweden's obligations under the Brussels Regulation and Lugano Convention (hereinafter "Brussels/Lugano").³⁸³ For quite some time, it has been somewhat unclear if an arbitral tribunal should terminate its proceedings should the case be pending in a Brussels/Lugano jurisdiction. The Brussels/Lugano have identical arbitration exceptions, expressed in Article 1(2)(d) respectively. The arbitration exception, as well as its scope, has been immensely discussed and the ECJ case law has not been consistent.³⁸⁴ It would constitute a *conflict de conventions* 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.³⁸⁵ A Contracting State should then on the one hand enforce the judgment under the Brussels/Lugano but on the other, it is

³⁷⁸ Heuman (2003), p. 705.

³⁷⁹ Heuman (2003), p. 705; Lindskog (2012), p. 552.

³⁸⁰ Especially when a foreign court pronounces the decision.

³⁸¹ SOU 1994:81, p. 137; Prop 1998/99:35, p. 104; Pålsson (1994), pp. 21-22; Heuman (2003), p. 705; Lindskog (2012), p. 552, fn. 90 and p. 554.

³⁸² Heuman (2003), p. 705.

³⁸³ SOU 1994:81, p. 137; Prop 1998/99:35, p. 104; Pålsson (1994), pp. 21-22; Heuman (2003), p. 705; Lindskog (2012), p. 554.

³⁸⁴ See, *inter alia*, *Marc Rich & Co. AG v Società Italiana Impianti PA*, Case C-190/89, *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another*, Case C-391/95. For commentary, see Houtte (1997), p. 85 *et seq.*

³⁸⁵ See further, Houtte (1997), p. 87.

under a duty to refer the parties to arbitration according to Article II of the New York Convention.

The uncertainty regarding the scope of the arbitration exception in the Brussels Regulation has led to a new Recital of the Brussels Regulation. The new Recital 12, second and third paragraphs, clarifies what the exception means in practice and reads:

“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 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).

A decision by a court of a Member State, which declares that an arbitration agreement is not binding, will thus not be recognised under the Regulation. As a consequence, suppose that a court in Germany has declared an arbitration clause providing for arbitration in Stockholm invalid. In such situation, Swedish courts may nevertheless rule that the arbitration agreement is valid and should be enforced. Further, such decision by a German court does, much less, prevent an arbitral tribunal seated in Sweden to declare itself competent. Since the Regulation entitles two *fora* to declare themselves competent, the risk of irreconcilable judgments on the same cause of action is palpable under the recast Regulation regime. 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 to be invalid, does not preclude recognition and enforcement in accordance with the Regulation on the substance matter of the judgment. It is without prejudice to the competence of the courts to decide on recognition and enforcement in accordance with the New York Convention (to which all Member States have acceded). Suppose, again, that the German court decides that an arbitration clause is invalid and pronounces a judgment on the merits. Suppose, also, that the arbitral tribunal seated in Sweden declares itself competent (and that a Swedish court agree), and renders an award on the substance, 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 substance of the German judgment will be recognisable and enforceable in accordance with the Regulation and the arbitral award likewise but under the New York Convention.

In this situation, Recital 12 states that the court of the third Member State ought to reach its own conclusion on whether the arbitration agreement is valid and binding in accordance with 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 to be valid, there is indeed a *conflict de conventions*. Perhaps the arbitral award has prevalence over the court judgment in such situation, since the New York Convention clearly has precedence over the Brussels Regulation according to Recital 12 and the new Article 73(2).

In summary, the Recital does offer some guidance on the application of the arbitration. Some uncertainty remains, especially since a court in a Member State is not bound to recognise or enforce a judgment pronounced declaring an arbitration agreement invalid (this falls within the arbitration exception), but at the same time, it is bound to enforce judgments on the merits of a claim, which has been found not to be subject of a valid arbitration clause. Ultimately, it would be up to the ECJ to rule on the primacy between the New York Convention and the Brussels Regulation and thus also the primacy between court judgments on the merits and an arbitral award.

While it was previously unclear whether a Member State had to recognise a judgment on the validity of an arbitration agreement, it is now clear that such decision would not be enforceable under the Brussels Regulation. This significantly weakens the argument that arbitral tribunals seated in Sweden should adopt the recognition prognosis when a claim is simultaneously pending in another Brussels jurisdiction. The only court to which an arbitral tribunal should defer is thus the supervisory court at the seat of the arbitration.

5.2.3. *Parallel Proceedings Between Two Arbitral Tribunals*

Although very sparsely commented, it has been argued that, under Swedish law, the municipal *lis pendens* rule should apply if the claim has been brought before two arbitral tribunals.³⁸⁶ Thus, the arbitral tribunal second seised ought to dismiss the case if the respondent so requests.³⁸⁷ Justice Lindskog has argued that the doctrine of *lis pendens* precludes an arbitral tribunal second seised to hear all questions arising out of the arbitration agreement, on which the arbitration proceedings were commenced.³⁸⁸ The rationale for that view is that a party should be able to refer to new claims for relief and causes of action in ongoing arbitration proceedings, according to 23(2) of the SAA.³⁸⁹

The position taken by Swedish legal scholars, that the arbitral tribunal second seised ought to dismiss its case is, in part, consistent with the views taken by international authorities. The difference between the Swedish and international approach is that the latter suggest that should two parallel and identical claims, between the same parties, be brought before separate arbitral tribunals, there are compelling reasons suggesting that the secondly constituted tribunal should *stay* its proceedings.³⁹⁰ It has been considered inappropriate to adopt a strict first-to-file rule, demanding the tribunal second seised to automatically dismiss the claim. Such, rigid *lis pendens* rule can, in an international arbitration context, be used by an oppressive party to anticipate a dispute and commence arbitration on, *e.g.*, its home turf where the parties have not agreed to arbitrate their dispute.

5.3. *Parallel Treaty Arbitration: the CME Case*

The two arbitral tribunals and Svea Court of Appeal, expressly dealt with *lis pendens* between two arbitral tribunals *CME* case, which is the most fully argued case of parallel treaty arbitration. For the purpose of a discussion of the case, the background will be presented in more detail.

³⁸⁶ Gärde (1945), p. 294; Lindskog (2012), p. 552; Heuman (2003), p. 707.

³⁸⁷ Heuman (2003), p. 707.

³⁸⁸ Lindskog (2012), p. 552, fn. 88.

³⁸⁹ Lindskog (2012), p. 552, fn. 88.

³⁹⁰ ILA Final Report on *Lis Pendens* and Arbitration, para. 4.48; Born (2009), p. 2948; McLachlan (2009), p. 217; Söderlund (2005), p. 321.

5.3.1. Background of 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 2003.³⁹¹ 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 of the Respondent.

Further, the tribunal denied the claim for a declaration that the respondent had committed further breaches of the BIT regarding the events in 1996 and 1999. In summary, the tribunal dismissed the claims entirely concluding that the claim was essentially between Mr. Lauder and the Czech investment partner. Thus, it was a private commercial dispute and the BIT “created no duty of due diligence on the part of the Czech Republic to intervene in the dispute between the two companies over the nature of their legal relationships.”³⁹²

On 22 February 2000, CME, a company in The Netherlands, which Mr. Lauder indirectly controlled and partially owned, demanded 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 had its seat in Stockholm. In essence, CME alleged the same breaches and referred to the same facts as Mr. Lauder in the London proceedings. The Republic requested dismissal of the proceedings, arguing that the tribunal lacked jurisdiction as the same remedies were concurrently pursued in a different forum:

“Ronald S. Lauder, the ultimate controlling shareholder of CME, has himself brought an *ad hoc* arbitration against the Czech Republic pursuant to the bilateral investment treaty in force between the United States and the Czech Republic (the “US Treaty”). The factual predicate of the claims in that proceeding are virtually identical to the factual predicate of this action.”³⁹³

On 13 September 2001, only ten days after the London Award was rendered, the majority of the Stockholm tribunal adopted a Partial Award.³⁹⁴ On the merits, the Stockholm tribunal reached an opposite decision to the London tribunal. It held that the respondent had not breached its obligation 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 2003.³⁹⁵ As put by one authoritative scholar, it “is close to incomprehensible how the identical acts of the same host state, the Czech Republic, could have been qualified as indirect expropriation and violations of treatment standards including fair and equitable treatment and full protection and security by one tribunal, while another tribunal reached the opposite conclusion.”³⁹⁶

However, both tribunals addressed the possibility of irreconcilable findings in the arbitrations and did argue consensual on this issue. Mr. Lauder requested (repeatedly) that the two proceedings should be consolidated. The Republic did not agree to a *de*

³⁹¹ *Ronald S. Lauder v The Czech Republic*, Final Award of September 3, 2001, hereinafter “London Award”.

³⁹² *London Award*, para. 314.

³⁹³ *CME Czech Republic B.V. v The Czech Republic*, Partial Award and Separate Opinion of September 13, 2001, hereinafter “Stockholm Award”, para. 143.

³⁹⁴ *Stockholm Award*.

³⁹⁵ *CME Czech Republic B.V. v The Czech Republic*, Final Award of March 13, 2003, hereinafter “Final Award”.

³⁹⁶ Reinisch (2010), p. 116.

facto consolidation of the treaty proceedings but did, on the contrary, insist that a different arbitral tribunal ought to hear CME's claims.³⁹⁷ 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, since 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."³⁹⁸

The Republic asserted that the doctrine of *res judicata* and *lis pendens* should apply, in both the arbitration proceedings as well as in the challenge proceedings before the Svea Court of Appeal. Since the *London Award* was rendered first, the arbitral tribunal only addressed the litispence issue. It repudiated the application of *lis pendens* in its proceedings, holding that:

"[t]he Arbitral Tribunal considers that the Respondent's recourse to the principle of *lis alibi pendens* to be of no use, since all the other court and arbitration proceedings involve different parties and different causes of action [...] Therefore, no possibility exists that any other court or arbitral tribunal can render a decision similar to or inconsistent with the award which will be issued by this Arbitral Tribunal, i.e. that the Czech Republic breached or did not breach the Treaty, and is or is not liable for damages towards Mr. Lauder."³⁹⁹

In its Final Award of 2003, the Stockholm tribunal addressed the Republic's contention of *res judicata*. It held that the doctrine should be applied in international investment arbitration but that there was no identity between the current claims. Further, since the Republic did not accept the claims to be consolidated, "the Respondent waived that defense."⁴⁰⁰ The tribunal also held, on the same line of reasoning, that the Republic, expressly and impliedly, had waived any *lis pendens* defence.⁴⁰¹

5.3.2. Challenge Proceedings in the CME Case

Before the Final Award was rendered, the Republic challenged the Stockholm Award, requesting the Svea Court of Appeal to declare it invalid or to be set aside. The Svea Court of Appeal pronounced its judgment on 15 May 2003, rejecting the petition.⁴⁰² It did not grant a leave for appeal to the Supreme Court. The judgment dealt, *inter alia*, with questions related to the doctrine of *lis pendens* in international arbitration under Swedish law. It made several relevant statements, which will be discussed in turn.

The Republic's position in the challenge proceedings regarding *lis pendens* and *res judicata* was that:

"[t]he Stockholm Tribunal lacked jurisdiction to examine the case *per se* due to *lis pendens* and *res judicata* since: (i) the London proceedings were commenced prior to the Stockholm proceedings; (ii) the Stockholm proceedings involved the same claims, grounds, and damage, and the same investments and factual circumstances in general, and violations of essentially the same treaty obligations as the London proceedings; (iii) the defendants in the Stockholm proceedings and London proceedings were identical and, in practice, the petitioners were the same; and (iv) the London award was issued prior to the Stockholm award. The conflicting outcome of the Stockholm award is unacceptable from a legal standpoint. The

³⁹⁷ *London Award*, para. 173; *Stockholm Award*, paras. 302 and 412.

³⁹⁸ *Stockholm Award*, para. 412. See also, *London Award*, para. 175.

³⁹⁹ *London Award*, para. 171. Cf. *Stockholm Award*, para. 412 (cited above).

⁴⁰⁰ *Final Award*, para. 430.

⁴⁰¹ *Final Award*, para. 431.

⁴⁰² *The Czech Republic v CME Czech Republic B.V.* (RH 2003:55). For an unofficial English translation of the decision, see Stockholm Arbitration Report 2003:2, p. 187 *et seq.*

existence and content of the parallel proceedings were invoked by the Republic as grounds for dismissal.”⁴⁰³

CME contested the Claimant’s petitions and argued that:

”[t]he Stockholm Tribunal has, namely, the jurisdiction to examine the matter on its merits since the principles of *res judicata* and *lis pendens* are not applicable to this type of international dispute. Even if they were deemed to be applicable, they have not constituted an impediment to examination of the dispute since: (i) Lauder and CME are not the same party; (ii) Lauder and CME invoked different substantive agreements in support of their respective claims; and (iii) the issues disputed in the Stockholm proceedings were not covered by the arbitration agreement applicable in the London proceedings.”⁴⁰⁴

(i) *Applicability of lis pendens and res judicata*. The Swedish Supreme Court has, in previous judgments, held that the principle of *res judicata*, as expressed in municipal law, is generally applicable in arbitration and that deviations from the principle must be based on strong reasons.⁴⁰⁵ The Svea Court of Appeal began with a general paragraph, discussing the applicability of *lis pendens* and *res judicata* in international investment treaty arbitration. It held that:

”[t]he issue whether *lis pendens* and *res judicata* may be applicable in a situation such as the instant one has not, as far as is known, arisen previously. The mere fact that the arbitrations were initiated under different investment treaties which were entered into between different states, the Czech Republic and the United States in the one treaty and the Czech Republic and the Netherlands in the other, militates against these legal principles being applicable at all. However, a couple of arbitral awards have been invoked from which it at least is evident, that the dispute has been considered to be the same in different arbitration proceedings which were brought under two different treaties. Since, in any event, it cannot be ruled out entirely that the principles of *lis pendens* and *res judicata* may become applicable as between two different international arbitrations, the Court of Appeal will proceed with its assessment.”⁴⁰⁶ (emphases added).

Where the Supreme Court had been quite clear on the issue that *res judicata* is indeed applicable in arbitration, the Svea Court of Appeal was more cautious in its reasoning. Perhaps it was because the *CME* case concerned parallel treaty arbitration, which was not the issue in the previous judgments of the Supreme Court. However, the Svea Court of Appeal did not entirely rule out the possibility that *res judicata* and *lis pendens* could be applicable in investment arbitration, merely that two claims under separate treaties “militates against these principles being applicable at all”. It did not take a final approach on the applicability, but proceeded with its assessment.

(ii) *Public policy or ground for the setting aside of an award?* An award can be declared invalid on the basis of *ordre public* according to Section 33 of the SAA. In addition, Section 34 of the SAA provides that an award can be set aside. The Court of Appeal stated that according to Swedish law, an objection of *lis pendens* and *res judicata* constitutes a bar to substantive adjudication, and is only taken into consideration if a party has raised an objection thereof.⁴⁰⁷ Since the objection is optional, the Court considered an objection of *lis pendens* and *res judicata* to be a

⁴⁰³ SAR 2003:2, p. 173 (unofficial translation).

⁴⁰⁴ SAR 2003:2, p. 175 (unofficial translation).

⁴⁰⁵ *Aktiebolaget Skånska Cementgjuteriet v Motoraktiebolaget i Karlstad* (NJA 1953 p. 751); *Esselte AB v Allmänna Pensionsfonden* (NJA 1998 p. 189); Legislative history, NJA II 1929 nr. 1, pp. 10-12. See Bolding (1962), p. 51, fn. 82 and Heuman (2003), fn. 279 with further references to case law.

⁴⁰⁶ SAR 2003:2, p. 186 (unofficial translation).

⁴⁰⁷ SAR 2003:2, p. 187 (unofficial translation).

ground for the setting aside of an award, not public policy.⁴⁰⁸ The assessment of the Svea Court of Appeal on this issue is consistent with the subsequent findings of the ILA Committee, which held that “*lis pendens* is not generally considered to be part of public policy and therefore need not be raised by an arbitral tribunal of its own motion.”⁴⁰⁹

According to Section 51 of the SAA, in a commercial case where neither of the parties has its place of business or is domiciled in Sweden, they can agree to limit or exclude their right to bring challenge proceedings under Section 34 (for example based on *lis pendens* or *res judicata*). However, the parties cannot agree to renounce the right to declare the award invalid on, *inter alia*, the grounds of an alleged violation of public policy according to Section 33. Since *res judicata* and *lis pendens* is not considered to be a part of public policy, it can thus be excluded from the right to challenge the award under Section 34. If an arbitration agreement contains a valid exclusion clause, the winning party can focus on enforcing the award.⁴¹⁰ The function of the exclusion clause is hence to prevent parallel proceedings, *i.e.* challenge and enforcement proceedings.⁴¹¹

(iii) *Objection of lis pendens and res judicata.* Since the Court of Appeal did not consider the principles of *lis pendens* and *res judicata* to be a part of public policy under Section 33 of the SAA, it can be waived. A party is barred from the right to invoke a circumstance as a ground for challenge, if it is deemed that a party has waived its right during the arbitration proceedings.⁴¹² Thus, the Court of Appeal examined if the Republic made an objection of *lis pendens* or *res judicata* during the arbitration proceedings. The Court held that the Republic had expressly stated that it did not rely on *lis pendens* and *res judicata* when objecting to the tribunal’s jurisdiction.⁴¹³ The Republic argued on the grounds of abuse of process. The Svea Court of Appeal stated that Swedish law does not have a concept equivalent to abuse of process and thus, it was deemed unclear if the objection included *lis pendens* and *res judicata*.⁴¹⁴ For reasons of judicial economy, the Court held that it would not adopt a definitive position regarding the issue whether the Republic’s conduct constituted a waiver.

(iv) *Identity of claims.* The Court of Appeal finally discussed the identity of the London and Stockholm arbitration proceedings. When assessing the identity of the claims, it applied the traditional triple identity test. 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 any 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 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.”⁴¹⁵ Finally, it dismissed the Republic’s claim on the grounds of *lis pendens* and *res judicata*, holding that:

”[a]ccording 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,

⁴⁰⁸ SAR 2003:2, p. 187 (unofficial translation). This is in line with scholarly opinions and previous case law, *see, inter alia*, Hassler (1964), p. 328; Lindskog (2012), pp. 899-900; Hobér (2011), para. 7.106; *The Republic of Latvia v Swembalt AB* (NJA 2002 C 62).

⁴⁰⁹ ILA Final Report on *Lis Pendens* and Arbitration, para. 5.12.

⁴¹⁰ Heuman (2003), p. 712.

⁴¹¹ SOU 1994:81, p. 191; Prop 1998/99:35, p. 158. *See also* Heuman (2003), p. 712.

⁴¹² Section 34(2) of the SAA.

⁴¹³ SAR 2003:2, p. 187 (unofficial translation).

⁴¹⁴ SAR 2003:2, pp. 187-188 (unofficial translation).

⁴¹⁵ SAR 2003:2, p. 188 (unofficial translation).

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.⁴¹⁶

5.3.3. Conclusions of the CME Case

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 procedure.⁴¹⁷ 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.

It is not argued that the Svea Court of Appeal applied Swedish law incorrectly. Rather, the problem is that the same factual dispute may be brought under two separate investment treaties by virtually the same claimant against the same host State. As expressed by the tribunal in the Stockholm Award, “the Claimant and its ultimate shareholder, by initiating two parallel UNCITRAL Treaty Proceedings had, as the Claimant expressed it, ‘two bites of the apple’.”⁴¹⁸ The core of the problem is thus that the triple identity criterion is all but satisfactory when adopted in investment treaty arbitration since it offers “the possibility to any investor with a more complex corporate structure, entailing different corporate (and individual) nationalities, to try one BIT arbitration after the other until one tribunal finds in its favour.”⁴¹⁹

5.4. Interim Conclusions

In the SAA, there is no provision on *lis pendens*, which has been the case in previous Swedish arbitration acts. The Supreme Court has stated that the principle of *res judicata*, as expressed in the CJP, is generally applicable in arbitration and that deviations from the principle must be based on strong reasons. However, it has not addressed the question of *lis pendens arbitralis*.

If a Swedish State court is faced with a claim and the respondent in a timely manner raises the arbitration defence, it should and would dismiss the case, should it find the arbitration agreement valid. If the court, however, find the arbitration agreement invalid, it would proceed and pronounce a judgment on merits irrespective of whether arbitration proceedings are simultaneously pending abroad.

According to the *travaux préparatoires* to the SAA, there are no reasons to generally preclude an arbitral tribunal to commence and continue its proceedings, *before* a court has ruled on its jurisdiction. In such situation, Swedish courts would not be prevented to assist the arbitral proceedings by, *e.g.*, appoint an arbitrator according to the provisions in the SAA. If the respondent in the arbitration proceedings objects that the tribunal is not competent and request a dismissal on the basis of *lis pendens*, the tribunal would nevertheless be allowed to rule on its own jurisdiction. Consequently, *before* a state court has established its jurisdiction, the solution to parallel proceedings between a State court and an arbitral tribunal lies in the adoption of the positive effect of *compétence-compétence*.

⁴¹⁶ SAR 2003:2, p. 189 (unofficial translation).

⁴¹⁷ Hobér (2011), para. 7.129.

⁴¹⁸ *Stockholm Award*, para. 621.

⁴¹⁹ Reinisch (2003), p. 56.

The preparatory works to the SAA thus clearly stated that arbitration proceedings may continue *before* a court has established its jurisdiction but were silent on how the issue should be resolved once a court has found itself competent. It has been argued that the preparatory works should not be construed *e contrario*, as implying that the arbitral tribunal must decline jurisdiction if a court has found itself competent.⁴²⁰ However, it has been held that an arbitral tribunal ought to defer to a State court in two situations. First, the tribunal should take into account if the court ruling on the validity of the arbitration agreement has legal force in subsequent challenge proceedings.⁴²¹ Since a foreign court determination on the validity of the arbitration agreement is often pronounced in a decision, and not a judgment, it may lack legal force.⁴²² This is consistent with the view that the only court an arbitral tribunal ought to defer to is the supervisory court at the seat of the arbitration.⁴²³

Second, an arbitral tribunal should adopt a recognition prognosis and take into account whether the foreign court could pronounce a decision enforceable in Sweden.⁴²⁴ This argument was put forward when the Brussels Regulation 44/2001 and its predecessor was in force. According to the revised Brussels Regulation, a judgment, which has declared an arbitration agreement invalid, would be enforceable only as to the merits. Thus, it is ultimately up to every court to decide on the validity of an arbitration agreement, which undermines the positions put forward in Swedish scholarly writing. Consequently, there are strong reasons for the conclusion that an arbitral tribunal seated in Sweden should not defer to a foreign court, even where it is located in a EU jurisdiction.

Under Swedish law, it has been argued that the municipal *lis pendens* rule should apply if the claim has been brought before two arbitral tribunals.⁴²⁵ That position is, in part, consistent with the views taken by international authorities, which advocate that there are compelling reasons suggesting that the secondly constituted tribunal should *stay* its proceedings.⁴²⁶

The final conclusion, which can be drawn from the chapter, is that *res judicata* and *lis pendens*, according to the Svea Court of Appeal, would possibly apply in parallel treaty arbitration, if there were identity between two claims. In the *CME* case, it held that the identity prerequisite, in relation to the parties in the arbitrations, was not met. However, the problem of investors taking “two bites of the apple”,⁴²⁷ as the claimant in the *CME* case expressed it, is not just a problem under Swedish law. Rather, it is a problem inherent in the very nature of investment treaty arbitration.

⁴²⁰ Heuman (2003), p. 705.

⁴²¹ Heuman (2003), p. 705; Lindskog (2012), p. 552.

⁴²² Especially when a foreign court pronounces the decision.

⁴²³ *Supra*, section 3.5.

⁴²⁴ SOU 1994:81, p. 137; Prop 1998/99:35, p. 104; Pålsson (1994), pp. 21-22; Heuman (2003), p. 705; Lindskog (2012), p. 552, fn. 90 and p. 554.

⁴²⁵ Gärde (1945), p. 294; Lindskog (2012), p. 552; Heuman (2003), p. 707.

⁴²⁶ ILA Final Report on *Lis Pendens* and Arbitration, para. 4.48; Born (2009), p. 2948; McLachlan (2009), p. 217; Söderlund (2005), p. 321.

⁴²⁷ *Stockholm Award*, para. 621.

6. Conclusions and Propositions

The text has, so far, presented the issues raised by parallel proceedings in international arbitration. Further, it has discussed different national principles of *lis pendens*, and argued that such solutions are inappropriate to simply transpose into the area of international arbitration. This chapter will return to the purpose of the thesis, namely to advocate two propositions on how *lis alibi pendens* in international arbitration is to be resolved under Swedish law, in the context of international trends and approaches. The discussion, which has been made throughout the text, should be seen as a background to these propositions. Thus, the current chapter will summarise and evolve conclusions made in previous chapters into propositions. For structural purposes, international commercial arbitration and parallel treaty arbitration will be discussed separately.

6.1. Possible Solution in International Commercial Arbitration

In chapter three, it was argued that a sound solution to *lis pendens* in international commercial arbitration begins by examining the competence to establish jurisdiction. The proposition argued below is thus based on the priority for arbitration, set out by Article II(3) of the New York Convention.

6.1.1. Proposition: *Compétence-compétence* and Discretionary Stay

The positive effect of the doctrine of *compétence-compétence* is accepted in virtually all developed jurisdictions worldwide.⁴²⁸ It is thus proposed that where the arbitral tribunal considers itself to be *prima facie* competent, it should proceed with the arbitration and decide on its jurisdiction, irrespective of whether the same claim is pending before a State court.⁴²⁹ The proposition can be summarised by the amended Swiss Private International Law Statute, providing 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.”⁴³⁰

Such solution is not codified in Swedish law. Professor Jean-François Poudret and Sébastien Besson have argued that, in order to be efficient in international relations, “such solution should not only be provided for in some national laws.”⁴³¹ On the contrary, they stress, it needs to be incorporated in an international convention, such as the New York Convention or alternatively, be regulated within the EU, which is based on mutual respect in and between its jurisdictions.⁴³² However, beyond the practical difficulties to revise the New York Convention,⁴³³ or to legislate within EU, such incorporation may be superfluous and unnecessary. 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*. Consequently, there is no need for new provisions in international conventions. Instead, what needs to be respected is the enforcement of the fundamental principles enshrined in the New York Convention and implied by the doctrine of *compétence-compétence*. The proposition is consistent with the Swedish approach; save for

⁴²⁸ Born (2009), pp. 862-863.

⁴²⁹ This accords with Recommendation 1 of the ILCA Recommendations on *Lis Pendens* and Arbitration. See also Gaillard (2010), para. 83; Poudret & Besson (2007), para. 521; Cremades & Madalena (2008), p. 539; Söderlund (2005), p. 321; Reichert (1992), p. 254; Gallagher (2006), para. 17-37.

⁴³⁰ Article 186(1bis).

⁴³¹ Poudret & Besson (2007), para. 521.

⁴³² *Ibid.*

⁴³³ This is noted by the authors, *ibid.*

scholarly opinions holding that arbitral tribunals ought to terminate its proceedings where a judgment may be enforced in Sweden, *e.g.* where the claim would be pending in a Brussels/Lugano jurisdiction. As argued in the previous chapter, such position can be called into question based on the new Recital 12 of the Brussels Regulation, which provides that a decision by a court of a Member State, which decides that an arbitration agreement is not binding, will thus not be recognised under the Regulation. ILA has perspicaciously summarised the arguments for the solution based on the positive effect of *compétence-compétence*:

“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.”⁴³⁴

On the other hand, though, where concurrent State court proceedings are pending at the place of the arbitration, the arbitral tribunal should 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.⁴³⁵ In Sweden, an arbitral tribunal are entitled to continue its proceedings even where a declaratory relief on the jurisdiction of the arbitral tribunal is brought to a Swedish State court. Should, however, a Swedish court decide that the arbitral tribunal lacks jurisdiction, such judgment would obviously render any subsequent arbitral award subject to annulment in Sweden, since the decision has legal force in the challenge proceedings. Consequently, there are strong reasons for the proposition that the only courts, to which the arbitral tribunal should defer to, are the courts at the seat of the arbitration.

However, it can also be argued that an arbitral tribunal should not discontinue its proceedings, even where a court at the seat of the arbitration has determined that there was 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.⁴³⁶ For example, in *Hilmarton*,⁴³⁷ 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.”⁴³⁸ 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, it would be contrary to Swedish and international authorities,⁴³⁹ and there is no consensus on the proper treatment of annulled international awards in other jurisdictions.⁴⁴⁰

⁴³⁴ ILA Final Report on *Lis Pendens* and Arbitration, para. 5.9.

⁴³⁵ Söderlund (2005), p. 321.

⁴³⁶ Born (2009), pp. 2924-2926 and p. 2942.

⁴³⁷ *Hilmarton Ltd. v. Omnium de traitement et de valorisation*, Cour de Cassation [Supreme Court], 23 March 1994.

⁴³⁸ *Ibid.*, 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. It should perhaps be noted that this is not just a French approach. Born (2009), pp. 2679-2680, argues that the same approach has been taken by Belgian, Dutch and Swiss courts.

⁴³⁹ Recommendation 3 of the Recommendation 1 of the ILA Recommendations on *Lis Pendens* and Arbitration; Heuman (2003), p. 705; Lindskog (2012), p. 552; Söderlund (2005), p. 321.

⁴⁴⁰ Born (2009), p. 2676.

Finally, 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 where a party so requests.⁴⁴¹ In the *Fomento* case, the Swiss court held that the forum second seised is *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).⁴⁴² Such mandatory stay is not advised, but a *discretionary stay* could sometimes be a sensible solution.

For example, where there is *prima facie* evidence that the claimant in the arbitration proceedings has waived its right to arbitrate based on its conduct before the foreign State court, it may be appropriate to stay its proceedings. Since there are compelling reasons in favour of the position that a question of a waiver should be assessed based on the procedural rules at the place of the court proceedings,⁴⁴³ it may be suitable for an arbitral tribunal to stay its proceedings pending the outcome on that question.⁴⁴⁴

Further, even where there are not identical concurrent proceedings it may, under exceptional circumstances by way of exception, be sensible for an arbitral tribunal to exercise discretionary power and stay its proceedings. Such “sound case management” may be exercised, *e.g.* where the arbitral tribunal is seised of a dispute between an owner and a contractor, and court proceedings are simultaneously pending between the contractor and its sub-contractor,⁴⁴⁵ since the litigation may rule on issues of great importance to the parties in the arbitration proceedings. Given that the arbitrators should decide the dispute before them in a speedy manner, such discretionary stay should be exercised very sparingly.⁴⁴⁶ In Swedish law, nothing prevents an arbitral tribunal from ordering a stay of its proceedings. However, the possibility is somewhat limited, given the requirement for expediency of arbitral proceedings.⁴⁴⁷

If the same claim is pending before two arbitral tribunals, the proposition is somewhat different. In such situations, it is proposed that the arbitral tribunal second seised should decline jurisdiction or stay its proceedings.⁴⁴⁸ However, to fully adopt a first-to-file rule for the arbitral tribunal second seised may be inappropriate. Thus, the tribunal second seised of the dispute should have a broad discretion to stay its proceedings, maybe on only some of the issues.⁴⁴⁹

6.2. Possible Solution in Parallel Treaty Arbitration

In chapter four, it was concluded that it is necessary to distinguish between treaty and contract claims. Such distinction, which will result in a distinction between national and international law, will lead to different causes of action and thus, there will be no *lis alibi pendens* between these *fora*. However, such distinction does not resolve the situation where virtually the same investor resorts to international arbitration under different BITs, *i.e.* parallel treaty arbitration as in the *CME* case.

⁴⁴¹ Recommendation 2 of the ILA Recommendations on *Lis Pendens* and arbitration; Reichert (1992), p. 254.

⁴⁴² Oetiker (2002), p. 143.

⁴⁴³ Söderlund (2005), pp. 306-307 and p. 313.

⁴⁴⁴ *Cf.* Recommendation 4 of the ILA Recommendations on *Lis Pendens* and Arbitration.

⁴⁴⁵ ILA Final Report on *Lis Pendens* and Arbitration, para. 5.11; Hobér (2005), p. 255.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Onda Communication v Telefonaktiebolaget LM Ericsson*, Judgment of the Svea Court of Appeal on October 5, 2012 (T 8399-11).

⁴⁴⁸ ILA Final Report on *Lis Pendens* and Arbitration, para. 4.48; Born (2009), p. 2948; Lew (2005), p. 310; McLachlan, p. 217; Söderlund (2005), p. 321.

⁴⁴⁹ *Ibid.*

The proposition put forward in relation to parallel treaty arbitration is that an arbitral tribunal seated in Sweden, when assessing the identity between claims, should relax the triple identity test. The proposition should, however, be seen as a more general proposition to investment tribunals. Since the proposed solution clearly has its implications under Swedish law, these will be discussed separately.

6.2.1. Proposition: Relax the Triple Identity Test

When assessing whether there is identity between two claims simultaneously pending, adjudicatory bodies generally adopt the triple identity test.⁴⁵⁰ The triple identity test is a formalistic technique of assessing identity between claims, and the focus will be on the parties and cause of action. The appropriateness of such approach can be seriously called into question when adopted in parallel treaty arbitration.

As is evident from the *CME* case, two claims under separate BITs was considered as different causes of action and thus, there was no identity between the cases. Moreover, the myriad of applicable BITs and the wide interpretation of “investment” enables different entities, which may be more or less the same,⁴⁵¹ to resort to international investment arbitration, relying on the same facts, against the same host State.⁴⁵² This is the very contradiction and gist of the problem with the formal application of the triple identity test; it may be rigid and strict but results in a *laissez faire* state, since the investor may endlessly re-litigate the same dispute under different BITs.

The solution, which has been advocated foremost by Professors August Reinisch and Christoph Schreuer, is to take a more flexible approach when assessing the identity of claims.⁴⁵³ The rationale for such solution is that the:

“[...] main purposes of preventing costly parallel litigation, avoiding conflicting judgements and protecting parties from oppressive litigation tactics will be achieved in a world of expanded dispute settlement opportunities only if [*res judicata* and *lis pendens*] are applied in a fashion transcending strict formalism.”⁴⁵⁴

When faced with parallel treaty arbitrations, it is thus proposed that it would be appropriate for international tribunals to focus more on the facts and issues of a case. This can be achieved by a relaxed attitude towards (i) the parties to the arbitration proceedings and (ii) the causes of action.

(i) *Parties*. In the current state, not only direct investors are entitled to pursue proceedings against a host State. To prevent re-litigation of disputes, it is proposed that arbitral tribunals should focus on the underlying economic realities rather than the formal structure of corporate groups. Consequently, *lis pendens* should apply to a broader range of related corporations, e.g. related parent and subsidiary companies.⁴⁵⁵ To adopt a more informal approach towards the party prerequisite entails a possibility for investment tribunals to give special attention to the foreign investors’ corporate

⁴⁵⁰ *Supra*, section 2.1.

⁴⁵¹ It can be, e.g., a subsidiary and its parent or a company and its controlling shareholder.

⁴⁵² Bjorklund (2007), p. 267; Gallagher (2006), para. 17-36.

⁴⁵³ Reinisch (2010), pp. 119-124; Reinisch (2003), pp. 51-72; Legal Opinion submitted to the Svea Court of Appeal, prepared by Christoph Schreuer and August Reinisch <<http://italaw.com/cases/documents/1250>> (retrieved on April 2, 2013), pp. 73-90. *See also* Bjorklund (2007), pp. 301-304; Yannaca-Small (2008), p. 1018. On the contrary, *see* Expert Opinion of Professor Giorgio Sacerdoti submitted to the Svea Court of Appeal in *The Czech Republic v CME Czech Republic B.V.* (RH 2003:55), published in *Transnational Dispute Management*, Volume 2, Issue 5, November 2005, hereinafter “Expert Opinion by Professor Sacerdoti”, p. 110 *et seq.*

⁴⁵⁴ Reinisch (2003), p. 72.

⁴⁵⁵ Reinisch (2003), pp. 60-61.

structure.⁴⁵⁶ There is a great number of techniques available to consider alleged links between legal entities by way of different corporate veil piercing doctrines, which exists under both municipal and international law and perhaps, lessons may be learned from other areas of international law.

In international arbitration, tribunals have adopted an “economic realistic approach” towards parties when assessing jurisdictional issues.⁴⁵⁷ In international commercial arbitration, the principle of “economic reality” has been considered with regard to the distinction between separate legal personality and economic unity. One example can be found in the reasoning of an ICC tribunal, which argued that “irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (*une réalité économique unique*) of which the arbitral should take account when it rules on its own jurisdiction.”⁴⁵⁸ Under the ICSID Convention, investment tribunals have adopted a “realistic attitude” when identifying the party on the investor’s side.⁴⁵⁹ With such approach, the arbitral tribunal would be unimpressed by the fact that the consent agreement only names a subsidiary and will instead look for the actual foreign investor and consequently, a narrow interpretation of the identity will not frustrate the operation of ICSID clauses.⁴⁶⁰ In summary, international arbitral tribunals have assessed party identity in an extended way in relation to jurisdictional issues, based on “economic reality” and by adopting a “realistic attitude”. As a consequence, since it has been accepted to adopt such an approach for jurisdictional purposes, it may be equally appropriate to adopt such “realistic economic approach” in *lis pendens* situations.⁴⁶¹

Examples on “economic realistic approaches”, focusing on the underlying economic realities rather than the formal structure of corporate groups, can also be found in several other fields of contemporary international economic law. In EU Competition law, the “same economic entity” doctrine “recognises that different companies belonging to the same group form an economic unit.”⁴⁶² As a result, a subsidiary’s activities can be identified as conduct of a parent company and will thus fall under the EU’s competition law jurisdiction.

(ii) *Identity of the issue in dispute*. The identity of the issue in dispute requires identity between both object and ground. A sensible starting point is thus to first consider whether the same type of relief is sought in the concurrent proceedings. Different arbitral tribunals have construed the identity of object broadly.⁴⁶³ The rationale for a broad interpretation is that a party should not be able to re-litigate a claim by a minor modification of the relief sought. As a consequence, it would be sounder to relax the identity of the ground for relief.

It is true that the wording of provisions in different BITs may substantially differ. Notwithstanding, there exist a reasonable consistency on the core standards in investment arbitration, such as fair and equitable treatment or full protection and security and hence,⁴⁶⁴ different BITs do not necessarily imply different causes. If the relevant BIT provisions are not distinctly different, “it would thus appear sensible to regard identically or similarly worded provisions in different BITs as identical grounds

⁴⁵⁶ Reinisch (2010), p. 121.

⁴⁵⁷ Bjorklund (2007), p. 301.

⁴⁵⁸ *Dow Chemical France, The Dow Chemical Company and others v ISOVER Saint Gobain*, Interim Award, ICC Case No. 4131, 1982, p. 135.

⁴⁵⁹ Schreuer (2009), Article 25, para. 329.

⁴⁶⁰ *Ibid.*

⁴⁶¹ Reinisch (2003), p. 59. On the contrary, see Expert Opinion by Professor Sacerdoti, p. 117.

⁴⁶² *Manufacture française des pneumatiques Michelin v Commission of the European Communities*, Case T-203/01, para. 290.

⁴⁶³ Bjorklund (2007), p. 302.

⁴⁶⁴ Reinisch (2010), p. 122.

for the purposes of applying *res judicata* and *lis pendens* principles.”⁴⁶⁵ Thus, it is submitted that where a party relies on identical or similarly worded provisions in different BITs, it is appropriate to consider them as identical grounds.

As an example and possible precedent for a more informal approach to the identity standard of cause of action, *Southern Bluefin Tuna* case may be put forward.⁴⁶⁶ In that case, an arbitral tribunal constituted under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) had to assess whether a claim brought under the 1993 Convention for the Conservation of Southern Bluefin Tuna (“CCSBT”) and under UNCLOS concerned the same cause of action. It held that:

“[T]he Parties to this dispute [...] are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.”⁴⁶⁷

The arbitral tribunal thus considered that the “two” disputes were in fact one and the same, since the legal grounds of the claims were considered to be identical. Thus, the arbitral tribunal adopted a flexible approach and emphasised the identity of the factual background.⁴⁶⁸ The importance of the emphasis on identical events and facts, was put forward by the UN Human Rights Commission in *Glaziou v France*, which held that:

“the Committee notes that the author's complaint before the European Commission was based on the same events and facts as the communication that was submitted under the Optional Protocol to the Covenant, and that it raised substantially the same issues; accordingly, the Committee is seized of the "same matter" as the European Commission of Human Rights.”⁴⁶⁹ (emphasis added).

6.2.2. *Implication and Alternative*

The first, and most obvious impediment to the advocated solution, for an arbitral tribunal seated in Sweden, is that the Svea Court of Appeal has held that “[a]ccording 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. [...] This assessment would apply even if one were to allow a broad determination of the concept of identity.”⁴⁷⁰ Consequently, a less formal requirement of identity would be inconsistent with the position in Swedish law, as expressed by the Svea Court of Appeal.

This is, of course, the main implication. On the one hand, a general and uniform approach by arbitral tribunals may offer consistency and predictability that should be encouraged, since “cautious reliance on certain principles developed in a number of

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility of August 4, 2000, hereinafter “Southern Bluefin Tuna”.

⁴⁶⁷ *Southern Bluefin Tuna*, para. 54. On the contrary, see *The MOX Plant Case (Ireland v The United Kingdom)*, Order: Request for Provisional Measures on December 3, 2001, para. 51, where the International Tribunal for the Law of the Sea (“ITLOS”) were not overly concerned with the existence of parallel proceedings and held that “the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.”

⁴⁶⁸ Reinisch (2010), p. 122.

⁴⁶⁹ UN Human Rights Commission 452/1991, *Glaziou v France*, Decision of 18 July 1994, para. 7.2

⁴⁷⁰ SAR 2003:2, p. 189 (unofficial translation).

those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States.”⁴⁷¹ It is true that it does not exist any in international law. However, a *de facto* doctrine of *stare decisis* in investment arbitration should not be underestimated. As put by one international investment tribunal:

“The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.”⁴⁷²

On the other hand, arbitral awards need to be correct, which raises another complex question. To what extent should an international investment tribunal seated in Sweden be concerned with a judgment pronounced by the Svea Court of Appeal? Such question does, indeed, take the issue to the very fundamentals of international arbitration. Thus, to relax the triple identity test may be easier said than done.

As an alternative, it is submitted that arbitral tribunals should exercise discretionary power to stay its proceedings, as in *SPP v Pakistan*.⁴⁷³ The jurisdiction of one tribunal will 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.”⁴⁷⁴ Consequently, there is a difference between the *existence* and *exercise* of jurisdiction and it is therefore argued that arbitral tribunals consider the possibility to stay its proceedings should the same claim be pending before another arbitral tribunal. Such discretion should be exercised sparsely, but may be an efficient technique to manage parallel proceedings and can help to “preserve the legitimacy of international dispute settlement.”⁴⁷⁵

6.3. Concluding Remarks

In 1983, when deciding an anti-suit injunction case, Lord Denning wrote that: “In the interest of comity, one [court] or other must give away. I wish that we could sit

⁴⁷¹ *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, Award of October 2, 2006, ICSID Case No. ARB/03/16, para. 293.

⁴⁷² *Saipem S.p.A. v People's Republic of Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007, ICSID Case No. ARB/05/7, para. 67.

⁴⁷³ *Southern Pacific Properties (Middle East) Limited, Southern Pacific Properties Limited v The Arab Republic of Egypt*, Decision on Jurisdiction of November 27, 1985, ICSID Case No. ARB/84/3, hereinafter “*SPP v Egypt*”. The case was discussed in detail above, see section 4.3.

⁴⁷⁴ *SPP v Egypt*, p. 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, 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.”

⁴⁷⁵ Bjorklund (2007), p. 305.

together and discuss it.”⁴⁷⁶ Perhaps it was being uttered in a moment of despair, picturing some distant utopia. But it turns out the statement was rather foresighted. Provisions on judicial cooperation and intercourt communication have been implemented in areas of law where one would think countries would never agree and much less communicate and cooperate. For example, in the case of insolvency, Chapter V of the 1997 UNCITRAL Model Law on Cross-Border Insolvency deals with “co-ordination of concurrent insolvency proceedings”,⁴⁷⁷ and Guideline 15 of the III/ALI Guidelines provides that direct communication between State courts may be undertaken:

“for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction [...] whenever there is commonality among the issues and/or parties in the proceedings.”⁴⁷⁸

Intercourt communication and judicial cooperation is perhaps the most ultimate practice-driven solution, and the arbitration community may glance at the progression made in transnational insolvency law.⁴⁷⁹ However, while such co-operation may work efficiently between national courts in different jurisdictions, the situation may be more problematic in international arbitration. It must be accepted and kept in mind that the factual situation where two or more *fora* are simultaneously seised of a dispute, *i.e.* international *lis pendens*, is inherent in the very nature of international arbitration. Since the arbitration agreement ousts the jurisdiction of State courts, and the validity of such agreement may be contested, problems of forum shopping and *lis pendens* will continue to arise. What needs to be further refined is the solutions adopted to resolve them.

⁴⁷⁶ *Smith Kline & French Laboratories Ltd. v Bloch*, [1983] 1 WLR 730, p. 735 (CA).

⁴⁷⁷ See also the 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation <http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html> (retrieved on April 4, 2013).

⁴⁷⁸ The American Law Institute, Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases: As Adopted and Promulgated in Transnational Insolvency <http://www.justiz.nrw.de/WebPortal_en/projects/ieei/documents/public_papers/guidelines/index.php> (retrieved on April 6, 2013).

⁴⁷⁹ Communication and cooperation is also common in international matters on family law, see Conclusions and Recommendations of the Hague Conference on Private International Law on Direct Judicial Communication on Family Law Matters and the Development of Judicial Networks, 15-16 January, 2009 <http://www.hcch.net/upload/judcomm_concl2009e.pdf> (retrieved on May 3, 2013).

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