Parallel Proceedings in International Commercial Arbitration

Parallel proceedings in international commercial arbitration

(Francesca Ragno)

1. Introduction

In an ever-increasingly globalized world the proliferation of proceedings in the context of private international litigation seems to be on the rise[1] and at the same time inevitable.[2] The availability of multiple *fora*,[3] the magnitude of the economic interests at stake,[4] the lack of any mandatory jurisdiction[5] (or coordination mechanism)[6] at a supra-national level inevitably encourages forum shopping[7] and strategic behaviours by the parties, which often lead to a scenario of parallel litigation. When parallel proceedings – *i.e.*, disputes involving the same cause of action (and, thus, the same relief – *petitum* – and the same juridical basis upon which arguments as to the facts will take place – *causa petendi*) and the same parties[8] – are pending before different courts, a

---

[1] L. E. Teitz, 'Parallel Proceedings: Treading Carefully', *International Lawyer*, 32 (1998), 223, 229.

[2] A. L. Parrish, 'Comity and Foreign Parallel Proceedings: A Reply to Black and Swan. *Lloyd's Underwriters* v. *Cominco LTD*', *Canadian Business Law Journal*, 47 (2009), 209, 215. Cordero-Moos

[3] G. Cordero-Moos, 'Between Private and Public International Law: Exorbitant Jurisdiction as Illustrated by the Yukos Case', *Review of Central and East European Law*, (32) 2007, 1 4-5.

[4] A. Romanetti, 'Preventing the Multiple and Concurrent Arbitration Proceedings: Waiver Clauses', *Stockholm International Arbitration Review*, (2009), 75, 111.

[5] W. W. Park, 'Amending the Federal Arbitration Act', *American Review of International Arbitration*, 13 (2002), 75; H. Schulze, 'Declining and Referring Jurisdiction in International Litigation: The Leuven/London Principles', *South African Yearbook of International Law*, 25 (2000), 161.

[6] C. MacLachlan, 'Lis Pendens in International Litigation', *Recueil des Cours*, 336 (2008), 199, 212.

[7] For an attempt at defining forum shopping *see* F. Ferrari, 'Forum shopping: pour une définition ample dénuée de jugements de valeurs', *Revue Critique de Droit International Privé*, 105 (2016), 85; F. K. Juenger, 'Forum Shopping', *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*, 46 (1982), 708; more recently *see*, for this definition, G. D. Brown, 'The Ideologies of Forum Shopping – Why Doesn't a Conservative Court Protect Defendants', *North Carolina Law Review*, 71 (1993), 649, 654; M. C. Martinez, 'Fundamentos y limites del forum shopping: modelos europeo y anglo-americano', *Rivista di Diritto Internazionale Privato e Processuale*, 34 (1998), 521; K. J. Norwood, 'Shopping for a Venue: The Need for More Limits on Choice', *University of Miami Law Review*, 50 (1996), 267, 268.

In the case law *see* Civil Court of Rimini, 26 November 2002, available at http://cisgw3.law.pace.edu/cases/021126i3.html (last accessed 10 November 2019); *Zokaites* v. *Land-Cellular Corp.*, 424 F. Supp. 2d 824, 839 (W.D. Pa. 2006); *see* also *Teknor Apex Co.* v. *Hartford Acc. & Indem. Co.*, 14 December 2012, (2012) WL 6840498 (D. R. I., 2012); *Util. Workers Union of Am., AFL–CIO* v. *Dominion Transmission, Inc.*, 27 September 2006, (2006) WL 2794568 (W.D. Pa. 2006).

[8] For the idea that all of those three requirements need to be satisfied *see* J. J. Fawcett, 'General Report', in J. J. Fawcett (ed.), *Declining Jurisdiction in Private International Law* (Clarendon, 2015), 1, 25, and in the arbitral case law *Benvenuti & Bonfant SRL* v. *the Government of the People's Republic of Congo*, 8 August 1980, Award (ICSID Case no. ARB/77/2), *ICSID Reports*, vol. 1 (Cambridge University Press, 1993), 330, 340, para. 1.14; *Azurix Corp.* v. *The Argentine Republic*, 8 December 2003, Decision on Jurisdiction (ICSID Case no. ARB/01/12), *ASA Bulletin*, 22 (2004), 95, 112. According to the preferable view, the concrete application of this triple identity test should not be formalistic (in order to avoid possible abuses), but should aim to ascertain whether the actions pending can be defined as *eadem res* on the basis of a more substantive test (A. Reinisch, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes', *Law & Practice of International Courts & Tribunals*, 3 (2004), 37, 56; for a similar standard *see*, in the Italian case law, Italian Supreme Court, 28 November 2012, 21108; Italian Supreme Court, 15 May 2007, 11185).

situation will occur that is commonly referred to as *lis alibi pendens*[9].

In order to prevent the burdens associated with a *lis alibi pendens* scenario (above all additional costs for the litigants, risk of inconsistent judgments, prejudice to judicial efficiency; potential for harassment),[10] legal systems have adopted various different procedural mechanisms to be applied in private international litigation cases.[11] On the one hand, civil law systems traditionally resort to a strict priority-in-time rule (known also as "*lis pendens*" rule). This requires, with some degree, the court of a State second seized to suspend or stay any proceedings that involve the same cause of action and the same parties, if proceedings had already been initiated in another State[12] and until such time as the jurisdiction of the court first seized is established. On the other hand, common law systems, and in particular US courts,[13] often allow proceedings to continue simultaneously until a judgment is reached in one forum which can be pled as *res judicata* in the other.[14] Courts seated in those jurisdictions, however, also have the possibility to rely on the tool

---

For a rigid application of the triple identity test, in the (investment arbitration) case law, *see EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A.* v. *Argentine Republic*, 23 July 2012, Award (ICSID Case no. ARB/03/23); *Railroad Development Corporation* v. *Republic of Guatemala*, 18 May 2010, Second Decision on Objections to Jurisdiction (ICSID Case no. ARB/07/23); *Victor Pey Casado* v. *Chile*, *8* May 2008, Award (ICSID Case no. ARB/98/2); *Amto* v. *Ukraine*, 26 March 2008, Award (SCC Case no. 080/2005); *Ronald S. Lauder* v. *Czech Republic*, 3 September 2001, Award (UNCITRAL, London).

[9] As it has been correctly pointed out 'the term "*lis (alibi") pendens* has two different meanings. The first one merely is the description of a situation, the fact that an action involving the same parties and the same issue is pending elsewhere. The second meaning is a normative concept or – in other words – the doctrine of *lis pendens*. In its doctrinal meaning, *lis pendens* contains the principle that, in general, the own proceedings in the forum should be stayed if a situation of *lis pendens* is given. Thus, it is temporal priority that becomes a crucial factor when the doctrine is applied' (M. Gebauer, 'Lis Pendens, Negative Declatory-Judgment Actions and the First-in-Time Principle', in E. Gottschalk *et al.* (eds.), *Conflict of Laws in a Globalized World* (Cambridge University Press, 2011), 89, 90. The notion of *lis pendens* in its factual meaning is to be distinguished from the situation of related proceedings, which occur when not identical but similar proceeding are simultaneously pending before two different *fora*.

[10] On the negative effect of parallel litigation *see* see L.J. Silberman, 'Lis pendens', in J. Basedow *et al.* (eds) *Encyclopedia of Private International Law* (Elgar, 2017), 1158, 1159; Parrish, 'Comity and Foreign Parallel Proceedings' (2009), 209, 211-4; Y. Furuta, 'International Parallel Litigation: Disposition of Duplicative Civil Proceedings in the United States and Japan', *Pacific Rim Law & Policy Journal*, 5 (2005), 1, 3; M. T. De Coale, 'Stay, Dismiss, Enjoin or Abstain? A Survey of Foreign Parallel Litigation in the Federal Courts of the United States', *Boston University International Law Journal*, 17 (1999), 79.

[11] J. P. George, 'International Parallel Litigation: A Survey of Current Conventions and Model Laws', *Texas International Law Journal*, 37 (2003), 499, 539.

[12] Article 27 of the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter 'Brussels I Regulation') provides as follows: '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.' Regulation (EC) No. 44/2001 has been replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter 'Brussels I Recast Regulation').

[13] L. J. Silberman, 'The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime', *Houston Journal of International Law*, 26 (2004), 327, 340.

[14] *See*, in US case law, *Szabo v. CGU Int. Ins. PLC*, 199 F. Supp. 2d 715 (S.D. Ohio 2002); *AR International, Inc. v. Nimelias Enterprises S.A.*, 250 F3d 510 (7th Cir. 2001); *Neuchatel Swiss General Ins. Co. v. Lufthansa Airlines*, 925 F.2d 1193 (9th Cir. 1991); *China Trade and Develop. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987*)*; *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

Despite this being the approach generally favored by US courts, there have been attempts in introducing into

of anti-suit injunctions in order to restrain foreign concurrent parallel proceedings[15] and have the inherent power to stay litigation while a foreign proceeding is pending[16] or to dismiss the parallel action[17] in the realm of a *forum non conveniens* analysis.[18]

As it has been pointed out in legal doctrine, both approaches present inherent flaws. On the one hand, a strict lis pendens rule 'can incentivize strategic pre-litigation behaviour' and may 'encourage a race to file an action.'[19] An interesting example in this respect has been offered, in Europe, by the Brussels I Regime. This regime deals with the situation of *eadem res inter eadem*

---

the US legal system a modified rule of *lis pendens* that is tied to recognition and enforcement. More specifically, Prof. Silberman and Prof. Lowenfeld, acting as rapporteurs for the International Jurisdiction and Judgment Project of the American Law Institute ('ALI'), have proposed a rule on 'Declination of Jurisdiction When Prior Action is Pending' (*see* American Law Institute, *Recognition and Enforcement of Foreign Judgements: Analysis and Proposed Federal Statute* (ALI, 2006): '§ 11(a) Except as provided in subsection (b), when an action is brought in a court in the United States and it is shown that a proceeding concerning the same subject matter and including the same or related parties as adversaries has previously been brought and is pending in the courts of a foreign state, the court in the United States shall stay, or when appropriate, dismiss the action, if:

(i) the foreign court has jurisdiction on a basis not unacceptable under § 6; and

(ii) the foreign court is likely to render a timely judgment entitled to recognition under this Act.

(1)) A court in the United States may decline to stay or dismiss the action under subsection (a) if the party bringing the action shows

(i) that the jurisdiction of the foreign court was invoked with a view to frustrating the exercise of jurisdiction of the court in the United States, when that court would be the more appropriate forum;

(ii) that the proceedings in the foreign court are vexatious or frivolous; or

(iii) that there are other persuasive reasons for accepting the burdens of parallel litigation.')

For further details on the project *see* L. Silberman and A. Lowenfeld, 'A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute', *Indiana Law Journal*, 75 (2000), 635 *et seq*.

[15] *See*, in the US case law, *Cargill, Inc*. v. *Hartford* Acc. *& Indem. Co.*, 531 F. Supp. 710 (D. Minn. 1982) and in English case law, *Tracomin S.A.* v. *Sudan Oil Seeds Co*., *Weekly Law Reports*, 1 (1983), 1026; *Sohio Supply* v. *Gatoil*, *Lloyd's Law Reports*, 1 (1989), 588; *Aggeliki Charis Compania Maritima S.A.* v. *Pagnan S.p.A. (The "Angelic Grace")*, *Lloyd's Law Reports*, 1 (1994), 168, *Lloyd's Law Reports*, 1 (1995), 87; *Phillip Alexander Securities & Futures Ltd.* v. *Bamberger*, *International Litigation Procedure*, (1997), 73.

[16] *See*, for the USA, *Posner* v. *Essex Insurance Company, Ltd.*, 178 F.3d 1209, 1222 (11th Cir. 1999); *Turner Entertainment Co.* v. *Degeto Film GmbH*, l1, 25 F3d 1512 (11th Cir. 1994).

[17] For the technical difference between the concept of staying and the dismissing of the pending action *see* L. E. Teitz, 'Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation', *Roger Willliams University Law Review*, 10 (2004), 1, 11.

[18] On the usefulness of this too with respect to parallel litigation *see* K. Hicks, 'Parallel Litigation in Foreign and Federal Courts: Is Forum Non Conveniens the Answer?', *Review of Litigation*, 28 (2009), 659 *et seq*. It is worth noting in this respect that the temporal priority is merely one of the factors that a court could take into consideration in applying the *forum non conveniens* doctrine: *see* Lord Collins *et al.* (eds.), *Dicey, Morris and Collins on the Conflict of Laws*, 15th ed. (Sweet & Maxwell, 2012), para. 12-30.

For a comparative analysis of the *forum non conveniens* doctrine *see* R. A. Brand and S. R. Jablonski, *Forum Non Conveniens: History, Global Practice, And Future Under The Hague Convention On Choice Of Court Agreements* (Oxford University Press, 2007).

[19] R. A. Brand, 'Challenges to Forum Non Conveniens', *New York University Journal of International Law and Politics*, 45 (2013), 1003, 1010-1: 'The *lis pendens* approach favors efficiency and predictability (values focused on societal interests) over equity and fairness (values focused on individual interests). The result is a race to the courthouse that can interrupt (and perhaps prevent) rational negotiated resolution of disputes before tensions are raised by formal legal proceedings.'

partes[20] pending before EU Member State ('MS') courts by dictating an automatic priority rule[21] that requires a court of a MS second seized to stay proceedings in favour of the court of the MS first seized. This mechanism, grounded on the principle of mutual trust, is clearly aimed to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States.[22] The rigidity of this rule has clearly given rise 'to new forum-shopping and gamesmanship opportunities through use of *lis pendens*' and, in the last resort, to a race to the courthouse' incentive. In this regard it may suffice to recall the 'torpedo tactic,' by which a party starts proceedings in a MS jurisdiction, which has a slow judicial system (like Italy) in order to delay and block the proceedings in the default court.[23] Moreover, the *lis pendens* rule of the Brussels I Regulation, as interpreted by the famous (or infamous) ECJ Gasser decision,[24] has created the potential for litigants not only to undermine the efficiency of proceedings, but also to trump the effectiveness of a choice-of-court agreement. This situation has led to so much criticism[25] that the European legislator in the context of the recasting of the Brussels I Regulation has held necessary to introduce a one (and only) exception to the general priority rule precisely 'in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics.'[26]

---

[20] As it is well known the notion of 'same cause of action' and 'same parties' have been construed autonomously (and extensively: CJEU, 19 December 2013, *Nipponkoa Insurance Co. (Europe)*, C-452/12, EU:C:2013:858, 42) by the case law of the Court of Justice. On the one hand, the EU judges have pointed out that since 'the notion of "cause of action" comprises the facts and the rule of law relied on as the basis of the action' (ECJ, 6 December 1994, *The Tatry* v. *The Maciej Ratj*, C-406/92, ECLI:EU:C:1994:400, 38), the concept of *lis pendens* pursuant to the Brussels Regime covers cases where a party brings a declaratory action (such an action for a declaration of non-liability) and the counter-party raises a coercive claim (damage claim) (ECJ, 6 December 1994, C-406/92, *The Tatry* v. *The Maciej Ratj*, ECLI:EU:C:1994:400, 39), as well as cases where a party brings an action before a court in a MS for the rescission or discharge of an international contract whilst an action by the other party to enforce the same contract is pending before a court of another MS (ECJ, 8 December 1987, C-144/86, *Gubisch Maschinenfabrik KG* v. *Giulio Palumbo*, ECLI:EU:C:1987:528, 19). On the other hand, the case law had clarified that the 'same parties' requirement could be satisfied, even though they are not identical but have convergent and indissociable interests (*see* ECJ, 19 May 1998, C-351/96, *Drouot Assurances SA* v. *Consolidated Metallurgical Industries and others*, ECLI:EU:C:1998:242), as it is the case when, for example, an insurer exercises its right of subrogation to sue in the name of its insured..

[21] In the sense that 'the mechanism introduced by Regulation No 44/2001 to resolve situations of *lis pendens* is objective and automatic (*see*, by analogy, judgment in ECJ, 8 May 2003, C-111/01, *Gantner Electronic and Basch Exploitatie Maatschappij BV*, ECLI:EU:C:2003:257, 30) and is based on the chronological order in which the courts concerned were seised (*see*, to that effect, judgments in ECJ, 3 April 2004, C-438/12, *Weber*, EU:C:2014:212, 52 and the case-law cited, and, by analogy, CJEU, 6 October 2015, C-489/14, *A* v. *B*, ECLI:EU:C:2015:654, 30)' *see* CJEU, 22 October 2015, *Aannemingsbedrijf Aertssen NV and Aertssen Terrassements SA* v. *VSB Machineverhuur BV and Others*, ECLI: ECLI:EU:C:2015:722, para. 48.

[22] Recital No. 15 of the Brussels I Regulation.

[23] T. C. Hartley, 'How to Abuse the Law And (Maybe) Come Out on Top: Bad-Faith Proceedings Under the Brussels Jurisdiction and Judgments Convention', in J. A. R. Nafziger and S. C. Symeonides (eds.), *Law and Justice in a Multistate World: Essays in Honor of Arthur T. Von Mehren* (Ardsley, 2002), 73 *et seq.*

[24] ECJ, 9 December 2003, C-116/02, *Erich Gasser GmbH* v. *MISAT Srl*, ECLI:EU:C:2003:657.

[25] *See*, for example, O. Lando, 'Being First. On Uses and Abuses of the Lis Pendens under the Brussels Convention', in G. Melander (ed.), *Modern Issues in European Law. Essays in Honour of Lennart Pålsson* (Martinus Nijhoff, 1997), 105 *et seq.*; T. Hartley, 'How to Abuse the Law and (Maybe) Come Out On Top: Bad-faith Proceedings under the Brussels Jurisdiction and Judgments Convention', *King's Law Journal*, 13 (2002), 139 *et seq.*; A. Nuyts, 'The Enforcement of Jurisdiction Agreements Further to Gasser and the Community Principle of Abuse of Right', in P. de Vareilles-Sommières (ed.), *Forum Shopping in the European Judicial Area* (Bloomsbury, 2007), 55.

[26] Article 31(2) Brussels I Recast Regulation now provides an inversion of the *lis pendens* rule in relation to exclusive choice-of-court agreements pointing out the jurisdiction of a MS court, that ensures that, where a

On the other hand, the lack of a *lis pendens* rule in the common law systems and the solution of allowing parallel litigation until a judgment is rendered (*res judicata* approach)[27] has been viewed as encouraging a real 'race to judgment,'[28] with the result of causing an 'inconvenience to litigants, a waste of scarce judicial resources, and the risk of inconsistent judgments arising from the two different *fora*.'[29] Moreover, the instruments employed in the common law systems to mitigate those risks, like a dismissal for *forum non conveniens*[30] based possibly on the consideration that a concurrent litigation is already pending before a foreign court,[31] a staying of the parallel action in the light of the principle of 'international abstention'[32] or the issuing of anti-suit injunctions do not always seem well equipped to tackle the phenomenon.[33] In particular, the

court of a Member State on which parties have conferred exclusive jurisdiction is seized, any court of another Member State shall stay the proceedings until the court seized on the basis of the agreement declares that it has no jurisdiction under such agreement. It follows that the Recast clearly gives priority to the MS court putatively chosen in assessing the validity and the effectiveness of a choice-of-court agreement. The main problem with this provision, however, is its ambiguous wording. Article 31(2) grants priority to the putatively selected court and obliges the court not chosen but first seized to suspend proceedings subject to the condition, *inter alia*, that the parties have agreed to confer exclusive jurisdiction to a MS court. But what standard should be applied for assessing whether there is such an 'agreement' for the purpose of Article 31(2)? Is the court not chosen but first seized obliged to automatically suspend the proceedings simply because the party relying on the choice-of-court agreement alleges the existence of such an agreement? This issue is clearly beyond the scope of this paper; it is however worth pointing out that depending on the answer of this question, another type of delaying tactic, this time through invoking sham jurisdiction agreements, may come into play.

[27] For this solution in US case law, see *In re Maritima Aragua, S.A.*, 847 F. Supp. 1177 (S.D.N.Y. 1990); *China Trade and Develop. Corp. v. M.V. Choong Yong*, *cit.*; *Black & Decker Corp. v. Sanyei America Corporation*, 650 F. Supp. 406 (N.D. Ill. 1986); *Brinco Mining Ltd. v. Federal Insurance Co*., 552 F. Supp. 1233 (D.D.C. 1982).

[28] In the US case law *see Westec Aerospace Inc.* v. *Raytheon Aircraft Co*., (1999) 67 B.C.L.R. 3d 278, 289 (B.C. Ct. App. 1999) (Rowles, J. A.).

[29] *See* K. E. Vertigan, 'Foreign Antisuit Injunctions: Taking a Lesson from the Act of State Doctrine', *George Washington Law Review*, 76 (2007), 155, 158.

[30] For this approach *see*, in English case law, *Spiliada Maritime Corp* v. *Cansulex Ltd* (1987) AC 460 (HL); in the US case law *see Rodriguez* v. *Samsuing Elecs. Co., Ltd.*, 734 F. Supp. 2d 220, 225 (D. Mass. 2010).

[31] For the remark that 'to the extent that *forum non conveniens* operates as a dismissal, however, it lacks the fluidity of the other remedies (a stay or injunction may be lifted depending on developments in the parallel proceeding) and, thus, is perhaps not an efficacious device in the long run for resolving parallel proceedings,' *see* P. V. Majkowski, 'Foreign Parallel Proceedings from the United States Perspective: Do the Courts Need a Crystal Ball?', available at www.rivkinradler.com/assets/pubs/downloads/Majkowski-US-Korea-Parallel-Proceedings-8-12.pdf (last accessed 10 November 2019).

[32] On the affirmation of this principle in a domestic US case *see Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976).

[33] As it has been said 'in common law jurisdictions [...] there is no embargo on concurrent proceedings in the same matter in more than one jurisdiction. There are simply these two weapons, a stay (or dismissal) of proceedings and an anti-suit injunction. Moreover, each of these has its limitations. The former depends on its voluntary adoption by the state in question, and the latter is inhibited by respect for comity. It follows that, although the availability of these two weapons should ensure that practical justice is achieved in most cases, this may not always be possible' (House of Lords in *Airbus Industries G.I.E.* v. *Patel and others*, *Weekly Law Reports*, (1998), 686).

discretionary nature of those techniques[34] may lead to uncertainty,[35] which in turn 'involves delay and expense to the parties.'[36]

2. The problem of *lis pendens* in international commercial arbitration

Given the functional equivalence between arbitration and litigation in civil or commercial matters,[37] the possible occurrence of parallel proceedings involving the same dispute and the same parties in an international arbitration scenario comes as no surprise.[38] Although the proliferation of proceedings appears to be a phenomenon particularly relevant in investment arbitrations,[39] most likely because of the very nature of investment arbitration[40] and the large abundance of investment treaties,[41] this analysis will only address the issue in relation to international commercial arbitration disputes. More precisely, this contribution will deal with the scenario in which identical proceedings[42] regarding jurisdiction and/or the merits of the case[43] are pending at the same time before a state court and a foreign arbitral tribunal[44] or before two arbitral tribunals seated in different countries.

---

[34] G. Walter, 'Lis Alibi Pendens and Forum Non Conveniens: From Confrontation via Co-ordination to Collaboration', *European Journal of Law Reform*, 4 (2002), 69, 85; Fawcett, 'General Report' (2015), 1, 67-8. On the completely different appreciation of the judicial discretion in civil law and common law systems *see* G. Andrieux, 'Declining Jurisdiction in a Future International Convention on Jurisdiction and Judgments – How Can We Benefit from Past Experiences in Conciliating the Two Doctines of Forum Non Conveniens and Lis Pendens', *Loyola of Los Angeles International and Comparative Law Review*, 27 (2005), 323, 328.

[35] For an interesting and controversial Canadian case showing this limit *see Teck Cominco Metals Ltd* v. *Lloyd's Underwriters*, 2009 SCC 11.

[36] Fawcett, 'General Report' (2015), 1, 23.

[37] M. V. Benedetelli, 'Human Rights as a Litigation Tool in International Arbitration: Reflecting on the ECHR Experience', *Arbitration International*, 31 (2015), 631, 638.

[38] In the sense that '[t]he increasing occurrence of parallel proceedings in commercial disputes and the higher numbers of arbitrations that are being delayed by disputes regarding jurisdiction will put the reputation of international commercial arbitration as an efficient means of dispute resolution at risk' *see* F. Kremslehner, 'The Arbitration Procedure – Lis Pendens and Res Judicata in International Commercial Arbitration', *Austrian Arbitration Yearbook*, (2007), 127.

[39] *See*, for example, the *Ronald S. Lauder and CME Czech Republic BV* saga, available at www.italaw.com/sites/default/files/case-documents/ita0451.pdf (last accessed 10 November 2019). On this topic *see* J. Shookman, 'Too Many Forums for Investment Disputes? ICSID Illustrations of Parallel Proceedings and Analysis', *Journal of International Arbitration*, 27 (2010), 361.

[40] C. McLachlan *et al.*, *International Investment Arbitration – Substantive Principles*, 2nd ed. (Oxford University Press, 2017), 96.

[41] For this remark *see* E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review*, 32 (2017), 1-2. On the issue *see* also G. Sacerdoti, *The Proliferation of BITs: Conflicts of Treaties, Proceedings and Awards* (Oxford University Press, 2008).

[42] For the purpose of this paper, it is assumed that the parallel proceedings pending satisfy the aforementioned triple identity test. For a broader prospective, which 'defines parallel proceedings in terms of parties that are the same or substantially the same, rather than in terms of the trip' *see* F. De Ly and A. Sheppard, 'ILA Final Report on Lis Pendens and Arbitration', *Arbitration International*, 25 (2009), 3.

[43] On the *lis pendens* issues that may come into play given the concurrent jurisdiction of arbitral tribunals and national courts in relation to the issuance of interim measures *see* B. D. Ehle, 'Concurrent Jurisdiction: Arbitral Tribunals and Courts Granting Interim Relief', in A. Alibekova and R. Carrow (eds.), *International Arbitration and Mediation* (Yorkhill Law, 2007), 157.

[44] The scenario of parallel proceedings before a national court and an arbitral tribunal seated in the same jurisdiction is not explored here, as 'where the arbitral tribunal has its seat in the same jurisdiction as that of the court to which one of the parties seeks resort, the question is simply one of the timing of the exercise of supervisory

Regarding the first scenario, it is noticeable that in an ideal world, a dispute covered by an (exclusive) arbitration agreement should never be brought before an arbitral tribunal and a (domestic or foreign) national court. By agreeing to arbitration as the mechanism to settle their dispute, the parties not only provide the basis for the jurisdiction of the arbitrators (positive effect of the arbitration agreement), but also prevent any court that would be competent but for the arbitration agreement from hearing that dispute (negative effect of the arbitration agreement).[45] Unfortunately this doesn't happen in reality. Sometimes, recalcitrant parties seize state courts with the merits of the dispute despite the existence of an arbitration agreement with a view to protracting and delaying arbitral proceedings;[46] in other instances, parties rely on state courts in good faith in order to seek protection against an arbitration agreement that they perceive as oppressive, vexatious or non-existent.[47] As a matter of fact, this proliferation of proceedings – which increases the overall costs and at the same time reduces the efficiency of the arbitral process –[48] is anything but rare and is determined by the bare wording of Article II(3) New York Convention, which does not provide any coordination mechanism apt to solve the delicate problem of the interface between arbitration and court adjudication.[49] This provision makes the duty of referral to arbitration[50] (and, thus, the ousting effect which an arbitration agreement has on the jurisdiction of a national court) conditional, on the one hand, on the (objective) arbitrability of the dispute and, on the other hand, on the agreement to arbitration being not null and void, inoperative or incapable of being performed. It has been said that 'this entitles national courts to review the dispute and the arbitration agreement and, thus, raises a *lis pendens* issue as soon as an arbitral tribunal is seised of the same dispute and a *res judicata* issue as soon as either a state court or an arbitral tribunal has rendered a final decision concerning jurisdiction.'[51] Since there is no established uniform standard[52] under

jurisdiction' (MacLachlan, 'Lis Pendens' (2008), 199, 351). On the same token, the present paper does not discuss the problem of parallel proceedings on the validity/existence/effectiveness of an arbitration agreement pending between State courts seated in different jurisdictions. On this topic and and on the (finally rejected) proposal of the European Commission to address the issue by concentrating the competence to decide in the MS of the seat of the arbitration [Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (2010) 748 final (Dec. 14, 2010)], see L. G. Radicati di Brozolo, 'Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonisation?', *Journal of Private International Law*, 7 (2011), 423, 435-6.

[45] E. Gaillard and J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer, 1999), 382, 402; G. B. Born, *International Commercial Arbitration*, 2nd ed. (Kluwer, 2014), I, 1069.

[46] On the various strategic tactics that might be employed in international arbitration *see* G. J. Horvath and S. Wilske (eds.), *Guerilla Tactics in International Arbitration* (Kluwer, 2013).

[47] G. A. Bermann, 'The "Gateway" Problem in International Commercial Arbitration', *Yale Journal of International Law*, 37 (2012), 1, 6-7; M. V. Benedettelli, 'Le anti-suit injunctions nell'arbitrato internazionale: questioni di legittimità e opportunità', *Rivista dell'Arbitrato*, 24 (2014), 701, 704.

[48] J. Graves, 'Court Litigation Over Arbitration Agreements: Is It Time for a New Default Rule?', *American Review of International Arbitration*, 23 (2012), 113-4.

[49] *See* M. V. Benedettelli, 'The European Convention on Human Rights and Arbitration: The EU Law Perspective', in F. Ferrari (ed.), *The Impact of EU Law on International Commercial Arbitration* (Juris, 2017), 463, 480-1.

[50] On the various interpretation of this duty, *see* L. Graffi, 'Securing Harmonized Effects of Arbitration Agreements Under the New York Convention', *Houston Journal of International Law*, 28 (2006), 663.

[51] De Ly and Sheppard, 'ILA Final Report' (2009), 3, 24.

[52] In the sense that this gap can be explained by the impossibility to reach a consensus in this regard *see* H. Van Houtte, 'Parallel Proceedings Before State Courts and Arbitration Tribunals. Is There a Transnational Lis Pendens - Exception in Arbitration and Jurisdiction Conventions?', in P. A. Karrer (ed.), *Arbitral Tribunals or State*

which the issue of the arbitrability[53] and the validity and the effectiveness of the arbitration agreement[54] have to be evaluated,[55] the existence of concurrent jurisdiction of arbitral tribunals and

Courts – Who Must Defer to Whom? (Swiss Arbitration Association ('ASA'), 2001), 35, 44. On the issue *see* also D. Di Pietro, 'Applicable Laws under the New York Convention', in F. Ferrari and S. Kröll (eds.), *Conflict of Laws in International Arbitration* (Sellier, 2011), 63, 64. On the difficulties of emending the New York Convention in this regard *see* H. Van Houtte, 'Why not Include Arbitration in the Brussels Jurisdiction Regulation', *Arbitration International*, 21 (2005), 509, 517.

[53] For the discussion of the conflict of laws problems related to the issue of arbitrability *see* L. A. Mistelis and S. L. Brekoulakis (eds.), *Arbitrability: International and Comparative Perspectives* (Kluwer, 2009), 99; S. L. Brekoulakis, 'On Arbitrability: Persisting Misconceptions and New Areas of Concern', in Mistelis and Brekoulakis (eds.), *Arbitrability* (2009), 19; S. L. Brekoulakis, 'Law Applicable to Arbitrability: Revisiting the Revisited *lex fori*', in Mistelis and Brekoulakis (eds.), *Arbitrability* (2009), 101; J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration*, 2nd ed. (Sweet & Maxwell, 2007), 288 *et seq.*; S. L. Brekoulakis, 'Conflict of Jurisdictions in Arbitration: The (Diminishing) Relevance of the *Lex Loci Arbitri*', in Ferrari and Kröll (eds.), *Conflict of Laws* (2011), 117, 118; B. Hanotiau, 'What Law Governs the Issue of Arbitrability?', *Arbitration International*, 12 (1996), 391.

[54] On the problem of the law applicable to the arbitration agreement *see* A. Arzandeh and J. Hill, 'Ascertaining the Proper Law of an Arbitration Clause Under English Law', *Journal of Private International Law*, 5 (2009), 425; I. Bantekas, 'The Proper Law of the Arbitration Clause: A Challenge to the Prevailing Orthodoxy', *Journal of International Arbitration*, 27 (2010), 1; P. Bernardini, 'Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause', in A. J. van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer, 1999), 197; M. Blessing, 'The Law Applicable to the Arbitration Clause', in van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards* (1999), 168; O. Chukwumerije, *Choice-of-Law in International Commercial Arbitration* (Quorum Books, 1994); D. Di Pietro, 'Applicable Laws' (2011), 63; A. Dimolitsa, 'Issues Concerning the Existence, Validity and Effectiveness of the Arbitration Agreement', *ICC International Court of Arbitration Bulletin*, 7 (1996), 14; P. D. Friedland and R. N. Hornick, 'The Relevance of International Standards in the Enforcement of Arbitration Agreements Under the New York Convention', *American Review of International Arbitration*, 6 (1995), 149; C. Gertz, 'The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Dépeçage', *Northwestern Journal of International Law & Business*, 12 (1991), 163; L. Graffi, 'The Law Applicable to the Validity of the Arbitration Agreement', in Ferrari and Kröll (eds.), *Conflict of Laws* (2011), 19; H. A. Grigera Naón, 'Choice-of-Law Problems in International Commercial Arbitration', *Recueil des Cours*, 289 (2001), 9; Hanotiau, 'What Law Governs Arbitrability?' (1996), 391; V. Heiskanen, 'Forbidding Dépeçage: Law Governing Investment Treaty Arbitration', *Suffolk Transnational Law Review*, 32 (2009), 367; M. Hook, 'Arbitration Agreements and Anational Law: A Question of Intent?', *Journal of International Arbitration*, 28 (2011), 175; J. D. M. Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause', in van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards* (1999), 114; G. Moss, *International Commercial Arbitration*: *Party Autonomy and Mandatory Rules* (Tano Ascheloug, 1999), 279-99; S. Pearson, 'Sulamérica v. Enesa: The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement', *Arbitration International*, 29 (2013), 115; M. A. Petsche, 'International Commercial Arbitration and the Transformation of the Conflict of Laws Theory', *Michigan State Journal of International Law*, 18 (2010), 453; K. Razumov, 'The Law Governing the Capacity to Arbitrate', in van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards* (1999), 260; K. Thorn and W. Grenz, 'The Effect of Overriding Mandatory Rules on the Arbitration Agreement', in Ferrari and Kröll (eds.), *Conflict of Laws* (2011), 187; J. Thrope, 'A Question of Intent: Choice of Law and the International Arbitration Agreement', *Dispute Resolution Journal*, 54 (1999), 16; A. S. Trukhtanov, 'The Proper Law of Arbitration Agreement – A Farewell to Implied Choice?', *International Arbitration Law Review*, (2012), 140.

[55] Van Houtte, 'Parallel Proceedings before State Courts and Arbitration Tribunals' (2001), 35, 39: 'if a court outside of the country of the seat of arbitration applies a different law than the law the arbitrators apply, there is a risk that that court will find the arbitration clause or agreement to be invalid and that it will assume jurisdiction on the merits. In that event there will be parallel proceedings before an arbitral tribunal and a state court.'

national courts over arbitration agreements might very often result in a true conflict between awards and court judgments.[56]

The other, less frequent, parallel proceedings scenario here explored arises when a commercial arbitral tribunal is seized in relation to a dispute which is also already pending before another arbitral tribunal.[57] This may happen when the parties start various arbitral proceedings concerning the very same dispute relying on different versions of the arbitration agreement, when the arbitration agreement authorizes or even postulates multiple arbitrations[58] or when a party fragmentates the claims originating from the same factual background by seizing different arbitral tribunals in order to multiply its chance of success.[59]

Given that 'there is little that can be done at present about the proliferation issue', but 'there is much that can be done in respect of the governing legal principles and rules,'[60] the purpose of this is paper is to try to analyze the techniques available in order to 'avoid or mitigate the undesirable effects of parallel proceedings'[61] simultaneously pending, and namely the risk of lengthy and costly proceedings that may result in irreconcilable decisions. Based upon this analysis, the concrete usefulness of the tools analyzed will be assessed.

3. The 'priority in time' rule

[56] C. Heinze and A. Dutta, 'Enforcement of Arbitration Agreements by Anti-suit Injunctions in Europe – From Turner to West Tankers', *Yearbook of Private International Law*, (2007), 415.

[57] This paper will not address the scenario of simultanous proceedings before international tribunals (*i.e.*, investment treaty arbitral tribunals) and private arbitral tribunals, that may arise when investors bring contractual claims before commercial arbitral tribunals and, at the same time, raise international law treaty claims before the treaty arbitrators. Indeed, those claims – although involving the same subject matter – cannot be deemed to have the same cause of action (for this approach *see Helnan International Hotels A/S* v. *The Arab Republic of Egypt*, 3 July 2008, Award (ICSID Case no. ARB/05/19); *Toto Costruzioni Generali SpA* v. *Republic of Lebanon*, 11 September 2009, Decision on Jurisdiction (ICSID Case no. ARB/07/12); *Azurix Corp.* v. *The Argentine Republic*, 8 December 2003, Decision on Jurisdiction (ICSID Case no. ARB/01/12); *Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux/Vivendi Universal* v. *Argentine Republic*, 3 July 2002, Decision on Annulment (ICSID Case no. ARB/97/3)), a situation of identity of proceedings does not occur and as such cannot be addressed here.

[58] For the remark that this is not an unknown phenomenon in insurance matters *see* W. Ma 'Parallel Proceedings and International Commercial Arbitration: The International Law Association's Recommendations for Arbitrators', *Contemporary Asia Arbitration Journal*, 2 (2009), 49, 68.

[59] As pointed out by E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review*, 32 (2017), 1, 7: 'Even the simplest arbitration agreement is susceptible to being exploited in this manner. For instance, a contract of sale might contain an arbitration clause providing for the resolution of all disputes between the parties in a given forum under an agreed set of institutional rules and for the appointment of a tribunal president by the designated arbitral institution. The seller might commit various breaches of contract and the buyer might decide to initiate arbitration. In the event the buyer becomes concerned about whether the arbitral tribunal (and in particular the institutionally-appointed president) will be sympathetic to its case, it could decide to "test the waters" by submitting to arbitration only one of its claims against the seller, but not its other claims. Once the tribunal is constituted, and if the buyer is satisfied with the tribunal's composition, it could amend its initial request for arbitration to include its remaining claims. On the other hand, if the buyer considers that it might have greater chances of prevailing before different arbitrators, it could submit its remaining claims to an entirely new arbitral tribunal pursuant to the same arbitration clause. This type of conduct is increasingly common in construction arbitrations, which typically involve dozens of claims that can be submitted to separate arbitrations by opportunistic claimants.'

[60] F. Orrego-Vicuña, 'Lis Pendens Arbitralis', in B. M. Cremades and J. D. M. Lew (eds.), *Parallel State and Arbitral Procedures in International Arbitration* (Kluwer, 2005), 207.

[61] B. M. Cremades and I. Madalena, 'Parallel Proceedings in International Arbitration', *Arbitration International*, 24 (2008), 507, 509.

As has already been mentioned, one of the most common procedural tools provided by national and international[62] legal instruments in order to eliminate the risk of parallel proceedings in international litigation is the 'priority rule' or '*lis pendens* rule'. Given that this approach, despite its inherent limits, has proved to be a viable option[63] and has been embodied in many national legal systems,[64] one may wonder whether it can legitimately come to play also in addressing the issue of parallel proceedings in international commercial arbitration.[65] In order to explore this possibility, it is necessary to verify first whether the priority in time rule, possibly as a general principle of law,[66] has been resorted to in dealing with the problem at stake. For this purpose, the situation of parallel proceedings before a national court and a foreign arbitral tribunal and before two different arbitral tribunals will be considered separately.

Regarding the former scenario, it is worth noting that the duty of applying the priority rule by an arbitral tribunal confronted with parallel litigation abroad has indeed been affirmed in the case law. In fact, in a seminal (and very much discussed)[67] decision[68] rendered in one of the most arbitration-friendly jurisdictions of the world, the Swiss Supreme Court has granted its support to the thesis that envisages the applicability of the *lis pendens* rule also to international arbitral tribunals sitting in Switzerland, by setting aside an ICC arbitral award for having been rendered in a dispute already pending before a foreign national court. In that matter, the Swiss Court held that when a tribunal is seized of an action already pending before a national court, the principle of litispendence might forbid it to render a decision before the conclusion of the first proceedings. In particular, the decision suggested that the obligation to stay the proceedings – imposed on arbitral tribunals and courts alike – is governed by Article 9 of the Swiss Private International Law Act ('PILA')[69] and, therefore, arises insofar as it is possible to predict that the foreign court would render, within an appropriate time frame, a decision capable of being enforced in Switzerland. This requirement needs to be met, according to the view maintained in the decision, because the rationale of the *lis pendens* rule is precisely to avoid, for public policy reasons, a scenario of contradictory (but equally enforceable) decisions within the same legal order. The most interesting

---

[62] *See*, for example, Article 35(2)(b) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[63] K. Hober, 'Res Judicata and Lis Pendens in International Arbitration', *Recueil des Cours*, 366 (2008), 99, 242.

[64] *See* Reinisch, 'Use and Limits of Res Judicata and Lis Pendens' (2004), 37, 44, note 28.

[65] For this thesis *see* J.-F. Poudret and S. Besson, *Droit Comparé de l'Arbitrage International* (Schultess, 2002), 466 *et seq*.

[66] *See* Reinisch, 'Use and Limits of Res Judicata and Lis Pendens' (2004), 37, 48.

[67] *See* M. Liatowitsch, 'Die Anwendung der Litispendenzregeln von Art. 9 IPRG durch schweizerische Schiedsgerichte: ein Paradoxon?', *ASA Bulletin*, 19 (2001), 422; J. M. Vulliemin, 'Litispendance et compétence internationale indirecte du juge étranger', *ASA Bulletin*, 19 (2001), 439 ; L. Lévy, 'Switzerland: Applying the Principle of Litispendence', *International Arbitration Law Review*, 4 (2001), 28 *et seq.*; A. Samuel, 'Fomento – A Tale of Litispendence, Arbitration and Private International Law', in J. D. Bredin *et al.* (eds.), *Liber Amicorum Claude Reymond: Autour de l'Arbitrage* (Litec, 2004), 255.

[68] *Fomento de Construcciones y Contratas S.A. (Spain)* v. *Colon Container Terminal S.A. (Panama)*, Bundesgericht (BGer.) (Federal Court), 14 May 2001, 127 *Entscheidungen des Schweizerischen Bundesgerichts*, III 279; *ASA Bulletin*, 19 (2001), 544 (English translation).

[69] According to this provision '[w]hen an action having the same subject matter is already pending between the same parties in a foreign country, the Swiss court shall stay the case if it is to be expected that the foreign court will, within a reasonable time, render a decision capable of being recognized in Switzerland.

2 In order to determine when an action has been initiated in Switzerland, the conclusive date is that of the first act that is necessary to initiate the proceeding. A notice to appear for conciliation is sufficient.

3 The Swiss court shall terminate its proceeding as soon as it is presented with a foreign decision capable of being recognized in Switzerland.'

aspect of the prognosis on the enforceability of the prospective foreign decision probably lies in the fact that it posits an assessment over the indirect international jurisdiction of the foreign tribunal first seized. More precisely, the Swiss decision seems to require the arbitral tribunal to first address the issue of the validity and efficacy of the arbitration agreement for the purpose of applying the *lis pendens* mechanism[70]. Following the (at the time implicit) logic embraced in the decision reported, it can be concluded that if the arbitral tribunal holds the arbitration agreement enforceable, it is exempted to stay proceedings because there would be no risk of conflicting decisions (at least) in the country of the seat. Conversely, when the arbitration agreement is perceived as not null, void, inoperative or incapable of being performed (for example because the parties, as in the case at stake, have apparently waived their right to arbitrate), the obligation to stay arises.

Although the referred judgment, by postulating the applicability of Article 9 PILA also to arbitral tribunals, convincingly 'place[s] arbitral tribunals and national courts on an equal basis,'[71] it has been criticized[72] – *inter alia* – for having failed to consider that *lis pendens* is only supposed to apply where *fora* that have equal jurisdiction are seized of a dispute.[73] According to the view expressed in the literature, 'in arbitration [...] 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.'[74] However, this line of criticism is not entirely convincing. Firstly, technically speaking from an private international law perspective, 'the equal jurisdiction requirement' is certainly not always a pre-requisite of the *lis pendens* doctrine. [75] Although this may be the case in relation to many national legal provisions,[76] such a statement cannot be held true as regards the Lugano/Brussels Regime. Therein, the *lis pendens* rule is conceived as a clear-cut rule,[77] whose applicability is triggered by the simple fact that an identical proceeding is pending before a different MS court and is not conditional upon the existence of the jurisdiction of the court first seized. Secondly, the Fomento decision did recognize to the arbitral tribunal the possibility to verify the

---

[70] C. Oetiker, 'The Principle of Lis Pendens in International Arbitration: The Swiss Decision in Fomento v. Colón', *Arbitration International*, 18 (2002), 137.

[71] MacLachlan, 'Lis Pendens' (2008), 199, 500. Arbitration is nowadays largely considered a 'jurisdictional equivalent' in many legal systems: *see*, for example, Spanish Constitutional Court, 16 March 1988, 43; Spanish Constitutional Court, 22 March 1991, 62; Spanish Constitutional Court, 4 October 1996, 288; Spanish Constitutional Court, 11 November 1996, 176; Spanish Constitutional Court, 2 December 2010, 136; Italian Supreme Court, 25 October 2013, 24153; Italian Constitutional Court, 28 November 2001, 376; Italian Constitutional Court, 15 January 2003, 11; Italian Constitutional Court, 7 July 2005, 298; Italian Constitutional Court, 17 July 2013, 223; Italian Constitutional Court, 10 April 2003, 122.

[72] *See* Liatowitsch, 'Die Anwendung der Litizpendenzregeln von Art. 9 IPRG' (2001), 422; J.-M. Vuillemin, *Litispendance et Compétence Intemationale Indirecte du Juge Étranger*, *ASA Bulletin*, (2001), 439. .

[73] For this remark *see* P. A. Kyriakou, 'Lis Pendens in International Commercial Arbitration', *Vindobona Journal of International Commercial Law and Arbitration*, 20 (2016), 61, 63.

[74] E. Geisinger and L. Lévy, 'Lis Alibi Pendens in International Commercial Arbitration', *ICC International Court of Arbitration Bulletin – Special Supplement*, (2003), 53.

[75] For critical remarks *see* also Poudret and Besson, *Droit Comparé de l'Arbitrage* (2002), 466.

[76] As far as the EU Member States, for example, Austria, Belgium, Cyprus, Czech Republic, Estonia, France, Italy, Slovenia, Spain and Sweden apply the *lis pendens* rule – outside the realm of the Brussels/Lugano system – only under the condition that the prospective foreign decision is deemed eligible for recognition (*see* A. Nuyts in his Report for the European Commission (*Study on Residual Jurisdiction – General Report*, available at http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf, last accessed 10 November 2019).

[77] *See* G. Pailli, 'Lis Alibi Pendens Within Europe: Is There a Way Out of the "First in Time" Rule?' (1 April 2013), available at https://ssrn.com/abstract=2276572 (last accessed 10 November 2019), 1, 2.

indirect jurisdiction of the national court seized first, and thus, to scrutinize the arbitration agreement.

In this author's view, the weakness of the approach envisaged by the aforementioned decision lies elsewhere. The idea (which is implicitly underlying the decision) that making the stay of the arbitral proceeding conditional on the prognosis of the recognizability of the foreign decision is a sufficient safeguard against the possibility of giving deference to a court seized in breach of an arbitration agreement[78] cannot be considered a catch-all solution. In this respect, it suffices to consider the situation in which parallel proceedings are pending before a Lugano Contracting State and an arbitral sated in Switzerland. Since the principle of mutual trust underlying the Lugano/Brussels regime entails that the recognizing court cannot question the jurisdiction of the Lugano Contracting State court having rendered the judgment and, consequently, cannot deny the recognition of such judgment even if it has been rendered in disregard of an arbitration agreement,[79] it would be impossible for an arbitral tribunal seated in Switzerland to refuse to apply the *lis pendens* rule to protect the jurisdiction of the arbitral tribunal *vis à vis* a court of a Lugano Contracting State.[80] Moreover, from a broader perspective, the rigidity of the *lis pendens* mechanism, as applied to arbitral tribunals, is completely at odds with the positive effect of the principle of competence-competence ('the arbitrators can rule on their own jurisdiction'),[81] which is recognized by all developed national legal systems[82] (including, of course, Switzerland).[83] If this principle entails that the arbitrators have the authority to rule on their own jurisdiction, it means conversely that they shouldn't be prevented (by any mechanism whatsoever) from proceeding even if national

---

[78] Poudret and Besson, *Droit Comparé de l'Arbitrage* (2002), 469.

[79] *See* Swiss Supreme Court, 31 August 2007, No. 4A_80/2007 (unpublished). In relation with the (old) Brussels Regime (equivalent to the Lugano system), *see* P. Mayer, 'Conflicting Decisions in International Commercial Arbitration', *Journal of International Dispute Settlement*, 4 (2013), 407, 417; J. Hill and A. Chon, *International Commercial Disputes: Commercial Conflict of Laws in English Courts*, 4th ed. (Hart, 2010), 75; R. T. Treves, 'Post West Tankers Strategies and the Brussels I Recast', *Diritto del Commercio Internazionale*, 28 (2014), 65, 74; for a different view in the case law *see*, however, *National Navigation Co* v. *Endesa Generacion SA*, [2009] EWHC 196 (Comm); *National Navigation Co* v. *Endesa Generacion SA*, [2009] EWCA Civ 1397; Spanish Supreme Court, 17 May 2007, no. 558/2007, *Yearbook Commercial Arbitration*, vol. XXXIII (2008), 698 *et seq*.

In this regard, it should be noted that the Brussels I Recast Regulation has much innovated on this aspect by clarifying the exact meaning of the 'arbitration exception.' According to Recital no. 12(2) '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' (emphasis added). From the wording of the Recital, it clearly follows that a decision of a MS court ruling (even incidentally) on the existence and validity of an arbitration agreement is not entitled to circulate under the Brussels I Recast Regulation: on the issue *see* A. Layton, 'Arbitration and Anti-Suit Injunctions under EU Law', in Ferrari (ed.), *The Impact of EU Law on Arbitration* (2017), 64, 77.

[80] M. Wirth, 'Neues aus der schweizerischen Gesetzgebung zur internationalen Schiedsgerichtsbarkeit – zwei Anmerkungen zum Aufsatz von Christoph Müller', *ASA Bulletin*, 25 (2007), 246, 247.

[81] *See* Poudret and Besson, *Droit Comparé de l'Arbitrage* (2002), 407 *et seq.*; P. Mayer, 'L'Autonomie de l'Arbitre International dans l'Appréciation de sa Propre Compétence', *Recueil des Cours*, 217 (1989), 319, 327; E. Gaillard, 'Les manœuvres dilatoires des parties et des arbitres dans Varbitrage commercial international', *Revue de l'Arbitrage*, (1990), 759, 768 *et seq*.; W. W. Park, 'The Arbitrators' Jurisdiction to Determine Jurisdiction', in A. J. van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (Kluwer, 2007), 3, 55.

[82] Article 16 UNCITRAL Model Law; Section 30 of the English Arbitration Act; Section 1040 of the German ZPO; Article 1465 of the French Code of Civil Procedure; Articles 817 and 819 *ter* of the Italian Code of Civil Procedure; Article 1052(1) of the Dutch Code of Civil Procedure; Article V(3) of the 1961 European Convention on International Commercial Arbitration; Article 41(1) ICSID Convention.

[83] *See* Article 186(1) PILA.

court is seized first.[84] This inconsistency[85] and the possible risk that the first-in-time rule could be abused in order to sabotage the arbitral proceeding[86] has been fully perceived by the Swiss legislator and has prompted a legislative amendment aimed at restoring the attractiveness of Switzerland as a seat of arbitration. The legislative reaction to the Swiss decision has been the addition of a paragraph to Article 186 PILA, effective as of 1 March 2007, aimed at clarifying that 'an arbitral tribunal shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a state court or another arbitral tribunal,[87] unless there are serious reasons to stay the proceedings.'[88]

As regards the question of chronological priority in the (frankly rare)[89] scenario of a true *lis pendens* between two arbitral tribunals, there are – to the best of our knowledge – only a few national statutes which address the issue. The new Article 186(1 bis) PILA, for its part, clearly

---

[84] G. Kaufmann-Kohler, 'How to Handle Parallel Proceedings: A Practical Approach to Issues such as Competence-Competence and Anti-Suit Injunctions', *Dispute Resolution International*, 2 (2008), 110, 111. For this solution, in the arbitral case law, *see Subcontractor (Russian Federation)* v. *Contractor (Turkey)*, 30 October 2014, Award (ICAC Case no. 161/2013), *International Commercial Arbitration Review*, (2015), 1 *et seq*.; *Parties from Brazil, Panama and U.S.A.* v. *Party from Brazil*, November 1984, Interim Award (ICC Case no. 4695), *Yearbook Commercial Arbitration*, vol. XXI (1986), 149 *et seq*.; *Dalmia Dairy Industries (an Indian cement Company)* v. *National Bank of Pakistan (a Pakistani bank)*, 14 January 1970, Second Preliminary Award (ICC Case no. 1512), *Yearbook Commercial Arbitration*, vol. X (1980), 174 *et seq*.; *Company ABC (nationality not indicated)* v. *Company Z International SA (nationality not indicated), Company W SA (nationality not indicated) and others*, Final Award (ICC Case no. 12745), *Yearbook Commercial Arbitration*, vol. XXXV (2010), 40 *et seq*.

[85] For the remark that 'requiring the arbitrators to stay the determination of their own jurisdiction pending the outcome of court proceedings on the same subject – regardless of whether they were initiated prior to or after the appointment of the arbitrators – would simply drain of its substance the fundamental principle of competence-competence and the arbitral process altogether' *see* E. Gaillard and Y. Banifatemi, 'Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators', in E. Gaillard and D. Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008), 257, 260.

[86] Howver, it should be noted that the Fomento decision did not certainly mean to impose on the arbitral tribunal a duty to stay arbitration proceedings in every case of prior litigation abroad (M. Scherer, 'When Should an Arbitral Tribunal Sitting in Switzerland Confronted with Parallel Litigation Abroad Stay the Arbitration?', *ASA Bulletin*, 20 (2002), 451).

[87] *See* Article 186(1 *bis*) of the Swiss PIL Act. This solution mirrors Article 8(2) Model Law and is embraced also by Article 584(1) of the Austrian ZPO, by Article 819*ter*(1) of the Italian Code of Civil Procedure and by Article 1032(3) German ZPO.

[88] Regarding the interpretation of the the notion of 'serious reasons,' it is suggested that the standard in Article 186(1bis) Swiss PILA 'should not differ substantially from the ordinary standards justifying a stay of arbitration. According to the case law of the Swiss Supreme Court, a stay may be justified if the arbitral tribunal considers it appropriate in view of the interest of the parties. In case of doubt, the principle of swift conduct of the proceedings should prevail. There seems to be no reason to depart from this test when applying Art. 186(1bis) Swiss PILA. In light of these principles, a stay of the arbitration proceedings based on Art. 186(1bis) SPILA is particularly unjustified, for instance, where it appears that the foreign proceedings were primarily initiated to "torpedo" the arbitration proceedings': D. Girsberger and N. Voser, *International Arbitration: Comparative and Swiss Perspectives*, 3rd ed. (Nomos, 2016), 289, 328.

[89] *See* Hober, 'Res Judicata and Lis Pendens' (2008), 99, 242. As has been noted 'this results from the elementary point that the parties' agreement to refer a dispute to arbitration operates, with the support of Article II of the New York Convention, to confer exclusive jurisdiction on the chosen tribunal. Thus, only an unusual fact pattern will produce an outright conflict of jurisdiction between arbitral tribunals. This is not so in the context of investment disputes, where, as will be seen, the fundamental distinction between treaty and contract disputes may well produce overlapping disputes between the treaty tribunal and a tribunal appointed to decide a contractual dispute between the same parties; and where (more problematically) investors have invoked parallel rights to arbitration in relation to the same underlying dispute under different bilateral investment treaties (MacLachlan, 'Lis Pendens' (2008), 199, 358-9).

rejects the idea that an arbitral tribunal facing parallel proceedings already pending before a (foreign) arbitral tribunal (or state court) is required to stay the arbitration.[90] Instead it adopts a more flexible approach which enables the arbitral tribunal to refrain from deciding on its jurisdiction only where serious grounds require the proceedings to be stayed.[91] On the other side of the spectrum, Article 584(3) of the Austrian Code of Civil Procedure provides a rigid 'first-in-time rule,' according to which the filing of a case before an arbitral tribunal is apt to bar a new arbitration regarding the same matter[92] at issue.

In the case law, only a few decisions have dealt with the applicability of the *lis pendens* doctrine between two arbitral tribunals seated in different countries.[93]An interesting case relating to a scenario of concurrent jurisdiction between private arbitral tribunals can also be found in the Italian case law on international arbitration. In that case, the occurrence of parallel proceedings derived from the fact that an Italian seller and a Chinese buyer involved in a sales transaction had agreed on a kind of symmetrical optional clause,[94] which provided for a Stockholm Arbitration Institute ('SAI') arbitration if the arbitration was commenced by the Italian party and for a CIETAC arbitration in Beijing if the arbitration was commenced by the Chinese party. After a dispute arose concerning the seller's performance under the contract, the Italian commenced arbitration in Stockholm, seeking a declaration that he didn't breach the contract. Pending the Swedish arbitral proceedings, the Chinese party instituted arbitration proceedings at CIETAC, claiming damages. The parallel proceedings before the aforementioned arbitral institutions led to two divergent awards, which, in turn, have been – albeit temporarily – enforced by two different Italian national courts. What matters for our investigation is that the Milan Court of Appeal,[95] asked to recognize the CIETAC award despite the previous recognition of the SAI award by the Rome Court of Appeal, rejected the plea of *lis pendens* raised by the Italian party by suggesting that such a petition had to be – at best – raised in the context of the CIETAC arbitral proceedings and at the setting aside but not at the enforcement stage.[96] Fortunately, the paradox and the absurdity of giving way

---

[90] In the sense that 'Article 186(1bis) only lifts the "barrier effect" of lis pendens, but leaves the "barrier effect" of res judicata untouched' *see* B. Berger and F. Kellerhals, *International and Domestic Arbitration in Switzerland*, 2nd ed. (Sweet & Maxwell, 2010), 951.

[91] For a decision applying the aforementioned provision *see* Swiss Supreme Court, 29 October 2008, 4A_210/2008, *ASA Bulletin*, 27 (2009), 309 *et seq*.

[92] For the interpretation of the notion of 'same matter' *see* F. T. Schwarz and C. W. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer, 2009), 206 ('[T]he meaning of this term in Section 584(3) ZPO is not explicitly defined by the legislature or Austrian commentary discussing this provision. It is best understood, however, in line with the concept of "matter in dispute" (Streitgegenstand) used in connection with other provisions of the ZPO, such as Section 411 (which deals with res judicata). As applied by the Austrian Oberster Gerichtshof, Streitgegenstand is a three-tier concept consisting of the (i) factual predicate, (ii) prayer for relief, and (iii) legal categorization of the type of matter (if specified by the claimant). This approach results in a narrow understanding of the "matter in dispute", such that two proceedings will only rarely really concern the "same claim"').

[93] For a case dealing with parallel proceedings before arbitral tribunals seated in the same jurisdiction *see* Court of First Instance of Geneva, 30 September 1998, *Revue Suisse de Droit International et Droit Européen*, 9 (1999), 628.

[94] For the validity of those kind of arbitration clauses *see OJSC Efirnoe* v. *Delta Wilmar CIS Ltd.*, Higher Arbitrazh Court of the Russian Federation, 13 January 2011, 11861/10.

[95] *Tema-Frugoli SpA* v. *Hubei Space Quarry Industry Co. Ltd*., Milan Court of Appeal, 2 July 1999, *Yearbook Commercial Arbitration*, vol. XXVI (2001), 807.

[96] This position is understandable but doesn't support the decision of the Milan Court; indeed, it remains completely inexplicable why the Court did not refuse the enforcement of the CIETAC award on public policy grounds in order to guarantee the respect of the principle of *ne bis in idem*. For analogous critical comments *see* R. Muroni, 'Il conflitto pratico tra lodi e la Convenzione di New York', *Rivista dell'Arbitrato*, 10 (2000), 753, 755; F. Tommaseo,

to two irreconcilable decisions stemming from different arbitral tribunals in the Italian legal system has been avoided – at a later stage – by the intervention of the Italian Supreme Court.[97] Indeed, the Italian Supreme Court posited that the circulation of the second award (the CIETAC award) was not impaired by the disregard of the principle of *lis pendens*, but rather was precluded by Article V(1)(d) of the New York Convention. Since the real intention of the parties – as ascertained by the Court – was clearly not to 'allow for parallel arbitration proceedings that could be autonomously commenced by either party and could lead to a plurality of (concurrent and possibly conflicting) decisions on the dispute,' the Court suggested (albeit implicitly) that the seizure of the Stockholm arbitral tribunal implied the repeal of the agreement selecting a CIETAC arbitration. Based on the above consideration, the Court held the constitution of the Chinese arbitral tribunal and the arbitration commenced there by the Chinese party not in accordance with the arbitration agreement.
It is apparent that what emerges from the brief overview provided is that only the Austrian legislation shows an explicit support for the applicability of a strict *lis pendens* mechanism in relation to parallel arbitral proceedings. Conversely, the case law thas has been examined seems inclined not to consider *lis pendens* 'as part of public policy'.[98]
A more balanced and flexible approach that does not promote the application of an automatic priority rule, but rather a careful examination of the facts and of the circumstances of the case seems clearly preferable. Not only is this approach more in line with the view - prevailing in the arbitral community[99] - that *lis pendens* 'is not a mandatory rule, but rather is the basis for the exercise of a discretion,'[100] but it also appears more consistent with the aforementioned positive aspect of the principle of competence-competence. By allowing the arbitral tribunal to take 'into due account all relevant circumstances of the individual case, as well as the consensual nature of the arbitration, and the obligation of arbitrators to conduct the arbitration in a speedy and efficient manner,'[101] the envisaged solution seems to strike the right balance between the duty of the arbitral tribunal to render an enforceable award and its ability to conduct the proceedings – subject to the provisions of the *lex arbitri* and to the indication of the parties – in the matter that it considers appropriate.[102]

4. If not a lis pendens rule…a rule of unilateral priority?

If competence-competence (in its positive meaning) seems a barrier to the exportability of the priority in time rule upon arbitral tribunals, it cannot be underestimated that this doctrine 'does

'Sul riconoscimento in Italia di lodi stranieri plurimi de eadem re', *Rivista di Diritto Internazionale Privato e Processuale*, 36 (2000), 29.

97 Italian Supreme Court, 7 February 2001, 1732, *Yearbook Commercial Arbitration*, vol. XXXII (2007), 390.

98 For the same conclusion *see* De Ly and Sheppard, 'ILA Final Report' (2009), 34, para. 5.12.

99 *See* De Ly Sheppard, 'ILA Final Report' (2009), 3, 33, para. 5.10 and, in the case law, *Southern Pacific Properties (Middle East) Ltd* v. *Egypt*, 27 November 1985, Decisions on Preliminary Objections to Jurisdiction (ICSID Case no. ARB/84/3), available at www.italaw.com/cases/3300 (last accessed 10 November 2019).

100 *See* C. McLachlan *et al.*, *International Investment Arbitration – Substantive Principles*, 2nd ed. (Oxford University Press, 2017), 144.

101 *See* Hober, 'Res Judicata and Lis Pendens' (2008), 99, 242.

102 Article 19(2) Model Law; P. Schlosser, 'Arbitral Tribunals or State Courts – Who Must Defer to Whom?', in Karrer, *Arbitral Tribunals or State Courts* (2001), 15, 20.

not address a court's authority to determine arbitral jurisdiction'[103] and thus seems of little help when examining – from the perspective of a national court – the scenario in which an arbitral tribunal is seized first and a national court is seized after. Whereby the position commonly held[104] deems it dogmatically[105] impossible to consider a national court bound to apply by analogy the domestic *lis pendens* rule (conceived for parallel court proceedings) to proceedings pending before (foreign) arbitral tribunals,[106] an explicit endorsement in the constellation considered of a 'rule of chronological priority' – which somehow echoes the *lis pendens* exception[107] – is embodied in Article VI(3) European Convention.[108] According to this provision '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.'[109] A similar approach is also enshrined in the French legislation. In fact, Article 1448(1)[110] of the French Code of Civil Procedure, by providing that a court – seized of a matter falling under an arbitration agreement – must decline to hear the case, as long as the arbitral tribunal has been seized of the dispute.[111] This

---

[103] G. A. Bermann, 'The "Gateway" Problem in International Commercial Arbitration', in S. M. Kröll *et al.* (eds.), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution, Liber Amicorum Eric Bergsten* (Kluwer, 2011), 55, 62.

[104] *See* P. Schlosser, 'Arbitral Tribunals or State Courts' (2001), 15, 20.

[105] As it has been pointed out 'private international law deals with judicial decision of parallel legal orders, namely national legal systems. It does not deal with the parallel pursuit of claims in fora of different types' (C. McLachlan *et al.*, *International Investment Arbitration – Substantive Principles*, 2nd ed. (Oxford University Press, 2017), 99).

[106] Italian Supreme Court, 25 September 2009, no. 20688 (unpublished, according to which 'la disciplina della litispendenza internazionale prevista dall'art. 7 della legge n. 218 del 1995 non è applicabile all'arbitrato estero, posto che detta norma prevede l'obbligo (comma 1) o la facoltà (comma 3) di sospendere il procedimento soltanto nel caso di pendenza della lite davanti ad un giudice straniero, e non anche nel caso di arbitrato estero. Tale interpretazione, oltre a porsi in linea con un'interpretazione costituzionalmente orientata della disciplina della sospensione, alla luce dell'art. 111 Cost., non contrasta con il principio di parità tra la giurisdizione italiana e la giurisdizione o l'arbitrato estero, fissato dall'art. 4, comma 2, della citata legge, tenuto conto del diverso rapporto di interferenza con il procedimento interno della lite pendente all'estero e del giudizio arbitrale, nonché della mancanza di efficacia diretta del lodo nell'ordinamento italiano e della nuova disciplina introdotta anche per l'arbitrato interno dal d.lgs. n. 40 del 2006, il quale ha escluso l'applicabilità delle norme in tema di sospensione del processo (art. 819 - ter cod. proc. civ.)).'

[107] Poudret and Besson, *Droit Comparé de l'Arbitrage* (2002), 459.

[108] The 1961 European Convention on International Commercial Arbitration applies when the parties to the arbitration agreement have their habitual place of residence in different Contracting States when concluding that agreement (Article I(1)(a)). The Convention is currently in force in 31 States (mostly EU States), *see* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en (last accessed 10 November 2019).

[109] On this provision *see* S. M. Kröll, 'Issues Specific to Arbitration in Europe, The European Convention on International Commercial Arbitration – The Tale of a Sleeping Beauty', *Austrian Yearbook on International Arbitration*, (2013), 1, 9.

[110] According to this provision '(w)hen a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable. A court may not decline jurisdiction on its own motion.'

[111] It should be noted that pursuant to Article 1456 French Code of Civil Procedure a tribunal should be deemed seized upon the arbitrators' acceptance of their mandate. On the point of time at which an arbitration becomes pending according to the Swiss legislation *see* M. Stacher and M. Feit, 'Commentary on Chapter 12 PILA, Article 181 (Lis pendens)', in M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer, 2013), 98.

seems to suggest that, once the arbitral tribunal has been constituted, 'it exclusively resolves challenges to its own jurisdiction, whatever the basis of the objection'[112]. This prioritization of arbitral tribunals over national courts[113] can also be found in Austria, given that Section 584(3) of the Austrian Code of Civil Procedure[114] forbids a court to entertain a claim, when an arbitration procedure (over the same dispute) is pending.[115]

The common thread running through those provisions is that all contain 'chronological priority' rules apt to operate 'unilaterally[116]' in in favor of the priority of the jurisdiction of arbitral tribunals.[117] This approach stems[118] – with clearly different nuances – from the negative effect of the competence-competence principle[119] and aims precisely at minimizing the effect of parallel court and arbitration proceedings. In this respect, all the aforementioned rules reflect a policy

[112] G.A. Bermann, 'Forum Shopping at the "Gateway" to International Commercial Arbitration', in F. Ferrari (ed.), *Forum Shopping in the International Commercial Arbitration Context* (Sellier, 2013), 69, 90.

[113] As it has been noted, this provision 'provides for a clear-cut conflict of jurisdictions rule, giving obvious precedence to arbitral tribunals over national courts: national courts have limited power for a *prima facie* only review of the jurisdiction of a tribunal before the dispute is pending before that tribunal, and no power at all to after that stage' (S. Brekoulakis, 'The Negative Effect of Compétence-Compétence: The Verdict Has to be Negative', in C. Klausegger *et al.* (eds.), *Austrian Arbitration Yearbook 2009* (Beck, Stämpfli, Manz, 2009), 238).

[114] According to this rule 'when an arbitration procedure is pending, no other legal dispute may be carried out before a court or an arbitral tribunal concerning the asserted claim. Any action brought on the grounds of the same claim is to be rejected.'

[115] As a matter of fact, Austrian law also provides that 'this principle shall not apply if an objection to the jurisdiction of the arbitral tribunal was raised to the arbitral tribunal at the latest together with entering an appearance in the case and a decision of the arbitral tribunal on this matter cannot be obtained within a reasonable period of time,' but it is suggested that this provision is merely aimed 'to prevent parties from initiating arbitral proceedings just to obstruct the pursuit of the claim with the state court', F. T. Schwarz and C. W. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer, 2009).

[116] Despite the fact that such a 'unilateral priority approach' was explicitly endorsed in Italian case law prior to the 2006 arbitration reform (see, e.g., Italian Supreme Court, 7 April 1997, 3001; Italian Supreme Court, 8 July 1996, 6205), the Italian legislation (art. 819-*ter*, Code of Civil Procedure) has eventually adopted - not unlike the German legislation - a system of '*vies parallèles*': A. Santini, '*Art. 12 - Lack of jurisdiction of the Arbitral Tribunal*', in U. Draetta and R. Luzzatto (eds.), Chamber of Arbitration of Milan Rules: A Commentary (Juris, 2012), 184; M. Bove, 'Ancora sui rapporti tra arbitro e giudice statale', in *Rivista dell'arbitrato*, (2007), 357, 359.

[117] As it has been underlined 'the priority rule operates once the arbitral tribunal is constituted or seized. Before this time, state courts are allowed to review arbitral jurisdiction fully. The only exception is France, where courts only exercise *prima facie* review at this stage,' D. Bentolila, *Arbitrators as Lawmakers: The Creation of General Rules Through Consistent Decision Making in International Commercial and Investment Arbitration*, (Kluwer, 2017), 26. On the negative effect of competence-competence and the p*rima facie* review *see* E. Gaillard, 'L'effet négatif de la compétence-compétence', in J. Haldy *et al.*, *Etudes de Procédure et d'Arbitrage en l'Honneur de Jean-François Poudret* (Univ. Lausanne, 1999), 387; E. Gaillard, 'La reconnaissance, en droit suisse, de la seconde moitié du principe d'effet négatif de la compétence-compétence', in G. Aksen and R. Briner (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution – Liber Amicorum in Honour of Robert Briner* (ICC Publications, 2005), 311.

[118] N. Erk, *Parallel Proceedings in International Arbitration: A Comparative European Perspective* (Kluwer, 2014), 38.

[119] This principle, as it is well known, means 'that the arbitrators must be the first (as opposed to the sole) judges of their own jurisdiction and that the courts' control is postponed to the stage of any action to enforce or to set aside the arbitral award rendered on the basis of the arbitration agreement' (*see* Gaillard and Banifatemi, 'Negative Effect of Competence-Competence' (2008), 257, 259-60). For a critical critical view *see* Brekoulakis, 'Negative Effect of Compétence-Compétence' (2009), 237, 238. On the various approaches to the issue in the different legal systems *see* G. B. Born, *International Commercial Arbitration*, 2nd ed. (Kluwer, 2014), I, 1046 *et seq*.; Poudret and Besson, *Comparative Law of International Arbitration* (2007), 489 *et seq*.

choice,[120] *i.e.*, that the arbitral tribunal should be able to rule on the jurisdiction first, given that the exercise of that power is in any case reviewable by national courts.[121] In this author's view, this allocation of powers between national courts and arbitral tribunals – despite not being largely accepted[122] – is a workable solution to the problem of parallel proceedings[123] because it is able to discourage 'forum shopping and abusive litigation techniques.'[124] It is certainly true that the precedence given to the arbitral tribunal over national courts could imply that 'a party who never agreed to arbitrate must await the tribunal's jurisdictional decision and then challenge that decision in court at the place of arbitration before being able to bring its action on the merits in the courts of competent jurisdiction.'[125] This risk, however, seems marginal if one accepts the premise that arbitration is a 'legitimate and reliable alternative to litigation'[126] and, as a consequence, the arbitrators will not enforce 'sham arbitration agreements' or arbitration agreements obviously void

[120] As mentioned before, in France the support for this policy choice is further enhanced by the idea that a national court – prior to the constitution of the arbitral tribunal – is only entitled to perform a *prima facie* assessment of the arbitration agreement's validity and its scope (Article 1456 of the French Code of Civil Procedure). On the application of this *prima facie* review by French courts *see* S. Synkova, *Courts' Inquiry into Arbitral Jurisdiction at the Pre-Award Stage: A Comparative Analysis of the English, German and Swiss Legal Order* (Springer, 2013), 89 *et seq*. In general, on the peculiarities of French arbitration law *see* J. Rouche *et al.*, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration*, 2nd ed. (Kluwer, 2009), 15.

[121] G. Marchisio, *The Notion of Award in International Commercial Arbitration: A Comparative Analysis of French Law, English Law, and the UNCITRAL Model Law* (Kluwer, 2017), 90. In the sense that 'the availability of court review is essential to determining whether the parties validly waived their right to access to the courts, a right guaranteed by the [...] European Convention of Human Rights' *see* M. Stojiljković, 'Arbitral Jurisdiction and Court Review: Three Swiss Federal Supreme Court Decisions to Reconsider', *ASA Bulletin*, 34 (2016), 897, 898-9.

[122] Italian, German, US, English and Swiss law are well-established examples of a completely different approach.

[123] A different solution aimed at addressing the delicate problem of the interface between international arbitration and litigation was offered in the original proposal of the Commission on the recasting of the Brussels I Regulation (COM(2010) 748 final: the 'Recast Proposal'). That proposal (based on the so called 'Heidelberg Report'- B. Hess *et al*. (eds), The Brussels I Regulation 44/2001 - The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States (2008) provided that '(w)here the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement'. It is evident that the aformentioned (rejected) approach does not grant exclusive jurisdiction on the arbitration agreement to the *forum* first seized, but to the seat court or the arbitral tribunal 'once seised': see M.V. Benedettelli, 'Pensiero debole nell'arbitrato commerciale internazionale e comunitarizzazione del diritto dell'arbitrato', *Rivista del Commercio Internazionale*, (2012), 305, 323. For similar remarks see also M. Mose, 'Arbitration/Litigation Interface: The European Debate', *Northwestern Journal of International Law & Business*, 35 (2014), 1, 15; Radicati di Brozolo, 'Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonisation?', 7 (2011), 423, 435-6; M. Illmer, 'Brussels I and Arbitration Revisited', *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 75 (2011), 645, 661.

[124] F. Emanuele and M. Molfa, *Selected Issues in International Arbitration: The Italian Perspective* (Thomson Reuters, 2014), 142.

[125] *See* Kaufmann-Kohler, 'How to Handle Parallel Proceedings' (2008), 110, 112. For a similar remark in relation to the prioritization of the chosen court *see* Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (COM/2009/0175 final), *sub* point 3; Report on the Application of Regulation Brussels I in the Member States (Heidelberg Report) (Study JLS/C4/2005/03 Final Version September 2007), par. 494, available at http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf (last accessed 10 November 2019).

[126] A. Kawharu, 'Public Policy Ground for Setting Aside the Refusing Enforcement of Arbitral Awards', *Journal of International Arbitration*, 24 (2007), 491, 498.

or defective.[127] Moreover, this criticism 'loses part of its weight where arbitral tribunals expeditiously on jurisdiction through a separate award on jurisdiction.'[128]

On a different note, it should be noted that an even more extreme position is nowadays officially recognized in the European judicial area in relation to choice-of-court agreements pointing out the jurisdiction of a MS court.[129] Although it is clear that this regime is founded on a mutual trust premise, it seems quite inconsistent to maintain – at least in the EU – a substantial divergence in the legal treatment of choice-of-court agreements and arbitration agreements[130] designating an arbitral tribunal seated in a EU Member State.

5. Injunctive relief

A procedural technique traditionally used in common law jurisdictions[131] to (prevent or) deter the continuation (or the very commencement) of parallel proceedings before alternative *fora* lies in the so called anti-suit injunctions,[132] which are issued by tribunals in order – not to stay their own proceedings but – to enjoin a party from continuing (or even commencing) parallel state court (or arbitral) proceedings.[133] These injunctions are directed against the party who intends to initiate

---

[127] Of course, divergent decisions on the enforceability of the arbitration agreement are always possible: for a very famous case in which an arbitral tribunal held an arbitration agreement as valid, but then a national court later determined that the tribunal lacked competent jurisdiction *see Dallah Real Estate and Tourism* v. *Ministry of Religious Affairs of the Government of Pakistan*, (2010) UKSC 46, available at www.italaw.com/cases/4479 (last accessed 10 November 2019). However, this seems the price to be paid given that the principle of competence-competence cannot be interpreted 'as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators' jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award' (Gaillard and Savage (eds.), *Fouchard Gaillard Goldman* (1999), 399.

[128] G. Carducci, 'Arbitration, Anti-suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention: Notes on West Tankers, the Revision of the Regulation and Perhaps of the Convention', *Arbitration International*, 27 (2011), 171, 186.

[129] As already indicated above, Article 31(2) Brussels I Recast Regulation departs from a 'chronological priority' approach. The chosen court is exclusively competent to determine the validity and the effectiveness of an exclusive choice-of-court agreement regardless of timing, *i.e.,* even the court in question is the second seized. For further details *see* C. Heinze, 'Choice of Court Agreements, Coordination of Proceedings and Provisional Measures in the Reform of the Brussels I Regulation', *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*, 75 (2011), 582, 587 *et seq*.

[130] G. B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 5th ed. (Kluwer, 2016), 2. On the more favourable treatment of arbitration agreements when compared to jurisdiction agreements *see* S. Brekoulakis, 'The Notion of the Superiority of Arbitration Agreements Over Jurisdiction Agreements: Time to Abandon It?', *Journal of International Arbitration*, 24 (2007), 341 *et seq.*

[131] For the remark that anti-suit injunctions are an 'oddity of the Anglo-American legal system' *see* T. Landau, '"Arbitral Lifelines": The Protection of Jurisdiction by Arbitrators', in van den Berg (ed.), *International Arbitration 2006* (2007), 282. Although civil law systems usually do not recognize the authority of their courts to issue anti-suit injunctions, the situation is different in Quebec (*see* Article 3135 of the Quebec Civil Code and, in the case law, *Lac d'Amiante du Canada Ltee* v. *Lac d'Amiante du Quebec Ltee*, JQ (Quicklaw) No. 5438 (29 November 1999) (CA, Quebec).

[132] For a general introduction on the matter *see* J. Arkins, 'Borderline Legal: Anti-Suit Injunctions in Common Law Jurisdictions', *Journal of International Arbitration*, 18 (2001), 603. On the first cases in which an injunction restraining a foreign proceeding has been considered admissible *see* T. Raphael, *The Anti-Suit Injunction* (Oxford University Press, 2008), 42.

[133] In general, *see Mr Boris Bannai* v. *Mr Eitan Shlomo Erez (Trustee in Bankruptcy of Eli Reifman)*, 26 November 2013, (2013) EWHC 3689 (Comm).

or continue parallel proceedings elsewhere[134]. A failure to comply with the orders issued by a national court results in contempt of court (which could lead to a fine or even to the arrest of the offending party) and determines the impossibility of recognizing and enforcing the foreign decision rendered in defiance of those injunctions for public policy reasons.[135]

For the purpose of this analysis – which aims to examine the remedies to an actual *lis pendens* situation – only injunctions affecting pending proceedings will be considered.[136] To this aim, a distinction will be made between the injunctive relief granted by a national court and the injunctive relief granted by an arbitral tribunal.

As far as injunctive relief granted by national courts is concerned, it is notorious that different legal systems[137] recognize their courts' discretion[138] to grant injunctions that may affect an international arbitration. Such injunctions can be multi-faceted.[139] Since this study focuses on parallel proceedings, it suffices here to explore the so-called pro- and anti-arbitration injunctions.

Pro-arbitration injunctions are devices used to restrain foreign court proceedings brought in breach of an arbitration agreement[140] with a view of enforcing 'both a positive right to have any disputes resolved by way of the contractually agreed forum (arbitration proceedings), and a closely related but legally distinct and concomitant negative right not to be sued in any other forum.'[141]

Taking English law as an example,[142] it should be noted that the injunctive relief provided by the English courts in order to uphold the sanctity of arbitration agreements against foreign legal

---

[134] For the remark that anti-suit injunctions are 'part of the law of jurisdiction in a functional sense' *see* R. Michaels, 'Jurisdiction', in J. Basedow *et al.* (eds) *Encyclopedia of Private International Law* (Elgar, 2017), 1042 1046.

[135] A. Briggs, *The Conflit of Laws*, 2nd ed. (Oxford University Press, 2008), 148. In the case law *see Toepfer International GmbH* v. *Molino Boschi*, (1996) EWHC (Q.B.D.), *Lloyd's Law Reports*, 1 (1996), 510; *Philip Alexander Securities and Futures Limited* v. *Bamberger* (1996) EWCA, *International Litigation Procedure*, (1997), 73

[136] It should be noted, however, that the issuance of anti-suit injunctions does not require the commencement of the arbitral proceedings. In the sense that an English court has jurisdiction to grant an anti-suit injunction even when there is no actual, proposed or intended arbitration *see Ust-Kamenogorsk Hydropower Plant JSC* v. *AES Ust-Kamenogorsk Hydropower Plant LLP*, (2013) UKSC 35.

[137] For a comparative overview *see* Bentolila, *Arbitrators as Lawmakers* (2017), 7 *et seq*.

[138] *Donohoe* v. *Armco Inc*, (2001) UKHL 64, *Lloyd's Law Reports*, 1 (2002), 425; *BAS Capital Funding Corp.* v. *Medfinco Ltd.*, (2003) EWHC 1798 (Ch), *Lloyd's Law Reports*, 1 (2004), 652.

[139] As has been noted 'anti-suit injunctions may be sought at different stages of the proceedings and may pursue different goals in the context of arbitration: to prevent a party from initiating court proceedings or to disrupt foreign court proceedings commenced in disregard of an arbitration agreement, to halt or prevent proceedings to set aside an arbitral award...' (N. Erk, *Parallel Proceedings in International Arbitration: A Comparative European Perspective* (Kluwer, 2017), 119).

For a broad perspective *see* M. Stacher, 'You Don't Want to Go There – Antisuit Injunctions in International Commercial Arbitration', *ASA Bulletin*, 23 (2005), 640, 644-5; S. Clavel, 'Anti-suit Injunctions et Arbitrage', *Revue de l'Arbitrage*, (2001), 669; J. Fellas, 'Anti-Suit Injunctions in Aid of Arbitration', *Mealey's International Arbitration Report*, 20 (2005), 26; L. Collins, 'Anti-Suit Injunctions and the Arbitration Process', in Karrer, *Arbitral Tribunals or State Courts* (2001), 85 *et seq*.

[140] G. Fisher, 'Anti-suit Injunctions to Restrain Foreign Proceedings in Breach of an Arbitration Agreement', *Bond Law Review*, 22 (2010), 1.

[141] K. Davies and V. Kirsey, 'Anti-Suit Injunctions in Support of London Seated Arbitrations Post-Brexit: Are All Things New Just Well-Forgotten Past?', *Journal of International Arbitration*, 33 (2016), 501 (citing R. Merkin and L. Flannery, *Arbitration Act 1996*, 5th ed. (Routledge, 1996) at 187-8).

[142] English courts' jurisdiction to order anti-suit injunctions to restrain foreign proceedings in breach of an arbitration agreement derives – whether on an interim or a final basis – from Section 37 of the Senior Courts Act 1981: *see AES Ust-Kamenogorsk Hydro Power Plant LLP* v. *Ust-Kamenogorsk Power Plant JSC*, (2013) UKSC 35.

proceedings[143] is normally granted if the seat of arbitration is located in England[144] and provided that some predicates are satisfied: (a) the defendant, against whom the injunction is sought, is amenable to the personal jurisdiction of the court;[145] (b) the applicant for an anti-suit injunction shows a high degree of probability that there is an arbitration agreement that governs the dispute in question;[146] c) the applicant shows that the foreign proceedings are vexatious or oppressive[147] or – more broadly – that the ends of justice require the injunction;[148] d) the remedy is sought promptly and before the foreign proceedings are too far advanced;[149] e) the English forum has a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails;[150] and f) there is no strong reason why the relief should not be granted.[151]

From a general point of view, it it should be underlined that there are 'two separate legal foundations for the use of anti-suit injunctions in an arbitration context under English law. The first lies in the court's power to protect the contractual rights and obligations contained in the arbitration agreement itself. In addition, there exists a second, more general power to prevent vexatious and oppressive conduct that, in this context, has the effect of undermining an arbitration agreement' (J. Maples and T. Goldfarb, 'Anti-suit Injunctions: Expanding Protection for Arbitration under English Law', *Dispute Resolution International*, 7 (2013), 169). For further details *see* H. Seriki, 'Anti-suit Injunctions and Arbitration: A Final Nail in the Coffin?', *Journal of International Arbitration*, 23 (2006), 25.

[143] On the compatibility of these injunctions with Article II(3) of the New York convention *see* R. Fentiman, *International Commercial Litigation*, 2nd ed. (Oxford University Press, 2015), 512.

[144] But *see Malhotra* v. *Malhotra and Another*, (2012) EWHC 3020 (Comm), according to which English courts may grant anti-suit injunctions irrespective of the seat of the arbitration. For a similar conclusion reached by a Bermudas court *see IPOC Int'l Growth Fund Ltd.* v. *OAO 'CT-Mobile'*, Berm. Ct. App., 23 March 2007, 22, 23.

[145] *American International Speciality Lines Insurance* v. *Abbott Laboratories*, *Lloyd's Law Reports*, 1 (2003), 267.

[146] *Midgulf International Ltd* v. *Groupe Chimiche Tunisien*, (2009) EWHC 963 (Comm); *Bankers Trust* v. *Jakarta International Hotels and Development*, *Lloyd's Law Reports*, 1 (1999), 910; *American International Speciality Lines Insurance* v. *Abbott Laboratories*, *Lloyd's Law Reports*, 1 (2003), 267; *Navigation Maritime Bulgare* v. *Rustal Trading Inc. (The Ivan Zagubanski)*, *Lloyd's Law Reports*, 1 (2002), 106.

[147] *Sheffield United Football Club Limited* v. *West Ham United Football Club PLC*, (2008) EWHC 2855 (Comm.), *Through Transport Mutual Insurance Association* (*Eurasia*) *Ltd* v. *New India Assurance Co Ltd* (The Hari Bhum) [2005] APP.L.R. 03/21. In this regard it should be noted that where the proceedings are brought in breach of an arbitration agreement (or an exclusive jurisdiction agreement) and the defendant is unable to show a strong reason why he should not be held to his agreement, the foreign proceedings will be regarded *per se* as oppressive and vexatious: *see Aggeliki Charis Compania Maritima SA* v. *Pagnan SpA (The Angelic Grace)*, *Lloyd's Law Reports*, 1 (1995), 87.

For a case in which an English court has issued an anti-suit injunction against a non-party to the arbitration agreement arbitration for vexatious and oppressive conduct *see Joint Stock Asset Management Company 'Ingosstrakh Investments'* v. *BNP Paribas SA*, (2012) EWCA (Civ.) 644.

[148] *Société Nationale Industrielle Aerospatiale* v. *Lee Kui Jak* [1987] AC 87; *Donohue* v. *Armco Inc.*, *Lloyd's Law Reports*, 1 (2002), 425.

[149] *Aggeliki Charis Compania Maritima SA* v. *Pagnan SpA (The Angelic Grace)*, *Lloyd's Law Reports*, 1 (1995), 87.

[150] *Airbus Industrie* v. *Patel*, (1998) UKHL 12, (1999) 1 *AC* 199 and, more recently, *Star Reefers Pool Inc* v. *JFC Group Co Ltd*, (2012) EWCA (Civ.) 14.

[151] *Niagara Maritime SA* v. *Tianjin Iron & Steel Group Company Limited (MV Good Luck)*, (2011) EWHC 3035 (Comm). For the idea that the binding effect of Article II(3) of the New York Convention on the foreign court does not prevent an English court to grant an injunction for the simple reason that the foreign court seised is not vested with the exclusive jurisdiction over the enforceability of the arbitration agreement *see West Tankers Inc* v. *Ras Riunione Adriatica di Sicurtà (The Front Comor)*, *Lloyd's Law Reports*, 2 (2005), 257 (QB) 269 (Colman J).

As in England, US courts at times also grant anti-suit injunctions *in personam* for the purpose to enforce arbitration agreements.[152] Whereas there is a general consensus on the threshold requirements that a party seeking an anti-suit injunction must meet,[153] conflicting opinions have arisen among the various circuits about the weight that should be given to comity concerns in the delicate balance with other discretionary factors.[154] Notwithstanding the different positions held[155] and the stricter approach that US courts follow compared to the English ones,[156] it can nevertheless be submitted that, in the light of the strong federal policy supporting arbitration embodied in the Federal Arbitration Act ('FAA'),[157] US courts 'generally grant anti-suit injunctions where there is a valid arbitration clause which is binding on the parties.'[158]

In spite of these tools having been described as an 'antidote to jurisdictional shenanigans [...] second to none,'[159] their suitability in 'curing' parallel proceedings is doubtful. Not only is the conceptualization behind the theory of the pro-arbitration injunctions disputed,[160] but their concrete

---

[152] In the USA, another method for giving effect to an international arbitration agreement lies in orders compelling arbitration (Section 4 and 206 of the Federal Arbitration Act), which direct parties to arbitrate in accordance with the agreement to arbitrate. In the case law see *Azavedo v. Royal Caribbean Cruises Ltd*., 4 F. Supp. 3d 1357, 1361 (S.D. Fla. 2014); *Bautista v. Star Cruises*, 26 396 F.3d 1289 (11th Cir. 2005). On the possibility to file at the same time a motion to stay and a motion to compel arbitration see *Dumitru v. Princess Cruise Lines Ltd*., 732 F. Supp. 2d 328 (S.D.N.Y. 2010).

[153] More precisely, according to established case law (*American Home Assurance Corp.* v. *The Insurance Corp. of Ireland, Ltd*., 603 F. Supp. 636, 643 (S.D.N.Y. 1984); *China Trade & Dev. Corp.* v. *M.V. Choong Yong*, 837 F.2d 33, 35-6 (2d Cir. 1987); *LAIF X* v. *Axtel*, 390 F. 3d 194 (2nd Cir. 2004); *Eastman Kodak Co.* v. *Asia Optical, Co.*, 23 July 2015, No. 11-cv-6036 (S.D.N.Y. 2015)) it is required that (1) the parties to the federal case and the case to be enjoined must be the same, and (2) the resolution of the federal case must be dispositive of the action to be enjoined. For a decision in which it was held that this identity requirement is satisfied if the 'real parties in interest are the same in both matters' *see Storm LLC* v. *Telenor Mobile Commc'ns AS*, 15 December 2006, No. 06-13157 (S.D.N.Y. 2006), 2006 WL 3735657.

[154] On this *see* Fellas, 'Anti-Suit Injunctions in Aid of Arbitration' (2005), 25 *et seq*.; A. Baum, 'Anti-Suit Injunctions Issued by National Courts to Permit Arbitration Proceedings', in E. Gaillard (ed.), *Anti-Suit Injuntions in International Arbitration* (Juris, 2005), 19, 22 *et seq*.

[155] For a liberal approach *see Interdigital Tech. Corp.* v. *Pegatron Corp*., 29 June 2015, (2015) WL 3958257 (N.D. Cal. 2015); *Microsoft Corp.* v. *Motorola, Inc.*, 696 F.3d 872, 886 (9th Cir. 2012); *Kaepa, Inc*., 76 F.3d at 627-8; *Allendale Mut. Ins. Co.* v. *Bull Data Sys., Inc*., 10 F.3d 425, 431 (7th Cir. 1993); *Seattle Totems Hockey Club* v. *Nat'l Hockey League*, 652 F.2d 852, 855-6 (9th Cir. 1981). Conversely, for a more cautious approach *see Gen. Elec. Co.* v. *Deutz AG*, 270 F.3d 144, 160-1 (3d Cir. 2001); *Gau Shan Co.* v. *Bankers Trust Co*., 956 F.2d 1349, 1354-55 (6th Cir. 1992); *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 926- 33, 937-9 (D.C. Cir. 1984).

[156] J. D. M. Lew, 'Does National Court Involvement Undermine the International Arbitration Processes?', *American University International Law Review*, 24 (2009), 490, 516.

[157] T. E. Carbonneau, 'The Reception of Arbitration in United States Law', *Maine Law Review*, 40 (1988), 263.

[158] *See* A. Ali *et al.*, 'Anti-Suit Injunctions in Support of International Arbitration in the United States and the United Kingdom', *International Arbitration Law Review*, 11 (2008), 12, 13. In the case law *see Amaprop, Ltd.* v. *Indiabulls Financial Services, Ltd*., 23 March 2010, (2010) WL 1050988 (S.D.N.Y. 2010).

[159] A. Briggs, 'Anti-Suit Injunctions and Utopian Ideals', *Lloyd's Quarterly Review*, 120 (2004), 529, 530.

[160] *See* Heinze and Dutta, 'Enforcement of Arbitration Agreements by Anti-suit Injunctions in Europe' (2007), 415, 420, where the idea underlying this procedural tool, *i.e.*, that an arbitration agreement establishes a right not to be sued abroad, is put in question. For a very convincing line of criticism *see* also Benedettelli, 'Le anti-suit injunctions nell'arbitrato internazionale' (2014), 713-4. The author underlines the limit of a perspective which focuses only on the contractual nature of the arbitration agreement by disregarding its procedural effects: '(n)essuno ovviamente può mettere in dubbio che le convenzioni arbitrali siano contratti. Si tratta tuttavia di contratti particolari, posto che il loro principale effetto non è di disporre direttamente di beni della vita, ma di incidere indirettamente sul

utility also remains highly controversial. On the one hand, the experience has shown that anti-suit injunctions 'may exacerbate, rather than solve, the problems [...] by triggering an escalation of injunctions that lead to the frustration of the arbitral process as a whole.'[161] On the other hand, the practical effectiveness of these tools is far from proven.[162] Noticeably, civil law countries, – except perhaps France[163] – are very reluctant in enforcing these measures as they are perceived as means of intolerable intrusion into the functioning of their judicial systems.[164] Whereas anti-suit injunctions are technically directed at the party bringing the judicial proceedings in breach of the arbitration agreement,[165] they inevitably can be regarded as an (albeit indirect)[166] interference in the foreign proceedings.[167] From an international law perspective,[168] this interference is held as posing an unacceptable restriction on a foreign State's sovereignty[169] (in breach of international

godimento di tali beni definendo meccanismi alternativi alla giustizia togata per la soluzione delle relative controversie. Gli obblighi derivanti dalla conclusione di una convenzione arbitrale, ivi inclusi quelli ancillari o impliciti che possono risultare da una sua interpretazione e applicazione alla luce della clausola generale della buona fede, vanno dunque ricostruiti considerandone la sua natura di negozio con effetti eminentemente processuali, e quindi valorizzando alcuni principi generali che negli ordinamenti moderni disciplinano la giustizia civile, sia togata che privata. Tra questi principi vi è quello per cui una parte chiamata in causa in una controversia civile non ha alcun obbligo di costituirsi in giudizio e di difendersi in quanto il procedimento può egualmente svolgersi, e utilmente concludersi con una decisione produttiva di effetti, anche nella contumacia del convenuto. E tale principio trova attuazione anche nell'ambito della giustizia arbitrale, se è vero che nella maggior parte delle legislazioni e dei regolamenti d'arbitrato si prevedono meccanismi idonei a consentire che il tribunale arbitrale possa essere costituito, ed il procedimento possa svolgersi e terminare con la pronunzia di un lodo valido ed eseguibile, anche nel caso di assenza del convenuto.'

[161] E. Gaillard, 'Reflections on the Use of Anti-Suit Injunctions in International Arbitration', in L. A. Mistelis and J. D. M. Lew (eds.), *Pervasive Problems in International Arbitration* (Kluwer, 2006), 201, 213. On the issue *see* also H. A. Grigera Naon, 'Competing Orders Between Courts of Law and Arbitral Tribunals: A Latin American Experience', in Aksen and Briner (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution* (2005), 335. For an illustrative case *see* E. Gaillard, '"KBC v. Pertamina": Landmark Decision on Anti-Suit Injunctions', *New York Law Journal*, 2 October 2003.

[162] Bentolila, *Arbitrators as Lawmakers* (2017), 7, 30.

[163] According to an important decision of the French Supreme Court (French Supreme Court, 14 October 2009, 08-16.369), an anti-suit injunction ordered by a foreign judge can be recognized and enforced in France when three conditions are met: (1) there is no *fraude à la loi*, (2) a sufficient link between the dispute and the foreign judge exists and (3) the recognition of the orders does not violate international public policy (in particular with the respect to the right of access to a judge).

[164] S. Clavel, 'Anti-suit Injunctions et Arbitrage', *Revue de l'Arbitrage*, (2001), 669, 701 *et seq*.

[165] Carducci, 'Arbitration, Anti-suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention' (2011), 171, 180.

[166] A. Leandro, 'Le Anti-Suit Injunctions a supporto dell'arbitrato: da West Tankers a Gazprom', *Rivista di Diritto Internazionale*, 98 (2015), 815.

[167] As has been pointed out '(w)hen a dispute is linked to more than one jurisdiction [...] it is impossible to argue that a contractual obligation providing for the referral of all disputes to arbitration has been violated without considering that the chosen state court absolutely lacks jurisdiction. It is therefore necessary to determine the scope of the foreign court's jurisdiction, something that has been considered, with respect to international jurisdiction, as constituting interference with state sovereignty' (J. C. Fernández Rozas, 'Anti-suit Injunctions Issued by National Courts Measures Addressed to the Parties or to the Arbitrators', in Gaillard (ed.), *Anti-Suit Injuntions in Arbitration* (2005), 73, 80-1). This aspect is broadly acknowledged also by common law courts: *see Star Reefers Pool Inc* v. *JFC Group Co Ltd*, (2012) EWCA (Civ.) 14; *British Aiways Board* v. *Laker Airways Ltd*, (1984) QB 142 (CA 1983); *Laker Airways Ltd* v. *Pan American World Airways*, 559 F. Supp. 1124; *Laker Airways Ltd* v. *Pan American World Airways*, 577 F. Supp. 348.

[168] S. M. Schwebel, 'Anti-suit Injunctions in International Arbitration – An Overview', in Gaillard (ed.), *Anti-Suit Injuntions in Arbitration* (2005), 5. For a different perspective, however, *see* Benedettelli, 'Le anti-suit injunctions nell'arbitrato internazionale' (2014), 709-11.

[169] G. Cuniberti, *Conflict of Laws – A Comparative Approach: Text and Cases* (Elgar, 2017), 233.

comity)[170] and on the parties' right to access to justice.[171] Furthermore, anti-suit injunctions of this form are no longer available within the EU. Their legitimacy has been clearly denied by the ECJ in the famous West Tankers decision,[172] which – consistently with its previous case-law[173] – has considered the power of an English court to issue an injunction to restrain a party, in breach of an arbitration agreement, from pursuing foreign court proceeding in a Member State (subjected to the European jurisdictional regime) as inconsistent with the Brussels I Regulation. On the basis of the (criticized)[174] assumption that a preliminary issue concerning the validity and the effectiveness of an arbitration agreement falls within the Regulation's scope,[175] the Court has held that MS courts lack jurisdiction to grant anti-suit injunctions restraining proceedings before other MS courts commenced in violation of an arbitration agreement.[176] As obstructing the court of another MS in

[170] On this topic *see* D. S. Tan, 'Antisuit Injunctions and the Vexing Problem of Comity', *Virginia Journal of International Law*, 45 (2005), 285; T. C. Hartley, 'Comity and the Use of Anti-Suit Injunctions in International Litigation', *American Journal of Comparative Law*, 35 (1987), 487; S. R. Swanson, 'The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions', *George Washington Journal of International Law & Economics*, 30 (1996), 1.

[171] For this line of arguments *see*, for example Oberlandesgericht Düsseldorf (Court of Appeal), 10 January 1996, *Praxis des Internationalen Privat- und Verfahrensrechts*, 4 (1997), 260: 'such injunctions constitute an infringement of the jurisdiction of Germany because the German courts alone decide, in accordance with the procedural laws governing them and in accordance with existing international agreements, whether they are competent to adjudicate on a matter or whether they must respect the jurisdiction of another domestic or a foreign court (including arbitration courts). Furthermore, foreign courts cannot issue instructions as to whether and, if so, to what extent (in relation to time-limits and issues) a German court can and may take action in a particular case'; Tunis Court of First Instance, 3 November 2010, 23953, as reported by A. Ouerfelli and L. Quirk, 'Arbitral Jurisdiction as an Indivisible Package: an Analysis of the Approach of the English and Tunisian Courts in Midgulf v. Groupe Chimique Tunisien – One Issue, Two Perspectives', *International Journal of Arab Arbitration*, 5 (2013), 11, 16; *Marseilles Fret SA* v. *Seatrano Shipping Co Ltd*, (2002) ECR I-3383; Tribunal de Commerce, Marseille, 22 March 2002; French Supreme Court, 30 June 2004 [2005] Il Pr 24; *see* also in Belgium Civil Court of Bruxelles, 18 December 1989, *Rechtskundig Weekblad* 1990-91, 676.

In the same vein, in the ECJ case law, *see* ECJ, 27 April 2004, *Gregory Paul Turner* v. *Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*., Case C-159/02, ECLI:EU:C:2004:228, 27: 'a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court.'

[172] ECJ, 10 February 2009, *Allianz SpA and Generali Assicurazioni Generali SpA* v. *West Tankers Inc.*, Case C-185/07, ECLI:EU:C:2009:69. For comments on this decision *see*, among others, F. Perillo, 'Arbitrato comunitario e anti-suit injunctions nella sentenza West Tankers della Corte di Giustizia', *Diritto del Commercio Internazionale*, 23 (2009), 351; M. Winkler, 'West Tankers: la Corte di Giustizia conferma l'inammissibilità delle anti-suit injunctions anche in ambito escluso dall'applicazione del Regolamento Bruxelles 1', *Diritto del Commercio Internazionale*, 22 (2008), 728, 735; A. J. Bělohlávek, 'West Tankers as a Trojan Horse with Respect to the Autonomy of Arbitration Proceedings and the New York Convention 1958', *ASA Bulletin*, 27 (2009), 646.

[173] *See* ECJ, 9 December 2003, *Erich Gasser GmbH* v. *MISAT Srl*, C-116/02, ECLI:EU:C:2003:657 and ECJ, 27 April 2004, *Turner* v. *Grovit*, C-159/02, ECLI:EU:C:2004:228.

[174] V. Lazic, 'The Commission's Proposal to Amend the Arbitration Exception in the EC Jurisdiction Regulation: How 'Much Ado about Nothing' Can End Up in a 'Comedy of Errors' and in Anti-suit Injunctions Brussels-style', *Journal of International Arbitration*, 29 (2012), 19, 24.

[175] ECJ, 10 February 2009, *Allianz SpA and Generali Assicurazioni Generali SpA* v. *West Tankers Inc.*, Case C-185/07, ECLI:EU:C:2009:69, 26-7. This conclusion seems coherent with the position that the Court already held in addressing the isue of the 'arbitration exception' provided in the Brussels Regime: ECJ, 25 July 1991, *Marc Rich and Co. AG* v. *Società Italiana Impianti PA.*, C-190/89, ECLI:EU:C:1991:319 and ECJ, 17 November 1998, *Van Uden* v. *Deco-Line*, C-391/95, ECLI:EU:C:1995:543.

[176] Of course, this assesment doesn't affect the possibility for a MS court to issue anti-suit injunctions to restrain non EU proceedings: *see Niagara Maritime SA* v. *Tianjin Iron & Steel Group Company Limited (MV Good Luck)*, (2011) EWHC 3035 (Comm).

ascertaining whether it has jurisdiction, the anti-suit injunction mechanism has – according to the Court – the intolerable effect of limiting the application of the rules on jurisdiction laid down by the Brussels Regulation,[177] runs counter to the principle of mutual trust[178] and prejudices the right to access to courts,[179] which constitutes the basis of the European common judicial area. Contrary to the view sometimes expressed,[180] the availability of anti-suit injunctions in support of arbitration agreements in a intra-EU scenario remains clearly curtailed also under the new legislative framework introduced by the Brussels I Recast Regulation.[181]

Less frequent than the anti-suit injunctions, but equally able to be relied upon to address the *lis pendens* situation here explored (*i.e.*, the occurrence of parallel proceedings between an arbitral tribunal and a foreign national court), are the so called anti-arbitration injunctions, *i.e.*, injunctions – which can be addressed to the parties or even to an arbitral tribunal[182] or to an arbitral institution – issued by a state court in order to restrain arbitral proceedings that have been (or are going to be) commenced (abroad).[183] Not unlike what has been said in relation to the anti-suit injunctions, the breach of an anti-arbitration order granted by a court would amount to contempt of court (for which serious penalties, such as imprisonment or seizure of assets, can be imposed) and would negatively affect the enforcement of the award in the country of the issuing court.

---

[177] *See* ECJ, 10 February 2009, *Allianz SpA and Generali Assicurazioni Generali SpA* v. *West Tankers Inc.*, Case C-185/07, ECLI:EU:C:2009:69, 24. On the need to preserve the 'effet utile' of the Regulation *see* also ECJ (Full Court), 27 April 2004, *Gregory Paul Turner* v. *Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA.*, Case C-159/02, ECLI:EU:C:2004:228, 29.

[178] *See* EC, 10 February 2009, *Allianz SpA and Generali Assicurazioni Generali SpA* v. *West Tankers Inc.*, Case C-185/07, ECLI:EU:C:2009:69, 29: 'an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it... It should be borne in mind in that regard that Regulation No 44/2001, apart from a few limited exceptions which are not relevant to the main proceedings, does not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State... That jurisdiction is determined directly by the rules laid down by that regulation, including those relating to its scope of application. Thus in no case is a court of one Member State in a better position to determine whether the court of another Member State has jurisdiction...' For similar remarks *see* also ECJ, 27 April 2004, *Gregory Paul Turner* v. *Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*., Case C-159/02, ECLI:EU:C:2004:228, 24-25; ECJ, 9 December 2003, *Erich Gasser GmbH* v. *MISAT Srl*, C-116/02, ECLI:EU:C:2003:657, 48. For a critical analysis of the incidence of this principle on jurisdictional matters *see* M. Weller, 'Mutual Trust: In Search of the Future of European Private International Law', *Journal of Private International Law*, 11 (2015), 64, 65 *et seq*.

[179] ECJ, 10 February 2009, *Allianz SpA and Generali Assicurazioni Generali SpA* v. *West Tankers Inc.*, Case C-185/07, ECLI:EU:C:2009:69, 31.

[180] *See* the surprising remarks of the General Attorney in the Gazprom case C-536/13, ECLI:EU:C:2014:2414. For further details, *see* C. P. Ojiegbe, 'From West Tankers to Gazprom: Anti-suit Injunctions, Arbitral Anti-suit Orders and the Brussels I Recast', *Journal of Private International Law*, 11 (2015), 267.

[181] Leandro, 'Le anti-suit injunctions a supporto dell'arbitrato' (2015), 815, 817.

On the impact that Brexit will likely have on this aspect *see* K. Davies and V. Kirsey, 'Anti-Suit Injunctions in Support of London Seated Arbitrations Post-Brexit: Are All Things New Just Well-Forgotten Past?', *Journal of International Arbitration*, 33 (2016), 501.

[182] *See Hubco* v. *Water and Power Development Authority of Pakistan (WAPDA)*, *Arbitration International*, (2000), 439.

[183] Injunctions issued by courts of the seat of arbitration won't be addressed because they refer to the exercise of the supervising authority of the national court over an arbitration to be held in its jurisdiction (so called primary jurisdiction): for an interesting case in which the arbitral tribunal refused to comply with an anti-arbitration injunction issued by the court of the seat *see Salini Costruttori S.P.A.* v. *The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, 7 December 2001, Award Regarding the Suspension of the Proceedings and Jurisdiction (ICC Arbitration no. 10623/AER/ACS), *ASA Bulletin*, 21 (2003), 82.

In the legal systems (mostly common law systems)[184] where the authority to grant this kind of injunctions is recognized,[185] the inherent power to make recourse to this procedural weapon is to be exercised with particular restraint by national courts when 'there is an agreement for the arbitration to have its seat in a foreign jurisdiction and the parties have "unquestionably agreed" to the foreign arbitration clause.'[186] Conversely, where the immediate and co-extensive continuance of arbitration proceedings will be unconscionable, vexatious or oppressive[187] or will infringe or threaten the applicant's legal or equitable rights,[188] the (foreign) arbitration proceedings can be enjoined.[189] This situation, according to case law, seems to arise when there is an alleged lack of consent on the arbitration,[190] where the very existence of the arbitration agreement is at stake,[191] when the disputed matter clearly falls outside of the substantive scope of the agreement,[192] when the issue is whether the putative arbitration agreement is valid,[193] – or in other words – the arbitration agreement is not null and void, inoperative or incapable of being performed.[194]

---

[184] As has been said '(c)ommon law countries tend to be permissive and therefore more willing to become involved, while civil law countries tend to be restrictive and are reluctant to interfere in the process chosen by the parties. This is not surprising as – at the risk of gross exaggeration or simplification – common law systems generally deal with parallel proceedings on a case by case basis by way of *forum non conveniens*. Civil law systems however use the *lis alibi pendens* principle, *i.e.*, first come first served, and therefore do not intervene very much' (Lew, 'Does National Court Involvement Undermine Arbitration?' (2009), 490, 499-500. For examples of civil law countries where the power to issue anti-arbitration injunctions is recognized *see* Born, *International Commercial Arbitration* (2014), I, 1253, 1310.

[185] For further details *see* J. D. M. Lew, 'Control of Jurisdiction by Injunctions Issued by National Courts', in van den Berg (ed.), *International Arbitration 2006* (2007), 185, 189-200. In England, for example, the authority to grant injunctions restraining arbitrations (where the seat of the arbitration is in a foreign jurisdiction) is to be found in Section 37 of the Senior Courts Act 1981: *see*, for example, *Black Clawson International Ltd* v. *Papierwerke Waldhof-Aschaffenberg AG*, *Lloyd's Law Reports*, 2 (1981), 446, 458; *Cetelem SA* v. *Roust Holdings Ltd*, *Lloyd's Law Reports*, 2 (2005), 494; *Weissfisch* v. *Julius*, *Lloyd's Law Reports*, 1 (2006), 716; *Elektrim SA* v. *Vivendi Universal (No 2)*, *Lloyd's Law Reports*, 2 (2007), 8; *Albon (T/A NA Carriage Co.)* v. *Naza Motor Training SDN BHD*, *Lloyd's Law Reports*, 1 (2007), 297; *Claxton Engineering Services* v. *TXM*, (2011) EWHC 345. On the controversy surrounding the issue in the USA *see* J. L. Gorskie, 'US Courts and the Anti-Arbitration Injunction', *Arbitration International*, 28 (2012), 295.

[186] *Excalibur Ventures LLC* v. *Texas Keystone Inc. & Ors* (2011) EWHC 1624, para. 55: 'that is because, given the priority to be accorded to the parties' choice of arbitration, and the limited nature of the court's powers to intervene under the provisions of the Arbitration Act 1996 ("the Act"), the court should not simply apply the same approach as for the grant of the normal anti-suit injunction... Questions relating to arbitrability or jurisdiction, or to staying the arbitration, may in appropriate circumstances better be left to the foreign courts having supervisory jurisdiction over the arbitration.' For a similar reasoning, although applied in a domestic setting, *see In re American Express Financial Advisors Securities Litigation* ('*American Express*'), 672 F.3d 113 (2d Cir. 2011).

[187] *See Jarvis & Sons Ltd.* v. *Blue Circle Dartford Estates Ltd.*, (2007) EWHC (TCC) 1262.

[188] *Elektrim S.A.* v. *Vivendi Universal S.A*, (2007) EWHC 571 (Comm).

[189] *Albon (T/A NA Carriage Co.)* v. *Naza Motor Training SDN BHD*, *Lloyd's Law Reports*, 1 (2007), 297.

[190] For a case in which an anti-arbitration injunction has been granted since it was arguable that the agreement to arbitrate was forged *see Albon (T/A NA Carriage Co.)* v. *Naza Motor Training SDN BHD*, *Lloyd's Law Reports*, 1 (2007), 297.

[191] *Excalibur Ventures LLC* v. *Texas Keystone Inc. & Ors* (2011) EWHC 1624; *Société Géneralé de Surveillance, S.A.* v. *Raytheon European Management and Systems Co.*('*SGS*'), 643 F.2d 863 (1st Cir. 1981).

[192] *Oracle Am., Inc.* v. *Myriad Group AG*, C 10-05604 SBA (N.D. Cal. 2012).

[193] *Claxton Engineering Services Ltd* v. *TXM Olaj-es Gazkutato KTF*, 1 February 2011, (2011) EWHC 345 (Comm).

[194] *Board of Trustees of the Port of Kolkata* v. *Louis Dreyfus Armatures SAS & Others*, 29 September 2014, High Court of Calcutta, G.A. No.1997/2014 in CS No.220/2014; *McDonald's India Private Limited* v. *Vikram*

Despite having being frequently[195] narrowed down to exceptional[196] remedies *in personam* aimed to prevent – for the sake of procedural efficiency and cost-saving[197] – a defeat of the proceedings properly brought before the competent national courts,[198] the orders at stake appear, on the one hand, not binding on arbitral tribunals,[199] and, on the other hand, clearly irreconcilable, not as much with the wording of Article II(3) of the New York Convention[200] or with the need to respect international comity,[201] rather as with the general principles governing international arbitration. Admitting that a national court can interfere in or case-manage a (foreign)[202] arbitration already pending seems not only to 'contradict the negative effect of the principle of Kompetenz-Kompetenz under which courts are not entitled to rule on the jurisdiction of an arbitral tribunal until after the arbitrators have themselves ruled on their own jurisdiction,'[203] but also completely disregards the

---

Bakshi & Ors., 21 July 2016, High Court of Delhi, FAO (OS) 9/2015 and CM No. 326/2015. On the same token *see* – a US decision issued in relation to a domestic arbitration – *In re American Express Financial Advisors Securities Litigation* ('*American Express*'), 672 F.3d 113, 140 (2d Cir. 2011): 'if the parties have not entered into a valid and binding arbitration agreement, the court has the authority to enjoin the arbitration proceedings.'

[195] For an interventionist approach *see*, however, *Petroplus Sul Comércio Exterior S.A. ("Petroplus") et al.* v. *First Brands do Brasil Ltda. et al. ("First Brands")*, as reported by A. Cavalcanti Abbud and G. Santos Kulesza, 'Interim Measures and Anti-Arbitration Injunctions in Brazil', *Kluwer Arbitration Blog* (4 August 2014), available at http://kluwerarbitrationblog.com/2014/08/04/interim-measures-and-anti-arbitration-injunctions-in-brazil/ (last accessed 10 November 2019). On the issuance of anti-arbitration injunctions by courts of States involved in arbitration as parties *see* J. Werner, 'When Arbitration Becomes War: Some Reflections on the Frailty of the Arbitral Process in Cases Involving Authoritarian States', *Journal of International Arbitration*, 17 (2000), 97 *et seq*.

[196] *See AmTrust Europe Ltd* v. *Trust Risk Group SpA*, (2015) EWHC 1927 (Comm); *Black Clawson International Ltd* v. *Papierwerke Waldhof-Aschaffenberg AG, Lloyd's Law Reports*, 2 (1981), 446; *Weissfisch* v. *Julius and others*, (2006) EWCA (Civ.) 218; *Claxton Engineering Services Ltd* v. *TXM Olaj-Es Gazkutato KFT*, (2011) EWHC 345; *Excalibur Ventures LLC* v. *Texas Keystone Inc. & Ors* (2011) EWHC 1624.

[197] *Ahmad Al Naimi* v. *Islamic Press Agency*, (2000) EWCA (Civ.) 17.

[198] J. Gaffney, 'Non-party Autonomy: Displacing the Negative Effect of the Principle of "Competence-Competence" in England?', *Journal of International Arbitration*, 29 (2012), 107, 116 *et seq*.

In the case law *see, inter alia*, *Claxton Engineering Services Ltd* v. *TXM Olaj-es Gazkutato KTF*, 1 February 2011, (2011) EWHC 345 (Comm.); *Excalibur Ventures LLC* v. *Texas Keystone Inc. & Ors* (2011) EWHC 1624.

[199] *See*, in the arbitral case law, *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan*, 16 October 2002, Procedural Order No. 2 (ICSID Case no. ARB/01/13); *Himpurna California Energy Ltd.* v. *Republic of Indonesia*, 26 September 1999, Interim Award and 16 October 2009, Final Award, *Yearbook Commercial Arbitration*, vol. XXV (2000), 11-432; *Saipem S.p.A.* v. *People's Republic of Bangladesh*, 30 June 2009, Award (ICSID Case no. ARB/05/7).

[200] In this author's opinion, the possibility to retain jurisdiction over a dispute covered by an invalid/ineffective arbitration agreement granted to a national court by Article 2(3) of the New Convention cannot be held as giving to the court the authority to issue anti-arbitration injunctions that are not contemplated by the *lex fori*, but cannot be considered as a bar to the injunctive relief either. For similar remarks *see* Born, *International Commercial Arbitration* (2014), I, 1311. For a different view *see*, however, Schwebel, 'Anti-suit Injunctions in International Arbitration' (2005), 5 and, in the case law, *URS Corp.* v. *Lebanese Co. for the Development & Reconstruction of Beirut Central District Sal*, 512 F. Supp. 2d 199 (D. Del. 2007).

[201] But *see* P. A. Karrer, 'Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please', in A. J. van den Berg (ed.), *International Arbitration and National Courts: The Never Ending Story* (Kluwer, 2001), 97, 107.

[202] On a different note, it is often suggested that the courts of the seat of the arbitration should (as courts exercising supervising jurisdiction) be permitted to grant, in particular cases, the injunctive relief under consideration: *see* J. D. M. Lew, 'Control of Jurisdiction by Injunctions Issued by National Courts', in van den Berg (ed.), *International Arbitration 2006* (2007), 185, 186; S. Sattar, 'National Courts and International Arbitration: A Double-edged Sword?', *Journal of International Arbitration*, 27 (2010), 51, 60.

[203] *Air (PTY) Ltd* v. *International Air Transport Association (IATA) and C., company in liquidation*, Geneva Court of First Instance, 2 May 2005, Ref. C/1043/2005-15SP, *ASA Bulletin*, 23 (2005), 739.

autonomy of arbitration[204] and the (broadly recognized) bedrock principle of competence-competence in its positive meaning.[205] If arbitrators are entitled to continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court (Article 16(3) Model Law), there should be no room for the 'egoistic paternalism'[206] inherent in a court enjoining continuation of a concurrent (foreign) arbitral proceedings. Moreover, even if one accepts the idea that there are 'gateway matters' (as the validity of arbitration agreements) that should be decided by national courts,[207] the idea to preempt (at least potentially) the capability of an arbitral tribunal seated abroad to rule on its own jurisdiction goes too far.[208] First, it violates 'the general principle according to which the legality of the arbitral process may only be controlled after an award was made, either by the court of the seat of the arbitration or by the court of the place of enforcement.'[209] Second, it does not take into account the risks associated with this *modus operandi*. When the injunctions are considered by courts other than at the seat of the arbitration, the national court seized 'may be tasked with applying unfamiliar foreign law to determine whether an agreement to arbitrate exists. The party seeking arbitration can also move to compel arbitration at the seat, threatening a wave of competing and conflicting decisions, and the courts of the seat will have the final say in a set-aside proceeding.'[210]

In the light of what has been said, we can conclude that the anti-arbitration injunctions, if not a 'nightmare scenario,'[211] do create in any case – not unlike anti-suit injunctions – more problems than they solve.

A partly different assessment needs to be made in relation to anti-suit orders[212] possibly granted by arbitral tribunals in order to restrain concurrent proceedings and, thus, preserve the *effet utile* of the arbitration. Once it is assumed that an arbitral tribunal has the authority to issue (in

---

[204] D. T. Hascher, 'Injunctions in Favor of and Against Arbitration', *American Review of International Arbitration*, 21 (2010), 189, 192; on arbitration as a (relatively) autonomous system see G. Cordero-Moss, *Limits on* 'Party Autonomy in International Commercial Arbitration', 4 (2015) *Penn State Journal of Law and International Affairs*, 186, 189 *et seq.*

[205] *See* Gaillard, 'Reflections on the Use of Anti-Suit Injunctions' (2006), 201, 214; M. Stacher, 'You Don't Want to Go There – Antisuit Injunctions in International Commercial Arbitration', *ASA Bulletin*, 23 (2005), 640, 653.

[206] For this expression *see Vitol Bahrain EC* v. *Nasdec General Trading LLC and others*, (2013) All ER (D) 38.

[207] For this approach *see*, in the case law, *First Options* v. *Kaplan*, 514 U.S. 938 (1995). *See* also *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 452 (2003); *Dallah Real Estate and Tourism* v. *Ministry of Religious Affairs of the Government of Pakistan*, (2010) UKSC 46, available at www.italaw.com/cases/4479 (last accessed 10 November 2019).

[208] For the contrary position *see* N. Poon, 'The Use and Abuse of Anti-Arbitration Injunctions – A Way Forward for Singapore', *Singapore Academy of Law Journal*, 25 (2013), 244, 253: 'if there are occasions when it would be inappropriate to allow the arbitral tribunal to determine the validity of the arbitration agreement, the corollary must be that it may be appropriate to restrain the arbitral tribunal from making a determination of the validity of the arbitration agreement pending the court's decision. One such occasion where the arbitral tribunal should not be left to determine its own jurisdiction when the court is seised of the jurisdictional question is when the applicant seeks an anti-arbitration injunction on the basis that the arbitration agreement was never formed.'

[209] Lew, 'Control of Jurisdiction by Injunctions' (2007), 185, 189-216.

[210] Gorskie, 'US Courts and the Anti-Arbitration Injunction' (2012), 295, 316.

[211] J. D. M. Lew, 'Achieving the Dream: Autonomous Arbitration', *Arbitration International*, 22 (2006), 179, 180.

[212] For the use of the alternative term 'anti-suit orders' to avoid confusion with the anti-suit injunctions granted by national courts *see* R. Moloo, 'Arbitrators Granting Antisuit Orders: When Should They and on What Authority?', *Journal of International Arbitration*, 26 (2009), 675, 676.

some particular cases)[213] these kinds of measures[214] – on the basis of its inherent power to enforce the contractual agreement to arbitrate[215] or to take any measure necessary to avoid the aggravation of the dispute and/or to protect the effectiveness of the final award,[216] on the premise of specific indications given by the parties[217] or in the light of what the *lex arbitri*[218] or the applicable procedural rules[219] prescribe – it should be clarified that this type of interim relief doesn't prompt the same concern that surrounds the anti-suit injunctions issued by national courts. As it has been

[213] For the need for caution in the grant of such injunctions *see* Moloo, 'Arbitrators Granting Antisuit Orders' (2009), 675, 676: 'Arbitrators should be willing to exercise this authority to grant an antisuit order to enforce an arbitration agreement only when it is clear that the parties intended to arbitrate the dispute in question to the exclusion of any other forum'; L. Lévy, 'Anti-suit Injunctions Issued by Arbitrators', in Gaillard (ed.), *Anti-suit Injunctions in Arbitration* (2005), 115, 126 ('arbitrators should only issue anti-suit injunctions when it comes to their attention that one of the parties has committed fraud or otherwise engaged in abusive behavior in order to revoke the arbitration agreement. This can be the case when there is an abusive petition for interim measures designed to paralyze the arbitration or of when there is an attempt to slow down the proceedings or to harm the interests of another party.').

[214] On the various theories attempting to explain this (lack of) authority *see* P. Ortolani, *Anti-Suit Injunctions In Support Of Arbitration Under The Recast Brussels I Regulation* (Max Planck Institute Luxembourg, 2015), available at www.mpi.lu/research/working-paper-series/2015/wp-2015-1/ (last accessed 10 November 2019), 11-2.

[215] For the remark that 'antisuit injunctions ordered by arbitrators are in reality nothing more than an order given to the party acting in breach of the arbitration agreement to comply with its contractual undertaking to arbitrate the dispute it has submitted to domestic courts', *see* E. Gaillard, 'Anti-Suit Injunctions Issued by Arbitrators', in van den Berg (ed.), *International Arbitration 2006* (2007), 235, 239. For this approach *see*, in the arbitral case law, *E-Systems Inc.* v. *Islamic Republic of Iran et al.*, 4 February 1983, Interim Award (No. ITM 13-388-FT): 'This Tribunal has an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority made fully effective'; ICC Case no. 8307, FMS/KGA, 14 maggio 2001, published in Gaillard (ed.), *Anti-Suit Injunctions in Arbitration* (2005), at 307: 'an arbitrator has the power to order the parties to comply with their contractual commitments, the agreement to arbitrate being one of them (sole arbitrator Tercier).'

On the limits of the view that perceives 'the injunction as a form of negative specific page performance obligation' *see* J. Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer, 2012), 659: 'The latter contention does not address the conceptual challenge as to the right of one adjudicator to make negative jurisdictional rulings under criteria where they are not empowered adjudicators. There is a problem in considering anti-suit orders as simply specific performance directives in relation to breach of arbitration agreements. If one is speaking of specific performance, it is important to consider exactly which performance is being promoted. The natural performance under an arbitration agreement is to arbitrate. Yet we do not consider it appropriate to make orders for specific performance of the arbitration promise itself where a respondent simply does not turn up. Instead, arbitration calls for a claimant to proceed to make its case, and usually requires it to advance all the fees and costs prior to a final determination. Hence an anti-suit order is not truly specific performance of the arbitration agreement but an order not to do anything that is contradictory to it.'

[216] *See* E. Gaillard, 'Anti-Suit Injunctions' (2007), 235, 237. In the case law *see* ICC Case no. 389, 23 December 1982, Award, *Journal du Droit International (Clunet)*, 110 (1983), 914.

[217] *See* Benedettelli, 'Le anti-suit injunctions nell'arbitrato internazionale' (2014), 726-7. For the view that such authority need not be expressly granted to the arbitral tribunal because it flows from the jurisdiction granted to it by the arbitration agreement *see* Moloo, 'Arbitrators Granting Antisuit Orders' (2009), 675, 680. In the case law *see Rintin Corp., S.A.* v. *Domar Ltd.*, 476 F.3d 1254 (11th Cir. 2007).

[218] *See* Landau, 'Arbitral Lifelines' (2007), 282, 289-90; In this regard, it should be noted that anti-suit orders can be considered measures aimed to prevent obstruction or delay of the arbitral process pursuant to Article 17(2) Model Law: *see* Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-third Session (Vienna, 3-7 October 2005), UNCITRAL, 39th Sess., UN Doc. A/CN.9/589 (19 June-7 July 2006), at 16-7.

[219] For the idea that '(a)ny broad provision of authority to grant interim or provisional measures [...] would permit the arbitral tribunal to grant temporary antisuit relief,' *see* Moloo, 'Arbitrators Granting Antisuit Orders' (2009), 675, 683.

acknowledged by the CJEU in a recent case[220] – where the Brussels Regime has been construed as not requiring a MS court to deny the recognition and the enforcement of an arbitral award 'ordering a party to arbitration proceedings to reduce the scope of the claims formulated in proceedings pending before a court of that Member State' – anti-suit orders (at least when incorporated in an award) are much less intrusive than anti-suit injunctions essentially for two reasons. On the one hand, an arbitral tribunal's prohibition of a party from bringing certain claims before a court does not impose penalties in case of a failure of compliance.[221] On the other hand, this type of interim relief does not adversely affect the fundamental right of access to courts, since 'in proceedings for recognition and enforcement of such an arbitral award, first, that party could contest the recognition and enforcement and, second, the court seised would have to determine, on the basis of the applicable national procedural law and international law, whether or not the award should be recognised and enforced.'[222]

Nevertheless, these orders also pose problems. First, it is true that anti-suit orders are less intrusive than anti-suit injuctions, but it is equally true that they amount to an (indirect) interference in proceedings before another tribunal. Their *raison d'être* and their compatibility with the principles of international arbitration can be especially questioned when these injunctions impact directly on the jurisdiction of another arbitral tribunal. As it has been said 'the principle should be that each arbitral tribunal should decide on its own jurisdiction. Each arbitral tribunal should have its own competence-competence in the loose sense in which we use it in international arbitration, whether these are tribunals in the country of the seat or somewhere else. We must expect from each arbitral tribunal that it respects the realm of the jurisdiction of another arbitral tribunal that derives its jurisdiction from the same party autonomy that created the first arbitral tribunal.'[223] Second, arbitrators obviously lack the coercive powers of the courts to compel compliance with their orders and have only the authority to impose procedural sanctions or, at best, award damages for the breach of their injunctions.[224] It follows that if the enjoined party does not comply voluntarily with the order to restrain from pursuing the parallel proceeding, there is no other alternative than resorting to national courts for enforcement purposes. This may involve significant complexities. Even if one accepts the idea that anti-suit orders can be incapsulated in awards capable to circulate under the New York Convention,[225] their enforceability could likely be denied for public policy reasons in legal systems based on the idea that 'jurisdiction is something that is declared, not something that can be ordered.'[226] *A fortiori*, free-standing orders of an injunctive nature present

[220] CJEU, 13 May 2015, *'Gazprom' OAO* v. *Lietuvos Respublika*, Case C-536/13, ECLI:EU:C:2015:316.

[221] CJEU, 13 May 2015, *'Gazprom' OAO* v. *Lietuvos Respublika*, Case C-536/13, ECLI:EU:C:2015:316, para 40.

[222] CJEU, 13 May 2015, *'Gazprom' OAO* v. *Lietuvos Respublika*, Case C-536/13, ECLI:EU:C:2015:316, para 38.

[223] Karrer, 'Interim Measures Issued by Arbitral Tribunals and the Courts' (2001), 97, 110.

[224] On the remedies available to arbitrators to enforce their orders for interim measures *see* A. Carlevaris, 'The Recognition and Enforcement of Interim Measures Ordered by International Arbitrators', *Yearbook of Private International Law*, 9 (2007), 503, 505 *et seq*.

[225] Benedettelli, 'Le anti-suit injunctions nell'arbitrato internazionale' (2014), 730. *Contra* Ortolani, *Anti-Suit Injunctions In Support Of Arbitration* (2015), *supra* note 225, at 15; Leandro, 'Le anti-suit injunctions a supporto dell'arbitrato' (2015), 815, 818.

[226] Lévy, 'Anti-suit Injunctions' (2005), 115, 128. For an overview of grounds that may trigger the public policy reservation (and more generally the denial of enforcement) in the scenario at stake *see* Leandro, 'Le anti-suit injunctions a 30ualifi dell'arbitrato' (2015), 815, 825: '(p)uò darsi, infatti, che il riconoscimento dell'anti-

significant hurdles: their implementation by state courts would depend not on the New York Convention but on national procedural rules, that might well hinder the concrete effectiveness of this remedy.[227]

6. Monetary or declaratory relief as an alternative to anti-suit/arbitration injunctions?

A remedy that is at times employed in practice in lieu of (but also in addition to)[228] anti-suit injunctions/orders in order to shield an arbitration agreement is monetary relief.[229] If one views the arbitration agreement as (also)[230] 'embodying contractual obligations and the right to arbitrate [...] as a contractual right'[231] and construes the arbitration agreement as covering a damages claim for its violation,[232] it is conceptually possible to conceive that an arbitral tribunal (and the national

suit injunction arbitrale strida con l'ordine pubblico dello Stato richiesto per il semplice fatto di restringere il diritto di accesso al giudice, oppure a causa degli effetti indirettamente 30ualificat sull'esercizio della giurisdizione, o ancora perché il provvedimento inibitorio sia 30ualificator come un provvedimento cautelare dell'arbitro e risulti, perciò, improduttivo di effetti in tale Stato. Ma può darsi che l'anti-suit injunction non sia riconosciuta perché la convenzione arbitrale è dichiarata inoperativa in sede di exequatur e, di conseguenza, perché il tribunale arbitrale risulta privo anche del potere di emettere un ordine inibitorio.'

[227] M. Illmer, 'The Arbitration Interface with the Brussels I Recast: Past, Present and Future', in Ferrari (ed.), *The Impact of EU Law on Arbitration* (2017), 31, 49.

[228] *See* Tan, 'Antisuit Injunctions and Comity' (2005), 285, 347.

[229] P. Friedland and K. Brown, 'A Claim for Monetary Relief for Breach of Agreement to Arbitrate as a Supplement or Substitute to an Anti-Suit Injunction', in van den Berg (ed.), *International Arbitration 2006* (2007), 267; C. Gambino, 'La legittimità delle azioni risarcitorie per violazione di clausole compromissorie dopo la giurisprudenza West Tankers', *Rivista di Diritto Internazionale Privato e Processuale*, 46 (2010), 949; J.-P. Fierens and B. Volders, 'Monetary Relief in Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements', *Revista Brasileira de Arbitragem*, 34 (2012), 92.

On the analogous issue of the possibility to compensate the breach of a choice-of-court agreement *see* K. Takahashi, 'Damages for Breach of a Choice-of-court Agreement', *Yearbook of Private International Law*, 10 (2008), 57; P. Mankowski, 'Ist eine vertragliche Absicherung von Gerichtsstandsvereinbarungen möglich?', *Praxis des Internationalen Privat- und Verfahrensrechts*, 1 (2009), 23; H. T. Chee, 'Damages for Breach of English Jurisdiction Clauses: More than Meets the Eye', *Lloyd's Maritime & Commercial Law Quarterly*, (2004), 46. In the case law *see* Spanish Supreme Court, 12 January 2009, RJ 2009/544; Spanish Supreme Court, 23 February 2007, RJ 2007 1/2 118; *Allendale Mutual Insurance Co.* v. *Excess Insurance Co. Ltd.*, 992 F. Supp. 278 (S.D.N.Y. 1998); *Indosuez Intern. Finance, B.V.* v. *National Reserve Bank*, 758 N.Y.S.2d 308 (N.Y. App. Div. 2003); *Ball* v. *Versar, Inc.*, No. 1:01 CV 0531 DFH TAB, 2006 WL 2568057 (S.D. Ind. 2006); *Union Discount Co Ltd* v. *Zoller and Others*, *Weekly Law Reports*, 1 (2002), 1517; *Donohue* v. *Armco Inc.*, *Lloyd's Law Reports*, 1 (2002), 425; *Svenborg* v. *Akar*, [2003] EWHC 797.

[230] According to the prevailing view the arbitration agreement has a mixed or hybrid nature, comprising both procedural and contractual aspects: K. P. Berger, 'Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?' in van den Berg (ed.), *International Arbitration 2006* (2007), 301.

For a detailed analysis of the legal nature of arbitration agreements *see* S. Gabriel, 'Damages for Breach of Arbitration Agreements', in Arroyo (ed.), *Arbitration in Switzerland* (2013), 147.

[231] D. S. Tan, 'Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court's Remedial Powers', *Virginia Journal of International Law*, 47 (2007), 547, 589, 602.

[232] G. von Segesser, 'Damages for Damages: If a State Court Imposes Damages on a Party in Violation of an Arbitration Agreement, can an Arbitral Tribunal Award Damages Negating Those Court-imposed Damages?', *Kluwer Arbitration Blog* (13 June 2014), http://kluwerarbitrationblog.com/2014/06/13/damages-for-damages-if-a-state-court-imposes-damages-on-a-party-in-violation-of-an-arbitration-agreement-can-an-arbitral-tribunal-award-damages-negating-those-court-imposed-damages (last accessed 10 November 2019).

court of the seat)[233] can order the party which initiated proceedings before a tribunal in breach of that agreement to pay the damages incurred by the injured party as a result of this breach.[234] Leaving aside the critical aspects of this tool[235] and the complicated issue of the practical assessment of the amount of damages that can be liquidated[236] (not addressable here), what emerges from the case law and from the scholarship that have dealt with the topic is that this device is to be considered an *ex post* remedy[237] meant not to deter a party to continue parallel proceedings before

---

[233] *See* C. Ambrose, 'Can Anti-Suit Injunctions Survive European Community Law?', *International & Comparative Law Quarterly*, 52 (2003), 401, 415; T. Hartley, 'The Brussels I Regulation and Arbitration', *International & Comparative Law Quarterly*, 63 (2014), 843, 864. In the case law *see Mantovani* v. *Carapelli SpA*, *Lloyd's Law Reports*, 1 (1980), 375 (CA).

[234] S. Dutson, 'Breach of an Arbitration or Exclusive Jurisdiction Clause: The Legal Remedies if it Continues', *Arbitration International*, 16 (2000), 89, 96.

In the case law *see* Swiss Federal Court, 11 February 2010, 4°_444/2009, available at www.swissarbitrationdecisions.com/necessity-to-file-immediate-appeal-against-award-on-jurisdiction (last accessed 10 November 2019); *West Tankers Inc* v. *Allianz SpA et al.*, 4 April 2012, EWHC 854 (Comm.), *CMA CGM SA* v. *Hyundai Mipo Dockyard Co Ltd*, (2008) APP.L.R. 11; *Tracomin* v. *Sudin In Tracomin SA v Sudin Oil Seeds Co Ltd*, *Lloyd's Law Reports*, 1 (1983), 560; *Schiffahrtsgesellschaft Detlev Von Appen GmbH* v. *Voest Alpine Intertrading GmbH*, *Lloyd's Law Reports*, 2 (1997), 279.

For the necessity of a self-restraining approach by the arbitrators whenever it is impossible to establish the bad faith of the party breaching the agreement *see (1) Party to License Agreement (Sweden), (2) Joint Venture (Sweden) and (3) Holding Company of Joint Venture (Sweden)* v. *(1) Party to License Agreement (Netherlands) and (2) Affiliated Company (Germany)*, 2012, Final Award (ICC Case no. 17176), *Yearbook Commercial Arbitration*, vol. XLI (2016), 86, 115.

[235] *See* P. Santomauro, 'Sense And Sensibility: Reviewing West Tankers And Dealing With Its Implications In The Wake Of The Reform Of EC Regulation 44/2001', *Journal of Private International Law*, 6 (2010), 281, 345 *et seq.*; B. Steinbruck, 'The Impact of EU Law on Anti-suit Injunctions in Aid of English Arbitration Proceedings', *Civil Justice Quarterly*, (2007), 358, 368-9.

[236] On the issue *see* Tan, 'Enforcing International Arbitration Agreements in Federal Courts' (2007), 545, 606 *et seq.*

For the remark that 'damages will not usually be an adequate remedy since damages will not be easily calculable and can indeed only be calculated by comparing the advantages and disadvantages of the respective fora' *see OT Africa Line Ltd* v. *Magic Sportswear Corp*, (2005) EWCA (Civ.) 710.

[237] *See* ICC Award, 3 August 2009 (upheld by Swiss Federal Court, 11 February 2010, 4A_444/2009) as reported by M. Scherer, 'Court Proceedings in Violation of an Arbitration Agreement: Arbitral Jurisdiction to Issue Anti-suit Injunction and Award Damages for Breach of the Arbitration Agreement', *International Arbitration Law Review*, 14 (2011), 43; ICC Award, 25 February 2013 (upheld by Swiss Federal Court, 30 September 2013, 4A_232/2013, available at www.swissarbitrationdecisions.com/sites/default/files/30%20septembre%202013%204A%20232%202013_1.pdf (last accessed 10 November 2019)).

Among the legal scholars *see* J. Michaelson and G. Blanke, 'Anti-suit Injunctions and the Recoverability of Legal Costs as Damages for Breach of an Arbitration Agreement', *International Journal of Arbitration, Mediation and Dispute Management*, 71 (2008), 12, 27: 'A party to an arbitration agreement can bring proceedings in the English courts to recover legal costs, including interest, as damages for breach by its opponent of that arbitration agreement on an indemnity basis provided that the affected party can establish a separate cause of action for recovery of the legal costs concerned. The affected party has to show that the legal costs, recovery of which it is seeking, are a direct result of the opponent's breach of the arbitration agreement and are reasonable' (emphasis added); Santomauro, 'Sense And Sensibility: Reviewing West Tankers' (2010), 281, 311: 'when ruling on damages, the court merely compares two situations: the actual, indeed recognising the other court's decision, and the hypothetical, where no court proceedings were brought that could be reviewed'; Fierens and Volders, 'Monetary Relief In Lieu of Anti-Suit Injunctions' (2012), 92, 95: 'such relief would purport to compensate the injured party for the costs incurred in the parallel court proceedings – such costs might comprise the injured party's lawyers' fees and other spending associated with the parallel proceedings (including translation and travel costs) which the injured party would

a (foreign) national court (or before a (foreign) arbitral tribunal), but rather to vindicate the right to arbitrate. Given that this tool is no more than 'a final attempt to achieve at least some financial compensation for the mess created by parallel proceedings'[238] and is not properly designed to put an end to a *lis pendens* situation,[239] its relevance for this study appears minor.

Conversely, an analysis of the remedy of declaratory relief as a solution capable of tackling the problem under exam should not be left out. Since some national legal systems[240] grant to the parties the possibility to seek, at a pre-award stage,[241] declaratory relief to have a national court establish the (in)validity of an arbitration agreement, it is possible to imagine that an action to obtain a prompt declaratory judgment could be filed (before the court of the seat or even a foreign court)[242] with the aim to 'cure' a situation in which parallel proceedings are pending before a national court (of a different jurisdiction) and a (foreign) arbitral tribunal. Clearly, such a goal could be achieved only if the court's declaratory judgment were deemed to have a preclusive effect on the arbitral tribunal or on the foreign court according to the *res judicata* principle.[243] This assumption needs to be examined from the perspective of the arbitral tribunal first and, then, of a foreign national court. Although there are certainly powerful arguments to support the viewpoint that an arbitral tribunal should give weight to a declaratory judgment rendered by the national court of the seat[244] (and maybe to a declaratory judgment rendered by a foreign court recognizable in the country of the seat),[245] the idea of a *res judicata* effect in arbitration proceedings is not convincing. In this author's

---

not otherwise have been able to recover in the parallel proceedings. This relief as a "compensation" would be possible if the foreign court were to dismiss the proceedings because of a lack of jurisdiction and/or to award the injured party with an indemnity against any judgment on the merits in those proceedings (should the foreign court have dismissed the arbitration exception).'

238 Illmer, 'The Arbitration Interface with the Brussels I Recast' (2017), 31, 57.

239 The consistent practice of awarding damages for breach of arbitration agreements seems to be, at best, capable of having a negative general protection function, *i.e.*, deterring parties from forum shopping by breaching arbitration agreements, *see* Ambrose, 'Can Anti-Suit Injunctions Survive?' (2003), 401, 415.

240 *See*, for example, Section 32 of the English Arbitration Act, Section 1032(2) of the German Code of Civil Procedure and, according to the prevailing view (M. Bove, 'Ancora sui rapporti tra arbitro e giudice statale', *Rivista dell'Arbitrato*, (2007), 357, 361; F. P. Luiso, 'Rapporti fra arbitro e giudice', in E. Fazzalari, *La Riforma della Disciplina dell'Arbitrato* (Giuffrè, 2006), 111, 114), Article 819 ter of of the Italian Code of Civil Procedure.

241 *I.e.*, prior to the constitution of the arbitral tribunal pursuant to the German and the Italian legislation.

242 Section 1025 of the German Code of Civil Procedure.

243 The possibility to pursue an analogous strategy vis-à-vis an arbitral tribunal (*i.e.*, obtaining a quick award on juridiction in order to paralyze other proceedings) is not explored here, for the simple reason that the *res judicata* effect of a jurisdictional award is generally denied, *see* G. Walters, 'Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?', *Journal of International Arbitration*, 29 (2012), 651, 687 (*contra*, however, *see* Poudret and Besson, *Comparative Law of International Arbitration* (2007), 400-1; J.-F. Poudret, 'Concluding Remarks on Relationship between State Courts and Arbitral Tribunals', in Karrer, *Arbitral Tribunals or State Courts* (2001), 147, 156). For some interesting cases in this regard *see* L.G. Radicati di Brozolo, 'Res Judicata', in P. Tercier (ed.), *Post Award Issues* (Juris, 2011), 127.

244 *See* S. Schaffstein, *The Doctrine of Res Judicata before International Commercial Arbitral Tribunal* (Oxford University Press, 2016), 232, reporting the opinion of J. Paulsson, 'Interference by National Courts', in L. W. Newman and R. D. Hill (eds.), *The Leading Arbitrators' Guide to International Arbitration*, 2nd ed. (Juris, 2008), 135: 'where a court at the arbitral seat finally decided that the arbitral tribunal does not have jurisdiction over the parties and the dispute, "it may be pointless, imprudent or indeed unlawful" for the arbitral tribunal to act, absent other serious factors, in contradiction with the ruling, even if the arbitrators believe it to be wrong. This applies especially where the law of the arbitral clearly gives the court the authority to rule on the arbitral tribunal jurisdiction.'

245 On the relevance of decisions of foreign national courts recognizable at the seat *see* W. Wenger and M. Schott, , in H. Honsell *et al.* (eds.), *Basler Kommentar Internationales Privatrecht*, 2nd ed. (Helbing Lichtenhahn, 2007), Article 186, note 10. On the ability of arbitral tribunals 'to incidentally consider whether a foreign court decision

view,[246] the criticized approach fails to take into consideration that the arbitral tribunal has the authority to rule on its own jurisdiction and should not be prevented from doing this by the intervention of any court. Although the disregard of the court (of the seat)'s ruling on the invalidity/unenforceability of the arbitration agreement could very likely lead to the setting aside of the award, there is no reason to conclude that such a decision *implies* a bar for the arbitral tribunal. Without the need to promote the theory of a 'floating' arbitration completely detached from the legal system of the country where the proceedings take place,[247] it is apparent that an adverse conclusion is simply irreconcilable with the principle of the autonomy of the arbitration and legitimises an intolerable intrusion of national adjudicators into the functioning of what is an out of court dispute resolution system par excellence. Moreover, given that in some countries awards set aside in the country of the origin are capable of being recognized/enforced,[248] arbitral tribunals may well decide to reconsider the issue decided by the national court afresh, without fear of breaching their duty to render an enforceable award.

As far as the chances that a declaratory judgment on the validity of an arbitration agreement could be recognized in other jurisdictions, there is no mechanism that ensures that this result would

---

would be entitled to recognition in the jurisdiction where the arbitration is seated' *see* A.-C. Hahn, 'The Award and the Courts, Res Judicata as a Challenge for Arbitral Tribunals', in C. Klausegger *et al.* (eds.), *Austrian Yearbook on International Arbitration 2014* (Manz'sche Verlags- und Universitätsbuchhandlung, 2014), 329, 337.

[246] For similar remarks *see* Born, *International Commercial Arbitration* (2014), I, 3784-5: '(i)t goes without saying that arbitral tribunals (and national courts) should accord substantial deference to the findings and contractual analysis of other decision-makers, in an effort to minimize inconsistent results and take advantage of presumptively well-considered fact-finding and legal conclusions. Nonetheless, where an arbitral tribunal concludes that a prior jurisdictional decision is incorrect, or that it rests on one of the Convention's escape devices (*i.e.*, nonarbitrability or public policy), then the tribunal may properly reach a different conclusion. This conclusion is controversial because it rests on a premise of the arbitral tribunal's autonomy from the courts of the arbitral seat. Nonetheless, this analysis draws support from the special character of the New York Convention's rules governing the validity of arbitration agreements... In order to effectively implement the Convention's regime for recognizing international arbitration agreements, neither Contracting States nor arbitral tribunals should be bound by local court decisions which either ignore the Convention or rely on a local mandatory law to deny effect to an otherwise valid arbitration agreement. On the contrary, giving effect to local court decisions of this character is inconsistent with, and can be seen independently to violate, the Convention's requirement that Contracting States recognize international arbitration agreements. Under this analysis, the international character of the Convention, and the international obligations imposed on Contracting States under the Convention, would justify the non-application of ordinary rules of preclusion in jurisdictional matters.'

[247] *See* P. Fouchard, *L'Arbitrage Commercial International* (Dalloz, 1965), 22 *et seq*.; J. Paulsson, 'Arbitration Unbound: Awards Detached from the Law of its Country of Origin', *International & Comparative Law Quarterly*, 30 (1981), 358.

[248] *See*, for France, *Société Pablak Ticaret Limited Sirketi* v. *Norsolor S.A.*, French Supreme Court, 9 October 1984, (1985) *Rev.l.Arb*. 431; *Société Hilmarto Ltd* v. *Omnium de traitement et de valorization*, French Supreme Court, 23 March 1994, (1994) *Rev.l.Arb*. 327; *The Arab republic of Egypt* v. *Chromalloy Aeroservices, Inc*., Paris Court of Appeal, 14 January 1997, (1997) *Rev.l.Arb*. 395. In the US case law *see In Re Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 906 (D.C. Cir. 1996); *Corporación Mexicana de Matenimiento Integral, S. de R.L. de C.V.* v. *Pemex-Exploración y Producción*, 23 August 2013, No. 10 Civ. 206 (AKH), (2013) WL 4517225 (S.D.N.Y. 2013); *Baker Marine (Nig.) Ltd.* v. *Chevron (Nig.) Ltd*., 191 F. 3d 194 (2d Cir. 1999); *TermoRio S.A.E.S.P.* v. *Electranta S.P*., 487 F. 3d 928 (D.C. Cir. 2007). For some recent Dutch decisions *see* Amsterdam Court of Appeal (Gerechtshof Amsterdam), 28 April 2009, *Yukos Capital s.a.r.l. (Luxembourg)* v. *OAO Rosneft (Russian Federation)*, *Yearbook Commercial Arbitration*, vol. XXXIV (2009), 703 *et seq*.; Dutch Supreme Court (Hoge Raad), 25 June 2010, *Rosneft (Russian Federation)* v. *Yukos Capital s.a.r.l. (Luxembourg)*, *Yearbook Commercial Arbitration*, vol. XXXV, (2010), 423 *et seq*.

On this topic *see* V. Lazić, 'Enforcement of the Arbitral Awards Annulled in the Country of Origin', *Croatian Arbitration Yearbook*, 13 (2006), 179 *et seq*.; A. J. van den Berg, 'Should the Setting Aside of the Arbitral Award be Abolished?', *ICSID Review*, 29 (2014), 1 *et seq*.

certainly be achieved[249]. In the EU, the proposal to subject a declaratory judgment on the validity of the agreement to the same regime applicable to court decisions[250] has been clearly rejected in the Brussels Recast Regulation. It follows that the declaratory relief mechanism seems not suitable to effectively address the problem of parallel proceedings, because it even exacerbates the risk of possibly inconsistent decisions.

7. Final remarks

It is incontrovertible that the proliferation of proceedings is a phenomenon well known (also) in international commercial arbitration. In order to prevent the shortcomings associated with parallel proceedings in that scenario, and in particular the risks of conflicting decisions, different tools can be used.

The analysis of the various techniques normally advocated in this regard has shown that many of the procedural mechanisms available are clearly ill-suited given the specificity of international commercial arbitration. On the other hand, this very same specificity allows us to draw the following conclusions.

As far as a situation of a *lis alibi pendens* before a state court and a foreign arbitral tribunal, the more convincing approach requires 'a balanced and reasonable cooperation between States and international arbitral justice.'[251] Since arbitration is largely accepted as a reliable and effective alternative to litigation and the judicial policy of minimal interference with the arbitration process clearly reflects this view, such an approach supports the prioritization of arbitral tribunals over national courts as long as a dispute covered by a *prima facie* existent arbitration agreement is brought before arbitral tribunals. This solution, unfortunately, is not explicitly envisaged in the New York Convention and can be found only in the European Convention and in a few arbitration statutes. This, however, does not prevent national courts from exercising a certain degree of restraint in handling disputes already pending before foreign arbitral tribunals.[252] This is particularly true in common law jurisdictions, where courts have an inherent power to stay proceedings in the interest of case management.[253] In civil law systems, on the contrary, it would

---

[249] As has been convincingly pointed out 'courts other than those of the seat have a free-standing obligation under the New York Convention to assess issues of validity and scope of arbitration agreements and to resolve these issues consistently with the Convention, irrespective of the determinations of the court of the seat, which would have to be disregarded if they are incorrect, or at least blatantly incorrect (...). The same approach applies to other foreign decisions that the courts of a given State may view as unjustifiably interfering with arbitration' (L. G. Radicati di Brozolo, 'The Relation between Courts and Arbitration: Support or Hostility', Opinio Juris in Comparatione, 1 (2012), 1, 5).

[250] See *Heidelberg* Report, para. 122 et seq.

[251] For the use of this expression *see* A. Mourre, 'Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal', in Mistelis and Brekoulakis (eds.), *Arbitrability* (2009), 207, 209.

[252] *See* also Kröll, 'Issues Specific to Arbitration in Europe' (2013), 1, 9.

[253] De Ly and Sheppard, 'ILA Final Report' (2009), 3, 10; Born, *International Commercial Arbitration* (2014), 397. As the US Supreme Court has pointed out in a seminal decision 'the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants' (*Landis* v. *North Am. Co*., 299 U.S. 248, 254 (1936)). For cases related to arbitration *see Maybank Kim Eng Securities Pte Ltd* v. *Lim Keng Yong and another* [2016] 3 SLR 431 (Singapore High Court), *Tomolugen Holdings* v. *Silica Investors Ltd* [2016] 1 SLR 373 (Singapore Court of Appeal); *Carter Holt Harvey Ltd* v. *Genesis Power Ltd, Rolls-Royce* [2006] 3 NZLR 794 (New Zealand High Court); *Korea Wheel Corporation* v. *JCA Corporation*, 2005 WL 3454335 (W.D. Wash); *Hewlett-Packard Co.* v. *Berg*, 61 F.3d 101, 105 (1st Cir. 1995).

be auspicable to specifically recognize such an authority to national courts, as it has been done – even to a larger extent – within the EU in support of courts exclusively chosen by the parties.

Of course, such a prioritization mechanism cannot be imposed on arbitral tribunals in a scenario in which proceedings are already pending before a national court. While it is true that an arbitral tribunal is certainly entitled to stay proceedings in order to avoid a protracted and expensive parallel litigation, it is certainly not bound to do so, at least in the absence of a joint request by the parties or in presence of a clear waiver of the arbitration agreement.[254]

A comparable flexibility should also guide the solution to be adopted in parallel arbitral proceedings, where the tribunal second seized should be free to act according to case management considerations in the framework provided by the *lex arbitri*.[255]

[254] P. Huber and I. Bach, 'Arbitration Agreement, § 1032 – Arbitration Agreement and Substantive Claim Before Court', in K.-H. Böckstiegel *et al.* (eds.), A*rbitration in Germany: The Model Law in Practice*, 2nd ed. (Kluwer, 2014), 116, 132.

[255] For the same conclusion *see* De Ly and Sheppard, 'ILA Final Report' (2009), 3, 33, *sub* Recommendation 5.