Lis Pendens – Who Defers To Whom?

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Definition (1)

"A situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different states at the same time."

(ILA Final Report on Lis Pendens and Arbitration, 2006)

Definition (2)

- Possible (undesirable) consequences of parallel proceedings
  - ➡ High costs
  - ➡ Conflicting or irreconcilable judgments
  - ➡ Oppressive, delaying litigation tactics.

- The doctrine of lis pendens aims to avoid such consequences.
  - ➡ Proceedings over the same dispute cannot be commenced in a second forum if the action (lis) is already pending (pendens) in another one.

- For this procedural doctrine to apply, a triple identity test must normally be met:
  - ➡ The parties must be the same.
  - ➡ The relief sought must be identical in the parallel proceedings.
  - ➡ The grounds or set of facts alleged by the claimant must be the same.

The Issue of Lis Pendens in International Arbitration

- With respect to arbitration, the issue of lis pendens refers to the fundamental question of which legal principles apply when national courts or arbitral tribunals in different jurisdictions are simultaneously seized with the same dispute.

- Such situations include parallel proceedings between:

  - One or more arbitral tribunals and one or more national courts,

  - One or more arbitral tribunals.

1958 New York Convention (1)

Article II (3) NYC provides for a national court of a contracting state to recognize agreements to arbitrate and to

„*refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*“

- Enforces the „negative effect “of the arbitration agreement, by requiring either the stay or dismissal of national court proceedings.
- Any other action by a national court concerning the substance of the arbitral dispute is contrary to the obligation to „refer the parties to arbitration.“
- There is, therefore, limited need to have a rule which determines which of two legitimate fora should proceed to determine the dispute, since the jurisdiction of the arbitral tribunal will trump the jurisdiction of any national court.

New York Convention (2)

BUT: The New York Convention does not give guidance on what to do when the jurisdiction of an arbitral tribunal is challenged either before the tribunal or in an application for stay before a national court:

- Should the arbitral tribunal defer to the national court and suspend the arbitration until the court has reached a conclusion?
- Or should the arbitral tribunal generally proceed to determine its own jurisdiction irrespective of parallel national court proceedings?
- The question is who should make the determination as to whether the arbitration agreement enjoys effect?
- Who defers to whom?
- The issue is largely left to local national law, since the answer will largely depend on how the doctrine of competence-competence is applied in different jurisdictions.

Doctrine of competence-competence

- Under the competence-competence doctrine, an arbitral tribunal is entitled to decide not only the merits of the dispute but also the antecedent question of its own jurisdiction.

- This doctrine has significance in arbitration practice in the sense that it can provide speed and efficiency to the proceedings.

  - The positive effect of this doctrine enjoys a broad consensus today, with only isolated „outliers."

  - The negative effect of this doctrine – providing exclusive jurisdiction to arbitral tribunals and denying national courts a right to review the jurisdiction of a tribunal until the stage of challenge or enforcement of an arbitral award – is less uniformly accepted.

  - An increasing harmonization or convergence can be observed, while differences in national arbitration legislation remain.

1985 UNICITRAL Model Law

- Article 8 (1) UNCITRAL Model Law is to the same effect as Article II (3) NYC.
  - ➡ Provides little if any guidance on the extent of any limits on early consideration by a national court of the parties' putative arbitration agreement.

- Article 8 (2) UNCITRAL Model Law expressly foresees parallel arbitration and court proceedings.
  - ➡ Significantly, it does not prescribe an automatic stay of the arbitral proceedings by the mere introduction of court proceedings.

- In connection with Article 16 (1) UNCITRAL Model Law, the arbitral tribunal may decide either to stay or dismiss the arbitration or to continue with the arbitration for the purposes of confirming or denying its own jurisdiction.

- Many national arbitration laws, like for example Articles 8 and 16 Ukrainian Law on International Commercial Arbitration („LICA"), repeat those provisions.

- However, nothing in Articles 8 and 16 UNCITRAL Model Law obliges a national court to summarily dismiss its own proceedings in the face of a potentially competing arbitration agreement.
  - ➡ Fully competing proceedings in the national court and before the arbitral tribunal are possible.

Approaches under certain national legislation (1)

French Civil Procedure Code (2012 Decree)

- French courts and the legislature have endorsed a progressive approach to negative competence-competence, providing strong support to arbitration and leaving minimal opportunities for parallel court proceedings.
- Article 1448 French Civil Procedure Code ("NCPC") provides:
  - Before the tribunal is constituted, the national court undertakes only a prima facie review of the arbitration agreement.
  - National courts have no power to examine the validity of an arbitration agreement once the dispute has been brought before an arbitration tribunal.

English Arbitration Act (1996)

- Sections 9 (4) and 72 English Arbitration Act ("AA") suggest that English courts will have the power to engage in a full review of the validity or the existence of the arbitration agreement in question.
  - Here, national courts and arbitral tribunals seem to have concurrent jurisdiction over the determination of the validity of an arbitration agreement.
- When arbitral proceedings have already commenced, English courts will not have jurisdiction to examine the validity of the arbitration agreement unless the stringent conditions of Section 32 AA apply, which include a prior agreement in writing of all parties to the proceedings, or the permission of the arbitral tribunal.
  - Clear expression of the negative competence-competence doctrine.

Approaches under certain national legislation (2)

German Code of Civil Procedure (1998)

- German law does not endorse the negative effect of the competence-competence doctrine:
  - Where one of the parties to an arbitration agreement brings a claim on the merits before a national court and the respondent relies on the arbitration agreement, the state court may engage in a full review of the validity of the arbitration agreement in order to determine whether it is „null, inoperative or incapable of being performed," irrespective of whether the tribunal has been constituted (Section 1032 (1).
  - Section 1032 (2) allows either party to seek a declaratory court judgment with respect to the putative arbitration agreement as long as the court action is commenced before the arbitral tribunal has been constituted.

Swiss Code on Private International Law (1987)

- Article 186 of the Swiss Private International Law Act ("PIL Act") provides as follows:

  "1. The arbitral tribunal shall decide on its own jurisdiction.

  1bis. It 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, unless there are serious reasons to stay the proceedings.

  2. Any objection to its jurisdiction must be raised prior to any defense on the merits.

  3. The arbitral tribunal shall, in general, decide on its jurisdiction by a preliminary decision."
- Art. 186 1bis PIL Act was added in 2007 in response to the "Fomento" case.

Approaches under certain national legislation (3)

US Federal Law

- Section 4 Federal Arbitration Act (“FAA”) provides solely for court determination of any question as to whether the parties agreed to arbitration.
  - However, US courts have held that claims of invalidity, illegality or termination are for judicial determination only when they are specifically directed at the arbitration agreement itself.
- Also, the parties can agree to arbitrate jurisdictional disputes and in that case the final resolution by an arbitral tribunal is subject to only minimum judicial review (contractual approach).

US Law of Estoppel and Issue Preclusion

- There is a debate as to whether arbitral tribunals can and should apply „ issue estoppel” or „collateral estoppel.”
  - Legal rules providing that a judgment in one case prevents (estops) a party to that suit from trying to litigate the issue in another case.
- The current draft of the American Law Institute (“ALI”) Restatement of the US Law of International Commercial Arbitration allows courts to give collateral estoppel effect to New York Convention awards, but only if two conditions are satisfied:
  - The award itself must be entitled to recognition (i.e. claim preclusion) under the NYC.
  - The award must meet all the requirements that the forum law generally imposes before giving judgments collateral estoppel or issue preclusion effect.

“International Comity”

- Lis pendens arises from international comity and permits a court to refuse to exercise jurisdiction when there is parallel litigation pending in another jurisdiction.

- In law, comity specifically refers to legal reciprocity.

  - Principle that one jurisdiction will extend certain courtesies to other jurisdictions (or other courts within the same country), particularly by recognizing the validity and effect of their executive, legislative, and judicial acts.

  - Refers to the concept that courts should not act in a way that demeans the jurisdiction, laws or judicial decisions of another jurisdiction.

ILA Report on Lis Pendens (2006)

- The International Law Association (ILA) Final Report on Lis Pendens and Arbitration recommends as follows:
  - Where parallel proceedings are pending before a court of the jurisdiction of the seat of the arbitration, in deciding whether to proceed with the arbitration the arbitral tribunal should be mindful of the law of that jurisdiction, particularly having regard to the possibility of annulment of the award in the event of conflict between the award and the decision of the court. (ILA Rec. 3)
  - In a situation such as that in Fomento, i.e. the respondent in the arbitration has commenced court proceedings elsewhere, the arbitral tribunal should proceed to determine its own jurisdiction. (ILA Rec. 4)
  - Arbitral tribunals should have confidence to exercise case management powers and be empowered to stay their own proceedings, even when the situation does not fulfil the traditional criteria of lis pendens. The ultimate objective should be to achieve a fair result as between the parties. (ILA Rec 6)

Conclusion regarding Parallel Arbitration and Court Proceedings

- The relevant provisions of the New York Convention and the UNCITRAL Model Law, where applicable, do not offer far-reaching protection against parallel arbitration and court proceedings.

- Although not all jurisdictions have endorsed the progressive French version of negative competence-competence, courts in many jurisdictions appear to have adopted certain fundamental conceptual components of the doctrine, and in particular the assertion that arbitral tribunals should have priority over national courts in the examination of an arbitration agreement.

- The almost universal recognition of the positive effect of competence-competence tips the balance in favor of arbitral tribunals.
  - ➡ Since arbitral tribunals invariably have the competence to rule on their own jurisdiction (with narrow ecxeptions), the only question which remains is whether there is any interest in litigating in parallel that same issue before state courts.

- Acceptance of the negative effect of competence-competence does not mean that the arbitral tribunal is the sole judge of its jurisdiction, but rather merely that it is the first in time.
  - ➡ The issue is one of timing.
  - ➡ The parties will still be able to challenge the arbitration agreement either during setting aside or recognition and enforcement proceedings.

Lis Pendens between Arbitral Tribunals – Identical Cause of Action

- Cases which have produced parallel arbitration proceedings have arisen either where there is a dispute over which of two successive but different arbitration agreements apply, or where the clause itself confers jurisdiction on more than one arbitral tribunal.

  - Rare in international commercial arbitration, but possible in the context of investment-related disputes, e.g. Lauder/CME vs. Czech Republic.

- Pursuant to ILA Rec. 5: The second arbitral tribunal should decline jurisdiction or stay the current arbitration, in whole or in part, if the

  - first arbitral tribunal has jurisdiction, and
  - no material prejudice arises to the party opposing the stay.

First – In – Time Rule

- The rigid first-in-time rule as applied in many civil law jurisdictions should not necessarily apply in international arbitration.

- Instead, the tribunal should have considerable discretion to order a stay of the arbitration on such terms as it sees fit. This might be a stay of only certain of the issues. It might also be a stay for a limited period of time in order to prevent the successful application from slowing down the other arbitration unfairly.

- This is consistent with the ILA recommendation. Nevertheless, there is a need for coordination in order to avoid conflicting awards and the first-in-time rule may be too rigid and inflexible depending on the circumstances.

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