

## **RESOLUTION No. 1/2006**

### **INTERNATIONAL COMMERCIAL ARBITRATION**

The 72th Conference of the International Law Association held in Toronto, Canada, 4-8 June 2006:

**HAVING CONSIDERED** the Final Report on Res Judicata and Arbitration as well as the Report on Lis Pendens and Arbitration by the Committee on International Commercial Arbitration;

**RECOGNISING** the need for efficiency in conducting arbitral proceedings, the need for finality of arbitral awards and the role of party autonomy regarding arbitral proceedings;

**THANKS** the Chairman, the Rapporteur and the Members of the Committee for their work done in developing an understanding of the topic and its role;

**ADOPTS** the Recommendations annexed to this Resolution;

**COMMENDS** the Recommendations to arbitral tribunals, with a view to facilitate uniformity and consistency in the interpretation and application of provisions and principles concerning parallel proceedings and the conclusive and preclusive effects of prior arbitral awards;

**REQUESTS** the Committee and others to encourage the application of the Recommendations within the arbitral community; and

**RECOMMENDS** that the Executive Council renews the mandate of the Committee for a period of four years and to study and report on the topic of *iura novit curia* and issues related to the determination of the content of the applicable law in international commercial arbitration.

# RECOMMENDATIONS ON LIS PENDENS AND RES JUDICATA AND ARBITRATION

## ANNEX 1

### INTERNATIONAL LAW ASSOCIATION RECOMMENDATIONS ON LIS PENDENS AND ARBITRATION

#### RECOMMENDATIONS

1. An arbitral tribunal that considers itself to be *prima facie* competent pursuant to the relevant arbitration agreement should, consistent with the principle of *competence-competence*, proceed with the arbitration (“Current Arbitration”) and determine its own jurisdiction, regardless of any other proceedings pending before a national court or another arbitral tribunal in which the parties and one or more of the issues are the same or substantially the same as the ones before the arbitral tribunal in the Current Arbitration (“Parallel Proceedings”). Having determined that it has jurisdiction, the arbitral tribunal should proceed with the arbitration, subject to any successful setting aside application.
2. Nevertheless, in the interest of avoiding conflicting decisions, preventing costly duplication of proceedings or protecting parties from oppressive tactics, an arbitral tribunal requested by a party to decline jurisdiction or to stay the arbitration on the basis that there are Parallel Proceedings should decide in accordance with the principles set out in paragraphs 3., 4. and 5. below.
3. Where the Parallel Proceedings are pending before a court of the jurisdiction of the place of the arbitration, in deciding whether to proceed with the Current Arbitration, the arbitral tribunal should be mindful of the law of that jurisdiction, particularly having regard to the possibility of setting aside of the award in the event of conflict between the award and the decision of the court.
4. Where the Parallel Proceedings are pending before a court of a jurisdiction other than the jurisdiction of the place of the arbitration, consistent with the principles of *competence-competence*, the tribunal should proceed with the Current Arbitration and determine its own jurisdiction, unless the party initiating the arbitration has effectively waived its rights under the arbitration agreement or save in other exceptional circumstances.

5. Where the Parallel Proceedings have been commenced before the Current Arbitration and are pending before another arbitral tribunal, the arbitral tribunal should decline jurisdiction or stay the Current Arbitration, in whole or in part, and on such conditions as it sees fit, for such duration as it sees fit (such as until a relevant determination in the Parallel Proceedings), provided that it is not precluded from doing so under the applicable law and provided that it appears that:
  - 5.1 the arbitral tribunal in the Parallel Proceedings has jurisdiction to resolve the issues in the Current Arbitration; and
  - 5.2 there will be no material prejudice to the party opposing the request because of (i) an inadequacy of relief available in the Parallel Proceedings; (ii) a lack of due process in the Parallel Proceedings; (iii) a risk of annulment or non-recognition or non-enforcement of an award that has been or may be rendered in the Parallel Proceedings; or (iv) some other compelling reason.
6. Also, as a matter of sound case management, or to avoid conflicting decisions, to prevent costly duplication of proceedings or to protect a party from oppressive tactics, an arbitral tribunal requested by a party to stay temporarily the Current Arbitration, on such conditions as it sees fit, until the outcome, or partial or interim outcome, of any other pending proceedings (whether court, arbitration or supra-national proceedings), or any active dispute settlement process, may grant the request, whether or not the other proceedings or settlement process are between the same parties, relate to the same subject matter, or raise one or more of the same issues as the Current Arbitration, provided that the arbitral tribunal in the Current Arbitration is:
  - 6.1 not precluded from doing so under the applicable law;
  - 6.2 satisfied that the outcome of the other pending proceedings or settlement process is material to the outcome of the Current Arbitration; and
  - 6.3 satisfied that there will be no material prejudice to the party opposing the stay.
7. The effects of Parallel Proceedings need not be raised on its own motion by an arbitral tribunal. If not waived, such effects should be raised as soon as possible by a party.

**ANNEX 2**  
**INTERNATIONAL LAW ASSOCIATION RECOMMENDATIONS ON RES**  
**JUDICATA AND ARBITRATION**

**RECOMMENDATIONS**

1. To promote efficiency and finality of international commercial arbitration, arbitral awards should have conclusive and preclusive effects in further arbitral proceedings.
2. The conclusive and preclusive effects of arbitral awards in further arbitral proceedings set forth below need not necessarily be governed by national law and may be governed by transnational rules applicable to international commercial arbitration.
3. An arbitral award has conclusive and preclusive effects in further arbitral proceedings if:
  - 3.1 it has become final and binding in the country of origin and there is no impediment to recognition in the country of the place of the subsequent arbitration;
  - 3.2 it has decided on or disposed of a claim for relief which is sought or is being reargued in the further arbitration proceedings;
  - 3.3 it is based upon a cause of action which is invoked in the further arbitration proceedings or which forms the basis for the subsequent arbitral proceedings; and
  - 3.4 it has been rendered between the same parties.

4. An arbitral award has conclusive and preclusive effects in the further arbitral proceedings as to:
  - 4.1 determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto;
  - 4.2 issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award.
5. An arbitral award has preclusive effects in the further arbitral proceedings as to a claim, cause of action or issue of fact or law, which could have been raised, but was not, in the proceedings resulting in that award, provided that the raising of any such new claim, cause of action or new issue of fact or law amounts to procedural unfairness or abuse.
6. The conclusive effects of an arbitral award can be invoked in further arbitration proceedings at any time permitted under the applicable procedure.
7. The preclusive effects of an arbitral award need not be raised on its own motion by an arbitral tribunal. If not waived, such preclusive effects should be raised as soon as possible by a party.