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FINAL REPORT ON *LIS PENDENS* AND ARBITRATION

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I. INTRODUCTION

1.1. This is the Committee's final report on *lis pendens*.¹ After a conceptual introduction (Part I), the report gives an overview of *lis pendens* from the perspective of domestic law and public international law (Parts II and III). Thereafter, the doctrine of *lis pendens* is discussed and analysed from an international commercial arbitration perspective (Part IV). Finally, the Committee sets out its conclusions and recommendations (Part V).

(1) The doctrine of *lis pendens*

1.2. James Fawcett, in his authoritative 1994 Report to the International Academy of Comparative Law on Declining Jurisdiction in Private International Law,² describes *lis pendens*³ as 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."⁴

1.3. Fawcett identifies four possible ways in which a court might deal with a *lis pendens* situation:⁵

- i. the forum could decline jurisdiction or suspend (or stay) its own proceedings;
- ii. the forum could seek to restrain the foreign proceedings;
- iii. both sets of proceedings could be allowed to continue, and rules of *res judicata* could be used to prevent two judgments being given; and/or
- iv. mechanisms could be adopted to encourage the parties to opt for trial in just one forum.

1.4. The rationale for taking such steps is threefold: to avoid conflicting judgments; to prevent costly parallel litigation; and to protect parties from oppressive litigation tactics. These justifications are very similar to those underpinning the doctrine of *res judicata*.⁶

1.5. As with the doctrine of *res judicata*, a state court applies the established rules of *lis pendens* applicable in its jurisdiction to determine whether it should proceed to hear the action of

¹ The Chairman and Rapporteur are very grateful to all those members who contributed to the Committee's work, and attended the meetings and submitted comments. Written reports/comments concerning *lis pendens* were received from Damian Sturzaker (Australia), Florian Kremslehner (Austria); Prof. Bernard Hanotiau (Belgium/Luxembourg), Barry Leon (Canada), Prof. Ole Spiermann (Denmark), Prof. Bernd von Hoffmann (Germany), Shishir Dholakia (India), Mojtaba Kazazi (Iran), Klaus Reichert (Ireland), Prof. Luca Radicati (Italy), David Williams QC (New Zealand), Prof. Dragica Wedam Lukic (Slovenia), Tore Wiwen-Nilsson (Sweden), Teresa Giovannini (Switzerland), Pierre Karrer (Switzerland), and Prof. Louise Ellen Teitz (USA).

² James Fawcett (ed.), "Declining Jurisdiction in Private International Law", Report to the XIVth Congress of the International Academy of Comparative Law, Athens, 1994 (Oxford University Press, Oxford, 1995), at 27.

³ *Lis pendens* literally means a "law suit pending" (and *lis alibi pendens*, which is the phrase more often used in Common Law jurisdictions, means a "law suit pending elsewhere"). There was a debate within the Committee whether it would be preferable to use the phrase "parallel proceedings" in this report, but it was decided that use of Latin was acceptable to describe parallel litigation because the phrase is well recognised and customarily used in that context; nevertheless, the phrase "parallel proceedings" is adopted in the recommendations, for the reasons explained in Part V below.

⁴ *Lis pendens* in some jurisdictions, such as India, has an additional and quite separate meaning relating to real property, namely that any interest in property created pending litigation will be subject to the outcome of that litigation, referred to in s. 52, India Transfer of Property Act 1882 (see India national report from Shishir Dholakia).

⁵ Fawcett, *supra* fn 2, at 28.

⁶ See the Committee's Interim Report on "*Res Judicata* and Arbitration", Report of the Seventy-First ILA Conference, Berlin, 2004, available from the International Law Association and in pdf format at <www.ila-hq.org>.

which it is seised. The application of the *lis pendens* doctrine varies between the Civil Law and Common Law legal systems (see Part II below): a Common Law court has a discretion whether or not to stay its proceedings on the basis of *forum non conveniens* and the order in which the proceedings were commenced is only one of several factors that the court will take into account; whereas a Civil Law court will generally apply a first-in-time rule.

- 1.6. In addition, consistent with the policy objectives referred to in paragraph 1.4 above, in situations where the parties and/or the causes of action are not identical, state courts have powers to suspend their own proceedings to await the outcome of the other parallel proceedings.

(2) **Lis pendens and international arbitration**

- 1.7. Commercial arbitral tribunals are increasingly faced with parallel proceedings giving rise to issues of *lis pendens*.⁷ Such situations include parallel proceedings between:

- an arbitral tribunal and a state court
- two arbitral tribunals
- an arbitral tribunal and a supra-national court or tribunal.⁸

- 1.8. It needs to be emphasised at the outset that there is often a fundamental difference between, on the one hand, parallel proceedings taking place between two domestic courts and, on the other hand, parallel proceedings, one of which is an arbitration. In the former, it is generally the case that parallel proceedings have been commenced before two courts both of which have jurisdiction to hear the case pursuant to their respective domestic rules on jurisdiction. For this reason, it is generally not necessary to decide which court has legitimate jurisdiction, but instead it is necessary only to have a rule that determines which court should proceed to hear the merits of the case (e.g. the most convenient court or the court first seised rule - see Part II below).⁹

- 1.9. A valid agreement to arbitrate, by its nature, confers exclusive jurisdiction on an arbitral tribunal constituted pursuant to its terms to decide the dispute referred to arbitration, to the exclusion of all domestic courts (save in order to support the arbitration, or to review or enforce any final award, as prescribed in applicable arbitration laws)(see e.g. Article II New York Convention 1958 and Article 8(1) UNCITRAL Model Law). A party to an arbitration agreement (which is not null and void, inoperative or incapable of being performed) is generally entitled to a mandatory stay of court proceedings brought in breach of the agreement to arbitrate (or an order of similar effect such as one declining jurisdiction). There is, therefore, limited need to have a rule which determines which of two legitimate *fora*, should proceed to determine the dispute, because the jurisdiction of the arbitral tribunal will trump the jurisdiction of any court. Arbitral tribunals, however, need guidance as to what they should do when it is asserted that a competing *forum* is the only legitimate one (especially tribunal versus court), i.e. who should decide whether the arbitration agreement is valid and binding and/or whether the dispute falls within the scope of that agreement. Should an arbitral tribunal always defer to a state court and suspend the arbitration until the court has reached a conclusion? Does it depend whether the court seised is a court at the place of

⁷ For previous consideration of this topic, see e.g. Schweizer and Guillod, "L'exception de litispence et l'arbitrage international", in Le juriste Suisse face aux droits et jugements étrangers (Editions Universitaires Fribourg, Fribourg, 1988) at 71; Douglas Reichert, "Problems with parallel and duplicate proceedings: the litispence principle and international arbitration", (1992) 8 *Arbitration International* 237; Luis Andrés Cucarella, "Litispencia y Arbitraje", in *Anuario de Justicia Alternativa*, (2001) 1 *Tribunal Arbitral de Barcelona* at 43; various authors, in Arbitral Tribunals or State Courts, Who must defer to whom?, ASA Special Series No. 15 (2001); Elliott Geisinger & Laurent Levy, "Lis alibi pendens in international commercial arbitration", in Complex Arbitrations: Perspectives on their Procedural Implications (ICC Special Supplement, Paris, 2003) at 53; Pierre Mayer, "Litispence, connexité et chose jugée dans l'arbitrage international", in Liber amicorum Claude Raymond (Litec, Paris, 2004) at 195; Francisco Orrego Vicuna, "Lis pendens arbitralis", in Parallel State and Arbitral Procedures in International Arbitration (ICC Dossiers, Paris, 2005) at 207.

⁸ For examples of each of these situations, see the Committee's Interim Report on *Res Judicata*, supra fn 6.

⁹ In some cases, of course, there may be jurisdictional issues, for example where there is an exclusive jurisdiction clause or whether there is a dispute over whether the domestic jurisdictional criteria are met, and the court first seised may subsequently determine that it does not have jurisdiction and the matter may revert to the other court.

arbitration or is in another country? Should the forum first seised (court or tribunal) be the one to decide any dispute as to jurisdiction? Should an arbitral tribunal generally proceed to determine its own jurisdiction irrespective of parallel court proceedings?

- 1.10. In considering these questions, the Committee has had to consider whether an arbitral tribunal should apply the rules of the place of arbitration or whether there is or should be an accepted international arbitration practice. It has been suggested that the question "does an arbitral tribunal have legitimate jurisdiction" should be determined by the application of the principle of "competence-competence".¹⁰ According to that principle, arbitral tribunals have the power to rule on their own jurisdiction, and domestic courts should defer considering the question of the tribunal's jurisdiction until after the tribunal has made an award on that issue (see Part IV below). The Committee has made recommendations on this issue (see Part V below).
- 1.11. In some situations, two tribunals might both have legitimate jurisdiction over a dispute. For example, if a second arbitral tribunal is constituted under the same arbitration agreement and same arbitration rules and requested to determine the same dispute in parallel with another tribunal. More commonly, a second tribunal is constituted under the same arbitration agreement and same arbitration rules, but is asked to decide a different dispute. The first situation gives rise to *lis pendens* in its strict sense, whereas the second situation gives rise to case management objectives of efficiency and consistency.
- 1.12. It is also possible, again in rare cases, that a supra-national court or tribunal has concurrent jurisdiction over a dispute arising out of the same facts. In such situations, the cause of action is likely to be different (e.g. a claim under international law rather than national law) or the parties are likely to be different (e.g. involving a government and/or parent company and/or additional parties). Again, this raises issues of case management rather than *lis pendens* in its strict sense. Issues of case management, which are more closely related to the Common Law application of *lis pendens* (i.e. *forum non conveniens*), are also considered in this Report, and the Committee has made recommendations on this question (see Part V below).

(3) The Committee's Objectives

- 1.13. As with the Committee's report on *res judicata*, the Committee is not seeking to give guidance as to how state courts should apply their domestic laws. The Committee, instead, is seeking to give guidance to arbitrators, when faced with an argument that other proceedings dealing with the same matter are running in parallel and that the arbitral tribunal should suspend or terminate the arbitration.

(4) Limitations on the scope of the Committee's work

- 1.14. As to the scope of this report, some limitations on the Committee's work should be noted. This report proceeds on the basis that parallel proceedings are pending in different jurisdictions (arbitral proceedings, on the one hand, and state court/other arbitral/supra-national tribunal proceedings, on the other hand) regarding jurisdiction and/or the merits of the case. Parallel proceedings as to interim measures are outside the scope of this report, because they do not prejudice a decision on jurisdiction and/or the merits.
- 1.15. As with our study of *res judicata*, the question arose within the Committee whether anti-suit injunctions should be addressed. Anti-suit injunctions clearly are at the heart of any debate as to the relationship between state courts and arbitral tribunals, especially in Common Law countries. Does the institution of an anti-suit injunction provide a defence for a claimant in arbitration based on *lis pendens* raised by a respondent?¹¹ This is a complex issue and the

¹⁰ Meaning "jurisdiction concerning jurisdiction", also referred to as "*compétence-compétence*" and "*Kompetenz-Kompetenz*" (see Part IV.A.2 below). For differences between the French and German concepts, see Peter Schlosser, in Arbitral Tribunals or State Courts, Who must defer to whom?, ASA Special Series No. 15 (2001), at 15.

¹¹ For example, in 2002, the Pakistani Supreme Court prohibited Société Générale de Surveillance SA from pursuing its claims in an ICSID arbitration; nevertheless, the ICSID tribunal accepted jurisdiction notwithstanding the Pakistani order: (2003) 19 Arbitration International 179.

Committee decided to limit its consideration to the less complicated situation of parallel proceedings taking place with no anti-suit injunction having been made.¹²

- 1.16. Post-award proceedings are also not addressed in this report, such as parallel setting aside and enforcement proceedings.¹³
- 1.17. The time at which proceedings might be said to commence may vary from country to country (e.g. at the time of filing the originating claim or at the time of service on the defendant). For the purposes of this report, it is assumed that both parallel proceedings have been validly commenced and are afoot.
- 1.18. Parallel administrative or criminal proceedings before state courts or regulatory authorities might raise issues of *lis pendens* and/or case management for an arbitral tribunal. The effect of such proceedings justifies separate study and would have taken the Committee's report beyond acceptable limits.¹⁴
- 1.19. In Part II below, we consider the application of *lis pendens* in domestic law.

II. PARALLEL PROCEEDINGS IN DOMESTIC LAW

- 2.1. systems to a situation where there are parallel court proceedings, and in particular the In this Part of the report, we summarise the approach of national courts in a few selected legal application of the doctrine of *lis pendens*.

A. COMMON LAW JURISDICTIONS

- 2.2. In Common Law jurisdictions such as England, parts of Canada, Australia, New Zealand and Israel, in cases not falling within the scope of an applicable convention or regulation,¹⁵ *lis pendens* (i.e. the existence of parallel proceedings) is a factor which is considered when applying the wider doctrine of *forum non conveniens* and when deciding whether to decline jurisdiction in favour of another court.¹⁶
- 2.3. In the United States, *lis pendens* and *forum non conveniens* are distinct doctrines, with different jurisprudential underpinnings, although there is some overlap in that parties often join motions to dismiss for *forum non conveniens* with an alternative motion to stay.¹⁷ The traditional rule in US courts as to litigation in multiple fora has been developed in the context of purely domestic litigation, where it is impossible to consolidate actions in two different state courts without first departing from one system, either through dismissal or stay. When there are parallel suits in two different federal courts, it is often possible to transfer the cases to one forum and then consolidated the cases. Thus the general rule in domestic cases is to allow both suits to proceed to judgment. Once one suit has reached judgment, the prevailing party generally seeks to foreclose further action in the remaining suit under the applicable Full Faith and Credit Clause or statute.

¹² On this topic, see e.g. Emmanuel Gaillard (ed.), *Anti-Suit Injunctions in Arbitration*, IAI series no. 2 (Juris Publishing, New York, 2005); David Scott, "Commentary: practical options when faced with an injunction against arbitration", (2002) 18 *Arbitration International* 333; and Peter Gross, "Anti-suit injunctions and arbitration", (2005) *LMCLQ* 10.

¹³ For example, an issue that often arises is whether enforcement should be suspended while challenge proceedings at the place of arbitration are ongoing.

¹⁴ For a discussion on the desirability of continuing arbitral proceedings notwithstanding the pendency of related criminal proceedings before a court ("*le criminel tient le civil en état*"), see the Working Session debate, *Report of the ILA Sixty-Seventh Conference*, Helsinki, 1996, and Poncet and Macaluso, "La suspension de la procedure arbitrale comme dependant penal", in *Mélanges en l'honneur de Franz Kellerhals*, (M. Jametti Greiner / B. Berger / A. Güngerich éd., Berne, 2005) at 65, and the ongoing study of the ICC Commission Working Group (2006).

¹⁵ E.g. European Council Regulation No. 44/2001 - see Part II.C below.

¹⁶ Fawcett, *supra* fn 2, at 29. See also Dicey & Morris, *The Conflict of Laws*, 13th edn (Sweet & Maxwell, London, 2000), Vol. 1, at 385-424.

¹⁷ See e.g. Andreas Lowenfeld, *International Litigation and Arbitration*, 3rd edn, (West Group, Eagan, 2006) at 300-349; Louise Ellen Teitz, *Transnational Litigation*, (Michie, Charlottesville, 1996 & Supp. 1999) at 112-130, 233-250.

- 2.4. This same approach, namely allowing parallel proceedings to continue simultaneously, has been applied in the United States to litigation dispersed in multiple countries or fora. Parallel proceedings on the same *in personam* claim will ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as *res judicata* in the other.

(1) **Forum non conveniens**

- 2.5. Common Law courts have an inherent jurisdiction to stay or strike out their own proceedings, whenever it is necessary to prevent injustice.¹⁸
- 2.6. The reason a party to proceedings applies to have them stayed on grounds of *forum non conveniens* is very often because litigation is being conducted abroad. In such cases, where the forum court and the foreign court are both recognised as having jurisdiction (according to the forum court's rules of private international law), the forum court has a discretion to determine in which forum the dispute will be resolved, by using its power to grant or refuse a stay of the proceedings commenced before it, or by exercising or refusing to exercise its power to authorise service of originating process out of the jurisdiction, and by using its power to enjoin a party who is (or who is threatening to become) a claimant in the foreign court from commencing or continuing proceedings in that court.
- 2.7. The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(2) **Lis alibi pendens**

- 2.8. As noted above, in many Common Law countries, the existence of parallel proceedings is simply an additional factor relevant to the determination of the appropriate forum (in the application of the doctrine of *forum non conveniens*).
- 2.9. In some cases, the foreign proceedings may be of no relevance at all, for example, because of their subject matter or timing. But if genuine proceedings have been started and have had some impact on the dispute between the parties and/or are likely to have a continuing effect, then this may be a relevant (but not necessarily decisive) factor when considering whether the foreign jurisdiction provides the appropriate forum.
- 2.10. There has been an increasing interest in the United States in reducing parallel litigation and incorporating a modified rule of *lis pendens* that is tied to recognition and enforcement. The most recent and significant example of this is the American Law Institute's International Jurisdiction and Judgments Project,¹⁹ which includes a proposed federal statute that "adopts the position that parallel litigation is generally undesirable, and that properly implemented, the doctrine of *lis pendens* promotes both justice and efficient use of judicial resources." Section 11 of the draft, "Declination of Jurisdiction When Prior Action is Pending," adopts a basic *lis pendens* principle that presumes that the first-filed matter should proceed, if that judgment would be entitled to recognition under the Act.

(3) **Abuse of process**

- 2.11. The most common reason for granting a stay is that a foreign court is the natural or appropriate forum. However, there are some cases where a stay will be given even though

¹⁸ See Fawcett, *supra* fn 2, at 11 ff. In some Common Law countries, the courts are encouraged to avoid parallel proceedings by statute, e.g. in England, Supreme Court Act 1981, s. 49(2), states: "Every court ... shall so exercise its jurisdiction ... [so as] to secure that ... all multiplicity of legal proceedings with respect to [all matters in dispute] is avoided". As to restrictions in the application of the discretion in the EU context, see *Owusu v Jackson*, Case C-281/02.

¹⁹ Proposed Final Draft, April 2005. The ALI statute builds on concepts similar to those in the ILA's project covering both *forum non conveniens* and parallel proceedings, the "Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters" (Report of Litigation Committee in the [Report at the Seventieth ILA Conference](#), London, 2000) and the ABA Conflict of Jurisdiction Model Act (1987).

the forum where the stay is sought is the natural forum, because the court concludes that the case before it is an abuse of process, because it is abusive, or oppressive, or vexatious, or brought in bad faith. As Dicey & Morris note, such cases are rare and the onus on the defendant to prove injustice is a heavy one.²⁰

(4) **Stay of proceedings awaiting the outcome of another action**

2.12. A Common Law court has an inherent jurisdiction to stay its own proceedings, in the interests of justice, and it is not a strict requirement that the parallel proceedings are between the same parties and/or concern the same cause of action.²¹

2.13. For example, the English Court of Appeal approved the granting of a stay of litigation proceedings (between A and B) to await the outcome of a related claim in separate arbitration proceedings (between A and C).²² The court took into account the relationships between all the parties, and the defendant's (i.e. B) costs and convenience and the overall interests of justice. The Court of Appeal noted, however, that such stays should only be granted in rare and compelling circumstances.

2.14. In New Zealand, the High Court stayed court proceedings being conducted in parallel with an ICSID arbitration.²³

2.15. In the United States, Supreme Court Judge Cardozo has said:²⁴

"The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes in its docket with economy of time and effort for itself, for counsel and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interest and maintain an even balance. True, the supplicant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both."

B. EUROPEAN CIVIL LAW JURISDICTIONS

2.16. Peter Schlosser has stated that there is no uniform interpretation of the notion of *lis pendens* in European jurisdictions, mainly because of the dichotomy of right and remedy is not known in Civil Law.²⁵ However, it can be said that Civil Law courts generally give effect to a first-in-time rule if proceedings are pending before another court with equally competent jurisdiction involving the same dispute between the same parties.

2.17. The strict *lis pendens* principle was, until relatively recently, not even deemed applicable in the international context (but applied only as between courts in the same country). Absent an applicable international convention, this is still the position in Sweden and Denmark.

²⁰ Dicey & Morris, supra fn 16, at 391.

²¹ In Ireland, this power is confirmed by statute: Supreme Court of Judicature (Ireland) Act 1877, section 27(5).

²² *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173 (CA). More recently, the English court applied its case management powers to suspend court proceedings to await the outcome of a related ICC arbitration in *ET Plus SA & Ors v Welter & Ors* [2005] EWHC 2115 at [91]. And see e.g. David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement*, (London, Sweet & Maxwell, 2005), at 303-307.

²³ *Attorney-General v Mobil Oil NZ Ltd*, (1987) 4 ICSID Reports 117. In a recent New Zealand case, the court concluded that it had power to stay arbitration proceedings where the issues before the court and the tribunal were sufficiently close that there was a material risk of inconsistent findings on fact or law: *Carter Holt Harvey Ltd v Genesis Power Ltd & Ors*, unreported, 22 February 2006, High Court.

²⁴ *Landis v North American Co.*, 299 US 248, 255.

²⁵ Peter Schlosser, "The 1968 Brussels Convention and Arbitration", (1991) 7 *Arbitration International* 227.

(1) **France**

2.18. In France,²⁶ the rule is called "*l'exception de litispendance*", and it may be raised in any proceedings started after another.

2.19. As between two domestic courts, the second seised must deny jurisdiction. Article 100 of the New Code of Civil Procedure ("NCCP") provides:

"Where a same cause of action is pending before two forums of the same hierarchy equally competent, the court seised last shall relinquish jurisdiction in aid of the first seised one where one of the parties so requests. In default thereof, this may be proceeded with *ex proprio motu*."

The same cause of action is required, which implies the same parties.

2.20. The principle was applied in an international context only after 1974. Within the EC, Regulation No. 44/2001 applies (see Part II.C below).

2.21. Article 101 NCCP is also of relevance for our study. It concerns related proceedings and states:

"Where matters currently apprised by different forums shall exhibit links between them so that it is in the interest of justice to manage and to determine them together, one of forums seised may be asked to relinquish jurisdiction and to remit the matter as it shall stand before the other."

2.22. A French court which has jurisdiction may suspend its proceedings to await the outcome of other related proceedings (*sursis à statuer*).

2.23. Article 102 NCCP is also of interest:

"Where the forums seised are not of the same hierarchy, pleas of litispendens or those against double cognisance may only be raised before the inferior one."

(2) **Switzerland**

2.24. In Switzerland,²⁷ where two Swiss court are seised, Article 35 of the Federal Act on the Place of Jurisdiction in Civil Matters of 1 January 2001 applies a first-in-time rule. Article 35 requires identity of the parties and identity of the cause of action.

2.25. Where a foreign court is seised and the Swiss court is second seised, the Lugano Convention (which is similar to the EC Regulation) or the Federal Act on Private International Law of 18 December 1987 will apply. Article 9 PIL provides:

"1. When 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.

...

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

2.26. Again, there must be identity of parties and identity of cause of action. Article 9 PIL includes the requirement that the first court must be expected to render a decision within a reasonable time and that the decision must be capable of recognition in Switzerland.

²⁶ See e.g. Vincent and Guinchard, *Procédure Civile*, 26th edn (Daloz, Paris, 2001); Jeuland, *Droit Judiciaire Privé*, 4th edn (Litec, Paris, 2004).

²⁷ See Switzerland national report from Teresa Giovannini. See also Spühler/Tenchio/Infanger (Hrsg.), *Kommentar zum schweizerischen Zivilprozessrecht. Bundesgesetz über den Gerichtsstand in Zivilsachen*, (Verlag Helbing & Lichtenhahn, Basel, 2001), ch. 6.

2.27. Swiss courts have discretion to stay their own proceedings, pending the outcome of other related proceedings, but again this is unusual.

2.28. Swiss courts may decline jurisdiction if they consider the bringing of proceedings to be an abuse of rights, but this rarely happens.

(3) **Italy**

2.29. In Italy,²⁸ where the same dispute is pending before different domestic courts, Article 39.1 of the Italian Code of Civil Procedure ("ICCP") prescribes a first-in-time rule.

2.30. Where the same dispute is pending before a domestic court and a foreign court, the EC Regulation or Article 7 of the Statute on Private International Law applies. The latter provides:

"When, during the proceedings, it is objected that prior litigation is pending between the same parties and dealing with the same subject matter and based on the same grounds before a foreign judge, the Italian judge, if it deems that the foreign decision may produce effects within the Italian system, shall suspend the proceedings. If the foreign judge declines jurisdiction or if the foreign decision is not recognised within the Italian system, the proceedings in Italy may continue, subject to their resumption at the instance of the party in interest."

2.31. Italian courts have discretion to stay their own proceedings pending the outcome of other proceedings. They may decline jurisdiction if they consider the bringing of proceedings to be an abuse of rights, but again this is unusual.

(4) **Germany**

2.32. In Germany,²⁹ §261 ZPO provides that "lis pendens is caused by commencement of proceedings" and "during the continuation of lis pendens, none of the parties may bring the same action before another court". The identity of the parties and identity of the subject matter of the proceedings (*Streitgegenstand*) are decisive.³⁰ *Lis pendens* may be considered ex officio although the court has no duty to investigate.³¹

2.33. In the case of proceedings in a foreign country to which the EC Regulation or other international convention does not apply, the pendency of such proceedings has to be respected by a German court provided that the foreign court has international competence and a decision of the foreign court is likely to be recognised in Germany.³² §261 ZPO is applied by analogy.

(5) **Sweden and Denmark**

2.34. In Sweden,³³ Chapter 13, Section 6 of the Code of Judicial Procedure provides that "while an action is pending, a new action involving the same issue between the same parties may not be entertained". The Svea Court of Appeal has confirmed that one of the fundamental conditions for *lis pendens* is identity of parties, and that a controlling shareholder and the company are not identical for this purpose.³⁴

²⁸ See Italy national report from Prof. Luca Radicati di Brozolo and Lorenzo Melchionda.

²⁹ See German national report from Prof. Bernd von Hoffmann. See also e.g. Musielak-Foerste, *ZPO Kommentar*, 4th ed., (Vahlen, Munich, 2005), §261 Rn. 9; Baumbach and Lauterbach and Albers-Hartmann, *Zivilprozessordnung*, 64th ed., (Beck, Munich, 2006), §261 Rn 3.

³⁰ Zöller, *Zivilprozessordnung Kommentar*, 25th ed. (O. Schmidt, Cologne, 2005), §261 Rn. 8a and 9.

³¹ Bosch, *Rechtskraft und Rechtshängigkeit im Schiedsverfahren*, (Bosch, Tübingen, 1991), at 166; Musielak-Foerste, supra fn 28, §261 Rn. 9, and BGH, NJW 1989, at 2064

³² Musielak-Foerste, supra fn 29, §261 Rn. 5; Baumbach et al, supra fn 29, §261 Rn. 7.

³³ See Sweden national report from Tore Wiwen-Nilsson.

³⁴ *Czech Republic v CME Czech Republic BV*, Case 8735-01, Stockholm Arbitration Report 2003:2. Reprinted in (2003) 15 World Trade and Arbitration Materials 171.

2.35. The position is similar in Denmark.³⁵

C. EUROPEAN JURISDICTION CONVENTION

(1) 2001 European Council Regulation

2.36. European Council Regulation No. 44/2001 on jurisdiction and the recognition of judgments in civil and commercial matters (and its predecessor the 1968 Brussels Convention³⁶ and the related Lugano Convention³⁷) prescribe which Member State has jurisdiction over a particular matter. The Regulation (and its predecessors) also contains specific rules, which deal with the problem of actions pending in different Member States.³⁸

2.37. In Section 9, under the heading "Lis pendens - related actions", Article 27 (ex Art. 21 Brussels) addresses *lis pendens* and states:

"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."

2.38. Article 28 addresses related proceedings and states:

"1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

2.39. Thus, the Council Regulation (like its predecessors) applies a first-in-time rule to all judicial proceedings involving civil and commercial matters. This rule applies even when the first proceedings have been commenced *prime facie* in breach of an exclusive jurisdiction agreement.³⁹

(2) The same parties

2.40. For the purpose of Article 27 (ex Art. 21, Brussels), the actions in the different Member States must be "between the same parties." However, the European Court of Justice has concluded that proceedings may also be regarded as being between the same parties on the ground that there is identity of interest.

³⁵ See Denmark national report from Prof. Ole Spierman.

³⁶ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Done at Brussels on 27 September 1968, 29 ILM 1413 (1990).

³⁷ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Done at Lugano on 16 September 1988, 28 ILM 620 (1989).

³⁸ See e.g. Peter Kaye, Law of the European Judgments Convention (Barry Rose Publishers Ltd, Chichester, 1999); and Helène Gaudemet-Tallon, Compétence et exécution des jugements en Europe, Règlement n°44/2001 et Conventions de Bruxelles et de Lugano, 3rd edn (LGDJ, Paris, 2002).

³⁹ See *Erich Gasser GmbH v MISAT Srl*, Case C-116/02. The contract included a forum selection clause in favour of Austria, but the Austrian court was required to defer to the Italian court, which was first seised, and await that court's decision on jurisdiction. The ECJ has also held that English courts cannot grant anti-suit injunctions to stop parties pursuing cases before other EU courts in breach of a jurisdiction agreement: *Turner v Grovit*, Case C-159/02.

2.41. Thus, in *Drouot Assurances S.A. v. Consolidated Metallurgical Industries* (1998)⁴⁰, the Court held that when an insurer invokes its right of subrogation to defend proceedings in the name of its insured, the insurer and the insured may be regarded as the same party for the purposes of Article 27.

2.42. By contrast, it was noted in the same case that claims brought (i) by the insurer of the hull of a vessel against the insurer of the cargo for a contribution to general average, and (ii) by the insurer of the cargo against the owner and charterer of the vessel for a declaration that they were not liable to contribute to the general average, are not the same parties unless it is established that, with regard to the subject matter of the disputes, the interests of the insurer of the hull of the vessel are identical to and indissociable from those of the insured, the owner and the charterer of that vessel.

2.43. The test of identity and indissociability of interest is for the national court to apply.

(3) **Same cause of action**

2.44. Article 27 also requires the same cause of action in the two proceedings. In the French version: "le même objet et la même cause".

2.45. In *Gubisch Maschinenfabrite KG v Palumbo* (1987)⁴¹, the European Court held that the concept of the "same cause of action" had to be given an independent Convention interpretation and did not depend on the procedural law of the courts concerned (contrast the test for the "same parties" - see above). In that case, a German seller was suing an Italian buyer in the German court for the price: the Italian subsequently sued the German seller in the Italian court for a declaration that he was not liable on the contract, or for its rescission. The European Court held that where the same parties were suing each other in two legal proceedings in different Member States, which were based on the same contractual relationship, the "same cause of action" was involved, and it was not necessary for the two claims to be identical for them to involve the same subject matter.

2.46. In *The Tatry* (1999)⁴², it was held that actions have "le même objet" when the ends they have in view are the same, and "la même cause" when the facts and the rule of law relied on as the basis of the actions are the same.

(4) **Related actions**

2.47. When the actions fall outside Article 27, they may still come within the scope of Article 28 (ex Art. 22, Brussels). Article 28 provides that where related actions are brought in the courts of different Member States, any court other than the court first seised has the power (but not the duty), while the actions are pending at first instance, to stay its proceedings or to dismiss the proceeding in order that they may be consolidated.

2.48. Actions are "related" for the purpose of Article 28 if they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings (Article 28, third paragraph). The European Court has ruled that the "risk of irreconcilable judgments" covers cases where the judgments may contain conflicting decisions without necessarily giving rise to mutually exclusive legal consequences.⁴³ The English House of Lords in *Sorrio SA v Kuwait Government Authority*⁴⁴ interpreted this condition to be satisfied if common issues of fact may arise and be recorded in two sets of proceedings, rejecting the narrower interpretation that the test of potential irreconcilability had to be assessed by reference to those issues which the courts would be required to determine in order to give judgment.

⁴⁰ Case C-351/96, [1998] ECR I -3075

⁴¹ Case 144/86 [1987] ECR 4861; see also Case C-351/89 *Overseas Union Insurance Ltd v New Hampshire Insurance Co.* [1991] ECR I-3317.

⁴² Case C-406/92 [1994] ECR I-5439.

⁴³ *The Tatry*, *idem.*

⁴⁴ [1999] 1 AC 32.

- 2.49. Dicey & Morris notes that if the court orders a stay of proceedings, it will presumably be in the situation where the action in the court first seised appears in the eyes of the court seised second to be likely to render *res judicata* issues raised for determination in the action in the court second seised, and therefore should be imposed until the court first seised gives judgment.⁴⁵
- 2.50. It is also worth noting that Article 6(1) addresses the situation of multiple defendants. That article seeks to avoid duplication of proceedings. It provides that a person domiciled in a Member State may be sued, where he is one of a number of defendants, in the courts of the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. It has been held that in applying this test, a "broad commonsense approach" is to be adopted and an "over sophisticated analysis" to be avoided.⁴⁶

D. ALI / UNIDROIT Transnational Principles

2.51. The Principles of Transnational Civil Procedure,⁴⁷ adopted in April/May 2004 by the American Law Institute and UNIDROIT, is an attempt to develop an internationally harmonised approach to procedure.⁴⁸

2.52. As to parallel proceedings, the Principles provide:

"2.5. Jurisdiction may be declined or the proceedings suspended when the court is manifestly inappropriate relative to another more appropriate court that could exercise jurisdiction.

2.6. The court should decline jurisdiction or suspend the proceedings, when the dispute is previously pending in another court competent to exercise jurisdiction, unless it appears that the dispute will not be fairly, effectively, and expeditiously resolved in that forum."

2.53. The Working Group's Commentary notes that the concept recognised in Principle 2.5 is comparable to the common law rules of *forum non conveniens*, and that in some civil law systems, the concept is that of preventing abuse of the forum (see P-2F). Later in the Commentary, it is noted that some systems have strict rules of *lis pendens* whereas others apply them more flexibly, particularly having regard to the quality of the proceeding of both forums (see P-28B).

2.54. Principle 28, which is entitled "*Lis pendens and res judicata*", states at paragraph 28.1 that in applying the rules of *lis pendens*, the scope of the proceedings is determined by the claims in the parties' pleadings. The Commentary notes that the objective is to avoid repetitive litigation, whether concurrent (*lis pendens*) or successive (*res judicata*) (see P-28A).

III. PARALLEL PROCEEDINGS IN INTERNATIONAL LAW

3.1. It is disputed whether international courts and tribunals have any power to suspend their own proceedings absent express authority.⁴⁹ The procedural rules of some international courts and

⁴⁵ Dicey & Morris, supra fn 16, at 413.

⁴⁶ Regulation 6(1) codifies the test in *Kalfelis v Schroeder, Muenchmeyer, Hengst & Co.* [1988] ECR 5565 at 5584. For a recent application by the English court, see *ET Plus SA & Ors v Welter & Ors* [2005] EWHC 2115 at [59] - [90].

⁴⁷ Available at <[www.unidroit.org/English/principles/civil procedure/ali-unidroit principles-e.pdf](http://www.unidroit.org/English/principles/civil%20procedure/ali-unidroit%20principles-e.pdf)>.

⁴⁸ See also ALI's International Jurisdiction and Judgments Project in the United States (Proposed Final Draft, April 2005), ILA's "Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters" (2000), and the ABA Conflict of Jurisdiction Model Act (1987), all at supra fn 16.

⁴⁹ See Vaughan Lowe, "Overlapping jurisdiction in international tribunals", 20 Australian Year Book of International Law 191; August Reinisch, "The use and limits of *res judicata* and *lis pendens* as procedural tools to avoid conflicting dispute settlement outcomes", (2004) 3 The Law and Practice of International Courts and

dispute settlement institutions make express provision for parallel proceedings. Some tribunals have suspended their own proceedings as a matter of inherent jurisdiction or case management. The recent phenomenon of arbitrations brought under bilateral investment treaties has given rise to *lis pendens* issues, as between arbitral tribunals and also between arbitral tribunals and domestic courts. Some examples are given below.

- 3.2. The application of *lis pendens* in this context assumes that the parallel proceedings are before *fora* of equal status. *Lis pendens* does not apply as between supra-national tribunals and domestic courts so as to require the supra-national court to suspend its proceedings. As Douglas Reichert has noted:⁵⁰

"The relevant rules under international law are different since, at least in theory, international tribunals are not in conflict with national tribunals. When a court or arbitral tribunal is created on the basis of a treaty between States, the international tribunal is considered to be hierarchically superior to any national court or private arbitral tribunal (the generally international composition of private arbitral tribunals does not affect this status). Such supranational tribunals typically determine that their jurisdiction takes precedence, and is not subject to the *lis pendens* principle."

- 3.3. Nevertheless, a national court might decide to suspend its proceedings pending the outcome of the supra-national proceedings.⁵¹
- 3.4. It is possible that more than one supra-national tribunal has jurisdiction to consider a dispute. Some tribunals are given express power to deal with parallel proceedings. In the absence of such a power, some tribunals consider that they have an inherent jurisdiction to do so.

(1) **NAFTA / GATT**

- 3.5. NAFTA Article 2005(6) addresses the possibility of parallel proceedings as between NAFTA and GATT Dispute Settlement:

"Once dispute settlement procedures have been initiated under Article 2007 [NAFTA] or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other ...".

- 3.6. As to the standard of identity, Article 2005 (2) refers to "grounds that are substantially equivalent to those available ... under this Agreement."

(2) **ECHR**

- 3.7. According to Article 35(2)(b) European Convention of Human Rights (ex Art. 27(2)(b) ECHR):

"The [European] Court [of Human Rights] shall not deal with any application submitted under Article 34 that is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."

- 3.8. In *Martin v Spain*,⁵² the European Commission on Human Rights held that a claim by 23 Union activists, presented in their personal capacity, which was identical in its object and scope to a previous claim brought before the ILO Committee on Freedom of Association by the trade organisation to which the applicants belonged, was precluded. Although, formally speaking the parties were different, the Commission held that they were "essentially the same".

Tribunals 37; and Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals*, (Oxford University Press, Oxford, 2003).

⁵⁰ Reichert, *supra* fn 7.

⁵¹ See e.g. Christoph Schreuer, "Concurrent jurisdiction of national and international tribunals", (1976) 13 *Houston Law Review* 508.

⁵² Case 16358/90, Admissibility Decision, 12 October 1992. See also European Commission of Human Rights, Application 16717/90, *Pauger v Austria*, Decision on Admissibility of 9 January 1995, 80 D&R 24 (1995).

(3) **Exercise of inherent jurisdiction**

- 3.9. In the absence of specific EC Treaty provisions, the European Court of Justice has nevertheless applied principles of *lis pendens* in its judicial practice.⁵³
- 3.10. The Iran-US Claims Tribunal in one case ordered a stay of parallel ICC arbitration, and in another case declined to do so.⁵⁴
- 3.11. It has been the practice of the UN Compensation Commission not to suspend proceedings, notwithstanding the existence of parallel proceedings.⁵⁵
- 3.12. In the MOX Plant litigation, concerning Ireland's objection to the UK's operation of a processing plant at Sellafield in England, Ireland brought separate proceedings before an arbitral tribunal under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), the International Tribunal for the Law of the Sea (ITLOS), and the European Court of Justice (ECJ). There were overlapping issues of law and treaty interpretation. The OSPAR tribunal saw no impediment to the pursuit of multiple proceedings.⁵⁶ Likewise, an initial ITLOS tribunal saw no need to suspend its proceedings.⁵⁷ However, a differently constituted tribunal at the next stage of the ITLOS proceedings took a radically different approach, and decided to stay its proceedings until the ECJ proceedings were resolved, citing considerations of mutual respect, comity, propriety and effectiveness.⁵⁸

(4) **Bilateral Investment Treaty Arbitrations**

- 3.13. Investment protection treaty cases may raise issues of *lis pendens* as between the tribunal established under the treaty and domestic law *fora* (be it national courts or arbitral tribunals constituted pursuant to contractual arbitration clauses) and also possibly between different treaty tribunals that have been called upon to decide on the basis of the same facts.
- 3.14. It is beyond the mandate of this Committee's work to consider the relationship between treaty tribunals and domestic law *fora*, and issues such as fork-in-the-road, and exhaustion of local remedies.⁵⁹ The Committee has, however, noted the decisions concerning the relationship between two treaty arbitrations made in the parallel Lauder/CME/Czech Republic cases.
- 3.15. Proceedings against the Czech Republic were commenced by Mr Ronald Lauder under the US-Czech Republic BIT in August 1999, alleging that his investment in connection with operation of a commercial television station had been expropriated. Six months later, a company he controlled, CME Czech Republic BV, commenced proceedings under the Netherlands-Czech Republic BIT, making the same allegation, based on the exact same facts. In addition, there were various other court and arbitral proceedings also taking place. The Czech Republic sought to resist the parallel BIT claims on the basis of, *inter alia*, *lis pendens* and abuse of process.
- 3.16. The Lauder tribunal (which was the first constituted) concluded:

"This Arbitral Tribunal considers that the Respondent's recourse to the principle of *lis alibi pendens* to be of no use, since all the other court and arbitration proceedings involve different parties and different causes of action Therefore, no possibility exists that any other court or tribunal can render a decision similar to or inconsistent with the award which will be issued by this Arbitral Tribunal, i.e. that the Czech

⁵³ See e.g. Cases 172, 226/83, *Hoogovens Groep v Commission* [1985] ECR 2831, at 2843; Cases 358/85, 51/86, *France v Parliament* [1988] ECR 4821, 4846.

⁵⁴ *Reading and Bates Corp. v Iran* (1983) 2 Ir-USCTR 401; *Flour Corp. v Iran*, (1986) 11 Ir-USCTR 296.

⁵⁵ Norbert Wuhler, "The United Nations Compensation Commission: A new contribution to the process of international claims resolution", (1999) 2 *Journal of International Economic Law* 249, 260.

⁵⁶ OSPAR Award, para. 142, 2 July 2003, available at <www.pca-cpa.org>.

⁵⁷ ITLOS Provisional Measures Order, 3 December 2001, available at <www.ITLOS.org>.

⁵⁸ ITLOS Order No. 3, 24 June 2003, 42 *ILM* 1187 at 1191.

⁵⁹ Issues of *lis pendens* in investment treaty arbitration are being considered by the ILA Committee on International Law on Foreign Investment. See also Mark Friedman, "Related dispute resolution regimes: parallel proceedings in BIT arbitration", paper at ICCA Conference, Montreal, June 2006.

Republic breached or did not breach the Treaty, and is or is not liable for damages towards Mr Lauder."⁶⁰

3.17. The CME Czech Republic BV tribunal (by majority) concluded:⁶¹

"There is also no abuse of the Treaty regime by Mr Lauder in bringing virtually identical claims under two separate Treaties. should two different Treaties grant remedies to the respective claimants deriving from the same facts and circumstances, this does not deprive one of the claimants of jurisdiction, if jurisdiction is granted under the respective Treaty. A possible abuse by Mr Lauder in pursuing his claim under the US Treaty as alleged by the Respondent does not affect jurisdiction in these arbitration proceedings."

3.18. The award in the CME Czech Republic BV arbitration was challenged before the Svea Court of Appeal in Stockholm and the award was upheld.⁶² The court applying Swedish law acknowledged that *lis pendens* might apply, but held that the requirement of identity of parties was not met in that case.

3.19. Likewise, the Danish Maritime & Commercial Court accepted that *lis pendens* could apply in arbitration brought under the Latvian-Swedish BIT, such that a case pending between two parties prevented a new case being brought between the same parties concerning the same subject matter.⁶³ However, the court held that a second notice of arbitration, which had been issued, constituted a new notice in the same case, and not a new case.

3.20. In one BIT case, the tribunal stayed its proceedings pending the outcome of related commercial arbitration commenced under the relevant contract, but this approach has not been universally approved.⁶⁴

IV. PARALLEL PROCEEDINGS AND INTERNATIONAL ARBITRATION

4.1. The objective of this report is to give guidance to arbitral tribunals when faced with an argument that the arbitration before it should be suspended or terminated because of relevant parallel proceedings. The Committee has considered three scenarios, the first of which is the most common:

- (a) parallel proceedings between the arbitral tribunal and a state court
- (b) parallel proceedings between two arbitral tribunals
- (c) parallel proceedings between the arbitral tribunal and a supra-national court or tribunal.

We consider each of these in turn.

A. PARALLEL ARBITRATION AND COURT PROCEEDINGS

(1) Introduction

⁶⁰ *Lauder v The Czech Republic*, Final Award, dated 3 September 2001. Reprinted in (2002) 14 World Trade and Arbitration Materials 109.

⁶¹ *CME Czech Republic BV v The Czech Republic*, Partial Award, dated 13 September 2001, (2002) 14 World Trade and Arbitration Materials 288.

⁶² Case 8735-01, Stockholm Arbitration Report 2003:2; also (2003) 15 World Trade and Arbitration Materials 171.

⁶³ UFR 2003.886.

⁶⁴ *SGS v Philippines*, Award on Jurisdiction dated 29 January 2004, ICSID Case No. ARB/02/6; but contrast *Bayindir v Pakistan*, Decision on Jurisdiction dated 14 November 2005, ICSID Case No. ARB/03/29. The relationship between treaty and contract claims is a complex, often involving consideration of so-called "umbrella clauses" in some BITs, and has attracted much comment. See e.g. the papers at supra fn 59. See also the approach in *SPP v Egypt*, referred to in infra para. 4.27.

- 4.2. Two different sequences of events can be envisaged giving rise to parallel proceedings between an arbitral tribunal and a state court: (1) a claimant commences arbitration and the defendant subsequently files a suit before a domestic court; and (2) a party institutes proceedings in a domestic court and the other party subsequently commences arbitration. In both scenarios, it is assumed for the purposes of this report that the party commencing arbitration seeks a stay of the parallel litigation, invoking the parties' agreement to arbitrate.
- 4.3. The foregoing summary of national law and international law (Part III above) presupposes that more than one court or tribunal has competent jurisdiction over a dispute and *lis pendens* may apply to determine in which forum the matter should proceed. The situation in arbitration is fundamentally different, because a valid arbitration agreement confers exclusive jurisdiction on the constituted arbitral tribunal in respect of the disputes referred to it, to the extent that they come within the scope of the arbitration agreement (save where a party waives its right to insist on arbitration).⁶⁵
- 4.4. Accordingly, a number of authors deny the existence of any question of *lis pendens* in the context of arbitration (at least between an arbitral tribunal and a State court) based on the notion that a contractual undertaking to arbitrate is sufficient, in and of itself, to preclude the concurrent exercise of jurisdiction by public authorities, thus rendering moot the problem of *lis pendens*.⁶⁶
- 4.5. Nevertheless, because of the exclusive consequences of a valid agreement to arbitrate, the commencement of parallel proceedings - in court or arbitration - requires a determination as to whether the arbitration agreement takes effect. The question is who should make that determination? While this may not be a situation of *lis pendens* in its strict sense (i.e. two *fora* both with *prima facie* competent jurisdiction), it is undoubtedly a situation of parallel proceedings very akin to *lis pendens*, and the arbitral tribunal must decide whether or not to suspend its proceedings to await the outcome of the court's determination on jurisdiction.⁶⁷ An example of such a situation is the Swiss *Fomento* case, where one party started litigation in Panama and the other started ICC arbitration in Geneva (see *infra* para. 4.36).
- 4.6. In theory, three basic solutions may be proffered. A first solution, based on the sovereignty of state courts, would refuse to consider that arbitration has equal standing to state court dispute settlement, and would accept jurisdiction over the case notwithstanding the existence of an agreement to arbitrate. Consequently, no *lis pendens* would arise and state court litigation and arbitration might run in parallel without any mechanism of coordination. This solution does not accord with international arbitration law and practice (see e.g. New York Convention - see Part IV.A.c below). A second solution, based on the equivalence of state courts and arbitration tribunals, might transpose *lis pendens* principles, applicable under domestic law as between a domestic court and a foreign court, to the relationship between state courts and arbitral tribunals. That solution has the disadvantage of not avoiding the risk of possible conflicting decisions and of divergent solutions worldwide, since the rules on *lis pendens* vary considerably between Common Law and Civil Law countries. Furthermore, if a first-in-time rule applied, a prospective defendant might "run to court" to frustrate an anticipated arbitration. A *forum non conveniens* approach would be too unpredictable, and begs the question of who (court or tribunal) should make the decision. A third solution would be to give priority to arbitration and for a state court to review the issue of jurisdiction only later in the context of setting aside and enforcement proceedings. This has the advantage of reducing the opportunity for a defendant to adopt litigation strategies aimed at frustrating the arbitral process. However, the disadvantage is that a defendant who has a legitimate objection to arbitral jurisdiction has to wait until an award on jurisdiction is made before it can get before

⁶⁵ We have not considered the effect of a contract provision which makes arbitration optional, say at the unilateral election of one of the parties, see e.g. *Law Debenture Trust Corp plc v Elektrim Finance BV* [2005] EWHC 1412.

⁶⁶ See e.g. Schweizer and Guillod, "L'exception de litispendance et l'arbitrage international", in Le juriste Suisse face aux droits et jugements étrangers, (Editions Universitaires Fribourg, Fribourg, 1988); and Lachmann, Handbuch für die Schiedsgerichtsbarkeit, 2nd ed., (O. Schmidt, Cologne, 2002), Rn 499; and Musielak-Foerste, ZPO Kommentar, 4th ed., (Vahlen, Munich, 2005), §261 Rn. 16. See also e.g. in ICC Case No. 5103 (1988), the tribunal recognised the applicability of the *lis pendens* principle only as between concurrent judicial proceedings, (1988) *Journal de Droit International* 1206.

⁶⁷ For a discussion of this topic, see Arbitral Tribunals or State Courts, Who must defer to whom?, ASA Special Series No. 15 (2001), at 65.

the court, in a setting aside application. Such a defendant has the dilemma whether or not to participate in the arbitration while reserving all its rights. This third solution accords with the widely accepted principle of competence-competence (as giving an arbitral tribunal authority to rule on its own jurisdiction).

- 4.7. Another critical issue is what is the effect of a prior court decision? Does it have *res judicata* effect on the tribunal? Does it depend upon whether the decision is of a court at the place of arbitration, or does a foreign court judgment have the same effect?
- 4.8. National arbitration law and practice generally offers a solution where the arbitration and court proceedings are taking place in the same jurisdiction, both as to whether a court or tribunal has propriety, and the effect of a prior court decision on the arbitral tribunal. The Committee does not presume to suggest that arbitral tribunals should act contrary to the applicable law at the place of arbitration. National laws are generally less clear as to the solution, or approach tribunals should adopt, where the court proceedings have been commenced in a different jurisdiction, and it is in respect of that situation that the Committee seeks to give guidance.
- 4.9. The Committee considered the significance of the principle of competence-competence, and the position under various international instruments and national laws.
- 4.10. In addition to separate proceedings being commenced in arbitration and court between the same parties, there may be parallel court proceedings which do not give rise to a strict *lis pendens*, because the parties or issues are not identical. We also consider the law and practice relating to tribunals suspending their own proceedings to await the outcome of the related proceedings.

(2) **Competence-Competence**

- 4.11. An arbitral tribunal is deemed to have an inherent power to determine its own jurisdiction. This is referred to as competence-competence⁶⁸ (i.e. competence to decide its own jurisdiction). It is a legal fiction, which derives from the separability of the arbitration agreement.⁶⁹
- 4.12. The power of an arbitral tribunal to determine its own jurisdiction is expressly set out in many procedural rules (e.g. Article 21 UNCITRAL Arbitration Rules, Article 6.4 ICC Rules, Article 15.1 ICDR International Rules, Article 23.1 LCIA Rules) and national laws (see below). This is often referred to as positive competence-competence.
- 4.13. In some jurisdictions, competence-competence has a further connotation, namely that the arbitral tribunal should be the first to make a determination as to jurisdiction, and national courts should defer to the tribunal, while retaining a right of review in any setting-aside application. This is referred to as negative competence-competence, and is more controversial.

(3) **Exclusive arbitral jurisdiction and mandatory stay of litigation**

- 4.14. There is no doubt that a valid arbitration agreement - if properly invoked - deprives state courts of jurisdiction. Pursuant to the New York Convention and many national laws, a party against whom court litigation is commenced concerning a dispute covered by the valid arbitration agreement is entitled to invoke that agreement and is further entitled to a mandatory stay.
- 4.15. Article II of the New York Convention 1958 states:

⁶⁸ Also referred to as *Compétence de la compétence* in French and *Kompetenz/Kompetenz* in German.

⁶⁹ See Gaillard and Savage (eds), Fouchard, Gaillard & Goldman on International Commercial Arbitration (Kluwer, The Hague, 1999) at para. 416 ff.; Lew, Mistelis and Kroll, Contemporary International Commercial Arbitration, (Kluwer, The Hague, 2003) at para. 14-13 ff.; Redfern and Hunter, Law and Practice of International Commercial Arbitration, 4th edn. (Sweet & Maxwell, London, 2004) at para. 5-36 ff.; W Park, "An Arbitrator's Jurisdiction to Determine Jurisdiction", ICCA Conference, Montreal, June 2006.

“(1) Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

...

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

4.16. Article II(3) is reflected in Article 8(1) UNCITRAL Model Law, and many national laws (e.g. section 9 English Arbitration Act 1996).

4.17. Significantly, the Model Law adds that the party requesting the stay of litigation must do so "not later than when submitting his first statement on the substance of the dispute". The English Act, similarly, provides that an application may not be made "after [the applicant] has taken any step in those proceedings to answer the substantive claim".

4.18. Pursuant to any national law provision based on Article II(3) New York Convention, a state court may accept jurisdiction over a dispute and not refer it to arbitration if: (1) the dispute concerns subject matter not capable of settlement by arbitration; or (2) the agreement to arbitration is null and void, inoperative or incapable of being performed. This entitles the court to review the dispute and the arbitration agreement and, thus, raises a *lis pendens* issue as soon as an arbitral tribunal is seized 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.

4.19. In the event that arbitration is commenced, the claimant in the litigation (and respondent in the arbitration) is likely to raise the same arguments before the tribunal relating to arbitrability and/or the invalidity of the arbitration agreement as it will raise before the court in its attempt to resist the stay application. Should the court and arbitral tribunal both decide on jurisdiction, there is a possibility of inconsistent decisions. This is due, of course, to the fact that different people can come to different conclusions on the same facts and arguments, but also because questions going to arbitrability and validity can give rise to complex issues where even very experienced jurists could well disagree (e.g. evidence of the arbitration agreement itself,⁷⁰ the policy issues relating to arbitrability, distinction between void and voidable, what is meant by inoperative and incapable of performance, what is the applicable law,⁷¹ has a substantive step been taken in the litigation⁷²).

(4) **Should tribunals defer to courts, or vice versa, on jurisdiction?**

4.20. The New York Convention does not prescribe what is to happen when an arbitral tribunal is facing a jurisdictional challenge which raises the same issues as raised in a stay application before a national court.

⁷⁰ A typical case is *Marc Rich & Co. AG v Società Italiana Impianti*, [1992] ECR I-3855 (ECJ) in which English proceedings regarding the constitution of an arbitral tribunal went together with Italian proceedings for a declaration of non-liability. The question in *Marc Rich* was whether an amendment to the original contract supplementing an arbitration clause had been agreed upon by the Italian seller.

⁷¹ The *Deutsche Schachtbau- und Tiefbohrergesellschaft v R'As Al Khaimah National Oil Co.* case provides an example of the difficulties that may arise in this respect. In that case, conflicting decisions ensued from a Geneva ICC award and a court decision in R'As al-Khaimah. The ICC award endorsed the validity of the agreement whereas the state court decision annulled the contract on the basis of misrepresentation. The ICC award was dormant for seven years until some assets were located in England, which could be attached. The English courts found that the agreement was valid under the governing law (Swiss law) and that the local courts of R'As al-Khaimah, thus, had no jurisdiction and no account could be had of their decision (see D. Scott, Commentary: practical options when faced with an injunction against arbitration, (2002) 18 *Arbitration International* 333).

⁷² See e.g. *Fomento v Colon* - see part IV.A.8 below.

- 4.21. In contrast, the European Convention on International Commercial Arbitration 1961 provides that generally a court, which is subsequently seised, should defer to the arbitral tribunal. Article VI(3) states:

"Where either party to an arbitration agreement has initiated 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."

- 4.22. While it is not explicit, one might infer from Article VI(3) that a consistent approach would be for a tribunal subsequently seised to stay its proceedings until the court had ruled on jurisdiction.

- 4.23. The UNCITRAL Model Law 1985 does not include any indication as to which *forum* should have priority. However, Article 8(2) states:

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

Article 8(2) is significant in that it does not prescribe an automatic stay of the arbitral proceedings by the mere introduction of court proceedings. Also, it permits the arbitral tribunal to proceed and to render an award.⁷³

- 4.24. The LCIA Rules 1998, unusually, seek to exclude the possibility of parallel proceedings relating to jurisdiction. Article 23.4 states:

"By agreeing to arbitration under these Rules, the parties shall be treated as having agreed not to apply to any state court or other judicial authority for any relief regarding the Arbitral Tribunal's jurisdiction or authority, except with the agreement in writing of all parties to the arbitration or the prior authorisation of the Arbitral Tribunal or following the latter's award ruling on the objection to its jurisdiction or authority."

(5) Should tribunals stay proceedings pending the outcome of related court proceedings?

- 4.25. Assuming that there are parallel and related arbitral and court proceedings, in which the latter dispute is not subject to arbitration, can and should an arbitral tribunal suspend its own proceedings? This is not an issue of *lis pendens* or competence-competence, but of case management. On the one hand, the tribunal should seek to avoid inconsistent decisions, but on the other hand a tribunal is mandated to decide the dispute referred to it without unnecessary delay and a claimant has a right to have its claims determined (see e.g. Article 6, ECHR).

- 4.26. Undoubtedly, domestic courts can stay their own proceedings, and Common Law courts appear more willing to do so (see Part II.A above). An EU court can stay its own proceedings, but "related claims" in the EC Regulation has been given a somewhat narrow interpretation (see Part II.C above).

⁷³ See e.g. Binder, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, 2nd edn. (Sweet & Maxwell, London, 2005), p. 91. Binder notes that the purpose of this provision, according to the Analytical Commentary, was "to reduce the risk and effects of dilatory tactics of a party reneging on his commitment to arbitration" (A/CN.9/264, Art.8, para.5). Nevertheless, Binder concludes that: "In cases where the tribunal's jurisdiction is seriously in dispute, the above-mentioned point [i.e. risk of potential cost of simultaneous arbitration proceedings] will surely convince most arbitral tribunals and arbitration-willing counter-parties to wait until the court has decided the jurisdiction issue, as otherwise the (possibly wasted) arbitral proceedings will cause substantial expense."

4.27. As noted above, some supra-national tribunals have concluded that they have an inherent power to suspend their own proceedings (e.g. second Mox Plant ITLOS tribunal, and the BIT tribunal in *SGS v Philippines*). A flexible approach was adopted by the ICSID tribunal in *SPP v Egypt*, which said:⁷⁴

"When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising jurisdiction. However, in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its discretion pending the decision of the other tribunal."

The tribunal did, in fact, suspend its proceedings while parallel litigation was pursued before the Cour de Cassation in France.

4.28. There is Common Law authority that an arbitral tribunal may stay its proceedings to await the outcome of related court proceedings (see below).

(6) England

4.29. Under the Arbitration Act 1996, unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction (section 30), which award may be challenged in court (section 67). In addition, a party at the commencement of the proceedings may apply to the court to determine any question as to substantive jurisdiction, but only with the agreement of all the parties or with the permission of the tribunal, and the court is satisfied *inter alia* that there is good reason why the matter should be decided by the court (section 32).

4.30. A party to an arbitration agreement against whom legal proceedings are brought may apply to the court for a stay of the legal proceedings (section 9). A stay shall be granted unless the arbitration agreement is null and void, inoperative or incapable of being performed.

4.31. The question has arisen whether the court, when faced with a stay application and arbitration proceedings already commenced, should await the tribunal's decision on jurisdiction.⁷⁵

4.32. As noted above, the English court can stay its own proceedings awaiting the outcome of a related arbitration. There is also authority that an arbitral tribunal can stay its proceedings. For example, Browne-Wilkinson LJ (as he then was) has observed:⁷⁶ "I agree ... that in law the arbitrator is entitled to refuse to decide any issues which overlap with the High Court proceedings and that he is the best position to decide whether such overlap does exist."

(7) France

4.33. In French law, an arbitral tribunal may determine its own jurisdiction (Article 1466 NCCP).

4.34. French arbitration law embraces negative competence-competence. Article 1458 of the New Code of Civil Procedure obliges French courts – without qualification – to refer a jurisdictional issue to arbitration if the arbitral tribunal has been seised of the dispute. Article 1458 states:

"Where in a dispute regarding which the arbitration tribunal is seised by virtue of an arbitration agreement is brought before a court of law of the State, the latter shall have to decline jurisdiction. Where the arbitration tribunal is not yet seised, the court shall equally have to decline jurisdiction save where the arbitration agreement is manifestly null. In both cases, the court may not raise *ex proprio motu* its lack of jurisdiction."⁷⁷

(8) Switzerland

⁷⁴ Decision on Jurisdiction I, 27 November 1985, 1 ICSID Reports 112 at 129, para. 84.

⁷⁵ See Merkin, *Arbitration Law*, (Informa Legal Publishing, London, looseleaf), paras 8.28 - 8.31.

⁷⁶ *Northern Regional Health Authority v Derek Crouch Construction Co. Ltd* [1984] 2 All ER 175. See also *University of Reading v Miller Construction* 52 Con. LR 31. And recently confirmed by the New Zealand High Court in *Carter Holt Harvey Ltd v Genesis Power Ltd & Or*, unreported, 22 February 2006, supra fn 23.

⁷⁷ See also, e.g. Article 13, Egyptian Arbitration Act (Law No. 27/1994).

- 4.35. Article 186(1) of the Swiss PIL Act provides that the arbitral tribunal shall decide on its own jurisdiction. A party may invoke an agreement to arbitrate and apply to the court for a stay of litigation, under Article 7 of the PIL Act. According to Swiss doctrine, a Swiss court decision that it has jurisdiction (e.g. because the arbitration agreement is null and void), is binding on the arbitral tribunal. However, if the court decided that it does not have jurisdiction, the tribunal must still decide its own jurisdiction.⁷⁸
- 4.36. The effect on a tribunal sitting in Switzerland of parallel court proceedings elsewhere was considered in the *Fomento* case.⁷⁹ Colon (of Panama) employed Fomento (of Spain) to construct a port terminal in Panama. The contract provided for ICC arbitration in Geneva. Disputes arose and Fomento started court proceedings against Colon in Panama. Colon took some time before it raised a jurisdictional defence based on the arbitration agreement. The Panama court of first instance held that Colon was too late to raise that defence according to the rules of the Panama Civil Procedure Code, but the Court of Appeal allowed Colon's appeal. Meanwhile, Colon had started ICC arbitration, and the tribunal issued an award confirming that it had jurisdiction, in particular in light of the Panama Court of Appeal decision. Subsequently, the Panama Supreme Court allowed Fomento's appeal and held that Colon had been too late in raising the arbitration agreement. Fomento then challenged the arbitration award.
- 4.37. The Court held that the tribunal in such a situation must consider: (1) whether both proceedings concern the same subject matter and are between the same parties; (2) whether it is expected that the foreign court will render a judgment within a reasonable time; and (3) whether the foreign court's decision would be enforceable in Switzerland. These three conditions reflect Article 9 PIL (see Part II.B.2 above). If the conditions are met, a tribunal sitting in Switzerland should stay its proceedings. The Court controversially opined:⁸⁰

"Since *res judicata* and *lis pendens* are tightly linked principles that serve the same purpose, it seems logical to deal in the same way with the principle of *lis pendens* and admit that the arbitrator seised in the second place has to stay its proceedings until the firstly seised state court renders its decision as long as the latter is liable to be recognised at the seat of the arbitration."

The Court held that it would be contrary to Swiss public policy to have two equally enforceable decisions circulating in Switzerland and that the *lis pendens* mechanism in Article 9 PIL is precisely aimed at avoiding that risk. In addition, the Court held that there is no priority rule under Swiss law that would give the arbitral tribunal precedence to decide upon the validity of an arbitration agreement and the tribunal's jurisdiction (i.e. negative competence-competence). Because the tribunal had not carried out the examination required in Article 9, the Court set aside the tribunal's jurisdiction award.

- 4.38. With respect to parallel arbitrations, Swiss authors consider that the arbitral tribunals should have regard to *lis pendens*, and the tribunal second seised should probably stay its proceedings.⁸¹

⁷⁸ See Jean-François Poudret and Sébastien Besson, *Droit comparé de l'arbitrage international*, (Schulthess, Zurich, 2002) at 456; and François Perret, "Parallel actions pending before an arbitral tribunal and a state court: the solution under Swiss law", in *Arbitral Tribunals or State Courts, Who must defer to whom?*, ASA Special Series No. 15 (2001), at 65.

⁷⁹ See *Fomento de Construcciones y Contratas SA v Colon Container Terminal SA*, 14 May 2001, ATF 127 III 279, [2001] ASA Bulletin 544. The decision followed the approach if the Swiss Federal Tribunal in two earlier cases: *UAE & Ors v Westland Helicopters*, 19 April 1994, ATF 120 II 155; and *Compania Minera Condesa SAL v BRGM-Perou SAS*, 19 December 1997, AFTF 124 III 83.

⁸⁰ *Idem*, at 284. See e.g. Elliott Geisinger & Laurent Levy, "Lis alibi pendens in international commercial arbitration", in *Complex Arbitrations: Perspectives on their Procedural Implications* (ICC Special Supplement, Paris, 2003) at 53; Christian Oetker, "The principle of *lis pendens* in international arbitration: the Swiss decision in *Fomento v Colon*", (2002) 18 *Arbitration International* 137; The *Fomento* decision has been heavily criticised by some commentators and we understand that the Swiss Parliament is considering amending the PIL Act to overrule it.

⁸¹ Poudret and Besson, *op. cit.*, at 471-472; Pierre Lalive, Jean-François Poudret and Claude Reymond, *Le droit de l'arbitrage interne et international en Suisse*, (Payot, Lausanne, 1989) at 346.

(9) **Italy**

- 4.39. Italian law provides that the arbitral tribunal shall decide on its own jurisdiction. A party may invoke an agreement to arbitrate and apply to the court for a stay of litigation.⁸²
- 4.40. According to the Italian Supreme Court, because of the private nature of arbitration, the *lis pendens* rule is inapplicable to arbitration.⁸³ Nevertheless, the Supreme Court in the same case held that once the arbitral tribunal is constituted, a court subsequently seised must decline jurisdiction and abstain from examining the case, including the validity of the arbitration agreement, leaving to the arbitrators the power to determine their own jurisdiction.
- 4.41. The situation is uncertain in respect of foreign legal proceedings commenced in parallel with an Italian arbitration.
- 4.42. Italian arbitration law expressly gives an arbitral tribunal power to suspend its own proceedings in certain limited circumstances. Article 819 ICCP provides:

"If during the course of the proceedings a question arises which, according to law is not arbitrable, the arbitrators, if they deem that the matter submitted to them depends upon the resolution of said question, shall stay the proceedings. In all other cases, the arbitrators shall decide all questions arising in the course of the arbitration proceedings."

It might be inferred that in "all other cases", a tribunal may not suspend its own proceedings.

- 4.43. The issue of *lis pendens* between two arbitral tribunals has not received much attention in Italy. The few scholars who have dealt with it consider that Article 30 ICCP is applicable.

(10) **Germany**

- 4.44. According to §1040 ZPO, an arbitral tribunal has competence to decide on its own jurisdiction, but this decision is not binding and can be overruled by a state court. This is sometimes called an "unreal competence-competence",⁸⁴ on the basis that the arbitral tribunal does not have the final say (i.e. it is subject to review by the court).⁸⁵
- 4.45. Prior to the constitution of the arbitral tribunal, a party may apply to have court proceedings rejected as inadmissible on grounds of a valid agreement to arbitrate (§1032 ZPO).⁸⁶ Where such an action has been brought, arbitral proceedings may nevertheless be commenced or continued, and an arbitral award may be made, while the issue is pending before the courts.
- 4.46. Concerning parallel arbitrations, some scholars argue that only one arbitral tribunal can have jurisdiction over the same dispute, whereas other authors argue that there is no priority rule applicable between different tribunals.

B. PARALLEL ARBITRATION PROCEEDINGS

- 4.47. It is possible that parties to the same contract and same agreement to arbitrate commence separate arbitration proceedings concerning the same dispute (perhaps because the respondent in the first arbitration did not like the tribunal which had been constituted), giving rise to parallel arbitrations, and a true *lis pendens*. A more likely scenario is two arbitrations between the same parties raising different claims, albeit closely related. Another more likely scenario is two arbitrations between the same parties in which each relies on different formulations of the agreement to arbitrate (e.g. because it is alleged that the arbitration

⁸² See e.g. M Rubino Sammartano, *L'arbitrato internazionale*, (Cedam, Padua, 1989).

⁸³ Cass., 8 July 1996, n. 6205 *Montedison ed altri c. Eni ed Enichem*, in Riv. Arb. 1997, at 324. See also e.g. C. Consolo, "Litispendenza e connessione fra arbitrato e giudizio ordinario", in Riv. Arb. 1998, at 659.

⁸⁴ Triebel and Coenen, *Parallelität von Schiedsverfahren und staatlichen Gerichtsverfahren*, BB 2003, IDR-Beilage, S. 2.

⁸⁵ Schwab and Walter, *Schiedsgerichtsbarkeit Kommentar*, 7. Aufl., (Beck, Munich, 2005), Kap.16, Rn 4 and 10.

⁸⁶ Henn, *Schiedsverfahrensrecht, Handbuch fuer die Praxis*, 3rd ed., (Müller, Heidelberg, 2000), Rn. 316; Baumbach, Lauterbach and Albers-Hartmann, *ZPO*, 64th ed., (Beck, Munich, 2006), §261 Rn. 11.

agreement was amended, perhaps changing the applicable procedural rules). Another situation is where closely related disputes are running in parallel between parties that are not identical.⁸⁷

- 4.48. In the situation of a true *lis pendens*, the issue arises as to whether one of the tribunals is entitled to stay its own proceedings. It is argued by some commentators that the tribunal is mandated to determine the dispute referred to it by the claimant, and should proceed to do so. The Committee disagrees. *Lis pendens* is recognised in most legal systems, and has also been recognised as *prima facie* applicable in international arbitration. The Committee submits that the second tribunal should stay its proceedings.
- 4.49. In the situation of related claims between the same parties, the issue may not be one of *lis pendens* but of case management. Here, the argument that an arbitral tribunal should comply with its mandate is powerful. Nevertheless, the Committee concluded that in some circumstances, arbitral efficiency and doing justice between the parties should persuade tribunals to stay their own proceedings pending the outcome of the other proceedings, or encourage the parties to consolidate the disputes.
- 4.50. In the situation of related claims between non-identical parties, the issue may be one of *lis pendens* (if the parties are so closely related that they are deemed identical), but it is again more likely to be an issue of case management. The Committee concluded that arbitral efficiency and justice may dictate that one of the proceedings should be stayed pending the outcome of the other.

C. PARALLEL ARBITRATION AND SUPRA-NATIONAL PROCEEDINGS

- 4.51. It is possible that an international commercial arbitration will be conducted in parallel to proceedings before a public international or supra-national court or tribunal. This is unlikely to give rise to a true *lis pendens*, because the parties or the cause of action will most probably be different.
- 4.52. Nevertheless, the Committee concluded that, in some circumstances, arbitral efficiency may dictate that the commercial arbitration should be stayed pending the outcome of the other proceedings.

V. CONCLUSION AND RECOMMENDATIONS

A. CONCLUSION

- 5.1. Douglas Reichert remarked in 1992 that decisions of arbitral tribunal on *lis pendens* are "generally too sparse and contradictory to constitute in any way representative statements of an accepted practice amounting to a procedural rule for international arbitration".⁸⁸
- 5.2. Hans van Houtte (our Committee colleague) commented in 2000:⁸⁹

"There does not yet exist a clear and global transnational *lis alibi pendens* - exception in the arbitration and jurisdiction conventions. Arbitration and court proceedings belong to separate worlds with their own jurisdiction and enforcement conventions, which have neglected the interface between arbitration and court jurisdiction. However, some of the conventions, such as the New York Convention, already contain the gremia to allow

⁸⁷ See e.g. the situation that arose in the dispute *Arthur Andersen v Andersen Consulting*. After ICC arbitration had been commenced between virtually all the relevant parties, one Arthur Andersen member commenced *ad hoc* arbitration against one Andersen Consulting member firm based on an earlier signed version of the arbitral clause. In the second arbitration, the respondent refused to appoint an arbitrator, which was confirmed by the Swiss court as being premature (referred to in Geisinger & Levy, supra fn 80 at 66).

⁸⁸ Reichert, supra fn 7.

⁸⁹ Hans van Houtte, "Parallel proceedings before state courts and arbitration tribunals: is there a transnational *lis alibi pendens* - exception in arbitration or jurisdiction conventions?" in *Arbitral Tribunals or State Courts: Who must defer to whom?*, ASA Special Series No. 15 (2001) pp. 53-54.

courts to refuse jurisdiction over disputes, which are within the arbitrator's jurisdiction and to refuse enforcement of court judgment which did not respect the arbitrators' jurisdiction. Others, like the European Arbitration Convention or the Brussels and Lugano Conventions, unfortunately, do not curb parallel proceedings in courts and before arbitrators."

- 5.3. Given this uncertainty, the Committee concluded that it could assist arbitrators if the Committee were to make a number of recommendations.

B. COMMENTARY TO RECOMMENDATIONS

(1) Recommendation 1

- 5.4. The Committee identified widespread support within the arbitral community for the principle of positive competence-competence and therefore concluded that generally the arbitral tribunal should proceed to determine its own jurisdiction, notwithstanding that the issue of jurisdiction might be being considered by a state court or other tribunal. This recommendation was considered to be particularly apposite where there were court proceedings started other than at the place of arbitration.

- 5.5. The Committee recalls its own resolution of ten years ago:⁹⁰

"... that the fact that a pending or forthcoming court case, whether civil or criminal, is related to an arbitral proceedings should not, in itself, cause the discontinuance or suspension of the arbitral proceeding."

- 5.6. The recommendation defines "Parallel Proceedings" in terms of parties and issues that are the same or substantially the same, rather than in terms of the triple identity test (of identical parties, causes of action and relief). This reflects the Committee view of *lis pendens* in arbitration to be largely about case management rather than the application of a rigid criteria.⁹¹

(2) Recommendation 2

- 5.7. Nevertheless, the Committee recognised the important policy objectives of arbitral efficiency, the avoidance of conflicting decisions, and the avoidance of costly duplication and oppressive tactics, and therefore concluded that an arbitral tribunal should have a discretion to stay its own proceedings in appropriate circumstances.

(3) Recommendation 3

- 5.8. The Committee's principal aim was to give guidance to arbitrators when faced with court proceedings in a jurisdiction other than the place of arbitration. The Committee was mindful that an arbitral tribunal should apply the law and respect the practice at the place of arbitration, not least because the courts of that country will ultimately have the power to set aside the tribunal's award and are very unlikely to allow inconsistent decisions on jurisdiction to stand. Accordingly, if the law and practice at the place of arbitration prescribes that it is for the tribunals to defer to the courts on issues of jurisdiction, then the tribunal should act accordingly.

(4) Recommendation 4

- 5.9. As noted above, the Committee has sought principally to give guidance concerning the situation such as that in *Fomento*, i.e. the respondent in the arbitration has commenced court proceedings elsewhere. In such a situation, the Committee has given a strong recommendation that the arbitral tribunal proceed to determine its own jurisdiction. This recommendation is based on a number of considerations. First, the arbitral tribunal in most

⁹⁰ Report of the ILA Sixty-Seventh Conference, Helsinki, 1996.

⁹¹ See also the conclusion of the Committee regarding the triple identity test with respect to *res judicata*, Final Report on Res judicata and Arbitration, Report of the ILA Seventy-First Conference, Toronto, 2006, at paras 41-49.

jurisdictions is authorised and even obliged to determine its own jurisdiction. Second, the arbitral tribunal often will be informed by the parties regarding the parallel court proceedings abroad and will be able to give appropriate weight to a respondent's arguments contesting jurisdiction. Third, parallel court proceedings abroad may take a long time before coming to a final decision and may provide compelling reasons not to stay the arbitration until such time. Fourth, the recognition of a foreign decision on jurisdiction may not be available at the place of arbitration. Fifth, a setting aside court at the place of arbitration or a court requested to grant recognition or enforcement may still review the award for lack of jurisdiction and, in its assessment, may take into account a conflicting court decision rendered abroad. There may be some exceptional circumstances where the above approach is not appropriate, for example where there is *prima facie* evidence that the claimant in the arbitration has taken a substantive step in the foreign litigation thereby waiving its right to rely on the agreement to arbitrate. In that situation, it may be more appropriate for the foreign court to determine whether such a waiver has occurred pursuant to its procedural rules, and for the tribunal to stay its proceedings pending the outcome of that issue.

(5) **Recommendation 5**

- 5.10. Where there are two parallel arbitrations raising the same or substantially the same issues, the Committee concluded that the secondly constituted tribunal should give consideration to case management issues. The Committee concluded that it would be wrong for the second tribunal to proceed with its arbitration, blinkered to the existence of the other arbitration. This recommendation is based on the consideration that, in the case of parallel arbitrations, there is a real *lis pendens* situation because there is parallel jurisdiction and a policy need for coordination in order to avoid conflicting awards. But the Committee does not recommend that the rigid first-in-time rule as applied in many Civil Law jurisdictions should apply. Instead, the tribunal should have considerable discretion to order a stay the arbitration on such terms as it sees fit. This might be a stay of only some of the issues. It might be a stay for a limited period, in order to avoid the successful application slowing down the other arbitration unfairly.

(6) **Recommendation 6**

- 5.11. The Committee concluded that arbitral tribunals should have confidence to exercise case management powers and be empowered to stay their own proceedings, even when the situation did not fulfil the traditional criteria of *lis pendens*. The ultimate objective should be to achieve a fair result as between the parties, and in some circumstances this may mean waiting for the outcome of other proceedings. A possible situation where this might be appropriate includes one where a tribunal hearing a dispute between an owner and contractor might decide to suspend that arbitration until legal proceedings between the contractor and its relevant sub-contractor have been determined. Or a tribunal hearing a dispute between two parties in a string contract or long supply chain might decide that it would be right to await the outcome of legal proceedings between the original seller or manufacturer and the original buyer. Nevertheless, the Committee envisages such power being exercised very sparingly.

(7) **Recommendation 7**

- 5.12. Finally, the Committee sought to clarify that *lis pendens* is not generally considered to be part of public policy and therefore need not be raised by an arbitral tribunal of its own motion. By and large, the private interests of the parties are at stake and, furthermore, the arbitral tribunal will be informed by the parties about parallel proceedings and will not be in a position to have any such information. The Committee considered it important to note that a party that seeks to raise issues relating to the effects of Parallel Proceedings should do so as soon as a possible. The Committee was not minded, however, to recommend a deadline (e.g. before taking a substantive step in the arbitration), because such effects may not become apparent until some way through the arbitration.

B. RECOMMENDATIONS

- 5.13. The Committee recommends the following principles:

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 domestic 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 seat 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 annulment 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 seat 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.

FINAL REPORT ON RES JUDICATA AND ARBITRATION

INTRODUCTION

1. This is the Final Report of the ILA International Commercial Arbitration Committee on the topic of res judicata and arbitration. This Report should be read together with the Committee's Interim Report presented and adopted at the Berlin Conference in August 2004 ('Interim Report')⁹². In this Final Report, references will be made in footnotes to the Interim Report, the content of which is incorporated in this Final Report.
2. The Committee has agreed upon certain Recommendations as to res judicata in relation to international commercial arbitration. This Final Report provides a brief commentary on each. This Final Report is followed by a list of relevant literature additional to the literature cited in the Interim Report.
3. These Recommendations are the culmination of a four year study of res judicata by the Committee, starting just before the New Delhi Conference in 2002. The Recommendations have been discussed and agreed by the Committee at meetings in Auckland (October 2004), Geneva (March 2005), Paris (May 2005), Prague (September 2005) and Zürich (January 2006) and discussed at the Conference Working Session in Toronto (June 2006). A number of Committee members have made written comments or have sent documentation regarding the project. Also, scholars and practitioners have sent observations regarding the Interim Report. The Chairman and the Rapporteur wish to thank all those who have contributed to this project.
4. In conducting this project, the Committee has noted that there was both academic and practical interest and a need for analysis and recommendations regarding res judicata in international commercial arbitration.
5. The Recommendations do not intend to be comprehensive, but only to cover some aspects of res judicata in international commercial arbitration. The Committee believed that a compromise was to be struck between those aspects addressed by the Recommendations (where it considered that transnational rules could be developed) and other aspects (where it perceived that development of transnational rules was premature and reference to conflict rules was more appropriate)⁹³.
6. In this respect, the Committee considered that, pursuant to Recommendation 2, transnational rules can be developed regarding the following issues:
 - a more extensive notion of res judicata than is known in some civil law jurisdictions regarding claim preclusion, which not only covers the dispositive part of an arbitral award but also the underlying reasoning, as in Recommendation 4.1
 - a more extensive notion of res judicata than is known in civil law jurisdictions in relation to issue estoppel, as in Recommendation 4.2
 - the introduction of a standard of abuse of process and procedural unfairness, as in Recommendation 5
 - the procedural status of res judicata, as in Recommendations 6 and 7.
7. On the other hand, the Committee has refrained from formulating transnational rules in relation to the following issues:

⁹² Published in the Report of the Seventy-first Conference, International Law Association, 2004, 826-861 (available from the International Law Association) and in pdf format at www.ila-hq.org.

⁹³ Interim Report, p. 5 (page reference to the Report on the ILA website).

- the definition of arbitral awards which qualify for res judicata effects
 - res judicata effects of decisions of tribunals from different legal orders
 - res judicata effects on third parties in using a more lenient “identity of the parties” standard
 - res judicata effects if the requirement of mutuality was to be abolished as in the United States
 - an extension of issue estoppel benefiting third parties as in the United States by application of the doctrine of collateral estoppel.
8. The exclusion of those aspects identified in the preceding paragraph does not imply that further development may not be needed. It only implies that the Committee considered that it should not give guidance at this stage regarding any such development, because of the complexity of those issues and in order not to preempt any such development.
 9. The Recommendations concern the effect of an international commercial arbitral award upon further or subsequent arbitration proceedings between the same parties⁹⁴. Thus, they concern both distinct arbitration proceedings, where the effects of a prior arbitral award are raised in the subsequent arbitration, as well as the question as to res judicata effects within the same arbitration where a prior award has been rendered which is invoked at a later stage of the same proceedings (*e.g.*, bifurcation of the arbitration proceedings).
 10. These Recommendations are for the benefit of international commercial arbitrators faced with res judicata issues. They are not directly addressed to state courts faced with res judicata effects of arbitral awards in relation to jurisdiction, setting aside or enforcement questions⁹⁵, but they may constitute persuasive authority for domestic courts when considering res judicata effects of international commercial arbitral awards.
 11. However, international arbitrators may be faced with res judicata problems not only in relation to prior arbitral awards but also in relation to prior state court judgments, specifically regarding the existence of an arbitration agreement. Where a prior state judgment is invoked in arbitral proceedings, arbitrators may have to determine the res judicata effects of the prior judgment. Since the Recommendations do not deal with the relationship between state courts and arbitral tribunals, they will equally not apply to the question what the arbitral tribunal is to do when faced with a prior state judgment. Also in this respect, arbitrators may consider that they should not automatically apply the res judicata doctrine of the law governing the previous state judgment and/or of the arbitration seat, but to take the Recommendations into consideration.
 12. Although the Recommendations primarily follow a procedural approach to questions of res judicata, they are not intended to bar alternative perspectives, as for instance contractual characterizations such as interpretation of the agreement to arbitrate or waiver, as means to reach results similar to those embedded in the Recommendations⁹⁶.
 13. The Committee recognized that confidentiality of awards may have an impact on res judicata issues, but that this was less likely in further proceedings between the same parties.

⁹⁴ Interim Report, p. 3-4. Subsequent arbitration proceedings refer to different arbitration proceedings while further arbitration proceedings refer to both subsequent proceedings and arbitration proceedings which continue within the same arbitration proceedings in which the prior arbitral award was rendered (*e.g.*, after a partial final award).

⁹⁵ For a discussion, see Interim Report, p. 4-5.

⁹⁶ See Interim Report, p. 25.

14. Finally, this Report does not separately address the issues identified at the end of the Interim Report. The answers to those questions are incorporated in this Report and in the Recommendations.

RECOMMENDATION 1: AWARDS AND EFFECTS

15. In defining *res judicata* in international commercial arbitration, Recommendation 1 does not refer to domestic law nor does it use *res judicata* terminology. Both domestic law and *res judicata* notions differ significantly as between jurisdictions and, for that reason, Recommendation 1 uses the terminology of “conclusive and preclusive effects of arbitral awards” to encompass both the positive and negative effects of awards (positive and negative *res judicata*). Regarding the former, *res judicata* may be invoked by a claimant in further proceedings to develop his case (*i.e.*, to rely on previous findings). As to the latter, *res judicata* works as a defense to stop relitigation of subject-matter, which has been disposed of in a previous decision. The terminology of conclusive and preclusive effects of arbitral awards has the added advantage in that it covers the full scope of application of the doctrine of *res judicata* and similar concepts (see Recommendations 4 and 5: claim estoppel, former recovery, issue estoppel and abuse of process).
16. In this respect, *res judicata* is to be distinguished from⁹⁷:
- invoking previous arbitral awards rendered between different parties as persuasive precedent
 - correction of arbitral awards rendered between the same parties in order to have an error in an arbitral award corrected, which in many countries is covered by specific rules in the applicable arbitration law
 - interpretation of arbitral awards rendered between the same parties in order to obtain a clarification of the meaning and scope of such arbitral awards, which in many countries is covered by specific rules in the applicable arbitration law
 - supplementation of arbitral awards rendered between the same parties in order to obtain an additional award regarding claims formulated during the arbitration proceedings but not dealt with in the arbitral award (*infra petita*), which in many countries is covered by specific provisions in the applicable arbitration law
 - revision of arbitral awards rendered between the same parties on the basis of facts discovered after the rendering of the award that were unavailable at the time of rendering of the award and which the party invoking the facts was unaware of and could not reasonably be expected to have been aware of at the time the award was made, which in some countries is covered by specific provisions in the applicable arbitration law
 - remission of arbitral awards rendered between the same parties to the arbitral tribunal for reconsideration in order to avoid partial or complete setting aside, which in some countries is covered by specific provisions of the applicable arbitration law.
17. The Committee’s Recommendations apply only to international commercial arbitration. It is up to domestic courts to determine *res judicata* effects regarding domestic arbitrations. However, these Recommendations may also be useful in a domestic arbitration context and the Recommendations may inform arbitrators in domestic cases as well as domestic courts when seized of a *res judicata* question regarding a domestic award.
18. Because law and practice in different jurisdictions do not have uniform standards for the characterization of different forms of awards and procedural decisions and no

⁹⁷ See in relation to public international law, Bowett, D.W., *Res judicata and the limits of rectification of decisions by international tribunals*, *Afr.J.Int.Comp.L.*, 1996, 577-591.

international consensus has emerged or is likely to emerge in the near future regarding characterization of awards and procedural orders, the Recommendations refrain from defining such awards or procedural decisions and leave that to the *lex arbitri*. Thus, the law of the place of arbitration of the prior award by and large will govern the question whether determinations in the prior award, in view of the nature of the award, may qualify for conclusive and preclusive effects.

19. Notwithstanding the reservation in the preceding paragraph and in order to give some guidance, it may be added that the Recommendations are intended to apply to partial final awards, final awards (including awards on agreed terms⁹⁸) and awards on jurisdiction. Only these awards seem to qualify for conclusive and preclusive effects, because they contain final determinations. Contrary to § 13 Restatement Second Judgments, which gives *res judicata* effects to issues of fact and law contained in judgments that are not final, the Recommendations are not intended to cover any such preliminary or provisional determinations since this solution does not correspond to practice and perceptions in international commercial arbitration.
20. As to awards on jurisdiction⁹⁹ and subject to the applicable law, the Recommendations do not exclude giving such awards conclusive and preclusive effects¹⁰⁰. An award declining jurisdiction entails a decision that there is no agreement to arbitrate or that the dispute does not fall within the ambit of the arbitration agreement, and accordingly the general jurisdiction of domestic courts may revive. Positive rulings on jurisdiction in which an arbitral tribunal accepts jurisdiction, may also constitute *res judicata*. Of course, these rulings may be reviewed in setting aside proceedings, but that creates a question of validity and *res judicata* is predicated on the assumption that an award is valid. Either the setting aside court will confirm the arbitrators' decision on jurisdiction or the setting aside court will nullify the award and in that case there is no longer a valid award and no *res judicata* issue. The problem arises, then, primarily if domestic courts in countries in applying article II of the New York Convention deny arbitral jurisdiction and assume jurisdiction themselves. If a setting aside court accepts arbitral jurisdiction, there will be a situation of conflicting decisions on jurisdiction, but that does not imply that the award has no *res judicata* effect. Under those circumstances, *lis pendens* rules may not have been able to avoid conflicting decisions and a party may invoke *res judicata* of the arbitral decision on jurisdiction, which will be followed in the country of the place of arbitration and probably not in the country where the conflicting judgment denying arbitral jurisdiction was made. In third countries, there will be the question whether under article V, § 1 a) New York Convention the arbitral award on jurisdiction can be recognized (see under 3.1 of the Recommendations as to requirements for *res judicata*).
21. Furthermore, the Recommendations have not attempted to deal with any single situation which may arise. Situations such as awards declaring that the request for arbitration is withdrawn (with or without prejudice) or that the request was premature, will have to be dealt with on a case-by-case basis (compare Restatement Second Judgments § 20 where solutions to these problems are given) and have been left to further development. Similarly, the question whether the granting of a primary claim for relief bars the relitigation of an alternative claim is not resolved by the Recommendations, because it is primarily a question of interpretation of the prior award.
22. The Recommendations generally are not intended to be applicable to provisional awards, awards regarding interim measures or procedural decisions, and the characterization of

⁹⁸ See G.R. Shell, *Res judicata and collateral estoppel effects of commercial arbitration*, 35 UCLA L.Rev. 659 (1988) emphasizing the limited issue estoppel effects of consent awards as well as of default awards (at p. 648) and unreasoned awards (at p. 660). Similar observations may apply regarding awards based on "amiable composition" (compare Shell at p. 659).

⁹⁹ In some jurisdictions, an arbitral tribunal may give procedural orders that the arbitration may proceed on the basis that the tribunal has jurisdiction (subject to confirmation in an award on the merits) and these preliminary orders do not constitute *res judicata* in the sense that the tribunal may still dismiss the case for want of jurisdiction, for instance on the basis of new evidence.

¹⁰⁰ For a discussion, see Interim Report, pp. 7 and 18.

these awards and decisions is to be governed by the law of the seat of the prior arbitration.

RECOMMENDATION 2: TRANSNATIONAL APPROACH

23. Some aspects of res judicata as set forth in the Recommendations are to be characterized autonomously and are to be governed by transnational substantive or procedural rules and not by domestic or transnational conflict rules.
24. The Interim Report had indicated that there were important differences between the various legal systems regarding res judicata effects of judgments and arbitral awards. Thus, the Committee was faced with the question whether and to what extent those differences were acceptable in arbitration and were to be coordinated by appropriate conflict rules or whether and to what extent uniform transnational rules should be developed to the benefit of international commercial arbitration.
25. Res judicata regarding international arbitral awards should not necessarily be equated to res judicata effects of judgments of state courts and, thus, may be treated differently than res judicata under domestic law. International arbitral awards in accordance with the Recommendations are to be treated differently than judgments. This is due to the differences between international commercial arbitration and domestic court dispute settlement, as well as to the international character of arbitration, which should not be reduced to domestic notions regarding res judicata that are valid in a domestic setting but are hardly appropriate in an international context¹⁰¹.
26. At its meeting in Auckland on October 26, 2004, the Committee opted for a mixed model under which transnational rules on certain aspects of res judicata would be adopted and remaining issues were to be referred to domestic law under an acceptable conflict rule.
27. In reaching this conclusion, the Committee took into consideration the following arguments. First, a conflict of laws approach raises difficult characterization issues as to the substantive or procedural nature of conclusive and preclusive effects. Second, a conflict of laws perspective implies a difficult choice between three different legal systems: the law of the place of arbitration of the proceedings leading to the prior award; the law of the place of arbitration of the proceedings where res judicata is invoked; and the law governing the contract¹⁰². Third, the Committee believed that, for some aspects of res judicata, a uniform approach was feasible, which would by-pass the difficult conflict of laws issues mentioned above and would also generally provide more satisfactory answers assuring procedural efficiency and finality than answers provided by domestic law.
28. The mixed model can be found in the Committee's Recommendations. Recommendations 3 thru 7 contain the transnational rules, which in the opinion of the Committee may be appropriate and beneficial in international commercial arbitration. Aspects other than those covered by the Recommendations are to be governed by domestic law referred to by a conflict rule but, in view of the complexity of the issue, no specific recommendation is made regarding the characterization of res judicata and the choice as between the three competing conflict rules mentioned above.

¹⁰¹ This departs from § 84 (1) Restatement Second Judgments stating that awards should have the same legal effects as judgments. First, the Restatement has not addressed international commercial arbitration and has been written primarily from a US domestic perspective. Further, the Restatement from a comparative law perspective contains the most extensive approach to res judicata. This implies, on the one hand, that the US model is interesting for these Recommendations, but, on the other hand, that a proposition that awards are to be equated to judgments may be arguable for a liberal set of rules regarding effects of judgments but are not necessarily suitable on a worldwide level where more restrictive notions of res judicata exist.

¹⁰² See Hascher, D., *L'autorité de la chose jugée des sentences arbitrales*, Trav. Com. fr. dr. int. privé, 2000-2002, Paris, Pedone, 2004, 18-21.

RECOMMENDATION 3: REQUIREMENTS FOR CONCLUSIVE AND PRECLUSIVE EFFECTS

29. The Committee identified five traditional conditions for arbitral awards to have conclusive and preclusive effects:
- The prior award must be final and binding and capable of recognition in the country where the arbitral tribunal of the subsequent arbitration proceedings has its seat
 - The arbitration proceedings in which the res judicata issue is raised, must pertain to the same legal order as the prior award
 - Identity of the subject matter
 - Identity of the cause of action
 - Identity of the parties

These conditions are generally thought to be cumulative.

30. As the discussion below will show, the Committee decided to retain four of the five conditions above, but not the requirement as to the “same legal order”.
31. The conditions above are not exhaustive. For instance, the Recommendations do not deal with the moment at which arbitral awards constitute res judicata¹⁰³. Although arbitral awards may constitute res judicata between the parties as of the time the award is rendered, sent to or received by the parties or at such time as means of recourse can no longer be instituted against the award (depending on the applicable law), the Recommendations proceed on the basis that the award can no longer be challenged before domestic courts at the place of arbitration. This implies that the Recommendations apply as of such time as arbitral awards have become final and binding at the place of arbitration (i.e., that no challenge can be brought against any such awards or that a challenge has been denied by a final decision of a domestic court at the place of arbitration).
32. Recommendation 3.1, thus, proceeds on the basis that arbitral awards are valid and have conclusive and preclusive effects in accordance with the lex arbitri of the prior arbitral award.
33. In international cases, the prior award will also need to be recognized at the place of arbitration of the further arbitration proceedings, if different from the place of arbitration of the prior award. Recommendation 3.1, thus, also proceeds on the basis that the prior award can be recognized abroad and will have res judicata effects until such effects are suspended in recognition proceedings. In this regard, Recommendation 3.1 intends to provide a link with the New York Convention which proceeds on the assumption of a single legal system determining the validity of arbitral awards (i.e., at the place of arbitration) and provides in article V, § 1 (e) for a coordination mechanism regarding recognition of arbitral awards which are subject of setting aside proceedings¹⁰⁴. Recommendation 3.1 suggests following the global standard of the New York Convention, which implies that those validity questions will not come into play if no challenge has been brought or when challenge proceedings have finally been dismissed at

¹⁰³ See Interim Report, p. 6.

¹⁰⁴ Other grounds for refusal of recognition may, of course, be available under Article V of the New York Convention. Also, recognition may be based on the more favourable treatment provision of the New York Convention as well as on other international conventions or domestic recognition rules. In the context of the recognition of the prior award in the subsequent arbitration proceedings, the second arbitral tribunal may, for instance, have to determine whether there was an arbitration agreement regarding the proceedings leading to the prior award, whether due process was observed, whether the subject matter was capable of settlement by means of arbitration or whether there was a violation of public policy.

the place of arbitration. On the other hand, a prior award which is set aside at the place of arbitration by a final judgment, will no longer be valid, not be capable of recognition and, thus, no longer produce conclusive and preclusive effects¹⁰⁵.

34. The second requirement (“same legal order”) recognizes that arbitral awards rendered between States, which are deemed awards of a public international law character, do not have *res judicata* effects in international commercial arbitration and vice versa¹⁰⁶. Generally, this requirement does not create problems in practice because this situation does not occur frequently.
35. The requirement is, however, more relevant in the context of the relationship between state courts and international commercial arbitral tribunals which – the Committee submits – both belong to the same legal order since both are dealing with a relationship between the parties which is governed by private law (and not by public international law). Since the Committee has refrained from expressing recommendations to state courts or to arbitral tribunals faced with a prior state court judgment, this requirement needs no further discussion. However, to the extent that state courts or arbitral tribunals may infer indirect support from these Recommendations (see above), the requirement of the same legal order is to be interpreted as expressing the view that state courts and arbitral tribunals pertain to the same legal order and that this requirement is met.
36. The preceding paragraphs express traditional views which have recently been challenged by the rise of investment arbitrations where foreign investors under Bilateral Investment Treaties (“BITs”) have a direct cause of action against States for violation of investment protection by the State giving rise to State responsibility. This has created novel issues regarding conclusive and preclusive effects of arbitral awards. The many BITs and the wide scope of application regarding the notion of “investor” have created possibilities for treaty shopping and parallel arbitrations, which may raise *res judicata* issues. These issues include the application of the identity of the causes of action and identity of the parties (as in the *Lauder/CME/Czech Republic* arbitrations)¹⁰⁷. The Recommendations do not address these issues, because they pertain more to public international law than to international commercial arbitration or at least to the hybrid legal order of BIT arbitrations¹⁰⁸. However, the Recommendations may still have some indirect relevance for BIT arbitrations.
37. The Recommendations also do not directly envisage parallel arbitrations between a BIT arbitration and a commercial arbitration. To the extent different parties are involved, there would not be *res judicata* under Recommendation 3.4, but the Recommendations do not exclude further development and refinement regarding these issues.
38. To the extent that a State is also the counterpart to the contractual relationship, there would not be a Recommendation 3.4 problem. However, parallel BIT and commercial arbitrations would still face the traditional same legal order requirement (as well as the same cause of action requirement).
39. Similarly, there may be an impact of European Union law, which may also create a same legal order impediment to *res judicata*.
40. In order not to prejudge further developments on the subjects above, the Committee decided not to include the same legal order as a requirement in its Recommendations. That decision was also inspired by the complexity of the issues raised as well as the Committee’s impression that a process of permeation and interaction between different legal orders is only beginning and may result in the legal community no longer viewing private law and public law as operating in separate legal orders.

¹⁰⁵ But see footnote 13 for exceptions.

¹⁰⁶ Interim Report, p. 21.

¹⁰⁷ See Interim Report, pp. 21-24.

¹⁰⁸ The Committee understands that the ILC Committee on Law of Foreign Investment is studying *res judicata* of BIT awards.

41. The Recommendations maintain the traditional triple identity test (identity of the claims, of the causes of action and of the parties).
42. For an arbitral award to have conclusive and preclusive effects, the same claim or relief must be sought in the further arbitration proceedings. Conversely, new claims and new prayers for relief in principle will not be barred by a prior award. Recommendation 3.2 expresses a principle that is accepted both in the civil and common law and does not seem to be controversial. However, under Recommendation 5, a party may still be barred from litigating new claims and relief if any such litigation constitutes procedural unfairness or abuse.
43. For an arbitral award to have conclusive and preclusive effects, the claims or relief sought in further arbitration proceedings must be based on the same cause of action¹⁰⁹ as in the prior arbitration proceedings (Recommendation 3.3). Conversely, a claim or relief based on a different cause of action is not barred by *res judicata*. This rule is also uncontroversial both in civil and common law jurisdictions. Again, Recommendation 3.3 is subject to the procedural unfairness or abuse defense of Recommendation 5.
44. For an arbitral award to have conclusive and preclusive effects in further arbitration proceedings, it must have been rendered between the same parties as the parties in the further arbitration proceedings (Recommendation 3.4). This principle is by and large also generally accepted. Conversely, if there are different parties in the further arbitration proceedings, the prior award will not have conclusive and preclusive effects on a different party.
45. The Recommendations refrain from formulating new rules in relation to the requirement of the identity of the parties.
46. First, they do not formulate a requirement as to mutuality (*i.e.*, that the parties are only identical if they act in the same capacity in the prior and further arbitration proceedings). Although many jurisdictions, except for the United States, require mutuality¹¹⁰, this requirement has not been included expressly in order not to block further developments if so required.
47. Second, the Recommendations also refrain from formulating definitions as to the notion of parties. They do not seek to make any comment on the common law concept of “privies”, save to note that this concept is applied far less often than civil lawyers fear. In addition, there are too many different situations in relation to the question whether a party, by virtue of assignment, succession, close relationship or otherwise, is bound to obligations of a predecessor that these issues are left to the applicable law. Moreover, different jurisdictions have sometimes very different rules regarding succession of title that it is best that these aspects are left to the applicable law.
48. The Committee notes that, in practice, important and delicate problems arise in relation to the identity of the parties, particularly in relation to groups of companies and BIT arbitrations. These issues are, however, too complex to deal with in a report which is focused on *res judicata*. On the other hand, Recommendation 3.4 is not intended to preempt further development and refinement.
49. In relation to the issue discussed in the previous paragraph, the Committee has considered § 39 Restatement Second Judgments, which provides that a person not a party to an action but controlling or substantially participating in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party. However, the Committee assessed that international acceptance of any such recommendation would be weak and, thus, to be omitted. Moreover, different countries

¹⁰⁹ Cause of action may be construed broadly as all facts and circumstances arising from a single event and relying on the same evidence which are necessary to give rise to a right to relief (see Interim Report, p. 7-8).

¹¹⁰ Interim Report, p. 9-10 and 13.

have different methods and theories for identification of third parties to a legal action, which do not necessarily have the same requirements and do not lead to the same conclusion (*e.g.*, alter ego, agency, protection of legitimate expectations). Furthermore, the most important application of identification questions is in the field of piercing the veil of corporations and raises fundamental issues of international corporate law regarding limited liability of subsidiaries in multinational corporate groups, which – the Committee believed – could not be treated within the scope of the *res judicata* project and deserved better and more elaborate treatment elsewhere.

50. Finally, the application of the identity of parties test in recent BIT arbitrations also warrants extensive treatment, but exceeded the scope of the Committee's project on *res judicata*. All this does not, however, exclude that further legal developments can take place in relation to the identity of the parties test, but guidance regarding these developments will not be found in the Recommendations.

RECOMMENDATION 4: SCOPE OF CONCLUSIVE AND PRECLUSIVE EFFECTS

51. Recommendation 4 deals with claim estoppel, former recovery and issue estoppel.
52. As to the first, they endorse a more extensive notion of *res judicata*, which is also followed in public international law¹¹¹, under which *res judicata* not only is to be read from the dispositive part of an award but also from its underlying reasoning¹¹². More restrictive notions of the scope of *res judicata*, limiting conclusive and preclusive effects to the dispositive part of awards, have not been followed in the Recommendations, because the Committee considered the latter notion to be overly formalistic and literal. If it is clear from an arbitral tribunal's reasoning that the dispositive part is to be interpreted in a way to bar further or subsequent arbitration proceedings, claim preclusion ought to follow for the sake of arbitral efficiency and finality. Claims estopped on the basis of the same cause of action by virtue of the *res judicata* effects of both the dispositive part of the award as well as its underlying reasoning prevent that some evidence or legal argument regarding that cause of action being reargued.
53. Rules on claim estoppel apply not only to claims but also to counterclaims. The Recommendations do not expressly reflect this because it seems evident that, since counterclaims are also claims, claim estoppel also applies to them. This rule has also been adopted by § 23 of the Restatement Second Judgments.
54. The Recommendations also endorse claim estoppel if it relates to former recovery. Further relief than the one formerly recovered or obtained cannot be claimed if it is based on the same cause of action.
55. The Recommendations have not taken a position regarding claim preclusion in relation to claims related to the same transaction or connected transactions. In the United States, such claim preclusion is accepted, but the Committee considered that it could not yet recommend that it be extended to other jurisdictions. In this respect, § 24 (2) Restatement Second Judgments formulates an open-ended standard under which transactions and series of connected transactions are to be determined pragmatically, giving weight to such considerations as whether the facts constituting a transaction or series of connected transactions are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. The fact that the Recommendations have not adopted a test similar to § 24 (2) Restatement Second Judgments does not, however, imply that the Committee rejected any such standard, but only that the Committee considered it premature to adopt it as a transnational principle in international arbitration.

¹¹¹ Interim Report, p. 24.

¹¹² However, it will not extend to subsidiary and collateral matters of fact or law and to *obiter dicta* (see Interim Report, p. 8).

56. Furthermore, Recommendation 4.2 endorses common law concepts of issue estoppel¹¹³, which for reasons of procedural efficiency and finality, seem to be acceptable on a worldwide basis, notwithstanding the fact that they are yet unknown in civil law jurisdictions¹¹⁴. To accept issue preclusion, it is required that a particular issue of fact or law has actually been arbitrated and determined by the award and that the determination of the issue was essential or fundamental to the arbitral award. Conversely, if an issue was not the subject of debate between the parties, determined in the prior award or incidental in the arbitral tribunal's determination, it would not be a bar to further or subsequent arbitration proceedings in relation to that issue.
57. Issue estoppel, under the conditions above, not only applies regarding the same claim but also regarding different claims in further arbitral proceedings.
58. The Committee acknowledges that issue estoppel may be subject to certain exceptions as indicated in § 28 Restatement Second Judgments (*e.g.*, unrelated claims in both proceedings, changes in the law, different burden of proof regarding different claims, fairness in the proceedings), but has chosen not to take a position as to possible exceptions.
59. However, similar to the requirement of mutuality and the identity of the parties test, the Committee was reluctant to follow United States law in relation to extending issue estoppel to third parties (collateral estoppel) (see § 29 Restatement Second Judgments), by which a third party in subsequent proceedings may invoke issue preclusion for its benefit against a party to prior proceedings¹¹⁵. The Committee considered that there was insufficient worldwide support for any such extension and that third party effects of issue estoppel at this stage is to be left to further legal development.

RECOMMENDATION 5: PROCEDURAL UNFAIRNESS

60. The Recommendations have also chosen a cautious approach to procedural unfairness or abuse¹¹⁶. In arbitration, party autonomy to a large extent reigns and parties and their counsel should be given wide discretion in determining their strategies. Costs, psychological influences, relational elements, cross-cultural considerations, persuasiveness, political constraints and other aspects may be responsible for not instituting certain claims or for not raising certain causes of action or issues of fact or law, and caution is in order to avoid *res judicata* amounting to a patronizing review of what parties and counsel ought to have done in managing their case.
61. On the other hand, policy objectives of efficiency and finality can also be taken into account to protect respondents from being exposed to further arbitration if a claimant fails

¹¹³ Interim Report, pp. 8 and 12-13. These Recommendations follow the approach of R.W. Hulbert (*Arbitral procedure and the preclusive effect of awards in international commercial arbitration*, 7 *Int. Tax & Bus. Law*, 155 ff. (1989)) advocating that arbitration is not to be treated differently from domestic judgments in terms of issue estoppel. In doing so, the contractual model of Shell (*Res judicata and collateral estoppel effects of commercial arbitration*, 35 *UCLA L.Rev.* 623 ff. (1988)) and the exclusion model of G. Sanders (*Rethinking arbitral preclusion*, 24 *L. & Pol. Int. Bus.* 101-121 (1992)) are rejected. Shell's model has been considered as being too conjectural as to the parties' intent regarding issue estoppel and Sanders' theory as being contrary to finality of arbitration.

¹¹⁴ A decision of the Swedish Supreme Court indicates that broader concepts regarding preclusive effects of arbitral awards are also acceptable in a civilian context. In that case, it was accepted that dismissal of a set-off defense did not entitle a party to file fresh arbitration proceedings to have its case retried again. Under traditional civil law notions of *res judicata*, a dismissal of a set-off defense would only constitute *res judicata* as to the amount of the alleged set-off, but would not prevent having new proceedings to the extent that a claim exceeds the amount invoked for set-off purposes. The Swedish Supreme Court went further and accepted that the claim filed in a second arbitration to the extent it exceeded the amount of the set-off claimed in the prior arbitration was also covered by *res judicata* and, thus, accepted in this specific context an application of issue estoppel. For a more extensive discussion of this case, see Söderlund, C., *Lis pendens, res judicata and the issue of parallel judicial proceedings*, 22 *J.Int.Arb.*, 2005, 317-318.

¹¹⁵ Interim Report, p. 12.

¹¹⁶ For a description, see Interim Report, pp. 8-9, 13, 24 and 27.

to raise claims, causes of action or issues of fact or law in prior proceedings¹¹⁷. Also, there is a legitimate public interest in having an end to arbitration as well as an end to the supportive and corrective powers of domestic courts supervising and reviewing the arbitral process and assisting at the recognition and enforcement stage.

62. The doctrines of procedural fairness and abuse, in the view of the Committee, provide an acceptable compromise regarding the private and public interests at stake. The open-textured nature of these doctrines give arbitral tribunals wide powers to assess, on the basis of the specific circumstances of the case, whether there is procedural unfairness and/or abuse. Finally, the compromise between a claimant's right to have access to justice and a respondent's right to have a fair trial in conformity with constitutional and human rights standards (as under Article 6 of the European Convention on Human Rights) also seems to be acceptable if arbitral tribunals exercise their powers with wisdom and restraint.
63. Procedural unfairness and abuse equally apply to counterclaims, for instance if the relationship between the counterclaim and the claim is such that successful prosecution of the second action would nullify the initial arbitral award or would impair rights established in the initial action (see the wording of § 22 Restatement Second Judgments). If, however, there are acceptable reasons for late filing of counterclaims, which can no longer be filed in the first proceedings (as was the case with the preclusion of filing new claims after signing of the Terms of Reference under the 1988 ICC Arbitration Rules), a second arbitration may have to be instituted to deal with the counterclaim. The first proceedings would, then, not constitute *res judicata* as to the second proceedings.
64. The limited acceptance of procedural unfairness or abuse regarding *res judicata* does not imply that the Committee endorses a general theory of procedural unfairness or abuse in international commercial arbitration. The broader ramifications of any such theory need further research including its characterization (contractual and/or procedural) and its scope of application which exceeds the ambit of the *res judicata* project.
65. Finally, the Committee accepts that there ought to be exceptions to conclusive and preclusive effects of arbitral awards, for instance if the award was procured by fraud. Other exceptions may be left to the *lex arbitri* (e.g., revision of awards by means of recourse such as the *requête civile* or *tierce opposition* under which in certain circumstances discovery of new documents may provide a way to reopen a case¹¹⁸ or where a third party who is affected by an award may be entitled to reopen a case) or the *lex causae* which provide the background under which the parties have had their dispute arbitrated.

RECOMMENDATIONS 6 AND 7: PROCEDURAL STATUS OF CONCLUSIVE AND PRECLUSIVE EFFECTS

66. The Recommendations suggest that a distinction is to be made between the conclusive and preclusive effects of arbitral awards in relation to their characterization. Their conclusive effects pertain much more to the substance of the dispute on which a successful claimant may build further arbitral proceedings. Thus, it is recommended that a claimant can invoke the conclusive effects of an award in further arbitral proceedings as long as

¹¹⁷ This situation is to be distinguished from late filing of new claims and late submission of amendments to causes of actions and issues, if the arbitral tribunal were to bar these amendments from being litigated. In exercising their powers, tribunals in further or subsequent proceedings will have to balance claimant's due process rights against respondent's right not to have this relitigated for reasons of procedural unfairness or abuse.

¹¹⁸ In this respect, reference can be made to established practice in the WIPO Domain Name Administrative Panel Decisions which, under common law precedents, accept relitigation of a dispute in cases of serious misconduct, perjured evidence, discovery of credible and material evidence which could not have reasonably foreseen or known at trial and breach of natural justice or due process (see Case No. D2001-1041, *Jones Apparel Group Inc. v. Jones Apparel Group.com* at www.wipo.int which discusses previous cases).

this is permissible under the rules applicable to the arbitration (arbitration rules, applicable law at the seat).

67. The preclusive effects on the other hand pertain more to procedure and, thus should be raised as soon as possible after a party has become aware of or should have been aware of the prior award¹¹⁹. Since preclusion is a bar to arbitration, efficiency dictates that this is raised as soon as possible.
68. In this respect, the Committee does not express an opinion as to the question whether preclusive effects of a prior arbitral award go to jurisdiction or to admissibility¹²⁰. Jurisdictions give different answers to this question and the Committee prefers to leave this question to the applicable law. On the other hand, the question is to a large extent moot since under both characterizations a preclusion defense is to be raised early in proceedings.
69. The Committee does not believe that conclusive or preclusive effects of arbitral awards pertain to public policy¹²¹. These effects primarily relate to the parties' interests in having final, fair and efficient arbitral proceedings. Public interest is limited to the costs and time related to the supportive and reviewing powers of domestic courts. Furthermore, as a consensual and private process, arbitration does seem to be distinguishable from court proceedings, where some jurisdictions consider that *res judicata* belongs to public policy.
70. The conclusion of the preceding paragraph implies that conclusive and preclusive effects of arbitral awards are not to be invoked by arbitrators on their own motion and that their application is to be left to the initiative of the parties¹²². Also, the parties may waive the application of conclusive and preclusive effects of arbitral awards.
71. The Recommendations do not deal with review by domestic courts of the second award in the context of setting aside or enforcement proceedings in circumstances where the second award is said to have violated the preclusive effects of the first award. However, the fact that Recommendation 7 is based on the principle that *res judicata* does not pertain to public policy¹²³ and can be waived by a party, the Recommendations implicitly call for restraint by setting aside and enforcement courts. To the extent that waiver is accepted, the issue would not arise. If a party raises *res judicata* in the further arbitration, but is overruled by the arbitral tribunal, it will be up to the reviewing domestic court to assess whether this amounts to one of the grounds for setting aside or for refusal of enforcement under the rules applicable in that court¹²⁴.
72. Finally, the Committee does not see reasons for having specific recommendations regarding matters of evidence regarding conclusive and preclusive effects of arbitral awards and, thus, recommends that general discretion given to arbitral tribunals concerning evidence.

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Chairman

Audley Sheppard
Rapporteur

¹¹⁹ Given the identity of party requirement, it is likely that in most cases, a party will know of or been expected to know of the prior award.

¹²⁰ Interim Report, p. 28.

¹²¹ See Interim Report, p. 16.

¹²² See Interim Report, p. 16 and Söderlund, C., l.c., 304.

¹²³ The European Court of Human Rights has held that *res judicata* is a fundamental principle in a democratic society and that disrespect by States may violate Article 6 of the European Convention on Human Rights guaranteeing fair trial (see for instance ECHR, January 12, 2006, *Kehaya and others v. Bulgaria* available at www.echr.coe.int/echr). However, the Court's case law relates to court judgments and it may be doubted whether and to what extent this applies to a consensual process such as arbitration.

¹²⁴ See Hascher, D., l.c., 28-32 for an analysis under French law.

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