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Issues of Lis Pendens and kompetenz-kompetenz in international.....

**KYM THOMAS**

**ISSUES OF *LIS PENDENS* AND *KOMPETENZ-KOMPETENZ* IN INTERNATIONAL COMMERCIAL ARBITRATION**

**LLM RESEARCH PAPER**

**INTERNATIONAL ARBITRATION (LAWS 521)**

**FACULTY OF LAW**

**VICTORIA UNIVERSITY OF WELLINGTON**

**2009**

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## ABSTRACT

This paper analyses the issues of parallel proceedings within the realm of international commercial arbitration and evaluates proposals that seek to establish a level of uniformity as between two national courts, between a court and a tribunal and between two tribunals. It commences with a brief overview of the European Court of Justice decision in *Allianz Spa and Others v West Tankers Inc (The "Front Comor")* [2008] 2 Lloyd's Rep. 661 as a basis for a discussion on the topics of *lis pendens*, *kompetenz-kompetenz*, and anti-suit injunctions. The paper seeks to identify the appropriate judicial response to parallel proceedings within the field of international commercial arbitration. Within that context it also asks whether anti-suit injunctions should legitimately be part of that judicial response. The paper concludes that anti-suit injunctions (whether issued by a court or a tribunal) should only be used in exceptional cases. For example, an injunction would be appropriate when the arbitral proceedings are well advanced and a party instigates fraudulent parallel proceedings as a tactic to disrupt the current arbitration proceedings. In all other cases, and particularly when the validity of the agreement is in question, anti-suit injunctions should be avoided.

### *Word Length:*

The text of this paper (excluding abstract, footnotes, and bibliography) comprises approximately 13,000 words.

International Commercial Arbitration – Lis Pendens – Anti-suit Injunctions



## I. INTRODUCTION

An arbitration agreement between two parties will not be effective if one party seeks to invoke it but the other party attempts to ignore it and pursues proceedings in the most favourable court. Therefore, international commercial arbitration can only work if the courts in the relevant jurisdictions can be counted on to refuse, for substantially similar reasons, to exercise jurisdiction when parties have agreed to arbitrate, and that agreement is valid.<sup>1</sup> Efforts to defeat arbitration commitments at the beginning or during the process seek to exploit the differences in national legal systems in the relevant jurisdictions. The optimum management of the international arbitration system therefore requires closely approximate, if not uniform, judicial responses regarding commitments to arbitration and proceedings in support of arbitration.<sup>2</sup>

This paper analyses the issues of parallel proceedings within the realm of international commercial arbitration and evaluates proposals that seek to establish a level of uniformity as between two national courts, between a court and a tribunal and between two tribunals. It commences with a brief overview of the European Court of Justice decision in *Allianz Spa and Others v West Tankers Inc (The "Front Comor")*<sup>3</sup> (hereinafter referred to as "*West Tankers*") as a basis for a discussion on the topics of *lis pendens*, *kompetenz-kompetenz*, and anti-suit injunctions. The paper seeks to identify the appropriate judicial response to parallel proceedings within the field of international commercial arbitration. Within that context it also asks whether anti-suit injunctions should legitimately be part of that judicial response, a topic that has been hotly debated by academics and practitioners over recent years<sup>4</sup>.

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<sup>1</sup> Emmanuel Gaillard and Domenico Di Pietro *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron, London, 2008), 1.

<sup>2</sup> *Ibid.*, 2.

<sup>3</sup> [2008] 2 Lloyd's Rep. 661.

<sup>4</sup> For example see generally Hakeem Seriki "Anti-Suit Injunctions and Arbitration: A Final Nail in the Coffin?" (2006) 23 (1) *J Int Arbitrat* 25-38; Emmanuel Gaillard "Reflections on the use of anti-suit injunctions in International Arbitration" in Loukas Mistelis and Julian Lew *Pervasive Problems in International Arbitration* (2006, Kluwer Law International, Netherlands), 201-214; and Emmanuel Gaillard "Anti-suit Injunctions Issued by Arbitrators" (2006) International Council for Commercial Arbitration at: ICCA [www.arbitration-icca.org](http://www.arbitration-icca.org) (accessed 2 July 2009).



This paper is comprised of the following parts:

- II. West Tankers
- III. Proposed reforms to Council Regulation (EC) 44/2001
- IV. Issues of *lis pendens* and *kompetenz-kompetenz* in international arbitration
- V. Anti-suit injunctions in international arbitration
- VI. Conclusions
- VII. Bibliography

## II. WEST TANKERS

### A. *Factual Background*

The vessel *Front Comor* was chartered by Erg Petroli Spa (hereinafter referred to as “Erg”) under a charter agreement containing an arbitration clause for arbitration in London.

In August 2000 *Front Comor* collided with Erg’s oil jetty in Syracuse, Sicily, and Erg’s insurers paid Erg a sum in excess of 15.5 million Euros. Erg claimed damages against West Tankers (*Front Comor*’s owners) for the uninsured losses in arbitration proceedings in London. The insurers then brought court proceedings against West Tankers in Syracuse claiming the amount paid to Erg.<sup>5</sup> In doing so the insurers were relying on their rights of subrogation under the Italian Civil Code.<sup>6</sup>

West Tankers then commenced proceedings in the English Commercial Court claiming declarations that the dispute subject to proceedings in Syracuse was subject to the arbitration clause in the charter party and therefore insurers were bound to arbitrate the dispute in London. The ship owners also sought an anti-suit

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<sup>5</sup> *Allianz Spa and Others v West Tankers Inc* (The “Front Comor”), above n3, 661.

<sup>6</sup> *Ibid.*



injunction against the insurers preventing them from continuing with the proceedings in Syracuse.<sup>7</sup>

The English courts held that English courts remained empowered to grant anti-suit injunctions in support of an arbitration agreement, but referred the question of whether the power was compatible with Council Regulation (EC) No 44/2001<sup>8</sup> (hereinafter called "the Regulation") to the European Court of Justice (ECJ).<sup>9</sup>

The Regulation lays down uniform rules to settle conflicts on jurisdiction and facilitate the free circulation of judgments, court settlements and authentic instruments of the European Union.<sup>10</sup> Its aims are to:

- (1) simplify formalities;
- (2) achieve rapid and simple recognition and enforcement of judgments in Member States; and
- (3) promote cooperation and mutual trust in civil matters.<sup>11</sup>

The Regulation adopts a strict application of *lis pendens*<sup>12</sup> whereby 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".<sup>13</sup> The Regulation

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<sup>7</sup> *Allianz Spa and Others v West Tankers Inc* (The "Front Comor"), above n3, 661

<sup>8</sup> Council Regulation (EC) 44/2001 Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2000] OJ L12/2.

<sup>9</sup> *Allianz Spa and Others v West Tankers Inc* (The "Front Comor"), above n3, 661.

<sup>10</sup> Commission of the European Communities "Report From the Commission to the European Parliament, The Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters" Brussels (21 April 2009) COM (2009) 174 final.

Available at: European Commission

[http://ec.europa.eu/civiljustice/news/docs/report\\_judgements\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/report_judgements_en.pdf) (accessed 31 August 2009), 2, 1.1.

<sup>11</sup> Council Regulation (EC) 44/2001 Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, above n8, see for example recitals 1-4.

<sup>12</sup> *Lis pendens* literally means 'law suit pending' and *lis alibi pendens* means 'law suit pending elsewhere': see Filip De Ly and Audley Sheppard "Final Report on Lis pendens and Arbitration" (Paper presented to the International Commercial Arbitration Committee of the International Law Association, Toronto Conference 2006), Available at: ILA [www.ila-hq.org](http://www.ila-hq.org) (accessed 13 May 2009), 2, fn 3. The term is now commonly used to denote the international principle aimed at preventing new proceedings on a matter if there is an existing case pending before a court or tribunal: see Norah Gallagher "Parallel Proceedings, Res Judicata and Lis Pendens: Problems and Possible Solutions" in Loukas Mistelis and Julian Lew *Pervasive Problems in International Arbitration* (2006, Kluwer Law International, Netherlands), 329-356, 338, para 17.17.

<sup>13</sup> Council Regulation (EC) 44/2001, above n8, art 27(1). See also Article 28 addressing related proceedings.



also excludes arbitration completely from its scope.<sup>14</sup> It is within this framework, that the English courts referred the matter to the ECJ for determination of the issue in *West Tankers*.

There are some specific facts of note when analysing the *West Tankers* decision. Firstly, Erg was both the charterer of the *Front Comor* and the jetty owner in Syracuse. Secondly, the insurers that filed proceedings in Syracuse were neither a party to the charter agreement concerned, nor the arbitration clause contained within as they were claiming the damages entitled to the jetty owner Erg.<sup>15</sup> These factual anomalies are discussed in some detail by Professor Campbell McLachlan who made the following observations on the matter:

If the jetty owner had been a third party [i.e. not Erg who was also the charterer], the arbitration agreement could have had no conceivable application to its claim for damage in tort.<sup>16</sup>

There were solid grounds for [the insurers] proceeding in Italy, since it was the location of the events giving rise to the tort claim.<sup>17</sup>

The Syracuse proceedings cannot therefore be criticized on the conventional ground that they were an 'Italian torpedo' designed to pre-empt a valid choice of forum by negative declaratory proceedings in a court which was unlikely to prorogate its jurisdiction on a speedy basis a la *Gasser v MISAT*.<sup>18, 19</sup>

*West Tankers*' has far reaching implications for European Community Law, despite its unique facts. The decision is highly topical and important because it touches on three of the cornerstones of international commercial arbitration: *Kompetenz-Kompetenz*, *lis pendens* and the use of anti-suit injunctions in support of arbitration proceedings. This paper will address each of these aspects in turn.

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<sup>14</sup> Council Regulation (EC) 44/2001, above n8, art 1 (2) (d).

<sup>15</sup> Campbell McLachlan *Lis Pendens in International Litigation* (Martinus Nijhoff Publishers, Leiden/Boston, 2009), 231 – 232.

<sup>16</sup> This was due to the charter-party's general exclusion of liability on the part of the vessel, master and owner for any defaults of the master or other servants of the owner in the navigation of the vessel. *Ibid*, 232.

<sup>17</sup> *Ibid*, 233.

<sup>18</sup> *Erich Gasser GmbH v MISAT Sri*, Case C-116/02 [2003] ECR I-14693.

<sup>19</sup> Campbell McLachlan *Lis Pendens in International Litigation*, above n15, 232 – 233.



## **B. Legal Issue**

The legal issue before the ECJ was whether anti-suit injunctions to give effect or support to arbitration agreements were compatible with the Regulation.

The question referred to the ECJ in *West Tankers* was based on the confusion about the effect of Article 1(2)(d) of the Regulation which specifically excludes arbitration from its scope.<sup>20</sup>

While the legal issue is quite narrow, wider discussion is possible based on some of the key arguments put forward by the English courts and statements made in response by the ECJ on the issue of anti-suit injunctions and parallel proceedings. In particular, this paper investigates the implications of the relationship between *lis pendens* and *Kompetenz-Kompetenz*<sup>21</sup> and further whether the decision precludes the arbitral tribunal from issuing an anti-suit injunction against a party if arbitral proceedings are already in progress.

## **C. The English Position**

The English position put forward in *West Tankers* can be summarised as:<sup>22</sup>

[W]here the parties have contractually agreed to settle disputes arising from a contract exclusively by arbitration, that legal relationship is completely removed from the outset from the national courts, apart from the courts at the arbitral seat.

This position is founded in a belief that only the arbitration tribunal or the national courts at the seat of arbitration have jurisdiction to determine the effectiveness and scope of the arbitration clause.

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<sup>20</sup> Council Regulation (EC) 44/2001, above n8, art 1(2)(d).

<sup>21</sup> The bedrock principle of *Kompetenz-Kompetenz* (or competence-competence) is that a court or tribunal has jurisdiction to rule on its own jurisdiction: Emanuel Gaillard "Reflections on the use of Anti-Suit Injunctions in International Arbitration", above n4, 212, para 10.21.

<sup>22</sup> *Allianz Spa and Others v West Tankers Inc* (The "Front Comor"), above n3, para 38.



With respect to the legal question before the ECJ, the English House of Lords argued that: “[a]s anti-suit injunctions support the conduct of arbitration proceedings ... proceedings seeking the issue of such injunctions are [therefore] covered by the exception in Article 1(2)(d) of Regulation No 44/2001”.<sup>23</sup>

The policy grounds put forward in support of these arguments were:<sup>24</sup>

[T]he practical reality of arbitration proceedings as a method of resolving commercial disputes required the English courts to be able to grant anti-suit injunctions in support of arbitration, that the principle of party autonomy had to be respected, and that London would be at a competitive disadvantage if English courts could no longer issue anti-suit injunctions.

#### *D. The ECJ Decision*

The ECJ did not accept the English arguments finding instead that the issue of anti-suit injunctions by a national court of a European Union Member State, even in support of arbitration proceedings or to uphold an arbitration agreement, was contrary to the principle of mutual trust upon which the Regulation is founded.<sup>25</sup>

On the legal issue the ECJ felt that the English courts were wrong in their approach to Article 1(2)(d), excluding arbitration from scope, stating:<sup>26</sup>

The decisive question in the present case was not whether the proceedings before the English courts for an anti-suit injunction fell within the scope of the Regulation, but whether the proceedings before the Syracuse court did so. It was not a prerequisite of infringement of the principle of mutual trust that both sets of proceedings had to fall within the scope of the Regulation.

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<sup>23</sup> *Allianz Spa and Others v West Tankers Inc* (The “Front Comor”), above n3, para 30.

<sup>24</sup> *Ibid*, para 8.

<sup>25</sup> *Ibid*, para 10: “Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters precludes a court of a Member State from making an order restraining a person from commencing or continuing proceedings before the courts of another Member State because, in the opinion of the court, such proceedings are in breach of an arbitration agreement”.

<sup>26</sup> *Ibid*, para 2.



Therefore, the English courts could not rely on the exception of arbitration to justify the issue of the anti-suit injunction in support of arbitration because the Syracuse proceedings (being proceedings in tort for damages) were within the scope of the Regulation. Even though the issue of the anti-suit injunction was aimed at the parties and not the Syracuse court, the ECJ still found that in reality it interfered with the inherent right of the Syracuse court to determine its own jurisdiction as the court first seised. For example:<sup>27</sup>

(5) The existence and applicability of the arbitration clause merely constituted a preliminary issue which the Syracuse court, as the court seised, had to address when examining whether it had jurisdiction. ...

(6) Every court was entitled to examine its own jurisdiction (*Kompetenz-Kompetenz*). The claim that there was a derogating agreement between the parties, eg an arbitration agreement, could not remove the entitlement from the court seised. That included the right to examine the validity and scope of the agreement put forward as a preliminary issue.

#### ***E. ECJ Discussion about Jurisdiction and Lis Pendens***

*West Tankers* establishes the legal position in Europe that national courts of a European Union Member State are precluded from resort to anti-suit injunctions. However, of specific interest is the extent to which *West Tankers* has sparked renewed debate on how to appropriately manage the interface between jurisdiction and arbitration in the European Community and the extent to which the outcome of this debate could supply a solution that could be applied more widely (i.e. beyond Europe).

All Member States of the European Community are parties to the New York Convention on the Regulation and Enforcement of Foreign Arbitral Awards<sup>28, 29</sup> The New York Convention lays down rules which must be respected not by the arbitrators, but by the courts of the contracting states. For example, the New York

<sup>27</sup> *Allianz Spa and Others v West Tankers Inc* (The "Front Comor"), above n3, paras 5 and 6.

<sup>28</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (7 June 1959) 330 UNTS 38 (hereinafter referred to as "New York Convention").

<sup>29</sup> *Allianz Spa and Others v West Tankers Inc* (The "Front Comor"), above n3, para 4.



Convention contains rules whereby contracting parties refer a dispute to arbitration. Article II (3) of the New York Convention states:<sup>30</sup>

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

Article II (3) allows the court seised to examine as a preliminary issue the existence and scope of the arbitration clause itself before referring the parties to arbitration.<sup>31</sup> In *West Tankers* the ECJ held that Article II (3) of the New York Convention establishes a three part test that must be satisfied before the obligation arises to refer the matter to arbitration:<sup>32</sup>

- the subject matter of the dispute is actually capable of settlement by arbitration. If that is not the case, under Article II (1) of the New York Convention the contracting state (and its courts) are not required to recognise the arbitration agreement;
- the court of a contracting state is seised of an action in a matter in respect of which the parties have made an agreement within the meaning of that Article;
- the court seised does not find that that agreement is null and void, inoperative or incapable of being performed.

Thus, the ECJ ruled that the correct approach to the issue of parallel proceedings should be as follows:

(1) the court seised of a matter must decide upon its jurisdiction – such determination may include a *prima facie* evaluation of the validity, scope and application of an arbitration agreement if a party to the dispute raises this as an issue for determination by the court (therefore it is up to the party seeking to uphold the arbitration agreement to bring it to the attention

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<sup>30</sup> New York Convention, above n28, art II (3).

<sup>31</sup> *Allianz Spa and Others v West Tankers Inc* (The “Front Comor”), above n3, para 55.

<sup>32</sup> *Ibid.*



of the court seised and refer that court to the appropriate Articles within the New York Convention on the recognition of such agreements<sup>33</sup>); and

(2) if a party to those proceedings commences proceedings on the same subject matter in another court, the second court seised should stay its proceedings until the first court has reached a conclusion as to its jurisdiction. Further, upholding the principle of 'mutual trust'<sup>34</sup>, the second court should recognise and enforce the first court's decision on this matter.

Applying this rationale to *West Tankers*, the court first seised in Syracuse, as a signatory to the New York Convention, would be required to apply the test set out in Article II (3) to determine prima facie whether the arbitration clause was valid and thus whether the dispute should be referred to arbitration. The English court as the court second seised would need to comply with its obligations of mutual trust and *lis pendens* under the Regulation<sup>35</sup> to stay its proceedings and allow the Syracuse court to make that determination without interference. This obligation on the English court existed because the claim before the Syracuse court fell within the scope the Regulation (it was a claim for damages in tort) and the subject matter of that claim was not arbitration.

*West Tankers* addressed the responsibilities of the member courts with respect to each other where the subject matter of proceedings falls within the Regulation, but does not address the issue of parallel proceedings between the court and arbitration tribunals, nor does it address the issue of parallel court proceedings where the subject matter of those proceedings is arbitration. As the situation currently stands, parallel proceedings where the subject matter is arbitration fall outside the Regulation's application.

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<sup>33</sup> This step is required to ensure that the party wishes to uphold the arbitration agreement is not deemed to have waived the right to arbitrate which will happen if that party does not timely raise the arbitral agreement as a defence in court proceedings, see UNCITRAL Model Law on International Commercial Arbitration (1985) 24 ILM 1302, art 8(2); see also Desiree Roskothen "Competition of Decisionmakers in International Commercial Arbitration" available at: Interleges [www.interleges.com](http://www.interleges.com) (accessed 15 July 2009).

<sup>34</sup> Council Regulation (EC) 44/2001, above n8, recitals 16 and 17 of the preamble.

<sup>35</sup> *Ibid*, arts 27 and 28.



### F. *Practical Implications of the West Tankers Decision*

While not addressing the issue directly, the ECJ noted that the blanket exclusion of arbitration from the Regulation opened the door for increased parallel proceedings between courts of Member States where the subject matter of those proceedings is arbitration.<sup>36</sup> For example, two separate courts of Member States may each reach divergent views on the validity of the arbitration agreement and those judgments would not be subject to the obligations of good faith or *lis pendens* because of Article 1(2)(d). In such circumstances one court may refer the parties to arbitration whereas the other may proceed with the case on the basis that it has jurisdiction by virtue of finding the arbitration agreement was not valid.

The approach described by the ECJ with respect to the New York Convention works where the arbitration agreement is clearly valid or invalid. Where this is not the case and the validity and scope of the agreement is in question, the possibility for divergent decisions and parallel proceedings becomes more likely.

The ECJ indicated that this problem would remain unless the Regulation was amended to specifically address issues arising between Member State courts relating to arbitration.

### III. PROPOSED REFORMS TO EC 44/2001

As discussed in the previous part of this paper, *West Tankers* clearly demonstrates gaps in the effectiveness of the Regulation due to the exclusion of arbitration in Article 1(2)(d). This part of paper investigates those issues in more detail referring to the General Study<sup>37</sup> on the application of the Regulation in Member States and the subsequent Green Paper produced by the Commission of the European Communities<sup>38</sup>. The study and related documents lead the way for possible

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<sup>36</sup> *Allianz Spa and Others v West Tankers Inc* (The "Front Comor"), above n3, paras 70 and 71.

<sup>37</sup> For more information on the General Study go to: European Commission at: <http://ec.europa.eu/>.

<sup>38</sup> Commission of the European Communities "Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters" Brussels (21 April 2009) COM(2009) 175 final. Available at: European Commission <http://ec.europa.eu/> (accessed 31 August 2009).



reforms of the Regulation that may address the problems that have been identified as issues in *West Tankers*. This part of the paper summarises the key findings of the study and the recommendations to illustrate what shape any possible reforms to the Regulation may take.

#### *A. General Study on the application of the Regulation*

In September 2007, Professors Burkhard Hess, Thomas Pfeiffer and Peter Schlosser published the Heidelberg Report on the Application of Regulation Brussels I in the Member States (hereinafter called “the Heidelberg Report”)<sup>39</sup>.

The Heidelberg Report documents the findings from a study on the application of the Regulation in European Union Member States.<sup>40</sup> The study was commissioned by the Commission of the European Communities and consisted of interviews, statistics and practical research in the files of national courts.<sup>41</sup> The study was commissioned in accordance with Article 73 of the Regulation that requires the Commission to evaluate the operation of the Regulation within five years after its entry into force.<sup>42</sup>

The Heidelberg Report is not binding on the Commission, which has since published the Green Paper<sup>43</sup> and a Report to the European Parliament, the Council and the European Economic and Social Committee on the application of the

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<sup>39</sup> Burkard Hess, Thomas Pfeiffer and Peter Schlosser “The Report on the Application of Regulation Brussels I in the Member States” (September 2007).

Available at European Commission:

[http://ec.europa.eu/justice\\_home/doc\\_centre/civil/studies/doc\\_civil\\_studies\\_en.htm](http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm) (accessed 31 August 2009).

<sup>40</sup> Ibid, Executive Summary, 1 at para 1.

<sup>41</sup> Ibid.

<sup>42</sup> Commission of the European Communities, Memorandum: Report and the Green Paper on the Review and Application of Regulation (EC) No 44/2001 on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters, Brussels, 21 April 2009, MEMO/09/169, 2, available at: European Commission <http://ec.europa.eu/> (accessed 31 August 2009).

<sup>43</sup> Commission of the European Communities “Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters”, above n38.



Regulation (hereinafter called "the Commission's Report")<sup>44</sup>. The Commission's Green Paper and Report serve as a basis for public consultation on the operation of the Regulation. The Report summarises the findings contained in the Heidelberg Report and the Green Paper provides suggestions on possible improvements that could be made.<sup>45</sup>

### **B. Heidelberg Report – Findings and Recommendations**

The Heidelberg Report recommends removing the exclusion of arbitration contained in Article 1(2)(d) of the Regulation. It also provides an analysis of the issues resulting from the exclusion (as were discussed in *West Tankers*). Additionally, it contains several other recommendations on how these issues could be resolved through reforms of the Regulation.<sup>46</sup>

The Heidelberg Report shows that the interface between the Regulation and arbitration raises the following difficulties:

- (1) parallel proceedings arise when the validity of the arbitration clause is upheld by the arbitral tribunal but not by the court;
- (2) procedural devices under national law aimed at strengthening the effectiveness of arbitration agreements (such as anti-suit injunctions) are incompatible with the Regulation if they unduly interfere with the determination by the courts of other Member States of their jurisdiction under the Regulation (as was demonstrated by *West Tankers*);
- (3) there is no uniform allocation of jurisdiction in proceedings ancillary to or supportive of arbitration proceedings;
- (4) the recognition and enforcement of judgments given by the courts in disregard of an arbitration clause is uncertain;

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<sup>44</sup> Commission of the European Communities "Report From the Commission to the European Parliament, The Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters", above n10.

<sup>45</sup> Commission of the European Communities, Memorandum: Report and the Green Paper on the Review and Application of Regulation (EC) No 44/2001 on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters, above n42, 2.

<sup>46</sup> Burkard Hess, Thomas Pfeiffer and Peter Schlosser "The Report on the Application of Regulation Brussels I in the Member States", above n39, paras 106 to 136.



- (5) the recognition and enforcement of judgments on the validity of an arbitration clause or setting aside an arbitral award is uncertain;
- (6) the recognition and enforcement of judgments merging an arbitration award is uncertain; and
- (7) the recognition and enforcement of arbitration awards, governed by the New York Convention, is considered less swift and efficient than the recognition and enforcement of judgments.<sup>47</sup>

With the exclusion of arbitration from the Regulation as it currently stands the Heidelberg Report shows how it is possible for multiplicity of proceedings:<sup>48</sup>

According to the pertinent case law these [foreign declaratory] judgments [on the validity of the arbitration clause] are not recognised under Articles 32 et seq. [of the Regulation] due to the exclusion of arbitration in Article 1 (2) (d) [of the Regulation]. Consequently, the arbitration clause may be considered as valid in one Member State and as void in another with the result of parallel proceedings and conflicting judgments. Equally a judgment declaring an arbitral award void or ineffective is not recognised in the other Member States.

This is consistent with the view of the ECJ in *West Tankers* where the Advocate General recognised that there could be parallel determinations, by the arbitral tribunal and by a national court in another European country, on the validity and scope of the arbitration agreement.<sup>49</sup> That could in turn lead to inconsistent decisions. The Advocate General noted that this was a problem with the Regulation and not with the use of anti-suit injunctions, and suggested that the problem could be resolved by bringing arbitration within its scheme.<sup>50</sup>

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<sup>47</sup> Commission of the European Communities "Report From the Commission to the European Parliament, The Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters", above n10, 9, 3.7.

<sup>48</sup> Burkard Hess, Thomas Pfeiffer and Peter Schlosser "The Report on the Application of Regulation Brussels 1 in the Member States" above n39, para 120.

<sup>49</sup> *Allianz Spa and Others v West Tankers Inc* (The "Front Comor"), above n3, paras 70 – 72.

<sup>50</sup> *Ibid.*



The Heidelberg Report also reaches this conclusion stating:<sup>51</sup>

[T]he present situation is not satisfactory and the interfaces between the Judgment Regulation and arbitration should be addressed in a more sophisticated way than by the all-embracing exclusion of arbitration in Article 1(2)(d) JR.

The Heidelberg Report recommends four distinct changes to the Regulation as follows:

- (1) deletion of Article 1(2)(d);<sup>52</sup>
- (2) inclusion of a specific provision addressing supportive proceedings to arbitration through the introduction of a new Article 22(6) that reads:<sup>53</sup>

*The following courts shall have exclusive jurisdiction, regardless of domicile, (6) in ancillary proceedings concerned with the support of arbitration the courts of the Member State in which the arbitration takes place;*

- (3) addressing the situation of concurring litigation on the validity of the arbitration agreement in different Member States by the introduction of a new Article 27A that reads:<sup>54</sup>

*A court of a Member State shall stay its proceedings once the defendant contests the jurisdiction of the court with respect to existence and scope of the arbitration agreement if a court of the Member State that is designated as the place of arbitration in the arbitration agreement is seized for declaratory relief in respect to the existence, the validity and/or scope of that arbitration agreement;*

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<sup>51</sup> Burkard Hess, Thomas Pfeiffer and Peter Schlosser "The Report on the Application of Regulation Brussels I in the Member States" above n39, 39, para 130.

<sup>52</sup> Ibid, 64, para 131.

<sup>53</sup> Ibid, para 132.

<sup>54</sup> Ibid, 65, para 134.



(4) introducing a new recital in the Regulation addressing the place of arbitration that reads:<sup>55</sup>

*The place of arbitration shall depend on the agreement of the parties or be determined by the arbitral tribunal. Otherwise, the court of the Capital of the designated Member State shall be competent. Lacking such a designation the court shall be competent that would have general jurisdiction over the dispute under the Regulation if there was no arbitration agreement.*

The deletion of the blanket exclusion of arbitration under Article 1(2)(d) is advisable. Also, the Regulation should address the status of proceedings supporting arbitration which could be achieved quite well by the proposed amendment to Article 22. However, the wording of the proposed Article 27A, addressing the situation of concurring proceedings, does not fully achieve its objective.

The proposed Article 27A indicates that a court of a Member State shall stay its proceedings when (1) the defendant contests the court's jurisdiction on the basis of the existence and scope of an arbitration agreement, and (2) if the court of the Member State "designated as the place of arbitration in the arbitration agreement is seised for declaratory relief in respect to the existence, the validity and/or scope of that arbitration agreement".<sup>56</sup> Therefore, unless the court of the seat is seised (either before or during the current proceedings) on the validity and scope of the arbitration agreement, it would appear that the other court seised (not the court of the seat) can proceed in accordance with the New York Convention to assess the validity and scope of the agreement itself. It appears that the intent of this proposed new Article

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<sup>55</sup> Burkard Hess, Thomas Pfeiffer and Peter Schlosser "The Report on the Application of Regulation Brussels I in the Member States", above n39, para 136.

<sup>56</sup> This appears to be a reversal of the priority rule adopted under the Regulation, giving priority to the courts at the seat with other courts having to stay their proceedings until the court at the seat has made a determination. A similar approach is recommended in the Green Paper for choice of court agreements. The Green Paper notes that a potential drawback of this solution may be that if the agreement is found invalid, a party must first seek to establish the invalidity before the court designated in the agreement before being able to seise the otherwise competent courts: Commission of the European Communities "Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters", above n36, 5: "the lis pendens rule requires that, 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".



was to adopt the principle argued by the English courts in *West Tankers* that only the arbitration tribunal or the courts of the seat should have jurisdiction to determine the validity and scope of an arbitration agreement.<sup>57</sup> However, it does not appear to fully reach the mark as it would only take effect where the defendant seises the court at the seat. Such an approach has to be questioned in terms of how likely it would be to resolve the issue of parallel court proceedings effectively (given it seemingly requires the parties to initiate satellite proceedings at the seat in response to proceedings in another Member State<sup>58</sup>), and also for its likelihood to create additional costs for the parties concerned.

The proposed new Article 27A has been criticised for failing to recognise the tribunal's right to determine its own jurisdiction (tribunal *kompetenz-kompetenz*).<sup>59</sup> However, the Heidelberg Report is not addressing the issue of whether the tribunal has *kompetenz-kompetenz*, but rather which courts within Member States should decide the existence or validity of an arbitration agreement if this is raised by a party as a challenge to the court's jurisdiction. The principle focus of the Regulation is the smooth flow and recognition of judgments through the European Union, not the recognition of arbitration awards, which is dealt with under the New York Convention. As will be discussed in Part IV of this paper, there is substantial support for parallel determination of the existence or validity of an arbitration agreement by both the court seised and the arbitration tribunal.<sup>60</sup> This support is qualified on the basis that the court seised should only undertake a *prima facie* review of the agreement, rather than conducting a full hearing on jurisdiction.<sup>61</sup> The advantage of a parallel approach is that time is not wasted by the arbitral tribunal staying its proceedings when the agreement is found to be valid.

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<sup>57</sup> See *Allianz Spa and Others v West Tankers Inc* (The "Front Comor"), above n3, para 38: "The House of Lords, West Tankers and the United Kingdom government are of the view that, where the parties have contractually agreed to settle disputes arising from a contract exclusively by arbitration, that legal relationship is completely removed from the outset from the national courts, apart from the courts at the arbitral seat".

<sup>58</sup> Campbell McLachlan *Lis Pendens in International Litigation*, above n15, 236.

<sup>59</sup> *Ibid*: "The proposed new Article 27A, understandable though its objective may be, risks encouraging a new species of satellite litigation in the courts of the seat, which cuts across the priority which ought to be accorded to the arbitral tribunal itself".

<sup>60</sup> See for example, UNCITRAL Model Law on International Commercial Arbitration, above n33, art 8(2); and Amokura Kawharu "Arbitral Jurisdiction" (December 2008) 23 NZULR 238, 245.

<sup>61</sup> See for example, Amokura Kawharu "Arbitral Jurisdiction", *ibid*, 245.



The key challenge facing the drafters of any future amendments to the Regulation is to achieve consistency with the New York Convention. All Member States are also signatories to the New York Convention, and the New York Convention is given priority as a 'special convention' under Article 71 of the Regulation. The Heidelberg Report also emphasises that "the Regulation should not address issues dealt with by the New York Convention".<sup>62</sup> In this respect, another potential obstacle facing the proposed new Article 27A is that Article II (3) of the New York Convention requires that the court seised refer the parties to arbitration unless 'it' finds that the agreement is null and void, inoperative or incapable of being performed.<sup>63</sup> This implies that it is the court first seised that makes this determination – and such determination would have *res judicata* effect on any subsequent court seised (including one presumes, on the court of the seat).

Additionally, recommendations to give exclusive jurisdiction to the court at the seat may raise issues of statehood similar to those discussed in *West Tankers* and part V of this paper with respect to anti-suit injunctions. The validity of the agreement is directly linked to whether or not the court seised has jurisdiction. There is likely to be some objection among European countries to a rule that allows a court in another country to decide a question that in effect determines the seised court's jurisdiction.

Despite these apparent problems, the recommendations contained in the Heidelberg Report have been adopted to a limited extent by the Commission of the European Communities in its Green Paper.<sup>64</sup>

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<sup>62</sup> Burkard Hess, Thomas Pfeiffer and Peter Schlosser "The Report on the Application of Regulation Brussels 1 in the Member States" above n39, 34, para 115.

<sup>63</sup> See also UNCITRAL Model Law on International Commercial Arbitration, above n31, art 8 (1): "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless *it* finds that the agreement is null and void, inoperative or incapable of being performed" [emphasis added].

<sup>64</sup> Commission of the European Communities "Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters", above n38, 8 and 9.



### C. *Commission of the European Communities Green Paper*

The Commission's Green Paper starts the discussion on the interface between the Regulation and arbitration as follows:<sup>65</sup>

Arbitration is a matter of great importance to international commerce. Arbitration agreements should be given the fullest possible effect and the recognition and enforcement of arbitral awards should be encouraged. The 1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners. It would therefore seem appropriate to leave the operation of the Convention untouched or at least as a basic starting point for further action. This should not prevent, however, addressing certain specific points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgements in Europe and prevent parallel proceedings.

Following on from this the Green Paper recommends a "partial deletion" of the exclusion of arbitration from the scope of the Regulation with the intent that court proceedings in support of arbitration might come within the scope, enhancing the legal certainty of such proceedings.<sup>66</sup> There is no indication as to what 'partial exclusion' means. However, the following paragraphs of the Green Paper address support proceedings, judgments on the validity of the agreement and decisions as to the enforceability of the awards. It therefore appears to be a complete removal of the exclusion, rather than partial, and therefore aligns with the Heidelberg Report's first recommendation.<sup>67</sup>

The Green Paper also suggests the introduction of a "special rule" allocating jurisdiction in support proceedings to the courts at the place of the arbitration, subject to an agreement between the parties, on the basis that it could enhance legal

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<sup>65</sup> Commission of the European Communities "Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters" above n38, 8.

<sup>66</sup>Ibid, 9.

<sup>67</sup> Burkard Hess, Thomas Pfeiffer and Peter Schlosser "The Report on the Application of Regulation Brussels 1 in the Member States" above n39, 64, para 131.



certainty.<sup>68</sup> While this principle is not as fully developed as the Heidelberg Report's second recommendation that proposes a new Article 22(6)<sup>69</sup>, it is clear the Commission is interested in reviewing responses on this matter. Such a jurisdictional rule would have its benefits as it is the role of the courts of the seat to provide judicial assistance and support to the arbitral proceedings taking place within its jurisdiction, and as argued by the English courts in *West Tankers*, the domestic laws at the seat applied by the courts can have an impact on the parties' choice of the place of arbitration.

Next the Green Paper indicates the importance of ensuring that judgments given on the validity of arbitration agreements and judgements setting aside awards are covered by the Regulation. This appears to be the key recommendation for reducing the possibility of parallel court proceedings. If judgements given on the validity of the arbitration agreement were subject to the Regulation, no other court in a Member State could decide on the same matter at the same time, and the obligations of mutual trust would ensure the judgment is recognised when rendered.

The Green Paper indicates that priority could be given to the courts at the seat to decide on the existence, validity and scope of the agreement.<sup>70</sup> However, rather than adopting the principle contained in the Heidelberg Report's new Article 27A, which requires the court at the seat to be seised for declaratory relief as to the existence or validity of an arbitration agreement, this proposal appears to grant exclusive jurisdiction to the courts at the seat. This, as with the approach proposed in the Heidelberg Report, faces the same issue that the New York Convention allows the court seised to address this question without referring to the court at the seat and may also be rejected due to issues of statehood. The Green Paper leaves this matter open, but indicates an alternative option of including provisions requiring cooperation between courts seised on such matters and the introduction of time limits

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<sup>68</sup> Commission of the European Communities "Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters" above n38, 9.

<sup>69</sup> Burkard Hess, Thomas Pfeiffer and Peter Schlosser "The Report on the Application of Regulation Brussels I in the Member States" above n39, 64, para 132.

<sup>70</sup> Commission of the European Communities "Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters", above n38, 9.



for the party contesting the validity of the agreement to arbitrate.<sup>71</sup> The options of ensuring that judgments given on the validity of the arbitration agreement come within the scope of the Regulation and including a specific time limit for decisions on the validity of an arbitration agreement are promising and seem to fit within the existing framework of the New York Convention quite well.

**D. Interim conclusions on the possible reforms to the Regulation**

Reading the Heidelberg Report and the Green Paper together, the following proposed changes to the Regulation should substantially address the issues of parallel court proceedings relating to arbitration in the European Union:

- (1) deletion of Article 1(2)(d);
- (2) including the proposed amendment to Article 22(6) that gives exclusive jurisdiction to the courts of the seat for support proceedings of arbitration;
- (3) introducing a definition or method of determining the court of the seat when this is not specified in the agreement; and
- (4) specifying a time limit for determining the validity and application of an arbitration agreement once this is raised by a party as a challenge to a court's jurisdiction.

Deletion of the exclusion of Article 1(2)(d) would ensure that proceedings on the validity and application of the arbitration agreement are subject to the rules on *lis pendens* and the overarching obligation of mutual trust. This should ensure that no two courts within the European Union can decide this question in parallel and reach divergent decisions. The time limit would ensure that the question is fast tracked when arbitration proceedings may be pending.

As discussed, the proposed special rule requiring the validity of the agreement to be determined at the court of the seat is likely to meet opposition due to concerns that this would be an infringement against statehood and possibly for

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<sup>71</sup> Commission of the European Communities "Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters", above n38, 9.



inconsistency with the New York Convention. Additionally, if a party is justified in challenging an agreement, that party may not want to have to travel to the court of the seat to do so when it could be addressed as a preliminary matter in the court that would otherwise have jurisdiction over the merits of the dispute.

It should be noted that even if an amendment to Article 22(6) is adopted granting exclusive jurisdiction to the courts at the seat for support proceedings, arguably those courts could not use anti-suit injunctions targeting proceedings in another Member State so long as the *West Tankers* decision stands.

#### **IV. ISSUES OF LIS PENDENS AND *KOMPETENZ-KOMPETENZ* IN INTERNATIONAL COMMERCIAL ARBITRATION**

##### **A. *Kompetenz-Kompetenz* in *West Tankers***

The issue of parallel proceedings on the validity or scope of the arbitration agreement (as played out in *West Tankers* and now being discussed as the basis of reforms to the Regulation) appears to be largely due to a clash between two schools of thought on the priority afforded to the tribunal to determine its own competence.

In *West Tankers*, the English courts, *West Tankers* and the English government advanced arguments that were based on recognising the tribunal's competence to determine its own jurisdiction. The presumption was that where the existence of an arbitration agreement between the parties is established, the court should refer those parties to arbitration and the arbitration tribunal will determine its jurisdiction to hear the proceedings. The ECJ however adopted a counter view, relying heavily on the wording of Article II (3) of the New York Convention that the mere existence of an arbitration agreement did not relieve the courts of jurisdiction or prevent a court from exercising its own competence to determine its jurisdiction.



See for example the following key extracts:

Every court seised is therefore entitled, under the New York Convention, before referring the parties to arbitration to examine those three conditions [whether the agreement is null and void, inoperative or incapable of being performed]. It cannot be inferred from the Convention that that entitlement is reserved solely to the arbitral body or the national courts at its seat.<sup>72</sup>

That includes the right to examine the validity and scope of the agreement put forward as a preliminary issue. If the court were barred from ruling on such preliminary issues, a party could avoid proceedings merely by claiming that there was an arbitration agreement. At the same time a claimant who has brought the matter before the court because he considers that the agreement is invalid or inapplicable would be denied access to the national court. That would be contrary to the principle of effective judicial protection which, according to settled case law, is a general principle of Community law and one of the fundamental rights protected by the Community.<sup>73</sup>

The rationale for the ECJ's reasoning appears to be that the tribunal cannot exist without an effective arbitration agreement covering the subject matter concerned.<sup>74</sup> Therefore, the tribunal does not have competence until it is confirmed that the agreement is valid and covers the scope and subject matter of the dispute, and such matter should be determined by the courts in accordance with the New York Convention. The obvious problem with this logic is that the precise reason for having an arbitration agreement is to avoid the jurisdiction of the courts and it seems counter intuitive to have to go to the courts in order to verify that parties can in fact proceed to arbitration. The other key weakness of the ECJ's discussion in this area was a failure to take into account issues of timing. The ECJ's approach to Article II (3) of the New York Convention makes sense at the outset of proceedings or when the arbitration is not yet underway, but what should the courts do when arbitration is already underway? The ECJ in *West Tankers* is silent on this point, but it is precisely this area that creates the greatest risk of parallel proceedings and conflicting outcomes between the arbitration tribunal and the courts.

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<sup>72</sup> *Allianz Spa and Others v West Tankers Inc* (The "Front Comor"), above n3, para 56.

<sup>73</sup> *Ibid*, para 58.

<sup>74</sup> *Ibid*, 60.



The following section addresses the wider issues of *lis pendens* and *kompetenz-kompetenz* between national courts and arbitration tribunals on the one hand, and two arbitration tribunals on the other.

**B. International Law Association Final Report on Lis Pendens and Arbitration (2006) – A Practitioner’s Guide**

*1. Lis pendens in international commercial arbitration*

The International Law Association Final Report on Lis Pendens and Arbitration<sup>75</sup> (hereinafter called the “ILA Report”) looks at the interplay between *lis pendens* between two state courts versus parallel proceedings between a state court and an arbitral tribunal. The ILA Report is intended to provide some guidance to practitioners on the following questions:<sup>76</sup>

- (1) should an arbitral tribunal always defer to a state court and suspend the arbitration until the court has reached a conclusion?
- (2) does it depend on whether the court seised is a court at the place of arbitration or is in another country?
- (3) should the forum first seised (court or tribunal) be the one to decide any dispute as to jurisdiction?
- (4) should an arbitral tribunal generally proceed to determine its own jurisdiction irrespective of parallel court proceedings?

The ILA Report is useful because it comprehensively addresses parallel proceedings from the tribunal’s perspective, which neither *West Tankers* nor the discussions on reforms to the Regulation do. The other advantage of the ILA Report is that it applies beyond the European Union and the recommendations can be adopted by practitioners world wide.

Before addressing the questions set out above, the ILA Report clearly describes the key differences between *lis pendens* between two national courts

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<sup>75</sup> Filip De Ly and Audley Sheppard “Final Report on Lis pendens and Arbitration” above n12.

<sup>76</sup> *Ibid*, 3, para 1.9.



versus the issue of parallel proceedings between an arbitral tribunal and a national court. Principally, national courts have inherent jurisdiction to stay their own proceedings in the face of parallel proceedings elsewhere when the parallel proceedings are in another forum that has jurisdiction to hear the matter.<sup>77</sup> An arbitration tribunal however, derives exclusive jurisdiction in respect of the disputes referred to it, to the extent that they come within the scope of the arbitration agreement and therefore arguably issues of *lis pendens* do not apply (i.e. if the arbitration tribunal has jurisdiction under a valid agreement to arbitrate, the state courts cannot also have jurisdiction over the same matters within the scope of that agreement).<sup>78</sup> For this reason, it is possible to argue that the arbitral tribunal has no power to stay its own proceedings once the validity of the arbitration agreement has been determined.

However, the opposing and important consideration, as discussed by Desiree Roskothen, is that if a state court concludes that the arbitration agreement is null, void, inoperative or incapable of being performed this, by virtue of the arbitral tribunal having only derivative jurisdiction, means that the tribunal cannot decide the case.<sup>79</sup> Therefore, if a court that would otherwise have jurisdiction over the dispute does determine in its *prima facie* review that the arbitration clause is invalid or otherwise inoperative, this implies that arbitration proceedings should stop, unless it is reasonably considered that this ruling was made in bad faith.

With these principles in mind, the key matter requiring resolution is which forum should determine the validity of the arbitration agreement. The ILA Report makes it clear that there is not a uniform approach or consensus on this matter.

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<sup>77</sup> Filip De Ly and Audley Sheppard "Final Report on *Lis pendens* and Arbitration" above n12, 7, paras 2.12 and 2.16. Common law courts will stay proceedings in the face of parallel proceedings in the interests of justice and so long as the other court is an appropriate forum to hear the matter. Civil law countries generally adopt a first seised rule whereby the court second seised is expected to stay its proceedings in favour of the court first seised.

<sup>78</sup> *Ibid*, 16, paras 4.4 and 4.5.

<sup>79</sup> Desiree Roskothen, above n33, 2 and 4.



## 2. *Three possible approaches to kompetenz-kompetenz*

The ILA Report outlines three possible approaches for the determination of arbitral jurisdiction. The first derives from the notion that state courts have sovereignty over dispute resolution and therefore those courts should either be given priority and may refuse to refer a matter to arbitration regardless of the validity of the arbitration agreement. The ILA Report notes that such an approach does not accord with international arbitration law and practice.<sup>80</sup> The second approach is based on the equivalence of state courts and arbitration tribunals to hear disputes and therefore might transpose principles of *lis pendens* applicable to a domestic court to the arbitral tribunal. The disadvantage here is that this does not resolve the issue of parallel proceedings and conflicting decisions as the application of *lis pendens* principles varies from country to country. It also raises the possibility of a party seeking to frustrate arbitration by running to the courts where the country adopts a first-in-time rule.<sup>81</sup> The third solution would be to give priority to arbitration and for a state court to only review the question of jurisdiction in the context of setting aside an award. The advantage of this approach is that an arbitration tribunal may be able to resolve the matter more quickly than a national court. The disadvantage, on the other hand, is that a respondent who has a legitimate objection to the arbitral jurisdiction has to wait until an award is made before they can get before the court to challenge the validity of the award due to a lack of jurisdiction.<sup>82</sup>

In a practical sense, none of these three approaches are completely satisfactory. For this reason, the recommendations proffered in the ILA Report draw from each to some extent but the application is dependent upon the circumstances of each case, for example whether it is the parallel proceedings are in the court of the seat or elsewhere. The ILA Report also indicates that in some circumstances the arbitral tribunal should consider a stay of proceedings when there are legitimate

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<sup>80</sup> Filip De Ly and Audley Sheppard "Final Report on Lis pendens and Arbitration" above n12, 16, para 4.6.

<sup>81</sup> Ibid.

<sup>82</sup> See also Professor William Park who similarly describes three approaches to *kompetenz-kompetenz* as follows: (1) arbitration stops automatically until matters have been clarified by a judge; (2) arbitration and judicial proceedings proceed in parallel to determine the issue; and (3) courts refrain from entertaining any jurisdictional motions until after an award has been rendered: William Park "The Arbitrator's Jurisdiction to Determine Jurisdiction" (ICCA Congress, Montreal, 2006) 13 ICCA Congress Series 55, 23. Available at ICCA: [www.arbitration-icca.org](http://www.arbitration-icca.org) (accessed 2 July 2009).



questions about the validity of the agreement.<sup>83</sup> Such an approach is discussed in more detail below.

### 3. *The ILA Report Recommendations*

- a) Parallel determination of the validity and application of the arbitration agreement

The first of the ILA Report recommendations firmly upholds the principle of *Kompetenz-Kompetenz* that a tribunal should decide on its own jurisdiction regardless of any parallel proceedings addressing the same question. The recommendation states:<sup>84</sup>

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 tribunal ... Having determined that it has jurisdiction, the arbitral tribunal should proceed with the arbitration, subject to any successful setting aside application.

This recommendation requires that the tribunal be satisfied at first sight that the arbitration agreement is valid before proceeding to hear the submissions on jurisdiction.<sup>85</sup> This approach is consistent with Article 8 (2) of the UNCITRAL Model Law that states that while a court is considering the validity of an arbitration agreement, an arbitral tribunal seised can nonetheless proceed and render an award.<sup>86</sup> As discussed above, this does not resolve the problems of parallel proceedings, the effect of which can only be mitigated for the parties by the courts adopting a *prima facie* review test to determining the tribunal's jurisdiction.

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<sup>83</sup> See for example Filip De Ly and Audley Sheppard "Final Report on *Lis pendens* and Arbitration" above n12, 26, recommendation 5.

<sup>84</sup> *Ibid*, 26, recommendation 1.

<sup>85</sup> Della Thompson *The Pocket Oxford Dictionary of Current English* (revised ed) (Clarendon Press, Oxford, 1996), defines *prima facie* as "at first sight" and "based on first impression", 709.

<sup>86</sup> UNCITRAL Model Law on International Commercial Arbitration (1985), above n33.



(i) Court to conduct a prima facie review of arbitration agreement

Professor Emmanuel Gaillard advocates that where a court is seised of a matter and a party raises the existence of an arbitration agreement as a defence, the relevant questions become “whether a valid arbitration agreement exists and whether the dispute is covered by such agreement, and who has the jurisdiction to decide those questions”.<sup>87</sup> These questions replace any determination of jurisdiction based upon the party’s fundamental right to seek relief before the national courts, because by virtue of a valid arbitration agreement the parties have waived that right.<sup>88</sup> Furthermore, Gaillard recommends that: “when seised of the matter, the courts should limit, at that stage, their review to a prima facie determination that the agreement is not null and void, inoperative or incapable of being performed”.<sup>89</sup> Such an approach appears consistent with the underlying purpose of the New York Convention, and would not be inconsistent with Article II (3).

Amokura Kawharu also promotes limiting the court’s involvement at this stage to a prima facie review of the agreement.<sup>90</sup> Kawharu considers this would be the best application of the parallelism contained within Article 8 of the UNCITRAL Model Law.

McLachlan, another supporter of the prima facie review approach, concludes on the matter:<sup>91</sup>

Since the tribunal’s determination of its own jurisdiction may always be the subject of review by the national courts at the seat, the application of a prima facie review by the court at a preliminary stage does not ultimately deprive the party contesting arbitral jurisdiction of access to a court. But it does ensure that the arbitral process itself cannot be derailed by dilatory applications to court.

The rationale for this approach, limiting parallelism by the court conducting only a prima facie review of the validity of the agreement, is that it strikes a balance

<sup>87</sup> Emmanuel Gaillard “Anti-suit Injunctions Issued by Arbitrators”, above n4, 242.

<sup>88</sup> Where such an arbitration agreement is found to exist, the parties may only opt out unanimously: Désirée Roskothen, above n33, 2.

<sup>89</sup> Emmanuel Gaillard “Anti-suit Injunctions Issued by Arbitrators”, above n4, 242.

<sup>90</sup> Amokura Kawharu “Arbitral Jurisdiction”, above n60, 258.

<sup>91</sup> Campbell McLachlan *Lis Pendens in International Litigation*, above n15.



between parties generally wishing to challenge the validity of an arbitration agreement versus those parties using the judicial system to cause havoc during arbitration proceedings (for example as a dilatory tactic). In the former situation, there is an interest in ensuring the genuine party is not subjected to the expense and time of invalid arbitration proceedings, whereas in the latter situation there is an interest in ensuring that arbitration proceedings proceed in accordance with the agreement between the parties to settle the dispute. The integrity and validity of international commercial arbitration as a dispute settlement process requires that agreements to arbitrate disputes are upheld and reluctant parties must be required to honour these agreements.

There appears to be international support for the "prima facie review" approach, for example in Switzerland, Canada and India.<sup>92</sup>

(ii) Application of the parallelism in Recommendation 1

Recommendation 1 reflects what the authors of the ILA Report consider to be the ideal starting position, however, in reality it appears that it applies only if the agreement is clearly valid, the parallel proceedings are not before the court of the seat and so long as the parties have not effectively waived their rights to arbitrate under the agreement.<sup>93</sup> The wording of the second recommendation supports this and indicates that in all other circumstances the arbitral tribunal may be required to consider whether to stay proceedings in the interest of avoiding conflicting decisions, preventing costly duplication of proceedings or protecting parties from oppressive tactics.<sup>94</sup> Practitioners should refer to recommendations 3 to 5 to determine whether a stay is appropriate.<sup>95</sup>

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<sup>92</sup> William Park "The Arbitrator's Jurisdiction to Determine Jurisdiction", above n82, 21, 11. See also Campbell McLachlan *Lis Pendens in International Litigation*, above n15, 203.

<sup>93</sup> Filip De Ly and Audley Sheppard "Final Report on Lis pendens and Arbitration" above n12, 26, recommendations 3 to 5.

<sup>94</sup> *Ibid.*, 26, recommendation 2.

<sup>95</sup> *Ibid.*



b) When should the tribunal stay its proceedings?

(i) Law of the seat applies

Recommendation 3 states that arbitration tribunals should act in accordance with the laws of the seat, and therefore, if the seat has a law requiring the courts to determine the question of jurisdiction, then the arbitration tribunal should decline jurisdiction or stay its proceedings until the matter is determined by the court at the seat.<sup>96</sup> It should be noted that if the European Parliament were to adopt reforms to the Regulation based upon the preference for the courts of the seat to determine matters of jurisdiction (as indicated in the Heidelberg Report and Green Paper) than this recommendation would apply to arbitration within Member States of the European Community (including arbitration in England).<sup>97</sup>

(ii) Parallel determination with courts other than at the seat except in exceptional circumstances

Recommendation 4 states that where the parallel court proceedings are in a jurisdiction other than the seat, the arbitration tribunal should proceed with the arbitration so long as the parties have not effectively waived their rights to arbitrate under the agreement or other exceptional circumstances exist (this is the same principle as provided for in recommendation 1, with the specific qualification that it applies to parallel proceedings not in the place of the seat).<sup>98</sup> This recommendation does not resolve the problem of parallel proceedings or the possibility of conflicting outcomes. As with recommendation 1, it should be noted that recommendation 4 is in line with Article 8(2) of the UNCITRAL Model Law<sup>99</sup> which does not prescribe an automatic stay of the arbitral proceedings by the mere introduction of court

<sup>96</sup> Filip De Ly and Audley Sheppard "Final Report on Lis pendens and Arbitration" above n12, 26, recommendation 3.

<sup>97</sup> As noted by McLachlan, the debate on the possible reforms to the Regulation has not yet adequately addressed matters of the tribunal's competence to decide its own jurisdiction. The core focus has been on reducing parallel proceedings in Member State courts related to arbitration. Further discussion on these issues is likely subsequent to the questions put forward in the Green Paper: Campbell McLachlan *Lis Pendens in International Litigation*, above n15, 236.

<sup>98</sup> Filip De Ly and Audley Sheppard "Final Report on Lis pendens and Arbitration" above n10, 26, recommendation 4.

<sup>99</sup> UNCITRAL Model Law on International Commercial Arbitration, above n33.



proceedings and permits the arbitral tribunal to proceed and render an award. The ILA Report notes that the purpose of Article 8(2) is to reduce the risk of dilatory tactics of a party reneging on their commitment to arbitration. Nevertheless, the ILA Report quotes an authority who states:<sup>100</sup>

In cases where the tribunal's jurisdiction is seriously in dispute, ... [the risk of the 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 of the issue, as otherwise the (possibly wasted) arbitral proceedings will cause substantial expense.

This quote really gets to the heart of the matter. While there is a general willingness to uphold the tribunal's *kompetenz-kompetenz* this has to be balanced against the cost to the parties of duplicated proceedings and the possibility of the proceedings being wasted if the court reaches a divergent view in cases where there are prima facie questions as to the validity of the tribunal's competence.

In circumstances where the arbitration tribunal was first seised, and ensuring that the parties have not waived their right to arbitrate and the agreement is clearly valid, a possible solution to prevent a party running off to the courts could be resort to an anti-suit injunction granted by the tribunal. Such an injunction would be aimed at preventing a party to the arbitration acting in a manner that may interfere with the tribunal's jurisdiction to settle the dispute. The issue of anti-suit injunctions by the tribunal is an approach supported by Emanuel Gaillard<sup>101</sup> and is discussed in more detail in part V of this paper.

### (iii) Parallel arbitration proceedings

Recommendation 5 applies when the parallel proceedings commenced prior to the 'Current Arbitration' and are in another arbitral tribunal. In such

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<sup>100</sup> Filip De Ly and Audley Sheppard "Final Report on Lis pendens and Arbitration" above n12, 19, fn 73; Peter Binder *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (2<sup>nd</sup> ed) (Sweet and Maxwell, London, 2005), 91.

<sup>101</sup> See for example: Emmanuel Gaillard "Reflections on the use of anti-suit injunctions in International Arbitration", above n4; and Emmanuel Gaillard "Anti-suit Injunctions Issued by Arbitrators", above n4.



circumstances recommendation 5 requires the Current Arbitration tribunal to decline jurisdiction or stay its proceedings, in whole or in part, and on such conditions as it sees fit, for such duration as it sees fit, provided that it is not precluded from doing so under the applicable law and provided that:<sup>102</sup>

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.

Recommendation 5 proceeds on the assumption that in circumstances where a situation of 'true *lis pendens*' arises (between the same parties and with the same subject matter) the tribunal second seised should stay its proceedings.<sup>103</sup> This opposes the argument that every tribunal is mandated to determine the dispute referred to it by the claimant, and should proceed to do so.<sup>104</sup> In situations of related claims where a pure situation of *lis pendens* does not exist, the ILA Report still advocates that the "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".<sup>105</sup>

(iv) Case management

Finally, the ILA Report recommends that:

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 ... 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

<sup>102</sup> Filip De Ly and Audley Sheppard "Final Report on Lis pendens and Arbitration" above n12, 26, recommendation 5.

<sup>103</sup> Ibid, 23, para 4.48.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.



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.

With this end, the ILA Report recommendations are a little bit self-contradictory. In recommendations 1 and 4 they promote continuing despite parallel proceedings, but in recommendation 6 they advocate not continuing with parallel proceedings based on the circumstances of the case. To resolve this contradiction some further points of clarification would be useful, namely clarifying between situations where the arbitration agreement is prima facie valid versus situations where there are prima facie questions, and by providing some guidance on how the tribunal could mitigate any vindictive or abusive parallel proceedings in circumstances where the arbitration agreement is prima facie valid.

In the first scenario, where the agreement is prima facie valid, the tribunal is seised first, and the parties have not waived their rights to arbitrate under the agreement, the tribunal should proceed and additionally the tribunal should consider the appropriateness of a tribunal issued anti-suit injunction (as will be discussed further in the paper), or alternatively the arbitration tribunal could take into account the breach of the arbitration agreement when making an award for compensation. In the second scenario, the tribunal needs to show more caution and it may be more appropriate for the starting position to be that the arbitration tribunal considers the appropriateness of a stay in accordance with recommendation 6, rather than proceeding so as to avoid undue cost or risk to the parties.

#### 4. *Interim Conclusions on the ILA Recommendations*

The ILA Report recommendations could benefit from taking the analysis to the next step in terms of clarifying the relationship between recommendations 1, 4 and 6 with respect to whether an agreement is prima facie valid or invalid.



However, the ILA Report does demonstrate recognition of the pervasiveness of parallel proceedings in international commercial arbitration and the need for practitioners to be flexible and to adapt to the circumstances of the individual case as is necessary to protect the interests of the parties concerned.

The ILA Report provides a comprehensive framework for practitioners to address issues of *lis pendens* and *kompetenz-kompetenz* as they arise and, if widely adopted and applied, should make a positive contribution to improving the situation for parties and tribunals faced with parallel court proceedings.

## V. ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION

Traditionally, anti-suit injunctions have been issued (particularly in common law countries) upon the request of a party that the other party be enjoined from initiating or from proceeding with a legal action in a different jurisdiction.<sup>106</sup> In English law the anti-suit injunction was originally designed to prevent foreign litigation that was determined to be “oppressive or vexatious”.<sup>107</sup> They are also thought to be used to support the common law doctrine of *forum non conveniens*<sup>108</sup> whereby a forum court has 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 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.<sup>109</sup> Violations of anti-suit injunctions typically result in heavy penalties connected to the notion of contempt of court.<sup>110</sup>

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<sup>106</sup> Emmanuel Gaillard “Reflections on the Use of Anti-Suit Injunctions in International Arbitration”, above n4, 201-214, 201.

<sup>107</sup> *Ibid.* See also *Cohen v Rothfield* [1919] 1 KB 410, in which the English Court of Appeal ordered a party to withdraw an action commenced in Scotland, considered by Gaillard to be the “seminal case” for anti-suit injunctions, *ibid.*, fn 1.

<sup>108</sup> A literal translation is ‘an inconvenient forum or court’.

<sup>109</sup> Filip De Ly and Audley Sheppard “Final Report on Lis pendens and Arbitration”, above n12.

<sup>110</sup> Emmanuel Gaillard “Reflections on the Use of Anti-suit Injunctions in International Arbitration” above n4, 202.



The introduction of anti-suit injunctions into international arbitration is described by Gaillard as a recent trend.<sup>111</sup> Directed at arbitral proceedings or at court proceedings surrounding an international arbitration, they vary in their form and are requested either in an attempt to disrupt the arbitral process or to try to protect it (as is the situation in the *West Tankers* decision). The growing use of anti-suit injunctions, particularly in preventing an arbitral tribunal from hearing a claim, has sparked debate on the adequacy of anti-suit injunctions in international arbitration.

The remainder of this paper is devoted to determining whether anti-suit injunctions ever have a role to play in controlling the pursuit of parallel proceedings by parties to an arbitration agreement. *West Tankers* makes it clear that the answer to this question in the European Community is 'no' (at least with respect to anti-suit injunctions issued by Member State national courts that are aimed at proceedings in another Member State), but what about elsewhere? Are anti-suit injunctions the appropriate answer to address the issue of parallel litigation in the courts? Additionally, if anti-suit injunctions do have a place, should they be issued by the courts or the arbitration tribunal?

#### A. *Jurisdictional Problems*

##### 1. *Lack of Uniformity*

One of the key problems with using anti-suit injunctions in support of international commercial arbitration is that each jurisdiction has developed divergent views and approaches on how and when anti-suit injunctions can be used. This ranges from divergent legal tests within countries that accept anti-suit injunctions as an appropriate remedy (mostly common law countries) to wider conflict on whether or not an anti-suit injunction is an infringement against a foreign court's exercise of its own jurisdiction (common law versus civil law jurisdictions). This part of the paper illustrates this lack of uniformity with respect to anti-suit injunctions.

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<sup>111</sup> Emmanuel Gaillard "Reflections on the Use of Anti-suit Injunctions in International Arbitration" above n4, para 10.2.



a) English approach

Common law courts have developed a widespread practice of granting anti-suit injunctions in aid of arbitration.<sup>112</sup> Such injunctions compel adherence to an arbitration agreement where, in breach of the agreement, one of the parties pursues litigation in another court. It is this practice which has now been excluded within the European Community by *West Tankers*.

The English courts have been the most liberal with their use of the anti-suit injunction in support of arbitration proceedings. In 1994, in *The Angelic Grace* case<sup>113</sup>, the English Court of Appeal stated that the time had come to lay aside the ritual incantation that this was a jurisdiction which should be exercised sparingly and with great caution. The court said that there was no reason for the diffidence in granting an injunction to restrain foreign proceedings brought in breach of an arbitration agreement, on the clear and simple ground that the defendant had promised not to bring them. The English courts have subsequently staunchly maintained and defended their jurisdiction to issue anti-suit injunctions in this manner until *West Tankers* delivered the final nail in the coffin for their use within the European Community.<sup>114</sup> English courts retain the jurisdiction to issue anti-suit injunctions if the proceedings are taking place outside of the European Community, such as in the United States, Asia, Australia or New Zealand.<sup>115</sup>

It seems clear that in England, the courts will grant an anti-suit injunction if prima facie an arbitration agreement between the parties exists. As discussed earlier in the paper, the English courts consider that the tribunal or the courts at the seat should determine the validity and applicability of that agreement and therefore, it would not matter if the other party was seeking a determination on that same question from the other court (raising issues of *lis pendens*). In England, the key

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<sup>112</sup> Campbell McLachlan *Lis Pendens in International Litigation*, above n15, 219.

<sup>113</sup> *The Angelic Grace* [1995] 1 Lloyd's Rep. 87 (CA), 96 per Millet LJ cited in *Through Transport Mutual Insurance Assn. (Eurasia) Ltd. V New India Assurance Assn. Co. Ltd.* [2005] 1 Lloyd's Rep. 67, paras 87-91; and Campbell McLachlan *Lis Pendens in International Litigation*, above n15, 224.

<sup>114</sup> See for example, Hakeem Sriki "Anti-Suit Injunctions and Arbitration: A Final Nail in the Coffin?", above n4, 25-38.

<sup>115</sup> Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, New York, 2008), 98.



issue is protecting the parties' agreement and ensuring that a party is not permitted from breaching that agreement to the other's detriment.

b) Approaches within the United States of America

Courts within the United States have also demonstrated a willingness to issue anti-suit injunctions in support of arbitration; however, different courts have adopted different standards to determine whether it is appropriate in the circumstances to do so. This creates jurisdictional problems within the United States with different states adopting divergent tests and thresholds when determining whether or not to grant the injunction. For example, in the more liberal jurisdictions, courts generally will grant an anti-suit injunction if the parties and issues are the same, and if proceeding with the foreign litigation would impede the prompt and efficient resolution of the case in the forum.<sup>116</sup> However, in more conservative states the use of anti-suit injunctions is applied much more sparingly and requires that the foreign proceedings undermines the court's jurisdiction or threatens a national policy.<sup>117</sup>

Unlike the courts in England, it is unclear whether any courts in the United States can grant an anti-suit injunction purely on the basis of holding the parties bound to their agreement to arbitrate. Despite the variance across states, the tests appear to require something more and generally reflect issues of *forum non conveniens* or national policy.

c) The European view

The use of anti-suit injunctions in Europe has been a controversial issue in the past. The reason for this is that some civil law countries in Europe view the use of an anti-suit injunction as interfering with their court's jurisdiction to determine its own jurisdiction over the dispute (*kompetenz-kompetenz*). For example, an attempt by

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<sup>116</sup> Margaret Moses, *The Principles and Practice of International Commercial Arbitration*, above n115, 93.

<sup>117</sup> *Ibid*, 93.



an English court to serve an anti-suit injunction in support of an English arbitration upon German parties was met with hostility by the German court that stated:<sup>118</sup>

Such injunctions constitute an infringement of the jurisdiction of Germany because the German courts alone decide, in accordance with the procedural laws governing them and in accordance with existing international agreements, whether they are competent to adjudicate on a matter of another domestic or a foreign court (including arbitration courts).

The controversy concluded with the *West Tankers* decision, making it clear that the ECJ considers the use of an anti-suit injunction an interference with a court's ability to determine its own competence and appropriately handle the issue of parallel arbitration proceedings. For these reasons it was considered an infringement of the principle of mutual trust between courts of the Member States of the European Union.

## 2. *Statehood and Recognition*

As demonstrated above with respect to *West Tankers* and the German courts deeming an anti-suit injunction to be an infringement of the jurisdiction of German courts to determine their competence to adjudicate a matter, another key jurisdictional problem for anti-suit injunctions is the problem that an anti-suit injunction can raise issues of statehood.

Gaillard has written on this topic and uses a number of cases to demonstrate how the issue of an anti-suit injunction can instigate a 'battle of the injunctions'.<sup>119</sup> Possibly one of the most dramatic examples is the case of *KBC v Pertamina*<sup>120</sup> where courts in the United States and Indonesia reached divergent views on the validity and enforceability of an arbitration award. In this case both of the parties (the party

<sup>118</sup> Re the enforcement of an English anti-suit injunction [1997] IL Pr. 320 (Oberlandesgericht Düsseldorf) cited in Campbell McLachlan *Lis Pendens in International Litigation*, above n15, 226.

<sup>119</sup> Emanuel Gaillard "Reflections on the Use of Anti-Suit Injunctions in International Arbitration", above n4, see for example paras 10.10-10.12, 10.14, and 10.18, 205-211; and *Karaha Bodas Company LLC ("KBC") v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")* (Preliminary Award of 30 September 1999) UNCITRAL (2001) 16 No. 3 Mealey's Int. Arb. Rep. C-17; (Final Award of 18 December 2000), (2001) 16 No. 3 Mealey's Int. Arb. Rep. C-2; F. 3d 357 (5<sup>th</sup> Cir., 2003); 465 F. Supp. 2d 283 (SDNY 2006).

<sup>120</sup> *Karaha Bodas Company LLC ("KBC") v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, above n119.



seeking to enforce the award and the party challenging it) were subjected to anti-suit and anti-anti-suit injunctions issued from the United States and Indonesian courts respectively and also the arbitral tribunal itself.<sup>121</sup>

This battle of the injunctions usually arises because of issues of statehood with a court in one state perceiving that it is being told what to do by a court in another state. Gaillard states that in such situations:<sup>122</sup>

[Anti-anti-suit injunctions] may exacerbate, rather than solve, the problems created by anti-suit injunctions by triggering an escalation of injunctions that lead to the frustration of the arbitral process as a whole.

Gaillard is particularly concerned that court issued anti-suit injunctions in international arbitration may result in the parties being subjected to numerous injunctions and a multitude of proceedings. This ultimately raises the cost and decreases the efficiency of the dispute resolution process and is a situation to be avoided.<sup>123</sup>

The issues of statehood that may be triggered by the use of an anti-suit injunction are significant and, as argued by Gaillard, can reduce the overall effectiveness of the dispute resolution process. For this reason, remedies that are provided at the international law level and incorporated into domestic legislation offer the most promise, particularly where those remedies can be applied consistently between states.

The 2006 revisions of the UNCITRAL Model Law provided an opportunity to address this matter at the international law level, however, Article 17J fails at the first hurdle. Article 17J of the UNCITRAL Model Law provides that:<sup>124</sup>

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<sup>121</sup> See Emanuel Gaillard "Reflections on the Use of Anti-Suit Injunctions in International Arbitration", above n4 paras 10.10-10.12, 206-207, that refer to the *KBC v Pertamina* case where a court in Jakarta issued an injunction preventing KBC from enforcing an arbitral award with a penalty of \$500,000 per day. This decision was overturned by the Supreme Court two years later in 2004.

<sup>122</sup> *Ibid*, para 10.18, 211.

<sup>123</sup> *Ibid*, para 10.14, 208.

<sup>124</sup> UNCITRAL Model Law, above n33, art 17J.



A court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

Article 17J appears to uphold the status quo with respect to interim measures (including anti-suit injunctions<sup>125</sup>), therefore leaving the matter to domestic practice. As a consequence this Article provides no relief to the issues created by divergent tests and statehood.

### ***B. Anti-suit Injunctions Issued by Arbitrators***

The above section demonstrated that there are a number of obstacles to the effective use of anti-suit injunctions in support of arbitration proceedings. Principally these stem from each jurisdiction having different laws and applying different thresholds. Additionally, some jurisdictions view the anti-suit injunction as a challenge to their own jurisdiction. This section determines the extent to which these obstacles can be minimised by the anti-suit injunction being issued by the tribunal rather than a state court. It also looks at the pros and cons of court issued versus tribunal issued injunctions to determine which provides the most effective remedy.

#### *1. Enforcement*

In the past parties have traditionally gone straight to the courts if they required interim relief.<sup>126</sup> This is regardless of whether or not the tribunal had the power to grant the relief itself.<sup>127</sup> Wang Shengchang and Cao Lijun consider that this preference is attributed to speed and immediate enforceability.<sup>128</sup> However, with

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125 Article 17(2)(b) defines interim measure as: (2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to: (b) Take action that would prevent, or refrain from taking action is likely to cause current or imminent harm or prejudice to the arbitral process itself, UNCITRAL Model Law, above n33.

<sup>126</sup> Wang Shengchang and Cao Lijun "National Courts and Lex Fori" in Loukas Mistelis and Julian Lew *Pervasive Problems in International Arbitration* (2006, Kluwer Law International, Netherlands), 170, para 8-52.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*



respect to anti-suit injunctions, going to the courts may not always prove effective due to the risk that the court seised in another jurisdiction may retaliate against the perceived interference from the court issuing the injunction. This issue may be mitigated by adoption of international laws that provide for the immediate enforcement of arbitration issued interim relief, including anti-suit injunctions.

a) Chapter IV A, UNCITRAL Model Law

The 2006 revisions to the UNCITRAL Model Law enhance the provisions dealing with the tribunal's ability to provide interim measures. Interim measures are those measures intended to protect the ability of a party to obtain a final award. The Article 17 definition of interim measures states that:<sup>129</sup>

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(b) Take action that would prevent, or refrain from taking action is likely to cause current or imminent harm or prejudice to the arbitral process itself.

Article 17(2)(b) has been read as including the power to order anti-suit injunctions as interim measures.<sup>130</sup> The inclusion of a power to order anti-suit injunctions in the revised UNCITRAL Model Law demonstrates the acceptance that tribunals retain a power to ensure that the parties before it do not engage in abusive satellite litigation in a way which may undermine the power of the tribunal to decide the dispute referred to it.<sup>131</sup>

A great strength of the revisions to the UNCITRAL Model Law is the inclusion of specific provisions on the enforcement of interim measures. Article 17H (1) provides:

<sup>129</sup> UNCITRAL Model Law, above n33, art 17.

<sup>130</sup> See for example Margaret Moses, *The Principles and Practice of International Commercial Arbitration*, above n113, 101; and Campbell McLachlan *Lis Pendens in International Litigation*, above n13, 221; and Emmanuel Gaillard "Reflections on the Use of Anti-suit Injunctions in International Arbitration", above n4, para 10.21, 212.

<sup>131</sup> Campbell McLachlan *Lis Pendens in International Litigation*, above n15, 223.



An interim measure issued by an arbitral tribunal shall be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17I.

Being made subject to Article 17I means that the measure must be enforced, unless there are reasonable grounds for non-enforcement, as for example, those set forth in Article 36.<sup>132</sup> Article 36 incorporates the grounds contained within the New York Convention for refusing to recognise or enforce an award, such as if the agreement is void, inoperative, or incapable of being performed.<sup>133</sup>

The intended effect of Article 17H is that an award of an anti-suit injunction would be enforceable in any Model Law country, irrespective of whether it is the place of the seat.<sup>134</sup> Article 17H brings awards for interim relief under the same umbrella as final awards on the merits of the dispute.

Article 17H makes it clear at the international level that arbitration awards, and particularly those issued to protect the integrity of the arbitration proceedings should be immediately enforced by the courts, irrespective of the place of arbitration. Article 17H is a positive step forward as the tribunal is arguably the best placed to grant such awards because the parties have contracted out of their right to seek relief in the courts.

If the provisions contained within Chapter VI of the Model Law are adopted in the 60 countries where the Model Law is in effect, it should significantly facilitate the enforcement of tribunal issued anti-suit injunctions.<sup>135</sup> Additionally, wide adoption of the revisions could encourage non-Model Law countries to either adopt similar legislation or to refer to the Model Law provisions as guidelines on accepted

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<sup>132</sup> Margaret Moses, *The Principles and Practice of International Commercial Arbitration*, above n115, 106.

<sup>133</sup> See for example, New York Convention, above n28, art V.

<sup>134</sup> However, the effectiveness of Article 17H may potentially be limited by Article 17I(1)(b)(i). This Article provides that a court can refuse to enforce an interim measure if it finds that the interim measure "is incompatible with the powers conferred upon the court", UNCITRAL Model Law, above n33, art 17I(1)(b)(i). The extent of the potential limiting effect of this provision will need to be tested by its application.

<sup>135</sup> Margaret Moses, *The Principles and Practice of International Commercial Arbitration*, above n115, 107.



practice.<sup>136</sup> To date, 4 of those 60 countries have enacted legislation based on the 2006 revisions, with New Zealand being the first.<sup>137</sup>

A risk with respect to the UNCITRAL Model Law is that even if it is adopted, it may not be adopted uniformly, or possibly even effectively. The best outcome would arise if countries adopted the provisions in a manner that closely reflected the original drafting (particularly of Articles 17 and 17H).

An additional and relevant point is that if the tribunal issues the anti-suit injunction in the form of an award, this should be enforceable in the courts of states that are parties to the New York Convention so the effects of the 2006 UNCITRAL revisions may reach further than just those states that have already adopted its provisions.

## 2. *Higher Threshold for Arbitrator Issued Injunctions*

### a) Chapter IV A, UNCITRAL Model Law

The 2006 revisions to the UNCITRAL Model Law set out the thresholds for granting the interim measures. In order for the tribunal to grant the relief sought, the party requesting the anti-suit injunction must satisfy the tribunal of the following:<sup>138</sup>

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim.

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<sup>136</sup> Margaret Moses, *The Principles and Practice of International Commercial Arbitration*, above n115, 107.

<sup>137</sup> The countries that have adopted the 2006 revisions are New Zealand (2007), Mauritius (2008), Peru (2008) and Slovenia (2008), status available at: UNCITRAL [www.uncitral.org/uncitral/](http://www.uncitral.org/uncitral/) (accessed 13 September 2009).

<sup>138</sup> UNCITRAL Model Law, above n33, art 17A.



This is a much higher threshold than merely requiring a party to establish that the other party is acting in breach of the arbitration agreement. It is also a higher threshold than the *forum non conveniens* test adopted in some United States courts.

Article 17A reflects the principle that tribunals will genuinely only resort to an anti-suit injunction in exceptional cases where it is necessary to protect the arbitral proceedings.<sup>139</sup> McLachlan has argued that an arbitral tribunal issued anti-suit injunction would be particularly appropriate where one of the parties starts subsequent court proceedings in a fraudulent attempt to undermine the jurisdiction of the tribunal.<sup>140</sup> Such fraudulent proceedings would be distinguished from legitimate proceedings where a party approaches a court for interim relief or seeks to determine at an early stage in the proceedings whether or not the arbitration agreement is valid. The kind of proceedings that McLachlan is referring to would be those issued once the arbitral proceedings are well in progression and when the party considers that they may not go in their favour. The recalcitrant party therefore commences parallel court proceedings as a tactic to delay and frustrate the tribunal in reaching a final award.<sup>141</sup> In such circumstances it is likely that the test set out in Article 17A would be met.

The higher threshold that applies to the tribunal issued anti-suit injunctions may be a factor that determines whether parties seek relief in the courts or the tribunal, however, its advantage is that it provides a standardised test. As with the other provisions of the UNCITRAL Model Law, if this provision is widely adopted, it should facilitate the effectiveness and enforcement of tribunal issued anti-suit injunctions. It should also help streamline and direct international arbitration practice to improve consistency.

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<sup>139</sup> Campbell McLachlan *Lis Pendens in International Litigation*, above n15, 221.

<sup>140</sup> *Ibid.*

<sup>141</sup> See for example *Paramedics Electromedicina Comercial Ltda. V GE Medication Systems Information Technologies Inc.* 369 F. 3d 645 (2d Cir. 2004). In this case one party, GE, commenced arbitration proceedings and the other party, Paramedics, subsequently initiated court proceedings in Brazil. After initiating the Brazilian proceedings Paramedics initiated court proceedings in New York to obtain a stay of the arbitration proceedings. GE counterclaimed seeking an anti-suit injunction which was granted on the basis that both the District Court and the arbitral tribunal had already found the arbitration agreement to be valid and therefore the Brazilian proceedings could be nothing more than a tactic to evade arbitration. While in this case the anti-suit injunction was issued by the United States courts, it demonstrates the kind of situation when it would be appropriate for the arbitral tribunal to intervene and provide the anti-suit injunction itself in accordance with Article 17A of the UNCITRAL Model Law, above n33.



## VI. CONCLUSIONS

### 1. *West Tankers*

The ECJ decision in *West Tankers* makes it clear that resort to use of anti-suit injunctions by national courts within the European Community in support of arbitration proceedings in another Member State is no longer an option. The ECJ ruled that resort to such measures was contrary to the principle of mutual trust and *Kompetenz-Kompetenz* that allows the court first seised to determine its own jurisdiction.

The English courts would have been wrong to grant an anti-suit injunction in *West Tankers* because the insurers were claiming damages in tort entitled to the jetty owner and were not seeking to exercise any rights as the charterer under the charter party, which contained the arbitration agreement.

*West Tankers* highlighted that the exclusion of arbitration under Article 1(2)(d) of the Regulation opens the door for increased parallel proceedings when the subject matter of those proceedings is arbitration.

### 2. *Reforms to Council Regulation (EC) 44/2001*

The proposed reforms to the Regulation can be summarised as:

- (1) remove Article 1(2)(d);
- (2) give exclusive jurisdiction for support proceedings of arbitration to the courts at the seat of the arbitration (proposed Article 22(6)); and
- (3) give priority to the courts of the seat to determine the validity and scope of the arbitration agreement (proposed Article 27A).



The third proposal above can be criticised on the following grounds:

(1) it infringes on the inherent right of the court first seised to decide its own jurisdiction (the validity of an arbitration agreement being a preliminary matter for the court to address);

(2) it infringes on statehood by giving a court in a foreign country the power to decide the jurisdiction of another court in a different country; and

(3) it may create additional cost and inconvenience for the parties if the agreement is found invalid, when the parties were required to determine that invalidity in the courts of the seat before being able to seise the otherwise competent court.

A more favourable approach would be to establish time limits for proceedings to determine the validity of an arbitration agreement and to ensure that those proceedings fall within the scope of the Regulation and are subject to the *lis pendens* rule and obligation of mutual trust.

### 3. *Issues of kompetenz-kompetenz and lis pendens*

National courts have inherent jurisdiction to stay their own proceedings in the face of parallel proceedings in another competent forum. An arbitral tribunal on the other hand derives exclusive jurisdiction on all matters that fall within the scope of the arbitration agreement. Arguably therefore, issues of *lis pendens* with respect of the tribunal to the court do not arise and the tribunal may not have jurisdiction to stay its proceedings under a valid arbitration agreement.

Despite the above, the ILA Report recommends that a tribunal consider a stay as a matter of sound case management and when it would be in the parties' best interests.

With respect to determining the validity of an arbitration agreement, there is significant support for the proceedings to be conducted in parallel. The effects of this



parallelism can be mitigated by the courts applying a prima facie test to the validity of the agreement and expediting the proceedings.

#### 4. *Anti-suit injunctions*

There is a lack of uniformity with respect to state practice to issue anti-suit injunctions in support of arbitrations. Different states adopt varying thresholds and tests to determine when an anti-suit injunction may be granted.

The 2006 revisions to the UNCITRAL Model Law failed to address this lack of consistency, and instead leaves the matter to existing state practice.

In some civil law countries court issued anti-suit injunctions are viewed as infringing against a court's jurisdiction to decide its competence. The ECJ adopted this rationale in *West Tankers*.

Article 17 of the UNCITRAL Model Law gives arbitrators the power to grant anti-suit injunctions. This power is supported by enforcement provisions in Article 17H.

Article 17A establishes quite a high threshold for when an arbitrator can exercise the powers contained in Article 17. However, the test adopted in Article 17A is appropriate within the context of international arbitration, and ensures that an arbitrator can only exercise these powers in appropriate circumstances.

Whether issued by a court or by a tribunal, anti-suit injunctions should only be used in exceptional cases. For example, it would be appropriate when the arbitral proceedings are well advanced and a party instigates fraudulent parallel court proceedings as a device to disrupt the current arbitral proceedings. In all other cases, and particularly when the validity of the agreement is in question, resort to anti-suit injunctions should be avoided and the tribunal should refer to the recommendations of the ILA Report to determine the most appropriate course of action.



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