

**THE ART OF
ADVOCACY
IN
INTERNATIONAL
ARBITRATION**

SECOND EDITION

**DOAK BISHOP
and
EDWARD G. KEHOE
Editors**

JURIS

Questions About This Publication

For assistance with shipments, billing or other customer service matters,
please call our Customer Services Department at:

1-631-350-0200

To obtain a copy of this book, call our Sales Department:

1-631-351-2100

Fax: 1-631-351-5712

Toll Free Order Line:

1-800-887-4064 (United States & Canada)

See our web page about this book:

<http://www.jurispub.com>

COPYRIGHT © 2010
by JurisNet, LLC

All rights reserved.

Printed in the United States of America
ISBN 978-1-933833-61-3

JurisNet, LLC
71 New Street
Huntington, New York 11743
USA
www.arbitrationlaw.com

arbitration and court proceedings have earned him high regard as an advocate. His peers have said that “you know that you have a real fight on your hands when he’s on the other side” (*Chambers UK*). He is ranked as a leading individual in *Chambers (Global, UK and US)*, *The International Who’s Who of Commercial Arbitration*, *The International Who’s Who of Commercial Litigation*, *PLC Which Lawyer? Yearbook*, *Legal Experts*, and as one of 45 stars under 45 by the Global Arbitration Review. He is Senior Vice-Chair of the International Bar Association’s Arbitration Committee, a Vice-Chair of the International Dispute Resolution Committee of the International Section of the American Bar Association, and co-rapporteur of the International Law Association’s Commercial Arbitration Committee. Mr. Friedman speaks and publishes on international arbitration and compliance topics, and sits as an arbitrator.

EMMANUEL GAILLARD heads Shearman & Sterling LLP’s International Arbitration practice and has represented corporations, States and State-owned entities in international arbitration matters for over 25 years. He has also acted as sole arbitrator, party-appointed arbitrator or chairman under most international arbitration rules, and is frequently called upon to appear as expert witness on arbitration law issues in international arbitration proceedings or enforcement actions before domestic courts. Through his practice, extensive writing and teaching, Emmanuel Gaillard has significantly contributed to the shaping of contemporary international arbitration law. His publications include *Fouchard Gaillard Goldman On International Commercial Arbitration* (1999), a leading treatise on international arbitration, *La Jurisprudence du CIRDI* (2 volumes, 2004 and 2010), a commentary on ICSID case law; and the first essay on the legal theory of international arbitration, based on his Course at The Hague Academy of International Law (*Aspects philosophiques du droit de l’arbitrage international*, 2008; *Legal Theory of International Arbitration*, 2010; *Teoría Legal del Arbitraje Internacional*, 2010). Emmanuel Gaillard is a Professor of Law at Paris XII University.

PHILIPPE PINSOLLE is a Partner at Shearman & Sterling LLP in Paris, and specializes in international arbitration. He has been involved, as counsel or arbitrator, in more than a hundred and twenty international arbitrations, both institutional (ICC, ICSID, LCIA, SCC, AFA, Swiss Rules, etc.) and *ad hoc*, concerning such activities as investment, oil and gas, energy, telecom or defense industry. He is a member of the Paris Bar and of the Bar of England & Wales (Gray's Inn). He is a lecturer on international arbitration at the Universities of Aix-Marseille III, Versailles-St Quentin and Paris 12. Philippe Pinsolle is the former President of the International Arbitration commission of the Union Internationale des Avocats (UIA) and a co-founder of the Young Arbitration Practitioners (YAP). He is the author of numerous articles and case-notes on international arbitration. He holds a J.D. degree from the University of Paris II, a M.Jur. from Oxford University, Hertford College, and an MBA degree from Essec.

LUCY REED is co-head of the global international arbitration group of Freshfields Bruckhaus Deringer LLP. Lucy acts as advocate for private and public clients and sits as arbitrator in international arbitrations under the major institutional and ad hoc rules. She is past President of the American Society of International Law and Chair of the ITA. Lucy has served as an arbitrator on the Eritrea-Ethiopia Claims Commission, co-director of the Claims Resolution Tribunal for Dormant Accounts in Switzerland, U.S. Agent to the Iran-United States Claims Tribunal, and the State Department's Deputy Assistant Legal Adviser for International Claims and Investment Disputes.

DAVID W. RIVKIN, a litigation Partner in Debevoise & Plimpton's New York and London offices, has broad experience in the areas of international litigation and arbitration. He has handled international arbitrations throughout the world and before virtually every major arbitration institution, including the ICC, AAA, LCIA, ICSID, IACAC and the Stockholm Chamber of Commerce. Subjects of these arbitrations have included long-term energy concessions, investment treaties, joint venture agreements, insurance coverage,

Chapter 7

ADVOCACY IN PRACTICE: THE USE OF PARALLEL PROCEEDINGS

Emmanuel Gaillard and Philippe Pinsolle

I. Introduction

In the first edition of this book, we had taken the view that, in international arbitration, advocacy was not limited to the oral performance of counsel. In our view, advocacy encompassed all the aspects of the dispute and all the strategic decisions to be made in the case. Strategy in arbitration is multidimensional. Unlike court proceedings, arbitration leaves open a wide range of possibilities for the litigants and it is for their advocate to make the best possible use of these possibilities. The role of the advocate should thus not be limited to delivering the best oral performance, but should also extend to any important strategic decision to be made. Some authors have expressed doubt as to the accuracy of this far-reaching definition of advocacy.¹ The reasons are understandable. However, it seems that limiting advocacy to the oral argument of the advocate or indeed to the examination of witnesses does not do justice to this concept. We believe that the role of the advocate in an international arbitration is much wider than that and that the input of a good advocate can make the difference by choosing the right option from the very beginning of a case.

Against this background, we have described in the first edition of this book various scenarios where a choice had to be made in an attempt to identify what was the best choice for the good advocate.

¹ See David J.A. Cairns, *Advocacy and the Function of Lawyers in International Arbitration*, to be published in *Liber Amicorum* for Bernardo Cremades.

In this new edition, we propose to focus on a very intricate issue for advocates: parallel proceedings. With the proliferation of complex deals and the corresponding proliferation of a related contracts and agreements drafted in a different manner, there is room for playing with parallel proceedings that can really make a difference on the outcome of the case. Moreover, depending on the national legislations which may come into play in the arbitration, it will be more or less easy to have recourse to parallel proceedings. The first part of this contribution will be devoted to the study of actual situations where the parties have had recourse to parallel proceedings for obviously tactical purposes. This analysis is based on reported case law which came into the public domain. The second part of this contribution will be devoted to the analysis of the conditions which permit recourse to parallel proceedings as well as the possible limits of other tactical use. This chapter is not intended to provide a road map for derailing an arbitration, but rather to identify the fundamental issues underlying the very notion of parallel proceedings.

II. Examples of Parallel Proceedings Initiated for Tactical Purposes

Practice shows many examples of parallel proceedings initiated in order to gain a tactical advantage. For example, a party can start an action before State courts in breach of an arbitration agreement (A), a party may also start an action before an arbitral tribunal in response to the other party's violation of the arbitration agreement (B). Another option is to seize two different arbitral tribunals on the basis of the same agreement (C).

A. Going to Courts in Breach of the Arbitration Clause

A party may seize State courts (in most cases its home courts), either before the initiation of arbitral proceedings or once arbitration has been initiated, in order to either have the arbitration agreement annulled or have a judgment rendered on the merits. This happened in the well-known *West Tankers* case where the ECJ ruled on the

compatibility of anti-suit injunctions with EU law.² In this case, the Italian company Erg Petroli SpA had chartered a tanker owned by West Tankers Inc. The charter-party was governed by English law, and contained an arbitration agreement providing that disputes would be submitted to arbitration in London. Following a collision in Syracuse between a tanker and a pier owned by Erg Petroli, the latter sought compensation from its insurers up to the limit of its coverage and initiated arbitral proceedings in London against West Tankers for the surplus. The Italian company's insurers, for their part, filed a claim against West Tankers before the court of Syracuse in order to recover the sums they had paid to Erg petroli, under the insurance policy.

Considering that they were not bound by the charter-party, and the arbitration agreement it contained, the insurers submitted that the Italian courts had jurisdiction under Article 5.3 of the Brussels Regulation, which, in relation to tort claims, grants jurisdiction to the courts located where the damage took place.³ The tactical interest, for the Italian insurers, was to bring proceedings before an Italian court rather than before an arbitral tribunal in London. They thus hoped to argue their case in Italian and under Italian law. In this case, their strategy turned out to be successful. West Tankers tried, in vain, to obtain an anti-suit injunction from English courts, restraining the insurers from pursuing proceedings before Italian courts.

In response to the House of Lords' reference for a preliminary ruling, the ECJ deemed that such anti-suit injunction was not compatible with the Brussels Regulation since each court within the territory of the Union has exclusive jurisdiction to decide whether or not it has jurisdiction to settle a dispute under Article 5.3 of the

² ECJ, February 10, 2009, case C-185/07, Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA v. West Tankers Inc., in *Les Cahiers de l'arbitrage*, Gazette du Palais 2009, July 17-18, 2009, p. 51.

³ (EC) Regulation N° 44/2001 of the Council dated December 22, 2000 regarding jurisdiction, the recognition and enforcement of judgments in civil and commercial matters, OJEC N° L 012, January 16, 2001, p. 1-23.

Regulation.⁴ The proceedings initiated in Italy have therefore been pursued and, to the best of our knowledge, are still pending. Another strategy would have consisted in West Tankers initiating arbitration on the merits, and disregarding the Italian proceedings, as, in all likelihood, the arbitration award would have been rendered before a final decision of the Italian Courts and would have been enforced notwithstanding the Italian proceedings.

B. Starting Proceedings before an Arbitral Tribunal in Response to the Violation of the Arbitration Agreement

Another alternative is for a party to seize an arbitral tribunal on the merits against a party who had first seized a State court in breach of the arbitration agreement. A primary example is the *Fomento* case, which was filed with the Swiss Federal Tribunal in 2001.⁵ Fomento de Construcciones y Contratas S.A., a Spanish company, undertook to provide civil engineering services for the construction of a port in Panama. Although the agreement between it and a Panamanian company contained an ICC arbitration clause, the Spanish company filed an action before the Panamanian courts against the Panamanian

⁴ Regarding the preliminary question put forward by the House of Lords, see House of Lords, February 21, 2007, *West Tankers Inc. v. RAS Riunione Adriatica di Sicurtà SpA and others*, *Revue Critique DIP*, 2007, p. 434, note L. Usunier. See also S. Bollée, « *Quelques remarques sur les injonctions anti-suit visant à protéger la compétence arbitrale* (on *The Front Comor* decision of the House of Lords) », *Revue de l'Arbitrage* 2007, 223.

⁵ Swiss federal tribunal (1st Civil law division), May, 14 2001, *Fomento de Construcciones y Contratas S.A v. Colón Container Terminal S.A.*, Decision of the federal Tribunal 127 III 279, *ASA Bull*, 2001, n° 3, p. 544. See on this decision J.-F. Poudret, Note, *Revue de l'Arbitrage* 2001, p. 835 ; M. Scherer, « When Should an Arbitral Tribunal Sitting in Switzerland Confronted with Parallel Litigation Abroad Stay the Arbitration ? », *ASA Bull*, 2001, n° 3, p. 451 ; E. Geisinger and L. Lévy, « *Lis Alibi Pendens in International Commercial Arbitration, Complex Arbitrations* », *ICC Bulletin* 2003, special issue., p. 53 ; C. Oetiker, « The principles of Lis Pendens in International Arbitration: The Swiss Decision in *Fomento v. Colon* », *Arbitration International*, 2002, Vol. 18, No. 2, p. 137 ; F. de Ly and A. Sheppard, « *ILA Final Report on Lis Pendens and Arbitration* », *International Arbitration*, 2009, Vol. 25, n° 1, p. 3 *et seq.*, special p. 27-28.

company, most likely to delay or paralyze arbitral proceedings it believed to be imminent. The Panamanian company immediately responded by initiating an arbitration with its seat in Switzerland, and the Spanish company asked the arbitral tribunal to stay the proceedings until the Panamanian courts had rendered a decision. The arbitral tribunal refused to do so and rendered its award. Proceedings for setting aside the award were initiated before the Swiss Federal Tribunal, which decided that *Lis Pendens* rules under the Swiss Statutes on private international law (PIL) applied to the arbitral tribunal, and that the latter should have stayed its proceeding given that the Panamanian courts were first seized of the same dispute. The award was thus set aside.

This decision was evidently unfavorable to arbitration. Any party anticipating that an arbitration would be initiated against them could commence proceedings before any State court in order to paralyze the arbitration. The Swiss legislators thankfully put an end to this situation by amending Article 186 PIL on October 10, 2006, which now provides that *[the arbitrator] shall rule on its own jurisdiction, notwithstanding an action on the same matter, between the same parties, pending before a State court or another arbitral tribunal, unless serious reasons require the suspension of proceedings.*⁶

In a more recent case, the Swiss Federal Tribunal ruled on a dispute between a French and an Italian company that had entered into a put and call agreement for the shares of a third party company in Italy (company X).⁷ The agreement contained an arbitration agreement stating that all disputes relating to the interpretation and/or the execution thereof, whether deriving from the agreement or in connection with it, shall be submitted to arbitration in Switzerland.⁸ Several months later, the parties initiated discussions on

⁶ Swiss federal act on private international law (PILA), December 18, 1987, Art. 186 para. 1 bis, E. Gaillard, NYLJ.

⁷ Swiss Federal Tribunal (1st Civil law division), March 6, 2008, 4A_500/2007, ASA Bull, 2009, Vol. 27, n° 1, p. 94.

⁸ The arbitration agreement was drafted as follows: « [...] tutte le controversie relative all'interpretazione e/o all'esecuzione del Contratto, o comunque derivanti dal Contratto o in relazione allo stesso, saranno devolute alla competenza esclusiva

the possibility of extending the put and call agreement to warrants issued by company X. The parties had exchanged several letters on the matter and the Italian company claimed that two of these letters reflected the intention of the parties on the repurchase of the warrants and thus constituted an agreement. The Italian company seized the Tribunal of Milan, on the basis of Italian contract law, in order to assert such theory. The French company reacted by immediately submitting the dispute to an arbitral tribunal pursuant to the arbitration agreement contained in the put and call agreement. Before the arbitral tribunal, the French company submitted that the arbitration agreement included all disputes relating to the put and call agreement, including the dispute on the extension of the agreement to the repurchase of the warrants. This is what West Tankers should have done instead of requesting an anti-suit injunction before State courts.

By immediately initiating parallel proceedings before an arbitral tribunal without awaiting the decision of the Italian courts on their own jurisdiction the French company made a key strategic move which was manifestly advantageous for several reasons. First, it brought the case before its natural judge. Second, the provision of Swiss law and the case law of the Swiss Federal Tribunal regarding the scope of arbitration agreement are more liberal than those of Italian law and case law. It was therefore likely that the arbitral tribunal would decide that it had jurisdiction to settle the dispute, whereas arbitral jurisdiction would probably have been denied by Italian courts as the criteria applied by both judges is different.

This is what happened in this particular case. The Arbitral Tribunal decided that it had jurisdiction and rendered an award within a very short time-frame, rejecting the Italian company's claims. A few months later, the Tribunal of Milan held the exact opposite by stating that the arbitration agreement contained in the put and call agreement did not cover the dispute relating to the exchange of letters relating to the repurchase of the warrants, which was under the jurisdiction of the Italian courts. The French party was however in a

di un collegio arbitrale nominato, e che deciderà, in conformità al Regolamento d'arbitrato della Camera di Commercio e dell'Industria di Ginevra [...] ».

much more advantageous position before the Italian courts since it was able to rely on the international arbitral award rendered in its favor. The award most likely influenced the final decision at the Tribunal of Milan, which turned out to be entirely in favor of the French party.⁹

C. Seizing Two Arbitral Tribunals on the Basis of a Same Agreement

Litigants' imagination having no limits, a recently published decision of the Swiss Federal Tribunal mentions a case in which a party decided to commence parallel proceedings, not before a State court or on the basis of a different agreement, but on the basis of the same agreement before a different arbitral tribunal¹⁰. In this case, a professor of pharmaceutical sciences, who discovered a substance likely to have a therapeutic effect on certain forms of cancer, entered into a know-how license agreement with a Swiss pharmaceuticals company (company X). The agreement contained an ICC arbitration clause, with a seat in Geneva. Several years later, the same professor transferred all the rights and obligations resulting from the license agreement to a third company (company Y). A dispute arose between companies X and Y relating to the payment of royalties, and company Y submitted the dispute to an arbitral tribunal.

In a partial award, the arbitral tribunal acknowledged the right of company Y to receive payment of royalties, and the question of quantum was deferred to a subsequent phase of the arbitration. On the basis that the arbitral tribunal's interpretation of the agreement did not reflect its intention at the time it entered into the agreement, company X therefore informed Company Y that it considered that the agreement was void for mistake, and seized a second arbitral

⁹ Tribunal of Milan, Judgment of February 13, 2008, 8th civil division, case. N° 32406/2006.

¹⁰ Swiss Federal Tribunal, (1st civil law division), 4A_210/2008/ech, October 29, 2008, *X. SA v. Y Limited*, ASA Bull, 2009, Vol. 27, n° 2, p. 309.

tribunal to declare the agreement void. The claim of company X before the second arbitral tribunal was in fact an invitation to review the merits of the award rendered by the first tribunal. The direct consequence of the agreement being declared void, if granted, was that company Y would be deprived of its right to perceive royalties, which was precisely the object of the partial award rendered by the first tribunal.¹¹ The Federal Tribunal did stress the tactical aspect of the party's decision to commence the second proceeding: "*Speaking of claim is questionable when dealing with a mere declaratory relief, the only aim thereof being, other than deferring the outcome of the pending case regarding the payment, a case in which the Claimant has lost on the principle of liability, at least to give support to the request for partial release of this party's debt arising out of the case*".¹²

The Federal Tribunal consequently dismissed the claim to set aside the partial award, which led the first arbitral tribunal to refuse to stay the proceedings whilst awaiting the second tribunals' award. It was nevertheless a clever attempt to derail the first arbitration proceedings on the part of company X.

These examples lead to the conclusion that there are various ways of initiating parallel proceedings and that they are sometimes successful. In light of the above, two questions arise: what elements permitted a party to commence a parallel proceeding, and the limits of these procedural tactics.

¹¹ This is what the Federal Tribunal clearly stated in its recitals: "It is surprising to observe that in its arbitration request, the complainant did not make any request for relief apart from the one aiming at obtaining a declaration on the validity of the nullification of the second amendment. Had it done so, it would only have been in a position to partly reject the financial claims put forward by the respondent, a claim that the arbitral tribunal granted, on the principle, in its partial award. This shows, once again, that the two aforementioned questions are inseparable owing to their obvious connexity" *ibid*, p. 316-317.

¹² *Ibid*, p. 319.

II. Elements Enabling a Party to Have Recourse to Parallel Proceedings and the Limits Thereof

The study of the above cases reveals three different scenarios. Cases of parallel proceedings between an arbitral tribunal and a State court (A), cases of parallel proceedings between two arbitral tribunals ruling on different agreements (B) and cases of parallel proceedings between two arbitral tribunals ruling on the same agreement (C). Each of these cases calls for different analysis.

A. Cases of Parallel Proceedings between Two Arbitral Tribunals Ruling on Different Agreements

This is the standard scenario in parallel proceedings. It leads to the *West Tankers*, *Fomento* and Italian cases. National legislations generally address this situation, albeit in different ways, encouraging or discouraging, as the case may be, the use of state proceedings.¹³ Some legislations – the most arbitration friendly – reduce the judge’s intervention to a minimum and, consequently, the possibilities of having recourse for tactical purposes to parallel judicial proceedings. Such is the case, for example, of French legislation and, since the *anti-Fomento* law entered into force, Swiss legislation.

In France, the issue is tackled by the so-called negative effect of the principle of competence-competence. Pursuant to Article 1458 of the French Code of Civil Procedure, which also applies to international arbitrations, State courts have to declare that they do not have jurisdiction whenever the dispute has already been submitted to an arbitral tribunal in application of an arbitration agreement. When no arbitral tribunal has been seized, the same Article provides that the State court must also refrain from hearing the dispute, unless the arbitration agreement is manifestly null and

¹³ For a comparative study of national provisions on the matter, see the International Law Association’s report on *Lis Pendens* and arbitration, F. de Ly and A. Sheppard, “ILA Final Report on *Lis Pendens* and Arbitration”, *op. cit.*, spéc. pp. 25-30.

void. This calls for a *prima facie* control of the existence and validity of the arbitration agreement.¹⁴ Case law nevertheless extended this *prima facie* control to manifestly non-applicable clauses.¹⁵ It is in practice particularly difficult, if not impossible, for a litigant to seize French courts, for tactical purposes, in order to derail arbitration proceedings.

This is also the case in Switzerland. Aware of possible international repercussions following the *Fomento* decision, which is generally perceived as contrary to the interests of international arbitration, the Swiss legislator amended Article 186 of the PIL Act relating to the jurisdiction of the arbitral tribunal, by adding Article 1 bis thereto, which explicitly provides that: “[the arbitrator] rules on its own jurisdiction notwithstanding an action on the same matter already pending between the same parties before a State court or another arbitral tribunal, unless serious reasons require the suspension of proceedings”.¹⁶ In addition, Switzerland, like France, applies the negative effect of the principle of competence-competence when the seat of the arbitration is in Switzerland.¹⁷ The procedural strategy which consists in submitting a

¹⁴ Article 1458 CPC : “When a dispute that has been submitted to an arbitral tribunal by virtue of an arbitration agreement is brought to a State court, the latter must declare that it lacks jurisdiction unless the arbitration agreement is manifestly null and void. In both cases, the court cannot automatically reveal that it lacks jurisdiction”. On the negative effect of the principle of competence-competence in French law, see E. Gaillard and J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer, 1999, para. 661 et seq.; E. Gaillard, note ad 2nd civil chamber of the Court of cassation, May 10, 1995, *Coprodag*, *Revue de l'arbitrage* 1995, 618 ; E. Gaillard, « L'effet négatif de la compétence-compétence », in *Études de procédure et d'arbitrage en l'honneur de Jean-François Poudret*, Université de Lausanne, 1999, pp. 387 et seq.

¹⁵ 1st chamber of the Court of cassation, February 20, 2007, *Revue de l'arbitrage* 2007, 775, note F.-X. Train.

¹⁶ Swiss federal act on private international law (PILA), December 18, 1987, art. 186 para. 1bis. For reactions of the doctrine against the *Fomento* decision, see above mentioned references, note 6.

¹⁷ On the negative effect of the principle of competence-competence when an arbitration seat is located in Switzerland, see E. Gaillard « L'effet négatif de la compétence-compétence », *op. cit.*, p. 393 ; J.-F. Poudret, « Le pouvoir d'examen du juge suisse saisi d'une exception d'arbitrage », *ASA Bulletin* 2005, 401 ;

dispute to State courts of a third-country, in order to paralyze arbitral proceedings, has no longer any practical effects if the seat of arbitration is in Switzerland.

Conversely, other legislations give broader powers to State courts to intervene during arbitration proceedings and consequently allow parties more opportunities of having recourse to parallel proceedings for tactical purposes. This is the case for example in England where, notwithstanding the existence of an arbitration agreement, parties are allowed to have recourse to State courts in four different situations. First, Section 32 of the Arbitration Act provides under certain conditions parties with the possibility to obtain a preliminary decision from a State court on the arbitrator's jurisdiction.¹⁸ Second, Section 45 of the Arbitration Act authorizes the State court to determine of a preliminary point of law under certain conditions (notably the agreements of all parties concerned or the permission of the arbitral tribunal), provided that this point of law affects the rights of either of the parties to the arbitral proceedings.¹⁹ Finally, Section 72 enables a

G. Kaufmann-Kohler and A. Rigozzi, *Arbitrage International. Droit et pratique à la lumière de la LDIP*, Schulthess, 2006, paras. 438 *et seq.*

¹⁸ Arbitration Act, Section 32 (1) and (2) : “Determination of preliminary point of jurisdiction (1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal A party may lose the right to object (see section 73). (2) An application under this section shall not be considered unless— (a) it is made with the agreement in writing of all the other parties to the proceedings, or (b) it is made with the permission of the tribunal and the court is satisfied— (i) that the determination of the question is likely to produce substantial savings in costs, (ii) that the application was made without delay, and (iii) that there is good reason why the matter should be decided by the court “.

¹⁹ Arbitration Act, Section 45 (1) and (2) : “Determination of preliminary point of law (1) Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section. (2) An application under this section shall not be considered unless— (a) it is made with the agreement of all the other parties to the proceedings, or (b) it is made with the permission of the

person involved in an arbitration, but who takes no part in the proceeding, to seek from the courts a declaration, or an injunction, on the validity of the arbitration agreement, on the scope thereof or on the proper constitution of the arbitral tribunal.²⁰ Admittedly, English law subjects these recourses to a number of more or less constraining conditions, but it still offers the litigant a wider range of possibilities to initiate parallel proceedings than French or Swiss law.²¹

More fundamentally, Section 9 of the Arbitration Act provides that where a court is seized of a matter which is to be referred to arbitration under an arbitration agreement, the court should settle the matter if it considers the arbitration agreement to be “*null and void, inoperative, or incapable of being performed*”. This wording, inspired by the New York Convention and the UNCITRAL model law,²² echoes

tribunal and the court is satisfied—(i) that the determination of the question is likely to produce substantial savings in costs, and (ii) that the application was made without delay”.

²⁰ Arbitration Act, Section 72 (1): “Saving for rights of a person who takes no part in proceedings (1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question—(a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, or (c) what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in the court for a declaration or injunction or other appropriate relief”.

²¹ Recourses provided for by Sections 32 and 45 are only open in a limited number of cases, notably when the parties agree to apply them or when the arbitral tribunal is convinced that this solution aims at reducing important costs. Recourse in Section 72 however is not subject to any particular condition. See *Fiona Trust v. Yuri Privalov and Others* [2007] EWCA 20 at [34], taking into account that the judge must be very “cautious” before accepting a recourse based on Section 72.

²² UNCITRAL model law on international commercial arbitration, 1985 (amended in 2006), Art. 8(1): “The tribunal seized of a dispute on a question that is the object of an arbitration agreement will refer the parties to arbitration if one of them requests this, at the latest when it submits its first conclusions on the merits of the dispute, unless such judge establishes that said agreement is null and void, inoperative and not likely to be enforced”.

Article 7 of the Swiss PIL²³. It is however on the basis of that Article that the Swiss courts applied the negative effect of the principle of competence-competence in Switzerland and limited their review to a *prima facie* review of the arbitration agreement in question.²⁴ It should be noted that, on the basis of a quasi-similar wording, English courts decided, on the contrary, that, a detailed review of the validity and scope of the arbitration agreement was necessary at such a preliminary stage. English case law is unanimous in this regard.²⁵ In this specific case, judicial tradition, in addition to the law, encourages parties to have recourse to State courts, even at the beginning of the arbitration

The possibilities of having recourse to parallel proceedings between an arbitral tribunal and a State court thus largely depends on the applicable law in the State where the court is seized and on the judicial tradition of its courts. There is no doubt, in this context, that the reform relating to the Brussels Regulation proposed by the European Commission in its Green paper dated April 21, 2009, if adopted, would directly result in an increase of the opportunities to derail arbitration proceedings by initiating parallel proceedings within

²³ Swiss PILA, December 18, 1987, Art. 7: “Arbitration Agreement If the parties have entered into an arbitration agreement on an arbitration dispute, the Swiss tribunal will decline jurisdiction unless: a. the defendant has taken steps in the proceedings relating to the merits, without reserve; b. the tribunal established that the agreement is null and void, inoperative and is not likely to be enforced; or c. the arbitral tribunal cannot be formed for reasons that are clearly owed to the defendant to the arbitration”.

²⁴ Regarding decisions having *prima facie* control of the compromissory clause, see for example Swiss federal tribunal, (1st civil law division), Decision of the federal Tribunal 122 III 139, April 29, 1996, *Fondation M. v. Banque X.*, ASA Bulletin, 1996, 527 ; Swiss Federal Tribunal, (1st civil law division), 4P.114/2004, March 29, 2004, ASA Bulletin, 2005, 145.

²⁵ See, for example, *Sunlife Assurance Co of Canada v. CX Reinsurance Co Ltd* [2004] Lloyd’s Rep. I.R. 58 ; *Elektrim v. Vivendi Universal* [2007] EWHC 11, [123]-[132] ; *Downing v. Al Tameer* [2002] EWCA Civ 721; *Janos Paczy v. Haendler & Natermann GmbH* [1981] 1 Lloyd’s Rep. 302, CA.

the European Union.²⁶ By allowing judgments relating to arbitration to be automatically recognized within the European Union,²⁷ and by giving priority to the judge of the seat of the arbitration to rule on the validity of the arbitration agreement by a declaratory judgment,²⁸ the proposed reform will undoubtedly encourage a “race to the courts” between the parties.²⁹

All that a party seeking to derail arbitral proceedings will have to do is to seek from a State court a decision that will render an arbitration agreement invalid, preferably in a State where legislation is not favorable to arbitration, in order for this decision to be automatically recognized in all EU member States, thus preventing the enforcement (exequatur) of a possible arbitral award within these States. To avoid this situation, the party wishing to have recourse to arbitration will be forced to obtain from the courts of the seat of the arbitration, as a preventive measure, a decision recognizing the validity of the arbitration agreement. In both cases, proceedings will

²⁶ Green paper on the amendment of (EC) Regulation n° 44/2001 of the Council relating to jurisdiction, the recognition and enforcement of judgments in civil and commercial matters, April 21, 2009, COM(2009) 175 final. On this paper and on the consequences it will have on the future of arbitration within the European Union, see notably P. Pinsolle, “The Proposed Reform of Regulation 44/2001: A Poison Pill for Arbitration in the European Union?”, *Int A.L.R.*, 2009, Issue 4, p. 62 ; A. Mourre, « A propos de la portée de l'exclusion de l'arbitrage dans le règlement n° 44/2001, notamment après l'arrêt *West Tankers* de la CJCE », in *Les Cahiers de l'arbitrage*, GP July 17-18, 2009, p. 20-28, as well as the numerous contributions published at: http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0002_en.htm.

²⁷ Green paper p. 9: “[...] a (partial) deletion of the exclusion of arbitration from the scope of the Regulation could improve the interface between arbitration and judicial proceedings. As a consequence of this deletion, judicial proceedings in support of arbitration could come within the scope of the Regulation”.

²⁸ Green paper, p. 9: “More generally speaking, we could watch over the coordination between proceedings concerning the validity of an arbitration agreement brought before a court or before an arbitral tribunal. We could, for example, give priority to the member State courts where the arbitration is taking place, in order to rule on the existence, validity and scope of an arbitration agreement”.

²⁹ As per Lord Hoffmann in *GAR*.

hence take place before a State court, and not before arbitrators, contrary to the parties' agreement. Moreover, in the absence of choice of seat by the parties, the Green paper recommends that the seat be fixed in the country whose courts would have jurisdiction over the dispute in the absence of an arbitration agreement.³⁰ In practice, given the options of forum offered by the Regulation (respondent's place of residence and, if applicable, place of execution of the agreement, delivery of the object, damage, etc), one can imagine the number of possibilities that the Commission's reform will make available to the litigants desiring to escape or delay arbitration. Notwithstanding the intention behind the European proposal, which was most certainly laudable, this proposal is troublesome to say the least from the point of view of the efficiency of proceedings.

B. Cases of parallel proceedings between two arbitral tribunals ruling on different agreements

The existence of parallel proceedings before two arbitral tribunals ruling on different agreements that belong to the same underlying economic transaction is almost as frequent as parallel proceedings before a State court. This does not involve a conflict between the jurisdiction of a State court and that of an arbitral tribunal, but one between the *ratione materiae* jurisdiction of two arbitral tribunals.

The arbitrators are very cautious in this regard as the scope of their jurisdiction is fully reviewed by State courts with the risk to see their award set aside.³¹

³⁰ Green paper, p. 9, note 14: "If such approach were elected, uniform criteria should enable the seat of arbitration to be chosen. The general study suggests referring to the parties' agreement or to the arbitral tribunal's decision. If a seat cannot be chosen pursuant to this, it is recommended to turn to the courts of a member State that ruled on the dispute by virtue of the Regulation in the absence of an arbitration agreement".

³¹ This is the case, for example, in France (Art. 1502 of the Code of civil procedure, that makes provision for the annulment of the award when the arbitrator has ruled "without an arbitration agreement or based on an agreement that was null

Several examples exist. In a case that was recently referred to the Paris Court of Appeal, two Cuban companies had initiated arbitral proceedings against a Mexican bank on the basis of a loan agreement and a farm-out agreement, both providing for an ICC arbitration, without mentioning the seat of the arbitration.³² The parties had agreed on Paris as the seat of the arbitration. The Mexican bank soon hereafter expressed its intention to refer additional disputes to the arbitral tribunal, relating to a second loan agreement, which was linked to the first, and which also contained an ICC arbitration clause, but with a seat in Madrid this time. The Cuban companies objected to the arbitral tribunal's jurisdiction to decide on the second loan agreement and referred the matter to a second arbitral tribunal. However, given that the claims under the loan agreements were closely related and that, save for the seat, the arbitration clauses were similar, the first tribunal declared that it had jurisdiction to rule on all claims. This is the reason why the Paris Court of Appeal decided to partially set aside the award on the grounds that, on the one hand, no variation of the seat of the arbitration chosen by the parties in the second loan agreement could be implied from the parties' agreement to arbitrate in Paris the disputes relating to the first loan agreements, and, on the other hand, that the fact that the claims under the agreements were closely related had no influence over the parties' desire to organize separate proceedings in Paris and Madrid.

or had expired" or "*without complying to the mission it had been assigned*"), in the United Kingdom (Section 67 of the Arbitration Act, that provides for recourse due to the arbitral tribunal's lack of jurisdiction to rule on the merits, this recourse including the validity and the scope of the compromissory clause), in Germany and the UNCITRAL model law (§ 1509 para. 2 ch. 1 let. c ZPO and Art. 34 para. 2 let. A ch. 3 of the model law, providing for the annulment of the award if the tribunal ruled on a dispute that is not mentioned in the compromissory clause or that surpasses the compromissory clause) or in Switzerland (Art. 190(2) (d) of the PILA, that provides that the award can be annulled when an arbitral tribunal wrongfully declared that it had jurisdiction or when lacking jurisdiction).

³² Paris Court of Appeal, 1st Chamber, November 16, 2006, *Société Empresa de Telecomunicaciones de Cuba SA v. SA Telefonica Antillana and SNC Banco Nacional de Comercio Exterior*, *Revue de l'arbitrage* 2008, 109, note M. de Boissésou.

Consequently, if recourse to parallel proceedings based on different agreements that are part of a same transaction is relatively common, the success of such strategies will essentially depend on the drafting of the arbitration agreement contained in the agreements in question. In the presence of different arbitration clauses, even within a contractual group, it will be very difficult for a party to impose the jurisdiction of a single tribunal, at least as long as the other party objects to it. The existence of a single economic transaction can, however, lead one of the two tribunals to stay the proceedings (see paragraphed I.C above).

C. The case of two tribunals ruling on the basis of the same agreement

The case of two arbitral tribunals ruling on the basis of the same agreement is more delicate. It raises the problem of the allocation of jurisdiction between two tribunals that are equally competent to rule on questions referred to them. By definition, these questions are included within the scope of the clause. In practice, we believe that the question will not be resolved by delimitating the jurisdiction *ratione materiae* of each tribunal, but by deciding on the admissibility of the claims referred to a second tribunal.

It has been argued that the tribunal second seized would lack jurisdiction to settle the dispute since the arbitration agreement would no longer have any effects as a result of the first tribunal being seized.³³ This reasoning is appealing, but seems nevertheless slightly artificial. In reality, it is an application by analogy of a reasoning applicable to a specific submission to arbitration (*compromis*), that is an arbitration agreement which is entered into after the dispute has arisen, for the purpose of resolving this specific dispute. However, contrary to a submission agreement, an arbitration clause remains effective when an arbitral tribunal is seized. It is still possible to refer

³³ P. Mayer, «Litispendance, connexité et chose jugée dans l'arbitrage international», in *Liber Amicorum Claude Raymond, Autour de l'arbitrage*, Bredin, Lalive, Poudret, Terré (editions), Litec, 2004, p. 185 *et seq.*

an additional question and, in theory, the same question to a second arbitral tribunal. The second tribunal seized has supposedly as much jurisdiction to deal with these issues, as the first tribunal as its powers emanate from the same clause. The arbitration clause, contrary to a *compromis*, remains valid and effective even if the dispute was referred to an arbitral tribunal.

Other authors suggested the application, by analogy, of international *lis pendens* rules, as fundamental procedural rules recognized by nearly all legal systems as a mean of protection against dilatory tactics and increase in the number of proceedings.³⁴ However, such factors do not seem to justify the obligation for a second seized arbitral tribunal to stay its proceedings whilst awaiting the award of the first. Ever since the anti-Fomento law entered into force, Swiss law expressly provides for the contrary, since Article 186 para. 1 bis PIL states that when a claim, with the same object and between the same parties is brought before two arbitral tribunals, the second does not have to stay the proceedings, unless “serious reasons” require it to. Case law of the Federal Tribunal will specify what these serious reasons are, but the principle is that the decision to stay proceedings remains a discretionary decision for the arbitrator. A stay would appear to be an appropriate measure whenever one of the parties attempts to bring the same claim before a second arbitral tribunal, for tactical reasons.³⁵

³⁴ See G. Born, *International Commercial Arbitration*, Vol. 2, Kluwer Law International, 2009, p. 2048-2049.

³⁵ See on this subject the recommendations of the International Law Association (ILA) on *Lis Pendens*, *Res Judicata* and arbitration: “[...] (5) Where the Parallel Proceedings have been commenced before the Current Arbitration and are pending before another arbitral tribunal, the arbitral tribunal should decline jurisdiction or stay the Current Arbitration, in whole or in part, and on such conditions as it sees fit, for such duration as it sees fit (such as until a relevant determination in the Parallel Proceedings), provided that it is not precluded from doing so under the applicable law and provided that it appears that: (1) the arbitral tribunal in the Parallel Proceedings has jurisdiction to resolve the issues in the Current Arbitration and (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

The Swiss Federal Tribunal's above mentioned decision is a perfect example of this situation, insofar as the question that was referred to the second tribunal was only the other side of the coin of the question that was referred to the first. Once the award is rendered by the first arbitral tribunal, the question shall therefore be resolved in terms of admissibility of claims brought to the second tribunal, in account of *res judicata*.³⁶ In our opinion, the second tribunal should, through a definitive award, decide that the claims that have already been referred to a first tribunal and those that are necessarily included in the scope of the issues already referred to the first tribunal are inadmissible.

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 [...]”, F. de Ly and A. Sheppard, « ILC Recommendations on Lis Pendens and Res Judicata and arbitration », *Arbitration International*, 2009, Vol. 25, n° 1, p. 83 et seq., spec. p. 84.

³⁶ On *Res Judicata* in international arbitration, see notably D. Hascher, « L'autorité de la chose jugée des sentences arbitrales », *Trav. Com. fr. dr. int. privé*, 2000-2002, Paris, Pedone, 2004 ; B. Hanotiau, “The Res Judicata Effect of Arbitral Awards”, *CCI Bull.* 2003, spec. suppl., p. 43. as well as P. Mayer, *op.cit.*