This article is from The American Review of International Arbitration (ARIA)
Vol. 29 No. 3 © 2018 JurisNet, LLC 2018 www.arbitrationlaw.com

ARTICLES

COORDINATION OR CHAOS: DO THE PRINCIPLES OF COMITY, *LIS PENDENS*, AND *RES JUDICATA* APPLY TO INTERNATIONAL ARBITRATION?

*Emmanuel Gaillard**

Comity among nations is a notoriously ambiguous concept, classically defined as being "neither a matter of absolute obligation …nor of mere courtesy and good will."[1] Derived from territorial sovereignty, comity was advocated as a framework to address the earliest conflict of laws scenarios, countervailing the parochial inclination of a sovereign to apply its own law within its borders to the exclusion of all other law.[2] As now applied, it is generally used to justify a court's decision to show deference to a foreign proceeding and a foreign decision maker. Therefore,

---

* Emmanuel Gaillard is a visiting Professor at Yale Law School and Harvard Law School and heads the International Arbitration Group at Shearman & Sterling LLP.

[1] Hilton v. Guyot, 159 U.S. 113, 163–64 (1895); *see also* FREDERICK A. MANN, FOREIGN AFFAIRS IN ENGLISH COURTS 134 (1986) ("Comity is one of the most ambiguous and multifaceted conceptions in the law in general and in the realm of international affairs in particular. It may denote no more than that *courtoisie internationale*, that courtesy which ships observe when they salute each other or which is usual among diplomats or even judges and which caused Lord Reid to say that it was impossible for an English court to assume that any foreign government with which Her Majesty's Government has diplomatic relations may act so as to commit a clear breach of faith. At the opposite extreme it may be a synonym for public international law. Or it may mean, not a rule of law at all, but a standard to be respected in the course of exercising judicial or administrative discretion. Or it may be the equivalent of private international law (or the conflict of laws) or at least indicate the policy underlying particular rules or what is more generally known as public policy. Or it may be used to justify the existence of the conflict of laws or the origin of its sources or the public policy pursued by it."); Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 15 (1991) [hereinafter Paul*, Comity in International Law*] ("Comity has been defined variously as the basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or 'considerations of high international politics concerned with maintaining amicable and workable relationships between nations.'"); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 205 (2003) ("The 'comity of nations' is a venerable concept . . . a presumption of recognition that is something more than courtesy but less than obligation.").

[2] *See* Paul, *Comity in International Law*, *supra* note 1, at 15–16; *see also* Donald E. Childress, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 18 (2010); William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2087 (2015); Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 282 (1982).

comity is a vague idea that evades precise definition—something that has frustrated certain commentators, especially in England, who view international comity as a matter of foreign relations ill-suited to the judicial role.[3]

Comity is also a source principle, giving rise to more precise doctrines with defined elements and consequences, such as *lis pendens*, *res judicata* or issue estoppel. Further, comity limits the availability of anti-suit injunctions.[4] As rules aimed at preserving the integrity of pending and prior proceedings, and in so doing, avoiding chaos, these related doctrines and remedies promote comity interests by requiring a court to defer to the jurisdiction of foreign legal orders. Yet, protecting comity interests through the application of such rules is decidedly different from empowering courts to resort to comity as such. When a court views a given topic through the prism of comity, it retains flexibility, whereas when a court applies one of the rules derived from comity, it is confined in its decision by the technicality of these rules.

Paradoxically, when legal systems specifically empower courts to resolve questions of overlapping jurisdiction using comity—which mostly occurs in common law systems, they may weaken respect for foreign legal orders. When placed in the hands of an interventionist judge, a flexible principle like comity can be used to expand a court's discretion to act extraterritorially rather than limit it. As such, the flexibility of comity as a principle of judicial decision-making makes it somewhat of an "Orwellian" concept, working to undermine the very interests for which it stands.

By contrast, when legal systems approach questions of overlapping jurisdiction with less dependence on the application of comity and more on the rules that derive from it—which mostly occurs in civil law systems—they reflect more of the true

---

[3] *See* CHESHIRE, NORTH & FAWCETT, PRIVATE INTERNATIONAL LAW 5 (James J. Fawcett & Janeen M. Carruthers eds., 14th ed. 2008) ("'[A] phrase which is grating to the ear, when it proceeds from a court of justice' . . . it has been employed in a meaningless or misleading way. The word itself is incompatible with the judicial function, for comity is a matter for sovereigns, not for judges required to decide a case according to the rights of the parties" (quoting an American lawyer, Samuel Livermore)); DICEY, MORRIS & COLLINS, CONFLICT OF LAWS 5 (Lord Collins of Mapesbury et al. eds., 15th ed. 2016) ("Dicey was highly critical of the use of comity to explain the conflict of laws. He said it was 'a singular specimen of confusion of thought produced by laxity of language.'"); *cf.* Timothy Endicott, *Comity Among Authorities*, 68 CURRENT LEGAL PROBS. 1, 5 (2015) ("[T]hese claims underrate comity by suggesting that it does not have to do with the rights of the parties, and underrate the role of judges by suggesting that a judicial decision cannot amount to an exercise of state sovereignty."); Arthur K. Kuhn, *La Conception du Droit International Privé d'après la Doctrine et la Pratique aux Etats-Unis* [*The Conception of Private International Law according to Doctrine and Practice in the United States*], *in* 21 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 189, 208–09 (1928) (discussing Livermore's critique of comity); Adrian Briggs, *The Principle of Comity in Private International Law*, *in* 354 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 77, 80 (2011).

[4] *See, e.g.*, Steven Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions*, 30 GEO. WASH. J. INT'L L. & ECON. 1 (1997).

spirit of comity.[5] By constraining the extraterritorial actions of their courts through predictable, rules-based doctrines, they recognize other actors' entitlement to operate.

In international situations, comity and its technical corollaries are generally understood to apply as between State courts.[6] When parties have resorted to international arbitration, the question arises as to whether comity is to be applied as between courts and arbitral tribunals, or even as between arbitral tribunals themselves.

It is thus important to consider the interplay of different legal orders—the legal orders of States, and what is sometimes referred to as the arbitral legal order.[7] The following sections examine, in turn, (I) the relationships between national courts and arbitral tribunals, (II) the relationships among arbitral tribunals, and (III) the relationships among national courts on matters pertaining to arbitration.

I. COORDINATION AMONG NATIONAL COURTS AND ARBITRAL TRIBUNALS

This section will examine whether the three key coordination mechanisms—(A) *lis pendens*, (B) anti-suit injunctions, and (C) *res judicata* (or issue estoppel, as the case may be)—have a role to play in ensuring coordination among national courts and arbitral tribunals.

A. *Lis Pendens*

Lis pendens has no role to play in solving jurisdictional conflicts between national courts and arbitral tribunals.[8] The *lis pendens* doctrine—according to which

---

[5] *See, e.g.*, Council Regulation 1215/2012, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1, recital 21 ("In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously."); *see also* Council Regulation 1215/2012, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1, art. 21.

[6] *See, e.g.*, Slaughter, *supra* note 1, at 194; Joel R. Paul, *The Transformation of International Comity*, 71(19) LAW & CONTEMPORANEOUS PROBLEMS 27 (2008) [hereinafter Paul, *Transformation of International Comity*].

[7] *See* Emmanuel Gaillard, *The Representations of International Arbitration*, 1 J. INT'L DISP. SETTLEMENT 271 (2010); Emmanuel Gaillard, LEGAL THEORY OF INTERNATIONAL ARBITRATION (Martinus Nijhoff ed., 2010).

[8] *See, e.g.*, Emmanuel Gaillard, *Abuse of Process in International Arbitration*, 32 ICSID REV. 17, 28 n.52 (2017) [hereinafter Gaillard, *Abuse of Process*] ("[T]he doctrine of *lis pendens* offers no assistance in situations of concurrent proceedings where contractual parties have agreed to resolve disputes through arbitration, but where one party

a court will decline to exercise jurisdiction if the same action between the same parties is already pending elsewhere—presupposes that the two bodies are equally competent to hear the dispute.[9] As between an arbitral tribunal and a court, however, the situation does not arise: the existence of a valid arbitration agreement conferring jurisdiction on an arbitral tribunal necessarily excludes the jurisdiction of national courts.[10] In other words, either an arbitral tribunal will be exclusively competent over a dispute, or it will not be competent at all.

Yet, that is not the end of the matter. Whether an arbitral tribunal is, in fact, exclusively competent over the dispute,[11] and whether multiple bodies may be called on to make this determination must still be determined. It is not uncommon for a party unwilling to participate in arbitration to initiate court proceedings to challenge the jurisdiction of the arbitral tribunal, or for a defendant in an ongoing litigation to seek to initiate arbitration. In such cases, it would not be appropriate for the subsequently filed proceeding to defer to the former simply out of a sense of comity or in accordance with the *lis pendens* rule.[12] Rather, the guiding principle is that of competence-competence, in its positive and negative effects.[13] Applying the principle of competence-competence, a court confronted with an ongoing arbitration should defer to the competence of the arbitral tribunal to determine its own jurisdiction in the first instance, whereas an arbitral tribunal confronted with ongoing court proceedings should assess its own jurisdiction.

---

seizes a national court to resolve all or part of its claims."); Julian D.M. Lew, *Concluding Remarks: Parallel Proceedings in International Arbitration–Challenges and Realities*, *in* PARALLEL STATE AND ARBITRAL PROCEDURES IN INTERNATIONAL ARBITRATION 305, 311 (Bernardo M. Cremades & Julian D.M. Lew eds., 2005) ("There is no place for the concept of *lis pendens* in international arbitration. It will not and cannot resolve the problem of parallel and simultaneous forums."); Gabrielle Kaufmann-Kohler et al., *Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently: Final Report on the Geneva Colloquium held on 22 April 2006*, 21 ICSID REV. 59, 67 (2006).

[9] For an example of an arbitral tribunal holding that the requirements for *lis pendens* are not met where a company commences litigation before the courts of one State and the company's shareholders commence an arbitration with its seat in another State, see Busta v. Czech, Stockholm Chamber of Comm., Case No. V 2015/014, Award, ¶¶ 210–18 (Mar. 10, 2017).

[10] *See* Elliott Geisinger & Laurent Levy, *Lis Alibi Pendens in International Commercial Arbitration*, *in* SPECIAL SUPPLEMENT 2003: COMPLEX ARBITRATIONS: PERSPECTIVES ON THEIR PROCEDURAL IMPLICATIONS 53 (2003); *see also* Bernardo Cremades & Ignacio Madalena, *Parallel Proceedings in International Arbitration*, 24 ARB. INT'L 507, 511 (2008).

[11] *See* Christer Söderlund, *Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings*, 22 J. INT'L ARB. 301, 312 (2005).

[12] *See* Florian Kremslehner, *Lis Pendens and Res Judicata in International Commercial Arbitration*, AUSTRIAN Y.B. INT'L ARB. 127, 159 (Christian Klausegger et al. eds., 2007).

[13] *See, e.g.*, Paul, *Transformation of International Comity*, *supra* note 6; Slaughter, *supra* note 1, at 194.

1. National Courts Waiting for the Arbitrators to Decide on Their Own Jurisdiction: The Negative Effect of *Competence-Competence*

In most jurisdictions, it is well established that an arbitral tribunal has the authority to rule on whether a valid arbitration agreement exists and covers the dispute.[14] This widely accepted principle is known as the positive effect of competence-competence.[15] The true test of a legal system's support for arbitration, however, is whether it recognizes the negative effect of competence-competence, by requiring courts to abstain from ruling on an arbitral tribunal's competence at the pre-award stage, provided that a *prima facie* basis for jurisdiction exists. This rule of priority permits "the arbitrators to be the *first* (as opposed to the *sole*) judges of their own jurisdiction,"[16] with the question of the arbitral tribunal's jurisdiction coming before national courts only after an arbitral award is issued, in the context of setting-aside or enforcement proceedings.

A growing number of jurisdictions have now adopted competence-competence in both its positive and negative forms. In France, for example, the principle is codified in the arbitration law: "When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitration tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable."[17]

In many other jurisdictions, the principle has been implemented judicially. The Singapore Court of Appeal, for example, has established that a "court should adopt a *prima facie* standard of review" when determining whether to stay in favor of arbitration,[18] since permitting a "full determination of an arbitral tribunal's

---

[14] *See, e.g.*, CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1448 (Fr.); Special Rules of Court on Alternative Dispute Resolution, S.C., A.M. No. 07-11-08-SC, R. 2.4 (2009) (Phil.); Org. for the Harmonization of African Bus. L. [OHADA], The OHADA Uniform Act on Arbitration, art. 13 (amended Nov. 23, 2017); Arbitration Act 1996, c. 23 § 30 (Eng.); *see also* SÉBASTIEN BESSON & JEAN-FRANÇOIS POUDRET, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 387–88 (2d ed. 2007).

[15] *See* Emmanuel Gaillard & Yas Banifatemi, *Chapter 8: Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS, THE NEW YORK CONVENTION IN PRACTICE 257, 259 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).

[16] *Id.* at 259–60 (emphasis in original); *see also* Special Rules of Court on Alternative Dispute Resolution, S.C., A.M. No. 07-11-08-SC, Rule 2.4 (2009) (Phil.). *See* Eduardo Lizares, ARBITRATION IN THE PHILIPPINES UNDER THE ALTERNATIVE DISPUTE RESOLUTION ACT OF 2004 200 (2d ed. 2011) (summarizing Rule 2.4: "[T]he competence-competence principle also has a negative effect . . . in that it enjoins the courts to accord the arbitral tribunal the first opportunity to rule on the issue of its jurisdiction.").

[17] CODE DE PROCEDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1448 (Fr.). For the Philippines, see Special Rules of Court on Alternative Dispute Resolution, S.C., A.M. No. 07-11-08-SC, R. 2.4 (2009). For Africa, see The OHADA Uniform Act on Arbitration, art. 13 (amended Nov. 23, 2017).

[18] Tomolugen Holdings Ltd. v. Silica Investors Ltd., [2015] SGCA 57, ¶ 63 (Sing.).

jurisdiction could significantly hollow the [competence-competence] principle of its practical effect."[19] Similarly, the Hong Kong SAR Court of Appeal has determined that "[i]t is important for the court not to usurp the function of the arbitrators, and unless . . . [the tribunal's lack of jurisdiction] is clear, the matter should be stayed for arbitration."[20]

In the United States, judicial deference to international arbitration is making strides in a different fashion. In *First Options of Chicago v. Kaplan*,[21] the United States Supreme Court rejected the principle of competence-competence and instead established a presumption that parties to an arbitration agreement have not agreed to arbitrate the issues of existence and validity of the arbitration agreement unless there is "clear and unmistakable" evidence to the contrary.[22] Despite this, a number of appellate courts have protected competence-competence in the international arbitration context, by determining that an arbitration clause's reference to procedural rules providing for competence-competence (including the UNCITRAL and ICC rules) serves as evidence of a clear and unmistakable intent to submit the issues of the existence and validity of the arbitration agreement to the arbitrators.[23]

---

[19] *Id.*; *see also* The "Titan Unity" Case, [2013] SGHCR 28 (Sing.); Malini Ventura v. Knight Capital Pte Ltd., [2015] SGHC 225 (Sing.). For Venezuela, see *No. 4. Tribunal Supremo de Justicia, 3 November 2010,* Astivenca Astilleros de Venez., C.A. v. Oceanlink Offshore III AS, *in* 36 Y.B. Comm. Arb. 496, ¶ 25 (2011) ("[T]he courts can only carry out a 'prima facie', formal, preliminary or summary examination or verification of whether the arbitration clause is valid, operative or capable of being performed."); Banco de Venez. S.A. v. Banco Universal Fideicomiso Constituido Por Sudamtex de Venez. C.A., Venez. Sup. Ct. (Mar. 9, 2016). For India, see Shin-Etsu Chem. Co. v. Aksh Optifibre Ltd., (2005) 7 SCC 234 (India) (Judge Srikrishna's opinion) ("It is precisely for this reason that I am inclined to the view that at the pre-reference stage[,] the court is required to take only a prima facie view for making the reference, leaving the parties to a full trial either before the arbitral tribunal or before the court at the post-award stage.").

[20] PCCW Glob. Ltd. v. Interactive Comm'ns Serv. Ltd., [2007] 1 H.K.L.R.D. 309, ¶ 60 (C.A.); *see also* Wing Bo Bldg. Constr. Co. v. Discreet Ltd., [2016] C.F.I. 99 ¶ 40 (C.F.I.). For a panorama of the many jurisdictions that have adopted the negative effect of competence-competence, see Emmanuel Gaillard, *Actualité de l'Effet Négatif de la Competence-Compétence* [*Current Issues on the Negative Effects of Competence-Competence*], *in* MÉLANGES EN L'HONNEUR DU PROFESSEUR BERTRAND ANCEL 677 (Marie-Elodie Ancel et al. eds., 2018).

[21] First Options of Chi. v. Kaplan, 514 U.S. 938 (1995).

[22] *Id.* at 944 (internal quotations omitted) (citing AT&T Techs., Inc. v. Comm'ns Workers of Am., 475 U.S. 643, 649 (1986)). *See also* Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 1, 4–6 (2019).

[23] *See, e.g.*, Brittania-U Nigeria, Ltd. v. Chevron USA, Inc., 866 F.3d 709, 713 (5th Cir. 2017) (looking to UNCITRAL rules as evidence of intent to arbitrate); Chevron Corp. v. Republic of Ecuador, 795 F.3d 200, 207–08 (D.C. Cir. 2015) (same); Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 107475 (9th Cir. 2013) (same); Schneider v. Kingdom of Thai., 688 F.3d 68, 73–74 (2d Cir. 2012) (same); Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co., 862 F.3d 981, 985–86 (9th Cir. 2017) (looking to ICC rules as evidence of intent to arbitrate); Shaw Grp. Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 118 (2d Cir. 2003) (same); Apollo Comput., Inc. v. Berg, 886 F.2d 469, 473–74 (1st Cir. 1989)

As a result, courts are generally required to stay their proceedings in favor of international arbitration and refrain from ruling on issues relating to the existence and validity of arbitration agreements.

Creating a space for an arbitral tribunal to fully exercise its jurisdiction free from the burden of parallel court proceedings is, in essence, an act of comity toward the arbitration. However, comity as such provides insufficient safeguard as it would subject arbitral jurisdiction to a case-by-case, discretionary willingness to allow arbitration to proceed, whereas arbitration involves a situation of a singular presumptively competent forum (the arbitral tribunal) as opposed to competing forums with plausible claims to jurisdiction.

As a result, rather than leaving it to a judicial application of abstract comity interests, a bright-line approach enshrining these interests in a non-discretionary rule is required. In this respect, the adoption of a principle according to which "a court that is confronted with the question of the existence or validity of the arbitration agreement [that exists *prima facie*] must refrain from hearing substantive arguments as to the arbitrators' jurisdiction until such time as the arbitrators themselves have had an opportunity to do so"[24] seems far more predictable than a vague rule based on comity.

A rule-based regime along these lines is desirable because it provides predictability in international dispute resolution and disincentivizes parties from playing procedural games by rushing to a foreign court or inventing frivolous challenges to the arbitration agreement.[25] Further, since legitimate challenges to an arbitration agreement are relatively rare, it also ensures that the vast majority of cases proceed in the forum in which they should be heard. At the same time, those parties that do have a legitimate challenge to the arbitration agreement are not left without a remedy. They may raise their challenge before the arbitral tribunal itself, and, if the arbitrators get it wrong, a national court will have the opportunity to correct any error as to the existence and scope of the arbitration agreement at the annulment or enforcement stage.

2. Arbitral Tribunals Waiting for National Court Proceedings

While national courts should defer to pending arbitral proceedings, arbitral tribunals need not defer to pending court proceedings unless they have determined that no valid arbitration agreement covering the matter in dispute exists. This reflects the arbitral tribunal's primacy with respect to determining its own jurisdiction and serves to prevent abuse by discouraging races to the court.

A well-known negative illustration of this principle is the Swiss Federal Tribunal's controversial decision in *Fomento*,[26] which found that an arbitral tribunal

---

(same); *see also* UNCITRAL, GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 75 (1958) (Emmanuel Gaillard & George Bermann eds., 2017) [hereinafter UNCITRAL GUIDE].

[24] Gaillard & Banifatemi*, supra* note 15, at 260.

[25] *See generally* Gaillard, *Abuse of Process*, *supra* note 8, at 19–27.

[26] Tribunal Fédéral [TF] [Federal Supreme Court] May 14, 2001, 4P.37/2001 (Switz.).

having a seat in Switzerland was required to apply the rule of *lis pendens* by staying proceedings pending the outcome of litigation before the Panamanian courts.[27] This ruling weakened the competence-competence principle in Switzerland and opened the door for parties to seek to circumvent arbitration by preemptively initiating court proceedings.[28] Recognizing the potential for abuse, Switzerland amended article 186(1) of the Swiss Private International Law Act, giving legislative imprimatur to the principle that arbitral tribunals need not stay or dismiss proceedings before them on the ground that the dispute is already the subject of proceedings pending before a national court.[29]

An arbitral tribunal also need not defer to collateral or interlocutory challenges brought later in the arbitral proceedings, for example where a party seeks to set aside a partial award while the arbitration is still ongoing. As the arbitral tribunal in *Berkowitz v. Costa Rica*[30] noted, requiring an arbitral tribunal to issue a stay in such circumstances would effectively give the party seeking to set aside the partial award "a veto over the continuation of the proceedings in the face of what they perceive to be an adverse decision or outcome," and "would ultimately be encouraging of unsustainable set aside positions motivated for reason of achieving some procedural advantage or enhanced negotiating position."[31]

This is not to say that a stay might not be appropriate in certain cases, for example where justified by considerations of fairness, prejudice, balance of convenience, or cost.[32] However, the integrity of arbitral proceedings demands that it be the tribunal itself that determines whether such a stay is justified, in the exercise of its inherent power to manage the arbitral proceedings.[33]

---

[27] *Id.* at 7; *see also* Campbell McLachlan, *Lis Pendens in International Litigation*, *in* COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 340, 349 (2009).

[28] Gaillard, *Abuse of Process*, *supra* note 8, at 28 n.52.

[29] LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP] [FEDERAL ACT ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, art. 186(1bis) (Switz.).

[30] Berkowitz v. Republic of Costa Rica, ICSID Case No. UNCT/13/2, Procedural Order on the Claimants' Request for a Stay of the Proceedings (Feb. 28, 2017).

[31] *Id.* ¶ 47.

[32] *See, e.g.*, *Company ABC (nationality not indicated) v. Company Z International SA (nationality not indicated, Company W SA (nationality not indicated) and others, Final Award, ICC Case No. 12745*, *in* 35 Y.B. COMM. ARB. 40, 119 (2010) (While noting that "there is no lis pendens exception between arbitration and state proceedings," the arbitral tribunal nevertheless considered the appropriateness of a stay, presumably as an exercise of its discretion, and determined that no stay was warranted in the circumstances of the case.). *See also* S. Pac. Props. (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award, ¶¶ 15–17 (May 20, 1992); Mox Plant Case (Ir. v. U.K.), Perm. Ct. Arb. Case No. 2002-01, Procedural Order No. 3, ¶¶ 20–29 (June 24, 2003).

[33] *See*, *e.g.*, Emmanuel Gaillard, *Anti-suit Injunctions Issued by Arbitrators*, *in* 13 INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 235, 251 (2007) [hereinafter Gaillard, *Anti-Suit Injunctions Issued by Arbitrators*]; Chester Brown, *Inherent Powers in International Adjudication*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 829, 834 (Cesare PR Romano et al. eds., 2013).

B. *Anti-Suit Injunctions*

Increasingly, parties seek to dictate the course of competing proceedings through requests for anti-suit or anti-arbitration injunctions.[34] This mechanism may take a variety of forms, but most often requires a party to withdraw, or not to initiate, certain proceedings.[35] As their purpose is to prevent a court or arbitral tribunal from exercising jurisdiction over the dispute, anti-suit injunctions raise inherent comity concerns.[36]

The situation between courts and arbitral tribunals is not symmetrical. When a court enjoins an ongoing arbitration, it seeks to deprive the arbitral tribunal of the power to rule on its own jurisdiction, contrary to the principle of competence-competence. Such anti-arbitration injunctions should not be issued as a rule. By contrast, when an arbitral tribunal enjoins a court proceeding, it is acting to protect jurisdiction that is presumptively its own at the pre-award stage. While such injunctions should be rare, they may nevertheless be justified in appropriate cases.

1. National Courts Enjoining Arbitral Tribunals

When a court issues an anti-arbitration injunction, it deprives the arbitral tribunal of the power to rule on its own jurisdiction. This negates the principle of competence-competence, contradicts the aims of and rules applicable under the New York Convention,[37] and encourages tactical games and forum shopping. Nevertheless, the power of a court to enjoin international arbitration proceedings is

---

[34] *See, e.g.*, Steven Swanson, *supra* note 4, at 405; IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2: ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION (Emmanuel Gaillard ed., 2005); Julian D. M. Lew, *Control of Jurisdiction by Injunctions Issued by National Courts*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?, 13 ICCA CONGRESS SERIES 185–300 (2007); Crina M. Baltag, *Anti-Suit Injunctions and Other Means of Indirect Enforcement of an Arbitration Agreement*, *in* THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION 251, 252 (Stavros L. Brekoulakis et al. eds., 2016); Julie Bédard & Shannon T. Lazzarini, *Anti-Suit Injunctions in International Arbitration*, *in* INTERNATIONAL ARBITRATION IN THE UNITED STATES 289, 289 (Laurence Shore et al. eds., 2017).

[35] *See, e.g.*, Laurent Lévy, *Anti-Suit Injunctions Issued by Arbitrators*, *in* IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2: ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 124 (Emmanuel Gaillard ed., 2005).

[36] In most cases, the order is directed to the parties, as opposed to the other court or arbitral tribunal, but it is predicated on an assessment of the competing court or arbitral tribunal's jurisdiction. It is thus unconvincing to suggest that anti-suit injunctions do not raise comity concerns because they are only addressed to the parties. *See* China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35 (2d Cir. 1987), for the argument that anti-suit injunctions do not raise comity concerns for this reason.

[37] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. III, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. For a vast comparative law study on the implementation by national courts of the New York Convention, see UNCITRAL GUIDE , *supra* note 23, at 75.

generally recognized in common law jurisdictions, although it is considered to be limited and exceptional.[38]

In the United States, the case law is not consistent. A first trend is represented by the well-recognized decision denying the power to issue anti-arbitration injunctions issued by the United States District Court for the District of Delaware in *URS Corp. v. Lebanese Co. for Development and Reconstruction of Beirut Central District SAL*.[39] In that case, a Lebanese entity initiated an ICC arbitration in Paris against two Delaware companies (a parent and its subsidiary).[40] The Delaware parent then brought suit before the Delaware District Court seeking to enjoin the arbitration on the basis that, as a non-signatory to the agreement between its subsidiary and the Lebanese entity, it was not bound to arbitrate.[41] The court rejected this request, finding that the Federal Arbitration Act had no provision allowing it to enjoin an arbitration proceeding, and that doing so would be inconsistent with the New York Convention and the comity interests which underlie it:

> [C]omity and the purposes of the New York Convention do not support issuing an injunction against a foreign arbitral proceeding. Comity is an important and omnipresent factor in parallel litigation and assumes even more significance in international proceedings. It is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation . . . . The primary *reason* for giving effect to the rulings of foreign tribunals is that such recognition factors international cooperation and encourages reciprocity. Thus, comity promotes predictability and stability in legal expectations, two critical components of successful international commercial enterprises . . . . [T]he primary purpose of the New York Convention, enforced through the FAA, is to efficiently recognize and enforce commercial arbitration agreements in international contracts while unifying the standards by which these agreements are observed. [The plaintiff] has not demonstrated how issuing an

---

[38] For United States, see DRAFT RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 2-29 reporters' comment b (AM. LAW INST., Tentative Draft No. 4, 2015). For England, see Excalibur Ventures LLC v. Tex. Keystone Inc., [2011] EWHC 1624 456 (Comm) ("It is clear that the English courts have jurisdiction under s. 37 of the Senior Courts Act 1981 to grant injunctions restraining arbitrations where the seat of the arbitration is in a foreign jurisdiction, although it is a power that is only exercised in exceptional circumstances and with caution.").

[39] URS Corp. v. Lebanese Co. for Dev. & Reconstr. of Beirut Cent. Dist. SAL., 512 F. Supp. 2d 199 (D. Del. 2007).

[40] *Id.* at 202–05.

[41] *Id.* at 205.

> injunction against a foreign arbitral proceeding will further any of these goals.[42]

Regrettably, the trend in the United States is to acknowledge a limited judicial power to enjoin international arbitral proceedings.[43] This is the view taken by the United States Draft Restatement of the U.S. Law of International Commercial Arbitration ("Draft Restatement"), which establishes a court's power to enjoin international arbitration proceedings in the following terms:

> § 2-29 Availability of Anti-Arbitration Injunctions
> A court may enjoin a party to an international arbitration proceeding from proceeding with an arbitration to the extent that:
> (a) The party seeking the injunction establishes a defense to the enforcement of the agreement . . . ; and
> (b) issuance of an injunction is appropriate after consideration of the following:
> (1) the seat of the arbitration;
> (2) whether circumstances exist that raise substantial and justifiable doubt about the integrity of the arbitration proceedings; and
> (3) other principles applied by the forum court in determining whether to grant injunctive relief.[44]

As drafted, paragraph (a) of the Restatement provision leaves the impression that a court hearing an action to enjoin an international arbitration must determine whether a valid defense to enforcement of the agreement exists. Requiring a court to decide this at the pre-award stage, however, would run contrary to the negative effect of competence-competence, as described above. The Reporters' Note clarifies that anti-arbitration injunctions are not intended to be available where the parties have agreed to arbitrate issues of the existence and validity of the arbitration agreement.[45] Given that an arbitration clause will generally be interpreted to have this effect if it is broadly drafted or refers to procedural rules providing for competence-competence,[46] the implication is that anti-arbitration injunctions should rarely be available in respect of international arbitration.

---

[42] *Id.* at 210 (internal quotations and citations omitted); *see also id.* at 208 ("[I]t is apparent that making a judicial determination on arbitrability [i.e., existence and validity of the arbitration agreement], prior to an action seeking recognition or enforcement of an award, is inconsistent with the purposes of the FAA and the New York Convention.").

[43] *See* Draft Restatement (Third) of the U.S. Law of International Commercial Arbitration § 2-29 reporters' note b (iv) (Am. Law Inst., Tentative Draft No. 4, 2015).

[44] *See id.* § 2-29

[45] *Id.* § 2-29 reporters' note c ("[I]f the challenge to the enforceability of the arbitration agreement is one that is for the arbitrator, rather than a court to decide, the court should compel arbitration rather than enjoining it.").

[46] UNCITRAL GUIDE, *supra* note 23.

Further, while paragraph (b) appears to commit the weighing of various factors to the discretion of the court, the Reporters' Note instructs that the discretionary criteria in paragraph (b) should be applied in light of the "federal policy in favor of arbitral dispute resolution and the potential disruption to the international arbitration process," with the result that "courts should exercise their discretion to issue an anti-arbitration injunction sparingly."[47] In an additional move to preserve arbitral proceedings, the Restatement directs that, where the arbitration sought to be enjoined takes place in a foreign State, "greater comity concerns" suggest that injunctions be issued "only in very rare cases, such as when circumstances exist that raise substantial and justifiable doubt about the integrity of the arbitration proceeding."[48] Thus, the commentary on this provision in the Reporters' Note makes clear that the availability of an anti-arbitration injunction under the U.S. Draft Restatement is more limited than the text of the provision might imply.

The position in England is similar. While section 37 of the Senior Courts Act provides that the High Court is empowered to grant injunctions "in all cases in which it appears to the court to be just and convenient to do so,"[49] this power may only be exercised to grant an anti-arbitration injunction in "exceptional circumstances and with caution,"[50] for example, "where the applicant's legal and equitable rights have been infringed or threatened by a continuation of the arbitration or that its continuation will be vexatious, oppressive or unconscionable."[51] As noted by certain commentators, these limitations derive from "the principle that the tribunal should usually (but not always) be the first to determine its own jurisdiction"[52]—*i.e.*, competence-competence.

In light of the limited availability of anti-arbitration injunctions, both under the United States Draft Restatement and in England, it is worth considering whether the inclusion of the provision does more harm than good. It may be that United States and English courts will issue anti-arbitration injunctions with caution, only issuing them in the rare cases in which competence-competence does not apply and a substantial and justifiable doubt has arisen about the integrity of the proceedings.[53] But recognizing the availability of anti-arbitration injunctions as a matter of principle serves to legitimize their use in other countries which may not be as cognizant of comity and pro-arbitration concerns, and are

---

[47] DRAFT RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 2-29 reporters' note d (AM. LAW INST., Tentative Draft No. 4, 2015).

[48] *Id.*

[49] Senior Courts Act 1981, c. 54 § 37(1) (Eng.).

[50] DICEY, MORRIS & COLLINS, *supra* note 3, at 868 ("The court also has power to grant an injunction restraining foreign arbitral proceedings, although it is a power that is only exercised in exceptional circumstances and with caution.").

[51] DAVID ST. JOHN, GILL & GEARING, RUSSELL ON ARBITRATION ¶ 7-063 (David Sutton & Judith Gill eds., 24th ed. 2015).

[52] *Id.*

[53] *See, e.g.*, Jennifer L. Gorskie, *U.S. Courts and the Anti-Arbitration Injunction*, 28 ARB. INT'L 295, 323 (2012).

instead more willing to intervene illegitimately on behalf of their own nationals seeking to evade an arbitration agreement.[54]

Therefore, as a practical matter, the international arbitration system would be better served by a rule prohibiting anti-arbitration injunctions in all circumstances. This would require any potential irregularities in arbitral procedure to be addressed in post-award proceedings, while protecting the integrity of arbitration from interventionist courts.

2. Arbitral Tribunals Enjoining National Courts

As far as arbitral tribunals are concerned, the principle of competence-competence supports their power to rule on the existence and scope of the arbitration agreement and, as a corollary, to give effect to that agreement by enjoining parties from participating in proceedings before national courts in breach of such an agreement.

As noted by the Sole Arbitrator in ICC Case No. 8307,[55] this power is derived from straightforward contractual principles:

> [T]he agreement to arbitrate implies that the parties have renounced to submit to judicial courts the disputes envisaged by the arbitral clause. If a party despite this commences a judicial action when an arbitration is pending, it not only violates the rule according to which a dispute between the same parties over the same subject can be decided by one judge only, but also the binding arbitration clause . . . . [A]n arbitrator has the power to order the parties to comply with their contractual commitments. The agreement to arbitrate being one of them, its violation must be dealt with in the same manner when it is patent that the action initiated in a state court is outside the jurisdiction of such court and is therefore abusive.[56]

A similar approach was followed by the arbitral tribunal in *OAO Gazprom*,[57] which determined that it had the "power to order specific performance if it finds

---

[54] *See, e.g.*, Julian D.M. Lew, *Does National Court Involvement Undermine the International Arbitration Process?*, 24 AM. U. INT'L L. REV. 489, 511 (2009); Emmanuel Gaillard, *Chapter 10: Reflections on the Use of Anti-Suit Injunctions in International Arbitration*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 201 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006).

[55] *[A] v. [B] [C], ICC Case No. 8307/FMS/KGA, Interim Award (May 14, 2001)*, *in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 307 (Emmanuel Gaillard ed., 2005) [hereinafter ICC Case No. 8307].

[56] *Id.* ¶¶ 9–10. For an early case, see *An Indian Cement Company v. A Pakistani Bank, Second Preliminary Award, ICC Case No. 1512, 14 January 1970*, 5 Y.B. COM. ARB. 174 (1980).

[57] OAO Gazprom v. Ministry of Energy of the Repub. of Lith., SCC Case No. V 125/2011, Final Award (July 31, 2012).

that Respondent has breached the arbitration clause."[58] In that case, the arbitral tribunal found that certain requests for relief sought by the respondent in investigation proceedings before a Lithuanian court could result in a breach of the arbitration agreement and therefore ordered the respondent to withdraw such requests in order to prevent a breach.[59]

Understanding the impact of the competence-competence principle on anti-suit injunctions helps to explain why it should be permissible for an arbitral tribunal to enjoin parties from proceeding before a court, but not for a court to enjoin an arbitral proceeding when there exists an arbitration agreement covering *prima facie* the matter in dispute. When a tribunal enjoins a party from proceeding before a court, it need only give effect to its finding that a valid arbitration agreement covers the matter and order specific performance of that agreement.

More generally, the need to address abusive tactics by parties seeking to avoid arbitration agreements that they have willingly entered into is greater than the need to prevent parties from going to arbitration in the absence of a valid arbitration agreement covering the matter. The latter concern can be addressed in any event by the arbitrators or by the courts at the setting-aside or enforcement stage.[60]

C. *Res Judicata*

When an award or a judgment has been rendered, coordination is ensured by resorting to the principle of *res judicata*.

Res judicata has been defined as:

> [A] judicial decision of special character because, being pronounced by a court or tribunal having jurisdiction over the subject-matter and the parties, it disposes finally and conclusively of the matters in controversy, such that—other than on appeal—that subject-matter cannot be re-litigated between the same parties or their privies.[61]

---

[58] *Id.* ¶ 266.

[59] *Id.* ¶ 267.

[60] *See, e.g.*, ICC Case No. 8307, *supra* note 55, ¶ 10 ("[V]iolation [of the arbitration agreement] must be dealt with in the same manner when it is patent that the action initiated in a state court is outside the jurisdiction of such court and is therefore abusive."); Atlas Power Ltd. v. Nat'l Transmission & Dispatch Co., LCIA Case No. 142730, Ruling on Stay Application, ¶ 234 (July 8, 2016) (unpublished) ("[The Government's] participation in the proceedings is contrived for the purposes of seeking to defeat the prosecution of this Arbitration"); *Id.* ¶ 246 ("[W]here there is apparently an abuse of the process of the [State's] courts in breach of the arbitration agreements, and recognising that the purpose is effectively to defeat the progress of this Arbitration, the exercise of the discretion [to issue an anti-suit injunction] is clear.").

[61] PETER R. BARNETT, RES JUDICATA, ESTOPPEL AND FOREIGN JUDGMENTS § 1.11 (2001).

In other words, a decision becomes vested with *res judicata* effect once a competent international tribunal or court renders a final decision concerning the same parties, the same legal grounds, and the same claims.[62] Whereas the binding effect of arbitral awards on subsequent court proceedings is mandated under the New York Convention, the effect of a national court judgment on a subsequent arbitral proceeding will depend on whether there is a valid arbitration agreement stripping the national court of jurisdiction over the matter.

1. Binding Effect of Arbitral Awards before National Courts

The *res judicata* effect of an international arbitral award flows directly from the New York Convention, which, in eliminating the double *exequatur* requirement that previously existed under the 1927 Geneva Convention,[63] requires Contracting States to "recognize arbitral awards as binding and enforce them," subject to the conditions laid down in the Convention.[64] In the words of the U.S. Draft Restatement:

---

[62] *See* SPENCER BOWER & HANDLEY, RES JUDICATA § 1.01 (Ken Handley ed., 4th ed. 2009); *see also* Filip De Ly & Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration*, 25 ARB. INT'L 35, 36 (2009) [hereinafter De Ly & Sheppard, *Interim Report*] (referring to the ILA Conference from Aug. 2004); Filip De Ly & Audley Sheppard, *ILA Final Report on* Res Judicata *and Arbitration*, 25 ARB. INT'L 67 (2009) [hereinafter De Ly & Sheppard, *Final Report*] (adopted at 72nd ILA Conference in June 2006); Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Preliminary Objections, 2016 I.C.J. 100, 124 (Mar. 17, 2016) ("[T]he principle of *res judicata* requires an identity between the parties (*personae*), the object (*petitum*) and the legal ground (*causa petendi*).").

[63] Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, art. 1(d), Sept. 26, 1927, 92 L.N.T.S. 302 ("To obtain such recognition or enforcement, it shall, further, be necessary: . . . That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending"). In practice, establishing the finality of the award could only be achieved by obtaining a leave of enforcement in the courts of the country of the seat of the arbitration. *See also* UNCITRAL GUIDE, *supra* note 23, at 97–98.

[64] New York Convention, art. III. On the intent of the drafters of the New York Convention to repeal the double *exequatur* requirement, see Pieter Sanders, *Reflections on the New York Convention*, UN Audiovisual Library http://webtv.un.org/watch/reflections-on-the-new-york-convention-pieter-sanders/2579532768001 (last visited Nov. 22, 2018) ("[T]he main elements of the Dutch proposal were, first of all the elimination of the double *exequatur*, one in the country where the award was made, and another in the country of enforcement, and that was the situation under the Geneva Convention 1927 and to the Protocol 1923. And it seemed logical not to require two *exequaturs* but only in the country where enforcement is sought. Why should you also ask it in the country where the award has been made? And that was indeed the point which was welcomed generally[.]"); *see also* CBF Industria de Gusa SA v. AMCI Holdings Inc., 850 F.3d 58, 72–73 (2d Cir. 2017).

> It is generally acknowledged that international arbitral awards are entitled to claim preclusive or 'res judicata' effect, thus barring a party from seeking to relitigate a claim that was previously adjudicated in the arbitration.[65]

2. Binding Effect of Court Decisions before Arbitral Tribunals

An arbitral tribunal will be in a position to give *res judicata* effect to a prior-issued court judgment in the same matter only when it finds that the court had jurisdiction over the matter. The very existence of an arbitration agreement forming the basis of the jurisdiction of the arbitral tribunal will often preclude such a finding. In most cases, the competence of the arbitral tribunal will imply that the court did not have jurisdiction on overlapping matters. This reasoning is reflected, for example, in the refusal by one arbitral tribunal to give *res judicata* effect to a prior court decision in view of the "established legal principle whereby a judicial act ceases to have any effect if the court issuing such order exceeds the limits of its competence."[66] However, this is not to say that matters ruled on in the course of a judgment of a competent court, for instance before any arbitration agreement has been entered into with respect to a specific matter, could not have *res judicata* effect.

II. COORDINATION AMONG ARBITRAL TRIBUNALS

Increasingly, multiple arbitral tribunals are called on to decide related disputes on the basis of the same or connected arbitration agreements.[67] While the relationship between courts and tribunals can be rationalized by principles such as competence-competence, the same is not true of parallel arbitral proceedings in which both tribunals will presumably have the power to have the first word on their competence. Nor will considerations of hierarchy, procedural efficiency, legitimacy, or expertise necessarily provide the answer.[68] The relationship

---

[65] DRAFT RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-9 reporters' note a (AM. LAW INST., Tentative Draft No. 4, 2015); *see also* V Cars, LLC v. Chery Auto. Co., 603 F. App'x 453, 455–56 (6th Cir. 2015).

[66] *Case No. 27, Award of 11 August 1996, Case No. 67/1995*, *in* ARBITRAL AWARDS OF THE CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION 157 (1996); *see also* Tribunal Fédéral [TF] [Federal Supreme Court] May 27, 2014, 4A_508/2013, ¶ 4.1 (Switz.) ("[E]ither one accepts that the HCC judgment was not issued between the same parties as in the subsequent arbitral proceedings so that it would not be *res judicata* for them; or one accepts the opposite, which implies that the judgment at issue was issued in violation of the arbitration agreement.").

[67] *See, e.g.*, Orascom TMT Inv. S.à r.l. v. People's Democratic Republic of Alg., ICSID Case No. ARB/12/35, Award (May 31, 2017); Ampal-American Israel Corp. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (Feb. 21, 2018).

[68] *See* Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT'L L.J. 77, 106 (2009).

between arbitral tribunals therefore does not lend itself to rule-based coordination, and instead relies on the discretion of the arbitrators, whether one considers issues of (A) *lis pendens* and deference to parallel proceedings, (B) anti-suit injunctions, or (C) issues of *res judicata*.

A. *Lis Pendens*

Rarely will the strict requirements of *lis pendens* be met between two or more arbitral tribunals.[69] In most cases, either the causes of action will differ, or the parties will—otherwise there would be little reason for a second tribunal to be engaged.[70]

This does not mean that staying in favor of pending proceedings before another arbitral tribunal also having jurisdiction over the matter is impermissible, or that an arbitral tribunal does not have the power to stay the proceedings if there are good reasons to do so. Rather, arbitral tribunals should use their discretion to stay or otherwise coordinate their proceedings as the circumstances require.[71] As the tribunal in *SPP v. Egypt*[72] put it:

> When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising jurisdiction. However, in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal.[73]

In a recent award, an arbitral tribunal went a step further and held that "arbitral tribunals have the power to stay for the ends of justice, even where the requirements of *lis pendens* are not met, and their mandate to decide the dispute submitted to them does not prevent them staying proceedings."[74]

---

[69] On requirements for *lis pendens* see McLachlan, *supra* note 27, at 283 ("In the case of . . . *lis pendens* . . . this is established by examination of three elements: (a) the *parties* (*personae*); (b) the *cause* or subject matter in dispute (the *causa petendi*); and, (c) the *object* of the proceedings—what is decided, and what relief is granted in the action (the *petitum*).").

[70] *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3806–08 (2d ed. 2014); HANNO WEHLAND, THE COORDINATION OF MULTIPLE PROCEEDINGS IN INVESTMENT TREATY ARBITRATION 194, ¶ 6.95 (2013).

[71] *See* Kaj Hobér, *Res Judicata and Lis Pendens in International Arbitration*, *in* 366 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 126, 159–61 (2014).

[72] S. Pac. Props. (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction, ¶ 84 (Nov. 27, 1985).

[73] *Id.*; *see also* Egyptian Gen. Petroleum Corp. v. E. Mediterranean Gas S.A.E., CRCICA Case No. 829/2012, Partial Award on Jurisdiction and Procedural Ruling on Stay Application (Nov. 11, 2013) (unpublished).

[74] Egyptian Gen. Petroleum Corp. v. E. Mediterranean Gas S.A.E., CRCICA Case No. 829/2012, Partial Award on Jurisdiction and Procedural Ruling on Stay Application, ¶ 149

In the context of investment treaty arbitration, in which the multiplicity of treaties affords a fertile ground for multiple proceedings, it is not uncommon for a party to take advantage of a vertically incorporated chain of companies having an investment in the host-State to initiate multiple actions to resolve the same or related disputes. In doing so, the chances of success of such party are maximized by virtue of its vertically incorporated structure, while the State is left to shoulder the burden and risk of defending multiple proceedings initiated for the protection of the same interests.[75]

Arbitral case law has evolved to take this inherent unfairness into account, by resorting to the principle of abuse of process. The landmark decision in this matter is *Orascom TMT Investments v. Algeria*[76] which, in stark contrast with the approach taken in *CME*[77] and *Lauder*,[78] held that:

> It is true that tribunals in the past have adopted different approaches in relation to constellations that may show some similarities with the present case. In particular, the tribunals in *CME v. Czech Republic* and *Lauder v. Czech Republic* allowed the claims under different investment treaties to proceed, despite the fact that both sets of proceedings were based on the same facts and sought reparation for the same harm. The tribunals then reached contradicting outcomes, which was one of the reasons for which these decisions attracted wide criticism . . . . Moreover, it cannot be denied that in the fifteen years that have followed those cases, the investment treaty jurisprudence has evolved, including on the application of the principle of abuse of rights (or abuse of process), as was recalled above. The resort to such principle has allowed tribunals to apply investment treaties in such a manner as to avoid consequences unforeseen by their drafters and at odds with the very purposes underlying the conclusion of those treaties.[79]

(Nov. 11, 2013) (unpublished). This directly contradicts the argument that arbitrators usually do not show restraint due to the existence of another adjudicative forum. *See also* Gus Van Harten, *Judicial Restraint in Investment Treaty Arbitration: Restraint Based on Relative Suitability*, 5 J. INT'L DISP. SETTLEMENT 5, 13 (2014).

[75] Emmanuel Gaillard, *Concurrent Proceedings in Investment Arbitration*, *in* THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER 79, 84 (Patricia Shaughnessy & Sherlin Tung eds., 2017); *see also* Mohamed Shelbaya & Dimitrios Katsikis, *Combating Norm and Forum Shopping in Investment Arbitration*, BCDR INT'L ARB. REV. 278, 282 (2016).

[76] Orascom TMT Inv. S.à r.l. v. People's Democratic Republic of Alg., ICSID Case No. ARB/12/35, Award (May 31, 2017).

[77] CME Czech Rep. BV v. Czech, UNCITRAL, Partial Award, ¶ 419 (Sept. 13, 2001).

[78] Lauder v. Czech, UNCITRAL, Final Award, ¶¶ 162, 165, 167–75 (Sept. 3, 2001).

[79] Orascom TMT Inv. S.à r.l. v. People's Democratic Republic of Alg., ICSID Case No. ARB/12/35, Award, ¶ 547 (May 31, 2017).

In *Orascom TMT Investments v. Algeria* case, an Egyptian billionaire, Mr. Naguib Sawiris, controlled an Algerian company Orascom Telecom Algérie ("OTA"), through a vertically incorporated chain of companies.[80] Allegedly harmed by certain Algerian measures taken against OTA, Mr. Sawiris availed himself of the dispute settlement provision contained in the Egypt-Algeria BIT and filed a notice of dispute through OTA's Egyptian direct shareholder, Orascom Telecom Holding ("OTH").[81] After selling his shareholding interest in OTH, Mr. Sawiris initiated a parallel ICSID arbitration alleging the same state measures and the same harm under the Belgium-Luxembourg Economic Union-Algeria BIT, through OTH's former indirect shareholder, Orascom TMTI.[82] The ICSID tribunal found this conduct to be "an abuse of the system of investment protection" and further held that "the Claimant availed itself of the existence of various treaties at different levels of the vertical corporate chain using its rights to treaty arbitration and substantive protection in a manner that conflicts with the purposes of such rights and of investment treaties."[83]

In the situation in which parallel proceedings are brought by different parties representing different interests, arbitral tribunals will be reluctant to order a stay. For example, the tribunal in *Cairn v. India*[84] rejected India's request to stay proceedings pending the conclusion of a parallel arbitration brought by another company, Vedanta Limited.[85] The arbitrations arose from India's attempt to collect taxes on a sale of shares from Cairn to Vedanta.[86] Although the taxes were said to arise from the same underlying transaction, India initiated separate tax proceedings against both parties to the transaction (Cairn for non-payment of capital gains tax, and Vedanta for failure to withhold tax at time of payment), and each party challenged its respective tax demand in arbitration.[87] The tribunal rejected India's application for stay, suggesting that in the normal course, parallel arbitrations by separate claimants should be permitted to proceed absent evidence of abuse:

> [T]o the extent that each investor considers that it has been harmed by a measure implemented by the Respondent, it is their right under the BIT for each of them to assert their own claim. Rights cannot be exercised in an abusive fashion, but on the basis of the information available to it at present the Tribunal has not seen any evidence of abuse.[88]

---

[80] *Id.* ¶ 412.

[81] *Id.* ¶ 485.

[82] *Id.* ¶ 17.

[83] *Id.* ¶ 545.

[84] Cairn Energy PLC v. Republic of India, PCA Case No. 2016-7, Procedural Order No. 3 (Mar. 31, 2017).

[85] *Id.* ¶ 143.

[86] Cairn Energy PLC v. Republic of India, PCA Case No. 2016-7, Claimant's Press Release on the Notice of Dispute (Mar. 27, 2015).

[87] *Id.*

[88] Cairn Energy PLC v. Republic of India, PCA Case No. 2016-7, Procedural Order No. 3, ¶ 141 (Mar. 31, 2017).

While reaching different conclusions in different circumstances, both *Orascom* and *Cairn* illustrate the preparedness of arbitral tribunals to prevent and sanction abusive conduct in international arbitration.

B. *Anti-Suit Injunctions*

Orders by arbitral tribunals enjoining proceedings before other arbitral tribunals are extremely rare in international arbitration practice.[89] The only identifiable example of such a measure is found in the interim order issued by the Iran-U.S. Claims Tribunal ("IUSCT") in *Reading & Bates v. Iran* in 1983.[90]

In that case, the claimant initiated parallel proceedings before both the IUSCT and an ICC arbitral tribunal in Paris.[91] Both arbitrations addressed the same subject matter and named the National Iranian Oil Co. ("NIOC") as respondent.[92] NIOC moved the IUSCT for an order requiring the claimant to withdraw its ICC claim, as well as an interim order requiring a stay of the ICC proceeding while the withdrawal request was heard.[93] In support, NIOC cited, *inter alia*, Article VII (2) of the Claims Settlement Declaration, which gives the IUSCT exclusive jurisdiction over claims referred to it.[94]

The IUSCT granted the interim order, suggesting that this authority derived from the inter-governmental foundation for its jurisdiction:

> [T]he Tribunal, which was established by an inter-governmental agreement, has an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that its jurisdiction and authority are fully effective.[95]

In other contexts, given that the power to issue anti-suit injunctions derives from the arbitrators' competence to rule on and protect their own jurisdiction, it is conceivable that arbitrators may face circumstances that warrant a reaction against

---

[89] *See* Gaillard, *Anti-Suit Injunctions Issued by Arbitrators*, *supra* note 33, at 236 n.5; *contra* Kaj Hobér, *Parallel Arbitration Proceedings—Duties of the Arbitrators*, *in* PARALLEL STATE AND ARBITRAL PROCEDURES IN INTERNATIONAL ARBITRATION 243, 259 (Bernardo M. Cremades & Julian D.M. Lew eds., 2005) [hereinafter Hobér, *Parallel Arbitration Proceedings*]; Lévy, *supra* note 35, at 128.

[90] *Reading & Bates Corporation v. The Islamic Republic of Iran, The National Iranian Oil Co. and others, Interim Award, IUSCT Case No. 28 (ITM 21-28-1), 9 June 1983*, 9 Y.B. COM. ARB. 401 (1984) [hereinafter Reading & Bates Corp. v. Iran].

[91] *Id.*

[92] *Id.*

[93] *Id*. at 401–02.

[94] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by Iran and the United States, 20 I.L.M. 220, 233 (1981) ("Claims referred to the arbitration Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.").

[95] Reading & Bates Corp. v. Iran, *supra* note 90, at 402.

abusive conduct of parties that may attempt to preempt or interfere in the tribunal's jurisdiction by resorting to artificial or merely fraudulent arbitration proceedings.[96]

C. *Res Judicata*

Arbitral tribunals are increasingly confronted with arguments that certain issues cannot be reopened because they have already been decided with *res judicata* effect by a prior arbitral tribunal in a previous award.

As a matter of principle, nothing prevents arbitrators from assessing the impact of previously adjudicated matters on the dispute before them in the same way as national courts. The principle is uncontroversial and has been accepted as a general principle of international law.[97] As noted in an early award, it would be paradoxical for an arbitral tribunal not to recognize the binding effect of a prior arbitral award.[98] The same logic applies to prior awards rendered by the same arbitral tribunal in the course of the same proceedings.[99] In some jurisdictions, it

---

[96] For an example of a dispute involving the initiation of an allegedly fraudulent arbitration, see Al-Qarqani v. Chevron Corp., No. 3:18-cv-03297 (N.D. Cal. June 1, 2018). *See also* Alison Ross & Tom Jones, *Chevron Chased for US$ 18 Billion After "Sham" Cairo Award*, GLOBAL ARB. REV. (June 5, 2018), https://globalarbitrationreview.com/article/1170265/chevron-chased-for-ususd18-billion-after-"sham"-cairo-award.

[97] *See, e.g.*, Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905, 1949–50 (1941) ("That the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law."); Effect of Awards of Compensation Made by the U.N. Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Rep. 47 (July 13); AMCO v. Republic of Indon., ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 26 (May 10, 1988) (Resubmitted Case); Case Concerning a Boundary Dispute Between Argentina and Chile Concerning the Delimitation of the Frontier Line Between Boundary Post 62 and Mount Fitzroy ("Laguna del Desierto") (Arg. v. Chile), 22 R.I.A.A. 3, 24 (1994) ("A decision with the force of *res judicata* is legally binding on the parties to the dispute. This is a fundamental principle of the law of nations repeatedly invoked in the legal precedents, which regard the authority of res judicata as a universal and absolute principle of international law."); Waste Mgmt. Inc. v. United Mexican States, ICSID Case No. ARB (AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objections Concerning the Previous Proceedings, ¶ 39 (June 26, 2002); Apotex Holdings Inc. v. United States, ICSID Case No. ARB (AF)/12/1, Award, ¶ 7.11 (Aug. 25, 2014).

[98] *See Sentence Rendue dans les Affaires N° 2745 et N° 2762 en 1977* [*ICC Case No. 2745 & 2762, Award, 1977*], *in* COLLECTION OF ICC ARBITRAL AWARDS 1974–1985 326, 328 (Sigvard Jarvin & Yves Derains eds., 1990).

[99] *See* Alghanim v. Alghanim, ICC Case No. 19900/MCP/DDA (C-19915/MCP/DDA), Second Partial Award, ¶¶ 164–65 (June 28, 2018) (unpublished) ("The Arbitral Tribunal is not changing its mind in respect of issues fully briefed and decided in the first phase of the arbitration. . . . To conclude, the Arbitral Tribunal's role is now to take the new events into account . . . without revising the decisions reached in the First Partial Award[.]").

may even be considered a violation of public policy not to give *res judicata* effect to a previous award.[100]

As to the rules applicable to the conditions for an award to be recognized as having *res judicata* effect, arbitrators have generally either looked to national law through a choice of laws analysis or relied on transnational rules.[101]

A choice of laws approach requires determining what law is applicable. Those following this approach will need to identify the relevant connecting factors pointing to the applicable law, a notoriously difficult exercise for *res judicata*.[102] Is *res judicata* procedural or substantive? Is it governed by the law of the seat of the arbitration in which the *res judicata* argument is invoked, or by the law of the place where the award is alleged to produce a *res judicata* effect? Or both? Or is it governed by the law applicable to the substance of the contract which a first award has incorporated or applied?[103] Even those who are not active proponents of the transnational rules approach are bound to recognize that, given the multiplicity of possible connecting factors, this approach produces more predictable outcomes than a choice of law one.[104]

Acknowledging this difficulty, the International Law Association has recommended resorting to "transnational rules" when determining the effect of prior arbitral awards: "The conclusive and preclusive effects of arbitral awards in further arbitral proceedings set forth below need not necessarily be governed by

---

[100] For Switzerland, see Federal Supreme Court, May 29, 2014, 4A_633/2014, ¶ 3.2.1 (Switz.) ("The arbitral tribunal violates procedural public policy when, in particular, it disregards the *res judicata* effect of a previous judgment in its decision or when it departs in its final award from the view expressed in a preliminary decision as to a material preliminary issue. Res judicata applies both domestically and internationally and applies in particular to the relationship between an arbitral tribunal sitting in Switzerland and a foreign court or arbitral tribunal."). Similarly, for China, see Taizhou Court, P. R. China, Case Docket No. [2015] Tai Zhong Shang Zhong Shen Zi, No. 00004, Taizhou Haopu Invest. Co. v. Wicor Holding AG (June 2, 2016).

[101] *See, e.g.*, BASILE ZAJDELA, L'AUTORITE DE LA CHOSE JUGEE DEVANT L'ARBITRE DU COMMERCE INTERNATIONAL [*RES JUDICATA* BEFORE AN INTERNATIONAL COMMERCIAL ARBITRATOR] 220–33 (2018).

[102] De Ly & Sheppard, *Final Report*, *supra* note 6.

[103] *See* Dominique Hascher, *L'Autorité de la Chose Jugée des Sentences Arbitrales* [The *Res Judicata* Effect of Arbitral Awards], *in* TRAVAUX DE COMITE FRANÇAIS DE DROIT INTERNATIONAL PRIVE 17 (2004); Hobér, *Parallel Arbitration Proceedings*, *supra* note 89, at 258; Pierre Mayer, *Litispendance, Connexité et Chose Jugée* [*Lis Pendens*, Related Actions and *Res Judicata*], *in* LIBER AMICORUM CLAUDE REYMOND - AUTOUR DE L'ARBITRAGE 185 (2004) [hereinafter Mayer, *Litispendance*]; Luca G. Radicati di Brozolo, *Res Judicata and International Arbitral Awards*, *in* POST AWARD ISSUES – 38 ASA SPECIAL SERIES 121 (2011).

[104] *See* Mayer, *Litispendance, supra* note 103, at 188; Pierre Mayer, *Chapter 12: The Effect of Awards Rendered in Multiparty/Multicontract Situations*, *in* MULTIPARTY ARBITRATION 222, 229 (Bernard Hanotiau & Eric Schwartz eds., 2010) [hereinafter Mayer, *The Effect of Awards*].

national law and may be governed by transnational rules applicable to international commercial arbitration."[105]

The identification of transnational rules on *res judicata* is not necessarily as easy as it may seem. The principle of *res judicata* is itself uncontroversial. It is accepted in virtually every legal system,[106] and has been accepted as a general principle of international law.[107] More difficult, however, is the question of whether the *res judicata* principle applies only to the operative part of the award or extends to the reasons underlying the operative part. A comparative law study would likely show that in a majority of legal systems only the dispositive part of the decision is vested with *res judicata* effect, with the caveat that reasons can be considered to enlighten the meaning of the dispositive part (as the International Court of Justice has accepted).[108]

In certain legal systems, *res judicata* is supplemented by the notion of issue estoppel, with less stringent conditions.[109] To the extent, however, that issue estoppel is ignored in civil law systems, it is not sufficiently widely accepted to be recognized as a genuine transnational principle.[110]

---

[105] De Ly & Sheppard, *Final Report*, *supra* note 62. In a recent case, an investment tribunal relied on the ILA recommendations on *res judicata* and arbitration as part of its inquiry on the principle of *res judicata* under international law. *See* Caratube Int'l Oil Co. v. Republic of Kaz., ICSID Case No. ARB/13/13, Award, ¶ 377 n.30 (Sept. 27, 2017) ("The Tribunal observes that the ILA Reports on *Res Judicata* and Arbitration apply only to international commercial arbitration. However, with respect to investment arbitration (in particular BIT arbitrations), the Final ILA Report states that 'the Recommendations may still have some indirect relevance for BIT arbitrations.' The Parties seem to agree with this statement as they have both relied on the ILA Reports in support of their respective positions. Therefore, the Tribunal deems appropriate to rely on these Reports for the purposes of the present Award.").

[106] *See* BOWER & HANDLEY, *supra* note 62*,* § 1.01; *see also* De Ly & Sheppard, *Interim Report*, *supra* note 62, at 36 (referring to ILA Conference from Aug. 2004); De Ly & Sheppard, *Final Report*, *supra* note 62; Nicar. v. Colom., 2016 I.C.J. at 124 ("[T]he principle of *res judicata* requires an identity between the parties (*personae*), the object (*petitum*) and the legal ground (*causa petendi*).").

[107] *See supra* note 97.

[108] *See, e.g.*, Nicar. v. Colom., 2016 I.C.J. at 126.

[109] In common law jurisdictions, the doctrine of *res judicata* includes both "claim preclusion" and "issue preclusion" or "issue estoppel." *See, e.g.*, S. Pac. R.R. Co. v. United States, 168 U.S. 1, 48–49 (1897) ("The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.").

[110] See Grynberg v. Gren. ("RSM v. Gren."), ICSID Case No. ARB/10/6, Award (Dec. 10, 2011); Apotex Holdings Inc. v. U.S., ICSID Case No. ARB (AF)/12/1, Award,

III. COORDINATION AMONG NATIONAL COURTS ABOUT ARBITRATION

Given that national courts have an important role to play in respect of international arbitration, it is not surprising that competition occurs among courts in different countries at different stages of the arbitral process, generating the potential for chaos. This section will consider whether the tools of (A) *lis pendens*, (B) anti-suit injunctions, and (C) *res judicata* can be of assistance in minimizing the risks for such chaos.

A. *Lis Pendens*

As the courts of several national legal systems can be seized of different types of actions regarding international arbitration, the issue of *lis pendens* may arise in multiple situations: parallel actions to compel arbitration, an action to compel may compete with an action to decide the underlying dispute on the merits, an enforcement action may be initiated in parallel with an action to set aside, two enforcement actions may run in parallel in different countries, and, in exceptional circumstances, two actions to set aside may be brought in different jurisdictions.

1. Parallel Actions to Compel

The situation of parallel actions to compel arbitration among the same parties in relation to the same dispute will be rare, especially since a party having an interest in protecting the arbitral process will be ill-advised to initiate actions to compel in several countries. Such a situation may nonetheless arise where, for example, a group of potential claimants disagree on strategy, with one of them seizing the courts of the country whose procedural law governs the arbitration,[111] and another seizing the courts of the seat of the arbitration.

The United States Draft Restatement addresses the matter by stating that "courts . . . may dismiss an action to compel arbitration because a petition to compel arbitration is already pending before another court."[112] Assuming both courts have jurisdiction to compel,[113] each of them could exercise its discretion to give precedence to the other.

¶ 7.11 (Aug. 25, 2014); Caratube Int'l Oil Co. v. Kaz., ICSID Case No. ARB/13/13, Award, ¶ 377 n.30 (Sept. 27, 2017), for a suggestion that issue estoppel is a transnational principle.

[111] *See, e.g.*, Code de Procédure Civile [C.P.C.] [Civil Procedure Code] art. 1505 (Fr.).

[112] *See* Draft Restatement (Third) of the U.S. Law of International Commercial Arbitration § 2-25 reporters' note c (Am. Law Inst., Tentative Draft No. 4, 2015).

[113] On the requirement that both courts have jurisdiction for a stay to be considered, see Busta v. Czech, Stockholm Chamber of Comm. Case No. V 2015/014, Award, ¶¶ 210–18 (Mar. 10, 2017).

2. Action to Compel versus Action on the Merits

Unlike the uncommon scenario in which two courts are seized in parallel of an action to compel arbitration, it happens relatively frequently that one party, ignoring the existence of an arbitration agreement, brings a claim on the merits before the courts of one country, while another seizes the courts of a different country in order to set the arbitration in motion. In such a case, the latter court would have no reason to defer to the former.

This situation arose before the United States Sixth Circuit in *Answers in Genesis*.[114] There, one party to the dispute brought suit in an Australian court, while the other chose to bring an action to compel arbitration in Kentucky (rather than appear in the Australian action and defend on the basis of the arbitration provision).[115] The Sixth Circuit pointed out that the action in the United States was "the first action seeking to compel arbitration" and that comity concerns would not be infringed by proceeding on the action to compel.[116] It pointed out that both jurisdictions were bound to apply the New York Convention, and that the assumption behind a stay was that the Australian court might rule differently than the United States court—in other words, that it would violate its obligations under the New York Convention.[117] The court found that "[s]uch an argument both demeans the foreign tribunal and hardly advances . . . comity interests . . . ."[118] The Sixth Circuit accordingly compelled arbitration.[119]

3. Enforcement Action versus Action to Set Aside

A more classic question arises as to whether courts at the place of enforcement of an arbitral award should stay the action pending the completion of an action to set aside before the courts of the seat or the courts of the country under the law of which the award was made.

The matter is dealt with in article VI of the New York Convention, which expressly grants discretion to an enforcement court over whether to stay pending the conclusion of setting-aside proceedings:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application

---

[114] Answers in Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd., 556 F.3d 459 (6th Cir. 2009).

[115] *Id.* at 459.

[116] *Id.* at 469.

[117] *Id.*at 468–69.

[118] *Id.* at 469.

[119] *Id.* at 472.

> of the party claiming enforcement of the award, order the other party to give suitable security.[120]

In light of this discretion, the appropriate decision will depend on the enforcement court's attitude *vis-à-vis* the outcome of the action to set aside. In those countries where the potential setting aside of an award in a different legal order is irrelevant to the question of enforcement, the stay will not be warranted.[121] In other jurisdictions, the decision to stay will depend on the circumstances, including the time that an action to set aside will take, and the likely outcome of the matter.[122]

In *Stati v. Kazakhstan*,[123] the District Court for the District of Columbia stayed proceedings pending judgment in a setting-aside action in Sweden.[124] It emphasized that this was a discretionary determination, which required a court to "balance the [New York] Convention's policy favoring confirmation of arbitral awards against the principle of international comity embraced by the Convention."[125] Applying the multi-factor *Europcar* test developed by the Second Circuit,[126] the court found comity interests were implicated by the fact that the Swedish setting-aside action had been initiated six months before the U.S.

---

[120] New York Convention, art. VI; *see also* UNCITRAL GUIDE, *supra* note 23, at 279.

[121] *See, e.g.*, Cour d'appel de Paris [CA] [regional court of appeal], civ., June 19, 2004, 2003/09894, Société Bargues Agro Industries S.A. v. Société Young Pecan Company, REV. ARB. 154 (2006).

[122] UNCITRAL GUIDE, *supra* note 23, at 273–74.

[123] Stati v. Republic of Kazakhstan, 199 F. Supp. 3d 179 (D.D.C. 2016).

[124] *Id.* at 193.

[125] *Id.* at 192 (quoting Four Seasons Hotels & Resorts B.V. v. Consorcio Barr S.A., 377 F.3d 1164, 1172 (11th Cir. 2004)).

[126] Europcar Italia S.p.A. v. Maiellano Tours, 156 F.3d 310, 317–18 (2d Cir. 1998) ("(1) [T]he general objectives of arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation; (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved; (3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review; (4) the characteristics of the foreign proceeding including (i) whether they were brought to enforce an award (which would tend to weigh in favor of a stay) or to set the award aside (which would tend to weigh in favor of enforcement); (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute; (5) a balance of the possible hardships to each of the parties, keeping in mind that if enforcement is postponed under Article VI of the Convention, the party seeking enforcement may receive 'suitable security' and that, under Article V of the Convention, an award should not be enforced if it is set aside or suspended in the originating country; and (6) any other circumstances that could tend to shift the balance in favor or against adjournment.") (internal citations omitted).

enforcement proceedings.[127] It further found that there was a practical basis for a stay, since the Swedish proceedings were expected to result in a judgment within a matter of months, which "could have a dramatic impact" on the enforcement proceeding.[128]

By contrast, the same court declined to stay an enforcement action in *Gold Reserve v. Venezuela*,[129] reasoning that the setting-aside action in Paris was "not likely to be resolved soon," a consideration that was compounded by the fact that Venezuela (the party seeking the stay) had contributed to the delay in the French proceedings by seeking postponement of oral arguments.[130]

4. Parallel Enforcement Actions

Situations of parallel enforcement actions are extremely frequent. This is not surprising: the party that prevailed in the arbitration will have an interest in attempting to enforce the award in every jurisdiction in which it can locate assets. This is perfectly legitimate and the scenario does not raise any comity concerns.

The United States Draft Restatement endorses this approach, stating that a stay or dismissal on *lis pendens* grounds in such circumstances will "ordinarily not be appropriate."[131] This is because a parallel enforcement action is not a true *lis pendens*: although it may be seeking the same form of relief, it seeks that relief against different assets. As the Reporters' Note to the U.S. Draft Restatement emphasizes, "an enforcement action in one jurisdiction, even if successful, may not fully compensate the prevailing party because the value of the award exceeds the value of the local assets belonging to the losing party."[132]

Nevertheless, the trend in certain United States courts is to dismiss enforcement actions on *forum non conveniens* grounds.[133] *Forum non conveniens*, like *lis pendens*, is a doctrine targeted at situations where a dispute could be heard in multiple fora; it permits the court before which it is invoked to determine, in its discretion, that another forum is better suited to hear the case.

---

[127] Stati, 199 F. Supp. 3d at 193.

[128] *Id.*

[129] Gold Reserve Inc. v. Bolivarian Republic of Venezuela, 146 F. Supp. 3d 112 (D.D.C. 2015).

[130] *Id.* at 135. (observing that there was no guarantee that Venezuela would not seek further postponement of the Paris setting-aside proceedings); *see also* IPCO (Nigeria) Ltd. v. Nigerian Nat'l Petroleum Corp., [2015] EWCA (Civ) 1144 (Eng.) (holding that IPCO could enforce the award despite ongoing challenges in Nigeria due to the potential for significant delays otherwise).

[131] RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-29, note 33, reporters' note e (AM. LAW INST., TENTATIVE DRAFT NO. 3, 2013).

[132] *Id.*

[133] *See generally* Restatement (Third) of the U.S. Law of International Commercial Arbitration § 4-29 (Am. law inst., tentative draft no. 2, 2012).

In *Monde Re*,[134] the Second Circuit applied this principle to the recognition of an award governed by the New York Convention.[135] Several other decisions followed suit.[136] The better position is that of the U.S. Draft Restatement, which correctly notes that:

> [c]onstruing Article III [of the New York Convention] to permit the courts of a Contracting State to apply a national procedural device to defeat maintenance of an enforcement action would be inconsistent with the understanding that both the requirements for enforcement and the grounds for nonenforcement of Convention awards set out in the relevant Convention are exclusive, and that awards satisfying those requirements, and not falling within one of the stated grounds, are entitled to enforcement in the courts of the other Contracting States.[137]

The U.S. Draft Restatement must be commended for having taken the view that the "doctrine is not available in actions to enforce Convention awards."[138]

5. Parallel Set-Aside Actions

The prospect of parallel setting-aside actions may arise (albeit rarely),[139] as such actions may take place either at the place of arbitration or in the State under the law of which the award was made, as acknowledged by article V(1)(e) of the New York Convention.[140] That the New York Convention permits such parallel

---

[134] Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine, 311 F.3d 488 (2d Cir. 2002).

[135] *Id.* at 488.

[136] *See, e.g.*, Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384 (2d Cir. 2011).

[137] Restatement (Third) of the U.S. Law of International Commercial Arbitration § 4-29, note 33, reporters' note e (Am. law inst., tentative draft no. 3, 2013).

[138] *Id. See also* the strong dissent of Judge Lynch in Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d at 401 ("[C]ourts must be cautious in applying forum non conveniens in the context of actions to enforce arbitration awards under the New York and Panama Conventions, and must not be misled into assuming that dismissal is required simply because the underlying dispute has little or no nexus to the United States. Such caution is amply warranted in light of the text and the history of the Conventions as well as the need to ensure the dependability and impartiality of international arbitration so as to promote transnational commerce.").

[139] RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-29, note 33, reporters' note e (AM. LAW INST., TENTATIVE DRAFT NO. 3, 2013).

[140] New York Convention, art. V(1)(e). This provision enables the courts at the place of enforcement not to recognize an award suspended or set aside by the courts of the seat or the courts of the country "under the law of which that award was made"; *see also* UNCITRAL GUIDE, *supra* note 23, at 218–20.

actions suggests that each court should apply its own standards as to the integrity of the process and the resulting award, rather than refraining from carrying out this assessment in the face of another—possibly competing jurisdiction.

B. *Anti-suit Injunctions*

In the battle between national courts that may seek to regulate a given arbitration, one may wonder if the device of anti-suit injunctions is likely to fuel or mitigate chaos. The question arises both for anti-suit injunctions aimed at protecting an arbitration agreement, as well as for those issued in a bid to prevent setting-aside or enforcement actions in a different jurisdiction.

1. Anti-suit Injunctions to Protect Arbitration Agreements

In common law countries, anti-suit injunctions traditionally have been used to protect arbitration agreements. For example, in *AESUK v. JSC*,[141] the U.K. Supreme Court justified the grant of an anti-suit injunction on the basis that the foreign court had failed, on invalid grounds, to give effect to the arbitration agreement:

> In some cases where foreign proceedings are brought in breach of an arbitration clause or exclusive choice of court agreement, the appropriate course will be to leave it to the foreign court to recognize and enforce the parties' agreement on forum. But in the present case the foreign court has refused to do so, and done this on a basis which the English courts are not bound to recognise and on grounds which are unsustainable under English law which is accepted to govern the arbitration agreement. In these circumstances, there was every reason for the English courts to intervene to protect the prima facie right of AESUK to enforce the negative aspect of its arbitration agreement with JSC.[142]

The same tendency to issue anti-suit injunctions applies in the United States on the basis of the "strong federal policy in favor of enforcing international arbitration agreements."[143] Thus, United States courts have issued anti-suit injunctions to protect international arbitration agreements both in situations in

---

[141] Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC, [2013] UKSC 35, (appeal taken from Eng.).

[142] *Id*. ¶ 61. For an example of an anti-anti-suit injunction enjoining a party from seeking an anti-suit injunction in Pakistan of an arbitration unfolding in England, *see* Ecom Agroindustrial Corp. v. Mosharaf Composite Textile Mill Ltd., [2013] EWHC (Comm) 1276.

[143] RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 2-28, note 33, reporters' note c (AM. LAW INST., TENTATIVE DRAFT NO. 4, 2015). *See also* T-Jat Systems 2006 Ltd. v. Amdocs Software Sys. Ltd., 13 Civ. 5356 (S.D.N.Y. Dec. 9, 2013); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985).

which the seat of the arbitration is located in the United States,[144] and when the seat of the arbitration is elsewhere.[145]

Despite being well intended, anti-suit injunctions issued to protect arbitration agreements do raise comity concerns. In essence, they mean that the court issuing them believes it is better equipped to assess the scope and validity of the arbitration agreement than the foreign court seized of the merits. The United States Draft Restatement makes no mystery of this mindset as it includes among the factors for courts to consider when ruling on a request for an anti-suit injunction, the question of whether there is a "substantial and justifiable doubt about the integrity of the other court with respect to the litigation in question."[146] A natural reaction from the enjoined court would be to retaliate against the court that issued the initial anti-suit injunction and, in turn, issue an anti-anti-suit injunction enjoining the first court from interfering in its jurisdiction. It is not difficult to see how such a chain of reactions would result in "international legal chaos."[147] This is why it has been suggested that anti-suit injunctions are not appropriate, even in aid of arbitration.[148]

2. Anti-suit Injunctions of Post-Award Proceedings

The tension between anti-suit injunctions and anti-anti-suit injunctions has also arisen in the context of post-award proceedings. An early example of such a conflict of anti-suit injunctions can be found in the Fifth Circuit's decision rendered in *KBC v. Pertamina*, [149] in 2003. There, the Court of Appeals reversed an injunction prohibiting an Indonesian State-owned energy company from pursuing proceedings it had initiated in Indonesia to vacate an arbitral award rendered in Switzerland.[150] Although the Court could identify no basis for the Indonesian courts to purport to vacate an award rendered in Switzerland, it held that enjoining the Indonesian proceedings would be contrary to the "limited role"

---

[144] *See, e.g.*, Amaprop Ltd. v. Indiabulls Fin. Serv. Ltd., No. 10 Civ. 1853 (PGG), 2010 WL 1050988, *10 (S.D.N.Y. Mar. 23, 2010) (enjoining a party from an attempt to secure an anti-arbitration injunction in India against arbitral proceedings unfolding in the United States); *see also* Paramedics Electromedicina Comercial, Ltda. v. GE Med. Info. Techs., Inc., 369 F.3d 645, 652 (2d Cir. 2004).

[145] *See, e.g.*, Ibeto Petrochemical Indus. Ltd. v. M/T Beffen, 475 F.3d 56, 65 (2d Cir. 2007) (affirming the lower court's anti-suit injunction against the litigation in Nigeria in favor of the arbitration in London).

[146] *See* Restatement (Third) of the U.S. Law of International Commercial Arbitration § 2-28, note 33, reporters' note c (am. law inst., tentative draft no. 4, 2015).

[147] Philippe Fouchard, *Anti-Suit Injunctions in International Arbitration*, *in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 153, 156 (Emmanuel Gaillard ed., 2005).

[148] *Id.*

[149] Karaha Bodas Co. v. Perusahaan Pertambagan Minyak Dan Gas Bumi Negara, 335 F.3d 357 (5th Cir. 2003); *see also* Emmanuel Gaillard, *KBC v. Pertamina: Landmark Decision on Anti-Suit Injunctions,* N.Y. L. J. 3 (Oct. 2, 2003).

[150] Karaha Bodas Co., 335 F.3d at 375–376.

played by enforcement courts under the New York Convention,[151] as well as a comity-based rule of "local restraint."[152] As the Court reasoned, "allowing such an injunction to stand could set an undesirable precedent" that would harm comity interests:

> [A]n injunction here is likely to have the practical effect of showing a lack of mutual respect for the judicial proceedings of other sovereign nations and to demonstrate an assertion of authority not contemplated by the New York Convention.[153]

The Court further observed that little would be gained from enjoining the Indonesian proceedings, since "legal action in Indonesia, regardless of its legitimacy, does not interfere with the ability of US courts, or courts of any other enforcement jurisdictions for that matter, to enforce a foreign arbitral award."[154] Balancing this "absence of a practical, positive effect that any injunction could have" against the "more weighty considerations of comity," the Court concluded that "the better course for U.S. courts to follow is to avoid the appearance of reaching out to interfere with the judicial proceedings in another country and to avoid stepping too far outside its limited role under the Convention."[155]

KBC is also noteworthy for the fact that the Indonesian court had itself enjoined enforcement actions, meaning that the contemplated injunction against pursuing remedies in Indonesia would have been an anti-anti-suit injunction.[156] The aggressive posture of the Indonesian court in claiming for itself the power to set-aside an award rendered in Switzerland against an Indonesian government-owned company, coupled with an injunction against proceedings to enforce the award, made it attractive to enjoin those proceedings. At the same time, the proceedings illustrate the impropriety of anti-suit injunctions in the context of post-award proceedings.[157]

Similar comity considerations give reason to question the wisdom of the anti-suit injunction issued in the more recent case of *Citigroup Global Markets, Inc. v.*

---

[151] *Id.* at 374.

[152] *Id.* at 371.

[153] *Id.* at 373.

[154] *Id.* at 372.

[155] *Id.* at 374.

[156] *Id.* at 362. For recent examples of anti-anti-suit injunctions issued at the pre-award stage, see Amaprop Ltd., 2010 WL 1050988, at *9–10; Sulamerica CIA Nacional De Seguros S.A. v. Enesa Engenharia S.A., [2012] EWCA (Civ) 638 (Eng.); Ecom Agroindustrial Corp. Ltd. v. Mosharaf Composite Textile Mill Ltd., [2013] EWHC (Comm) 1276. (May 30, 2013).

[157] For an example of a preemptive anti-anti-suit injunction issued by a U.S. court to prevent a party from pursuing an anti-suit injunction before the BVI courts regarding the enforcement in the United States of an award rendered in Switzerland, see Sonera Holding B.V. v. Cukurova Holding A.S., 895 F. Supp. 2d 513 (S.D.N.Y. 2012), *rev'd*, 750 F.3d 221 (2d Cir. 2014).

Fiorella.[158] That case involved an arbitration between a U.S. citizen and a U.S. bank.[159] Although a New York court set aside the award for failing to enforce a prior settlement among the parties, the award creditor succeeded in having it enforced in *ex parte* proceedings in France without informing the French court that the award had been set aside.[160] The New York court responded by enjoining the French proceedings, which were eventually dropped.[161] The anti-suit injunction was affirmed on appeal, on the grounds that the French proceedings were commenced "in bad faith" and did not compel application of "the doctrine of comity."[162] A better route would have been for the court to allow the French courts to consider the arguments against enforcement, and decide for themselves whether the award was worthy of recognition in France.

C. *Res Judicata*

Once an arbitral award has been issued, it falls to national courts to determine whether to give it effect. The New York Convention provides clear criteria for when arbitral awards may be refused enforcement.[163] In some common law jurisdictions, however, the argument is increasingly made that a court in another country has already ruled on questions determinative to the enforcement of the award, and that this ruling is preclusive.[164] Whether a party seeks to rely on the *res judicata* effect of decisions setting aside an arbitral award, refusing to set aside an arbitral award, or even on the *res judicata* effect of prior enforcement decisions, the result is to replace the New York Convention criteria on the recognition of arbitral awards with domestic tests for granting *res judicata* effect to foreign judgments ancillary to arbitral awards.

1. *Res Judicata* of Decisions Setting Aside an Arbitral Award

Article V(1)(e) of the New York Convention provides that, when an award has been set aside, recognition and enforcement of an arbitral award "may" be

---

[158] Citigroup Glob. Mkts., Inc. v. Fiorilla, 54 N.Y.S.3d 586 (N.Y. App. Div.).

[159] Cour d'appel [CA] [regional court of appeal] Paris, civ., May 30, 2017, 16/18976.

[160] Citigroup Glob. Mkts., 54 N.Y.S.3d at 586.

[161] *See* Cour d'appel [CA] [regional court of appeal] Paris, civ., May 30, 2017, 16/18976.

[162] Citigroup Glob. Mkts., 54 N.Y.S.3d at 587.

[163] New York Convention, art. V.

[164] *See generally* Maxi Scherer, *The Effect of Foreign National Court Judgments Relating to the Arbitral Award: An Emerging Conceptual Framework?*, 19 INTERNATIONAL ARBITRATION AND THE RULE OF LAW 691 (2017) (ICCA Congress Series); Sébastien Besson, *La Portée Internationale des «Jugements sur Sentence»* [*The International Reach of "Judgments on Awards"*], 19 INTERNATIONAL ARBITRATION AND THE RULE OF LAW 675, 675 (2017) (ICCA Congress Series) (advocating against preclusive effect of an "award judgment"); Michael Donaldson, *The Lesser Evil: How and Why Litigation over Arbitration Awards Should Have Preclusive Effects*, 28(3) AM. REV. INT'L ARB. 309 (2017) (advocating for preclusive effect of an "award judgment").

refused.[165] This permissive language makes clear that a court is under no obligation to give effect to a decision setting aside an award.[166] It therefore falls to the courts in the country of enforcement to determine whether an award that has been set aside elsewhere will be enforced. Two approaches may be identified in this regard.

The first one is centered on an examination of whether the annulment decision (as opposed to the award itself) is legitimate. The decision of the Second Circuit in *Commisa v. Pemex*,[167] upholding an arbitral award which had been vacated by a Mexican court, is an example of this approach.[168] There, the court held that the discretion that the New York Convention provides in this area is limited by the "prudential concern of international comity," which requires foreign annulment decisions to be given preclusive effect—subject, however, to a narrow public policy exception.[169] The court found that the "high hurdle" of this exception had been met in the circumstances of the case, which involved a retroactive change of Mexican law aimed at divesting the arbitral tribunal of jurisdiction over a pending arbitration against a subsidiary of the Mexican State-owned oil company.[170] The court emphasized, however, that these were "rare circumstances," and that a court should "act with trepidation and reluctance in enforcing an arbitral award that has been declared a nullity by the courts having jurisdiction over the forum in which the award was rendered."[171]

In essence, the *Commisa v. Pemex* court relied on comity to transform the question of whether to enforce an arbitral award that has been set aside at the seat into a question of whether to give effect to the foreign judgment setting

---

[165] New York Convention, art. V(1)(e).

[166] Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14 ARB. INT'L 227 (1998).

[167] Corporación Mexicana de Mantenimiento Integral, S. de R.I. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92 (2d Cir. 2016).

[168] *Id.* at 92–93(holding that "[the] district court did not abuse its discretion in confirming [the] Mexican arbitral award").

[169] *Id.* at 106–07. On the U.S. approach to enforcement of awards that have been set aside at their seat, see Emmanuel Gaillard, *La Vision Américaine des Sentences Annulées au Siege (Observations sur les Arrêts Pemex et Thai-Lao Lignite de la Cour d'Appel Fédérale du 2e Circuit des 2 août 2016 et 20 juillet 2017)* [*The American View on Awards Set Aside at the Seat (Comments on the* Pemex *and* Thai-Lao *Lignite Decisions of the United States Court of Appeals for the Second Circuit dated Aug. 2, 2016 and July 20, 2017)*], 4 REV. ARB. 1148 (2017).

[170] *Pemex*, 832 F.3d at 107.

[171] *Id*. at 111. In *Pemex*, the Court nevertheless refused to recognize the decision to set aside the award in Mexico. The Court held that the high hurdle of the public policy exemption was met by four considerations: "(1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectations; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation." *See id.* at 107.

aside the award.[172] This is comity towards the foreign court, rather than comity toward the arbitral process. This result is a direct consequence of the idea developed by the United States courts according to which one of the purposes of the New York Convention is to divide the world among "primary jurisdictions" and "secondary jurisdictions."[173] Nothing can be further from the philosophy of the New York Convention, which aims not to create a comprehensive choice-of-jurisdiction regime, but rather merely to set a ceiling of control of arbitral awards that the courts in State Parties cannot exceed without breaching the Convention.[174] To the contrary, by eliminating the *double exequatur* requirement, the drafters of the New York Convention intended to place the emphasis on the award itself and to reduce the significance of the fate of the award at the seat.

A second approach is exemplified by the longstanding position of the French courts that foreign setting-aside judgments have no preclusive effect at the place of enforcement.[175] For the French Court of Cassation, this reflects a view of international arbitration as an independent legal order:

> An international arbitration award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought.[176]

---

[172] *See* Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic, 864 F.3d 172, 186 (2d Cir 2017) ("The prudential concerns for international comity and the high standard for overcoming the presumptive effect of a primary jurisdiction's annulment, as articulated in *Pemex*, fit comfortably within the scope of this solicitude. Of course, consistently with *Pemex*, the party opposing vacatur of a judgment enforcing a later-annulled award may show in support of its opposition that giving effect to the judgment annulling the award would offend 'fundamental notions of what is decent and just in the United States.'") (internal citations and quotations omitted).

[173] *See id.* at 178 ("The [New York] Convention 'mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought.' The state in which or under whose laws an award is made is referred to as the 'primary jurisdiction,' while all other signatory states are considered 'secondary jurisdictions.'").

[174] *See* Jan Paulsson, *TermoRio S.A.E.S.P., et al v. Electranta S.P. et al., 487 F.3d 928 (DC Cir. 2007)*, REV. ARB. 552 (2007) (for the view that the notions of primary jurisdiction and secondary jurisdictions are totally alien to the New York Convention).

[175] This results from a long line of cases starting with: Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 9, 1984, No. 83-11.355, Bull. civ. I, No. 248 (Fr.), Société Pablak Ticaret Limited Sirketi v. Société Norsolor, *in* REV. ARB. 431(1985), note by Berthold Goldman; Philippe Kahn, Note, 3 J. DU DROIT INT'L 679 (1985); *see also* Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV. 16 (1999).

[176] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 29, 2007, No. 05-18.053, Bull. civ. I 200, No. 250 (Fr.), Société PT Putrabali Adyamulia v. Société Rena Holding et al., *in* REV. ARB. 507 (2007), report by Jean-Pierre Ancel and

Under this view, setting-aside decisions operate within the legal order of the court that issued them, while the question of whether to enforce an arbitral award in any other country is to focus on the issue of whether the arbitral award is worthy of recognition under the rules applicable to enforcement in that country. In other words, the primary material to be assessed by the courts in the country of recognition is the award itself, not a judgment rendered in any other jurisdiction about the award.

2. *Res Judicata* of Decisions Refusing to Set Aside an Arbitral Award

For jurisdictions like the United States which are prepared to give effect to foreign setting-aside decisions, consistency would require them to uphold foreign decisions both setting aside and refusing to set aside an arbitral award, alike. Indeed, it would seem anomalous that the international reach of a decision would depend on its outcome.

In *Petrec v. NNPC*,[177] a federal court in Texas enforced an arbitral award on the basis that the Swiss Federal Tribunal's refusal to set aside an award "must be recognized by this court as a matter of *res judicata* and international comity."[178] In reaching this conclusion, the court focused not on whether there were grounds for refusal to enforce the award under the New York Convention, but on whether the foreign court proceeding should be given effect.[179] A review of the facts, however, should have given the court pause. In the underlying arbitration, the tribunal had issued a partial award rejecting the respondent's challenge to the claimant's standing, and accepting the claimant's claims.[180] On the last day of the hearings that followed on the issue of damages, however, new evidence was introduced challenging the claimant's standing.[181] The tribunal then proceeded to issue a final award finding that the claimant lacked standing, directly contradicting its findings in its prior partial award.[182] By giving effect to the results of the subsequent Swiss setting-aside proceeding, the Texas court never considered whether the possible violation of *res judicata* by the arbitral tribunal rendered the final award unenforceable in the United States under the U.S. understanding of the public policy requirement protecting *res judicata*.

This shows how, a focus on the reasoning of a decision ancillary to the award, as opposed to scrutiny of the award itself, dramatically modifies the scope—and possibly the outcome—of the standard review to be performed in post-award litigation.

---

note by Emmanuel Gaillard; Jean-Pierre Ancel, Note, REV. JURISPRUDENCE DROIT DES AFFAIRES 883 (2007); Thomas Clay, Note, J. DU DROIT INT'L 1240 (2007).

[177] Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp., 288 F. Supp. 2d 783 (N.D. Tex. 2003).

[178] *Id.* at 795.

[179] *Id.* at 794–95.

[180] *Id.* at 785–86.

[181] *Id.* at 786.

[182] *Id.*

3. *Res Judicata* of Decisions regarding Enforcement of an Arbitral Award

In those legal systems in which scrutiny of arbitral awards has given way to review of court decisions ancillary to the award, courts may also be tempted to give preclusive effect to decisions regarding enforcement of arbitral awards.[183]

This trend has found its way into United States and English case law, as exemplified in *Belmont Partners, LLC v. Mina Mar Group, Inc.*[184] and *Chantiers de l'Atlantique S.A. v. Gaztransport & Technigaz S.A.S.*,[185] respectively.

In both cases, the courts at the seat refused to set aside arbitral awards on the basis that the reasons invoked for the setting aside had been raised and rejected in the context of prior enforcement proceedings in another State.

Belmont involved an ICDR arbitration in Virginia.[186] The award was first recognized in Canada, over allegations that it had been procured by corruption, fraud, and undue means.[187] When the same allegations were subsequently raised in setting-aside proceedings in Virginia, the Virginia court determined that the Canadian court's judgment "merits comity" and concluded that "claim preclusion bars this Court from deciding whether to modify or vacate the Award."[188]

Similarly, in *Chantiers de l'Atlantique*,[189] the English High Court applied issue estoppel to reach the same result, finding that a French court's rejection of allegations of fraud in the context of recognition proceedings gave rise to issue estoppel, barring the same allegations from being raised again in the English setting-aside proceedings.[190]

Both of the above cases involve courts at the seat deferring to foreign enforcement jurisdictions.

Courts have also followed the rulings of other jurisdictions in refusing to enforce an award. In *Diag Human SE v. Czech Republic*,[191] the English High Court held that a judgment by the Austrian Supreme Court that an award was not binding, and therefore not capable of enforcement, estopped the parties from re-litigating the issue in English courts.[192] The English court refused to enforce the

---

[183] *See, e.g.*, Scherer, *supra* note 164; Jonathan Hill, The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England, 8 J. PRIV. INT'L L. 159 (2012).

[184] Belmont Partners, LLC v. Mina Mar Grp., Inc., 741 F. Supp. 2d 743 (W.D. Va. 2010).

[185] Chantiers de l'Atlantique S.A v. Gaztransport & Technigaz S.A.S., [2011] EWHC (Comm) 3383 (Eng.).

[186] Belmont Partners, LLC, 741 F. Supp. 2d at 748.

[187] *Id*.

[188] *Id.* at 753.

[189] Chantiers de l'Atlantique S.A v. Gaztransport & Technigaz S.A.S., [2011] EWHC (Comm) 3383 (Eng.).

[190] *Id.* ¶ 317.

[191] Diag Human SE v. Czech, [2014] EWHC (Comm) 1639 (Eng.).

[192] *Id.* ¶¶ 62–63.

award, without considering whether the foreign decision "was wrong on the facts or as a matter of English law."[193]

All of these cases incentivize parties to rush to initiate enforcement proceedings in a preferred jurisdiction in order to obtain a favorable precedent that could be applied with preclusive effect in other proceedings.

The potential chaos engendered by focusing on ancillary court decisions, rather than on the award itself, can be seen in *Yukos Capital SARL v. OJSC Rosneft Oil Co.*,[194] in which Yukos Capital sought to rely on a finding made by the Amsterdam Court of Appeal in the course of its decision to enforce an arbitral award that had been set aside in Russia, that the setting aside proceedings were "not impartial and independent but . . . instructed by the executive."[195] The English Court of Appeal found that the Dutch court's decision was not preclusive, as it relied on a determination about the consistency of the Russian setting-aside proceedings with Dutch public policy, whereas the issue in the English proceedings was whether the proceedings were consistent with English public policy.[196] The decision, however, does not preclude an English court from giving effect to an enforcement decision rendered in a country other than the seat of the arbitration on matters other than arbitrability and public policy, as these matters may legitimately differ from country to country.

The court was confronted with three decisions: the arbitral award granting Yukos Capital's claims, the Russian decision setting aside the award, and the Dutch decision finding the Russian setting aside decision to be illegitimate.[197] As potentially contradictory decisions multiply, an approach focused on the preclusive effect of ancillary court decisions becomes absolutely unsustainable.

The approach focusing on the preclusive effect of ancillary court decisions, as opposed to the scrutiny of the award, is wholly unsatisfactory in that it invites the parties to race to the court expected to be the most sympathetic to their position with a hope of securing a good judgment prior to exporting it.

IV. CONCLUSION

In a world that remains divided between sovereign States, a residual degree of divergence is to be expected as to the manner in which certain issues of arbitration law are approached in various jurisdictions. Arbitrability or public policy will not be understood similarly everywhere. The treatment of non-signatories who have been involved in the negotiations and/or performance of the substantive contract containing an arbitration agreement provides another example of acceptable discrepancies. As long as complete unification will not be achieved in relation to the substantive rules that apply to arbitration and, more importantly, as long as

---

[193] *Id.* ¶ 62.
[194] Yukos Capital Sarl v. OJSC Rosneft Oil Co. (No. 2), [2014] QB 458 (Eng.).
[195] *Id.* at 471.
[196] *Id.* at 471, 517–19.
[197] *Id.* at 462.

national courts will be fully independent to decide disputes that involve parties falling within their jurisdiction—in practice, as long as the world will be divided into sovereign States—harmony and justice will be better served if, when considering the fate of an arbitral award, each legal order focuses on the award itself and makes a determination based on its own standards of acceptance rather than focusing on foreign court decisions ancillary to the award.

In this vision of inter-systemic cooperation, there can be no race to the most favorable court and no home advantage given to the party that has pushed for a venue in its own country. The arbitral process and the resulting award are considered independently by each State on an equal footing. Such an independent assessment of the arbitral process by each State is, after all, the most important lesson of the New York Convention, the main achievement of which was to repeal the double *exequatur* requirement and, in so doing, to free the arbitral process from the courts of the seat. This lesson must not be forgotten, as true chaos may result from the temptation, in certain quarters, to consider and give effect to potentially conflicting State court decisions relating to the award, as opposed to viewing and assessing the award itself.