

# Emergence of *Lis Pendens Arbitralis* in Europe

## I. Introduction

Parallel proceedings before two different *fora*, between the same parties and the same cause of action constitute an inconvenient situation which needs to be addressed. On the national level – as far as two domestic court's proceedings are concerned – certain rules adopt the principle of *lis pendens* and prevent costly parallel proceedings and protect parties from oppressive litigation tactics. Although the principle of *lis pendens* varies depending on the country, in principle it provides that the court first seized will be competent to decide the case, unless it finds that it has no jurisdiction.

In international arbitration such principle does not exist. Instead, in order to avoid concurrent court and arbitration proceedings, the exclusive jurisdiction of an arbitral tribunal (which should be respected universally) entitles it to decide on all issues including its own jurisdiction. In essence this should suffice. Usually as a consequence of dilatory, oppressive tactics of a respondent in international arbitral proceedings – an arbitral panel may have to face *lis pendens* situations<sup>1</sup>. In that case, a respondent in arbitration brings an action before a national court other than at the seat of the arbitration, claiming the invalidity of an arbitration agreement. Accordingly it deliberately chooses a foreign *forum* in order to frustrate its previous contractual bargain.

Eliminating the likelihood of parallel court and arbitral proceedings became an issue of utmost importance within the European Union. As unwanted consequences of a number of European Court of Justice decisions, frustrating arbitration proceedings became as possible as never before. That is why in latest revision of the Brussels I Regulation, the European Commission introduced a new mechanism tailored at eliminating the concurrent proceedings in the context of international arbitration.

The study aims to establish whether the principle of *lis pendens arbitralis* might emerge as a consequence of the Brussels I Regulation revision and whether such principle is actually needed.

The research will be divided into four parts. The first one will be devoted to explain legal paradigms that underline the principle of the exclusive jurisdiction of the arbitral tribunal (hence severability of arbitration agreement and the doctrine of competence-competence)

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<sup>1</sup> The application of traditional *lis pendens* assumes the parallel proceedings before *fora* of equal status. In case of concurring court and arbitral proceedings it is not the case.

which essentially should prevent any parallel proceedings from occurring in the first place. Second and third part will introduce different national approaches with respect to the interface between the court and arbitration proceedings. As each legal system provides different legal features (e.g. anti-suit injunction, negative competence-competence, declaratory relief) facilitating interaction between *fora*, they will be analyzed subsequently. Final part aims to introduce the development of the Brussels Regime<sup>2</sup> which might call for elaborated mechanism of preventing concurrent proceedings as a consequence of the ECJ case law.

Use of comparative research is particularly important. In the first chapters it shows that the underlying principles are recognized universally both on international and national level. In the two following chapter it is reasonable to confront different legal features introduced in different legal systems. In the fourth and final chapter European and national approach has to be contrasted.

The analysis of the national legislation will be primarily based upon the English, French and German arbitration legal orders with some auxiliary use of the law from different jurisdiction. Consequently, from international perspective, the New York Convention (1958), Geneva Convention (1961) and Model Law (1985 and its update on 2006) will be analyzed. From the European point of view, the Brussels Regime should be studied. Additionally in order to assess the development of the Brussels Regime, the ECJ case law will be examined.

Author is aware of the fact that some of the terms used have in principle different meaning. Notwithstanding for the purpose of this research expressions like arbitration agreement and arbitration clause, or competence-competence and Kompetenz-Kompetenz and few others will be used interchangeably.

The research takes into account recent developments in area of arbitration law meaning: amended French Code of Civil Procedure, the review of the New York Convention offered by *A. van den Berg* as well as the European Commission proposal on reviewing Brussels I Regulation.

## II. Establishing Arbitral Jurisdiction: principles reinforcing its exclusive character

Exclusive jurisdiction of arbitral tribunals is a legal paradigm established on the basis of two principles of international arbitration: severability of the arbitration agreement and the rule of competence-competence, which will be discussed respectively. In essence the doctrine of separability allows an arbitral tribunal to decide on the merits, whereas competence-competence doctrine empowers a tribunal to decide on its own jurisdiction<sup>3</sup>. When read together they allow an arbitral tribunal to decide on all disputes arising out

<sup>2</sup> The system established on Brussels Convention (1968), Lugano Convention (1988) and Brussels I Regulation designed to facilitate recognition and enforcement of state court decisions in civil and commercial matters in European Union.

<sup>3</sup> (Lew, Mistelis, & Kroell, 2003) p. 102.

Więcej informacji na stronie wydawcy

<http://www.ksiegarnia.beck.pl/adr-arbitraz-i-mediacja/id3398,ADR-Arbitraz-i-Mediacja-kwartalnik.-Prenumerata-2010.html>