Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings

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I. Introduction

Lis pendens and res judicata are fundamental principles of procedural law. While they may appear clear-cut on the surface and not susceptible to creating a great deal of academic controversy, a somewhat closer look at these concepts and their practical application in the variegated circumstances of real life situations reveals that they are occasionally less self-evident as the degree to which they are taken for granted would suggest. This is particularly the case when the interplay between court judgments and arbitral awards and the monitoring functions of the court in charge of supervising the particular arbitration are factors.

This article focuses on situations that might arise in adjudicatory practice, which is at the crossroads of competing court and arbitration proceedings and their resultant implications.

II. Lis Pendens and Res Judicata Generally

A. Regulation with nationwide scope of application

Presently, the rules on lis pendens and res judicata are part of the domestic procedural arsenal of countries with reasonably well-developed legal traditions. Usually—and always in the civil law systems of continental Europe—these rules are included in the respective Acts on Procedure¹ while the so-called estoppel per rem judicatam is a non-statutory rule of evidence in English law.

B. Formal finality of res judicata

One criterion for the res judicata effect is that the judgment is final from a formal point of view, i.e., it cannot be appealed within the normal procedural regime for review of lower court judgments by appeal to a higher court. It does not require, however, that the judgment is impervious against extraordinary remedies, such as in cases of gross procedural flaws etc.

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¹ Swedish Procedural Code, c. 13, art. 6 (lis pendens) and c. 17, art. 11 (res judicata); German Code of Civil Procedure (ZPO), art. 322, French New Code of Civil Procedure (NCPC), art. 480.
C. Substantive finality of res judicata

Substantive finality means that an action cannot be considered anew with respect to an identical object of dispute which has already been adjudicated in the form of a final judgment as defined above. Some specific issues—not necessarily all uncontested—may be discussed on this theme. A judgment or award by consent where the judge or the tribunal only confirm the settlement agreement which the parties have arrived at in the form of a judgment or an award is, according to French jurisprudence for example, devoid of res judicata effect. However, under Swedish law, for instance, such a judgment does not prevent a party from bringing an action for purposes of having the settlement declared null and void. A default judgment also has res judicata effect provided that no recourse against the decision has been taken according to available appeal routes.

In principle, only the dispositive part of the judgment and not the reasons obtain res judicata effect under continental legal systems. The reasons may be used as an aid to interpretation in order to establish the delimitation of the subject matter which was adjudicated and may not be obvious from the judgment proper, having thus become res judicata. Another effect of the finality is that it precludes all further argument on legal and factual issues existing at the time of the proceedings, which would have been relevant according to the applicable legal regime and which might have led to another conclusion had they been in fact introduced in the action leading to the relevant judgment.

Thus, circumstances arising after the decision are, of course, something different than circumstances that had not been invoked earlier. The finality of the judgment, however, extends to all the circumstances which could have been invoked in an action—whether or not they were invoked. But it will not pre-empt the legal consequence, if any, of any circumstance arising post-judgment, a factum superveniens.

A civil judgment establishing a certain obligation may have finality in a subsequent criminal procedure.

According to some scholars, an erroneous judgment ultra petita is not final with respect to the excess amount. According to others, however, it does constitute res judicata. Followers of this school of thought would refer a party to the remedy of extraordinary appeal based on the defective judgment.

D. There is no issue estoppel under continental law systems

In the context of res judicata, it is important to underline a feature of continental civil law systems different to the common law systems—that they do not attach res judicata effect to the adjudicatory bodies’ conclusions in respect of specific issues or legal premises but only to the dispositive part of the judgment. In other words, if one and the same issue arises in another action, although between the same parties, the judge or arbitrator in the
subsequent litigation will be at liberty to revisit the issue and conceivably arrive at a different conclusion.

This principle is opposed to the concepts of collateral estoppel (USA) or issue estoppel (English law), which attach the force of res judicata also to legal issues and legal premises. The thinking behind the continental law approach is that the importance of a legal action and a specific issue figuring in that action could differ widely in relation to another legal action, meaning that a party might not invest so much effort in one particular issue in the first litigation because of its relative insignificance while the situation could be radically different in a subsequent action.

E. THE EVOLUTION OF LIS PENDENS AND RES JUDICATA

There is no doubt that the lis pendens and res judicata concepts originally came into being in a domestic setting. The concepts evolved to provide an antidote to the duplication of proceedings because two different state courts had been seized with one and the same dispute between the same parties on different jurisdictional grounds, each of them legitimate, for example, the defendant’s domicile and location of its assets, respectively (lis pendens) or when the same (or another) court had already adjudicated on the merits of an identical cause of action between the same parties (res judicata). The policy considerations behind the principle are quite clear: eliminating wasteful expenditure of public funds and avoiding the risk of conflicting outcomes.

F. INTRODUCTION OF A FOREIGN ELEMENT

When state courts subsequently were faced with lis pendens and res judicata objections based on decisions by foreign courts, the question was seen in a different light. Obviously the criteria were present—same parties, same cause of action, identity of subject matter—but a party recommencing litigation obviously has not obtained satisfaction from the foreign judgment insofar as it was not enforceable in the second jurisdiction.

The situation has thus developed in most jurisdictions that the lis pendens and res judicata effect of a foreign action/judgment will be recognized if the judgment is recognized in that jurisdiction.

Whether the foreign court judgment is, in fact, enforceable in the other jurisdiction would normally depend on whether a treaty is in force between the relevant countries which institutes a duty to enforce. (In common law jurisdictions the principle of the most convenient forum would apply).

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5 The procedural implications, however, are different, obviously. Res judicata constitutes a jurisdictional bar against entering on the merits at all, while the issue estoppel only bars any departure from any prior conclusion made by a competent court on any particular substantive issue.

6 The issues relating to lis pendens are to a large extent similar to those of res judicata. The effects of res judicata and lis pendens are similar in that they lead to rejection or suspension of an identical cause of action. Lis pendens usually entails a stay of proceedings only.

The thinking behind this approach is clear. If a party cannot use the foreign court judgment for enforcement purposes in the relevant jurisdiction, it should not be prevented from pursuing the case there in order to open up the possibility of local enforcement. There would be a legitimate interest to obtain an enforceable judgment in that particular jurisdiction.

G. Res judicata of a prior arbitral award

Arbitral awards have the effect of res judicata. This is so even in the cases when the arbitrators have acted as amiable compositeurs—a rare occurrence, indeed. Normally, the finality of the award only concerns the parties to the action and their privies (common law) or their universal successors or assignees (continental civil law).

In view of the fact that arbitration is private and consensual in nature, there is no obstacle against parties relitigating any issue determined by a previous arbitral tribunal. This provides a contrast with the ex officio duty of state court judges to consider any possible situation of lis pendens or res judicata and to deny any substantive re-examination of such an action. This is logical, as the taxpayers’ money is at stake in a state court setting and because the public character of judgments enables judges to verify the re-emergence or duplication of actions (at least in theory). No successful party would sensibly expose itself to such double jeopardy, however, making this issue purely academic.

If a prior award exists, however, the subsequent tribunal would not have to take note of this ex officio. This is necessitated by the practical consideration of the non-public nature of prior awards and—as a matter of principle—as a consequence of the consensual nature of arbitration. Practically all arbitration laws and institutional arbitration rules explicitly require an objection based on lis pendens or res judicata to be raised at the first opportunity by the respondent because this defence is in the nature of an objection against the arbitrators’ jurisdiction.

III. At the Crossroads of Court Judgments and Arbitral Awards

A. Lis pendens and res judicata of prior state court judgments

How do the principles of lis pendens and res judicata translate when carried over to the realm of international arbitration? As stated above, a prior court action or judgment

8 Most legislation in continental Europe explicitly provides that “the arbitral award is res judicata in relation to the dispute it resolves” (NCPC, arts. 1476 and 1500; Belgian Judicial Code, art. 1703; Netherlands Code of Civil Procedure, art. 1059(1); ZPO, art. 1055. In other common law jurisdictions, however, legislation is silent on the matter (as is, e.g., the case in Swedish law).

9 An important example is the UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, Annex I, adopted by the United Nations Commission on International Trade Law on June 21, 1985, reprinted in 24 I.L.M. 1302 (1985) [hereinafter “Model Law”]. Art. 16(2) contains an explicit provision to this effect. The Swedish Arbitration Act, like the laws of common law jurisdictions, is entirely silent on this subject. This should not, however, be interpreted as a departure from this principle.
will normally be given effect in another jurisdiction only where the judgment is enforceable at the place where court proceedings are instituted.

Is the matter of local enforcement of any concern, however, in the context of international arbitration? Were a party to commence not court proceedings but arbitration in Stockholm, for example, the matter of whether a prior court judgment is enforceable in Sweden is normally of scant interest to the disputants. Stockholm was in all likelihood chosen because neither of the parties had any connection with that venue and neither of them would foresee any need for enforcement measures in Sweden in the future.

Admittedly, on the international scene, the issue of local enforceability has occasionally been given attention at least in earlier decisions. An arbitration in Czechoslovakia\(^\text{10}\) where the claimant initiated proceedings based on a breach of a sales contract provides a good example. The same claimant later commenced court proceedings in Brussels based on a bill of exchange which had secured the opposite party’s obligations under the sales contract. The defendant raised a plea of *lis pendens* in the arbitral proceedings. The arbitral tribunal concluded that a judgment by the Brussels court would not have been enforceable in Czechoslovakia and denied the motion. It is submitted that line of reasoning reflected in this example represents an antiquated approach.

Similarly in Case No. 152/1972 before the Bulgarian Chamber of Commerce,\(^\text{11}\) the claimant initiated arbitration seeking payment for goods sold to a French company and, later on, when the French defendant was declared bankrupt, brought the same claim before the bankruptcy court in France. The defendant requested termination of the arbitral proceedings because of the pendency of the same claim in France. The arbitrators considered, however, that the bankruptcy judgment did not have extraterritorial effect and could therefore not deprive the arbitrators of their competence. The request was denied.\(^\text{12}\)

**B. A PRIOR COURT ACTION/JUDGMENT RAISES A QUESTION OF COMPETENCE, NOT LIS PENDENS OR RES JUDICATA**

If the respondent raises a *res judicata* objection on the basis of a prior state court judgment, the tribunal will have to assess the relevance of the prior judgment which has been invoked. The enforceability of the judgment at the place of arbitration cannot be a relevant consideration for this assessment, however, in the way it would be if a state court were seized of the action. What is relevant, is whether or not the court seized with the competing action or which rendered the prior judgment was competent to do so. The first step for the tribunal will thus be to establish whether there is an identity between the prior action and the one currently brought to arbitration. In order to establish identity,
the classical criteria have to be applied, i.e. identity of the parties, cause of action, and subject matter.

As follows from what has already been stated, whether a state court accepts to enter on the merits of a dispute depends on whether or not the foreign court’s judgment will be enforceable in the relevant jurisdiction. If this threshold requirement is not satisfied, the domestic court will have no reason to look into the question whether or not the foreign court was in actual fact competent to adjudicate the dispute.

From the perspective of the arbitrator, however, the matter of the prior court’s competence takes on paramount importance. If that court is competent, no competence will then be vested in the arbitrators. If this is held to be the case, the tribunal will have to conclude that the judgment has the effect of pre-empting the tribunal’s jurisdiction (or, more precisely, the circumstances—rather than the judgment—which invested the court with jurisdiction to render the judgment in the first place).

C. No issue of priority in time in the state court/arbitration context

In the context of state courts the res judicata issue attaches decisive importance to the time sequence of initiation of competing court proceedings. However, in the state court/arbitration context the time element is irrelevant; only the connection between the issue referred to arbitration and the scope of the arbitration agreement and the parties’ pleadings within the remit of that agreement (always allowing for court review at the place of arbitration) are relevant.

1. Enforceability at the Place of Arbitration Should not be a Consideration

The matter of the prior state court judgment’s enforceability at the place of arbitration—or in any other jurisdiction, for that matter—should thus not be an issue in the tribunal’s deliberations of whether a bar against jurisdiction is presented by a prior court judgment. Neither will the arbitral tribunal have to consider the time sequence of the commencement of actions in the way a continental state court judge would nor the relative merits of one or the other forum from the point of view of convenience as the common law judge would.

In determining its (lack of) competence, the tribunal is entitled and required to decide the issue autonomously. The tribunal will thus have no duty to defer to the court’s conclusion on its jurisdiction but will be obliged to review the premises on which the court made its conclusion (always provided that these premises are pleaded before the tribunal by the parties). As occurs in practice, the result may be that an arbitral tribunal has considered itself competent to adjudicate a matter where a court—usually in one of the disputants’ home jurisdiction—has accepted a case for consideration or even issued a final

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13 Heuman, supra note 7, at 703.
14 EC Regulation 44/2001, December 22, 2000, art. 27, gives unconditional precedence to the first court within the European Union seized of the action.
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For this to happen, the tribunal must have concluded that the matter on which the court passed judgment rightly belonged to the tribunal’s ambit by virtue of the arbitration agreement. These situations are rare but they do occur. Clearly, they are most prone to arise when the relevant state falls short in its commitments under international law as laid down in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).

The first step that the tribunal will therefore have to take is to determine whether there is a valid and applicable arbitration clause which covers the dispute which has arisen between the parties. If an arbitration clause exists, it will be a necessary prima facie indication that the tribunal, and not the court which accepted the case for consideration or rendered the judgment, has jurisdiction to adjudicate the dispute.

2. Waiver of the Right to Arbitrate?

If this point of departure is simple enough, there are complicating circumstances that do arise which may render the arbitral tribunal incompetent, even in the presence of an arbitration clause in the contract covering the particular dispute. For instance, if it appears from the circumstances that the defendant party named in the court action failed to object to the court’s jurisdiction by invoking the arbitration agreement in a timely manner, this would have the effect of ousting the tribunal’s jurisdiction. However, it is not the foreign state court’s decision on this issue which ipso facto pre-empts the tribunal’s jurisdiction, but the tribunal’s own assessment of whether the defendant in fact failed to raise the arbitration defence in the court proceedings and, if so, whether it was done in a way and under such circumstances that the defendant’s conduct amounted to a waiver of the arbitration agreement.

3. Application of the Lex Arbitri or the Lex Fori of the State Court?

An interesting issue in this context is if the question of whether the defendant properly raised the arbitration defence should be adjudicated according to the law at the place of arbitration or according to the law in the particular state court jurisdiction. The state court jurisdiction could require such a defence to be submitted at the first opportunity, i.e. when the defendant enters pleadings in the case. The place of arbitration, however, might tolerate a more relaxed attitude and accept such a defence even if introduced later.

Compelling reasons speak in favour of applying the law of the state court jurisdiction as the basis for a decision whether the arbitration defence was raised in a timely fashion.

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16 SFS 129:145, art. 4.
17 This is required under the Model Law, art. 8(1).
18 This is consistent with the applicable practice under the U.S. Federal Arbitration Act, 9 U.S.C. §§ 1–307.
The reason for this is that a party which enters an appearance in a court of competent jurisdiction (save for the arbitration agreement) must be subject to the procedural rules of that forum as any other defendant in the same situation.

4. Res Judicata of a Default Judgment?

If we suppose, however, that the foreign judgment has been rendered by default—i.e. the defendant party failed to appear before the state court although it was duly summoned—would such a judgment then constitute res judicata? Or, more precisely, would jurisdiction be vested in the court as a consequence of the defendant's conduct? This scenario presupposes that the defendant not only did not raise the arbitration defence; it did not show up before the court at all. While a state court would attribute full force and effect to such a judgment, provided the defendant was duly summoned, such an occurrence should not constitute a bar to arbitration.

Although the defendant would have been subject to the foreign state's jurisdiction if it had not been for the arbitration agreement, the arbitration still should be allowed to proceed. It cannot reasonably be required that a party which has concluded an arbitration agreement should have a duty to appear before any state court to invoke the arbitration agreement and plead affirmatively that court's lack of jurisdiction in order not to lose its right to submit a dispute to arbitration.

D. Exclusive National Jurisdiction and Arbitrability

It occasionally occurs that a party invokes its domestic national procedural framework, which may provide that a certain category of disputes are reserved for the exclusive jurisdiction of that country's state courts. Even if there is a clear and unambiguous arbitration clause in the disputed contract the question may be raised whether provisions concerning such exclusive national jurisdiction in the respondent's home jurisdiction may eviscerate the parties' agreement to arbitrate. On that basis, a respondent party could easily argue for pending court proceedings or a previous court judgment to be granted precedence.

Also, the matter of arbitrability will enter into the picture. According to which law should arbitrability be determined? This is a difficult subject in its own right. In this context, however, most arbitration laws are based on the assumption that the law at the seat of the arbitration will be used to gauge the issue of arbitrability also where the arbitration agreement requires the competent court to determine whether the dispute is arbitrable.

19 An example is art. 248(2) of the Procedural Code for the “Arbitrazh” Courts in Russian legislation which stipulates that claims concerning real estate located on the territory of Russia are subject to the exclusive jurisdiction of the Russian “Arbitrazh” courts. An interesting “live” example of a similar situation is an ad hoc arbitration in Stockholm between a Canadian and Russian party where (the majority of) the tribunal found that Russian rules concerning exclusive jurisdiction concerning sub-soil exploratory operations made the dispute inarbitrable and—surprisingly—declared itself as lacking competence. This matter has been appealed to the Swedish courts where the first instance (the case is still pending on appeal) held that no circumstance vitiating the arbitration agreement was present. Stockholm District Court, Case No. T 10141-01.
is international in character and the enforcement of the award may be expected elsewhere, irrespective of whether the substantive aspects of the dispute will be governed by another law or not.\footnote{As a comparison, Swiss law also provides that arbitrability of the disputed subject matter shall be decided on the basis of Swiss law. SPIL, art. 178(2).}

In such situations—where a foreign state court will consider the matter subject to its exclusive jurisdiction or inarbitrable—it is obvious that an action commenced in that jurisdiction before a state court will be received and considered on its merits despite the existence of a clear and unambiguous arbitration clause. It is similarly obvious that an arbitral tribunal seized of the matter sitting anywhere outside the relevant jurisdiction will likewise consider itself competent provided that the matter brought to arbitration is not inarbitrable at the place of arbitration. A true case of parallel proceedings will emerge as a result.

### E. Res Judicata Effect of Court Decisions in Relation to International Arbitration Taking Place Elsewhere

An arbitral tribunal is subject to the supervision and control of the state court that has local jurisdiction at the place of arbitration; it is up to that court to decide on the tribunal’s competence in the last instance. It is the one and only court to which the tribunal has to defer. Inversely, the tribunal is not bound by whatever decision any foreign court—outside the place of arbitration—may render in respect of its jurisdiction or in any other respect. As a matter of practical necessity, the tribunal will certainly be wont to study the foreign court’s considerations for assuming jurisdiction (if and to the extent invoked by the parties). For obvious reasons, in practically all cases the tribunal will also find that it is able to concur in the court’s determination on the question of competence. However, it is quite another matter that the tribunal is by no means bound to respect such determination by the court but has to arrive at its own, independent conclusion.

#### 1. Res Judicata of a Prior Arbitral Award

As has been argued above, a tribunal whose jurisdiction is contested by a respondent party on the basis of the res judicata effect of a prior state judgment cannot satisfy itself by simply ascertaining the existence of a prior state court judgment. The tribunal also has to go behind the judgment and examine whether the court was competent having regard to the existence of an arbitration agreement.

What, then, about the res judicata effect of a prior arbitral award? What should the arbitral tribunal do if the respondent invokes res judicata in the form of a prior arbitral award and the claimant insists that the arbitration should be allowed to proceed because the prior award suffers from some vitiating defect? In that case, the normal test of identity must, as always, be applied. Apart from that, however, there is a clear difference in the
approach to be taken by the second tribunal confronted with a prior arbitral award as compared to a prior state court judgment.

2. **A Prior Award Must be Dealt with Differently**

   When a prior arbitral award exists, there will be no cause for the arbitral tribunal to go behind the award in order to determine whether that decision constitutes *res judicata* or not. The second tribunal will have no business to examine whether those proceedings were beset by any flaws, or whether there was a binding and applicable arbitration agreement legitimizing the prior arbitration, nor whether the arbitrators in those proceedings rightly assessed the jurisdictional implications of any conduct by the parties. The mere *existence* of the award will be enough to constitute a procedural bar based on *res judicata* against a second arbitration.

   The reason for this stems from the underpinnings of arbitration as compared to court proceedings. The latter potentially involves any person who has a link to the national territory which will vest jurisdiction in that state court system according to the procedural exigencies put in place by its legislature. Arbitration, however, being consensual in nature, cannot lead to an arbitral award unless there is party agreement. The second arbitral tribunal seized with a particular dispute cannot scrutinize the legitimacy of the first award and reconsider the prior tribunal’s conclusion as to its competence as they may (and should) do in respect of a court judgment. The reason for this is that it is only the supervisory court, i.e. the state court with local jurisdiction at the place of arbitration, that holds sway over the fate of the arbitral award. No other court, whether domestic or foreign, and no arbitral tribunal may pass judgment on the validity of an arbitral award.

   If no challenge has been initiated or the time period for lodging a challenge has expired then the mere fact that an award exists is sufficient to offer a valid *res judicata* defence.

3. **What if an Award is in the Process of Being Challenged?**

   Rather an interesting matter is what a tribunal should do if, in fact, a prior arbitral award which has been invoked as a *res judicata* defence is subject to setting-aside proceedings before the supervisory state court. Should the tribunal stay its proceedings (even where consent to a stay by the parties is not forthcoming) and await the outcome of the setting-aside proceedings?

   This scenario would appear to offer the very rare case where the tribunal might in fact be justified in staying the proceedings, although no arbitration law or institutional rule would seem to condone such conduct. The reason for this is that if the challenge is not successful there will indeed be a situation of *res judicata*. If the challenge is successful,
this may then indicate that the dispute is not subject to arbitration at all, spelling the inevitable doom for the second arbitration as well.

Not necessarily.

The reason why the prior arbitration was mooted is a critical factor. The second arbitration could proceed if the shortcoming in the original award was occasioned by some non-recurrent flaw, such as the wrong institutional setting for the first arbitration or a lack of specified qualifications of the members of the first tribunal.\(^23\)

Obviously, if the challenge were based on any non-recurrent defect then the tribunal would have the choice of continuing the arbitration instead of holding it in abeyance waiting for the court's decision. As in other situations when this choice surfaces (challenge of arbitrators, other objections against jurisdiction), the tribunal has to tread the delicate balance between economy and expediency.

F. The pre-eminent role of the supervisory court

As stated, the only court to which the tribunal must defer is the court at the place of jurisdiction, the supervisory court. If that court—during the course of the arbitral proceedings or as a result of a challenge of the ensuing award—holds that the tribunal did not have jurisdiction, this obviously constitutes the last word on this matter.

IV. Discussion of Certain Cases

Some illustrative cases where *lis pendens* and *res judicata* issues have been dealt with in a state court/arbitration context offer some interesting points for discussion.

A. The Swiss *Fomento* Case

An interesting case where parallel proceedings were initiated and where a Swiss tribunal was held to be under a duty to defer to the decision of a foreign state court is *Fomento de Construcciones y Contratas S.A. v. Colon Container Terminal S.A.* ("Fomento").\(^{24}\)

The conclusions of this case fail to take into account the fundamentally different underpinnings of state court adjudication as compared to arbitration.

The *Fomento* case dealt with a construction contract containing an arbitration clause. When a dispute arose the contractor started proceedings in a state court in Panama, thereby ignoring the arbitration clause. The defendant raised the arbitration defence but the court of first instance decided that this defence had been waived by being raised too late and held that the court was properly seized of the action. The defendant appealed and at the same time commenced arbitration in Geneva pursuant to the arbitration clause. As one would expect, the contractor contested the tribunal's jurisdiction arguing that it had

\(^{23}\) However, where an award is set aside because a contractually agreed time period allowed for rendering the award has expired, the situation certainly cannot be salvaged by instituting a new arbitration.

opted out of the arbitration agreement by starting proceedings in state court and that the defendant by not timely raising the arbitration defence must be held to have accepted this, i.e. the parties had by their respective courses of conduct terminated the agreement to arbitrate.

Shortly thereafter, the Panama Appellate Court held that the defendant had in fact raised its arbitration defence in a timely manner and that the court, therefore, lacked jurisdiction. In the interim the arbitral tribunal declared itself competent to consider the dispute in a partial award.

This was not the end of the story, however. The contractor appealed the appellate court’s decision to the Supreme Court of Panama, which reversed and confirmed the first instance court’s conclusion that the defendant had lost its right to submit the dispute to arbitration. This led the contractor to bring an action to set aside the tribunal’s award on jurisdiction before the Swiss courts.

The Swiss Federal Supreme Court granted the application to set aside the arbitral award by referring to the Swiss Statute on Private International Law (“SPIL”), which provides that

> [if an action on the same matter between the same parties is already pending abroad, the Swiss court must stay the proceedings if it is expected that the foreign court will, within a reasonable time, render a judgment enforceable in Switzerland.]

The court declared that *lis pendens* is a rule of jurisdiction and not just a procedural rule and that it would be contrary to public policy to have two equally enforceable but contradictory judicial decisions between the same parties relating to the same action. As a consequence, the award was set aside.

1. The Fomento Decision Raises Concerns of a Fundamental Character

Some comments need to be made with respect to the *Fomento* decision. First, it could be noted that the appellant’s argument was that the tribunal lacked competence on the basis of the *lis pendens* principle, and this is also the issue which the court examined on its formal level. However, as this article argues, there cannot be a situation of *lis pendens* between court and arbitration proceedings but only a question of to which adjudicatory body jurisdiction properly belongs. While SPIL Article 9(1) is reasonable from the point of view of a national state court (for the reason of comity and a host of other reasons) the matter of local enforceability is not, as mentioned, a concern in international arbitration.

The fallacy of the court’s approach is also obvious from the following considerations. If the defendant’s conduct in the Panamanian court proceedings had amounted to a

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25 SPIL, art. 9(1).
27 An arbitral award is, for all intents and purposes, universally enforceable on the basis of the New York Convention.
waiver of the arbitration agreement under the *lex fori* of the state court, then obviously that party could not proceed in arbitration *quite irrespective* of whether the ensuing judgment by the Panamanian court would be enforceable at the place where the arbitration otherwise would have taken place. The loss of the right to arbitrate would have been universal. With the chosen approach the arbitration agreement became invalid in Switzerland but would have been perfectly valid, for example in Sweden where a Panamanian judgment certainly would not have been enforceable.\(^{28}\) Moreover, as the Stockholm Appellate Court found in the Czech Republic case, it appears questionable to qualify the risk of concurrent and potentially conflicting judicial decisions as tantamount to a violation of public policy, and this for the reason that the parties dispose of the objection of *lis pendens/res judicata* in international arbitration.

2. **Does an Arbitral Tribunal have an Ex Officio Duty to Stay Proceedings?**

The proposition that a tribunal should suspend its proceedings pending a final say on the jurisdictional issue in a foreign court appears to be incompatible with fundamental principles of the arbitral process. There is no principle of arbitration, which, after all, is based on the supremacy of the parties’ agreement, that dictates to a tribunal to suspend the proceedings due to such external issues as concurrent court proceedings. Also, it is not the foreign court decision that is relevant to the arbitral tribunal (which does not owe allegiance to any foreign court) but the procedural reasons why the court might rightly or wrongly have asserted jurisdiction or not.

As for the situation in Sweden, a state court, not even the supervisory court at the place of arbitration, may order an arbitral tribunal to discontinue or suspend arbitral proceedings or in any other respect instruct the arbitrators on how to behave. The courts’ supervisory function is strictly governed by a principle of legality, i.e. that any court intervention requires express statutory support.

The *Fomento* case also raises a number of additional points of interest. Most importantly, the court opined that a court and an arbitral tribunal in Switzerland must equally apply SPIL Article 9.

However, putting a state court and an arbitral tribunal on an equal footing does not hold water for two fundamental reasons:

- The parties’ location of the arbitration in the territory of a particular country is the result of their agreement\(^{29}\) and not the result of procedural rules which operate by force of law in that particular jurisdiction.

\(^{28}\) No opinion is ventured in this article on whether the finding of a waiver by the Panamanian court was correct or not.

\(^{29}\) This applies even if the parties did not, in the particular case, select any seat for this arbitration. By picking institutional or ad hoc rules, the selection of a place which would be made by the arbitral institution or the arbitrators, respectively, would still be the result of the parties’ agreement.
Different courts (in the same national territory or in different national jurisdictions) can all be competent according to relevant procedural rules but an arbitral tribunal and a state court can never be competent in parallel with respect to one and the same cause of action between the same litigants.

As for the proposition advanced by the court that the risk of a state court in some distant jurisdiction flouting an arbitral agreement can be eliminated by non-recognition of the ensuing foreign judgment, this does not appear to provide any meaningful remedy. It may very well be that the foreign judgment does not ever emerge for enforcement in that jurisdiction. If so, a situation will result where a party that has opted for arbitration in Switzerland will be excluded from that option without any prospects of reinstatement by judicial review. For this reason, the safety valve must be the control exercised by the supervisory court at the place of arbitration in respect of the arbitral tribunal’s jurisdiction.30

The arbitrators’ mandate is premised on the parties’ agreement and the application of that agreement—leading to the tribunal’s affirmation or rejection of its jurisdiction—cannot be influenced by what any court, other than the supervisory court at the place of arbitration, considers to be the right solution.

3. Whether a Waiver of the Right to Arbitrate has Occurred is a Matter for the Lex Fori to Decide

It is correct that the matter of a waiver of the arbitration agreement must be adjudicated by the lex fori (as stated above). However, the court should, it is submitted here, have ascertained that the Panamanian court in fact solved the waiver issue correctly under the rules of the lex fori and not content itself with only surmising that the Panamanian court might “be better placed to know and apply this law correctly.” Generally speaking, this may be so, but not necessarily in the individual case. The court must consider the procedural history of the particular case to satisfy itself that the defendant’s action or failure to act before the Panamanian court amounted to a waiver of the arbitration agreement, under that court’s procedural law.31

4. As a Consequence, No Duty of the Arbitrators to Stay the Proceedings

In the Fomento decision, the arbitral tribunal is criticized for not having stayed the proceedings and awaited the outcome of the final court instance in Panama. According

30 The subject of the court’s review is actually not the foreign judgment but the circumstances on the basis of which the arbitrators assumed jurisdiction. A critical examination by the court of the underlying considerations of the foreign court for accepting jurisdiction despite the presence of an arbitration agreement should not, therefore, raise the issue of comity.

31 Quite another matter is whether the tribunal may render a decision on its jurisdiction prior to the supervisory court’s having its final say in the matter. This differs from country to country. Model Law countries give the time priority to the tribunal entitling a party to “appeal” a positive finding within a 30-day period of time. Art. 16(3) of the Swedish Arbitration Act, on the other hand, gives the parties the right to turn to the supervisory court at any time. Some laws do not allow specific review of jurisdiction other than in the context of a challenge of the ensuing award generally, according to the 1961 European Arbitration Convention, art. 6(3), a solution which is unnecessarily cumbersome.
to the position taken in this article, this criticism is unfair; the arbitrators owe their allegiance to the parties’ agreement to arbitrate and are duty bound to examine their competence exclusively on the basis of that agreement.\(^{32}\) They should resolve this question on this basis without casting sideways glances at court proceedings or other matters going on in other parts of the world.\(^{33}\)

B. **The Minera Condesa case**

A previous Swiss case, *Compañía de Minera Condesa S.A. and Compañía de Minas Buenaventura S.A. v. BRGM-Pérou S.A.S. (“Minera Condesa”)\(^{34}\) also places decisive importance on the question of the recognition of the Peruvian state court’s decision in Switzerland. The following is an outline, in brief, of the facts.

A dispute erupted on the basis of an alleged violation of a right of first refusal stipulated in the bylaws of a Peruvian company, in respect of which some of the parties were bound by an arbitration clause and others were not. In a pre-emptive strike, certain parties initiated an action before a Peruvian state court asking for a declaration that all conditions for the exercise of the right of first refusal had been duly complied with. The defendants disputed the state court’s jurisdiction, invoking the arbitration clause. The state court dismissed that defence, however. According to Peruvian law, an arbitration clause can only be effective if all litigants are parties to the arbitration agreement. Thus, according to the Peruvian court’s reasoning, none of the parties could invoke the benefit of the arbitration clause.

In this case, the Swiss Federal Supreme Court reviewed the reasoning of the Peruvian state court, found it wanting and as a consequence not enforceable in Switzerland. However, the court took the roundabout way through the New York Convention using Article 2(3) and indirect competence pursuant to Article 25(a) SPIL. The purpose of the New York Convention is not to disqualify state court judgments from recognition in other jurisdictions but to impose an obligation on states to ensure that their judiciaries recognize arbitration agreements. The question whether the foreign state court failed to implement that country’s obligations under the New York Convention must necessarily be beside the point when it comes to reviewing the arbitral tribunal’s competence.

The Peruvian court, it would appear, certainly had jurisdiction according to its own domestic rules. However, these rules amounted to a violation of Peru’s obligations under international law, specifically Article 2(3) of the New York Convention concerning the duty to recognize an agreement to arbitrate. The reasoning according to which the arbitrators recognized themselves competent should be the sole object of the court’s scrutiny.

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\(^{32}\) If applicable, this may include an examination of whether the agreement has been amended or waived by the parties’ subsequent conduct.

\(^{33}\) It is not unheard of that parties have attempted to weaken the tribunal’s authority by turning to local courts which are occasionally willing to oblige. Giving any credence to such proceedings by examining them from any other view than the jurisdictional would in fact undermine the institution of international arbitration.

\(^{34}\) *Compañía de Minera Condesa S.A. and Compañía de Minas Buenaventura S.A. v. BRGM-Pérou S.A.S.*, BGE 124 III 83.
In that respect, it should be noted that the tribunal, quite correctly, concluded that “no *lis pendens* could exist between a state court action and arbitral proceedings.” There was, thus, no reason for the tribunal, as actually transpired, to examine whether the decision of the Peruvian state court was capable of being recognized in Switzerland or not.

C. The *Rakoil* affair

A sounder approach to the conflict between parallel court and arbitration proceedings is illustrated by the earlier, so-called *Rakoil* affair, which also was submitted to arbitration in Switzerland.\(^{35}\) In this case, the government of one of the Arab Emirates contested jurisdiction of a tribunal sitting in Geneva and initiated a court action on its home turf. The arbitral proceedings and the court action proceeded side by side and delivered contradictory results, the arbitral award coming later in time. As for the court decision, the arbitrators merely noted in passing that the court decision would not prevent the “arbitration tribunal to proceed with the arbitration and to award on the merits of the case”. Thus, what the tribunal stated—and rightly so—was that the arbitral tribunal was under no duty to defer to any court of law outside of Switzerland as long as it had assumed jurisdiction over the dispute. It is conceded that the state court action was commenced later in this case, but, as mentioned above, the time sequence of these events has no bearing on how an arbitral tribunal should approach the matter of parallel state court proceedings or judgments.

Briefly, the facts of the case were the following. A group of companies forming a consortium ("DST") entered into a concession agreement in 1973 with the Government of Ras Al Khaimah and the state-owned Ras Al Khaimah National Oil Co. ("Rakoil"). A dispute arose and the consortium filed a request for arbitration under an ICC clause on March 7, 1979 against the government and Rakoil. A month later, in the beginning of April 1979, respondents filed a suit with the Ras Al Khaimah court against the claimants, i.e. in their home jurisdiction. As for the ICC proceedings, the respondent challenged the jurisdiction of the arbitral tribunal, denied liability and declined any participation in the arbitration. In the end the tribunal awarded the claimants approximately US$ 4 million.

Notably, the award debtor did not even attempt to challenge the arbitral award at Geneva, the place of arbitration. The award debtor, however, raised a number of defences in the ensuing enforcement proceedings in the United Kingdom. There, the award creditor sought enforcement of the award by way of an order against a garnishee within the jurisdiction.

This put the garnishee (Shell International Petroleum Co. Ltd) in the unenviable situation of being ordered by the English court to pay DST and by the civil court in Ras Al Khaimah to pay the same amount to that state. In the end, the majority of the House of Lords shied away from making the garnishee order absolute in view of the double

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\(^{35}\) Deutsche Schachtbau und Tiefbohrgesellschaft mbH (DST) and others v. R’as Al Khaimah Oil Company (Rakoil) and others, 14 Y.B. Com. Arb. 111 (1989).
jeopardy to which this would expose the garnishee. But this was not due to any flaw inherent in the arbitral award but out of concern for the innocent garnishee. Still, it is to be regretted that the garnishee proceedings in England were unavailing because of the clearly excessive court judgment in disregard of the arbitration clause in the award debtor's home jurisdiction, which consequently was allowed to stymie enforcement measures. However, the validity and finality of the arbitral award itself was never put in doubt; this was, on the contrary, a sine qua non for the quandary which the court was put in.

In the present context, the Rakoil affair is of interest because it shows an arbitral tribunal which derives its powers from a valid and applicable arbitration agreement is not only entitled, but has a duty, to disregard state court proceedings, a position which was not compromised in the Rakoil affair despite the disappointing outcome of the garnishee proceedings.

D. Difference in national treatment of res judicata defences

An interesting case of res judicata—issue estoppel, if one were to use the English common law concept—was dealt with by a Swedish Supreme Court judgment. What adds to its poignancy is that the outcome would have been the opposite if the arbitration had taken place in Germany and the case therefore been subject to German procedural law.

A claimant had commenced arbitration proceedings against a respondent, which considered itself to have a significantly greater counterclaim against the claimant. However, at the time, i.e. before the present Swedish Arbitration Act had entered into force, a counterclaim could not be joined to a principal claim submitted in arbitration. For this reason the respondent chose to invoke (part of) its counterclaim for set-off purposes.

From a procedural point of view, the introduction of a set-off defence is different from raising a counterclaim, although it in many ways resembles any other substantive defence against a claim in that the respondent cannot obtain anything more than a dismissal of the claimant's claim. If the claimant withdraws its claim, the set-off defence will become moot. Even if the set-off defence is fully successful, no award in the respondent's favour will be given. This would seem to militate in favour of disallowing any res judicata effect to the judgment insofar it deals with the set-off claim. However, from a substantive point of view, the set-off defence at the same time bears great similarity to a counterclaim, which speaks in favour of the opposite solution. In order to resolve this conundrum as far as the Swedish state courts are concerned, a specific provision has been inserted into the Code on Judicial Procedure which provides that the res judicata effect of a court judgment extends to the entirety of a counterclaim, part of which has been entered for set-off purposes in a prior action.

36 To quote from the dissenting opinion in the case: “No plausible explanation was offered ... for the refusal of the State to recognise the arbitration requirements of that contract. Yet the Civil Court endeavoured to usurp the jurisdiction of the arbitrators.” As for the risk of double jeopardy to the garnishee a relevant consideration was according to this dissenting opinion, “to accept such a criterion would be to accept coercion by a foreign state and a foreign court.”

The claim invoked as a set-off defence was not accepted in the instance and the tribunal ruled in favour of the claimant. This led the former respondent to initiate a new arbitration submitting a request for payment of the entire amount of its claim. The party which acted as claimant in the first arbitration requested that the second arbitral tribunal should dismiss that claim with prejudice, invoking *res judicata*; the matter of the respondent’s claim had already been decided with finality in its entirety, it submitted, although the examination of the set-off defence which had taken place in the first arbitration only concerned a fraction of that claim.

The question was thus whether the Swedish Act on Procedure could, in this respect, be applied by way of analogy in an arbitration context. One has to take into account the general *caveat* not to transpose too lightly the principles of a country’s legislation on state court procedure—which has to accommodate significantly different exigencies within the state judiciary—into an arbitral setting by analogy.

In a separate decision, a majority of the arbitrators held that the claim submitted in the second arbitration was not barred by *res judicata* to the extent it exceeded the amount invoked for set-off purposes in the first arbitration and could be subject to meritorious review in a second arbitration. Eventually, the tribunal granted the claimant’s request but declared that the amount of the claim should be reduced by the set-off amount.

One dissenting arbitrator held that the claimant’s claim was barred by *res judicata* in its entirety. The arbitrator noted that a provision of the Swedish Act on Procedure38 provides that legal finality in respect of a court judgment also extends to any claim which has been invoked for set-off purposes. An obvious additional prerequisite is that the set-off claim has in fact been subject to scrutiny, which was the case.

The solution for which the dissenting arbitrator had opted was subsequently upheld by the reviewing court, which as a consequence set aside the award.

It is noteworthy that the solution offered in German procedural law is exactly the opposite. Section 322(2) of the ZPO provides that a set-off claim which is dismissed on its merits will constitute *res judicata* up to the amount of the principal claim only.

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38 586:1996, § 17, art. 11, 2nd ¶.

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**E. THE CZECH REPUBLIC INVESTMENT DISPUTE**

In the realm of parallel proceedings, there is certainly reason to mention the recent Czech Republic investment arbitrations which, for obvious reasons, have aroused a great deal of attention. These arbitrations are often (but for no particular reason) mentioned in the context of *lis pendens* and *res judicata*.

A Dutch company, CME, invested in operating a TV licence in the Czech Republic which (according to the company) was lost as a consequence of government interference. CME initiated arbitral proceedings in Stockholm making use of the arbitration option incorporated in the Netherlands–Czech Republic Bilateral Investment Treaty requesting substantial damages. Prior thereto, an arbitration had been initiated in London by a private
individual who ultimately controlled CME. Being a U.S. national he was allowed to do this under the United States–Czech Republic Bilateral Investment Treaty. That arbitration took place in London.

The factual succession of regulatory action complained of in the London arbitration were the ones that also constituted the basis for the action in Stockholm.

Notably, the two tribunals reached opposite results. The London tribunal\(^39\) did not find any liability on the part of the Czech Republic and dismissed the U.S. national’s claim for damages. The Stockholm tribunal,\(^40\) however, held that the Czech Republic was in fact liable to CME and awarded damages in an amount of US$ 269,814 million plus interest.

The Czech Republic sought to have the latter award set aside before the Appellate Court in Stockholm, the court exercising supervisory functions in respect of the Stockholm award.\(^41\)

One of the grounds on which the setting aside action was based was the defence of *lis pendens* and *res judicata*. The following circumstances were invoked in support of this proposition:

- the London proceedings were commenced prior to the Stockholm proceedings;
- the Stockholm proceedings involved the same claims, grounds, and damages, and the same investments and factual circumstances in general, and violations of essentially the same treaty obligations as the London proceedings;
- the defendants in the Stockholm proceedings and the London proceedings were identical and, in practice, the petitioners were the same; and
- the London award was issued prior to the Stockholm award.

Generally, the conflicting outcomes of the Stockholm and London awards was argued to be unacceptable from a legal standpoint.

The contentions concerning *res judicata* and *lis pendens* were denied by CME on the grounds that

- the controlling shareholder and CME were not the same parties;
- the controlling shareholder and CME had invoked different substantive agreements in support of their respective claims; and
- the issues disputed in the Stockholm proceedings were not covered by the arbitration agreement giving rise to the London proceedings.

The court rather summarily dismissed the Czech Republic’s argument based on *lis pendens* and *res judicata*, noting in simple and straightforward language that there was no

\(^{39}\) <www.cetv.net.com/website.asp?article=17>

\(^{40}\) <www.cetv.net.com/website.asp?article=17>

\(^{41}\) Svea Court of Appeal (Stockholm), Case No T8735-01, May 15, 2003.
identity of parties (since the claimants were different in the two arbitrations) which was held to be an indispensable element of res judicata.42

One commentary on the case surmises that, but for the waiver, the issue would have been more challenging because “the Swedish Court would have been more squarely faced with the policy implications of the parallel London and Stockholm proceedings, which gave rise to such sharp criticism of the investment arbitration system.”43 In fairness, however, the waiver was not taken into account by the court, meaning that the court was indeed squarely faced with the res judicata issue, which must be considered to have been correctly decided. The reason is simply that policy implications, however compelling, cannot be brought to bear on issues requiring procedural rectitude.

From looking at the situation of the parallel proceedings in the Czech Republic case, the conclusion appears inevitable that, even in a remote sense, the duplication complained of by the Czech Republic had nothing to do with lis pendens or res judicata. There was simply no identity of parties.44 It is entirely understandable that the outcome, irrespective of the above, aroused great attention in wide circles bordering on shock in some quarters in view of the dramatically different outcomes in money terms. But this is a different matter.

From a procedural point of view, there is nothing remarkable about the occurrence of conflicting decisions under the circumstances. It has nothing to do with any procedural infirmity of the doctrines of lis pendens and res judicata, or of arbitration generally. It is instead the unavoidable consequence of a situation where states have extended options to arbitrate not only to the legal entities which have made investments, but also to the ultimate stakeholders in such investment vehicles. If there is any perceived need to do anything about this, the states would probably need to amend the treaties when next they came up and make proceedings pursued by legal entities and their ultimate owners mutually exclusive.

F. The SWEMBALT Case

It is difficult to envisage a situation where the issue of lis pendens/res judicata has not come up at an early stage of the arbitral proceedings. The issue did surface recently, however, in quite odd circumstances concurrently in Denmark and Sweden in the context respectively of an application to set aside the award and of leave of enforcement in respect of a Danish award.

A Swedish company arranged for a ship to be positioned in the Port of Riga, Latvia, in April 1993, allegedly with the approval of the relevant Latvian authorities. The ship was to serve as an exhibition and conference centre. One day the Port of Riga unceremoniously

42 The court chose to avoid CME’s argument that the Czech Republic had waived its right to invoke the lis pendens and res judicata principles in view of the alternative interpretations given to the waiver by the Czech Republic.


44 The fact that there were different constitutive bases (different arbitration agreements) for the competence of the London and Stockholm tribunals does not, in the author’s opinion, prevent the occurrence of lis pendens.
towed away the ship from its leased berth, declared it a wreck and auctioned it off for scrap value amid the strident protestations of the owner.

On September 11, 1996 the ship-owner submitted a damage claim to arbitration invoking the Sweden–Latvia Bilateral Investment Treaty. In the request, the ship-owner proposed that the proceedings should take place in Oslo, Norway, and be resolved by three arbitrators. For reasons that are not divulged in the reports of the case, these efforts to put the arbitration in motion came to nothing. Instead, on March 24, 1999, the ship-owner submitted a second request for arbitration. This request led to arbitration proceedings in Copenhagen, Denmark.

The Latvian Republic, which took the position that the Oslo proceedings were still pending, adopted the no doubt risky policy of ignoring the Copenhagen proceedings which, as a consequence, took place ex parte. The tribunal awarded the ship-owner damages. The Latvian Republic requested to have the award set aside before the relevant court at the place of arbitration, i.e., Copenhagen, and also resisted enforcement in Stockholm, something that the ship-owner had asked for in the interim.

Of interest in this context is the Latvian Republic’s invocation of lis pendens in both of these proceedings. According to the Republic’s argument, when the Copenhagen proceedings were initiated, the arbitration was already pending in Oslo and constituted lis pendens, thus pre-empting the jurisdiction of the Copenhagen tribunal.

1. The Swedish Court’s Decision

The Svea Court of Appeal in Stockholm did not explicitly invalidate the proposition that a lis pendens situation was present; it simply found that such a circumstance did not constitute any ground for refusal to enforce under the Swedish Arbitration Act. The court noted that the ordre public exception should be given a narrow application and held that the “circumstances in the case do not support the alleged fact that it should be manifestly incompatible with the fundamental principles of Swedish law to enforce the arbitral award.”

The Latvian Republic’s alternative request for suspension of enforcement was likewise denied. According to the court, this would require that the award debtor was able to show that it had “good reason for its challenge.” The court did not think so, and in this it was proved right in the end by the supervisory court’s decision in Denmark.

2. The Danish Court’s Decision

The decision of the Maritime and Commercial Court in Copenhagen was rendered shortly thereafter, on January 7, 2003. The Danish court differed in its conclusion, stating that the original request for arbitration back in 1996 had not “resulted in arbitration proceedings and an award.” The court reasoned that:

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45 § 55, 2nd ¶.
[t]he notice of arbitration of 24 March 1999 must be seen as a new notice of arbitration for the same case, not a notice of introduction of a new arbitration case. The principle that a pending case prevents legal proceedings between the same parties on the same case subject is therefore not disregarded.

Although this was an undoubtedly sensible and pragmatic approach, the need for procedural orthodoxy might possibly have dictated another course. In any event, it shows the potential danger of letting arbitrations be suspended in limbo sine die without formal closure.

The Swedish decision confirms the important principle in Swedish jurisprudence that disregard of the lis pendens/res judicata principles do not assume an ordre public dimension.46 The Svea Appellate Court in the CME case, which is referred to above, has also confirmed this position. It constitutes a departure from the position taken by Swiss law.

V. Conclusion

The objective of this article is to show that an arbitral tribunal faced with an objection based on the alleged presence of lis pendens or res judicata will have to approach the objection in a different manner depending whether the basis for this objection is ongoing state court proceedings or a pre-existing state court judgment, on the one hand, or ongoing arbitral proceedings or an arbitral award, on the other hand. In the former situation the question will be one of jurisdiction. In that case the arbitral tribunal is entitled—indeed, has a duty—to autonomously determine this issue. In this determination the tribunal is by no means bound by any conclusion taken by a state court (with the sole exception of the supervisory court) and as a consequence there is no duty for the tribunal to stay proceedings because a state court (other than the supervisory court) is considering or passing a decision on its own jurisdiction in respect of an identical dispute.47

In the latter situation, where the arbitral tribunal is confronted with a lis pendens/res judicata defence premised on ongoing arbitral proceedings or a prior arbitral award, the situation is different. The mere existence of a prior arbitral award will eclipse a subsequent tribunal’s competence and this quite independently of whether the later tribunal considers, in the particular case, that the constitution of the prior tribunal was defective or the conduct beset by procedural flaws and the award should rightly be set aside.

It is therefore important to realize that state court proceedings and arbitral proceedings are conducted, as it were, in different realms as a necessary outflow of their separate underpinnings. A necessary consequence of this dichotomy is also that conflicting decisions are unavoidable in those cases where the facts are adjudicated differently as there simply is no ultimate body ensuring final reconciliation between the two.

46 The case is reported in Stockholm Arb. Rep. no. 2, 2003, at 261 with observations by Christoph Liebscher.
47 No duty to stay exists even where the supervisory court is seized with the jurisdictional issue. See, e.g., Model Law, art. 16(3).