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Parallel Proceedings and the Doctrine of *Lis Pendens* in International Commercial Arbitration

A comparative study between the common law and civil law traditions

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I feel fairly sentimental to note that this thesis wraps up my years in Uppsala as a student at the Faculty of Law. I hope you will enjoy reading it!

Denice Forstén
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## Abbreviations

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<tr>
<td>AAA</td>
<td>American Arbitration Association</td>
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<tr>
<td>CJP</td>
<td>Swedish Code on Judicial Procedure (Sw. Rättegångsbalk (1942:740))</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Justice</td>
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<tr>
<td>IBA</td>
<td>International Bar Association</td>
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<tr>
<td>IBA Rules</td>
<td>IBA Rules on the Taking of Evidence in International Arbitration, entered into force on 29 May 2010</td>
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<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
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<tr>
<td>ILA</td>
<td>International Law Association</td>
</tr>
<tr>
<td>LCIA</td>
<td>London Court of International Arbitration</td>
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<tr>
<td>SAA</td>
<td>The Swedish Arbitration Act (Sw. Lag (1996:116) om skiljeförfarande)</td>
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<td>SCC</td>
<td>Stockholm Chamber of Commerce</td>
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1 Introduction

1.1 Background

Arbitration is a popular dispute settlement method amongst commercial partners making transnational business, as it provides the parties with a freedom without equivalence in traditional court litigation. Business partners who choose to enter into an arbitration agreement can agree on matters like applicable law, the appointment of arbitrators, and seat of arbitration, thereby creating more balanced conditions between them than what would have been the case in a court proceeding, taking place in one of the parties’ home country. In fact, the closure of an arbitration agreement entails exclusive jurisdiction for the arbitral tribunal, accordingly excluding jurisdiction for national courts to hear any dispute that may arise from the contract between the parties. In theory, this means that national courts and arbitral tribunals will never be simultaneously competent to hear a dispute. However, there are still a few instances where a national court and an arbitral tribunal might both consider themselves to be simultaneously competent to hear a dispute, and a situation of parallel proceedings might hence arise, would one of the parties choose to initiate a concurrent proceeding.

For a party to an arbitration agreement, parallel proceedings might be both a possibility and a threat, depending on which position the party takes in the proceedings. A claimant might for instance want to have its claim tried in multiple jurisdictions in order to enhance its chances of obtaining an upholding award or judgment. The respondent, on the other hand, typically has an interest of restricting the claimant’s right to have its claims tried before one judicial body in one jurisdiction solely. Accordingly, it is in the interest of the parties to an arbitration agreement to be able to foresee when a parallel proceeding might arise. The same

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1 See further, Lew, Mistelis, Kröll, *Comparative International Commercial Arbitration*, 2004, p. 3 et seq.
2 The incentives for parties to choose arbitration as their dispute settlement method will be examined further in section 2.2.4.
holds true for arbitral tribunals and national courts, whom need to assess whether or not a situation qualifies for the application of rules available to them to handle a parallel proceeding, such as the doctrine of *lis pendens*.

However, the question of when a parallel proceeding is deemed to take place is not easily answered. Instead, different jurisdictions take rather different approaches to the issue, and their approach is in turn a reflection of the legal tradition they belong to, be it common law or civil law. The doctrine of *lis pendens* plays an important role in both traditions in regard to parallel proceedings, but it has been given different roles within each tradition as to how it prevents parallel proceedings. What complicates the matter even more is the fact that there is no general definition of *lis pendens*, less any universally adopted standards for its application. As will unfold throughout this thesis, it has proven to be somewhat problematic that different approaches are taken to the doctrine when issues of parallel proceedings arise in international arbitration.

### 1.2 Purpose and delimitations

This thesis will examine the problem of parallel proceedings and the adoption of the doctrine of *lis pendens* in the common law and civil law traditions respectively, with the utmost purpose to answer the question as to when parallel proceedings in international commercial arbitration can be said to take place. The purpose of this thesis is – to some extent – twofold; it aims at presenting the issue of parallel proceedings and the doctrine of *lis pendens* from an overall perspective, as well as at presenting the issue with a more party-oriented view in mind.

The purpose of this thesis is not to provide the reader with any *de lege ferenda* reasoning, and will hence not bring suggestions on how to harmonize the area forward. To explore a problem and submit different solutions to it is of course not

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3 The terms common law and civil law will be explained below in section 1.4.
only an interesting approach in a thesis – it is the very duty of lawyers to strive for constant advancement in the field of law. But to parties facing a choice between different dispute settlement methods in their closure of a commercial contract, their primary interest is not to take part of academic debate on the area, but to be presented to a description of a problem (or, for what that matters, possibilities) they might encounter with each dispute settlement method they have in mind. Accordingly, in the interest of parties to arbitration agreements, this thesis will depict and analyze a highly substantial issue – parallel proceedings. Further, a presentation of the problem is of value for lawyers, especially those engaged in international arbitration, as an understanding will facilitate communication.

This thesis does not claim to provide a detailed examination of the substantive differences between national legislations. Rather, it will provide a more overall review of rules concerning parallel proceedings and *lis pendens*.

As indicated by the title of this thesis, I will examine parallel proceedings in international commercial arbitration, and leave international investment arbitration behind. Other types of considerations come into play when examining parallel proceedings in investment arbitration.

Parallel proceedings can take place between two national courts, either of the same or different nationality. As this thesis concerns arbitration I will not consider such constellations, but only constellations where the parallel proceedings involve at least one arbitral tribunal. In cases where the two parallel proceedings take place within the same jurisdiction, the issue is exclusively to be determined under domestic law. This thesis only deals with parallel proceedings pending in different jurisdictions.
1.3 Method and material

Problems and difficulties requiring to be resolved through legislation are often identical, or at least similar. What is interesting, however, is the fact that often, different solutions are adopted in different jurisdictions to the very same legal problems.4 By making a comparative study between different legal systems or traditions, we broaden our perspectives to the issue(s) in question. More specifically, one of the many functions of comparative studies is that it facilitates the communication amongst lawyers from different jurisdictions.5 This is an important objective, as the contacts between different legal systems and traditions are all the more intense and close in today’s globalized world.6 This holds especially true in international arbitration, a venue for actors from all around the world.

As mentioned in the foregoing, the doctrine of *lis pendens* has no general definition, and is certainly not applied in an identical manner in different legal systems. However, the principle is still recognized in most jurisdictions as it works as a safeguard against parallel proceedings.7 Thus, it is of interest to make a comparison between the approaches taken by different legal traditions. This thesis is a comparative study over the different approaches to the doctrine of *lis pendens* taken by the common law and civil law traditions. This specific comparison is interesting, since both traditions have strongly influenced international arbitration.

In connection to this, it can be noted that the thesis will not fixate the comparison to one or a few chosen jurisdictions from each tradition to illustrate the legal tradition they belong to. If this would be done, the thesis would no longer be a comparison between two *legal traditions*, but between two or more *jurisdictions*. Instead, the thesis will proceed from the “common law tradition” and the “civil law tradition” from a more general point of view, but in places, use a variety of

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6 Ibid. p. 143.
countries from each tradition for illustrative purposes. Further, the thesis will investigate and explain internal differences within each tradition when necessary.

In studies embracing a more traditional dogmatic method, a rather descriptive presentation of the problem at hand is often more rewarding in order to later on present solutions to it. However, in studies like this one – embracing a comparative method in order to analyze a problem without any *de lege ferenda* reasoning – it must also be called into question whether or not the problem one is about to analyze is in fact a problem. Therein lies the value of a study like this.

Arbitration is regulated on an international, national and institutional level, and I will hence examine these sources of law. However, as the doctrine of *lis pendens* is rarely codified, I will also consult scholarly writing as well as case law in order to determine its content and adoption. As will be discussed below, the doctrine of *lis pendens* is a tool originally developed to manage parallel court proceedings at a domestic level. Accordingly, much of what has been written refers to traditional court proceedings within the same jurisdiction, leaving international proceedings and arbitration behind. Due to this, some of the material used in this thesis will deal with the issue on a national basis solely.

1.4 Terminology

This thesis is a comparative study between the common law tradition and the civil law tradition. But what is a legal tradition? And is it possible to categorize two widely spread legal traditions into neatly packaged concepts? These questions aren’t easily answered, and could well be subject to a master’s thesis on their own. For the purpose of this thesis, however, I will have to make an attempt to, if not define, at least describe common law and civil law in rather short terms.
The observant reader might already have noticed that the thesis refers to two legal “traditions” rather than “systems”. This requires further explanation. A legal system can be said to be a rather uniform set of legal institutions, procedures and rules.\(^8\) A legal tradition, on the other hand, is “a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.”\(^9\)

In this thesis, the definition of common law and civil law provided in Black’s Law Dictionary works as a good basis. Common law is defined as “[t]he body of law based on the English legal system, as distinct from civil-law system; the general Anglo-American system of legal concepts, together with the techniques of applying them, that form the basis of the law in jurisdictions where the system applies.”\(^10\) Civil law, on the other hand, is defined as “[o]ne of the two prominent legal systems in the Western world, originally administered in the Roman Empire and still influential in continental Europe, Latin America, Scotland and Louisiana, among other parts of the world.”\(^11\)

Common law and civil law will be used as homogenous concepts in this thesis, but it is important to bear in mind that there are differences within both traditions. Each tradition has its own sub-sets of traditions, such as English common law and Canadian common law, and German civil law and French civil law. It should also be noted that there is an ongoing debate as to how jurisdictions are classified into legal families and traditions. For example, Zweigert and Kötz divide the Scandinavian countries into an independent legal family.\(^12\) This thesis will not embrace their classification in this aspect, but will treat the Scandinavian jurisdictions as belonging to the civil law tradition, a position that is accepted and embraced by other scholarly writers.

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\(^9\) Ibid. p. 2.


\(^11\) Ibid. p. 281.

\(^12\) See further Zweigert, Kötz, *An Introduction to Comparative Law*, 2011, p. 276 et seq.
To avoid confusion later on, the difference between the terms *lis pendens* and *lis alibi pendens* ought to be addressed. *Lis pendens* is Latin for “lawsuit pending” and *lis alibi pendens* is Latin for “lawsuit pending elsewhere”. The terms are used in a somewhat different context in different jurisdictions; in the U.S., for instance, *lis pendens* refers to the notification filed in public records, making non-parties bound by the result. *Lis alibi pendens* is a narrower concept, referring only to the notice of parallel proceedings, and is used as the basis for staying a case, which is what will be examined in this thesis. Civil law jurisdictions simply refer to *lis pendens* to describe the same action. I will use the term as each jurisdiction uses the term, hence the forthcoming mix in usage. When I am discussing the doctrine in general and not in connection to a certain jurisdiction, I will – as the civil law trained law student I am – use the term *lis pendens*.

1.5 Thesis outline

This thesis consists of six chapters, each placed in a logical order to guide the reader through the topic. To introduce the unfamiliar reader to international commercial arbitration, chapter two provides a general description of the characteristics of international commercial arbitration. Further, the incentives for parties to choose arbitration as their dispute settlement method will be examined. The chapter will be concluded with a presentation between the common law and civil law traditions regarding the conduct of parallel proceedings. The overall purpose of chapter two is to provide the reader with a foundation for the following presentation, since this will allow the reader to put the issue of parallel proceedings in a context and also to understand the dimensions of the problem unique to international arbitration. In chapter three, the issue of parallel proceedings will be presented and analyzed on a more general level. First, different constellations of parallelism will examined, as

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well as possible motives behind the commencement of a concurrent proceeding. Thereafter, the reader will be introduced to the difficulties attached to attempts to define parallel proceedings. In connection to this, the doctrine of competence-competence will be examined. The chapter will be concluded with a discussion on whether or not parallelism constitutes a true problem. Chapter four will deal with the doctrine of *lis pendens* and its role in international commercial arbitration. After an initial attempt to provide a general definition of the doctrine, a discussion will follow on whether or not the doctrine is applicable at all in international commercial arbitration. Further, the chapter will provide a detailed examination of the doctrine of *lis pendens* in the two traditions respectively, laying foundation for a final analysis in the subsequent chapter. In chapter five, conclusions will be drawn based on the prior examination. A comparison between the common law and civil law traditions will be made in regard to the doctrine of *lis pendens* in order to evaluate the position it takes in the two traditions. This will be followed by a revisit to the issue of parallel proceedings, a topic now ready to be evaluated. Lastly, chapter six will provide some final remarks.
2 International Commercial Arbitration

2.1 Introduction

There are certain dimensions to the issue of parallelism in cases where at least one arbitral tribunal is involved, in contrast to the more typical situation where two national courts are involved in parallel proceedings. In order to present the reader to those certain dimensions in the subsequent chapters on parallel proceedings and the doctrine of *lis pendens*, this chapter provides an introduction to international commercial arbitration. First, international commercial arbitration will be defined, and the incentives for parties to choose arbitration as their dispute settlement method will be examined. Thereafter, the legal framework of international commercial arbitration will be presented. Lastly, the chapter will be concluded with an overview of the approaches to arbitration taken by the common law and civil law traditions respectively.

2.2 The characteristics of international commercial arbitration

2.2.1 The definition of arbitration

Arbitration is perceived somewhat different in different national legal systems, and it falls beyond the scope of this thesis to examine those differences more closely. The definition provided by Redfern and Hunter serves as a good starting point for this thesis. According to Redfern and Hunter, arbitration involves “two or more parties, faced with a dispute that they cannot resolve for themselves, agreeing that one or more private individuals will resolve it for them through arbitration; and if the arbitration runs its full course […] it will not be resolved by a negotiated settlement or by mediation or by some other form of compromise, but by a decision
which is binding on the parties.”\textsuperscript{15} Put differently, arbitration can broadly been described as a method of dispute settlement between two parties, entered into through an agreement, and solved by a final and binding decision by the arbitral tribunal, consisting of one or more arbitrators.

From this brief explanation, some fundamental features of arbitration can be identified. First, arbitration serves as an alternative to traditional national court proceedings. As parties agree on arbitration, they also exclude the jurisdiction of national courts. Second, it is a private mechanism for dispute resolution in the sense that the judicial body hearing the case is non-governmental, but appointed either by the parties or an arbitration institute.\textsuperscript{16} Third, the decision by the tribunal will be a final and binding determination of the parties’ rights and obligations to one another.\textsuperscript{17} In addition, a certain feature of arbitration is the freedom for to the parties to control the proceedings through their agreement, according to the much important and widely recognized principle of party autonomy.\textsuperscript{18}

\subsection{2.2.2 The “international” character}

This brief definition of the concept of arbitration does not reveal whether or not the arbitration is to be characterized as international. By characterizing arbitration as international, one distinguishes it from purely domestic or national arbitration. There are at least three different approaches as to how the concept of internationality is to be perceived. The first approach is based on the nature of the dispute; the arbitration is international if the contract has a transnational element to it, or if the dispute is referred to an international arbitration institute, such as the ICC.\textsuperscript{19} The second approach, on the other hand, is based on the nationality of the parties; if the parties are of different nationality or if they have their business located in different jurisdictions, the arbitration is deemed to be international.\textsuperscript{20}

\footnotesize
\begin{itemize}
\item \textsuperscript{15} Redfern, Hunter, Law and Practice of International Commercial Arbitration (Fifth Edition), 2009, p. 29.
\item \textsuperscript{17} Lew, Mistelis, Kröll, 2004, p. 3.
\item \textsuperscript{18} The principle of party autonomy will be examined below in section 2.2.4.
\item \textsuperscript{19} Lew, Mistelis, Kröll, 2004, p. 31.
\item \textsuperscript{20} Ibid. p. 34.
\end{itemize}
approach consists of a mixture of the two other approaches,\textsuperscript{21} and is also the approach that has been adopted in the UNCITRAL Model Law.\textsuperscript{22} The Model Law distinguishes between domestic and international arbitration, and it does so by establishing that arbitration is to be regarded as international either in relation to the nationality of the parties, or in relation to the dispute and whether it has any international connection. In addition, the provision prescribes that if the parties have agreed either to place the arbitration in a foreign country, or if the subject matter relates to more than one country, the arbitration is deemed to be international. The view of the UNCITRAL Model Law has also been adopted by leading scholarly writers on the area.\textsuperscript{23}

It should be noted, however, that it is not self-evident to make a pronounced distinction between international and domestic arbitrations in the national legislation. In Sweden, for example, no such distinction is made in the Swedish Arbitration Act (the SAA), and accordingly, Swedish and international arbitrations are treated alike. Nevertheless, in a number of jurisdictions, such as Canada, Switzerland, Hong Kong, Singapore and France, the legislator has chosen to make a distinction between international and domestic arbitration, regulating them under separate sets of rules, with the consequence that international and domestic arbitrations are treated differently under the national legislation.\textsuperscript{24}

It follows from the foregoing that there is no universally accepted and adopted view of the concept of internationality when it comes to arbitration. In the end, the question of whether arbitration should be regarded as international or not will be decided under the national law in question.

\textsuperscript{21} Redfern, Hunter, 2009, p. 8.
\textsuperscript{22} See Article 1(3) of the UNCITRAL Model Law. The UNCITRAL Model Law and its role in international commercial arbitration will be explained below in section 2.3.
\textsuperscript{23} Redfern and Hunter have explicitly endorsed the view adopted in the UNCITRAL Model Law, see Redfern, Hunter, 2009, p. 11. It should be noted that the authors emphasize that the view might not be universally accepted.
\textsuperscript{24} Redfern, Hunter, 2009, p. 8.
2.2.3 The “commercial” character

Contrary to the concept of internationality, there is a universally accepted approach to the concept of commerciality. In international arbitration, the concept of commerciality is given a wide interpretation, leading to any dispute between companies with an economic character being regarded as commercial. This view is also reflected in the UNCITRAL Model Law. In a footnote to Article 1, it is stated that the term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. The fact that the explanation has been provided in a footnote, and not as a definition in a provision in the law, reveals the flexible attitude towards the concept of commerciality.

2.2.4 Incentives for parties to choose arbitration over court litigation

As was indicated in the introduction of this thesis, there are numerous factors contributing to making arbitration a more attractive option – legitimately or not – over traditional court proceedings, especially for parties making transnational business. In international business relationships, being entrapped in a dispute and attempting to resolve it will often bring enormous consequences for the involved parties, not least financially. As both procedural and substantive law might differ radically from one jurisdiction to another, the outcome of a dispute will often be dependent on which country the dispute is to be resolved in, since this will determine which laws are to be applied to it. Therefore, it is of crucial importance in which jurisdiction the dispute will be resolved. In addition, factors like language, overall familiarity with the legislation etc., might affect a party’s position in an ongoing litigation. One of the most distinct advantages of arbitration is the possibility for the parties to regulate these matters in their agreement, which is


26 The footnote in the UNCITRAL Model Law also contains a non-exhaustive list of transactions that are to be regarded as having a commercial nature, and it reads as follows: “[…] any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.”

27 See above, section 1.1.
enabled through the principle of party autonomy. This fundamental principle is unique to arbitration and, in short, means that the parties are free to control their own process.\textsuperscript{28} Professor Pierre Lalive expressed the principle in the following way in an arbitral award from 1971:

“There are few principles more universally admitted in private international law than that referred to by the standard terms of the ‘proper law of the contract’ – according to which the law governing the contract, is that which has been chosen by the parties, whether expressly or (with certain differences or variations according to the various systems) tacitly.

The differences which may be observed here between different national systems relate only to the possible limits of the parties’ power to choose the applicable law or to certain special questions or to modalities, but not to the principle itself, which is universally accepted.”\textsuperscript{29}

Professor Lalive’s explanation stands today, and it points out some central elements of the principle. To begin with, the principle allows the parties to choose the law governing the commercial contract, the \textit{lex contractus}, what Professor Lalive refers to as the “proper law of the contract”.\textsuperscript{30} The principle of party autonomy further entails another, very important advantage for the parties, namely the right to agree on the seat of arbitration. This provides the parties with an opportunity to choose a neutral forum to which neither of the parties has any specific connection. The law governing the arbitration is referred to as the \textit{lex arbitri}, and, if the parties have not made a specific choice of law for the arbitration agreement, this will in most cases be governed by the \textit{lex arbitri}. Furthermore, the parties to an arbitration agreement may agree on the right to appoint its own arbitrators, thus enabling the appointment of commercially experienced decision-makers with expertise knowledge relevant to the dispute in question.\textsuperscript{31}

As arbitration is not subject to the same rigid framework of procedural rules like those surrounding traditional court proceedings, it has accordingly been perceived

\textsuperscript{29} Quoted from ICC Award No 1512, doc 410/1935, dated 24 February 1971.
\textsuperscript{30} It should be noted that pursuant to the doctrine of separability, the main contract and the arbitration agreement are seen as two separate contracts, even when the arbitration agreement constitutes a clause in the main agreement. Consequently, a choice of law for the main contract is not automatically extended to govern also the arbitration agreement, see Hobér, \textit{International Commercial Arbitration in Sweden}, 2011, p. 106 \textit{et seq.}
\textsuperscript{31} Born, 2014, p. 80 \textit{et seq.}
as a more efficient dispute resolution method, as far as both the costs and the speed of the process are concerned.\textsuperscript{32} The absence of rules helps create room for flexibility. Furthermore, most national court proceedings are open to the public to take part of, and parties to court litigation are under no obligation to refrain from disclosing evidence and other information known to them. Litigating in court might hence attract unwelcomed, negative attention for the involved companies, and cause damage to their reputation. Furthermore, the parties to a dispute might fear that their rivals will access information that they submit in court proceedings, due to the publicity.\textsuperscript{33} Arbitration, in contrast, provides a confidential method of settling disputes.\textsuperscript{34} The hearings in arbitration proceedings are practically always closed to the public and the press and, unless the parties agree otherwise, the rendered award will remain confidential. This confidentiality is often referred to as one of the most important objectives of arbitration.\textsuperscript{35}

Another vital advantage of arbitration is the enforceability of arbitral awards.\textsuperscript{36} To the parties in a business relationship with international character, it is essential to obtain an enforceable award not only in the country where the award is rendered, but also where the counter-part may have assets. As will be addressed below, the New York Convention has played a crucial role in facilitating the recognition and enforcement of foreign arbitral awards,\textsuperscript{37} and today, more than 130 countries are signatories to it, accepting to give force to arbitral awards rendered in any of the other signatory countries.\textsuperscript{38}

It was pointed out above in section 2.2.1 that a valid arbitration agreement excludes the jurisdiction of national courts. In theory, this means that the parties eliminate the risk of facing parallel proceedings, since the arbitral tribunal is given exclusive

\textsuperscript{32} Lew, Mistelis, Kröll, 2004, p. 9.
\textsuperscript{34} Born, \textit{International Arbitration: Law and Practice}, 2012, p. 15.
\textsuperscript{35} It should be noted that the extension of the confidentiality in arbitration is a disputed topic. To assure confidentiality in all aspects desired, the parties should include a confidentiality clause in their arbitration agreement to regulate these matters.
\textsuperscript{36} Born, 2012, p. 11.
\textsuperscript{37} See below, section 2.3
\textsuperscript{38} Lew, Mistelis, Kröll, 2004, p. 7.
competence to try the dispute. As will be outlined below in section 3.5.1, several difficulties are attached to parallel proceedings, and it is therefore in the interest of the parties to eliminate any possibility for its counterpart to commence an overlapping, parallel proceeding in another forum.

Arbitration is often perceived as a less painful means to resolve commercial disputes than traditional court litigation. There are indeed other ways of settling disputes with flexibility comparable to that of arbitration, but no alternative will offer the same possibility of obtaining an enforceable decision in the end of the process. Arbitration is now “the ordinary and normal method of settling disputes of international trade.”

To sum up, it can generally be said that arbitration is surrounded by a procedural flexibility, absent in traditional court litigations. This procedural flexibility makes arbitration an attractive option for two business partners since it allows the arbitration process in question to be tailored to suit the special needs of the specific case. These above-mentioned advantages of arbitration have established it as the preferred dispute resolution between parties in international business relationships.

### 2.3 Legal framework

Arbitration does not exist in a legal vacuum, but ultimately depends on being permitted to exist by national laws. Moreover, arbitration is consensual in nature, meaning that the parties must have agreed to arbitrate – unless they have done so, there exists no legal ground for arbitration between the parties to take place. But then again, for the arbitration agreement, and an eventual following arbitral award, to have legal status, it must be recognized by national and international law.

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41 The judicial nature of arbitration is disputed, and different theories have been laid forward to justify its existence. See, for instance, Lew, Mistelis, Kröll, 2004, p. 71 et seq.
Arbitration is regulated in international conventions and treaties, national arbitration legislation, and institutional arbitration rules. International treaties and conventions have primarily been entered into by major trading nations, in order to facilitate international trade and investment.\(^{43}\) The most prominent of these international instruments is without doubt the New York Convention. The Convention imposes a duty on the national courts in the signatory States to guarantee the recognition and enforcement of foreign arbitral awards, unless any of the few listed exceptions is applicable. By creating such a homogenous legal standard as to the recognition and enforcement of foreign arbitral awards, the Convention has helped facilitate the usage of arbitration in the international arena.\(^{44}\) Despite its brevity, the Convention has inevitably played a significant role in the field of international arbitration, and it has been said to be the “most effective instance of international legislation in the entire history of commercial law.”\(^{45}\) The UNCITRAL Model Law is another crucial instrument in international commercial arbitration. Today, many jurisdictions have adopted national legislation very similar, or even identical, to the UNCITRAL Model Law, contributing to a harmonization within international commercial arbitration.\(^{46}\)

Arbitrations can be conducted through an *ad hoc* process, or under an institution. Should the parties choose to refer their dispute to an institution, the arbitration rules of that specific institution will apply to the arbitration. There are a number of arbitration institutions available to parties, for instance International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), American Arbitration Association (AAA), and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

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\(^{43}\) Born, 2014, p. 98.
\(^{46}\) Lew, Mistelis, Kröll, 2004, p. 27 *et seq.*
2.4 Legal procedures in the common law and civil law traditions

2.4.1 Different approaches to the conduct of procedures
Not only is arbitration regulated at different levels, but – as will unfold throughout this thesis – it is also a venue for different legal cultures, traditions and systems. Inevitably, this interaction between different legal traditions gives international arbitration even more characterization. The encounter between the common law and civil law tradition in the field of international arbitration will be dealt with in this section.

Even though the civil law and the common law traditions are not two sets of legal rules, it is indeed possible to speak of rules, principles or doctrines typical to one tradition or the other.\(^{47}\) For instance, and relevant to this thesis, the common law and the civil law traditions demonstrate significant differences between one another – and similarities within each tradition – as to how legal procedures are commenced and conducted.

The civil law tradition has been described as embracing a formal and deductive method when applying its codes and statues. Common law reasoning, on the other hand, has been said to be inductive, giving the judge a great discretion in order to be able to take all relevant and particular facts of the case into consideration. A civil law judge would, in contrast, first have to categorize the case at hand, to be able to proceed and try to make the case fit into a rule.\(^{48}\) These differences impact the way legal proceedings are conducted under the jurisdiction belonging to each tradition.

The common law and civil law traditions differ widely in their approach to dispute settlement and the conduct of legal proceedings. Where the common law tradition has been said to engage in a “search for the truth”, the civil law tradition simply requires the claimant to disclose those facts that will help him carry his burden of

\(^{47}\) The terms “common law tradition” and “civil law tradition” were explained above in section 1.4.

\(^{48}\) George, 2002, p. 506.
proof.\textsuperscript{49} These differences appear already at an early stage in the proceedings. It is beyond the scope of this thesis to examine those differences in detail, but for an illustrative purpose, a few differences will be mentioned.

To begin with, it can be noted that the common law and civil law traditions set forth rather different requirements as to the statement of the claim(s). In the United States and other common law jurisdictions, the party initiating an action does not need to have its claim(s) formulated in precise detail when it first files its claim, whereas in most civil law jurisdictions, the party initiating an action must present a fully developed statement in order to file its claim. When it comes to the gathering of evidence, another vital difference between the common law and civil law traditions unfolds. Discovery, seen as a given in common law jurisdictions, is unknown to most civil law jurisdictions.\textsuperscript{50} It is indeed possible for parties to legal proceedings in a civil law jurisdiction to request the court to produce a specific document in the counterparty’s possession. However, this scarcely compares to the discovery used in common law jurisdictions; especially not in the United States, where discovery can be exercised rather extremely.\textsuperscript{51} Furthermore, common law courts tend to give considerable weight to witness testimonies and expert evidence, than do civil law courts.\textsuperscript{52}

Numerous other examples could be given to illustrate the divergent approaches to the conduct of legal procedure taken by the two traditions. Perhaps, somewhat oversimplifying things, the different approaches taken to the conduct of legal proceedings by each legal tradition can be said to be a direct effect of the different approaches taken to law-searching and law-creating itself. Common law trained lawyers sometimes view the civil law tradition as being to mechanical in their approach to problem-solving. Civil law trained lawyers, on the other hand, might perceive the common law tradition as too unpredictable in its “looseness” and non-

\textsuperscript{49} McIlwhrat, Alvarez, \textit{Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives}, 2010, para. 2.03.
\textsuperscript{51} McIlwhrat, Alvarez, para. 2.05.2.
\textsuperscript{52} Rubinstein, p. 308, and McIlwhrat, Alvarez, para. 2.06.1.
statutory form. In the field of international commercial arbitration, however, it has been suggested that a common culture is emerging.

2.4.2 The amalgamation of common law and civil law values

It was submitted in the introduction to this thesis that overall, international arbitration has been successful in amalgamating different legal traditions from both the common law and the civil law traditions. As was described in section 2.3, arbitration derives its legitimacy from being permitted in national legislation, but is also regulated on both international and institutional levels. Furthermore, pursuant to the principle of party autonomy, the parties are free to make their own choice of law. This makes arbitration an especially attractive option for parties to transnational commercial contracts. From this description, a rather complex picture emerges. International commercial arbitration is a venue where parties, counsels and arbitrators from different legal traditions meet. Depending on the arbitration in question, more than one law might come into play, governing the arbitration process or the main contract.

International conventions, codes and guidelines concerning international commercial arbitration are often composed of a mixture of common law and civil law traditions. This is the case with, for instance, organizations such as the IBA, the ICC and the International Court of Arbitration. These and other international organizations involved in arbitration have based their conventions, codes and guidelines on both typical common law and civil law values. The IBA Rules on the Taking of Evidence in International Commercial Arbitration illustrates this converging consensus, since the rules are, to a great extent, a compromise between common law and civil law approaches to evidence.

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53 See above, section 1.1.
54 See above, section 2.2.4.
55 The ICC, however, has been said to be significantly more influenced by civil law values rather than common law values.
One respected commentator has noted that “[t]he different arbitration cultures which exist today are converging more and more, such that it is perhaps even possible to speak of a culture of international commercial arbitration.” The same commentator has also suggested that “[a] common approach to the conduct of international arbitration is gradually developing.”

Such a coherent system is essential to make arbitration a workable dispute settlement method across borders. However, there are still areas within international commercial arbitration where the common law and civil law traditions take rather different approaches, possibly causing problems to parties to an arbitration agreement. Parallel proceedings and the approach to the doctrine of *lis pendens* is one such area where the discrepancy between the two legal traditions might be problematic. The issue will be examined in detail below.

57 Ibid.
3 General Remarks on Parallel Proceedings

3.1 Introduction

In this chapter, the issue of parallel proceedings in international arbitration will be presented and analyzed. After a brief description of possible constellation of parallel proceedings, certain motives as to why a party would seek to initiate multiple proceedings will be discussed. Thereafter, an attempt to define parallel proceedings will be made, to be continued by a discussion on whether parallelism is indeed to be considered a problem.

3.2 Possible constellations of parallel proceedings

There are many possible constellations where an arbitral tribunal might face a proceeding, parallel to the ongoing arbitration before them. The most typical constellations include either parallel proceedings between an arbitral tribunal and a national court, parallel proceedings between two arbitral tribunals, or parallel proceedings between an arbitral tribunal and a supranational court or tribunal. Of these three listed scenarios, the first is the most common occurring. Not only does it take place most often, but it also brings an extra dimension to the issue; the party initiating a parallel proceeding before a national court typically not only intends to obstruct the proceedings, but also to erode the counter-party’s choice of arbitration. This and other motives behind commencing a parallel proceeding will be dealt with next.

58 ILA Final Report on *Lis Pendent* and Arbitration, para. 4.1.
Motives behind commencing a parallel proceeding

For parties to an arbitration agreement, it is of interest to be able to foresee which types of risks and threats that are typically attached to their choice of dispute resolution. In international arbitration, parallel proceedings constitute a real threat to the parties, as it is a widespread phenomenon. However, it might also be in the very interest of at least one of the parties to have its claim tried in multiple jurisdictions.

There are a number of imaginable motives that might lay behind a decision to initiate a parallel proceeding, and they shift in character. While some have the sole purpose of obstructing the proceedings, others are attempts to counterbalance the conditions between the parties by gaining own benefits and advantages. It can generally be said that, when the claimant usually has an interest of pushing the proceedings forward to gain the award sought, the respondent rather has an interest of delaying the proceedings. Accordingly, the respondent might initiate a parallel proceeding for that purpose. A party may furthermore initiate a parallel proceeding to gain time, in order to hide assets that would otherwise be subject to enforcement in the case of an upholding award. Similarly, a party may want to gain time in order to erase certain transactions and other types of evidence detrimental for the party.

To participate in proceedings, whether they take place in a court or before an arbitral tribunal, will most likely be a costly affair. Therefore, a well-off party might take advantage of its financial advantage and initiate a parallel proceeding in order to put pressure on the other party to settle. Likewise, such an action might also have the purpose of keeping the other party away from a settlement by causing offence.

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60 Erk, 2014, p. 3.
61 Ibid. p. 11.
62 Ibid.
The motives described above have in common that they are all *tactical* in one way or another. A party may also want to initiate a parallel proceeding in order to go forum shopping. As was explained above in section 2.2.4, the law governing the arbitration proceedings are – in the absence of a choice of law of the parties – the law of the seat of the arbitral tribunal, the *lex arbitri*. Furthermore, national arbitration rules often contain mandatory provisions, impossible for the parties to avoid by way of agreement. A party may for these reasons shop around for a suitable forum, either to have suitable procedural rules applied to the proceedings, or to get the most advantageous choice of law rules to be applied to the dispute between the parties, or perhaps to have the proceedings conducted in a language preferred by the party.\footnote{Erk, 2014, p. 12.}

Overall, there may be different motives behind a party’s choice to initiate a parallel proceeding to the already ongoing proceeding between the parties. As has been shown, a party may gain from initiating a parallel proceeding, thus motivating such an action. However, as will be described below, parallel proceedings are problematic and even if one party may gain from it, not only will the other party to the dispute have an equivalent loss, but its occurrence will undermine the arbitration system itself. But when are two parallel proceedings at hand? This issue will be addressed next.

### 3.4 The definition of parallel proceedings

At a first glance, the task to define parallel proceedings might not seem too complex. However, the concept is more intricate than it might initially seem to be. Should parallelism be deemed to only concern identical parties and identical claims? Or is it enough if the parties in two proceedings are similar? But when should parties be deemed to be similar enough?
There is no universal definition of parallel proceedings. What constitutes parallel proceedings will instead be determined under the requirements set forth in the national legislation in question.\textsuperscript{64} Such requirements typically concern the identity of the parties and the identity of the subject matter. In general, parallel proceedings can be said to take place when parties bring the same, or a closely related conflict, before more than one adjudicator.\textsuperscript{65} However, as will be further examined below,\textsuperscript{66} the definition of parallel proceedings is in some jurisdictions directly linked to which role the principle of \textit{lis pendens} is given in the legal system in question. Here, a noticeable difference is exposed between the civil law tradition and the common law tradition. As will be explained in detail in chapter 4, the most common approach in civil law legal systems is to let the principle of \textit{lis pendens} play a decisive role when parallel proceedings are at hand. Thus, the definition of parallel proceedings is dependent upon the prerequisites set forth for the application of \textit{lis pendens}. In several common law legal systems, on the other hand, the principle of \textit{lis alibi pendens} is not given the same decisive role, and accordingly do not have the same strict requirements regarding the party identity and the identity of the subject matter, and thus use the concept of parallel proceedings in a broader context. The role of \textit{lis pendens} in relation to parallel proceedings will be returned to in chapter 4.

In its Final Report on \textit{Lis Pendens} and Arbitration (2006), the ILA sought to give guidance to arbitrators when faced with parallel proceedings, in order to create a greater consistency in their approach to the issue. In its report, the ILA adopted a rather broad definition of parallel proceedings, closer to that of common law jurisdictions. It defined parallel proceedings as “[…] proceedings pending before a domestic court or another arbitral tribunal, in which the parties and one or more of the issues are the same or substantially the same as the ones before the arbitral tribunal in the Current Arbitration.”\textsuperscript{67} The ILA did thus not proceed from the criteria of the application of \textit{lis pendens} in its definition.

\textsuperscript{64} Erk, 2014, p. 16.
\textsuperscript{66} The principle of \textit{lis pendens} will be dealt with in chapter 4.
\textsuperscript{67} ILA Final Report on \textit{Lis Pendens} and Arbitration, para. 5.12(1).
The issue of parallel proceedings has also been dealt with in the Brussels I Regulation and the closely related Lugano Convention. Although stated in Article 1(2)(d) of the Brussels I Regulation that the Regulation shall not apply to arbitration – with a corresponding provision in Article 1(2)(d) of the Lugano Convention – it is of interest for this thesis to examine the definition provided in the two treaties, as they provide further guidance as to how parallel proceedings are perceived, especially in an international context. It is emphasized in the preamble of the Brussels I Regulation that it is necessary to limit the possibilities to commence parallel proceedings in two different Member States, and for this purpose, there must be a clear and effective mechanism for resolving questions of *lis pendens* and related actions. In Article 27 of the Brussels I Regulation and the Lugano Convention, parallel proceedings are referred to as “[p]roceedings involving the same cause of action and between the same parties.” The ECJ has given the provisions a broad interpretation. Furthermore, the treaties contain an additional provision, covering situations where the cause of action is not identical. Thus, Article 28 of the treaties states that “[w]here related actions are pending in the courts of two Member States, any court than the court first seised may stay its proceedings” (author’s emphasis). Pursuant to Article 28(3) of the treaties, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. From these provisions, and the ECJ’s wide interpretation of them, one can conclude that the Brussels I Regulation and the Lugano Convention has taken a rather broad approach to the concept of parallel proceedings. Thus, in conformity with the approach adopted by the ILA, the treaties widen their approach to the concept of parallel proceedings in comparison to the principle of *lis pendens*.

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68 In the interest of clarity it can be noted that the exact scope of this exception is unclear, see for instance Hobér, 2011, p. 191.
69 Recital (15) in the Brussels I Regulation’s preamble.
70 Erk, 2014, p. 18.
Scholarly writers on the area have favoured a broad approach to the concept, arguing that it is a better reflection of reality. Torbjörn Andersson, however, has proposed that “parallel proceedings presupposes a possibility of two or more authoritative decisions concerning the same subject-matter.” Andersson is hence suggesting that the concept is limited to only concern disputes where there is an identity between the subject matter in both proceedings. Such a definition is closely related to the doctrine of **lis pendens**, which will be shown below in chapter 4.

From what has been described in this section, one can conclude that there is no international consistency in the usage of the term parallel proceedings. Although the approaches seem to be similar, they are not identical. Rather, the term seems to be used to refer to a wide range of different situations, some relating the definition to the doctrine of **lis pendens**, others making no such connection. In fact, this attempt to define parallel proceedings points out the core of the problem; the definition seems to be dependent on which requirements one wants to set forth in regard to parallelism. In order, then, to provide a more final definition of parallel proceedings, the issue must be further explored.

### 3.5 The doctrine of competence-competence

There is one doctrine that must be given specific attention when dealing with parallel proceedings in international arbitration; the doctrine of competence-competence. As will be outlined in the following, the doctrine constitutes the foundation for arbitrators to decide their own competence, creating space for conflicts between national courts and arbitral tribunals.

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73 The doctrine is also commonly referred to as the doctrine of *compétence de la compétence* (French), or *kompetenz-kompetenz* (German).
The doctrine of competence-competence can in general terms be said to empower
the arbitrators to rule on their own jurisdiction.74 Put differently, the doctrine means
that the arbitrators have competence to try their competence, even if they will find
that they are not competent to adjudicate over the dispute. This inherent power of
the tribunal comes into play even in situations where one of the parties – typically
the respondent – challenges the existence or the validity of an arbitration agreement,
and as such, plays a crucial role in maintaining the integrity of arbitration. If the
document would not have existed, a party to an arbitration agreement could easily
avoid its contractual obligation to arbitrate by challenging the jurisdiction of the
tribunal and claim that there is no valid arbitration agreement. It is not hard to
imagine that such a practice would undermine the entire arbitration system, and
make it a highly unreliable means of dispute resolution.

The doctrine of competence-competence is a general principle of international
commercial arbitration, and it is recognized by nearly every national legal system.75
Although there is a unanimous comprehension that the doctrine does exist, and that
it gives the arbitrators the competence to review their own jurisdiction, the doctrine
has been attributed with a somewhat different content in various jurisdictions. In
some jurisdictions, such as Sweden, the doctrine does not prevent a party from
initiating a court proceeding concerning the competence of the tribunal at any time,
not even prior to the tribunal’s own decision.76 This is the so-called positive notion
of the doctrine – the tribunal is given power to decide its own competence, but this
does not inhibit a national court from ruling on the tribunal’s competence
simultaneously.77 Other jurisdictions, e.g. France and India, embrace the negative
competence-competence by prohibiting national courts to consider the arbitral
tribunal’s jurisdiction until the tribunal has rendered its own decision on its
jurisdiction, hence giving priority to the arbitral tribunal.78 Thus, even though there
is a consensus as to the authorization of the arbitral tribunal, there is a disagreement

75 Ibid. p. 1048.
76 Ibid. p. 1049 et seq.
77 Erk, 2014, p. 25.
78 Ibid.
as to the accurate time for a national court to review the jurisdiction of the arbitral tribunal. These differing approaches stand in relation to how the national legal system in question views the relationship between arbitral tribunals and national courts.\textsuperscript{79}

The doctrine of competence-competence is closely linked to the aforementioned doctrine of separability.\textsuperscript{80} Both doctrines are codified in the UNCITRAL Model Law in Article 16(1), which states that “[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.” The link between these two doctrines is sometimes explained as if the competence-competence doctrine derives its existence from, or depends upon, the doctrine of separability.\textsuperscript{81} When reading the provision in the UNCITRAL Model Law, this seems to be the view expressed. However, scholarly writers on the area have argued against such a categorization, suggesting that such an explanation gives an erroneous idea of the doctrine. The competence-competence doctrine comes into play when the existence, validity, or legality of the agreement to arbitrate is challenged, and not the main contract between the parties. In these situations, the doctrine of separability does not provide much explanation as to how the doctrine of competence-competence empowers the arbitrators to try their own jurisdiction. Instead, it has been suggested, the doctrine of competence-competence derives it existence from the applicable law governing the arbitral tribunal’s authority, and not from the doctrine of separability itself.\textsuperscript{82}

As the doctrine of competence-competence gives the arbitral tribunal competence to consider and decide its own jurisdiction, it plays a crucial role in the issue of parallel proceedings, as it entails – at least initially – competence of not only one, but two judicial bodies to try the jurisdiction of the arbitral tribunal. By empowering

\textsuperscript{80} See above, section 2.2.4, footnote 33.
\textsuperscript{81} Lew, Mistelis, Kröll, 2004, p. 333.
\textsuperscript{82} Among others, Born has argued in favour of this approach, see Born, 2014, p. 1071 \textit{et seq.}
the arbitrators to rule on their own jurisdiction, the doctrine is also one of the main sources to conflicts of competence between arbitral tribunals and national courts.\(^3\)

### 3.6 Parallelism – a factual or fictive problem?

#### 3.6.1 Difficulties arising from parallel proceedings

Hitherto, this thesis has referred to parallel proceedings as something negative, as a “threat” or a “risk” that parties to an arbitration agreement are facing.\(^4\) This assumption requires further explanation. Scholarly writing on parallel proceedings often refers to them as constituting a problem.\(^5\) There are indeed several reasons why they are considered to be problematic, some of them party-related and others system-related.

To begin with, two parallel proceedings will most certainly cause inconvenience from at least one of the parties’ point of view. Not only will twice the amount of work attached to litigation be required, but the costs for participating in two different proceedings will consequently increase. These concerns are particularly significant in cases where the two proceedings take place in different jurisdictions.

As was described above in section 3.3, these difficulties are in some cases indeed the reason a party initiates a proceeding parallel to an already ongoing one – to put the counterparty in an inferior position, causing them great inconvenience.

If a party to arbitration proceedings is pleased with the ongoing arbitration – that is, the party has not opposed to arbitration being the correct dispute settlement method between the parties – and the other party initiates a court proceeding, yet another concern arises for the first party. As the first party has preferred arbitration as the dispute settlement method, it will probably have chosen arbitration after

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\(^3\) Erk, 2014, p. 24.
\(^4\) See above, section 3.3.
\(^5\) Francisco Orrega Vicuña begins his article *Lis Pendens Arbitralis* with the words “Parallel proceedings, Unwelcome”; see Orrega in *Parallel State and Arbitral Proceedings in International Arbitration*, 2005, p. 207.
careful consideration.\textsuperscript{86} As noted above, one of the advantages of arbitration is the confidentiality that follows – the parties are protected from any insight from outsiders. However, if the other party initiates a parallel proceeding before a national court, the confidentiality will be lost, as the dispute – that is, the same dispute the party wanted to keep confidential in arbitration – will be heard in a national court.

Other concerns arising from parallel proceedings are system-related, rather than party-related. In arbitration, the parties are ultimately bearing the costs for the proceedings. In court litigation, however, not only the litigants will bear the costs, but to some extent also the government and its taxpayers.\textsuperscript{87} This means that when parallel proceedings are taking place between an arbitral tribunal and a national court, and where the arbitral tribunal turns out to have jurisdiction to hear the case in question, the resources used in the court proceedings will have gone to waste, burden not only the parties but the society as a whole. Parallel proceedings are hence undesirable from an efficiency point of view.

At its worst, parallel proceedings will result in contradictory or inconsistent findings. In a perfect world, when two or more judicial bodies were to apply the same law on the same case, they would interpret and apply the law in an identical manner. In such a perfectly coherent world, parallel proceedings would not pose a threat as conflicting and contradicting judgments or awards would not be rendered. However, reality is that the same law will be interpreted and applied differently by different adjudicators, entailing a risk for contradictory findings. The risk of contradictory findings are especially distinct in an international context, such as when one or more arbitral tribunals are involved, as these different judicial bodies might apply different substantive law to the same case.

\textsuperscript{86} The incentives for parties to choose arbitration as their dispute settlement method were presented in section 2.2.4.

\textsuperscript{87} Needless to say, to what exact extent the government and its taxpayers finance the court system of the country in question differs widely amongst nations. In some countries, parties are required to pay high filing fees, while other countries to a larger degree finance their court system with tax revenues.
One of the dangers attached to contradictory findings is that the predictability for the parties is put at risk, a very serious concern.\textsuperscript{88} Conflicting judgments and awards will also put parties in impossible legal situations, having no choice but to comply with only one of the decisions, violating the other.\textsuperscript{89} This discrepancy will show at the enforcement stage as well, where only one of the two decisions can be enforced, violating the other.

Albeit not as fatal as conflicting decisions or titles of execution, inconsistent reasons of the judgment or award — the ratio decidendi — are highly undesirable. For the same law to be given different meanings will damage the confidence in and thus the legitimacy of the legal systems. As for the society as a whole, it has been said that “[…] conflicting decisions highlight the lack of consistency of the legal order” and that “repeated inconsistencies may jeopardize [its] legitimacy and credibility.”\textsuperscript{90}

In accordance with what has been described above, parallel proceedings entail heavy burdens, for the parties, the society and the arbitration system itself. The lack of efficiency and the danger of inconsistent or contradictory results motivate that measures are taken to prevent parallel proceedings to take place. But before proceeding to questions about what ought to be done about parallel proceedings, \textit{i.e.}, how they are to be prevented, the question could be asked whether parallel proceedings should be prevented in the first place. Arguments in favour of parallel proceedings have been brought forward in scholarly writing, and these will be examined next.

### 3.6.2 Parallel proceedings as a healthy element in international procedure

The strongly predominant view amongst scholarly writers and in national legislation is that parallel proceedings are indeed a negative phenomenon. Voices have however been raised in favour of parallel proceedings, bringing the advantages with them forward.

\textsuperscript{88} Erk, 2014, p. 249.  
\textsuperscript{89} Andersson, 2005, p. 21.  
\textsuperscript{90} Cuniberti, \textit{Parallel Litigation and Foreign Investment Dispute Settlement}, 2006, p. 36.
The reason parallel proceedings can take place is simply because there is more than one possible forum competent to adjudicate the dispute. This overlapping jurisdiction has been said to constitute a “luxury problem”, since it is to be preferred over having no competent forum at all.\textsuperscript{91} Not only has it been suggested that parallel proceedings are a “better bad” than the corresponding problem of having a complete lack of competent forum, but it has also been suggested that they can bring positive outcomes as to litigation taking place in the international arena. One could argue that parallel proceedings help create a healthy level of competition between tribunals and courts, thus improving both the quality of the adjudication as well as the conduct of the proceedings. In addition, parallel proceedings could arguably indirectly boost the legitimacy of international arbitration, as they would entail some sort of control over the arbitral tribunals.\textsuperscript{92}

It was argued above in section 3.6.1 that conflicting findings of the judgments and/or awards are undesirable. This statement rests on a presumption that the law should be applied in an identical, or at least similar, manner. This, in turn, seems to entail that it is indeed possible to find one true answer to the legal question at hand. Objections can be made to such a presumption. For instance, the durability of such a presumption can be questioned on the sole basis that most jurisdictions have appellate systems. The competence of appellate bodies are typically not restrained to concern factual findings solely, but instead, they typically have the competence to re-examine questions of law as well. The use of appellate systems indicates that we do not think that there is only one true answer to questions of law.\textsuperscript{93} Rather, it seems to suggest that we embrace the idea of inconsistencies or non-conformities in the application of law.

\textsuperscript{91} Paulewyn, Salles, \textit{Forum Shopping Before International Tribunals: (Real) Concerns (Im)Possible Solutions}, 2009, p. 80.
\textsuperscript{92} Ibid.
\textsuperscript{93} Andersson, 2005, p. 24.
In line with this idea, Zahle has presented a theory of law’s polycentricity.⁹⁴ According to Zahle, polycentricity is an “essential characteristic of law application”⁹⁵, and he brings forward multiple circumstances substantiating this claim. For instance, he argues, the legal openness is one symptom of the polycentricity of law, in the sense that we allow a variety of sources based on various rationalities to establish legal arguments in our legal decision-making. Furthermore, the hermeneutic approach to law proves that it is in fact polycentric. In the words of Zahle; “the meaning of the law is based on legal material but is not legal material, the meaning of the law is based on construction, and the construction or interpretation has its focus on the case at hand.”⁹⁶ This, he suggests, shows that the adjustment of the decision to the individual case is a profound element of law application. It could hence be questioned whether inconsistencies in the application of law is such a dangerous element as was submitted above, as it, according to Zahle’s theory, seems to be a fiction that law is consistent to its nature. It has also been suggested that giving up the idea of a uniform law could enable new solutions on how to manage conflicting decisions.⁹⁷

As to conflicting reasons between arbitral awards, yet other objections can be made. It was noted above that one of the advantages of arbitration is the confidentiality that follows from it.⁹⁸ Without the consent of the parties, the arbitral award will not be published. In practice, the vast majority of rendered awards are never published. This means that the contents of most arbitral awards are and will remain unknown to the public. For this reason, it can be questioned whether the argument that conflicting or inconsistent reasons of arbitral awards does indeed pose a real threat to the confidence in the arbitral system. Since the content of most arbitral awards will remain unknown to the public, inconsistencies between them will hence remain

⁹⁴ See Zahle, *Polycentric Application of Law* in Andersson, *Parallel and Conflicting Enforcement of Law*. Zahle uses the term polycentricity rather than the more established term legal pluralism, as he understands it to better reflect the focus on dogmatic law.
⁹⁶ Ibid. p. 240.
⁹⁸ See above, section 2.2.4.
unknown, too. Thus, the danger of inconsistent reasons might be a durable argument as to court judgments, but does not stand as strong as to arbitration.

3.6.3 Interim conclusion

Even though the problem of having multiple competent forums for the same dispute is to be preferred over the problem of having no competent forum at all, overlapping proceedings do raise concerns. It falls beyond the scope of this thesis to dig deeper into principal questions of whether law is, can or should be uniform. From what has been described above it can at least be ascertained that the practical effects of parallel proceedings are indeed problematic from many perspectives. Furthermore, the overwhelming majority who considers parallelism to be a solely negative phenomenon shouts down the few voices that have been raised in favour of parallel proceedings. In any case, the concerns arising from parallel proceedings outweigh the advantages by far, posing a threat to the integrity of the arbitration system as a whole. The question then arises – how do we deal with it? This will be examined in the following chapter.
4  *Lis Pendens* as a Means to Handle Parallelism

4.1  Introduction

The doctrine of *lis pendens* has only been swiftly touched upon in the foregoing, see above section 1.1 and 3.1. In this chapter, the doctrine will be examined in closer detail. First, an overall examination of the doctrine and its applicability in international arbitration will be provided, to be continued by a closer look at the different roles the doctrine has been given in the two prevailing Western legal traditions – civil law and common law. This will lay foundation to the following chapter, where some final conclusions will be drawn.

4.2  The doctrine of *lis pendens*

4.2.1  The definition of *lis pendens*

It has been shown in the foregoing that parallel proceedings are commonly viewed as a negative phenomenon and most, if not all, jurisdictions have adopted different measures to prevent them from taking place. The doctrine of *lis pendens* is only one of many possible measures to deal with parallel proceedings. Other measures include, *inter alia*, anti-suit injunctions, consolidation of proceedings, and the application of the doctrine of *forum non conveniens*.

The doctrine of *lis pendens* is internationally recognized, and is ultimately used by an adjudicator to stay or suspend its own legal proceedings in the case of another, parallel proceeding before another judicial body. Hence, the doctrine is applied when a state court or arbitral tribunal has to determine whether to stay its own

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99 See above, chapter 3.
100 The doctrine of *forum non conveniens* will be dealt with below in section 4.4.
proceedings or proceed with the action before them. James Fawcett has described the doctrine of *lis pendens* to be applicable in a “situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different states at the same time.”\(^{102}\) Albeit its content being vague and, in addition, its standards being adopted differently in different national legal systems, it sets forth requirements as to the identity of the parties, the cause of action and the claim(s). In short, the doctrine implies that if these conditions are met, *lis pendens* bars a second legal proceeding to take place. The doctrine is relied upon in both civil law and common law jurisdictions as a means of suspending or dismissing a proceeding in case of another parallel proceeding.\(^{103}\) Despite its vagueness, it is indeed closely connected to how parallel proceedings are defined – its application is dependent upon the existence of another, competing proceeding taking place.\(^{104}\)

As such, the doctrine prevents the duplication of legal proceedings.\(^{105}\) This is also where the arguably ultimate purpose of the doctrine manifests – to protect the respondent in legal proceedings against the oppression of being brought before multiple adjudicators, its counterpart hoping to reach success with his claims before at least one of them.\(^{106}\) It has been submitted that the doctrine of *lis pendens* “is a fundamental principle of procedural fairness and justice which is normally considered to form part of procedural public policy in most legal systems.”\(^{107}\) Moreover, the doctrine prevents the waste of resources that result from multiple proceedings, thus also serving efficiency purposes.\(^{108}\)

The doctrine of *lis pendens* is closely related to the principle of *res judicata*, which establishes that “an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings involving the same subject matter of relief,

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103 Born, 2014, p. 3792.
105 Born, 2014, p. 3792.
106 Ibid. p. 3793.
the same legal grounds and the same parties.” Precluding following proceedings between the same parties concerning the same claim, demand or cause of action, the principle of *res judicata* serves purposes closely related to those of *lis pendens* – to protect the defendants or respondents to have to defend themselves twice in the same matter, to prevent the waste of resources, and to establish legal certainty and predictability by avoiding conflicting decisions. As will become clear below, the doctrine of *res judicata* proceeds from the same requirements as to identity as the doctrine of *lis pendens*. The principle of *res judicata* applies directly to arbitration in both common law and civil law jurisdictions.

### 4.2.2 Does the doctrine of *lis pendens* exist in international arbitration?

Before proceeding to a detailed review of the doctrine’s role in the common law and the civil law traditions, it is in order to examine whether the doctrine of *lis pendens* is applicable at all in international arbitration. Here, one should distinguish between parallelism between a national court and an arbitral tribunal on the one hand, and between two arbitral tribunals on the other.

Parallel proceedings between an arbitral tribunal and a national court has been said to not constitute a true case of *lis pendens*. It was established above that a valid arbitration agreement gives the arbitral tribunal exclusive competence to hear the case, eliminating the jurisdiction of national court. The doctrine of *lis pendens*, however, rests on a presumption that there are two equally competent forums, and it has consequently been argued that it is impossible for the doctrine to come into play in arbitration, as the arbitration agreement makes the arbitral tribunal the superior forum. Despite its “general inapplicability”, the doctrine has been applied in international arbitration in certain contexts. The most striking example of

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111 Cremades, Madalena, 2008, p. 520.


its applicability is cases where a party makes a jurisdictional objection, i.e., challenges the existence, validity or applicability of the arbitration agreement. In these cases, there is indeed more than one competent forum to hear the jurisdictional challenge. This is so, since the tribunal has a competence to try their own jurisdiction pursuant to the doctrine of competence-competence, discussed above in section 3.4.

Furthermore, the scope of the arbitration agreement may be subject to disagreement. Party A may consider an issue to be covered by the arbitration agreement, thus empowering the arbitral tribunal to hear the case, while party B opposes such an interpretation of the agreement, considering the issue to fall beyond the scope of the arbitration agreement. In such cases, a *lis pendens* situation may arise, if party A refers the dispute to an arbitral tribunal, while party B simultaneously initiates a court action to have the same matter resolved.

In conclusion, in situations where the validity of the arbitration agreement has been called into question, or whether the dispute falls within the scope of the arbitration agreement, two parallel proceedings between courts and arbitral tribunals might take place, and thus, give rise to the application of the doctrine of *lis pendens*.

When two arbitral tribunals, deriving their competence from the same arbitration agreement, are to try a dispute that has arisen from the same main contract between the same parties, a true *lis pendens* situation is indeed at hand.\(^\text{114}\)

Thus, parallel proceedings can – and do – occur in international arbitration. But the question remains – is the doctrine of *lis pendens* applicable in international arbitration? Different types of arguments have been raised resisting its application. To begin with, it has been called into question whether there is any legal basis for the doctrine’s existence in the field of international arbitration.\(^\text{115}\) Neither the New York Convention nor the UNCITRAL Model Law contains any provisions concerning *lis pendens* between a national court and an arbitral tribunal. The situation

\(^{114}\) ILA Final Report on *Lis Pendens and Arbitration*, para. 4.47.

\(^{115}\) The legal sources of international commercial arbitration were presented in section 2.3.
is similar in national legislation, where most jurisdictions have rules solely relating to parallel court litigations at a domestic level.\textsuperscript{116} Accordingly, these national rules cannot automatically be extended to include arbitration.\textsuperscript{117} Neither the major arbitration institutes provide any \textit{lis pendens} rules. Despite this, the doctrine of \textit{lis pendens} is applied – however with some reluctance – in international arbitration, largely in a \textit{sui generis} shape.\textsuperscript{118}

Other critique against its application has been of more principal character. For example, it has been argued that since the doctrine was ultimately designed to manage domestic parallelism, it is unsuitable to extent its application to international proceedings.\textsuperscript{119} It has also been argued that applying the doctrine of \textit{lis pendens} in international arbitration constitutes a threat to the sacred principle of party autonomy, presented above in section 2.2.4, as it could possibly lead to a party releasing itself from the arbitration agreement it once concluded.\textsuperscript{120}

It falls beyond the scope of this thesis to examine the critique that has been raised against the application of \textit{lis pendens} in international arbitration more closely. The fact remains that \textit{lis pendens} – irrespective of a questionable legal ground and its suitability – is applied in international arbitration. However, as will become clear in the following, the doctrine has been adopted rather differently in the civil law and common law traditions.

### 4.3 \textit{Lis pendens} as it is understood in the civil law tradition

The doctrine of \textit{lis pendens} is often referred to as a typical civil law tool. Though the doctrine does not have a uniform adoption amongst civil law jurisdictions, there are

\begin{itemize}
\item \textsuperscript{116} Cuniberti, 2006, p. 3.
\item \textsuperscript{117} Cremades, Madalena, 2008, p. 510.
\item \textsuperscript{118} Born, 2014, p. 3792.
\item \textsuperscript{119} Cuniberti has argued in favour of this position, see Cuniberti, 2006.
\item \textsuperscript{120} Erk, 2014, p. 199 \textit{et seq.}
\end{itemize}
indeed certain common features of it, typical to the civil law tradition. These will be examined in the following.

4.3.1 The triple identity test
In order for the doctrine of *lis pendens* to be applicable, identity between the two parallel claims is required; the same parties cannot bring the same case to a second litigation or arbitration. The three traditional elements for identification required by national courts and arbitral tribunals are (a) the parties (*persona*), (b) the grounds/subject matter (*causa petendi*) and (c) the object (*petitum*). This is commonly referred to as the triple identity test.\(^{121}\)

There is no unanimous notion of the doctrine of *lis pendens* and its requirements as to identity, but instead national legislation has formulated these requirements somewhat differently. These differences will not be explored in closer detail, but an overall examination follows below. Furthermore, the CJEU has interpreted each element in relation to the aforementioned Brussels I Regulation and the Lugano Convention, and it has taken a rather strict approach to its application.\(^{122}\) Below, each requirement under the triple identity test will be explored.

4.3.1.1 Identity of the parties (*persona*)
Nearly all published international cases on *lis pendens* and *res judicata* have expressly required “identity of the parties” for the doctrines to apply, establishing an international unanimity to the existence of this prerequisite.\(^{123}\) In cases where the two litigating parties are the same companies, corporations or legal entities, there is seldom any difficulty attached to this requirement. However, difficult questions may arise in cases where the parties are not identical, but well closely related – should legally separate entities of a corporation group be seen as identical for the doctrine of *lis pendens* to be applicable? There is a divergence between different civil law

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\(^{121}\) Hobér, 2013, p. 320 *et seq.*
\(^{122}\) See above, section 3.3.
\(^{123}\) Reinisch, 2004, p. 55.
jurisdictions to the adoption of this prerequisite; while some jurisdictions take a rather strict approach to the identity of the parties, other jurisdictions consider the requirement to be met even in cases where the parties aren’t identical in a strict sense, but sufficiently closely related.

In the CME case, the plaintiff challenged an arbitral award rendered in Stockholm and sought to have it set aside, *inter alia*, relying on *lis pendens* and *res judicata*. The Svea Court of Appeal, applying the triple identity test, held that “[i]dentity between a minority shareholder, albeit a controlling one, and the actual company cannot, in the Court of Appeal’s opinion, be deemed to exist in a case such as the instant one. This assessment would apply even if one were to allow a broad determination of the concept of identity.”

Accordingly, the court found that the requirement of identity between the parties was not met, and that the doctrine of *lis pendens* was not applicable.

According to the CJEU, the requirement as to the identity of the parties does not require that the parties hold the same positions in both proceedings, in order for the condition to be met. Consequently, the claimant in the first proceeding can be the defendant in the second proceeding, and vice versa. In other words, the dispute must be between the same parties, but the roles can be reversed in the second proceeding without the identity being affected.

4.3.1.2 Identity of the subject matter (*causa petendi*)

The requirement as to identity of the subject matter or ground means that the same rights and legal arguments must be relied upon in the parallel proceedings.

The claimant may make identical requests as to the relief sought in the two pending proceedings, but base its claim on different legal grounds. At a first glance, such a scenario seems to eliminate the application of the doctrine of *lis pendens*, as the

125 Tatry, C-406/92.
“cause” or “grounds” appear to differ. However, in Tatry, the CJEU stated that the “cause of action” consists of the facts and the rule of laws relied on as the basis for an action.

In Gubisch Maschinenfabrik\textsuperscript{127} the question at hand was whether it fell within the scope of \textit{lis pendens} (as understood in the predecessor to the Brussels I Regulation) when one party to a contract initiated a proceeding before a court in a contracting state, seeking to have the contract declared invalid – or in any event discharged –, and the other party simultaneously sought to have the same contract enforced in another contracting state. In other words, the problem was whether the two actions had the same subject matter, when one of the actions sought enforcement, and the other sought rescission. The CJEU held that it lied at the heart of both actions whether the contract was binding or not, and thus, they had the same subject matter. The court also held that the concept of \textit{lis pendens} could not be restricted to concern only entirely identical claims. Therefore, the two proceedings were covered by the \textit{lis pendens} rule.

\textbf{4.3.1.3 Identity of the object (petitum)}

In order for the requirement of the relief to be met, the same type of relief must be sought in the parallel proceedings.\textsuperscript{128} The CJEU has held that actions should be deemed to have the same object when the results are essentially the same.\textsuperscript{129}

\textbf{4.3.2 The first-in-time rule}

In civil law jurisdictions, once the applicability of the doctrine of \textit{lis pendens} has been established, \textit{i.e.}, that the identity of the parties and the subject matter has been established, the application typically causes no problem. The civil law rule is simple – the court in the forum that was seized first shall continue with its proceedings, and the court in the forum seized second shall accordingly decline jurisdiction and

\textsuperscript{127} C-144/86.
\textsuperscript{128} Reinisch, 2004, p. 62.
\textsuperscript{129} Tatry, C-406/92.
dismiss the case. In Article 27(1) of the Brussels I Regulation, priority is given to the court “first seised”.\textsuperscript{130} Article 30 provides a definition of when a court shall be deemed to be seized.

By way of examples, the first-in-time rule is found in 13:6 of the Swedish Code of Judicial Procedure (CJP), which sets forth that while an action is pending, a new action involving the same issue between the same parties may not be entertained. The same goes for the Italian Code of Civil Procedure (ICCP), where Article 39.1 prescribes a first-in-time rule when the same dispute is pending before different domestic courts.

4.4 \textit{Lis alibi pendens} as it is understood in the common law tradition

4.4.1 \textit{Lis alibi pendens} as a part of the \textit{forum non conveniens} doctrine

In Britain, the commonwealth parts of Canada, Australia and New Zealand, and Israel, \textit{lis alibi pendens} is not a distinct doctrine on its own, but merely one of several factors for the adjudicator to take into account when applying the doctrine of \textit{forum non conveniens}.\textsuperscript{131} In the U.S., however, \textit{lis alibi pendens} and \textit{forum non conveniens} are seen as two distinct doctrines. The position in the U.S. will be examined below in section 4.4.2.

The doctrine of \textit{forum non conveniens} is applied in common law jurisdictions, conferring discretion upon a court to decline jurisdiction where, in the interest of justice, the dispute should be tried in another court.\textsuperscript{132} The doctrine was established

\textsuperscript{130} It can be noted that this first-in-time rule is usually formulated as a “first-to-file” rule or a “first-seized” rule. However, these formulations seem to indicate different timings to be decisive for the question of which proceeding that was in fact the first one. This has caused some debate, especially since different jurisdictions adopt different standards to this seemingly identical rule, causing some inconsistencies. For the purpose of this thesis, these differences need not to be explored further, as the notion of the rule is the same within civil law jurisdictions; the first proceeding takes precedence over the second proceeding.

\textsuperscript{131} Fawcett, 1995, p. 29.

through a number of English court decisions, and its adoption caused a chain-
reaction among other common law-jurisdictions, who were quick to follow the new
English regime.\(^{133}\) In one of the lead cases, the *Spiliada* case, Lord Goff described
the doctrine in the following way:

“The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for trial of the action, *i.e.*, in which the case may be tried more suitably for the interest of all the parties and the ends of justice.”\(^{134}\)

James Fawcett has aptly defined *forum non conveniens* as “a general discretionary power for a court to decline jurisdiction on the basis that the appropriate forum for trial is abroad or that the local forum is inappropriate.”\(^{135}\) In other words, a stay will only be granted if another jurisdiction would serve as a more appropriate forum. In its assessment, the court will consider whether or not the plaintiff would be deprived of a legitimate judicial advantage, would the dispute be heard in the foreign jurisdiction.\(^{136}\) The court will take several factors into account to make this determination. An English court might not grant a stay of their proceedings if they find that, *i.e.*, the trial in England will be relatively quick and cheap,\(^{137}\) English damages will be higher,\(^{138}\) or the English cost rule “the winner takes all” is not applicable in the foreign forum.\(^{139}\)

In *The Abidin Daver* case, the English court was faced with a case of *lis alibi pendens*. In March 1982, a Cuban vessel and a Turkish vessel (the “Abidin Daver”) collided on international water, causing damages to both vessels. The Turkish ship-owners initiated proceedings in Turkey against the Cuban ship-owners in April 1982, claiming damages for negligence in the navigation and management of the Cuban vessel. A few months later, the Cuban ship-owners arrested a sister ship to the


\(^{134}\) *Spiliada* case [1987] A.C. 460.

\(^{135}\) Fawcett, 1995, p. 10.


Abidin Daver in England, and initiated proceedings in England in respect of the very same collision in the Turkish action, claiming damages for the Turkish ship-owners’ negligence in causing the collision. The Turkish ship-owners responded with applying to have the English action stayed.

The central issue in *The Adibin Daver* was the weight to be given to the existence of the present situation, where proceedings on the same subject matter between the same parties were already pending in another forum, *i.e.*, to the existence of *lis alibi pendens*, in the court’s exercise of its discretion to stay proceedings. Referring to the previous cases *The Atlantic Star* and *MacShannon*, Lord Diplock in the House of Lords noted that the latter case had not involved a *lis alibi pendens* situation, and that the former case – despite the element of parallelism - did not address the issue of *lis alibi pendens*. Both cases, however, had made desired progress – in the words of Lord Diplock – from “judicial chauvinism” to “judicial comity”, in the sense that two concurrent proceedings on the same issue pending in different forums were now acknowledged as something to aim to avoid. Lord Diplock formulated a test to apply to determine whether a stay should be granted in situations of *lis alibi pendens*.

“Where a suit about a particular subject-matter between a plaintiff and a defendant is already pending in a foreign Court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter […] then the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries […] can only be justified if the would-be plaintiff can establish objective by cogent evidence that there is some personal or judicial advantage that would be available to him only in the English action that is of so much importance that it would cause injustice to him to deprive him of it.”140

With this, Lord Diplock established *lis alibi pendens* as a factor of decisive importance in the discretion of the court to stay proceedings, *i.e.*, in the application of the doctrine of *forum non conveniens*.

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140 Lord Diplock at 344.
In the U.S., the doctrine of *forum non conveniens* has developed mainly through three Supreme Court cases; *Piper Aircraft Co. v. Reyno*, *Gulf Oil Corp. v. Gilbert*, and *Koster v. Lumbermens Mutual Casualty Co.* In *Gulf Oil Corp. v. Gilbert*, it was established that the *forum non conveniens* test in the U.S. is a balancing test of “public and private factors”. Both these factors seem to favour the forum that has progressed the most with the proceedings.\(^{141}\)

In summary, the applicability of the doctrine of *forum non conveniens* is not dependent upon the existence of a parallel proceeding pending elsewhere. Instead, the doctrine serves as a ground for the court to decline jurisdiction if it finds that there is some other forum – equally competent – that is more appropriate, regardless if a party has filed a suit in the other forum or not. However, if a parallel proceeding is in fact taking place in a different forum and one of the parties seeks to have the proceedings stayed on this ground, *forum non conveniens* can be used by the court to decline jurisdiction. In these situations, the *lis alibi pendens* scenario will be taken into account in the court’s discretion to stay proceedings.

### 4.4.2 *Lis alibi pendens* as a separate doctrine

Several mechanisms for handling transnational parallel proceedings are available to U.S. courts. The doctrine of *lis alibi pendens* is one of them. Whereas *lis alibi pendens* is a factor to take into account in the application of the doctrine of *forum non conveniens* in many common law jurisdictions, the United States takes a rather different approach to *lis alibi pendens*, dividing them into two distinct doctrines. Pursuant to the doctrine of *lis alibi pendens*, a U.S. court is allowed to stay its own proceedings in favour of a parallel proceeding pending before another forum, involving the same or similar parties and matters.\(^{142}\)

As was showed in the foregoing, the doctrine of *forum non conveniens* is applied by U.S. courts when the court finds that the public and the parties are best served if the

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\(^{141}\) George, 2002, p. 505.

dispute were to be heard in another forum. Contrary to other common law
djurisdictions, a U.S. court will not take the occurrence of *lis alibi pendens* into account
when they exercise their discretion in the matter.143 Instead, U.S. courts apply it as a
doctrine of its own. It has been called into question whether the doctrine of *lis alibi
pendens* can be applied in cases that are not purely domestic, but it has recurrently
been relied upon by U.S. courts to stay proceedings in favour of concurrent
proceedings in foreign courts.144 This was the case in, *inter alia, Turner Entertainment
Co. v. Degeto Film GmbH*, where a U.S. court granted a stay in favour of a
simultaneously pending action in a German court. In the case, two concurrent
lawsuits were filed in Germany and the United States, and the critical issue was
“whether a federal court, which properly has jurisdiction over an action, should
exercise its jurisdictions where parallel proceedings are ongoing in a foreign nation
[...].” Basing its decision on international comity, the court granted a stay of
proceedings. Very briefly the court stated that “[a]ll of the parties to the American
litigation are parties in the German litigation. Although some of the parties in the
German litigation are absent from this action, the central issue is the same in both
cases [...].”

In *Colorado River*, the Supreme Court had to determine whether a U.S. district court
had properly abstained from considering the action due to a pending state court
proceeding. The Supreme Court enumerated some relevant factors for the court to
take into account when faced with *lis alibi pendens*:

“In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal
court may [...] consider such factors as the inconvenience of the federal forum; the desirability of avoiding
piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums. No one
factor is necessarily determinative; a careful considered judgment taking into account both the obligation to
exercise jurisdiction and the combination of factors counselling against that exercise is required. Only the
clearest of justifications will warrant dismissal.”145

The case concerned parallel proceedings between a state court and a federal court, but the case has been relied upon in subsequent cases concerning parallel proceedings between U.S. courts and foreign courts.

To sum up, the foregoing examination has shown that the doctrine of *lis alibi pendens* serves as an independent ground for a U.S. court to grant a stay of proceedings in the case of another, parallel proceeding. This stands in contrast to other common law jurisdictions, which count *lis alibi pendens* as a factual circumstance to take into account in the application of *forum non conveniens*.

4.4.3 Requirements concerning identity

So far, it has been established that *lis alibi pendens* – whether it is seen as a factor or an independent doctrine – plays a role in the common law tradition in relation to parallel proceedings. In the following, the requirements as to identity for *lis alibi pendens* will be examined in closer detail.

For a *lis alibi pendens* situation to be deemed to exist in the common law tradition, the action in the other forum simply involves “similar parties and matters.” The following court case illustrates the position taken in common law jurisdictions.

In *Continental Time Corp. v. Swiss Credit Bank*, a federal court in the United States was faced with a request for a *lis alibi pendens* stay. The facts of the case were as follows. In January 1980, Swiss Credit issued a letter of credit in favour of Continental Time Corp. (“Continental”), whom in turn assigned its entire interest in the letter of credit to S. Frederick & Company (“Frederick”) and Arlington Distributing Co. Inc. (“Arlington”). Before any payment was made, Swiss Credit advised Merchants Bank, where Frederick held an account, that the air waybill did not meet the requirements

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146 See above, section 4.4.1.
of the letter of credit. The expiration date of the letter of credit passed without any payment being made. In May 1980, Frederick and Arlington instituted a suit in Switzerland for recovery of their assigned portions of the letter of credit. In 1981, Continental instituted a suit before a federal court in the United States, seeking to recover damages allegedly arising out of Swiss Credit’s wrongful refusal to honour its obligations under the letter of credit. Swiss Credit requested the court to dismiss the complaint or to stay the U.S. action on the ground that Continental was not the real party in interest and that the precise issues were being litigated in the Swiss action. Continental argued that the case should not be dismissed or stayed, since only the action in the United States could resolve all relevant issues.

The court noted that “it is true that this action includes other parties and claims than those in the suit in Switzerland, relating to the purchase and sale of merchandise underlying the letter of credit transaction. However, this factor does not support Continental’s contention that only this action can fully resolve the relevant issues, for it is settled that a letter of credit agreement constitutes an independent transaction between the issuer and the beneficiary, to be resolved without the reference to underlying contracts or transactions.” The court thus considered to what extent the matters in the concurrent proceedings were similar, i.e., whether it was in fact a question of “parallel” proceedings, by examining the identities of the parties, and the similarity of the issues in, the two concurrent actions. The federal court dismissed the action in favour of the Swiss proceedings.

Other U.S. cases where the court has examined the degree of similarity in two simultaneously pending proceedings (U.S. and foreign) involve Compare Itel Corp. v. M/S Victoria U and Herbstein v. Bruteman. In the former case, the court stated that “[a] stay pending adjudication in another tribunal should not be granted unless that tribunal has the power to render an effective judgment on issues that are necessary to the disposition of the stayed action” (author’s emphasis). In the latter case, the court held that “comity requires that the parties and issues in both litigations are the same or sufficiently similar, such that the doctrine of res judicata can be ascertained.”
As to the identity of the parties, it can be noted that the common law tradition has adopted different doctrines and concepts broadening the notion of identity. For example, the concept of privies is well established within the common law tradition. In short, it means that if two parties have a mutual interest in the same thing or action, without being related through an actual contract, they are privies. This might qualify the parties to be deemed to be sufficiently closely related.
5  *Lis Pendens* and Parallelism Revisited

5.1  Introduction

In the light of what has been presented, discussed and concluded so far, it is now possible to return to the questions at issue formulated initially in section 1.2, and make an attempt to give them final answers. First, some comparative conclusions will be drawn, regarding the doctrine of *lis pendens* and its role in the common law and civil law traditions respectively. Thereafter, an attempt to answer the question of when parallel proceedings can be deemed to take place will be made.

5.2  Comparative conclusions

As was described above in section 3.6.1 and 3.6.3, parallel proceedings are widely recognized as undesirable. The review of the doctrine of *lis pendens* in the common law and civil law traditions in the previous chapter shows just how undesirable they are considered to be – different as their means might be, both traditions have developed tools to prevent parallel proceedings from taking place. However, great divergence between the two traditions has appeared in the previous examination.

In the civil law tradition, *lis pendens* is an independent doctrine, barring the same claim(s) to be tried simultaneously in different forums. In most common law jurisdictions, however, *lis alibi pendens* is not a doctrine on its own, but one of several factors to take into account when applying the broader doctrine of *forum non conveniens*. The United States poses an exception to the position taken by other common law jurisdictions by treating *lis alibi pendens* as an independent ground for dismissing a case in favour of another forum. This being said, there is a rather homogenous notion of the key features of a *lis alibi pendens* situation from a common law perspective. Put differently, the standards adopted in common law jurisdictions
as to *lis alibi pendens* are uniform, regardless of it being treated as an independent rule or merely a factual circumstance to take into account in the application of *forum non conveniens*.

Yet another vital difference appears when comparing the two traditions. In civil law jurisdictions, the court second seized is under an obligation to decline jurisdiction, in favour of the court first seized. In other words, the application of the doctrine of *lis pendens* leaves no room for the court’s own discretion in the matter. Common law courts, on the other hand, are empowered with a discretionary competence when faced with *lis alibi pendens*. This discretion is apparently without equivalence within the civil law tradition. In addition, the civil law tradition has adopted a first-in-time rule when applying the doctrine. No such corresponding rule is found within the common law tradition. In other words, where a civil law court second seized is obliged to decline jurisdiction, it is within the discretion of a common law court to decide whether or not to do so. The civil law approach has been subject to massive critique, primarily from common law scholarly writers. It has been accused to be too mechanical and strict, encouraging a “race to the court houses.”

A party may for some reason – perhaps for some of the reasons listed in section 3.3 – find a certain forum to be particularly advantageous to hear the dispute. In that case, the civil law first-in-time rule encourages the party to hurry and have its claim filed in that certain jurisdiction, in order to prevent the counterparty from initiating a proceeding in a jurisdiction where the same advantage would not be obtained. The mechanical solution to have the court second seized automatically declining jurisdiction adopted by most civil law jurisdictions, is, it has been argued, undesirable and to some extent also unfair. The common law approach, on the other hand, to confer discretionary power upon courts to stay proceedings in the case of *lis alibi pendens*, does not encourage a party to rush to a specific jurisdiction, since it will be up to the court to determine the most appropriate forum to hear the dispute. From a civil law point of view, however, this discretion can challenge the cherished ideal of predictability, since it opens up to arbitrary decisions.

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These listed differences can perhaps tell us something as to the both traditions in general. It was noted above in section 2.4 that whereas the common law tradition has more of a “truth-seeking” element to it, the civil law tradition tends to be more mechanical and deductive in its approach to law. The view taken on how to deal with parallel proceedings through the doctrines of *lis pendens* and *forum non conveniens*, confirms this statement to some extent. The doctrine of *forum non conveniens* is a more flexible tool than the doctrine of *lis pendens*, both in conferring a discretion upon courts, but also by allowing the court to take more factors into account in its assessment. The doctrine of *lis pendens* leaves little or no room for a court to make any assessment based on the appropriateness of the forums. Furthermore, in sharp contrast to the doctrine of *forum non conveniens*, the only relevant facts taken into account is the identity of the parties and their claims in the overlapping proceedings. A continued comparison further establishes this observation (as to the nature of the two traditions). The differences that have been brought into light so far are closely related to the application of the rules, whether it be the doctrine of *lis pendens* or *forum non conveniens*. But the foregoing examination in section 4.3 – 4.4 has revealed that differences are found at a more elementary level as well; at the mere formulation of what constitutes *lis pendens* or *lis alibi pendens* respectively.

Both the common law and civil law traditions require identity between the parties and their claims in the two proceedings in order for it to constitute *lis pendens*, and hence, they have a conform understanding of the core of the concept. But a closer look at the standards adopted by the two traditions reveals differences with great practical importance. Common law jurisdictions do not set forth as rigid requirements as to the identity between the two pending proceedings as is typically the case within civil law jurisdictions. For instance, the triple identity test relied upon in civil law is not used in common law to establish whether or not there is a case of *lis pendens*. In fact, the rather meticulous requirements as to identity found in the civil law tradition are not adopted by the common law tradition. Common law jurisdictions have instead stretched the scope of the identity to cover a broader range of parties and claims, requiring the matters to be identical or similar.
Furthermore, common law jurisdictions have adopted concepts and doctrines as to the identity of the parties without equivalence in the civil law tradition. For instance, the common law concept of “privies” is unknown to the civil law tradition. This same flexibility appears when comparing which identity that is required from the claims. Civil law jurisdictions have, yet again, favoured a stricter approach than common law jurisdictions. The claims in a common law court need to be “identical” or “similar”, which is determined after an evaluation of the degree of similarity. Civil law courts, contrary, apply the two remaining stages of the triple identity test, and require the object and the subject matter to be identical. This stricter civil law approach relates to what was noted above in section 2.4, where it was pointed out that one of the very differences between the common law and civil law tradition is the approach taken to the conduct of procedure. Civil law courts typically require a party to have its entire statement of claim fixed before it can successfully file its claim, whereas common law courts do not expect the parties to have their claims set out in detail initially. In line with this, it seems natural that the two traditions have adopted different standards as to what constitutes a parallel proceeding.

This conclusion leads us to the question to be answered next – when, then, can a parallel proceeding be deemed to take place, in cases where at least one arbitral tribunal is involved?

5.3 When is a parallel proceeding deemed to take place?

It was initially established that this thesis would not aim at presenting the substantive laws in different jurisdictions in detail, but rather at broadly outlining the distinguishing features of each legal tradition as to parallel proceedings and the doctrine of *lis pendens*. Accordingly, it is not possible to make a detailed evaluation of how national courts and arbitral tribunals are likely to handle a case of a parallel proceeding, based on what has been presented in this thesis. However, some brief,
general remarks can be provided in connection to what has been presented in the foregoing chapters.

A civil law court faced with a parallel arbitration proceeding might seek a resolution to the situation by applying the doctrine of *lis pendens*. It’s applicability in international arbitration was discussed in detail above in section 4.2.2, where it was established that the doctrine may become relevant under certain circumstances – such as when the existence or validity of an arbitration agreement is challenged, or when there is a disagreement as to the scope of the arbitration agreement. In some jurisdictions, its applicability in international arbitration is indicated in case law.\textsuperscript{149}

Common law courts are more familiar with the doctrine of *forum non conveniens* when faced with a parallel proceeding. Its applicability in international arbitration, however, can perhaps be questioned on the ground that arbitration is consensual to its nature; since parties agree to arbitrate, it can be argued that no other forum can then be seen as being more appropriate than the arbitral tribunal. Whether or not the doctrine of *forum non conveniens* is applied, common law courts still recognize situations of *lis alibi pendens* to serve as a ground for declining jurisdiction or dismissing case, similarly to civil law courts. As was discussed and concluded above in section 5.2, however, the common law tradition adopts other standards than do the civil law tradition in regard to the identity required between the two proceedings.

Arbitral tribunals, lastly, might handle a parallel proceeding differently depending on whether or not it is an *ad hoc* arbitration or institutional arbitration, and further depending on whether the concurrent proceeding is pending before another arbitral tribunal or a national court. As previously noted, if the arbitral tribunal operates under an arbitration institute, they will not find an answer to how to deal with parallel proceedings in the rules of the arbitration institute in question. Furthermore,

\textsuperscript{149} For instance, the aforementioned Swedish *CME* case can be seen as such an example. The case seems to indicate that the doctrine of *lis pendens* is to be applied in the same manner in international arbitration, as in domestic arbitration and court procedure.
the issue is rarely dealt with in any national arbitration legislation. The above-mentioned ILA Recommendations\textsuperscript{150} are available to them as guidance, but they are not binding unless the parties have agreed to make them so. Arbitrators might, in the absence of any clear-cut rules to rely on, accordingly try to solve a situation in a manner known to them, which will be influenced by the tradition in question the arbitrator has been trained in.

This sums up what has been presented in the previous chapters; there is no consistency as to how arbitral tribunals and national courts will deal with a situation where they are facing a proceeding, concurrent to the ongoing before them. This is not only explained by the fact that different jurisdictions have adopted different measures to handle them – common law jurisdictions typically relying, \textit{inter alia}, on the doctrine of \textit{forum non conveniens}, and civil law jurisdictions typically relying on the doctrine of \textit{lis pendens} – but rather by the fact that the issue itself is perceived drastically different in the two legal traditions.

An answer to the question of \textit{when} parallel proceedings are taking place will, consequently, be dependent upon in which jurisdiction and before which judicial body the question is asked. And, as has been shown in this thesis, the answer provided by the jurisdiction in question will in turn reflect the legal tradition it forms a part of. In fact, as it turns out, parallel proceedings are perceived drastically different in common law and civil law jurisdictions. This lets us know something essential – how we formulate a problem will also determine if we perceive a situation to constitute such a problem.

This conclusion leads back to the discussion in section 3.6.2 on law and its conformity and consistency. This comparative thesis has shown that drastically different approaches can be taken to the same situation. In other words, different judicial bodies may perceive the exact same situation as diametrically different; one arbitral tribunal or national court might, for instance, find that a parallel proceeding

\textsuperscript{150} See above, section 3.4.
is pending elsewhere and that the doctrine of *lis pendens* should be applied in order to handle it. Had the issue aroused before another arbitral tribunal or national court, the outcome would perhaps have been quite the opposite, if that arbitral tribunal or national court instead relies on another legal tradition. Where one judicial body might find that the requirements regarding identity are met and that the doctrine of *lis pendens* hence should apply, another judicial body might find that no such identity is at hand and that accordingly, *lis pendens* cannot be applied.

As it has turned out, no single answer can be given to when parallel proceedings take place, and when the doctrine of *lis pendens* is applicable. It was noted above that this tells us that the way we formulate a problem will also determine whether or not we have a problem at hand. This seems to indicate that there is some substance to the discussion above in section 3.6.2; perhaps we should give up the idea of a uniform and consistent law, and rather go explore the diverse – or polycentric – nature of law.
6 Final Remarks

In one sense, it is perhaps misleading to declare that one is to make a comparison between the common law and civil law traditions as to the approach to the doctrine of *lis pendens* – this might give the reader the impression that the two legal traditions give the doctrine a somewhat similar status. If not misleading, it is at least a typical civil law position to make the doctrine of *lis pendens* the protagonist of a thesis. As has been shown in this thesis, the doctrine of *lis pendens* is a typical civil law tool, and it is given a more treasured role in the civil law tradition. In the common law tradition, in contrast, the doctrine of *lis alibi pendens* is typically bundled off to a much more secluded corner in the assessment of what to do when faced with two parallel proceedings. In fact, not all common law jurisdictions even regard it as a doctrine on its own, but rather a factual circumstance.

As was stated initially, this thesis has not been an attempt to suggest whether harmonization is appropriate or worth striving for. Far less has any possible harmonization measures been presented. The fact is, that I leave it unsaid whether or not the arbitration community and national courts should strive for greater consistency in their approach to parallel proceedings and *lis pendens*. Instead, what this thesis has attempted to do is to outline the phenomenon of parallel proceedings and examine it more closely, first and foremost through a comparison between the common law and civil law traditions. This has been a rewarding approach to take to the issue, since – as it turns out – the two traditions display great divergence between one another, but at the same time, show a rather uniform approach within themselves. Not only has this perspective provided an illustration of the greater differences between the common law and civil law traditions, *i.e.* this micro-perspective provides an understanding of the macro-perspective as well, but it has also showed that *how* we choose to formulate a problem will also determine *what* will come to constitute that problem.
A topic that has only briefly been considered is the emerging consensus within international commercial arbitration that some say are in progress. My own experience with arbitration is solely of academic nature, and I do not find myself to be in a position to assess and leave a judgment on if and how this amalgamation process is progressing. Nevertheless, more experienced people within arbitration have spoken of such a development. Therefore, I dare to say something about the topic in relation to my thesis. This thesis has shown that differences do remain, even though some speak of a common culture of international commercial arbitration. This thesis has illustrated that parallel proceedings and *lis pendens* is one such area, where the two traditions take rather opposing views. The common law tradition appears to be more flexible than the civil law tradition in both its formulation of the problem – *i.e.* when a parallel proceeding will be deemed to take place – as well as the solutions offered to solve it. Where a common law judge has a great discretionary power to decide the question, a civil law judge has a duty to almost mechanically apply the first-in-time rule.

Although the doctrines of *lis pendens* and *forum non conveniens* do not have as distinct roles in international commercial arbitration as in traditional civil procedure, they might still become effective in cases where an arbitral tribunal faces a parallel proceeding. This is so, since there are no clear-cut rules for the arbitrators to rely on in these situations. Hence, they might to some extent proceed from their own experiences and knowledge, and the legal tradition they were trained in will most certainly influence them in their conduct of the arbitration procedures. Not only is it in the interest of the parties to be aware of these differences before choosing arbitration as their dispute settlement method, but also to the legal actors engaging in international arbitration, as it will increase the understanding and facilitate communication. After all, we might not need to strive for uniformity and harmonization, but rather embrace the differences and plurality. Who knows, there might even be a thing or two we could learn from one another?
Bibliography

Literature


**Journals**


Court Judgments

**Court of Justice of the European Union**

*Gubisch Maschinenfabrik KG v. Giulio Palumbo*, C-144/86.

*The owners of the cargo lately laden on board the ship 'Tatry' v. the owners of the ship 'Maciej Rataj',* C-406/92.
Sweden


United Kingdom


The United States

Compare Itel Corp. v. M/S Victoria U, 710 F.2d 199 (5th Cir. 1983).
Turner Entertainment Co. v. Degeto Film GmbH, 25 F.3d 1512 (11th Cir. 1994).

Arbitral Awards


Recommendations

ILA Recommendations on Lis Pendens and Res Judicata and Arbitration, 2006,
International Law Association.
Reports