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**PARALLEL PROCEEDINGS
IN INTERNATIONAL
ARBITRATION**

A COMPARATIVE
EUROPEAN PERSPECTIVE

NADJA ERK



Wolters Kluwer

Law & Business

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Preface

Nadja Erk

What happens if a party initiates court proceedings, even though an arbitration agreement exists between the parties? How should a national court react when confronted with a jurisdictional objection that the parties have concluded a valid arbitration agreement? What is an arbitral tribunal to do if a national court addresses the question of whether the arbitral tribunal is competent to hear the case? The occurrence of parallel proceedings in national courts and arbitral tribunals gives rise to not only these, but also several additional procedural and tactical questions, both for the parties to the dispute and the adjudicatory bodies involved alike.

Although parallel proceedings should, in principle, be excluded by the parties' choice to have any future dispute settled by arbitration, situations of concomitant jurisdiction of a national court and an arbitral tribunal can nevertheless occur, because, as a general rule, both national courts and arbitral tribunals are competent to decide on their own jurisdiction.

Parties are empowered to remedy such situations of jurisdictional overlap between a national court and an arbitral tribunal. Remedies can be sought before national courts or before arbitral tribunals and the nature of the preferred remedy will depend on the specific constellation of the case. This book aims at depicting and evaluating in a European context, the pleas and actions available to parties in order to resolve the parallel jurisdiction of a national court and an arbitral tribunal.

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* A previous version of this book was approved as a doctoral thesis by the University of St. Gallen on the recommendation of Prof. Dr. Markus Müller-Chen and Prof. J.D. Gary Born in the fall semester 2013.

List of Abbreviations

Nadja Erk

AC	Law reports, appeal cases
AG	Advocate General
All ER	All England Law Reports
Anor	another
Arbitration Act	English Arbitration Act as revised in 2006
Art./Arts.	Article/Articles
ASA	Swiss Arbitration Association
BBI	(Schweizerisches) Bundesblatt
BCC	British Company Cases
Brussels Regulation	Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12
Bus LR	Business Law Review
CA	Court of Appeal
CCP	Swiss Code of Civil Procedure of 19 December 2008, SR 272
cf	confer
Ch	High Court, Chancery Division
Cit.	cited
CLC	Commercial Law Cases
Co	Company
Comm	High Court, Commercial Court
Corp(n)	Corporation
CPC	French Code of Civil Procedure as revised by Decree No 2011-48 of 13 January 2011 page "xix"
ECJ	European Court of Justice
ECR	European Court Reports
ed/eds	editor/editors
edn	edition
EFTA	European Free Trade Area
et al.	et alii/and others

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EU	European Union
EuLR	European Law Reports
European Convention	European Convention on International Commercial Arbitration adopted on 21 April 1961
EWCA Civ	Court of Appeal, Civil Division (transcript, neutral citation)
EWHC	High Court (transcript, neutral citation)
f./ff.	and following
fn	footnote
FSR	Fleet Street Reports
GmbH	Gesellschaft mit beschränkter Haftung
HL	House of Lords
IBA	International Bar Association
ICC	International Chamber of Commerce
ICC Rules	Rules of Arbitration of the International Chamber of Commerce in force as from 1 January 2012
ie	that is
ILA	International Law Association
ILPr	International Litigation Procedure
Inc	Incorporated
Int. ALR	International Arbitration Law Review
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
KB	High Court, King's Bench Division
LCIA	London Court of International Arbitration
LCIA Rules	Rules of the London Court of International Arbitration effective as of 1 January 1998
Lloyd's Rep	Lloyd's Law Reports
LLP	Limited Liability Partnership
LR QB	Law Reports: Queen's Bench cases page "xx"
Ltd	Limited Company
Lugano Convention	Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2009] OJ L147/5
NCPC	Le nouveau Code de Procédure civile français 1981
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted on 10 June 1958
NJW	Neue Juristische Wochenschrift
No(s)	Number(s)
OJ	Official Journal of the European Union
Ors	others
para./paras	paragraph/paragraphs
Pat	High Court, Patents Court
PC	Privy Council
plc	public limited company
QB	High Court, Queen's Bench Division; Law reports Queen's Bench Division
RIW	Recht der Internationalen Wirtschaft (Zeitschrift)
SC	(English) Supreme Court
SchiedsVZ	Zeitschrift für Schiedsverfahren
SPILA	Swiss Private International Law Act of 18 December 1987, SR 291
Swiss Rules	Swiss Rules of International Arbitration in force since June 2012
TCC	High Court, Technology and Construction Court
trs	translators
UK	United Kingdom
UKHL	UK House of Lords (transcript, neutral citation)
UKSC	UK Supreme Court (transcript, neutral citation)
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended in 2006
US	United States
vol(s)	volume(s)
WLR	Weekly Law Reports page "xxi"
YB Comm Arb	Yearbook of Commercial Arbitration
ZPO	German Code of Civil Procedure adopted on 12 September 1950

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(Own Illustration)

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Nadja Erk (-Kubat)

Wil, November 2013

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Chapter 1: Introduction

Nadja Erk

"Arbitration and court proceedings belong to separate worlds with their own jurisdiction and enforcement conventions, which have neglected the interface between arbitration and court jurisdiction."⁽¹⁾

Arbitration has become increasingly popular. This popularity, in turn, has led to an increase in procedural complexity, jurisdictional battles and forum shopping.⁽²⁾ A corollary of this development in international arbitration is the increasing prevalence of parallel proceedings.

The term 'parallel proceeding' is used to describe a complex patchwork of distinct legal questions which depend both on the applicable national laws contingent upon the different fora involved and on the nature of the specific facts of a case. Parallel proceedings are often said to complicate and slow down the settlement of disputes, consuming scarce resources, such as time and money. In addition, parallel proceedings are highly likely to result in the issuance of conflicting judgments/awards and hence run the risk of rendering the time-consuming and costly proceedings

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meaningless as a whole. Parallel proceedings are even regarded as the root of the erosion of the integrity of international arbitration in that they are said to cause fragmentation and unpredictability.⁽³⁾

The occurrence of parallel proceedings in national courts and arbitral tribunals concerning the same dispute is in principle excluded by the parties' choice to have any future dispute settled by arbitration. Nevertheless, situations of concomitant jurisdiction of a national court and an arbitral tribunal occur even where parties have concluded an arbitration agreement. Such a jurisdictional overlap is made possible because both the national court and the arbitral tribunal are, in general, competent to [page "1"](#) decide on their own jurisdiction. Competence-competence is the sacred principle in international arbitration, putting the arbitral tribunals on a par with judicial bodies as regards the competence to independently determine their jurisdiction. The other side of the coin, however, is that competence-competence may, by authorising the arbitral tribunal to decide on its own jurisdiction, lead to jurisdictional conflicts of competence where national courts and arbitral tribunals both declare themselves competent to hear a case.

Situations of concomitant jurisdiction between a national court and an arbitral tribunal do not, however, need to be observed helplessly, since there are remedies that parties can have recourse to in situations of jurisdictional conflicts, either before national courts or before arbitral tribunals. This book aims at depicting and evaluating the pleas and actions which parties may make use of to dissolve the parallel jurisdiction of a national court and an arbitral tribunal.

In this chapter, the scope of research of this work will be introduced first; second, an analysis of the proliferation of parallel proceedings before national courts and arbitral tribunals in practice, and the motivations for initiating such proceedings, will be analysed from different judicial players' perspectives; and finally, a definition of parallel proceedings will be attempted.

§1.01. Scope of Research

The type of parallel proceedings to be analysed, the crucial elements constituting the research question of this book and the sources of law involved in the analysis will be defined below.

[A]. Research Question

There are different constellations in which parallel proceedings may occur. Parallel proceedings may be initiated before separate national courts or separate arbitral tribunals, as well as before a national court and an arbitral tribunal, or also an arbitral tribunal and a supranational court or arbitral tribunal.⁽⁴⁾ Taking into account cross-border disputes, parallel proceedings need not be in progress in the same jurisdiction; a national court may also be confronted with proceedings pending in parallel before a foreign arbitral tribunal or vice versa. Hence, the possible constellations of parallel proceedings can be summarised in Figure 1.1.

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Figure 1.1 Overview of Possible Parallel Proceedings before National Courts and Arbitral Tribunals (Own Illustration)

	Arbitral Tribunal	Foreign Arbitral Tribunal	National Court	Foreign National Court
Arbitral Tribunal	Arbitral Tribunal	Foreign Arbitral Tribunal	Arbitral Tribunal	Arbitral Tribunal
National Court	Arbitral Tribunal	Arbitral Tribunal	National Court	National Court Foreign National Court

The analysis in this book focuses exclusively on the four constellations of parallel proceedings between a national court and an arbitral tribunal marked in bold in Figure 1.2.⁽⁵⁾

Figure 1.2 Parallel Proceedings before National Courts and Arbitral Tribunals Examined in this Book (Own Illustration)

	Arbitral Tribunal	Foreign Arbitral Tribunal	National Court	Foreign National Court
Arbitral Tribunal	Arbitral Tribunal	Arbitral Tribunal	Arbitral Tribunal 	Arbitral Tribunal
National Court	Arbitral Tribunal	Foreign Arbitral Tribunal	National Court 	Foreign National Court

Parallel proceedings are a widespread phenomenon in practice, but proceedings pending in parallel between a national court and an arbitral tribunal possess an additional characteristic: parties usually do not raise parallel proceedings in this context only for the purpose of delaying and obstructing the proceedings initiated first, but they

also seek to undermine the parties' choice for arbitration or, in the position of the party insisting on the agreement to arbitrate, to enforce the arbitration agreement and thereby exclude the national court's jurisdiction. The concurrent jurisdiction of a [page "3"](#) national court and an arbitral tribunal is therefore regarded as an especially challenging object of research, since it deals with the interface of state court litigation and arbitration. When proceedings are in progress in parallel in national courts and arbitral tribunals, two diverging legal concepts clash, which contain at their root different policy considerations, such as preserving the national court's jurisdiction to protect the party that has not validly made a binding agreement to arbitrate, on the one hand, and promoting arbitration as a dispute resolution mechanism alternative to state court litigation, on the other hand. Furthermore, unlike parallel court proceedings or parallel arbitral proceedings, where the concurrently pending proceedings can potentially be consolidated, there is no straightforward solution for conflicts of competence between a national court and an arbitral tribunal. Court proceedings and arbitral proceedings are not compatible for consolidation.

It is basically against the logic of the parties' choice to arbitrate if proceedings are initiated before a national court. The reasons and incentives to initiate parallel proceedings, however, are manifold, as will be shown below;⁶⁾ accordingly frequent is the proliferation of such parallel proceedings in practice. Hence, it is worth examining which means a party may make use of in order to limit the competence to decide on the same matter to one adjudicatory body only.

The range of jurisdictional pleas and actions which may be invoked either before the national court or the arbitral tribunal where proceedings on the same subject matter and between the same parties are in progress in parallel is therefore at the centre of this study. These pleas and actions are very distinct in character: some of them have been established against the background that arbitration agreements must be honoured at all costs and the national courts' exercise of jurisdiction should therefore be restricted to a minimalist review of core principles ('arbitration defence'); other pleas are of a rather self-restraining nature independent of an arbitration agreement involved ('plea of litispendence'); or the actions aim at actively restraining another court's or tribunal's jurisdiction ('anti-suit/anti-arbitration injunctions'); and there are also pleas to be invoked in the form of fundamental principles of international law striving to avoid procedural inefficiencies and inconsistencies ('plea of res judicata').

The provisions governing jurisdiction with regard to parallel proceedings have not yet been harmonised and organised in an international convention which would allow a homogenous portrayal. The national legal systems are still too diverse and must, therefore, be examined separately. Taking into account the wide dissemination of cross-border transactions and the international character of arbitration, the provisions dealing with the jurisdictional pleas and actions to be raised in the context of parallel proceedings in a national court and an arbitral tribunal will be analysed on a comparative basis with special regard to proceedings in Germany, France, Switzerland and England. These jurisdictions would seem to be predestined for the analysis, since they are major hubs for arbitration and therefore their arbitration laws are elaborate and tried and tested by the arbitration community. Furthermore, Germany enriches the group as a typical UNCITRAL Model Law country, as opposed to England, which has only partly aligned its arbitration law to the Model Law. The arbitration laws of these [page "4"](#) four jurisdictions have their own distinctive features, which are worth examining in depth, especially with respect to France, which is on the liberal end of the discussion as regards the arbitral tribunal's competence-competence.

Based on what has been said so far, this book aims at providing an answer to the following two questions: firstly, which jurisdictional pleas and actions are available under German, French, Swiss and English law where proceedings on the same subject matter and between the same parties are pending before a national court and an arbitral tribunal; and secondly, what are the characteristics of these jurisdictional pleas and actions and how effective are they in particular from the perspective of the national courts, the arbitrators and the parties.

In order to answer these questions, the principle of competence-competence as the prerequisite for situations of parallel jurisdiction of an arbitral tribunal and a national court needs to be elaborated at the outset: concurrent jurisdiction of a national court and an arbitral tribunal would be unthinkable if these adjudicatory bodies were not equally authorised to independently determine their jurisdiction. The principle conferring this right upon the arbitral tribunal is competence-competence. The arbitral tribunal hence is – to the same extent that is self-evident for national courts – its own master when it comes to determining the arbitral tribunal's jurisdiction. Therefore, the first main chapter (Chapter 2) of this work covers the principle of competence-competence and its forms of implementation in distinct European jurisdictions and the effects that such implementation has on the national court's competence to review arbitration agreements.

The second main chapter (Chapter 3) is dedicated to the presentation of jurisdictional pleas and actions obtainable in a comparative European context, either by the party insisting on the arbitration agreement or by the party opposing the arbitration

agreement, in situations where proceedings on the same subject matter and between the same parties are pending before a national court and an arbitral tribunal. The characteristics of the identified pleas and actions and their effectiveness will, in addition, be highlighted from the point of view of the main players in such proceedings, i.e. the national courts, the arbitrators and the parties.

[B]. Principal Sources of Law

Due to its comparative approach, the analysis in this book delivers insight into different sources of law. First of all, on the level of multinational conventions, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted on 10 June 1958 ('New York Convention'), with its broad territorial application, will be the subject of analysis in many parts of this work. Secondly, pursuant to the comparative analysis to be conducted, reference is made primarily to the national laws in force in Germany, France, Switzerland and England, but also to the UNCITRAL Model Law on International Commercial Arbitration as adopted by the United Nations [page "5"](#) Commission on International Trade Law on 21 June 1985 and amended in 2006 ('UNCITRAL Model Law'), due to its wide acceptance within Europe.⁽⁷⁾

In addition, the European Convention on International Commercial Arbitration adopted on 21 April 1961 ('European Convention'), to which Germany and France are parties,⁽⁸⁾ is not at the centre of the analysis and will be referred to only complement any analysis, since its practical importance was considerably diminished after the political changes in the eastern European countries.⁽⁹⁾ Furthermore, reference will also be made to the Brussels Regulation⁽¹⁰⁾ and the Lugano Convention⁽¹¹⁾.

Furthermore, reference will be made to the International Law Association's recommendations. Technically speaking, they do not represent hard law, but are a set of non-binding guidelines that are intended to serve as a point of reference for the arbitration and international law community. Although soft law, the International Law Association has issued useful recommendations regarding the application of the principles of *lis pendens* and *res judicata* in international arbitration, which will be dealt with in the respective chapters hereinafter.

[1]. New York Convention

The New York Convention has been a cornerstone in promoting arbitration by facilitating the recognition and enforcement of arbitral awards in over 140 countries throughout the world. Although it has not been revised since it was first signed on 10 June 1958,⁽¹²⁾ it still serves its purpose well.⁽¹³⁾

The New York Convention applies to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought as well as to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.⁽¹⁴⁾ [page "6"](#) The Convention, however, also extends to issues of a jurisdictional nature, such as authorising the national court of a contracting state to refer the parties, at the request of one of them, to arbitration when seised of an action in a matter where the parties have concluded an arbitration agreement that is not null and void, inoperative or incapable of being performed.⁽¹⁵⁾

Contracting states are free to make two reservations to the scope of application of the New York Convention on their territory: firstly, any state may, on the basis of reciprocity, declare that it will apply the Convention only to those awards made in the territory of another contracting state; secondly, any state may, upon declaration, restrict the application of the Convention to differences arising out of commercial relationships as qualified under the national law of the state making such a declaration.⁽¹⁶⁾ Switzerland has currently not invoked either the reciprocity or the commercial reservation; England and France, however, have opted to apply the reciprocity reservation in Article 1(3) New York Convention.⁽¹⁷⁾ However, the reciprocity reservation, in general, no longer has a significant impact, since an award made in a non-contracting state is a rarity with the New York Convention's broad adoption in currently 149 countries.⁽¹⁸⁾

[2]. National Arbitration Laws

The arbitration laws of Germany, France, Switzerland and England are the subject of the analysis on parallel proceedings in this study. The UNCITRAL Model Law, on which several national arbitration laws in Europe are based, is also the subject of the subsequent analysis and will therefore be introduced separately below.

[a]. UNCITRAL Model Law

The UNCITRAL Model Law is directed at states to help them reform and modernise their laws on arbitral procedure so as to harmonise the national rules on arbitration and thereby also create a common standard for the smooth conduct of arbitral proceedings. It was adopted by the United Nations Commission on International Trade Law in 1985 and was amended in 2006 to reflect worldwide

consensus on key aspects of international arbitration practice.⁽¹⁹⁾

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The UNCITRAL Model Law applies to international commercial arbitration (Article 1(1)). The states adopting the UNCITRAL Model Law, however, are not obliged to incorporate the wording of the Model Law verbatim into their legal system, but are granted flexibility in drafting new arbitration laws, although states are encouraged to make as few changes as possible.⁽²⁰⁾

[b]. German Code of Civil Procedure

The German arbitration law is integrated in the Zivilprozessordnung dated 5 December 2005 ('ZPO') where it constitutes the tenth Book. The articles on arbitration, i.e. §§ 1025-1066 ZPO, represent to a large extent a literal adoption of the UNCITRAL Model Law.⁽²¹⁾ The German arbitration law does not distinguish between domestic and international cases and hence provides a single regime for both types of arbitration.⁽²²⁾

The territorial scope of application of the German arbitration law is limited – with only few exceptions – to arbitral tribunals with their seat in Germany.⁽²³⁾ With respect to temporal application, the tenth Book of the ZPO applies to all arbitral proceedings or arbitration related court proceedings commenced after 1 January 1998.⁽²⁴⁾

[c]. French Code of Civil Procedure

The source of French arbitration law is the fourth Book of the Nouveau Code de Procédure Civile whose name was changed to Code de Procédure Civile in 2008 ('CPC').⁽²⁵⁾ On 1 May 2011, Decree No 2011-48 of 13 January 2011 entered into force and replaced the prior provisions that had been applicable since 1980/1981.⁽²⁶⁾ By this modification, a number of judge-made solutions developed over the last 30 years were incorporated into the CPC.⁽²⁷⁾ Not all provisions in the fourth Book of the CPC are directly applicable to all arbitral proceedings initiated after 1 May 2011: a distinction is made whereby provisions are applicable either if the arbitration agreement was concluded after 1 May 2011 (Articles 1442-1445, 1489, 1505(2) and (3) CPC), if the arbitral tribunal was constituted after that date (Articles 1456-1458, 1486, 1502, 1513 and 1522 CPC) or provided that the arbitral award was rendered after 1 May 2011 (Article 1526 CPC).⁽²⁸⁾

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French arbitration law makes a distinction between domestic and international arbitration: Articles 1442 to 1503 CPC concern domestic arbitration, whereas Articles 1504 to 1527 CPC pertain to cases that have international trade interests at their subject.⁽²⁹⁾ Article 1506 CPC, however, lists a significant number of provisions that are applicable to international arbitration even though they are contained in the domestic arbitration chapter, unless the parties have agreed otherwise. Furthermore the French arbitration law has not adopted, and is hence not based on, the UNCITRAL Model Law.⁽³⁰⁾

[d]. Swiss Private International Law Act

The twelfth chapter of the Swiss Private International Law Act of 18 December 1987 (SR 291; 'SPILA') applies to all arbitrations provided that the arbitral tribunal has its seat in Switzerland and that at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.⁽³¹⁾ Articles 176 to 194 SPILA thus pertain to international arbitral proceedings seated in Switzerland. The parties can, however, agree that the rules for domestic arbitration, as provided for in part three of the Swiss Code of Civil Procedure of 19 December 2008 (SR 272; 'CCP'), i.e. Articles 353 to 399 CCP, are applicable.⁽³²⁾ As an agreement of this kind is only made in exceptional cases and as the twelfth chapter of the SPILA has proven to be very well-suited to the needs of international arbitral proceedings, the analysis in this book will not consider the provisions for domestic arbitration in Articles 353 to 399 CCP.

Furthermore, it must be mentioned that the twelfth chapter of the SPILA is not based on the UNCITRAL Model Law, although there are no material differences between the two.⁽³³⁾

On 3 February 2012, the National Council's Legal Commission ('Kommission für Rechtsfragen des Nationalrates') filed a motion⁽³⁴⁾ with the Federal Council of Switzerland ('Bundesrat') applying for an update of the SPILA's provisions regarding international arbitration, in particular in light of the Swiss Federal Supreme Court's case law since the entering into force of the SPILA.⁽³⁵⁾ The twelfth chapter of the SPILA is hence due to be revised, but only selectively and with special emphasis on the relationship between national courts and arbitral tribunals with the aim of preserving Switzerland's popularity as an international arbitration hub. The National Council ('Nationalrat') and the Council of the Cantons ('Ständerat') have acceded to the motion. A first proposal is currently deliberated upon.

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[e]. English Arbitration Act

The national law on arbitration that is effective in England, the Arbitration Act, was revised in 1996 and entered into force on 31 January 1997. It is a combination of consolidation and reform of the legal principles established in the former Arbitration Acts of 1950, 1975 and 1979, in the Consumer Arbitration Agreements Act 1988, and in the common law.⁽³⁶⁾ The Arbitration Act applies where the seat of the arbitration is in England and Wales or Northern Ireland,⁽³⁷⁾ and where the arbitration proceedings have been commenced on or after 31 January 1997.⁽³⁸⁾ Specific provisions of the Arbitration Act are relevant even if the seat of the arbitration is outside England and Wales or Northern Ireland.⁽³⁹⁾

The Arbitration Act is also applicable to domestic arbitrations, although the specific rules in sections 85-87 of the Arbitration Act are relevant.⁽⁴⁰⁾ However, sections 85-87 of the Arbitration Act have never been brought into force and their repeal has long been the subject of discussions, but has not yet been effected; consequently, the law is the same as regards both domestic and non-domestic arbitrations.⁽⁴¹⁾ Furthermore, in the Arbitration Act, an explicit distinction is made between mandatory and non-mandatory provisions; the mandatory provisions take effect unless the parties have agreed otherwise,⁽⁴²⁾ while the remaining provisions are simply default provisions that may be ousted by agreement.⁽⁴³⁾ The mandatory provisions encompass UK legislation that is applicable to persons domiciled in England in all circumstances, including, for example, the Unfair Terms in Consumer Contracts Regulations 1999.⁽⁴⁴⁾

Even though England did not adopt the UNCITRAL Model Law verbatim in its Arbitration Act, the Model Law influenced the structure and the contents of the Arbitration Act substantially, as the Arbitration Act enacted the principles of the most favourable aspects of the UNCITRAL Model Law.⁽⁴⁵⁾

§1.02. Parallel Proceedings: A Common Phenomenon

When analysing the prevalence of parallel proceedings, it is worth considering what the reasons for the initiation of parallel proceedings might be and which interests the different stakeholders are likely to pursue. The stakeholders can be identified as: the parties to a dispute and their respective counsels, arbitrators and national courts.

Parallel proceedings can be initiated either by the same party, on primarily tactical grounds, or it can be the case that the parties have each raised an action and [page "10"](#) thus have different procedural positions in the two sets of proceedings. The motivations that induce a party to initiate parallel proceedings will be depicted in the following, and motives of a general nature and reasons specific to the commencement of parallel proceedings before a national court and an arbitral tribunal will be described.

[A]. General Motivations behind Commencing Parallel Proceedings

As will be shown below, parallel proceedings are initiated from the parties' or counsels' perspective either for tactical reasons, to forum-shop to gain procedural or substantive benefits, or to enhance the chances of successful enforcement of the award or judgment rendered at the end of the proceedings.

[1]. Tactics

The parties to a dispute are generally pursuing opposing interests: the claimant is usually interested in pushing the case forward and is therefore opposed to tactics that will delay the proceedings. The respondent is not generally keen on accelerating the proceedings initiated by the claimant and might therefore be more prone to obstructing the proceedings by turning to parallel proceedings, for instance. Accordingly, a creditor is more likely to choose to start proceedings in a jurisdiction that is known for its efficient judicial system, efficiently led proceedings and limited possibilities for appealing against decisions whereas, for a debtor, both a backlog in the judiciary and a differentiated and complicated appeals procedure will be to his advantage.⁽⁴⁶⁾ Dilatory tactics may, at times, also be used to gain time in order to hide assets that are in danger of being adjudicated by a judgment or award, or to blur the paper trail of the relevant money transfers. A creditor, by contrast, might be forced to institute parallel proceedings in different jurisdictions if the debtor's assets are situated in different countries.⁽⁴⁷⁾

Not only is defending a line of argumentation in parallel proceedings or raising the necessary objections time-consuming, the duplication of proceedings also gives rise to substantial extra costs; deep-pocket litigants may therefore use parallel proceedings as a means of exerting financial pressure upon a party. A party might also resort to financial or other economic pressure (including, the threat of reputational damage) for tactical reasons, in other words, to force the opposing party into a settlement of the dispute between the parties.⁽⁴⁸⁾ The initiation of parallel proceedings might, however, also cause offence and hence prejudice negotiations with financially strong opponents.⁽⁴⁹⁾

Parallel proceedings may also be initiated not for strictly tactical reasons but simply as a precaution against forfeiting one's rights under an ambiguous jurisdiction or arbitration clause. A further instance where the initiation of parallel proceedings is [page "11"](#) required as a precautionary measure is where it is not quite clear in which forum it will be possible to interrupt the limitation period; in this event, counsel is obliged (on the basis of his duty of care) to advise his client to initiate proceedings in all possible fora so as to prevent the claim from becoming time-barred.⁽⁵⁰⁾

[2]. Forum Shopping

A party may also use parallel proceedings as a means of shopping around for a suitable jurisdiction, or seat of the arbitral tribunal, with the corresponding *lex arbitri*.⁽⁵¹⁾ Parties may, in particular, in the absence of contractual privity or, in the case of contracts that lack any or any valid or clear-cut choice-of-forum provision, be tempted to shop around for a suitable forum.⁽⁵²⁾ Forum shopping is common in court litigation and the motivation to shop for a specific forum is surprisingly similar to the motivation in arbitral forum shopping.⁽⁵³⁾ A party may consider it beneficial for the presentation of its case to litigate in a specific jurisdiction, be it because of the applicable procedural rules, the determination of the applicable law or the language the proceedings are conducted in. These same reasons may be put forward to initiate arbitral proceedings with an arbitral tribunal that has its seat in a specific jurisdiction, as every jurisdiction has its own arbitration law, and, in addition, the smooth conduct of the arbitration is frequently dependent on the support of the national courts.

Further procedural benefits resulting from forum shopping may be: ⁽⁵⁴⁾ the efficiency with which defence and recovery is granted by national courts, in particular with regard to interim measures; the existence of pre-trial discovery to furnish a party with the crucial pieces of evidence to prove its case;⁽⁵⁵⁾ or, for example, the determination of the costs of the proceedings, whether it be the existence of court rates or contingency fees.⁽⁵⁶⁾ A party might also consider starting a second litigation in a different jurisdiction if it intends to raise a counterclaim and this is not possible under the procedural rules governing the first proceedings initiated.⁽⁵⁷⁾ The governing law at the forum or arbitral seat might even directly impact the admissibility of parallel proceedings.⁽⁵⁸⁾ A party may additionally make tactical use of a jurisdiction's acceptance of injunctions enjoining a party from initiating or continuing court or arbitral proceedings.⁽⁵⁹⁾ From a procedural perspective, a party may aim to frustrate the opposing party's efforts to initiate parallel proceedings by being the first to validly institute legal proceedings, thereby making its suit the first one pending in court; such an endeavour [page "12"](#) can, of course, only be successful if the jurisdiction adheres to the first-in-time rule, which is not the case per se in common law countries, for example.⁽⁶⁰⁾

If the parties have not agreed on the applicable law, they might also intend to 'forum-shop' for a particular law. The applicable national law may be decisive for the legal determination of questions regarding the duration and the start of limitation periods, or the amount of damages that can be requested.⁽⁶¹⁾ In addition, the parties may set out to obtain a 'home' advantage by initiating proceedings in their home forum – with an eye to the applicability of their home substantive law. This home substantive law might not only facilitate the legal argumentation but could also lead to the appointment of arbitrators with a specific nationality or legal background.⁽⁶²⁾

The legal principles governing the procedure for recognising and enforcing judgments and awards are also decisive for parties to parallel proceedings,⁽⁶³⁾ as there is the risk that the race to judgment might lead to a decision that is incapable of recognition or enforcement. Furthermore, the law of the seat of arbitration generally dictates the legal standard for the annulment of any award and is therefore paramount to the parties.⁽⁶⁴⁾

At times, forum shopping is motivated simply by practical considerations: the jurisdiction is the nearest to the party's seat or domicile in geographical terms, or the relevant pieces of evidence are situated in a specific jurisdiction – the construction site to be inspected is located in the jurisdiction that is to be chosen, for example, or the witnesses to be questioned are domiciled there.⁽⁶⁵⁾ In addition, a party's wish to retain its regular local attorneys is also a consideration of a practical nature.⁽⁶⁶⁾

[B]. Specific Interests Involved in Parallel Proceedings before National Courts and Arbitral Tribunals

If the parties have concluded an arbitration agreement, the initiation of parallel proceedings before a national court and an arbitral tribunal is characterised by a further component, i.e., the parties have failed to honour an agreement previously made between the parties and have involved a judicial body that has deliberately been excluded from adjudicating on the matter. Hence, two different sets of interests involved need to be distinguished in the following: the parties' and their counsels' interests in commencing parallel proceedings, on the one hand, and the judiciary's and arbitration community's interests in limiting the proliferation of parallel proceedings, on the other hand.

[1]. Parties' Interests

The party insisting on arbitration may commence arbitral proceedings in parallel to already pending court proceedings to give authority to the arbitration clause, whereas the party opposing the enforcement of the arbitration agreement who has initiated court proceedings may invoke the invalidity of the agreement to arbitrate. A counsel must fulfil his duty of care and preserve the client's interests. Based on his duty of care, a counsel is, at times, obliged to initiate parallel proceedings,⁽⁶⁷⁾ such as to contest the jurisdiction of a national court or an arbitral tribunal where the agreement between the parties regarding jurisdiction or arbitration is controversial and leaves room for different interpretations.

Apart from pathological clauses, unilateral arbitration clauses provide a further example of a situation where a counsel may be obliged to file a suit at the competent national courts as well as initiate arbitral proceedings in order to preserve the party's rights: unilateral arbitration clauses grant one of the parties to a dispute the option of either demanding arbitration or insisting upon ordinary litigation.⁽⁶⁸⁾ As long as the party being granted the option has not exercised it, the opposing party may wish to initiate proceedings before both an arbitral tribunal and a national court, so as not to run the risk of having chosen the wrong forum. That is to say, if a party were to initiate arbitration proceedings on its own and the other party did not participate in the arbitration proceedings, the party that was entitled to choose would not be precluded from exercising its option to litigate by the fact of the other party having already commenced arbitration.⁽⁶⁹⁾

But it is not only in situations where the parties have an unclear or allegedly invalid arbitration agreement that they might be driven to bring their claims before a national court: the strategic reasons for forum shopping, the lack of trust in arbitration, or less cogent reasons, such as delaying the proceedings and gaining time, may nevertheless induce a party to an unambiguous arbitration clause to initiate parallel proceedings before a national court.

[2]. Judiciary's and Arbitration Community's Concerns

From the judiciary's and arbitration community's perspective, both the judges and the arbitrators are interested in conducting the proceedings smoothly, in compliance with the applicable procedural rules and the general procedural standards, and in concluding them with the issuance of an enforceable judgment or award.

In jurisdictions that support arbitration procedures, the judiciary is geared to respecting the parties' choice to have any dispute arising from a contractual relationship decided by an arbitral tribunal. But, at the same time, the national courts offer a stage to those parties who argue that they have not validly subordinated all their claims from a contractual relationship to arbitration. The respect of party autonomy and the [page "14"](#) protection of a party's rights not to be forced involuntarily into arbitration proceedings are interests that are present simultaneously when the judiciary deals with parallel proceedings. In other words, for national courts, parallel proceedings give rise to a dilemma situation. The parties may, at times, feel tempted to deliberately set competition between the fora of national courts and arbitral tribunals for purely tactical reasons in light of these conflicting interests of the judiciary.

Furthermore, the international judicial order is also in jeopardy of being unnecessarily fragmented in view of the danger of conflicting decisions resulting from parallel proceedings.⁽⁷⁰⁾ Likewise, arbitration institutions also have an interest in the smooth conduct of arbitral proceedings and in the enforceability of awards rendered in proceedings administered by them.

In summary, viewed in terms of the orderly administration of justice, multi-fora disputes may generate substantial concerns.⁽⁷¹⁾ Irreconcilable decisions, which may result from parallel proceedings, further highlight the lack of consistency of the legal order and may jeopardise its legitimacy and credibility.⁽⁷²⁾ Hence the adjudicatory bodies' interests in the predictability and the stability of the law, in particular, call for the diligent handling of parallel proceedings. In addition, from a financial standpoint, a judicial system's resources are limited and the duplication of proceedings will undoubtedly fail to represent the most efficient use of money.⁽⁷³⁾

[C]. Conclusion

The above analysis of the interests that are involved emphasises that the reasons for initiating parallel proceedings are manifold: apart from the party's intent to enforce the arbitration agreement or to contest the validity of the agreement to arbitrate, the parties' motivation to initiate a set of proceedings in parallel to proceedings already in progress usually boils down to the expectation that some other forum than the one before which proceedings have already been commenced might produce better results. With regard to parallel proceedings before a national court and an arbitral tribunal, such a favourable outcome might be referred to the arbitral tribunal adjudicating the matter instead of the national courts, or vice versa – based on a lack of trust in arbitration – to the national courts instead of an arbitral tribunal. In other words, the respective advantages to

be expected in either litigating or arbitrating in a specific jurisdiction constitute the main motivation for initiating parallel proceedings.

The spread of parallel proceedings is further influenced by external factors, such as the litigation culture, the expediency of proceedings or the arbitration-friendliness of a jurisdiction: a party is, on the one hand, more inclined to file a parallel action where it expects benefits from running to an advantageous forum; on the other hand, the *page "15"* expense of initiating parallel court proceedings, in spite of a valid arbitration agreement, might act as a disincentive where it is likely that the court proceedings will be vacated in an arbitration-friendly jurisdiction.

The range of interests – either legitimate or abusive – involved in initiating proceedings in parallel before a national court and an arbitral tribunal shows that parallel proceedings will continuously occur as a means of securing a party's choice of jurisdiction, while also entailing the risk of being abused for other reasons of a non-protective nature.

§1.03. Definition of Parallel Proceedings

Parallel proceedings are generally said to occur when parties bring the same or a closely related conflict before multiple adjudicators.

⁽⁷⁴⁾ The requirements for proceedings to qualify as parallel vary depending on the legal system, and the applicable multinational conventions, doctrines and case law. However, as will be seen, there is no general definition of parallel proceedings, but merely criteria to identify undesirable concurrent proceedings which can be derived from doctrines such as, in particular, the *lis pendens* doctrine.⁽⁷⁵⁾

[A]. Definition in the International Law Association's Recommendations

The International Law Association ('ILA') defined parallel proceedings in its Final Report on *Lis Pendens and Arbitration of 2006* 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."*⁽⁷⁶⁾ The requirements of party identity and identity of subject matter are thus not applied in a restrictive way in this Report.

This broad definition also gives justice to the common law perspective: from an English-law perspective and outside the application of the Brussels and the Lugano regime, it is not a strict requirement in a common law court for the parallel proceedings to be between the same parties and/or concern the same cause of action.⁽⁷⁷⁾ There is no necessity to provide a complex definition and case law for the interpretation of parallel proceedings due to a common law court's inherent jurisdiction to stay its own proceedings in the interests of justice by considering the existence of parallel proceedings only as an additional factor relevant to the determination of the appropriate forum.⁽⁷⁸⁾ Since no direct legal consequence is derived from the existence of parallel proceedings under the *forum non conveniens* doctrine (as opposed to under the *lis pendens* rule),⁽⁷⁹⁾ the term 'parallel proceedings' is used in a broader context, not necessarily requiring identity of the cause of action and of the parties.⁽⁸⁰⁾

[B]. Definition in the Brussels Regulation and Lugano Convention

The Brussels Regulation is a parallel convention to the Lugano Convention; as a result of the revision of the Lugano Convention, the two treaties have been harmonised so that their content is, to a large extent, identical and their close interrelation has consequently been strengthened.⁽⁸¹⁾ Within the scope of these multilateral treaties, the application of the Brussels Regulation prevails over the Lugano Convention regarding cases involving the Member States of the European Union only, whereas in connection with the Lugano States⁽⁸²⁾ the Lugano Convention prevails over the Brussels Regulation.⁽⁸³⁾ Furthermore, Article 1(1) of Protocol 2 to the Lugano Convention is aimed at extending this parallelism in the interpretation of the Lugano and the Brussels regime to case law, in so far as any court applying and interpreting the Lugano Convention must pay due account to the principles laid down by any relevant decision rendered by the courts of the contracting states and by the European Court of Justice ('ECJ').⁽⁸⁴⁾ As a consequence, the Lugano States are also entitled to participate in the proceedings for a preliminary ruling brought before the ECJ.⁽⁸⁵⁾ The Lugano States are, however, not obliged to adopt the case law developed by the ECJ, but to contemplate it;⁽⁸⁶⁾ nevertheless, one can imagine only select few cases where it might be justified for the Lugano States to deviate from the ECJ's case law; the Swiss Federal Supreme Court considered such an exception to exist where the ECJ's case law is evidently motivated by aims of the European Union which are not equally shared by the Lugano States.⁽⁸⁷⁾

The Brussels Regulation emphasises in its preamble that one of the aims followed by the harmonisation in the regulation is to minimise parallel proceedings in civil and commercial matters and to ensure that irreconcilable judgments will not be issued;⁽⁸⁸⁾ in more general

terms, the Brussels-Lugano regime seeks to avoid a multiplicity of jurisdictions being competent in parallel, with a view to promoting uniformity, legal [page "17"](#) certainty and the protection of litigants.⁽⁸⁹⁾ Consequently, the Brussels Regulation also contains a definition of the types of concurrent proceedings to be reduced; this definition can be found in section 9, Articles 27 to 30 Brussels Regulation, dealing with *lis pendens* and related actions. The respective provisions' wording in the Lugano Convention is congruent with that in the Brussels Regulation; the comments made and the literature and case law cited to Articles 27 and 28 Brussels Regulation in the following, therefore, also pertain to the interpretation of Articles 27 and 28 Lugano Convention, even if not specifically mentioned.

[1]. Article 27 of the Brussels Regulation and the Lugano Convention

Article 27 Brussels Regulation refers to concurrent actions before the courts of the Member States as "*proceedings involving the same cause of action and between the same parties*"; in the context of the Brussels Regulation, identity of the parties and the subject matter is required. These two requirements have been interpreted extensively by the ECJ and, therefore, their meaning has been considerably broadened as described hereinafter.⁽⁹⁰⁾

[a]. Identical Cause of Action: The ECJ's 'Kernpunkttheorie'

Concerning the requirement that the cause of the concurrent actions be the same, the interpretation of this criterion does not depend on the procedural law of the courts in the Member States, but needs to be given an independent regulation interpretation.⁽⁹¹⁾ The ECJ held in *Gubisch Maschinenfabrik KG*⁽⁹²⁾ that, where the same parties were suing each other in two legal proceedings in different Member States based on the same contractual relationship, their actions have the same subject matter for the purpose of Article 27 Brussels Regulation, since the concept of the same cause of action cannot be restricted so as to mean two claims which are entirely identical.⁽⁹³⁾ In a later decision, *The Tatry*⁽⁹⁴⁾, the ECJ concluded that the cause of action is identical in the sense of Article 27 Brussels Regulation, if the ends envisaged by the parallel actions are the same (identical 'object of the action'), and if the facts and the rule of law relied on as [page "18"](#) the basis of the actions are the same (identical 'cause of action').⁽⁹⁵⁾ In other words, the action's purpose, as well as its basis, i.e. its factual situation and the legal questions, need to be the same.⁽⁹⁶⁾ This dictum also reflects the prevalent wording of the identical cause of action requirement in Article 27 Brussels Regulation in other languages;⁽⁹⁷⁾ the French version, for instance, holds that the object and the cause of the concurrent actions need to be the same ("*le même objet et la même cause*").⁽⁹⁸⁾ In *Maersk Olie & Gas A/S*⁽⁹⁹⁾, the ECJ furthermore confirmed that – when applying Article 27 Brussels Regulation – it is necessary to examine whether the concurrent proceedings involve the same subject matter and cause of action and whether those sets of proceedings have been brought between the same parties; "*those three cumulative conditions*" must be satisfied for there to be a situation of *lis pendens* in the sense of Article 27 Brussels Regulation.⁽¹⁰⁰⁾

The relief sought by the parties does not need to be identical for the claims to involve the same subject matter:⁽¹⁰¹⁾ as a result, even if one party were to request damages in one forum and the other to seek declaratory relief in the concurrent proceedings in another forum in a Member State, the cause of action within the meaning of Article 27 Brussels Regulation can still be considered identical.⁽¹⁰²⁾ In *Gubisch Maschinenfabrik KG*, the cause of action was held to be identical by the ECJ, even though one party was suing the other based on a contractual relationship and the other party was asking for a declaration that the contract was inoperative.⁽¹⁰³⁾ Similarly, [page "19"](#) in another leading case, *The Tatry*, one party asked for damages, whereas the other sought a declaration that it was not liable for damages.⁽¹⁰⁴⁾

In light of the purpose of Article 27 Brussels Regulation, i.e. to avoid conflicting judgments being delivered, the ECJ extended the scope of this article to cases that raise fundamentally the same legal questions:⁽¹⁰⁵⁾ in other words, the claims do not need to be entirely identical, but the heart of the two actions must be the same ('Kernpunkttheorie');⁽¹⁰⁶⁾ once the same subject matter lies "*at the heart of the two actions*"⁽¹⁰⁷⁾, thereby creating the risk of non-recognition under Article 34(4) Brussels Regulation, the parallel proceedings involve the same cause of action.⁽¹⁰⁸⁾ The requirement that the cause of action be identical is thus interpreted and applied extensively within the scope of the Brussels Regulation.⁽¹⁰⁹⁾ In addition, the Member States' courts, by and large, understand and respect the necessity of an autonomous and broad interpretation of the concept of the cause of action.⁽¹¹⁰⁾

[b]. Identity of the Parties: The ECJ's Test of Identity and Indissociability of Interests

As regards the requirement of identity of the parties, the ECJ has also opted for an independent interpretation.⁽¹¹¹⁾ It has concluded that proceedings may be considered as being between the same

parties on the grounds that they pursue the same interest with their actions.⁽¹¹²⁾ In *Drouot Assurances SA*⁽¹¹³⁾, the ECJ held that where an insurer invokes its right of subrogation to defend proceedings in the name of the insured person without the latter being in a position to influence the proceedings, the insurer and the insured person may be regarded as the same party for the purposes of Article 27 Brussels Regulation, if (with regard to the subject matter of the two disputes) the [page "20"](#) interests of the insurer and the insured in the action are *"identical and indissociable."*⁽¹¹⁴⁾ The ECJ, in addition, considers the interests to be identical and indissociable where a judgment delivered against one of the parties sharing the same interests would have the force of res judicata against the other.⁽¹¹⁵⁾

In another leading decision regarding the interpretation of Article 27 Brussels Regulation, the ECJ held that, where two actions involve the same cause of action and some but not all of the parties to the second action are equal to the parties to the action commenced earlier, the court seised second is required to decline jurisdiction, but only to the extent to which the parties to the proceedings before it are also parties to the action previously started.⁽¹¹⁶⁾

Furthermore, parties are also considered the same in the sense of Article 27 Brussels Regulation if they have assigned their contractual rights to a third party which continues to pursue the pending proceedings in the assignor's position; even though the assignor and assignee may not be the same legal entities, their interests are most likely to be identical and indissociable.⁽¹¹⁷⁾

The parties to the parallel proceedings do not therefore necessarily have to be identical to the ones in the proceedings simultaneously pending in a different forum. In addition, it does not affect the fulfilment of the requirement of the identity of the parties if their procedural position in each proceedings is not the same;⁽¹¹⁸⁾ this should be emphasised, since the respondent in one set of proceedings often tries to undermine the latter forum's jurisdiction by initiating a second set of proceedings as the claimant in another forum.

The identity and indissociability of interests test has thus replaced the strict application of the identity of the parties requirement. The precondition that the parties be the same has changed from a formal to a substantive one as the interests pursued by the parties need to be analysed.⁽¹¹⁹⁾

[2]. Article 28 of the Brussels Regulation and the Lugano Convention

For all the cases that do not meet the requirements in Article 27 Brussels Regulation, Article 28 Brussels Regulation holds that *"where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its [page "21"](#) proceedings."* According to Article 28(3) Brussels Regulation, 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."* Consequently, an independent interpretation applies to the term 'related actions'; it is thus not left to the discretion of the Member States' national procedural law to specify the meaning of related actions.⁽¹²⁰⁾

The ECJ gives a broad interpretation to the relationship between the actions as required by Article 28 Brussels Regulation: this article is to cover all cases where there is a risk of conflicting decisions, even if they can be enforced in separate proceedings and their legal consequences are not mutually exclusive.⁽¹²¹⁾ Article 28 Brussels Regulation does not call for identity of the parties or for the cause of action to be identical; the determinant for the actions to be related is the identical set of facts;⁽¹²²⁾ the connection between the actions is therefore to be interpreted broadly.

[3]. Interim Conclusion

In conclusion, the elements of the definition of parallel actions in the Brussels Regulation have been significantly broadened by the ECJ's case law. The possibility for a Member State's court to stay the proceedings where related actions are pending, according to Article 28 Brussels Regulation, encompasses an even wider interpretation of parallel actions. Due to the comprehensive understanding of the requirements of the 'same cause of action' and the 'same parties' as extended by case law, concurrent actions need not necessarily be raised between the same parties claiming identical relief, but the parties must pursue the same interests with their actions, and the main issues to be dealt with by the respective courts need to be the same.

[C]. Temporal Definition of Parallel Proceedings

When defining parallel proceedings, the reference to time is also of the essence. So far, parallel proceedings have been defined by considering the criteria established through the respective lis pendens provisions. For the lis pendens rules to be applied, the parallel proceedings must be pending simultaneously. There are, however, also other types of proceedings that might be qualified as parallel proceedings for the purpose of this book, although they are

not simultaneously pending.

It needs to be considered whether successive proceedings, where one adjudicatory body is seised of a dispute that another court has already decided on earlier,⁽¹²³⁾ can be qualified as parallel proceedings. In order to capture various forms of parallel [page "22"](#) proceedings and pursuant to the aim of reducing conflicting decisions, consecutive proceedings need to be included in the definition of concurrent proceedings. Likewise, one important jurisdictional plea against parallel proceedings can be found in the principle of *res judicata*, which comes into play only after a decision has already been rendered, and proceedings are initiated again on the same subject matter and between the same parties.

For the purpose of analysing the pleas and actions which may be raised with the concurrent jurisdiction of a national court and an arbitral tribunal and in order not to limit the scope of analysis due to a narrow definition of parallel proceedings, parallel proceedings will encompass both simultaneous and consecutive proceedings that fulfil the substantive criteria of identity of the subject matter in dispute and of the parties.

[D]. Conclusion

As has been seen, there is no general definition of parallel proceedings; on the contrary, it appears that parallel litigation or arbitration is a generic term referring to a wide range of situations in which disputes that are connected to some extent, or which have some similarities, are brought before different adjudicators.⁽¹²⁴⁾ It should be noted in passing that the definitions of parallel proceedings as set out above evolve from the requirements for *lis pendens*. These definitions, hence, seem to mainly serve the purpose of triggering the application of the *lis pendens* rule, but are equally suited to serve as criteria to allow a conclusion on the features of parallel proceedings in general.

With regard to parallel proceedings before a national court and an arbitral tribunal, the ILA proposes a broad definition of concurrent proceedings, stating that the parties and one or more of the issues at stake need to be the same or substantially the same.

As has been shown, the ECJ has also considerably extended the notion of parallel proceedings under the *lis pendens* rule in Article 27 Brussels Regulation (and in the Lugano Convention likewise). The ECJ's case law in this respect is compatible with the overarching objective of section 9 of the Brussels Regulation ('*lis pendens* – related actions'), i.e. "*in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom.*"⁽¹²⁵⁾

A broad definition of parallel proceedings, encompassing case constellations in which the criteria for the identity of the cause of action and the parties is interpreted on a wide basis is, moreover, more capable of reflecting reality and can thereby cover the majority of concurrent actions.⁽¹²⁶⁾ In particular, when taking into account the variety of corporate structures, the parties are often not identical, but belong to the same group of companies or to the same economic entity, or they may have a controlling stake in [page "23"](#) a company and thereby pursue identical interests.⁽¹²⁷⁾ With regard to the requirement that the subject matter in dispute be the same, the identity test is to be applied on an extensive basis, encompassing both the actions where the main issues are identical, and actions where the issues are so closely related that it seems sensible, in light of the efficiency of legal proceedings and the coherence of the judicial system, to consider them as concurrent.

The definition of parallel proceedings on which the analysis in this work is based welcomes the ECJ's broad interpretation of the identity of the cause of action and of the parties. In other words, whenever proceedings (be they strictly parallel or consecutive) ought to be adjudicated in one and the same forum for the sake of avoiding the costs of duplicative proceedings, the risk of inconsistent decisions, and even double recovery, they are herein considered to be parallel.

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¹ van Houtte (2001), 53.

² Rivkin, 270.

³ Gallagher, para. 17-2.

⁴ Cf ILA Report on *Lis Pendens*, para. 1.8.

⁵ In the context of this book, reference to proceedings before a national court pertains to civil litigation only and does not include parallel administrative or criminal proceedings before national courts or regulatory authorities. The term 'national court' does, furthermore, not include supranational courts. For the purpose of this study, it is also assumed that, where reference is made to parallel proceedings being pending, parallel proceedings have been validly commenced and are ongoing. As regards any reference to arbitration proceedings, this relates to international commercial arbitration; the rules applicable to domestic arbitration will not be dealt with.

⁶ See Chapter 1, §1.02 below.

⁷ Austria, Bulgaria, Croatia, Denmark, Estonia, Georgia, Germany, Greece, Hungary, Ireland, Lithuania, Malta, Norway, Poland,

- Russian Federation, Serbia, Slovenia, Spain, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland (status as on 15 February 2014): <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>).
- ⁸ Cf for the status of ratification <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mdsg_no=XXI-2&chapter=22&lang=en> accessed 15 February 2014.
- ⁹ Böckstiegel/Kröll/Nacimiento, General Overview para. 20; cf Lionnet/Lionnet, 93 f.
- ¹⁰ Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12, hereinafter 'Brussels Regulation'.
- ¹¹ Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2009] OJ L147/5, hereinafter 'Lugano Convention'.
- ¹² Recommendations regarding the wide use of modern communication technology (Art. II(1) of the New York Convention) and the strengthening of the more favourable law provision (Art. VII(1) of the New York Convention) have been since introduced: 2006 – Recommendation regarding the interpretation of article II(2) and article VII(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
- ¹³ For reviews of the New York Convention's first 50 years of successful existence cf: *Albert Jan van den Berg (ed), 50 Years of the New York Convention, ICCA Congress Series No 14* (Kluwer Law International 2009).
- ¹⁴ Art. I(1) New York Convention. For a detailed essay on the territorial scope of the New York Convention cf: Rubinstein/Fabian, 91-137.
- ¹⁵ Art. II(3) New York Convention.
- ¹⁶ Art. I(3) New York Convention; cf Kronke, 6 f.; Bagner, 32 ff.; van den Berg (1994), 12 ff., 51 ff.; Pryles, 161-185.
- ¹⁷ For a status report on the adoption of the New York Convention cf: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 15 February 2014; Rubinstein/Fabian, 111 f.
- ¹⁸ Pryles, 184; Bagner, 32; van den Berg (1994), 13.
- ¹⁹ Introductory comments on the homepage of the United Nations Commission on International Trade Law <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html> accessed 15 February 2014. A significant number of states have adopted the UNCITRAL Model Law; the exact status can be accessed on the mentioned website.
- ²⁰ UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, 23 f. (available under: <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 15 February 2014).
- ²¹ Böckstiegel/Kröll/Nacimiento, General Overview para. 12; Geimer (Zöller), Vor § 1025 para. 9; Lionnet/Lionnet, 135 f.
- ²² Böckstiegel/Kröll/Nacimiento, General Overview para. 12; Münch (2013), § 1025 para. 1.
- ²³ § 1025 ZPO.
- ²⁴ Böckstiegel/Kröll/Nacimiento, General Overview para. 15.
- ²⁵ Delvolvé/Pointon/Rouche, xv.
- ²⁶ Vidal, paras 22 ff.
- ²⁷ Vidal, para. 25.
- ²⁸ Vidal, para. 26.
- ²⁹ Cf Vidal, paras 27 ff.
- ³⁰ Delvolvé/Pointon/Rouche, para. 21.
- ³¹ Art. 176(1) SPILA.
- ³² Art. 176(2) SPILA.
- ³³ Hochstrasser/Fuchs, Einleitung zum Zwölften Kapitel paras 186 ff.
- ³⁴ '12.3012 – Motion: Bundesgesetz über das internationale Privatrecht. Die Attraktivität der Schweiz als internationalen Schiedsplatz erhalten.'
- ³⁵ Cf for the status and further information on the motion: <http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20123012> accessed 15 February 2014.
- ³⁶ Merkin/Flannery, 1.
- ³⁷ Section 2(1) Arbitration Act.
- ³⁸ Merkin/Flannery, 8.
- ³⁹ Sections 2(2), (3), and (5) Arbitration Act.
- ⁴⁰ Cf Hochstrasser/Fuchs, Einleitung zum Zwölften Kapitel para. 108.
- ⁴¹ Merkin/Flannery, 8; cf Hill/Chong, para. 20.2.5.
- ⁴² Section 4 Arbitration Act.
- ⁴³ Merkin/Flannery, 27.
- ⁴⁴ Merkin/Flannery, 26 f.
- ⁴⁵ Heigl, 61 f.; Merkin/Flannery, 2 ff. For an overview of the points in which the Arbitration Act differs from the UNCITRAL Model Law: Merkin/Flannery, 12; Briggs/Rees, para. 8.02.
- ⁴⁶ McGuire, 21 f.
- ⁴⁷ Cromie, 473.
- ⁴⁸ Schmehl, 215; Hau, 37; McGuire, 22.
- ⁴⁹ Cf Schneider (1990), 118.
- ⁵⁰ Cf McGuire, 4.
- ⁵¹ Kreindler (2010), 128.
- ⁵² Kreindler (2005), 159, 166 ff.

- ⁵³ Cf Kreindler (2005), 176 ff.
- ⁵⁴ For an illustration of procedural inducements for forum shopping cf also: Bell, paras 2.28 ff.
- ⁵⁵ Regarding the influence of pre-trial discovery and disclosure on forum shopping cf. Bell, paras 2.23 ff.
- ⁵⁶ Hau, 30 f.; Kreindler (2005), 161. For further references cf. McGuire, 23.
- ⁵⁷ Hau, 46.
- ⁵⁸ Kreindler (2005), 178.
- ⁵⁹ Hau, 39 f.
- ⁶⁰ For a detailed discussion of the *lis pendens* principle and the doctrine of *forum non conveniens* see Chapter 3, §3.01[B][1] below.
- ⁶¹ Hau, 31 ff.; Kreindler (2005), 160, cf also 172 ff. With regard to the force of attraction emanating from jury trials and higher damages cf. Bell, paras 2.17 ff.
- ⁶² Kreindler (2005), 176.
- ⁶³ Hau, 33; Kreindler (2005), 160, 177.
- ⁶⁴ Kreindler (2005), 177.
- ⁶⁵ Hau, 33 f.
- ⁶⁶ Kreindler (2005), 157. For a concise overview of the motives for forum shopping cf. Shany, 131 ff.
- ⁶⁷ Cf Balkanyi-Nordmann, 185.
- ⁶⁸ Smit, 393; Nesbitt/Quinlan, 134.
- ⁶⁹ Sutton/Gill/Gearing, para. 2-018.
- ⁷⁰ Cf Kreindler (2005), 157.
- ⁷¹ Hau, 47.
- ⁷² Cuniberti, 414; Shookman, 362 f.; McGuire, 40 ff.
- ⁷³ Shookman, 362; Cuniberti, 414.
- ⁷⁴ Shookman, 362.
- ⁷⁵ Cf Cuniberti, 382.
- ⁷⁶ ILA Report on *Lis Pendens*, paras 5.6, 5.13. Most parts of this report have also been published in: de Ly/Sheppard (Final Report on *Lis Pendens*), 3-34.
- ⁷⁷ ILA Report on *Lis Pendens*, para. 2.12.
- ⁷⁸ ILA Report on *Lis Pendens*, para. 2.8, 2.12; cf Collins (*Dacey, Morris & Collins*), para. 12-043.
- ⁷⁹ See for a discussion of these doctrines Chapter 3, §3.01[B][1] below.
- ⁸⁰ Cf Hau, 132; Fawcett, 30.
- ⁸¹ Cf Oetiker/Weibel, Einleitung paras 26 ff.; cf Markus/Giroud, 230; Kropholler/von Hein, Einl EuGVO para. 10; Magnus, Introduction para. 31.
- ⁸² Meaning the contracting states of the Lugano Convention which are not at the same time Member States of the European Union, i.e. Switzerland, the Kingdom of Norway and Iceland.
- ⁸³ Art. 64(1) and (2) of the Lugano Convention; cf Kruger, para. 1.71; Joseph, para. 2.113.
- ⁸⁴ Cf Markus/Giroud, 244; Kropholler/von Hein, Einl EuGVO paras 109 ff.; Magnus, Introduction para. 31; Grolmund, Allgemeine Einleitung paras 22 ff.; Joseph, para. 2.116.
- ⁸⁵ Art. 2 of the Protocol 2 to the Lugano Convention.
- ⁸⁶ The Swiss Federal Supreme Court, however, stated in its recent case law that the Swiss courts, in principle, have to follow the ECJ's case law regarding the interpretation of the Lugano Convention; the Supreme Court furthermore justified this reasoning with the aim to integrate Switzerland in an European area of unified jurisdiction in civil and commercial matters (Swiss Federal Supreme Court Decision 135 III 185 consideration 3.2).
- ⁸⁷ Swiss Federal Supreme Court Decision 135 III 185 consideration 3.2; cf Kropholler/von Hein, Einl EuGVO para. 111.
- ⁸⁸ Recital 15 in the Brussels Regulation's preamble in connection with Art. 1(1) Brussels Regulation.
- ⁸⁹ Layton/Mercer, para. 11.019.
- ⁹⁰ With regard to the definition of 'action' in the wording of Arts 27 and 28 Brussels Regulation, the applicable law at the place of the competent court is to determine the exact scope of the measures to be considered as causing proceedings to be raised in parallel (cf Geimer (2010), Art. 27 para. 19). For the sake of the analysis below, it is assumed that the actions are validly initiated in the contracting states and hence give rise to proceedings pending in parallel.
- ⁹¹ 'Autonome Auslegung'; cf Case 144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861, para. 11; Case C-406/92 *Tatry v Maciej Rataj* [1994] ECR I-5439, para. 47. See also Geimer (2010), Art. 27 para. 29; Schmehl, 137 f.; McGuire, 79; cf ILA Report on *Lis Pendens*, para. 2.45.
- ⁹² Case 144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861.
- ⁹³ Case 144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861, paras 15 ff. For a discussion of this case cf also: Bäumer, 122 ff.
- ⁹⁴ Case C-406/92 *Tatry v Maciej Rataj* [1994] ECR I-5439.
- ⁹⁵ Case C-406/92 *Tatry v Maciej Rataj* [1994] ECR I-5439, paras 38 ff.; Collins (*Dacey, Morris & Collins*), para. 12-065. For a discussion of the *Tatry* case cf also: Bäumer, 138 ff.
- ⁹⁶ Case C-406/92 *Tatry v Maciej Rataj* [1994] ECR I-5439, para. 38; cf Fentiman, Art. 27 para. 12; McGuire, 85; Dasser, Art. 27 para. 13; Joseph, paras 2.57 ff.
- ⁹⁷ Herzog, 387.
- ⁹⁸ Art. 27(1) Brussels Regulation in the French version: "*Lorsque des demandes ayant le même objet et la même cause sont formées entre les mêmes parties devant des juridictions d'États membres différents, la juridiction saisie en second lieu sursoit d'office à*

statuer jusqu'à ce que la compétence du tribunal premier saisi soit établie."

⁹⁹ Case C-39/02 *Maersk Olie & Gas A/S v Firma M de Haan en W de Boer* [2004] ECR I-9657.

¹⁰⁰ Case C-39/02 *Maersk Olie & Gas A/S v Firma M de Haan en W de Boer* [2004] ECR I-9657, para. 34; Joseph, paras 2.57 ff.

¹⁰¹ Case C-406/92 *Tatry v Maciej Rataj* [1994] ECR I-5439, paras 42 ff.; cf Geimer (2010), Art. 27 para. 30; Schmehl, 138 f.; Collins (*Dacey, Morris & Collins*), para. 12-063; Dasser, Art. 27 para. 14.

¹⁰² Geimer (2010), Art. 27 paras 33 ff.; cf Geimer (2009), para. 2694d; McGuire, 86. For an overview of the critical opinions to this interpretation cf. McGuire, 89 ff.; cf also Mabillard (2011), Art. 27 paras 34 ff.; Hartley (2002), 73-81; Gebauer, 94; von Mehren (1998), 422 ff.; Mabillard (2012), 227 ff.; von Mehren (2007), 315 f.

¹⁰³ Case 144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861, para. 19. Likewise, the Swiss Federal Supreme Court has decided in its case law on Art. 35 of the former Swiss Federal Law on the Place of Jurisdiction in Civil Court Matters that the matter in dispute is identical if one party seeks negative declaratory relief ('negative Feststellungsklage') before one forum and the opposing party requests positive relief ('Leistungsklage') before the second forum (Swiss Federal Supreme Court Decision 128 III 284 consideration 3). This decision meant a change of practice, since the identity of the matter in dispute was thitherto denied by the Federal Supreme Court in cases where one party sought negative declaratory relief and the opposing party requested damages or performance (Swiss Federal Supreme Court Decision 105 II 229 consideration 1b). The change of practice to put its recent case law regarding intrastate parallel proceedings on a par with the ECJ's interpretation has been confirmed in: Swiss Federal Supreme Court Decision 5C.289/2006 consideration 3.2.

¹⁰⁴ Case C-406/92 *Tatry v Maciej Rataj* [1994] ECR I-5439, paras 42 ff.

¹⁰⁵ 'Kernpunkttheorie': Case 144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861, paras 16 ff.; McGuire, 85; Geimer (2010), Art. 27 para. 30; Schmehl, 138.

¹⁰⁶ Dasser, Art. 27 para. 13; Liatowitsch/Meier, Art. 27 para. 37.

¹⁰⁷ Case 144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861, para. 16.

¹⁰⁸ Weller, para. 353.

¹⁰⁹ Schmehl, 140 f. The ECJ's wide interpretation of the requirement of the same cause of action has provoked various critical remarks in academic commentary: cf McGuire, 87 ff. Criticism has also been expressed concerning the equal treatment of positive claims and actions seeking negative declaratory relief for the interpretation of the identical cause of action requirement; the strict rule of priority under Art. 27 Brussels Regulation is nevertheless applicable, even if the action seeking negative declaratory relief has been instituted as a 'torpedo', i.e. for tactical reasons only (Weller, para. 370). For further references to critique expressed on this topic see fn 102 above.

¹¹⁰ Weller, para. 365.

¹¹¹ Case C-406/92 *Tatry v Maciej Rataj* [1994] ECR I-5439, para. 30; Case C-351/96 *Drouot Assurances SA v Consolidated Metallurgical Industries* [1998] ECR I-3075, para. 16; cf Schmehl, 141; McGuire, 104; Liatowitsch/Meier, Art. 27 para. 30.

¹¹² ILA Report on Lis Pendens, para. 2.40.

¹¹³ Case C-351/96 *Drouot Assurances SA v Consolidated Metallurgical Industries* [1998] ECR I-3075.

¹¹⁴ Case C-351/96 *Drouot Assurances SA v Consolidated Metallurgical Industries* [1998] ECR I-3075, paras 19, 25; cf ILA Report on Lis Pendens, para. 2.41.

¹¹⁵ Case C-351/96 *Drouot Assurances SA v Consolidated Metallurgical Industries* [1998] ECR I-3075, para. 19.

¹¹⁶ Case C-406/92 *Tatry v Maciej Rataj* [1994] ECR I-5439, paras 29 ff.; McGuire, 105; Dasser, Art. 27 para. 7; Liatowitsch/Meier, Art. 27 para. 30.

¹¹⁷ Fentiman, Art. 27 para. 8; *Kolden Holdings Ltd v Rodette Commerce Ltd and Another* [2008] EWCA Civ 10, [2008] Bus LR 1051 (CA) 1073 f. (para. 91).

¹¹⁸ Case C-406/92 *Tatry v Maciej Rataj* [1994] ECR I-5439, para. 31; cf Geimer (2010), Art. 27 para. 1; Schmehl, 141; Liatowitsch/Meier, Art. 27 para. 31.

¹¹⁹ Schmehl, 142; cf Mabillard (2011), Art. 27 para. 45. Extending the meaning of the identity of the parties' requirement in the ECJ's jurisprudence has been criticised by arguing that it further nourishes the legal uncertainty in interpreting Art. 27 Brussels Regulation, since the degree of identity of interests remains a matter of evaluation (Weller, paras 367 f.; Jayme/Kohler, 421 f.).

¹²⁰ Case C-406/92 *Tatry v Maciej Rataj* [1994] ECR I-5439, para. 52; cf Liatowitsch/Meier, Art. 28 para. 11; Mabillard (2011), Art. 28 para. 21.

¹²¹ Case C-406/92 *Tatry v Maciej Rataj* [1994] ECR I-5439, para. 53. For examples of cases where the actions were acknowledged to be related in the sense of Art. 28(3) Brussels Regulation cf. Fentiman, Art. 28 paras 29 f.; Dasser, Art. 28 para. 6; Liatowitsch/Meier, Art. 28 paras 14 ff.; Mabillard (2011), Art. 28 para. 28.

¹²² Geimer (2010), Art. 28 para. 11; Schmehl, 155.

¹²³ Pauwelyn/Salles, 85.

¹²⁴ Cuniberti, 382.

¹²⁵ Case C-351/96 *Drouot Assurances SA v Consolidated Metallurgical Industries* [1998] ECR I-3075, para. 17; Case 144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861, para. 8.

¹²⁶ Ma, 52.¹²⁷ Cf Reinisch, 122 f.

Chapter 2: Competence-Competence

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The principle of competence-competence⁽¹²⁸⁾ has created the foundation for arbitral tribunals to decide on their own jurisdiction, rendering the conduct of arbitral proceedings independent from judicial support or intervention from a very early stage. The doctrine of competence-competence was developed to overcome problems originating from the consensual nature of arbitration where the existence of a valid arbitration agreement is challenged.⁽¹²⁹⁾ In the words of two learned scholars, competence-competence benefits arbitration in the following way: *"The concept is important in practice because without it a party could stall the arbitration at any time merely by raising a jurisdictional objection that could then only be resolved in possibly lengthy court proceedings."*⁽¹³⁰⁾

Although this principle is one of the internationally accepted cornerstones of international commercial arbitration, its implementation in national arbitration laws differs depending on the jurisdiction's attitude towards the relationship between national courts and arbitral tribunals. The principle of competence-competence, as one of the main sources for conflicts of competence between a national court and an arbitral tribunal, will be analysed considering international arbitration conventions, the German, French, Swiss and English arbitration laws, and selected institutional rules of arbitration.

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§2.01. Internationally Accepted Principle in International Arbitration

Today, the principle that arbitrators are the judges of their own jurisdiction pertains to an internationally recognised standard.⁽¹³¹⁾ The arbitral tribunal's inherent power to determine its own jurisdiction is commonly referred to as the positive competence-competence;⁽¹³²⁾ consequently, even a challenge to the existence or the validity of the arbitration agreement does not prevent the arbitrators from proceeding with the arbitration.⁽¹³³⁾ In other words, the principle of competence-competence permits arbitral tribunals to consider and decide challenges to their own jurisdiction,⁽¹³⁴⁾ including disputes over the existence, validity, legality and scope of the parties' arbitration agreement.⁽¹³⁵⁾ If there is a positive connotation of competence-competence there must also be a negative one: negative competence-competence means that the arbitral tribunal should be given priority in establishing jurisdiction; national courts should therefore – when confronted with an arbitration agreement – limit their examination of the arbitral tribunal's jurisdiction to proceedings to set aside or to recognise and enforce an arbitral award, which would necessarily only become relevant after the arbitral tribunal has ruled on its jurisdiction.⁽¹³⁶⁾ The negative effect of competence-competence thus entails a priority rule dictating that the arbitrators should be the first judges of their own jurisdiction and that the national courts' control is postponed to the stage of enforcement or setting aside of the arbitral award.⁽¹³⁷⁾ The combination of the positive and the negative effect hence results in the definition that competence-competence is the *"rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, subject to subsequent review by the courts."*⁽¹³⁸⁾

In spite of the principle's definition as an internationally accepted doctrine, the question might be raised as to the legal basis of competence-competence or the source of its international acceptance. There is the view that the parties' will to confer on the arbitral tribunal the power to decide all aspects of their dispute may be presumed, while the national courts retain their power to control the tribunal's decision, but not to take the tribunal's place.⁽¹³⁹⁾ Gaillard and Savage, however, indicate that justifying the principle of competence-competence by the parties' will is – due to the circular nature of such an argument – of no avail where the arbitration agreement between the parties is null and void; hence, the power to rule on its own jurisdiction can only be [page "26"](#) conferred on the arbitral tribunal by the *lex arbitri*.⁽¹⁴⁰⁾ It may be noted in passing that even if this were the approach taken towards competence-competence, the wide acceptance of this principle has led to its incorporation in most national arbitration laws. On principle theoretical level, it needs to be clarified that the premise underlying the principle of competence-competence is to put an arbitral tribunal on an equal footing with a national court when determining its jurisdiction.⁽¹⁴¹⁾ Put differently, if a national court is competent to decide whether it has jurisdiction or not, an arbitral tribunal must be competent to do so regardless of whether it concludes that it has jurisdiction or not. The competence to decide on its own jurisdiction is granted to an arbitral tribunal by the law irrespective of the existence of a valid arbitration agreement;⁽¹⁴²⁾ in other words, the exercise of the tribunal's power to decide on its jurisdiction even if it

results in the arbitral tribunal denying jurisdiction due to an invalid arbitration agreement is an inevitable consequence of competence-competence.⁽¹⁴³⁾

The alternative would be to refer all questions regarding the arbitral tribunal's jurisdiction to the national courts, with the unwanted consequence that a recalcitrant defendant could easily frustrate the parties' agreement to arbitrate or at least contest the arbitration agreement's validity as a dilatory tactic.⁽¹⁴⁴⁾ Such an approach would severely undermine arbitration as a viable and effective alternative to state court litigation. Since the doctrine of competence-competence evolved for the precise reason of avoiding these kind of systemic drawbacks, certain learned authors are of the opinion that competence-competence obtains its justification from being a legal fiction.⁽¹⁴⁵⁾ In other words, the principle of competence-competence is imposed by force of policy considerations rather than by force of logical persuasion.⁽¹⁴⁶⁾

For the sake of completeness, it should be noted that, generally speaking, the principle of party autonomy overrides the principle of competence-competence; in other words, where the parties exclude competence-competence from the arbitral tribunal's jurisdiction, the principle of competence-competence as provided for in international arbitration conventions, most national arbitration laws and institutional arbitration rules would not take precedence over the parties' agreement.⁽¹⁴⁷⁾ Article 16(1) UNCITRAL Model Law, Article 1448(3) CPC and Article 186(1) SPILA, however, stipulate an exception to this hierarchy, since these provisions are of mandatory nature and may not therefore be changed by party agreement.⁽¹⁴⁸⁾

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As will be seen below, leading international arbitration conventions, national arbitration laws and institutional arbitration rules recognise and give effect to the competence-competence doctrine.

[A]. International Arbitration Conventions

As will be seen below, the principle of competence-competence is recognised – either implicitly or explicitly – by international arbitration conventions, such as the New York Convention and the European Convention.

[1]. New York Convention

The New York Convention does not stipulate the principle of competence-competence in express wording; Articles II(3) and V(1) New York Convention, however, refer to this topic:⁽¹⁴⁹⁾

- Article II(3) New York Convention gives the national courts instructions to refer the parties to arbitration, if one of them requests so and unless the arbitration agreement is null and void, inoperative or incapable of being performed.
- Article V(1)(a) and (c) New York Convention indicate that the arbitral tribunal has rendered an award – prior to a judicial determination – dealing with jurisdictional objections as to the validity and the scope of the arbitration agreement; these awards may be the subject of subsequent judicial review at the enforcement or recognition stage.

These provisions in the New York Convention suggest that both arbitral tribunals and national courts may consider and decide jurisdictional disputes; they, however, do not lead to any presumption concerning the priority of the tribunals' or the courts' power to decide on their jurisdiction.⁽¹⁵⁰⁾ Hence, one can conclude that the New York Convention impliedly recognises the arbitral tribunal's competence-competence.

[2]. European Convention

Unlike the New York Convention, the European Convention addresses the competence-competence doctrine and the allocation of jurisdictional competence between national courts and arbitral tribunals in express terms: "*Subject to any subsequent judicial control provided for under the lex fori, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule *page "28"* on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.*"⁽¹⁵¹⁾

Hence, the European Convention recognises the positive effect of competence-competence by granting the arbitral tribunal the right to decide on its own jurisdiction and on jurisdictional disputes. This provision furthermore establishes a presumption of priority in favour of the arbitrators by providing that an arbitral tribunal's jurisdictional award is subject only to subsequent judicial control.⁽¹⁵²⁾ Article VI(3) European Convention confirms the priority given to the arbitral tribunal, since it holds that a national court seised with the same subject matter, or with regard to the arbitration agreement's validity after arbitral proceedings have been initiated, shall stay its ruling on the arbitrators' jurisdiction until after the arbitral award is made; an exception can be made by the national court if it has good and substantial reasons to act to the contrary, i.e. where reasons of efficiency or fairness demand.⁽¹⁵³⁾ The wording of Article VI(3) European Convention signals that the national courts may perform

only a prima facie assessment of the arbitration agreement's validity and scope; a full review is postponed to a later stage, either when enforcement of the award is sought or the award is challenged.⁽¹⁵⁴⁾

[B]. National Arbitration Laws

Competence-competence, granting the arbitrators the right to determine their own jurisdiction and to also decide on jurisdictional disputes, is accepted as a principle in the major jurisdictions worldwide.⁽¹⁵⁵⁾

[1]. UNCITRAL Model Law/German Code of Civil Procedure

Article 16(1) UNCITRAL Model Law expressly grants arbitrators the power to rule on their jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.⁽¹⁵⁶⁾ The arbitral tribunal's decision on jurisdiction, however, is neither final nor exclusive, since it is first subject to immediate review by a national court (under Article 16(3) UNCITRAL Model Law), second to later court review in setting aside proceedings under Article 34 UNCITRAL Model Law, and third to still later review at the recognition and enforcement stage (pursuant to Article 36 UNCITRAL Model Law).⁽¹⁵⁷⁾ Furthermore, the principle of competence-competence as defined in Article 16(1) UNCITRAL Model Law is of mandatory nature; consequently, the parties [page "29"](#) to the arbitration cannot agree to limit the power of the arbitral tribunal to determine its jurisdiction.⁽¹⁵⁸⁾

Germany, as a jurisdiction having adopted the UNCITRAL Model Law, incorporated the rule into the ZPO: the arbitral tribunal may determine its own jurisdiction and therefore also the existence or validity of the arbitration agreement (§ 1040(1) ZPO). The interplay of § 1040(1) and § 1040(3) ZPO is mandatory; hence the parties cannot validly agree on the competence-competence of the arbitrators not being subject to court control.⁽¹⁵⁹⁾

[2]. French Code of Civil Procedure

French jurisprudence recognised the principle of competence-competence, both in general and also as applying to international arbitration, even before its codification.⁽¹⁶⁰⁾ The 1981 NCPC established the basis for competence-competence in the former Article 1466 holding (for domestic arbitration) that if a party challenges the existence or scope of the arbitrator's jurisdiction, the arbitrator shall decide on the issue.⁽¹⁶¹⁾ Article 1465 CPC in its revised version declares that the arbitral tribunal is exclusively competent to rule on objections regarding its jurisdiction (positive effect of competence-competence).⁽¹⁶²⁾

Articles 1448 and 1449 CPC further define the limits of the national courts to intervene in arbitral proceedings prior to the constitution of the arbitral tribunal.⁽¹⁶³⁾ Although situated in the domestic arbitration chapter, Articles 1448 and 1449 CPC also apply to international arbitration, provided that such application is not excluded by the parties.⁽¹⁶⁴⁾ Article 1448(1) CPC hence holds that if a case in which the parties have concluded an arbitration agreement is brought before a French court, the competent court must decline jurisdiction unless the arbitral tribunal has not been seised yet and the arbitration agreement is evidently void or manifestly inapplicable.⁽¹⁶⁵⁾ Article 1458 of [page "30"](#) the 1981 NCPC embraced the same rule, but split it into two paragraphs: Article 1458(1) of the 1981 NCPC held that when a dispute submitted to an arbitral tribunal by virtue of an arbitration agreement is brought before a national court, such court shall decline jurisdiction.⁽¹⁶⁶⁾ In the second paragraph of Article 1458 of the 1981 NCPC, the provision went on to state that if the arbitral tribunal had not yet been seised of the matter, the court should also decline jurisdiction unless the arbitration agreement was manifestly void.⁽¹⁶⁷⁾ The impact of the former and the newly adopted provision remains the same, with the only amendment being that the national court may, under the recently enacted provision, also review whether the arbitration agreement is manifestly inapplicable (in addition to its nullity), provided that the arbitral tribunal has not yet been seised.⁽¹⁶⁸⁾

In other words, once the arbitral process has commenced, a French court is obliged to refer the parties to arbitration without conducting any inquiry at all into the existence or validity of the arbitration agreement.⁽¹⁶⁹⁾ Article 1448(3) CPC furthermore holds that any agreement to the contrary is unenforceable, i.e. parties cannot contract out of the principle of competence-competence.⁽¹⁷⁰⁾ In conclusion, the CPC incorporates the negative effect of competence-competence in its arbitration law, granting the arbitral tribunal the primary power to decide on its jurisdiction and hence obliging the French court to decline jurisdiction provided that three conditions are met: (a) a French court is seised, (b) the arbitral proceedings have already been commenced, or if not, the arbitration agreement is not manifestly void or inapplicable, and (c) a party requests the French court to decline its jurisdiction.⁽¹⁷¹⁾

The French courts can, however, subsequently review the arbitral tribunal's jurisdiction in setting aside proceedings, provided that the parties have not excluded any court control of the award.⁽¹⁷²⁾

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[3]. Swiss Private International Law Act

Article 186(1) SPILA lays down the principle of competence-competence in Swiss international arbitration law, stating that the arbitral tribunal determines on its own whether it has jurisdiction. Besides being controversially discussed in legal doctrine, there is no priority rule under Swiss law, based on which the arbitral tribunal would take precedence to decide upon the validity of an arbitration agreement and hence the arbitral tribunal's jurisdiction.⁽¹⁷³⁾ Such a priority rule has not been introduced by Article 186(1bis) SPILA⁽¹⁷⁴⁾ either, since this provision does not confer a priority on the arbitral tribunal to decide on the validity of the arbitration agreement.⁽¹⁷⁵⁾

The competence-competence principle as set out in Article 186(1) SPILA pertains to the mandatory provisions under the Swiss international arbitration law, from which the parties are not entitled to derogate.⁽¹⁷⁶⁾ That is to say, the parties to an arbitration are not entitled to deprive the arbitral tribunal of the power to rule on its own jurisdiction and to confer it on another authority.⁽¹⁷⁷⁾ The arbitral tribunal's competence to determine its own jurisdiction is, however, not an exclusive one considering that the Swiss court has the final say regarding the existence, validity and scope of an arbitration agreement and hence on the arbitral tribunal's jurisdiction.⁽¹⁷⁸⁾ The situation is, however, different where the parties have – according to Article 192 SPILA – validly waived the right to challenge an award rendered by the arbitral tribunal before the national courts; under such circumstances, the arbitral tribunal is entitled to finally decide on its own jurisdiction subject only to the control at the recognition and enforcement stage.⁽¹⁷⁹⁾

[4]. English Arbitration Act

It has already been established that the principle of competence-competence finds international acceptance. Section 30(1) Arbitration Act is no exception and provides that an arbitral tribunal possesses the competence to determine its own substantive jurisdiction on matters relating to the validity of the arbitration agreement, the proper constitution of the tribunal, and the scope of the arbitration agreement. Hence, the [page "32"](#) arbitral tribunal's competence to determine its own jurisdiction is recognised by the English common law and has statutory force.⁽¹⁸⁰⁾

Section 30(1) Arbitration Act is based on Article 16(1) UNCITRAL Model Law.⁽¹⁸¹⁾ Unlike Article 16(1) UNCITRAL Model Law, section 30(1) Arbitration Act is not of a mandatory nature, i.e. the parties may agree that the arbitral tribunal should not be able to exercise this power.⁽¹⁸²⁾ Furthermore, the arbitral tribunal's decision on jurisdiction is not final, but subject to review by the national courts.⁽¹⁸³⁾

[C]. Institutional Arbitration Rules

In the same way that most contemporary national legislation on arbitration recognises the competence-competence doctrine, leading institutional rules also confer the power on the arbitral tribunal to decide on its own jurisdiction. By choosing the institutional rules to govern the arbitral procedure, the parties have at the same time agreed to the principle of competence-competence.⁽¹⁸⁴⁾ Certain of these rules are explained below.

[1]. UNCITRAL Arbitration Rules

Article 23(1) of the UNCITRAL Arbitration Rules as revised in 2010 holds that the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.⁽¹⁸⁵⁾ This provision, however, does not confer an exclusive right on the arbitral tribunal to determine its jurisdiction in a final decision, but the final word on the competence of the arbitrators remains with the national court.⁽¹⁸⁶⁾

[2]. ICC Rules 2012

The revised version of the Rules of Arbitration of the International Chamber of Commerce in force as from 1 January 2012 ('ICC Rules') incorporates the principle of competence-competence in Article 6(3), holding that if any party against which a claim has been made does not submit an answer to the request for arbitration, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4) of the Rules.

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Under the aegis of the former ICC Rules 1998, the handling of cases where any party raised one or more pleas concerning the existence, validity or scope of the arbitration agreement, or where no answer to the request for arbitration was filed, was such that the case was referred to the ICC Court which had to take a prima facie decision on jurisdiction.⁽¹⁸⁷⁾ In other words, in the event of jurisdictional

objections, a two-stage procedure was followed: first, the ICC Court had to satisfy itself of the prima facie existence of an arbitration agreement, and if in the affirmative, the ICC Court allowed the arbitration to proceed so that, second, the arbitral tribunal could decide on its jurisdiction.⁽¹⁸⁸⁾ By contrast, this strict prima facie test by the ICC Court has been considerably softened in the 2012 version of the ICC Rules, insofar as the ICC Court does not examine the arbitration agreement's validity unless the Secretary General refers the matter to the Court for such examination. This initial screening process seems to be adequate, since the proportion of cases likely to result in a negative decision by the ICC Court is very small.⁽¹⁸⁹⁾ The Secretary General will make use of this referral to the ICC Court in particular in multi-party and multi-contract case constellations.⁽¹⁹⁰⁾ In cases where all disputes arise under a single contract and where there are only two parties involved, the Secretary General will, however, make a reference to the ICC Court under exceptional circumstances only, such as, for example:⁽¹⁹¹⁾

- where there is no evidence whatsoever of an arbitration clause;
- where the arbitration clause does not refer at all to the ICC; or
- where the claim has been raised against a non-signatory and the claimant does not provide an argument or evidence as to why that person is bound by the arbitration agreement.

Read carefully, Article 6(3) ICC Rules does not explicitly empower the arbitral tribunal to determine its own jurisdiction in the absence of an ex parte proceeding or failing a jurisdictional objection.⁽¹⁹²⁾ Article 41 ICC Rules may be consulted to cure this lack of explicit wording: Article 41 ICC Rules holds that in all matters not expressly provided for in the Rules, the ICC Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law. Since the lack of jurisdiction by an arbitral tribunal constitutes a bar to the enforcement of an arbitral award, the arbitral tribunal should be allowed, in light of Article 41 ICC Rules to determine its own jurisdiction in any case.⁽¹⁹³⁾

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[3]. Swiss Rules 2012

The Swiss Rules of International Arbitration as in force since June 2012 ('Swiss Rules') also accept the arbitral tribunal's competence to decide on its own jurisdiction. Article 21(1) Swiss Rules provides that the arbitral tribunal shall have the power to rule on any objections to its jurisdiction, including any objection with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement. But this provision does not establish a priority rule granting the arbitral tribunal the primary power to decide on its jurisdiction.⁽¹⁹⁴⁾ The final decision as to whether an arbitral tribunal correctly declined or accepted jurisdiction remains with the national courts.⁽¹⁹⁵⁾

[4]. LCIA Rules

The Rules of the London Court of International Arbitration effective as of 1 January 1998 ('LCIA Rules') provide in Article 23(1) that the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the arbitration agreement. The LCIA Rules further hold that by agreeing to arbitration under these Rules the parties shall be treated as having agreed not to apply to any state court or other judicial authority for any relief regarding the arbitral tribunal's jurisdiction, except with the agreement in writing of all parties to the arbitration or the prior authorisation of the arbitral tribunal or save in proceedings for the setting-aside of an award on jurisdiction.⁽¹⁹⁶⁾ Not only do the LCIA Rules advocate the competence-competence of the arbitral tribunal, but they also establish the presumption that the parties have, by agreeing to arbitrate under the aegis of the LCIA, waived their right to apply to the national courts for a decision on the tribunal's jurisdiction before the arbitral tribunal has rendered an award on its jurisdiction. This respect for the enforcement of competence-competence is a contractual obligation that needs to be abided by irrespective of whether the jurisdiction where proceedings are instituted recognises the principle of competence-competence.⁽¹⁹⁷⁾

In practice, the exercise of jurisdiction by the arbitral tribunal is also subject to a two-stage procedure – similarly to the procedure under the ICC Rules, although informally – insofar as the Registrar will enter into discussions with the claimant to seek to resolve the matter, if on review of the documents submitted there is doubt as to the existence of an arbitration agreement; if after inquiry with the claimant there is no obvious inconsistency, the matter will be referred to the arbitral tribunal which then is to decide on its jurisdiction.⁽¹⁹⁸⁾

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§2.02. Diverging Implementation of Competence-Competence under National Arbitration Laws

Although the principle of competence-competence is internationally accepted, its implementation in national arbitration laws is not

uniform, but follows different approaches regarding the timing, the scope and the consequences of an arbitral tribunal's competence to consider its own jurisdiction.⁽¹⁹⁹⁾ There is little international consensus as regards first the allocation of jurisdictional competence between the arbitral tribunal and the national court and second the effects of the arbitral tribunal's decision on jurisdiction.⁽²⁰⁰⁾ In other words, some national laws might vest arbitrators with sole jurisdiction to determine their own jurisdiction, subject only to minimal subsequent judicial review or to no review at all,⁽²⁰¹⁾ while other legal systems permit initial judicial decisions on jurisdictional objections.⁽²⁰²⁾ The same diverging directions might be taken by national laws in respect of the effect of the arbitral tribunal's decision on jurisdiction: the arbitral tribunal's jurisdictional decision might either be qualified as a procedural decision or as an arbitral award, being open to challenge proceedings before the national courts only in the latter case. The analysis below will focus on the topic of priority of the arbitrators' decision on jurisdiction for the following reason: the application of a priority rule in favour of the arbitrators will presumably have a direct effect on the frequency with which proceedings become and remain pending before a national court and an arbitral tribunal in parallel. As regards the finality of the arbitrators' decision on jurisdiction, this topic will be dealt with when considering the plea of lack of jurisdiction before the arbitral tribunal.⁽²⁰³⁾

The principal approaches taken by leading national legal regimes, such as the UNCITRAL Model Law and hence the German ZPO, the French CPC, the Swiss SPILA and the English Arbitration Act are outlined below.

[A]. UNCITRAL Model Law/German Code of Civil Procedure

As explained above, the UNCITRAL Model Law provides expressly for the arbitrators' competence-competence and hence has contributed significantly to the proliferation and incorporation of this principle in several national arbitration laws. Article 16 UNCITRAL Model Law does not permit any presumption as to whether the arbitral tribunal is the first to determine its jurisdiction. The interaction between national courts and arbitral tribunals as regards jurisdictional decisions under the UNCITRAL Model Law is the following:⁽²⁰⁴⁾ [page "36"](#)

- National courts may consider jurisdictional issues prior to or in parallel with any arbitral decision on jurisdiction; the arbitral proceedings may be commenced or continued and an award may be made, even with a jurisdictional challenge pending before the national court (Article 8(2) UNCITRAL Model Law).
- Arbitral tribunals may consider and decide jurisdictional issues according to Article 16(3) UNCITRAL Model Law either in a positive preliminary ruling that is subject to immediate review by the national court, or in a positive award that is subject to subsequent court control in proceedings to set aside the award (Article 34 UNCITRAL Model Law).

Article 8 UNCITRAL Model Law does not indicate whether the national courts are bound to conduct a prima facie examination of the arbitration agreement or are rather entitled to fully review the agreement to arbitrate;⁽²⁰⁵⁾ the legislative history of Article 8(1) UNCITRAL Model Law, however, seems to suggest a full review.⁽²⁰⁶⁾

Germany, as an example of a European jurisdiction having adopted the UNCITRAL Model Law, has not incorporated a priority rule in its arbitration law either, but has limited itself to stipulating the positive effect of competence-competence in § 1040(1) ZPO.⁽²⁰⁷⁾ That priority is not conferred upon the arbitral tribunal to determine its jurisdiction can also be established from § 1032 ZPO: the first paragraph of this provision provides for the arbitration defence to be raised in court proceedings without restricting the national court's competence in the event that arbitral proceedings are already underway; the question as to whether arbitration is admissible may furthermore be determined by a national court prior to the constitution of the arbitral tribunal (§ 1032(2) ZPO); and last but not least, § 1032(3) ZPO holds that, while an action or application as to the arbitral tribunal's authority is pending before the national court, the arbitral proceedings may nevertheless be commenced or continued. Thus, national courts and arbitral tribunals seem more like co-actors in the determination of the arbitrators' jurisdiction.

[B]. French Code of Civil Procedure

French arbitration law is generally characterised as being arbitration-friendly by granting the arbitral tribunal the primary right to decide on its jurisdiction. It is furthermore said that by the CPC's revision in 2011, the role of French arbitration law as a policy-setter in the development of arbitration law and practice has even been reinforced.⁽²⁰⁸⁾ It also takes a clear stance, if not to say the most progressive, with regard to the arbitrators' priority to rule on their jurisdiction.

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[1]. Negative Effect Doctrine in French Statutory Arbitration Law

As already discussed above,⁽²⁰⁹⁾ Article 1465 CPC incorporates the

positive aspect of competence-competence into the French arbitration law and Article 1448 CPC does the same with the negative effect of competence-competence.⁽²¹⁰⁾ Based on the former, an arbitral tribunal has competence-competence to initially decide virtually all jurisdictional disputes, subject to potential judicial review; and according to the latter effect of competence-competence, the French courts are not permitted to consider jurisdictional objections on an interlocutory basis if the arbitration has already been commenced, but must await the arbitrators' final jurisdictional decision.⁽²¹¹⁾ The negative effect of competence-competence hence creates a rule of chronological priority in favour of the arbitrators.⁽²¹²⁾ Consequently, once arbitral proceedings have been initiated, the national court is prevented from inquiring into the merits of the dispute or the existence, validity, legality or scope of the arbitration agreement.⁽²¹³⁾ Even when faced with an arbitration clause that is manifestly null or inapplicable, the national judge's hands are tied and he cannot declare the nullity of the arbitral proceedings if the arbitral tribunal has already been seised.⁽²¹⁴⁾ The incorporation of the negative effect doctrine into French arbitration law has been declared to be compatible with Article II(3) New York Convention based on the more-favourable-right-provision in Article VII(1) New York Convention, which not only includes more favourable solutions for the benefit of arbitral awards, but is held to extend to such concerning the recognition of arbitration agreements.⁽²¹⁵⁾

The national court's review of the arbitration agreement is hence limited to a prima facie examination, provided that the arbitral tribunal has not yet been seised.⁽²¹⁶⁾ So, legally speaking, the interpretation of the point in time at which the arbitral tribunal is seised of the matter determines the national court's right to a prima facie review. This point in time has been defined in French case law as the point in time at which all the elements necessary for the constitution of the arbitral tribunal and its functioning are available, which means that all the arbitrators have been nominated and have accepted their mandate.⁽²¹⁷⁾ Furthermore, the negative effect of competence-competence extends to all categories of jurisdictional objections, i.e. to challenges to the existence and [page "38"](#) validity of the arbitration agreement and also to the scope of an otherwise non-disputed valid clause.⁽²¹⁸⁾

As a practical example, if the party opposing the arbitration on the basis that the arbitration agreement is allegedly invalid, were to file a claim directly with the French court before arbitral proceedings were commenced, this court would have to decline jurisdiction and refer the parties to arbitration, unless it were to find that the arbitration agreement is patently void or inapplicable. As a result, only once the arbitral tribunal has confirmed that the arbitration agreement is invalid, may the party opposing arbitration file the claim with the competent national court again.⁽²¹⁹⁾

[2]. Negative Effect Doctrine in French Case Law

Furthermore, French case law aptly reflects the premise stated in the statutory arbitration law: the French Supreme Court reversed a ruling by the Court of Appeal of Douai in which the latter held that – even though one of the parties had already initiated arbitral proceedings, but the arbitral tribunal had not yet been constituted – the arbitral tribunal should not be constituted on the basis that the arbitration agreement was void. In its reasoning, the French Supreme Court reiterated that the national court cannot declare that the arbitrators should not be appointed on the grounds that the arbitration agreement is void, since the arbitral tribunal alone has jurisdiction to rule on the validity or limits of its appointment if the question has been brought before it.⁽²²⁰⁾

The negative effect of competence-competence granting priority to the arbitrator faced with a challenge to his jurisdiction to decide the challenge has been further reinforced by recent case law of the French Supreme Court, which has held that this effect belongs to the substantive rules of French international arbitration law.⁽²²¹⁾ Hence, irrespective of whether French procedural law is applicable by virtue of the reference in Article 1505(2) CPC, the French courts recognise the negative effect of competence-competence as a material rule of international arbitration.⁽²²²⁾ The negative effect doctrine is hence extended to the determination of jurisdiction of a foreign court,⁽²²³⁾ and [page "39"](#) is applied by the French courts regardless of whether the seat of arbitration is located in France or abroad.⁽²²⁴⁾

An additional side effect of the negative effect of competence-competence is that no French court has jurisdiction to render a declaratory judgment regarding the validity and binding character of an arbitration agreement, since if there is the appearance of an arbitration agreement between the parties the national court must decline jurisdiction unless the arbitration has not yet been commenced and the arbitration agreement is patently void or manifestly inapplicable.⁽²²⁵⁾

[C]. Swiss Private International Law Act

The Swiss arbitration law is often praised for being straightforward and arbitration-friendly. These features are also recognisable in the SPILA's provision on the principle of competence-competence. The strong support of arbitration by the Swiss law would hence suggest that priority is given to the arbitral tribunal for determining its

jurisdiction. Swiss case law has, however, only partly opted for the introduction of the negative effect of competence-competence, as will be seen.

The question as to whether Swiss arbitration law provides for the negative effect of competence-competence is not as straightforward as under French arbitration law. As will be seen below, this is mainly due to the Swiss Federal Supreme Court's introduction of a bifurcation in the interpretation of arbitration agreements, distinguishing between whether the arbitral tribunal has its seat in Switzerland or abroad. Some comments will also be addressed to the proposal to revise Article 7 SPILA currently pending before the Swiss Parliament, which will have significant effects on the principle of competence-competence under Swiss law.

[1]. Partial Adoption of the Negative Effect of Competence-Competence in Swiss Case Law

Under Swiss arbitration law, Article 186(1) SPILA stipulates the principle of competence-competence in its positive effect. The wording of Article 186(1) SPILA, however, does not allow a presumption as to the incorporation of the negative effect of competence-competence into the Swiss arbitration law. The recently introduced Article 186(1*bis*) SPILA⁽²²⁶⁾ furthermore empowers the arbitral tribunal to decide on its [page "40"](#) jurisdiction regardless of whether an action on the same matter and between the same parties is already pending before the national courts and provided that there are no serious reasons why the arbitral proceedings should be stayed.

The Swiss Federal Supreme Court, however, sheds more light on whether the negative effect of competence-competence is applied under Swiss law, since it has introduced in its case law a distinction in the scope of review regarding arbitration agreements depending on whether the arbitral proceedings take place in Switzerland or abroad.

Where the arbitration to which the arbitration agreement gives rise is seated in Switzerland, the arbitration defence is to be invoked before Swiss courts in accordance with Article 7 SPILA; Article II(3) New York Convention, by contrast, applies only where the national court seised and the place of arbitration are not situated in the same country.⁽²²⁷⁾ The Swiss Federal Supreme Court has consistently held that the scope of review of an arbitration agreement's validity in application of Article 7 SPILA is limited to the arbitration-friendly approach of a prima facie review.⁽²²⁸⁾ In other words, Swiss case law has introduced the negative effect of competence-competence by limiting the review of the arbitration agreement's validity by the Swiss courts to a prima facie examination if the arbitral tribunal is seated in Switzerland, thereby partially paralleling the approach taken by the French courts.⁽²²⁹⁾ In contrast to the scope of review under Article 7 SPILA, the examination of an arbitration agreement under Article II(3) New York Convention is open to a comprehensive review.⁽²³⁰⁾ The reasons given by the Supreme Court to justify the bifurcation of the scope of review of an arbitration agreement are the following: firstly, the Swiss Federal Supreme Court argues that Article II(3) New York Convention calls for a full review of the arbitration agreement.⁽²³¹⁾ Secondly, the Supreme Court holds that a prima facie review of an arbitration agreement is only admissible where a Swiss state court has the final say on the arbitral tribunal's jurisdiction.⁽²³²⁾ Put differently, where the place of arbitration is outside Switzerland, the Swiss Federal Supreme Court cannot be called upon to adjudicate on a challenge against the final award and hence does not have the last word as regards [page "41"](#) jurisdictional disputes.⁽²³³⁾ Consequently, a full review of the arbitration agreement seems to be more adequate.

The Swiss Federal Supreme Court's case law has prompted criticism by several commentators: it is argued that the wording of Article 7 SPILA does not suggest a prima facie review, and furthermore a party's right to have the case dealt with by a national court should be denied only based on a full review of the arbitration agreement's requirements under Article 7 SPILA.⁽²³⁴⁾ The distinction made between the scopes of review when applying Article 7 SPILA or Article II(3) New York Convention, in addition, cannot be justified by the wording of these provisions.⁽²³⁵⁾ Article II(3) New York Convention, furthermore, is neutral as regards the scope of review to be applied by a national court when interpreting an arbitration agreement's validity.⁽²³⁶⁾ It has also been argued that the criteria according to which this distinction is made, i.e. where the seat of the arbitral tribunal is located, is not always determinable without any doubt.⁽²³⁷⁾ It is furthermore held that the first instance court's decision declining jurisdiction based on a summary review cannot be subsequently corrected by the Swiss Federal Supreme Court in setting aside proceedings against a decision of the arbitrators.⁽²³⁸⁾ In addition, the Swiss courts will rule again on the arbitrators' jurisdiction at the enforcement stage, if the seat of the arbitration was abroad; hence the different levels of review are not justified by the Swiss Federal Supreme Court's competence over judicial control of the arbitration agreement in setting aside proceedings where the situs of arbitration was in Switzerland.⁽²³⁹⁾ The solution chosen by the Swiss Federal Supreme Court might also result in two negative decisions on jurisdiction, which risks that the parties have both proceedings before national courts and an arbitral tribunal denied: this worst-case scenario might materialise when the national court declines jurisdiction based on a summary examination of the arbitration agreement (assuming that a full review would have

revealed the arbitration agreement's invalidity and therefore the national court's competence), while the arbitral tribunal seised second also declines jurisdiction by virtue of an unfettered review of the agreement to arbitrate.⁽²⁴⁰⁾ Poudret and Besson convincingly conclude that there is "no good reason to interpret the New York Convention, Art. II and SPILA, Art. 7 differently, even though their respective fields of application differ."⁽²⁴¹⁾ Berger and Kellerhals also opine that Swiss courts should review the validity of an arbitration agreement with unfettered powers, regardless of whether the arbitration agreement provides for the arbitral tribunal's seat within Switzerland or abroad.⁽²⁴²⁾ It is furthermore held that the different scopes of review applied to Article 7 SPILA and Article II(3) New York Convention discriminate against parties who have [page "42"](#) chosen an arbitral seat abroad and is, therefore, not in accordance with the more-favourable-right-provision in Article VII(1) New York Convention.⁽²⁴³⁾

Criticising the summary review of an arbitration agreement in general terms, Poudret holds that the procedure to be followed under Swiss law when limiting the national courts' review of the arbitration agreement to a prima facie test is rather cumbersome compared to when national courts are entitled to comprehensively review arbitral agreements: firstly, the national court decides that the arbitral tribunal is competent after a prima facie examination of the arbitration agreement; secondly, the arbitral tribunal determines that it has jurisdiction; thirdly, the party opposing arbitration may challenge the arbitral tribunal's decision on jurisdiction or, if the arbitral tribunal refuses to give a preliminary award on jurisdiction, the final award before the national court that has the last word as to the arbitrators' authority.⁽²⁴⁴⁾ A comprehensive review of the arbitration agreement by the national court right at the beginning of the arbitration could have rendered this intricate process futile.⁽²⁴⁵⁾

The authors in favour of the negative effect of competence-competence, however, advocate the national courts' prima facie review of the arbitration agreement and hence also favour extending the prima facie examination to the international context where Article II(3) New York Convention is applicable.⁽²⁴⁶⁾

In conclusion, the negative effect of competence-competence has been introduced to date only partially by the Swiss Federal Supreme Court's case law as regards the review of arbitration agreements where the arbitral tribunal has or will have its seat within Switzerland. Even though the opinions regarding whether the arbitral tribunal should be given priority in determining its jurisdiction diverge in Swiss legal doctrine, the reactions to the Supreme Court's case law on this subject seem to agree that there is no just ground for the unequal treatment of 'domestic cases' in application of Article 7 SPILA and 'international cases' in application of Article II(3) New York Convention.

[2]. Proposal to Introduce the Negative Effect of Competence-Competence into Swiss Law?

On 20 March 2008, an initiative⁽²⁴⁷⁾ was filed by a member of the Swiss National Council, Christian Lüscher, to add a second paragraph to Article 7 SPILA that provides the following: "*In international matters, regardless of where the arbitral tribunal's seat is located, the Swiss court seised shall not render a decision until the arbitral tribunal has [page "43"](#) determined its own jurisdiction, unless the Swiss courts conclude after a prima facie review that there is no arbitration agreement between the parties.*"⁽²⁴⁸⁾

This amendment has been proposed with the aim of extending the prima facie review of the arbitration agreement to cases where the arbitral tribunal has its seat outside Switzerland and hence of preserving the importance of Switzerland as an arbitration hub.⁽²⁴⁹⁾

The proposed revision, if accepted by Parliament, would lead to the introduction of the negative effect of competence-competence into statutory law.⁽²⁵⁰⁾ In other words, a Swiss court should become obliged to review an arbitration defence by way of a prima facie examination not only if the arbitral tribunal had its seat within Switzerland, but also if such seat were abroad.

In order to evaluate the initiative from a legal standpoint, two commissions have been set up to appraise the initiative's content: both the National Council's Commission ('Kommission für Rechtsfragen des Nationalrats') and the Commission of the Council of Cantons ('Kommission für Rechtsfragen des Ständerats') recommended by a majority decision to reject the initiative. The majority of the Commission of the Council of Cantons reasoned that the situation where the arbitral tribunal has its seat outside Switzerland and the arbitration agreement is invoked before Swiss courts is already conclusively governed by Article II(3) New York Convention; amending Article 7 SPILA in the proposed way would therefore run counter to the priority given in Article 1(2) SPILA to treaties under international law such as the New York Convention.⁽²⁵¹⁾ The majority of the National Council's Commission further argued that the abolition of Swiss courts' in-depth examination of arbitration agreements would severely damage Swiss courts' sovereignty.⁽²⁵²⁾ In spite of the Commissions' recommendations, the National Council allowed the initiative to go forward and the Council of Cantons agreed to such procedure.⁽²⁵³⁾ The time line to draft a first proposal how to implement the initiative has been extended by

the National Council to the summer session 2014.⁽²⁵⁴⁾

The petitioner's attempt to revise Article 7 SPILA is further rejected by learned authors. It is argued that allowing the initiative could pose the risk that both the national court and the arbitral tribunal could render negative decisions on jurisdiction, thus leaving the parties in a vacuum.⁽²⁵⁵⁾ Berger furthermore criticises the procedure *page "44"* chosen by the initiative: the revision of Article 7 SPILA as proposed by the initiative would already be the second example⁽²⁵⁶⁾ of an isolated revision of the SPILA directed against the Swiss Federal Supreme Court's case law as regards the coordination between the national courts' and the arbitral tribunal's jurisdiction.⁽²⁵⁷⁾ With all due respect for Switzerland's arbitration-friendly legal culture, such paternalistic behaviour of the Swiss legislator could also be seen as undermining the reliability of the Swiss Federal Supreme Court's case law in international arbitration.⁽²⁵⁸⁾ Berger moreover convincingly argues that the proposed revision of Article 7 SPILA (a) would not strengthen Switzerland's popularity as an international arbitration hub, (b) would not reflect current trends in international arbitration, and (c) would instead be disadvantageous to companies domiciled in Switzerland.⁽²⁵⁹⁾ The reasons given by Berger will be briefly outlined, since they make the initiative's weaknesses evident:

- a. In light of the arbitration-friendly approach of the Swiss courts' case law, a full review of an arbitration agreement does not cause detriment to Switzerland's attractiveness as an arbitration hub; the argument that the proposed revision of Article 7 SPILA would give rise to an increase in the choice of Switzerland as the seat to arbitrate is therefore unfounded.⁽²⁶⁰⁾
- b. It is a fact that France is the only well-known arbitration jurisdiction that has incorporated the negative effect of competence-competence into its arbitration law;⁽²⁶¹⁾ Article II(3) New York Convention does not call for such an interpretation. There is no indication of a current trend in favour of the negative effect of competence-competence.⁽²⁶²⁾
- c. Where the Swiss courts are competent to hear actions on the merits, which is most often the case where one party to the dispute is domiciled in Switzerland, the introduction of the negative effect doctrine (with the arbitral tribunal having its seat abroad) is – unlike the status quo – most likely to disadvantage the Swiss party: if the party domiciled abroad were to initiate judicial proceedings before the Swiss courts due to an allegedly pathological arbitration clause, the Swiss party raising the *exceptio arbitri* has, to date, nothing to fear from the arbitration-friendly Swiss courts' comprehensive examination of the arbitration agreement, provided that the agreement is valid. In the opposite case, however, where the Swiss party commences court proceedings in Switzerland arguing that the arbitration agreement is not valid, the foreign party – provided that Article 7 SPILA were revised in the proposed way – would only need to show that a valid arbitration agreement between the parties appears to exist, whereupon the Swiss court would need to stay the *page "45"* court proceedings with immediate effect.⁽²⁶³⁾ In conclusion, it is precisely the Swiss party's right to invoke the competence of the Swiss courts which is curtailed by the proposed revision.

The Swiss Arbitration Association (ASA), in its consultation on the proposed revision of Article 7 SPILA, has held that it generally appreciates the proposal to harmonise the scope of review by the Swiss courts when adjudicating on matters regardless of whether the arbitral tribunal has its seat outside or within Switzerland;⁽²⁶⁴⁾ the abandonment of a full review of the arbitration agreement, however, should not be agreed to unless the basis for accepting jurisdiction by national courts has been harmonised on an international level.⁽²⁶⁵⁾ The jurisdictional provisions in the New York Convention, however, are not fully standardised.⁽²⁶⁶⁾ In addition, ASA also criticises several aspects of the wording of the proposed Article 7(2) SPILA for lack of clarity and coordination, such as the legal consequence of the court's ruling that the arbitral tribunal is competent (i.e. the dismissal of jurisdiction under Article 7(1) SPILA versus the stay of proceedings under the proposed Article 7(2) SPILA).⁽²⁶⁷⁾

[D]. English Arbitration Act

English law does not have a long tradition of recognising the arbitral tribunal's power to determine its own jurisdiction. The Arbitration Act, however, explicitly stipulates the principle of competence-competence. The extent to which this power is granted to the arbitral tribunal in coordination with the national court's competence-competence, and the role played by English case law in coordinating jurisdiction, will be analysed in the following.

[1]. Principle of Competence-Competence in English Statutory Arbitration Law

The positive notion of competence-competence is set out in section 30(1) Arbitration Act, which states that, unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to whether there is a valid arbitration agreement, whether the tribunal is properly constituted, and what matters have been submitted to arbitration in accordance with the

arbitration agreement. What strikes the reader is that the tribunal's power to determine its own jurisdiction is not of a mandatory nature; the parties are entitled to provide differently.⁽²⁶⁸⁾

The Arbitration Act contains several provisions that permit the assumption that priority is not given to the arbitral tribunal to determine its jurisdiction: there are, in [page "46"](#) principle, three possibilities for the parties to have the issue of the arbitral tribunal's jurisdiction considered by the national courts (excluding the remedies at enforcement level):

- request a stay of legal proceedings based on a valid arbitration agreement under section 9 Arbitration Act;
- apply for the determination of a preliminary point of jurisdiction under section 32 Arbitration Act;
- apply for a declaration that there is no valid arbitration agreement under section 72(1)(a) Arbitration Act.

In addition, it is of interest that section 9(5) Arbitration Act, which deals with *Scott v Avery* clauses, i.e. arbitration clauses providing that the making of an award is a condition precedent to the bringing of legal proceedings, holds that such clauses are of no effect if the court refuses to stay the proceedings and hence affirms its jurisdiction to adjudicate the merits of the dispute.⁽²⁶⁹⁾ This paragraph indicates that agreements intending to impose the negative effect of competence-competence on parties are not enforceable if the court declares itself competent to deal with the case.

Section 31(5) Arbitration Act holds that the tribunal may stay proceedings whilst an application is made to the court under section 32: as regards applications to the national courts for the determination of a preliminary point of jurisdiction, section 32(4) Arbitration Act provides that unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court is pending. Even though the two sections cited contain diverging options how the arbitral tribunal may react in the event of proceedings pending before the national courts, they show that the party opposing the tribunal's jurisdiction may commence court proceedings on this subject notwithstanding an already pending arbitration. Furthermore, under section 72(1) Arbitration Act, a person alleged to be a party to arbitral proceedings but which takes no part in the proceedings may question, in court proceedings, whether there is a valid arbitration agreement. Consequently, applications to the national courts may be made by the party opposing arbitration even if arbitral proceedings are already in progress; hence English arbitration law does not seem to have incorporated the negative effect of competence-competence.⁽²⁷⁰⁾ Furthermore, court control of the arbitration agreement is not limited to a prima facie review; national courts have full powers of review.⁽²⁷¹⁾

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[2]. Principle of Competence-Competence in Recent English Case Law

Recent case law by the English courts, however, has given the discussion on the arbitral tribunal's competence-competence a new twist: the English courts originally took an interventionist approach towards questions of arbitral jurisdiction and hence applied a restrictive version of the principle of competence-competence; the centre of gravity for determinations of the jurisdiction of arbitral tribunals was the courts and the tribunal only played a supporting, but minor role.⁽²⁷²⁾ The English Court of Appeal, however, reversed this attitude towards competence-competence in its landmark decision *Fiona Trust & Holding Corp and Others v Yuri Privalov and Others ('Fiona Trust')*⁽²⁷³⁾, where it was confronted with the argument that the (separable) arbitration clause, like the contract, wherein it was contained, had been rescinded for bribery.⁽²⁷⁴⁾ The Court of Appeal concluded that "*it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute.*"⁽²⁷⁵⁾ This comment was confirmed by the Court of Appeal in *Republic of Kazakhstan v Istil Group Inc: "A party which wishes to challenge the jurisdiction of arbitrators must take the point before the arbitrators [...]"*⁽²⁷⁶⁾ Furthermore, the review of the arbitration agreement by the national courts under section 72(1)(a) Arbitration Act has been limited in *Fiona Trust* to cases where the arbitration clause is directly impeached by a ground used to attack the invalidity of the main contract.⁽²⁷⁷⁾ The House of Lords upheld the Court of Appeal's decision in its entirety.⁽²⁷⁸⁾ With this kind of case law, the Court of Appeal has sent a clear signal to the international arbitration community that the English courts will grant arbitral tribunals with their seat in England the ability to operate free of interference.⁽²⁷⁹⁾ The Court of Appeal in *Fiona Trust*, however, explicitly treated cases where one party argues that an arbitration agreement has never come into existence at all differently, insofar as these sorts of issues would fall exceptionally to national courts to determine in the first instance, rather than to arbitral tribunals.⁽²⁸⁰⁾

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In a more recent decision, *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan ('Dallah')*⁽²⁸¹⁾, the English Supreme Court rejected Dallah's

allegation that the arbitral tribunal's decision on jurisdiction should be given strong evidential force, but held that the court had to make an independent determination of the question whether there was an arbitration agreement between the parties, since the arbitral tribunal's own view of its jurisdiction has no legal or evidential value other than to place the burden of proof on the party challenging jurisdiction.⁽²⁸²⁾ The *Dallah* decision hence clarifies that the notion of competence-competence will not prevent a full and independent rehearing of the arbitral tribunal's jurisdictional findings by a national court.⁽²⁸³⁾ The same notion of the competence-competence principle was advocated by the Commercial Court in *Excalibur Ventures LLC v Texas Keystone Inc & Others* ('*Excalibur*')⁽²⁸⁴⁾ only recently, where it was held that, notwithstanding the doctrine of competence-competence, the English courts retain jurisdiction to determine the issue as to whether there is a valid agreement to arbitrate.⁽²⁸⁵⁾ This case law, however, does not seem to be at odds with the reasoning in *Fiona Trust*, since the Commercial Court in *Excalibur* was called to decide on whether the defendants in the arbitral proceedings were parties to the contract containing the arbitration agreement, i.e., whether the defendants had ever validly agreed to arbitration with binding force.⁽²⁸⁶⁾ Even though the reasoning given in *Excalibur* is also seen as a partial return to the position on the arbitral tribunal's competence-competence prior to the 1996 Arbitration Act,⁽²⁸⁷⁾ the Commercial Court's decision, in the author's opinion, is in line with the previous case law strengthening the arbitral tribunal's power to be the first to adjudicate on its jurisdiction as long as the challenge does not concern the mere existence of the arbitration agreement.

In summary, recent case law has clarified that where an arbitration has been commenced, the arbitral tribunal should decide on its jurisdiction first;⁽²⁸⁸⁾ however, cases where an issue regarding the validity of the arbitration agreement is raised are treated differently.⁽²⁸⁹⁾

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[E]. Comparative Conclusion

If not for the doctrine of competence-competence, an arbitral tribunal would be forced to suspend its proceedings every time a party challenged the tribunal's jurisdiction for whatever reason, and to refer the jurisdictional matter to a national court for determination before continuing the arbitral proceedings.⁽²⁹⁰⁾ Consequently, the doctrine of competence-competence may well be called a sacred principle of international arbitration, pertaining to the very foundation of arbitration as an independent dispute resolution mechanism.

The jurisdictions examined above have adopted the notions of the principle of competence-competence to a different extent: whereas the UNCITRAL Model Law and the German, the French, Swiss and English arbitration laws all have incorporated the positive effect of competence-competence empowering the arbitral tribunal to decide on its own jurisdiction, these jurisdictions diverge as to the implementation of the negative effect of competence-competence granting the arbitral tribunal priority to decide on its jurisdiction. The UNCITRAL Model Law and the German ZPO do not contain any indication as to the implementation of such a priority rule. The French arbitration law, by contrast, takes a firm stand in favour of the negative effect doctrine, obliging the national courts to decline their jurisdiction if the parties to the dispute have concluded an arbitration agreement and have already commenced arbitral proceedings. The Swiss and the English arbitration laws explicitly consider the positive effect of competence-competence, while the case law in these jurisdictions has made partial concessions to the implementation of a priority rule in favour of the arbitral tribunal: the Swiss Federal Supreme Court, on the one hand, has held that the national courts are limited to a prima facie review of the arbitration agreement where the arbitral tribunal has or is going to have its seat within Switzerland; cases where the arbitration agreement provides for a seat outside Switzerland are open to a comprehensive review by the Swiss courts. English case law, on the other hand, has developed a practice differentiating between whether the main contract wherein the arbitration clause is contained is argued to be invalid or whether a party argues that it never agreed to arbitration at all; in the former situation, English case law has held that the arbitral tribunal should be the first to determine its jurisdiction, whereas in the latter case it is rather for the English courts to adjudicate on the existence of an arbitration agreement. These different systems of implementation show that the recognition of the positive effect of competence-competence is uncontested, but that the debate is rather evolving around the incorporation of the negative effect of competence-competence. The concerns raised against the negative effect doctrine as well as the possible benefits it is said to create, will hence be dealt with below.

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[1]. Policy Considerations behind the Negative Effect of Competence-Competence

Discussions on the implementation of the negative effect of competence-competence often end with weighing the interests of an early and binding conclusion by the national courts, on the one hand, against the intrusion into the arbitrators' competence to decide on their jurisdiction, on the other hand.⁽²⁹¹⁾ The decision in favour of or against the implementation of the negative effect doctrine

always entails a restriction of the national courts' or the arbitral tribunals' equal right to competence-competence. In effect, commentators advocating the implementation of the negative effect of competence-competence hold that the negative effect does nothing more than safeguard the arbitral tribunal's exercise of the positive effect of competence-competence.⁽²⁹²⁾ The other side of the coin, however, is that the negative effect of the arbitral tribunal's competence-competence annihilates the state court's positive competence-competence when one of the parties invokes the arbitration agreement in court proceedings.⁽²⁹³⁾

In order to consider the crucial factors in this appreciation of the interests involved, it might be useful to identify the policy considerations behind the negative effect doctrine.

The French law is attributed "*un role pionnier*"⁽²⁹⁴⁾ for having recognised and honoured the need to incorporate the negative effect of competence-competence into its national statutory arbitration law. The policy considerations for such incorporation are aptly described by Gaillard and Savage:

- Prevention of dilatory tactics: if the national court's review of the arbitration agreement is limited to a prima facie examination, parties seeking to obstruct or to interfere with the progress of the arbitration are discouraged from doing so. Behind this policy consideration lies a clear preference for the smooth conduct of the arbitral proceedings irrespective of any risk of having the arbitrators wrongly retain jurisdiction in some cases and having that decision reversed by the national courts several months or years later.⁽²⁹⁵⁾
- Centralisation of litigation regarding the existence and validity of the arbitration agreement before certain courts: in legal systems that have adopted the negative effect of competence-competence, the national courts cannot review the arbitration agreement until the arbitral tribunal has rendered an award dealing with its jurisdiction and the party opposing the tribunal's jurisdiction challenges the award before the national courts; the state court competent to [page "51"](#) hear such challenge is not generally a commercial or civil court, but rather such litigation is normally centralised before certain higher courts, such as the Court of Appeal under French arbitration law⁽²⁹⁶⁾ or the Swiss Federal Supreme Court under Swiss arbitration law⁽²⁹⁷⁾.⁽²⁹⁸⁾ In other words, the courts competent to hear challenges to arbitral awards are considered better suited to conduct a full review of an arbitration agreement than any first instance court before which the arbitration defence may be invoked.

These two policy reasons were considered most compelling by the French legislator, even though the commercial interest in boosting arbitration might also have played a decisive role. Behind the considerations in favour of the priority and efficiency of arbitration lies a high degree of trust in the arbitrators being the first to adjudicate on their jurisdiction.⁽²⁹⁹⁾ The different treatment of the review of the arbitration agreement when a Swiss tribunal adjudicates or has been chosen to adjudicate on the matter and when a foreign arbitral tribunal does so, as has been established by Swiss case law, might also be based on the different level of trust conferred upon a foreign tribunal as opposed to a tribunal having its seat in Switzerland. As a result, on a policy level, it might also make a difference for the implementation of the negative effect doctrine whether a jurisdiction has a long-standing tradition in promoting and supporting arbitration, thereby building a relationship of mutual trust between the national courts and arbitral tribunals. Kaufmann-Kohler and Rigozzi conclude in this respect: "*Dans le régime actuel de l'arbitrage international, il nous apparaît juste d'accorder cette confiance [la confiance que l'ordre juridique suisse veut bien accorder au juge étranger] aux juridictions des Etats membres de la Convention de New York ou d'un autre traité sur la reconnaissance et l'exécution des conventions d'arbitrage.*"⁽³⁰⁰⁾ It might, however, be questioned whether the arbitrators' expertise and reliability in all the New York Convention states is such as to justify restricting national courts' review of an arbitration agreement in order to grant an arbitral tribunal the priority to determine its jurisdiction.⁽³⁰¹⁾

In the same way, one could argue that if a jurisdiction's case law is characterised by a consistently arbitration-friendly practice, the trust in the national courts' case law is also likely to be such as to make redundant the implementation of the negative effect of competence-competence to safeguard the arbitration's efficiency. Having trust in a judiciary conscious of the needs of arbitration and having a sound respect for the smooth conduct of arbitral proceedings, the policy considerations in favour of the negative effect doctrine mentioned above can be reconciled simply by the fact that the [page "52"](#) national courts are perfectly capable of reviewing arbitration agreements in an arbitration-friendly manner without the need for the circuitous referral to arbitration in the first place: court proceedings initiated with the sole strategic purpose of delaying and obstructing the arbitral proceedings, in spite of a valid arbitration agreement, will be terminated by the national court declining jurisdiction and referring the parties to arbitration. The centralisation of this kind of litigation before certain courts, furthermore, would be preferable for reasons of procedural efficiency, but would not constitute a necessity as all the courts to an arbitration-friendly system should share due respect for the smooth conduct of arbitration.

Ultimately, the policy considerations to be invoked will depend upon

the premises on which a legal system is based: either the arbitral tribunal is considered more apt to review the arbitration agreement and is thereby given priority to determine its jurisdiction, or the national courts are envisaged as 'co-actors' to arbitral tribunals, highly supportive of arbitration and hence also capable of fully reviewing the validity of an arbitration agreement. In other words, the question of whether the introduction of the negative effect of competence-competence on a statutory basis is considered beneficial very much depends on the relationship between national courts and arbitral tribunals. If the national courts in a particular jurisdiction share considerable respect for arbitration and their case law reflects their arbitration-friendly approach, and is furthermore characterised by efficient decision-making, the allocation of jurisdiction between national courts and arbitral tribunals will prove to be more efficient if national courts are entitled to conduct a full review of an arbitration agreement's validity. In legal systems that lack such mutual trust between the judiciary and arbitration, implementation of the negative effect doctrine is most likely to be considered more suitable to take a firm stand for arbitration.

[2]. Negative Effect of Competence-Competence: A Blessing or a Curse?

The enhancement of efficiency is often part of the discussion surrounding the negative effect of competence-competence: on the one hand, it is argued that a full review conducted by the national courts reduces the efficiency of arbitration, since the national courts' decision on the validity of the arbitration agreement takes up considerable time, and the party opposing arbitration may delay the arbitral proceedings by invoking the invalidity of the arbitration agreement before the national courts for merely strategic reasons.⁽³⁰²⁾ On the other hand, if the national courts seized of the merits of the case are also entitled to rule immediately on the existence and validity of the arbitration agreement, time and costs may be saved;⁽³⁰³⁾ if, in addition, an appeal against a court judgment deriving from a full review of its jurisdiction is admissible, the *page "53"* matter would be resolved once and for all.⁽³⁰⁴⁾ In summary, the consecutive duplication of proceedings (before the arbitral tribunal and the respective national court) caused by the implementation of the negative effect of competence-competence is both praised as a barrier to merely obstructive behaviour by the party opposing arbitration, which thereby contributes to the efficiency of the arbitration, but also criticised for squandering the parties' funds and time in the event that the arbitral tribunal was never competent.

Furthermore, as is often the case, arbitral tribunals are not obliged to stay their proceedings if a party commences court proceedings on the same subject matter. Hence, if the legal system has adopted the negative effect doctrine, the national court will refer the parties to the pending arbitration without fully reviewing the arbitration agreement. One could therefore argue, on the one hand, that the negative effect of competence-competence prevents the duplication of proceedings before the national courts (in parallel to the proceeding pending before the arbitral tribunal), thereby offering a solution for the coordination of parallel proceedings.⁽³⁰⁵⁾ It is argued that such a priority of the arbitral tribunal to determine its jurisdiction is furthermore preferable since it is independent of the litispendence rule examining which adjudicatory body was seized first. The arbitrators are further said to be more apt to assess certain elements specific to the tribunal's jurisdiction, and court control remains available after the tribunal has rendered an award.⁽³⁰⁶⁾

On the other hand, the negative effect of competence-competence may give rise to subsequent court proceedings if the party opposing the arbitration challenges the arbitral tribunal's decision on its jurisdiction before the national courts. Such a deferred court review of the arbitral tribunal's decision on jurisdiction might also be considered critical as regards the effective protection of a party's right of access to the courts.⁽³⁰⁷⁾ This concern is most distressing in view of parties that have never agreed to arbitrate, but are forced to take part in a bogus arbitration at substantial time and expense and to wait until the end of the arbitral proceedings to challenge jurisdictional defects.⁽³⁰⁸⁾ In particular in cases where the parties' consent to arbitrate is in dispute – which is usually coupled with complex issues, such as a group of companies, the assignment of an arbitration agreement or the incorporation of an agreement to arbitrate by reference – a prima facie examination will hardly enable a national court to ascertain the validity of an arbitration agreement.⁽³⁰⁹⁾ Developing this thought further, *page "54"* it could be argued that it might be more justifiable to give the arbitral tribunal priority in determining its jurisdiction where the question arises whether the dispute is covered by the scope of the arbitration agreement, than where the existence or validity of the arbitration agreement or the arbitrability of the dispute are controversial.⁽³¹⁰⁾

From a practical point of view it might be questioned whether the negative effect doctrine should also be applicable if the arbitral proceedings have not yet been initiated. The problem in this situation is the following: if the national judge refers the parties to arbitration upon appearance of a valid arbitration agreement between them, it would be for the party claiming before the national court and thereby opposing arbitration to take the initiative for the constitution of the arbitral tribunal in order to finally challenge the arbitral tribunal's potentially positive decision on its jurisdiction before the national courts.⁽³¹¹⁾ Provided that one of the parties presents a genuine challenge to the arbitral tribunal's jurisdiction based on a

substantiated jurisdictional objection to the existence or validity of the arbitration agreement and an arbitral tribunal has not yet been constituted, it would be sensible for the national court to resolve the objection on the merits.⁽³¹²⁾

The comments made above lead to the conclusion that the negative effect of competence-competence may, in terms of efficiency, be interpreted as both a blessing and a curse.

[3]. Future Role of the Negative Effect of Competence-Competence

Although the proliferation of the negative effect doctrine was once relatively isolated, with the early advocates being French law and the European Convention, more and more commentators are asserting that this effect seems to be gaining increasing acceptance.⁽³¹³⁾ When considering Swiss and English case law which held in favour of the negative effect of competence-competence, at least under certain circumstances and, in particular, when taking into account the proposal for the revision of Article 7 SPILA in Switzerland, these commentators might be proven right.

The author, however, holds that the implementation of the negative effect of competence-competence as a clear-cut principle, postponing the full review by national courts until after the arbitral tribunal has decided on its jurisdiction in an arbitral award, is not capable of doing justice to an efficient and just allocation of jurisdiction between national courts and arbitral tribunals. The task of coordinating jurisdiction between national courts and arbitral tribunals should not be undertaken by a rigid principle, but the solution should be flexible enough to answer, on a case-by-case basis, the question as to which forum can most efficiently, competently and fairly make the initial jurisdictional determination.⁽³¹⁴⁾ For this purpose, it seems to be justified to [page "55"](#) distinguish between cases where the validity of the underlying contract and the cases where the existence or validity of the arbitration agreement is challenged. In other words, where there is a credible dispute regarding the existence, validity or legality of an arbitration agreement, access to the national courts should be available before a party proceeds to arbitration.⁽³¹⁵⁾ When trying to translate this proposal of an adequate means of allocating jurisdiction between national courts and arbitral tribunals into the practice of a jurisdiction examined above, the case law developed in England comes closest to making the allocation of jurisdiction not contingent upon fixed parameters, but differentiating between the objections made by the parties in the spirit of a just and efficient decision-making process. The approach advocated is aptly worded by Born: *"Both arbitral tribunals and national courts have the competence to consider jurisdictional objections and the timing and nature of their respective decision-making processes and decisions should rest on considerations of efficiency, fairness and competence, rather than being defined by absolute categorizations."*⁽³¹⁶⁾

It therefore remains to be seen whether the sharp edges of the principle of competence-competence with its negative effect will, in practice, eventually be rounded by case law or by legislative projects to come.

§2.03. Competence-Competence and the Brussels and Lugano Regime

Since the jurisdictions examined above are either Member States of the European Union, and thereby have adopted the Brussels Regulation, or contracting states of the Lugano Convention, it will be analysed in this section first how the Brussels Regulation and the Lugano Convention influence the allocation of jurisdiction between national courts and arbitral tribunals, and second how the revised Brussels Regulation affects the coordination of jurisdiction at the interface of litigation and arbitration.

The Brussels Regulation is directly applicable in the Member States of the European Union, according to Article 288(2) of the Treaty on the Functioning of the European Union⁽³¹⁷⁾. The Lugano Convention, which is also directly applicable in Switzerland, mirrors the provisions of the Brussels Regulation.⁽³¹⁸⁾ Since the Brussels Regulation and the Lugano Convention are parallel conventions, the comments to be made with regard to their scope of application pertain to both of them, unless explicitly stated otherwise.

[A]. Arbitration Exception

Arbitration is excluded from the scope of application of both the Brussels Regulation and the Lugano Convention (Article 1(2)(d) Brussels Regulation/Lugano Convention). [page "56"](#) This provision is to be interpreted according to an independent Regulation/Convention standard.⁽³¹⁹⁾ As far as the legislative history of the Brussels Regulation is concerned, the Treaty establishing the European Economic Community (EEC) signed in Rome in 1957 ('Rome Treaty') provided in Article 220 paragraph 4⁽³²⁰⁾ that the Member States are to enter into negotiations with each other with a view to securing the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards. Over a decade later, the 1968 Brussels Convention on Jurisdiction and the Enforcement of

Judgments in Civil and Commercial Matters ('Brussels Convention') dealt with the jurisdiction and enforcement of court judgments only and went as far as excluding arbitration as a whole.⁽³²¹⁾ This amounted clearly to a departure from the uniform regime intended by Article 220 of the Rome Treaty.⁽³²²⁾

The arbitration exclusion was motivated (originally in the context of the Brussels Convention, which was replaced by the Brussels Regulation)⁽³²³⁾ by the existence of many international treaties on arbitration, and particularly the New York Convention, because almost all Member States of the European Union had meanwhile become parties to this Convention.⁽³²⁴⁾ The arbitration exception makes it clear that any conflict with existing international agreements on arbitration was to be avoided.⁽³²⁵⁾ The exclusion of arbitration was further maintained when the Brussels Convention was transformed from a multilateral treaty to an EU Regulation in 2000.⁽³²⁶⁾

Citing the New York Convention as the justification for the exclusion is not convincing, firstly, in terms of the scope of the Convention, since it is less concerned with jurisdiction and more with the recognition and enforcement of foreign arbitral awards.⁽³²⁷⁾ Secondly, the reasoning behind the full-scale exclusion of arbitration from the Brussels and Lugano regime is not convincing in view of the ECJ's case law on the interface between the Brussels Regulation and arbitration.

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[1]. ECJ's Case Law with a Connection to Arbitration

There are, in principle, three scenarios at the interface between court litigation and arbitration in which the ECJ has, to date, had to decide whether the arbitration exception is applicable: the admissibility of ancillary matters to arbitration proceedings under the Brussels Regulation, the applicability of the Brussels Regulation to provisional measures applied for by a party to an arbitration and, last but not least, the question as to whether a national court within the Brussels regime is entitled to grant injunctive relief to prohibit a parallel action aimed at sabotaging an arbitration.

[a]. Ancillary Proceedings: The *Marc Rich* Case

One of the first cases where the ECJ had to decide on a dispute relating to the interface between arbitration and court proceedings (under the Brussels Convention) was the case of *Marc Rich and Co. AG v Società Italiana Impianti PA*⁽³²⁸⁾ (*Marc Rich*).

[i]. Facts of the Case

The dispute arose out of a sales relationship between Marc Rich and Co. AG ('Marc Rich and Co') and Società Italiana Impianti PA ('Società Italiana'). According to the contract, Società Italiana was obliged to deliver crude oil to Marc Rich and Co. After the delivery was made to Marc Rich and Co, the latter claimed that the oil was contaminated. Società Italiana consequently brought proceedings before an Italian court seeking a declaration that it was not liable towards Marc Rich and Co. Relying on the existence of the arbitration clause in the sales contract, Marc Rich and Co challenged the jurisdiction of the Italian court and initiated arbitration proceedings before the London Court of International Arbitration. Società Italiana, however, refused to participate in this arbitration; Marc Rich and Co, therefore, applied to the High Court of Justice in London for the appointment of an arbitrator on behalf of Società Italiana. The High Court held that the Brussels Convention did not apply to the request of Marc Rich because the Convention's Article 1(4) excludes arbitration from its scope. On appeal, the Court of Appeal decided to stay the proceedings and to refer to the ECJ for a preliminary ruling on the question as to whether the arbitration exception in the Convention extended to litigation or judgments where the initial existence of an arbitration agreement is in issue.⁽³²⁹⁾

[ii]. Reasoning and Comments to the Case

The ECJ made the general remark that, by excluding arbitration from the scope of the Brussels Convention – on the grounds that it was already covered by international [page "58"](#) conventions – the Member States intended to exclude arbitration in its entirety, including proceedings brought before national courts in an arbitration context.⁽³³⁰⁾ Regarding the request for the appointment of an arbitrator before a national court, the ECJ concluded that such an application is a measure for setting arbitration proceedings in motion and hence comes within the sphere of arbitration covered by the exclusion in the Brussels Convention.⁽³³¹⁾ The *Marc Rich* judgment, therefore, settled that the Brussels Convention (now Brussels Regulation) is not applicable in respect of arbitration proceedings and is also not applicable to court proceedings relating to arbitration.⁽³³²⁾

The *Marc Rich* case is, furthermore, a principal ruling regarding the qualification of ancillary proceedings that are connected to arbitration proceedings: "If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court

must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention."⁽³³³⁾ So, even the preliminary question as to whether a valid arbitration clause had been concluded between Marc Rich and Co and Società Italiana, which would have prejudged whether Marc Rich and Co was entitled to commence arbitration proceedings and thus apply for the appointment of an arbitrator at all, fails to legitimate the application of the Brussels Convention if the subject matter of the dispute concerns arbitration.

The ECJ, however, gave no guidance as to how the issue of the existence or validity of an arbitration agreement is to be assessed under the Brussels Convention on a stand-alone basis.⁽³³⁴⁾ The Schlosser Report on the Brussels Convention in 1978 considered a judgment determining whether an arbitration agreement is valid or not as falling outside the Brussels Convention.⁽³³⁵⁾ The Evrigenis Kerameus Report on the accession of Greece to the Brussels Convention in 1982, however, took the view that the verification of the validity of an arbitration agreement as an incidental question raised by a litigant in order to contest the jurisdiction of the court seised under the Brussels Convention must be considered as falling within its scope.⁽³³⁶⁾ In its opinion on the *Marc Rich* case, Advocate General Darmon relied on the Schlosser Report and concurred that, if the existence of the arbitration agreement were the principal issue, the dispute should fall outside the scope of the Brussels Convention.⁽³³⁷⁾ The ECJ, accordingly, decided the *Marc Rich* case on the basis that the principal issue at stake [page "59"](#) was the appointment of an arbitrator, and therefore the dispute fell under the arbitration exception of the Brussels Convention.⁽³³⁸⁾

[b]. Provisional Measures: The Van Uden Case

In the case *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line and another*⁽³³⁹⁾ (*Van Uden*), the ECJ had another opportunity to interpret and define the applicability of the arbitration exception in the Brussels Convention.

[i]. Facts of the Case

The German company, Kommanditgesellschaft in Firma Deco-Line and another ('Deco-Line'), and the Dutch company, Van Uden Maritime BV ('Van Uden Maritime'), entered into a charter agreement containing an arbitration clause. When Deco-Line failed to pay the charter hire as agreed in the contract, Van Uden Maritime commenced arbitration proceedings in the Netherlands. As Deco-Line was reluctant to appoint an arbitrator, Van Uden Maritime sought an order from the President of the Rechtbank (District Court) Rotterdam against Deco-Line for payment of the outstanding charter hire. The President of the Rechtbank Rotterdam partially granted the relief sought by Van Uden Maritime. On appeal by Deco-Line, the Regional Court of Appeal quashed that order. A further appeal against that decision was eventually brought before the Hoge Raad der Nederlanden, which stayed the proceedings and requested a preliminary ruling by the ECJ, *inter alia*, on the question as to whether the competent Dutch court had jurisdiction to rule on the application for interim relief, despite the fact that arbitration proceedings had already been initiated between the parties.⁽³⁴⁰⁾

[ii]. Reasoning and Comments to the Case

The ECJ held that, fundamentally, the Brussels Convention does not apply to judgments determining whether an arbitration agreement is valid or not, or to proceedings and decisions concerning applications for the annulment, amendment, recognition and enforcement of arbitration awards. Furthermore, jurisdiction to order the parties not to continue the arbitration proceedings cannot be based on the Brussels Convention. Also excluded from the scope of the Brussels Convention are proceedings ancillary to arbitration proceedings, such as the appointment or dismissal of arbitrators, the fixing of the place of arbitration or the extension of the time limit for making awards.⁽³⁴¹⁾ The [page "60"](#) ECJ, however, did not consider provisional measures as ancillary, but saw them as being parallel to the main proceedings and intended as measures of support.⁽³⁴²⁾

With regard to the status of provisional measures in support of arbitration proceedings, the ECJ opined that they do not concern arbitration as such but serve to protect a wide variety of rights; their nature was thus considered dependent on the nature of the rights that they protect.⁽³⁴³⁾ This finding led the ECJ to conclude that, where the subject matter of an application for provisional measures relates to a question covered by the scope of the Brussels Convention, the Convention is applicable and may confer jurisdiction on the court hearing that application, even where proceedings have already been commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.⁽³⁴⁴⁾ In summary, the ECJ confirmed in the *Van Uden* judgment that the crucial and decisive factor for determining the applicability of the Brussels Convention is the subject matter at the heart of the proceedings; in other words, where the application for provisional measures is made in support of the contractual claim in a civil and commercial matter – as opposed to the conduct of arbitration proceedings – jurisdiction may be based on the Brussels Convention.⁽³⁴⁵⁾

[c]. Parallel Proceedings: The West Tankers Case

The ECJ's case law regarding the interface between the Brussels Regulation and arbitration eventually culminated in the dispute *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.*⁽³⁴⁶⁾ ('*West Tankers*').

[i]. Facts of the Case

The facts of the *West Tankers* case are the following: a vessel owned by West Tankers Inc. and chartered by Erg Petroli SpA ('Erg') collided in Italy with a jetty owned by Erg and caused damage. The charter agreement between West Tankers Inc. and Erg contained a clause providing for arbitration in London. After having claimed compensation from its insurers Allianz SpA ('Allianz') and Generali Assicurazioni Generali SpA ('Generali'), Erg initiated arbitration proceedings in London against West Tankers Inc. for the excess. Allianz and Generali, having paid Erg the compensation under the insurance policies, meanwhile brought proceedings against West Tankers Inc. in Italy [page "61"](#) before the Tribunale di Siracusa to recover the amount paid to Erg. West Tankers Inc., however, challenged the Italian court's jurisdiction based on the arbitration clause contained in the charter agreement with Erg. In parallel, West Tankers Inc. brought proceedings before the High Court of Justice of England and Wales, seeking a declaration that the dispute between itself and Allianz and Generali was to be settled by arbitration and, at the same time, sought injunctive relief restraining Allianz and Generali from pursuing any proceedings other than arbitration and requiring them to discontinue the court proceedings commenced. The High Court granted West Tankers Inc. injunctive relief and thus ordered an anti-suit injunction against Allianz and Generali. The latter appealed against that judgment to the House of Lords.⁽³⁴⁷⁾ The House of Lords decided to stay its proceedings and to refer the following question to the ECJ for a preliminary ruling: "*Is it consistent with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?*"⁽³⁴⁸⁾

[ii]. Reasoning and Comments to the Case

The ECJ, thus, first had to determine whether the dispute fell within the scope of the Brussels Regulation at all; it confirmed the judgment given in the *Van Uden* case and reiterated that the subject matter of the proceedings, i.e. the nature of the rights which the proceedings in question serve to protect, is solely decisive for qualifying the dispute as falling within or outside the Brussels Regulation. Proceedings which are aimed at the granting of an anti-suit injunction (in protection of an arbitration agreement) cannot, therefore, come within the scope of the Brussels Regulation.⁽³⁴⁹⁾

The ECJ, however, went on in the *West Tankers* case to emphasise that, even though proceedings might not fall within the scope of the Brussels Regulation, they might nevertheless have consequences which undermine the *effet utile* of the Regulation; this is, for example, the case where such proceedings prevent a court of another Member State from exercising the jurisdiction that the Brussels Regulation confers upon it.⁽³⁵⁰⁾ Through this analysis, the ECJ introduced an additional test when examining the scope of application of the Brussels Regulation, namely one of guaranteeing the effectiveness of the European judicial system.⁽³⁵¹⁾ Consequently, the ECJ examined whether the proceedings brought by Allianz and Generali against West Tankers Inc. [page "62"](#) before the Tribunale di Siracusa came within the scope of the Brussels Regulation;⁽³⁵²⁾ if answered in the affirmative, the Brussels Regulation would confer the right on the Italian court to decide on its own jurisdiction.

The ECJ followed Advocate General Kokott's opinion and found that if the subject matter of the dispute, such as a claim for damages, comes within the scope of the Brussels Regulation, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, is also covered by the Regulation.⁽³⁵³⁾ The Brussels Regulation was thus considered applicable for assessing the objection of a lack of jurisdiction based on the existence of an arbitration agreement raised by West Tankers Inc. before the Tribunale di Siracusa, and it was thus exclusively for that Italian court to rule on the objection and, at the same time, on its own jurisdiction.⁽³⁵⁴⁾ Consequently, the anti-suit injunction sought by West Tankers Inc. before the High Court of Justice would have prevented the Tribunale di Siracusa from ruling on the applicability of the Regulation to the dispute and that would have meant depriving a Member State's court of its power – bestowed upon it by the Brussels Regulation – to rule on its own jurisdiction.⁽³⁵⁵⁾ Such an anti-suit injunction would have run counter to the trust which the Member States accord one another's legal systems and judicial institutions and which also forms the basis of the system of jurisdiction under the Brussels Regulation.⁽³⁵⁶⁾ If the mere referral to an arbitration agreement existing between the parties to a dispute were to justify ordering an anti-suit injunction against a Member State's court, the party arguing that the arbitration agreement is void, inoperative or incapable of being performed would thus be barred from access to the Member State's court and thereby from a

judicial protection to which it is entitled under the Brussels Regulation.⁽³⁵⁷⁾ The sole fact that an arbitration agreement had been invoked in the proceedings did not, therefore, trigger the application of the arbitration exception.⁽³⁵⁸⁾ The ECJ further added that this conclusion is also supported by Article II(3) New York Convention, as this provision provides that the court of a contracting state will only refer the parties to arbitration at the request of one of the parties and only if it finds that the arbitration agreement is not null, void, inoperative or incapable of being performed.⁽³⁵⁹⁾

In summary, the application for an anti-suit injunction, as a principle, is not covered by the Brussels Regulation, since such a request has at its heart the support of [page "63"](#) the conduct of arbitration proceedings. If such proceedings are, however, to affect major objectives of the Brussels Regulation, such as the Member States' right to decide on their own jurisdiction, they are not compatible with the Brussels Regulation.⁽³⁶⁰⁾ Consequently, the ECJ introduced a two-step test to be applied to determine the scope of the arbitration exception under the Brussels Regulation: the first step being whether the court proceedings fall within the scope of the Brussels Regulation ('subject matter test'), and the second step being whether the effects of such proceedings undermine the effectiveness of the system established by the Regulation.⁽³⁶¹⁾ Hence, if the subject matter of a dispute is not covered by the scope of the Brussels Regulation, but happens to violate a basic principle pertaining to the very core of the Brussels Regulation, such proceedings may nevertheless be inadmissible under the Brussels Regulation. It is hence striking that the ECJ in *West Tankers* also extended the ambit of the Brussels Regulation by applying the *effet utile* test to the English proceedings.⁽³⁶²⁾ As a result, one could conclude that the ECJ placed more significance on the Member States' courts' power to rule on their own jurisdiction than on the order of a procedural instrument to avoid parallel proceedings. But what is more serious is the practical consequence that this ruling makes it possible to 'torpedo'⁽³⁶³⁾ proceedings and may thus lead to a race to obtain and enforce an award before such time as the court dealing with a claim on the merits can decide on the validity of the arbitration agreement.⁽³⁶⁴⁾ The possible impact of the *West Tankers* decision is even considered to be sufficiently grave as to reduce confidence in arbitration in Europe, since parties see that agreed procedures can be circumvented and the chosen mechanism of dispute resolution may be replaced.⁽³⁶⁵⁾

[2]. Interim Conclusion

It can be assumed from the ECJ's case law on the interface between the Brussels Convention/Regulation and arbitration that the ECJ accepts the possibility that parallel judicial and arbitral proceedings may be raised in developing a clear strategy of non-interference with arbitration.⁽³⁶⁶⁾ The absolute exclusion of arbitration in the [page "64"](#) Brussels Regulation cannot, however, be justified by the adoption of the New York Convention, which deals with the recognition and enforcement of arbitral awards and much less with the jurisdiction of national courts and arbitral tribunals.⁽³⁶⁷⁾ In the words of Veeder: the New York Convention is no sacred cow and cannot, therefore, exclude any attempt to reform the Brussels Regulation and the Lugano Convention.⁽³⁶⁸⁾

The categorical exclusion of arbitration from the scope of the Brussels Regulation and the Lugano Convention is dissatisfactory; this can be illustrated by the example of 'torpedo' claims:⁽³⁶⁹⁾ if the respondent in arbitration proceedings challenges the arbitral tribunal's jurisdiction and aims at obstructing the arbitration, he might intend to seise the least expeditious national court to delay the proceedings as long as possible. As long as the relevant law applicable at the place of the seised court does not grant priority to the arbitral tribunal for determining its own jurisdiction, the respondent might succeed in impeding the arbitration proceedings. No remedy can be found in the New York Convention either, since it does not grant priority to the arbitral tribunal and does not contain a *lis pendens* mechanism.⁽³⁷⁰⁾ Likewise, the ECJ in its *West Tankers* decision has given more weight to safeguarding the principle of judicial protection in favour of the Member States' courts than to preventing the 'torpedoing' of international arbitration by parallel court actions.⁽³⁷¹⁾

Furthermore, the ECJ has taken the view in its case law that the applicability of the Brussels Regulation depends on the nature of the subject matter; in other words, if the subject matter of the dispute falls within the scope of the Regulation, a preliminary issue outside its scope will not preclude the application of the Brussels Regulation.⁽³⁷²⁾ The criteria to determine whether the dispute is covered by the Brussels Regulation, however, require an intricate distinction to be made between principal and preliminary issues, which is not easy to draw and which, moreover, largely depends on national procedural law.⁽³⁷³⁾

As is evident, the ECJ plays an extremely important role in interpreting the Brussels Regulation, but its decisions do not have legislative power.⁽³⁷⁴⁾ It is desirable for certain specific case constellations concerning the interface between the Brussels and Lugano regime, respectively, and arbitration to be addressed by future conventions, not for the sake of regulating arbitration, but to ensure a smooth interplay between the national courts' jurisdiction and arbitral proceedings.⁽³⁷⁵⁾ Furthermore, amending the text of the

Brussels Regulation is politically less difficult and more likely to produce a [page "65"](#) uniform regime than the haphazard, piecemeal and inconsistent solutions to be worked out by different national courts, even if they are assisted by the ECJ.⁽³⁷⁶⁾

Based on the current wording of Article 1(2)(d) Brussels Regulation and the Lugano Convention as well as on the ECJ's case law in this respect, the arbitration exclusion is interpreted strictly. It is, therefore, assumed in the context of this book that the Brussels and Lugano regime is not applicable where arbitration is at the core of the proceedings brought before the Member States' courts.

[B]. Recast Brussels Regulation

The arbitration exception in the Brussels Regulation is said to cause severe incompatibilities as far as the jurisdiction of courts and arbitrators and the enforcement of court judgments and arbitral awards are concerned.⁽³⁷⁷⁾ There has been no uniform allocation of jurisdiction in proceedings ancillary to or supportive of arbitration proceedings to date; in addition, the recognition and enforcement of judgments given by courts in disregard of an arbitration clause is uncertain.⁽³⁷⁸⁾ It was therefore long overdue for the Member States to acknowledge their responsibility to negotiate the role of arbitration within the Brussels regime.

[1]. Historic Development of the Recast Brussels Regulation

Article 73 Brussels Regulation holds that no later than five years after the entry into force of the Regulation, the Commission is to present to the European Parliament, the Council and the Economic and Social Committee a report on the application of the Brussels Regulation and submit any proposals for adaptations, if need be. Before the Commission submitted any comments on the Brussels Regulation, the Report on the Application of Regulation Brussels I in the Member States was released in 2007 by Prof. Dr. Burkhard Hess, Prof. Dr. Thomas Pfeiffer and Prof. Dr. Peter Schlosser ('Heidelberg Report'). The Heidelberg Report suggested deleting the arbitration exception completely;⁽³⁷⁹⁾ to deal with the problem of parallel proceedings and conflicting judgments, the authors proposed giving priority to a Member State's court which is seised to grant declaratory relief in respect of the existence, the validity and/or the scope of the arbitration agreement at the designated place of arbitration.⁽³⁸⁰⁾

It was not five years after the entry into force of the Brussels Regulation, but around eight years later, that the Commission presented the Green Paper on the Review [page "66"](#) of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters⁽³⁸¹⁾. On 14 December 2010, the Commission finally released its proposal on how to amend the Brussels Regulation.⁽³⁸²⁾ In a nutshell, the Commission's Proposal suggested that a 'priority rule' be introduced in favour of arbitral tribunals or the Member States' courts at the seat of the arbitration when the existence, the validity or the effects of the arbitration agreement are in question; the suggested draft Article 29(4) did not hold that the court at the seat or the arbitral tribunal need to be seised first, but that the priority rule would have been activated once these adjudicatory bodies had been seised.⁽³⁸³⁾ The Commission's Proposal, however – in addition to the criticism proffered in legal doctrine⁽³⁸⁴⁾ – did not gain the support of the European Parliament and the Council and was finally dropped. The final text of the revised Brussels Regulation was published in the Official Journal on 20 December 2012 and will enter into force on 10 January 2015.⁽³⁸⁵⁾

Considering the historic development of the Recast Brussels Regulation, it may be observed that the proposal to leave the arbitration exception in Article 1(2)(d) as it is and only to add a recital dealing specifically with the interface of litigation and arbitration was preferable over a complete deletion of the arbitration exception and a priority rule in favour of the arbitral tribunal's or the seat court's determination of the arbitration agreement's validity. The relevant recital in the Recast Brussels Regulation dealing with the interface of litigation and arbitration will be outlined in the next chapter.

[2]. Recital 12 Recast Brussels Regulation

With regard to the interplay of litigation and arbitration in the Brussels regime, the Recast Brussels Regulation reinforces the exclusion of arbitration in its new recital 12:

The recital first holds that "*[n]othing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.*"⁽³⁸⁶⁾ This part of the new recital expressly acknowledges the Member States' courts' duties under Article II(3) New York Convention. Likewise, Article 73(2) Recast Brussels Regulation also provides that the Regulation shall not affect the application of the New York Convention.

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Secondly, recital 12 of the Recast Brussels Regulation reveals a change in the case law relevant under the currently effective Brussels Regulation: "A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question."⁽³⁸⁷⁾ This paragraph overturns the rule developed in the *West Tankers* ruling that a judgment as to an arbitration agreement's (in)validity falls within the scope of the Brussels Regulation where it is determined as a preliminary matter in a case whose main subject matter is covered by the ambit of the Regulation.⁽³⁸⁸⁾ The exclusion of judgments ruling on the arbitration agreement's validity from the recognition and enforcement scheme of the Recast Brussels Regulation is a very welcome amendment, since it helps diminish the incentive for a race to a judgment on the arbitration agreement's (in)validity by a Member State court, which is possible under the existing Brussels regime.⁽³⁸⁹⁾ Even though it substantially reduces the appeal of tactical litigation in the interface between court proceedings and arbitration within the EU, recital 12(2) Recast Brussels Regulation does not help to limit the risk of conflicting decisions being rendered and able to be enforced within the EU. Furthermore, the Recast Brussels Regulation seems instead to provide support for the existence of parallel proceedings at the interface of litigation and arbitration. It hence needs to be seen how the Recast Brussels Regulation is reconcilable with the goal of minimising the possibility of concurrent proceedings and of ensuring that irreconcilable judgments will not be given in two Member States, as provided in the current recital 15 Brussels Regulation and recital 21 Recast Brussels Regulation.

Thirdly, the Recast Brussels Regulation holds in recital 12(3) that, where a Member State court has concluded that an arbitration agreement is invalid, such a finding should not preclude that court's ruling on the merits of the dispute from being recognised or enforced in accordance with the Regulation. This should, however, be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards based on the New York Convention, which takes precedence over the Regulation.⁽³⁹⁰⁾ In other words, a Member State court may enforce an arbitral award it considers valid under the New York Convention in preference to a court judgment invoked under the Recast Brussels Regulation. By way of an example, this means the following: an Italian court declares the arbitration agreement invalid and renders a judgment on the substance of the dispute, whereas an English court holds that the same arbitration agreement is valid and hence refers the parties to arbitration. The arbitral tribunal seated in England renders an arbitral award conflicting with the Italian court judgment on the merits. The court judgment and the arbitral award are then sought to be enforced against the parties' assets in France. Both [page "68"](#) the arbitral award and the inconsistent judgment by a Member State court should – if there is no other ground to refuse enforcement under the New York Convention or the Brussels Regulation respectively – be enforceable before the French courts. In such a situation, recital 12(3) Recast Brussels Regulation suggests that the French courts may give preference to the arbitral award if none of the grounds to refuse enforcement under Article V New York Convention has materialised and hence they may deny enforcement of the Italian court judgment on the merits. Even though it clarifies the relationship between the Brussels Regulation and the New York Convention, this amendment is highly likely to lead to a 'race to an award'. The application of this priority rule in favour of enforcement under the New York Convention, in addition, is limited to situations where an arbitral award has already been given and where the EU judgment and the New York Convention award are simultaneously invoked before the same Member State court. Developing the example further, it is hardly imaginable that a party invoking the English arbitral award in proceedings before the Italian courts where the contradictory judgment was given will be successful with its request for prioritised enforcement of the award. Hence, the problem of irreconcilable decisions at the recognition and enforcement stage does not appear to be fully solved by recital 12 Recast Brussels Regulation.⁽³⁹¹⁾

Last but not least, the 'subject matter test' in court proceedings dealing with arbitration issues developed by the ECJ has been confirmed and incorporated into secondary EU law in recital 12(4) Recast Brussels Regulation, which explicitly stipulates that the Regulation should not apply to any action or ancillary proceedings relating to arbitration.⁽³⁹²⁾ Furthermore, there is no indication that the ECJ's ruling in *West Tankers*, introducing an *effet utile* test and hence prohibiting the issuance of anti-suit injunctions against Member States' courts, is being reversed by recital 12 Recast Brussels Regulation.

[3]. Impact on the Lugano Convention

As regards the parallel Lugano Convention, the Recast Brussels Regulation provides that it shall not affect the Lugano Convention.⁽³⁹³⁾ Article 2 of Protocol 3 to the Lugano Convention provides that if the EU organs envisage the adoption of a legislative act entailing provisions that would be inconsistent with the Convention, the contracting states to the Convention will contemplate an amendment of the Lugano regime. It remains rather doubtful that the clarification of the exclusion of arbitration from the purview of the Brussels

Regulation amounts to such an inconsistency. In any case, the Lugano States remain free to decide whether they intend to adopt the amendments to be made in the Brussels regime.⁽³⁹⁴⁾ It may, however, be assumed that as long as the changes of the Recast Brussels Regulation have not been adopted by the Lugano *page "69"* regime, the previous case law of the ECJ remains to be considered when applying the Lugano Convention.

§2.04. Summary

The doctrine of competence-competence of the arbitral tribunal has doubtlessly evolved to a principle of international law. Most national statutory arbitration laws and institutional arbitration rules explicitly recognise the positive effect of the arbitrators' competence-competence; as far as the negative effect of competence-competence is concerned, the acceptance of this doctrine is not uniform in the European legal systems examined, even though a certain tendency towards at least partial use of the negative effect doctrine may be observed. The negative effect of competence-competence harbours more potential for conflicts than the positive effect of this principle since it pertains to the allocation of jurisdiction between national courts and arbitral tribunals: even though the implementation of the doctrine that the arbitrators are the first (although not the sole) judges of their jurisdiction helps avoid concomitant jurisdiction between national courts and arbitral tribunals, it does not necessarily render the process of determining jurisdiction more efficient. Furthermore, implementation of the negative effect doctrine cannot be undertaken solely for its own sake, but to a considerable extent depends on a particular jurisdiction's interplay between its courts and arbitration as such and therefore also amounts to a political choice.

In summary, even though implemented in different forms as regards its scope, the principle of competence-competence constitutes the basis for the simultaneous and independent determination of jurisdiction of national courts and arbitral tribunals alike; it also includes the potential of jurisdictional conflicts arising between national courts and arbitral tribunals. The following two main chapters will therefore be dedicated to the pleas and actions a party may invoke either before national courts or before arbitral tribunals if it intends to challenge the concomitant jurisdiction of these adjudicatory bodies.

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¹²⁸ Cf for a discussion of the origin of the term 'competence-competence' or 'Kompetenz-Kompetenz' respectively: Gaillard/Savage, para. 651; Born, 853 ff.

¹²⁹ Kröll (2004), 69.

¹³⁰ Holtzmann/Neuhaus, 479.

¹³¹ Berger/Kellerhals, para. 603; Wenger, Art. 186 para. 2; Schott/Courvoisier, Art. 186 para. 2. For a comparative analysis of competence-competence cf: Chang (Seung Wha), 171-182; Dimolitsa, 231; Samuel, 178; Gaillard/Savage, para. 653; Berger (1993), 351.

¹³² Cf ILA Report on Lis Pendens, para. 4.12; Gaillard/Savage, para. 660.

¹³³ Gaillard/Banifatemi, 259.

¹³⁴ Born/Rutledge, 1169.

¹³⁵ Born, 851 f.

¹³⁶ Schramm/Geisinger/Pinsolle, 95; cf ILA Report on Lis Pendens, para. 4.13. For an example of a jurisdiction that has adopted the negative effect of competence-competence cf: Art. 1448(1) CPC (cf Oetiker (2003), para. 179; Perret, 333); Geisinger/Lévy, 54; Dimolitsa, 238 f.; Gaillard (1999), 387-402; Boucaron-Nardetto (2011), para. 37.

¹³⁷ Gaillard/Banifatemi, 259 f.; Schramm/Geisinger/Pinsolle, 95; Gaillard/Savage, para. 660.

¹³⁸ Gaillard/Savage, para. 660.

¹³⁹ Poudret/Besson, para. 457.

¹⁴⁰ Cf Gaillard/Savage, para. 658; cf Boucaron-Nardetto (2011), para. 140: "*On ne peut donc prétendre justifier l'effet négatif du principe compétence-compétence par le respect de la commune volonté des parties – la force obligatoire de la convention d'arbitrage, alors que l'objet de cette règle est de désigner l'organe compétent pour juger s'il existe ou non une volonté commune des parties de recourir à l'arbitrage.*"

¹⁴¹ Cf Kröll (2004), 63 f.

¹⁴² Kröll (2004), 63.

¹⁴³ Born, 897; cf Racine (2010) 732 f.

¹⁴⁴ Lew/Mistelis/Kröll, paras 14-15.

¹⁴⁵ Lew/Mistelis/Kröll, paras 14-16; Brekoulakis, 251.

¹⁴⁶ Brekoulakis, 239.

¹⁴⁷ Cf Born, 863.

¹⁴⁸ See references in fn 158, 170 and 176 below.

¹⁴⁹ Cf Born, 857.

¹⁵⁰ Cf Born, 858; Boucaron-Nardetto (2011), para. 104.

¹⁵¹ Art. V(3) European Convention.

¹⁵² Cf Born, 862; Hascher (1995), 1024 (para. 45).

¹⁵³ Cf Born, 862.

¹⁵⁴ Gaillard/Savage, para. 674; Brekoulakis, 242; Wilske/Fox, Art. II para. 325.

- ¹⁵⁵ Born, 864; cf Tweeddalle/Tweeddalle, para. 5.72. For examples of the few jurisdictions that are hostile towards the doctrine of competence-competence cf. Born, 867 ff.
- ¹⁵⁶ Cf for the legislative history of Art. 16 UNCITRAL Model Law: Holtzmann/Neuhaus, 487 ff.
- ¹⁵⁷ Holtzmann/Neuhaus, 479; cf Sanders (2004), 96.
- ¹⁵⁸ Holtzmann/Neuhaus, 480.
- ¹⁵⁹ Münch (2013), § 1040 para. 51.
- ¹⁶⁰ For references to French case law: Gaillard (2009), para. 6.31; Gaillard/Savage, para. 655 fn 83 and 84.
- ¹⁶¹ Cf also Gaillard (2009), para. 6.31; Carducci (2012), 135. The original wording of Art. 1466 of the 1981 NCPC: "*Si, devant l'arbitre, l'une des parties conteste dans son principe ou son étendue le pouvoir juridictionnel de l'arbitre, il appartient à celui-ci de statuer sur la validité ou les limites de son investiture.*"
- ¹⁶² The wording of Art. 1465 CPC: "*Le tribunal arbitral est seul compétent pour statuer sur les contestations relatives à son pouvoir juridictionnel.*" For further references cf. Jarrosson/Pellerin, 28; Després/Dargent, 1044 (Art. 1448), 1047 (Art. 1465); Boucaron-Nardetto (2011), para. 50.
- ¹⁶³ de Boissésion (2011), 86.
- ¹⁶⁴ Art. 1506 CPC. Carducci (2012), 149 f.; Castellane, 373; Delvolvé/Pointon/Rouche, para. 173; Boucaron-Nardetto (2011), para. 71. Vidal, however, suggests that in light of the significance of the principle of the negative effect of competence-competence provided in Art. 1448 CPC it pertains to the substantive rules of international arbitration and therefore the parties should not be permitted to exclude the extension of the negative effect doctrine to international arbitration by agreement (Vidal, para. 558).
- ¹⁶⁵ The original wording of Art. 1448(1) CPC is (as modified by the Decree no 2011-48 dated 13 January 2011 and effective as of 1 May 2011): "*Lorsqu'un litige relevant d'une convention d'arbitrage est porté devant une juridiction de l'Etat, celle-ci se déclare incompétente sauf si le tribunal arbitral n'est pas encore saisi et si la convention d'arbitrage est manifestement nulle ou manifestement inapplicable.*" A similar provision to the same effect is contained in section 584(3) of the Austrian Code of Civil Procedure: "*While arbitral proceedings are pending, no further action may be brought before a court or an arbitral tribunal concerning the asserted claim; an action brought because of the same claim shall be rejected. This shall not apply if an objection to the jurisdiction of the arbitral tribunal was raised with the arbitral tribunal, at the latest, when entering into argument on the substance of the dispute and a decision of the arbitral tribunal thereon cannot be obtained within a reasonable period of time.*"
- ¹⁶⁶ Gaillard (2009), para. 6.34. The original wording of Art. 1458(1) of the 1981 NCPC: "*Lorsqu'un litige dont un tribunal arbitral est saisi en vertu d'une convention d'arbitrage est porté devant une juridiction de l'Etat, celle-ci doit se déclarer incompétente.*"
- ¹⁶⁷ Gaillard (2009), para. 6.34. The original wording of Art. 1458(2) of the 1981 NCPC: "*Si le tribunal arbitral n'est pas encore saisi, la juridiction doit également se déclarer incompétente à moins que la convention d'arbitrage ne soit manifestement nulle.*"
- ¹⁶⁸ Cf Després/Dargent, 1044 (Art. 1448); Boucaron-Nardetto (2011), para. 50.
- ¹⁶⁹ Born, 900; Gaillard (2011), 8; Vidal, para. 139.
- ¹⁷⁰ Carducci (2012), 134.
- ¹⁷¹ Cf Vidal, paras 139 f.; Carducci (2012), 134; cf de Boissésion (2011), 86 f.; Castellane, 372 f.
- ¹⁷² Art. 1522(1) CPC; Vidal, paras 735, 745.
- ¹⁷³ Swiss Federal Supreme Court Decision 127 III 279 consideration 2c. ee; ILA Report on Lis Pendens, paras 4.13, 4.37; Berger/Kellerhals, para. 613; Perret, 333; Müller (Zuständigkeit des Schiedsgerichts), 132 f.; Oetiker (2002), 142 ff.
- ¹⁷⁴ See for comments on the legislative history of Art. 186(1bis) SPILA Chapter 3, §3.02[B][3][b][i] point (b) below.
- ¹⁷⁵ Berger/Kellerhals, para. 613.
- ¹⁷⁶ Berger/Kellerhals, para. 609; Wenger, Art. 186 para. 3; Heini, Art. 186 para. 4; Schott/Courvoisier, Art. 186 para. 5.
- ¹⁷⁷ Poudret/Besson, para. 462; Kaufmann-Kohler/Rigozzi, para. 422.
- ¹⁷⁸ Art. 190(2)(b) SPILA; Berger/Kellerhals, para. 608; Perret, 333 f.; Heini, Art. 186 para. 1; Schott/Courvoisier, Art. 186 paras 3 f.; cf Swiss Federal Supreme Court Decision 120 II 155 consideration 3b.bb. The principle of competence-competence is subject to possible review by the national courts also according to international practice: Dimolitsa, 229.
- ¹⁷⁹ Poudret/Besson, para. 462.
- ¹⁸⁰ Marriott, 735.
- ¹⁸¹ Merkin/Flannery, 77.
- ¹⁸² Cf Harris/Planterose/Tecks, para. 30C; Jalili, 172; Heigl, 109; Holtzmann/Neuhaus, 480.
- ¹⁸³ Harris/Planterose/Tecks, para. 30C; Jalili, 171; Holtzmann/Neuhaus, 479.
- ¹⁸⁴ Turner/Mohtashami, para. 6.86.
- ¹⁸⁵ Croft/Kee/Waincymer, para. 23.1.
- ¹⁸⁶ Castello, para. 16.254.
- ¹⁸⁷ See Art. 6(2) ICC Rules 1998.
- ¹⁸⁸ Blackaby/Partasides/Redfern/Hunter, para. 5.100; cf also Derains/Schwartz, 76 ff.
- ¹⁸⁹ Fry/Greenberg/Mazza, para. 3-197.
- ¹⁹⁰ Art. 6(4)(i) and (ii) ICC Rules.
- ¹⁹¹ Grierson/van Hooft, 107.

- 192 Chang (Seung Wha), 175.
- 193 Cf Chang (Seung Wha), 175.
- 194 Berger (2013), Art. 21 para. 6.
- 195 Berger (2013), Art. 21 para. 7.
- 196 Art. 23(4) LCIA Rules; cf Turner/Mohtashami, para. 6.105.
- 197 Lew/Mistelis/Davies, para. 18.303.
- 198 Turner/Mohtashami, para. 6.88.
- 199 Cf Born, 853 ff.
- 200 Cf Born, 856.
- 201 Born/Rutledge, 1169.
- 202 Born, 854.
- 203 See Chapter 3, §3.02[A][2] below.
- 204 Cf Holtzmann/Neuhaus, 486; Born, 880 f.
- 205 Cf for a detailed discussion Born, 881 ff.
- 206 Born, 882; Lew/Mistelis/Kröll, para. 14-61.
- 207 Canada, as a Model Law country, for instance, has decided to give priority to the arbitral tribunal to decide the issue of the existence or substantive validity of an arbitration agreement (Brekoulakis/Shore, 602 f. with references to case law; Born, 886 ff.).
- 208 Castellane, 380.
- 209 See Chapter 2, §2.01[B][2] above.
- 210 Cf also Born, 900 f.
- 211 Delvolvé/Pointon/Rouche, para. 139; Born, 854.
- 212 Gaillard (Comment to Jules Verne), 948.
- 213 Born, 901.
- 214 Park, 113; Brekoulakis, 240.
- 215 *Copropriété maritime Jules Verne et autre c Société ABS American Bureau of Shipping et autre (ABS)*, Cour de Cassation, 7 juin 2006 (2006) Revue de l'Arbitrage 945-953 with a note by Emmanuel Gaillard; Bollée, 235 f.; cf Boucaron-Nardetto (2011), para. 105.
- 216 Gaillard (Comment to Jules Verne), 947 f.
- 217 *Sociétés Carfa Trade Group et Omnium de travaux c République de Guinée et autres*, Cour d'Appel de Paris, 18 November 1987/4 May 1988 (1988) Revue de l'Arbitrage 657-684 with a note by Philippe Fouchard; cf also *Société Balenciaga c société Allieri et Giovanozzi*, Cour de Cassation, 29 November 1989 (1990) Revue de l'Arbitrage 633-648 with a note by Hélène Gaudement-Tallon; Poudret/Besson, para. 507; cf Delvolvé/Pointon/Rouche, para. 140; Bensaude (2010), 881.
- 218 Born, 902.
- 219 Cf Sachs/Schmidt-Ahrendts, 13.
- 220 *Société Coprodag et autre c Dame Bohin*, Cour de Cassation, 10 May 1995 (1995) Revue de l'Arbitrage 617-618. Even though this case reinforced the negative effect of competence-competence in the context of a French domestic arbitration, the solution found by the French Supreme Court applies a fortiori to international arbitration matters (Gaillard (Comment to Coprodag), 618).
- 221 Núñez-Lagos, 920; cf *Copropriété maritime Jules Verne et autre c Société ABS American Bureau of Shipping et autre (ABS)*, Cour de Cassation, 7 juin 2006 (2006) Revue de l'Arbitrage 945-953 with a note by Emmanuel Gaillard; cf Castellane, 372; Delvolvé/Pointon/Rouche, para. 139; cf for further case law Tweeddale/Tweeddale, para. 5.76.
- 222 Poudret/Besson, para. 465; Gaillard/Savage, para. 655; Núñez-Lagos, 920.
- 223 *Legal Department du Ministère de la Justice de la République d'Irak c sociétés Fincantieri Cantieri Navali Italiani, Finmeccanica et Armamenti e Aerospazio*, Cour d'Appel de Paris, 15 June 2006 (2007) Revue de l'Arbitrage 87-96 with a note by Sylvain Bollée: the Paris Court of Appeal ruled that the Italian court was not competent to hear the case, since a prima facie test would not have resulted in holding the arbitration agreement void; cf Niggemann, 69 f.; Boucaron-Nardetto (2011), para. 73. It is, however, rather doubtful whether this case law is still valid with the ECJ's ruling in *West Tankers* prohibiting Member State courts to restrain another Member State court from determining its jurisdiction freely (cf Niggemann, 73; Boucaron-Nardetto (2011), para. 129).
- 224 *Copropriété maritime Jules Verne et autre c Société ABS American Bureau of Shipping et autre (ABS)*, Cour de Cassation, 7 juin 2006 (2006) Revue de l'Arbitrage 945-953 with a note by Emmanuel Gaillard; cf Niggemann, 69 f.
- 225 Gaillard (2009), para. 6.39. See for a discussion of actions for declaratory relief Chapter 3, §3.01[D] below.
- 226 See for comments to the legislative history of Art. 186(1bis) SPILA Chapter 3, §3.02[B][3][b][i] point (b) below.
- 227 Cf Oetiker (2003), para. 146; Müller (2013), Art. 372 para. 39; Berti/Droese, Art. 7 para. 4; Poudret/Besson, para. 499; Berger/Kellerhals, para. 307; cf also Swiss Federal Supreme Court Decision 122 III 139 consideration 2a.
- 228 Swiss Federal Supreme Court Decision 122 III 139 consideration 2b. Despite the criticism expressed in Swiss doctrine regarding this case law, the Swiss Federal Supreme Court has confirmed its dictum in recent case law: Swiss Federal Supreme Court Decision 4A_279/2010 consideration 2; Swiss Federal Supreme Court Decision 138 III 681 consideration 3.2.
- 229 Cf Poudret/Besson, paras 502, 504; Born, 905 f.
- 230 Swiss Federal Supreme Court Decision 121 III 38 consideration 2b; Swiss Federal Supreme Court Decision 4A_279/2010 consideration 2.
- 231 Swiss Federal Supreme Court Decision 121 III 38 consideration

2b: "En d'autres termes, l'art. 11 al. 3 de la Convention de New York consacre l'obligation pour le juge ordinaire de statuer librement sur l'exception d'arbitrage invoquée à la lumière des critères de validité du traité international. [...]."

²³² Swiss Federal Supreme Court Decision 121 III 38 consideration 2b: "L'avis des auteurs en cause ne doit être partagé que dans la mesure où la question de la compétence est tranchée en dernier ressort par le juge ordinaire appelé à connaître du problème de la compétence du tribunal arbitral, ce qui implique que la procédure arbitrale réclamée soit soumise au Concordat suisse sur l'arbitrage ou à la Loi fédérale sur le droit international privé [...]."

²³³ Cf Schramm/Geisinger/Pinsolle, 98.

²³⁴ Berti/Droese, Art. 7 para. 8; cf Poudret/Besson, para. 502; Poudret (2007), 236; disagreeing Mayer (1996), 371 ff.

²³⁵ Liatowitsch, 132; Poncet, para. 17.

²³⁶ See for further comments Chapter 3, §3.01[A][1] below.

²³⁷ Mayer (1996), 364.

²³⁸ Poudret/Besson, para. 502.

²³⁹ Cf Poudret/Besson, para. 502.

²⁴⁰ Berger/Kellerhals, para. 317; cf Bom, 906.

²⁴¹ Poudret/Besson, para. 504.

²⁴² Berger/Kellerhals, para. 316.

²⁴³ ASA (Vernehmlassung zur Initiative zu Art. 7 IPRG), 590.

²⁴⁴ Cf Poudret (2005), 406; Poudret (2007), 236.

²⁴⁵ Or in the words of Brekoulakis: "The prima facie threshold implies that the arbitration agreement in question is only possibly valid, at best. To attach the legal effect of exclusivity to an arbitration agreement that is only possibly valid is disproportional if not totally unwarranted." (Brekoulakis, 253).

²⁴⁶ Tschanz (ASA), 478 ff.; Gaillard (2005), 322 ff.; Kaufmann-Kohler/Rigozzi, paras 442 ff.; Mayer (1996), in particular 379.

²⁴⁷ '08.417 – Parlamentarische Initiative: Bundesgesetz vom 18. Dezember 1987 über das internationale Privatrecht. Änderung von Artikel 7.'

²⁴⁸ Own translation; cf for information on the initiative:

<http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20080417> accessed 15 February 2014.

²⁴⁹ Cf reference in fn. 248 above.

²⁵⁰ Cf Besson (2011), 574.

²⁵¹ The report of the Commission of the Council of Cantons of 15 February 2010 can be found under:

<http://www.parlament.ch/afs/data/d/bericht/2008/d_bericht_s_k25_0_20080417_0_20100215.htm> accessed 15 February 2014.

²⁵² The report of the National Council's Commission of 4 May 2009 can be downloaded under:

<http://www.parlament.ch/afs/data/d/bericht/2008/d_bericht_n_k12_0_20080417_0_20090504.htm> accessed 15 February 2014.

²⁵³ Cf Poncet, para. 20.

²⁵⁴ <http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20080417> accessed 15 February 2014.

²⁵⁵ Cf Berger/Kellerhals, para. 317a. In favour of the proposed revision of Art. 7 SPILA: Tschanz (ASA), 478 ff.

²⁵⁶ The first being the introduction of Art. 186(1b^{is}) SPILA; see for a discussion of the legislative history of this article Chapter 3, §3.02[B][3][b][i] point (b) below.

²⁵⁷ Berger (2011), 39.

²⁵⁸ Cf for similar concerns Berger (2011), 39; ASA (Vernehmlassung zur Initiative zu Art. 7 IPRG), 593; Besson (2011), 583 f.

²⁵⁹ Cf Berger (2011), 39-42.

²⁶⁰ Cf Berger (2011), 39; Besson (2011), 578 f.

²⁶¹ Berger (2011), 40.

²⁶² ASA disagrees (Vernehmlassung zur Initiative zu Art. 7 IPRG), 591 f.

²⁶³ Cf Berger (2011), 42.

²⁶⁴ ASA (Vernehmlassung zur Initiative zu Art. 7 IPRG), 591.

²⁶⁵ ASA (Vernehmlassung zur Initiative zu Art. 7 IPRG), 589; cf Besson (2011), 578.

²⁶⁶ ASA (Vernehmlassung zur Initiative zu Art. 7 IPRG), 589.

²⁶⁷ ASA (Vernehmlassung zur Initiative zu Art. 7 IPRG), 594; cf Besson (2011), 580 ff.

²⁶⁸ Section 4(1) in connection with Schedule 1 Arbitration Act.

²⁶⁹ Cf Joseph, para. 11.52; Collins (*Dacey, Morris & Collins*), para. 16-071; Merkin/Flannery, 42.

²⁷⁰ Poudret/Besson, para. 497, agree. Gaillard and Savage recognise in section 32 Arbitration Act which makes the admissibility of a direct action dependent on several prerequisites a significant step toward the full acceptance of the negative effect of competence-competence (Gaillard/Savage, para. 675; concurring Brekoulakis, 247).

²⁷¹ Poudret/Besson, para. 497; cf Merkin (October 2012), 1 f.; Brekoulakis, 246 f.

²⁷² Gaillard/Banifatemi, 266; Snodgrass, 30; cf Ahrendt, 36; *Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] CLC 647 (CA); *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd and Others* [1993] QB 701 (CA); *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 (CA); *Downing v Al Tameer Establishment & Another* [2002] EWCA Civ 721 (CA), [2002] CLC 1291 (CA).

²⁷³ *Fiona Trust & Holding Corp and Others v Yuri Privalov and Others* [2007] EWCA Civ 20, [2007] 1 CLC 144 (CA); for an earlier case where the Commercial Court examined the arbitration

agreement on a prima facie basis referring the dispute to the tribunal cf. *XL Insurance Ltd v Owens Corning* [2001] CLC 914 (Comm).

²⁷⁴ Snodgrass, 27, 31; Brekoulakis, 248.

²⁷⁵ *Fiona Trust & Holding Corp and Others v Yuri Privalov and Others* [2007] EWCA Civ 20, [2007] 1 CLC 144 (CA) 160 (para. 34); Snodgrass, 31; Gaillard/Banifatemi, 267.

²⁷⁶ *Republic of Kazakhstan v Istil Group Ltd* [2007] EWCA Civ 471, [2008] Bus LR 878 (CA) 886 (para. 35, Toulson LJ).

²⁷⁷ Cf *Fiona Trust & Holding Corp and Others v Yuri Privalov and Others* [2007] EWCA Civ 20, [2007] 1 CLC 144 (CA) 160 (para. 35); Snodgrass, 29.

²⁷⁸ Shine, 211 f.

²⁷⁹ Snodgrass, 31.

²⁸⁰ *Fiona Trust & Holding Corp and Others v Yuri Privalov and Others* [2007] EWCA Civ 20, [2007] 1 CLC 144 (CA) 155 f. (para. 23); Snodgrass, 32.

²⁸¹ *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46 (SC), [2011] 1 AC 763 (SC).

²⁸² *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46 (SC), [2011] 1 AC 763 (SC) 813; cf Martinez, N5; Grierson/Taok, 412 f.

²⁸³ Khanna, 134; cf also Joseph, para. 13.49 with further references to case law.

²⁸⁴ *Excalibur Ventures LLC v Texas Keystone Inc & others* [2011] EWHC 1624 (Comm), [2011] 2 CLC 338 (Comm).

²⁸⁵ *Excalibur Ventures LLC v Texas Keystone Inc & others* [2011] EWHC 1624 (Comm), [2011] 2 CLC 338 (Comm) 356 f.; cf Gaffney, 115.

²⁸⁶ Cf for the facts Gaffney, 108 ff.

²⁸⁷ Gaffney, 117.

²⁸⁸ *Fiona Trust & Holding Corp and Others v Yuri Privalov and Others* [2007] EWCA Civ 20, [2007] 1 CLC 144 (CA) 160 (para. 34).

²⁸⁹ Tweeddale/Tweeddale, para. 5.84. *Downing v Al Tameer Establishment & Another* [2002] EWCA Civ 721 (CA), [2002] CLC 1291 (CA) 1295 ff.; *Azov Shipping Co v Baltic Shipping Co* [1998] CLC 1240 (Comm); *Excalibur Ventures LLC v Texas Keystone Inc & others* [2011] EWHC 1624 (Comm), [2011] 2 CLC 338 (Comm) 356 f.

²⁹⁰ Bermann, 62.

²⁹¹ Cf Lew/Mistelis/Kröll, paras 15-23.

²⁹² Bermann, 81.

²⁹³ Berger (2011), 40. It is, however, held by a commentator advocating the negative effect of competence-competence (Gaillard (2005), 317 f.): "[...] *le droit objectif de l'arbitrage ait éprouvé le besoin de donner aux arbitres la possibilité de se prononcer les premiers sur leur compétence, le contrôle étatique étant non supprimé comme on l'a parfois cru, mais reporté à la fin du processus.*" Concurring: Boucaron-Nardetto (2011), para. 92.

²⁹⁴ Gaillard (Comment to Jules Verne), 953.

²⁹⁵ Gaillard/Savage, para. 680; cf Gaillard (2005), 322; Kaufmann-Kohler/Rigozzi, para. 442.

²⁹⁶ Art. 1519(1) CPC.

²⁹⁷ Art. 191 SPILA.

²⁹⁸ Gaillard/Savage, para. 681; cf Lew/Mistelis/Kröll, para. 14-52; disagreeing Born, 978.

²⁹⁹ Cf Gaillard (Comment to Jules Verne), 948; Bermann, 81.

³⁰⁰ Kaufmann-Kohler/Rigozzi, para. 444.

³⁰¹ Besson also expresses concern in this respect (Besson (2011), 579): "*Dans les rapports internationaux, l'effet négatif de la compétence-compétence présuppose ainsi une relation de confiance judiciaire entre les Etats concernés. Cette confiance est illusoire au plan mondial. Par conséquent, l'effet négatif de la compétence-compétence en dehors d'un même ordre juridique ne peut se concevoir sans cautèles suffisantes.*"

³⁰² Cf Mayer (1996), 363; Gaillard/Savage, para. 680; cf Gaillard (2005), 322; Kaufmann-Kohler/Rigozzi, para. 442; Carducci (2012), 134; Lew/Mistelis/Kröll, para. 14-51; Boucaron-Nardetto (2011), para. 152.

³⁰³ Gaillard/Savage, para. 678; cf Poudret (2005), 406; Poudret (2007), 236; Born, 975 f.; Schlosser (2009/SchiedsVZ), 137; Lew/Mistelis/Kröll, paras 14-50; Brekoulakis, 255.

³⁰⁴ Poudret/Besson, para. 518.

³⁰⁵ Tschanz (2010), 41 ff.; cf Boucaron-Nardetto (2013), 50 f.: "*La compétence-compétence à la française constitue une véritable révolution des modes de résolution des conflits de compétence entre justice publique et justice privée. En ce sens, le principe compétence-compétence s'inscrit dans le cadre de ces nouveaux mécanismes de résolution des conflits de compétence du droit international privé impliquant une 'coopération judiciaire active'.*"

³⁰⁶ Tschanz (2010) 42 f.

³⁰⁷ Cf Liatowitsch, 135; Born, 976 f. Schlosser furthermore holds that the implementation of the negative effect of competence-competence as under French arbitration law is not compatible with Art. 6 of the European Convention on Human Rights (Schlosser (2009/SchiedsVZ), 137 f.).

³⁰⁸ Park, 144; cf Boucaron-Nardetto (2013), 40 considering that an exception to the principle of the negative effect of competence-competence be made where the party challenging the arbitrators' jurisdiction is 'une partie faible'.

³⁰⁹ Brekoulakis, 253 f.

³¹⁰ Cf for a similar line of thought: Brekoulakis, 256 f.

- ³¹¹ Cf Poudret (2007), 239.
- ³¹² Cf Born, 980.
- ³¹³ Gaillard/Savage, para. 676; Bermann, 82; Brekoulakis, 238, 250; disagreeing Park, 71 f.
- ³¹⁴ Born, 972.
- ³¹⁵ Born, 975.
- ³¹⁶ Born, 981.
- ³¹⁷ Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/47, 171; Magnus, Introduction paras 37 ff.
- ³¹⁸ Joseph, para. 2.115.
- ³¹⁹ Cf Dasser, Art. 1 paras 53 f.; Rogerson, Art. 1 paras 8 ff.
- ³²⁰ Corresponding to the former Art. 293 alinea 4 EC Treaty.
- ³²¹ Carducci (2011), 175; Veeder (2006), 806.
- ³²² Veeder (2006), 806.
- ³²³ Commission of the European Communities, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM(2009) 174 final 2.
- ³²⁴ Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (signed at Luxembourg, 9 October 1978) [1979] OJ C59/71, 92, para. 61 ('Schlosser Report'); Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (signed at Brussels, 27 September 1968) [1979] OJ C59/1, 13 ('Jenard Report'); Dasser, Art. 1 para. 97.
- ³²⁵ Cf Jenard Report, 13; Audit (1993), 25.
- ³²⁶ Carducci (2011), 176.
- ³²⁷ Carducci (2011), 174; cf van Haersolte-van Hof, 30.
- ³²⁸ Case C-190/89 *Marc Rich and Co. AG v Società Italiana Impianti PA* [1991] ECR I-3855.
- ³²⁹ Case C-190/89 *Marc Rich and Co. AG v Società Italiana Impianti PA* [1991] ECR I-3855, paras 3 ff.; cf Killias (2002), 122; Beraudo, 14; Kaye, 27 ff.
- ³³⁰ Case C-190/89 *Marc Rich and Co. AG v Società Italiana Impianti PA* [1991] ECR I-3855, para. 18.
- ³³¹ Case C-190/89 *Marc Rich and Co. AG v Società Italiana Impianti PA* [1991] ECR I-3855, para. 19.
- ³³² Mourel/Vagenheim, 76.
- ³³³ Case C-190/89 *Marc Rich and Co. AG v Società Italiana Impianti PA* [1991] ECR I-3855, para. 26.
- ³³⁴ Cf Yoshida, 363.
- ³³⁵ Schlosser Report, para. 64.
- ³³⁶ Report on the accession of the Hellenic Republic to the Community Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1986] OJ C298/1, 10, para. 35 ('Evrigenis Kerameus Report').
- ³³⁷ Case C-190/89 *Marc Rich and Co. AG v Società Italiana Impianti PA* [1991] ECR I-3855, Opinion of AG Darmon, paras 34 f.; Kaye, 40 f.
- ³³⁸ The ECJ's conclusion in the *Marc Rich* case also pertains to the scope of application of the Lugano Convention: Dasser, Art. 1 paras 102 f.; Rohner/Lerch, Art. 1 para. 108.
- ³³⁹ Case C-391/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line and Another* [1998] ECR I-7091.
- ³⁴⁰ Case C-391/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line and Another* [1998] ECR I-7091, paras 8 ff.; cf Killias (2002), 123; Beraudo, 15 ff.
- ³⁴¹ Case C-391/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line and Another* [1998] ECR I-7091, para. 32.
- ³⁴² Case C-391/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line and Another* [1998] ECR I-7091, para. 33.
- ³⁴³ Case C-391/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line and Another* [1998] ECR I-7091, para. 33.
- ³⁴⁴ Case C-391/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line and Another* [1998] ECR I-7091, para. 34.
- ³⁴⁵ Cf Killias (2002), 124. The ECJ's conclusion in the *Van Uden* case also pertains to the scope of application of the Lugano Convention: Dasser, Art. 1 paras 102 ff.
- ³⁴⁶ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663.
- ³⁴⁷ For the facts cf. Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663, paras 9 ff.
- ³⁴⁸ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663, para. 18.
- ³⁴⁹ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663, paras 22 ff.
- ³⁵⁰ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di*

- Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663, para. 24.
- ³⁵¹ Markus/Giroud, 236; Illmer (2009), 315.
- ³⁵² Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663, para. 25.
- ³⁵³ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663, para. 26.
- ³⁵⁴ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663, para. 27.
- ³⁵⁵ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663, para. 28.
- ³⁵⁶ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663, para. 30.
- ³⁵⁷ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663, para. 31.
- ³⁵⁸ Lazić, 23.
- ³⁵⁹ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663, para. 33.
- ³⁶⁰ The ECJ's conclusion in the *West Tankers* case also pertains to the scope of application of the Lugano Convention: Dasser, Art. 1 para. 104; Swiss Federal Supreme Court Decision 138 III 304 consideration 5.3.1 (313).
- ³⁶¹ Markus/Giroud, 237.
- ³⁶² Lehmann, 1646 f.; Noussia, 318.
- ³⁶³ 'Torpedo actions' in this book mean actions for negative declaratory relief which often have no other purpose than to preempt the jurisdiction of a court other than the court before which the opposing party is expected to bring its claim (cf Véron, 638 f.); cf also for a description of the also unflatteringly called 'Italian torpedo': Hartley (2002), 77 f.; Gebauer, 94.
- ³⁶⁴ Markus/Giroud, 238; cf Rogerson, Art. 1 para. 42a; Lehmann, 1647.
- ³⁶⁵ European Commission's Final Report concerning the Data Collection and Impact Analysis – Certain Aspects of a Possible Revision of Council Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('Brussels I'), 17 December 2010, <http://ec.europa.eu/justice/civil/files/study_cses_brussels_i_final_17_12_10_en.pdf> accessed 15 February 2014 (hereinafter 'CSES Data Collection and Impact Analysis'), 107, 111; see also the discussion in Chapter 3, §3.01[A][2][c][iii] point (c) below.
- ³⁶⁶ Cf Killias (2002), 125.
- ³⁶⁷ Carducci (2011), 175.
- ³⁶⁸ Veeder (2006), 808.
- ³⁶⁹ Carducci (2011), 177 f.
- ³⁷⁰ Carducci (2011), 177 f.
- ³⁷¹ Carducci (2011), 178.
- ³⁷² Ambrose, 25.
- ³⁷³ Ambrose, 11.
- ³⁷⁴ Ambrose, 26.
- ³⁷⁵ Cf Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters COM(2009) 175 final ('Green Paper on the Brussels Regulation'), 8.
- ³⁷⁶ Veeder (2006), 804, 808.
- ³⁷⁷ van Houtte (2005), 516.
- ³⁷⁸ Report to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters COM(2009) 174 final 9.
- ³⁷⁹ Hess (2008), paras 121 ff.
- ³⁸⁰ Hess (2010), 22 ff.; Hess (2008), paras 133 ff.; cf also Illmer (2011), 656; Schlosser (2009/SchiedsVZ), 129-139; Schlosser (2009/Int. ALR), 45-48; cf for a detailed discussion of the ideas stated in the Heidelberg Report: Consolo, 49-55.
- ³⁸¹ Green Paper on the Brussels Regulation.
- ³⁸² European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM(2010) 748 final ('Commission's Proposal').
- ³⁸³ Commission's Proposal, 36; cf for a detailed review: Illmer (2011), 659 ff.
- ³⁸⁴ Cf for critical comments on the Commission's Proposal: Lazić, 19-47; Illmer (2011), 645-670; Carducci (2011), 193 f.
- ³⁸⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1, hereinafter 'Recast Brussels Regulation'.
- ³⁸⁶ Recital 12(1) Recast Brussels Regulation.
- ³⁸⁷ Recital 12(2) Recast Brussels Regulation.
- ³⁸⁸ Dowers/Holloway, N-19.
- ³⁸⁹ See for detailed comments Chapter 3, §3.01[A][2][c][iii] point (c) below.

³⁹⁰ Recital 12(3) Recast Brussels Regulation. It is, however, unclear what this new paragraph adds to the preexisting general rule in Art. 71 Brussels Regulation (Dowers/Holloway, N-20 f.).

³⁹¹ Cf Pohl, 110; Carducci (2013), 491.

³⁹² Cf Dowers/Holloway, N-20.

³⁹³ Art. 73(1) Recast Brussels Regulation.

³⁹⁴ Markus (2012), 5; cf Markus/Giroud, 246.

Chapter 3: Jurisdictional Pleas and Actions with Parallel Proceedings before an Arbitral Tribunal and a National Court

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Needless to say, the parties should, as early as when drafting the arbitration agreement, strive to prevent the occurrence of parallel proceedings before national courts; to this end, the unambiguous wording of the arbitration agreement, in particular as regards the clear and unmistakable determination of the seat of arbitration, is essential. Nevertheless, such a straightforward and careful drafting of arbitration clauses cannot prevent parallel proceedings from being initiated entirely, but constitutes a means of reducing one source from which parallel proceedings may originate.

In this section, the international practitioner's tool kit if national courts and arbitral tribunals are simultaneously invoked to be competent to hear one and the same case will be elaborated. The challenges and pleas as to jurisdiction will be presented firstly as those available before national courts and in a second chapter as those available before arbitral tribunals.

The means of contesting jurisdiction might roughly be divided into three categories: firstly, the pleas or actions directly challenging a court's or a tribunal's jurisdiction due to a valid or invalid arbitration agreement (exceptio arbitri, plea of lack of jurisdiction before the arbitral tribunal, action for declaratory relief); secondly, the pleas referring to a chronological priority rule, be it either because proceedings were already pending before a court or an arbitral tribunal (litispendence) or because a court or an arbitral tribunal has already conclusively ruled on the same subject matter (res judicata); and thirdly, as the most intrusive means, actions seeking to restrain a court's or a tribunal's jurisdiction (anti-suit and anti-arbitration injunctions).

The requirements and the effectiveness of the mentioned pleas and actions to challenge the national court's or the arbitral tribunal's jurisdiction will be examined as established in statutory arbitration laws in a European context, as well as in the New [page "71"](#) York Convention and the UNCITRAL Model Law insofar as they contain relevant provisions.

This study will, however, not elaborate on the possibility of instituting a damage claim based on the violation of a valid arbitration agreement, since such an action is, strictly speaking, not directed at contesting the national court's jurisdiction, but is rather a measure of compensatory nature to which a party may resort – if the damage is quantifiable at all – in order to alleviate the financial burden imposed by parallel proceedings, and which may, at best, exert some pressure on the continuation of the duplicative proceedings.⁽³⁹⁵⁾

§3.01. Pleas and Actions to Be Invoked before National Courts

As discussed initially, proceedings before national courts may be initiated either for tactical and dilatory reasons or based on an honest and well-reasoned challenge of the arbitral tribunal's jurisdiction. In the following chapters, the pleas and actions which a party may raise before national courts to challenge jurisdiction will be established, together with the procedural and substantive requirements such pleas or actions must meet.

[A]. Exceptio Arbitri

If the parties to a dispute have concluded a valid and binding arbitration agreement and one of the parties nevertheless commences court proceedings or a party raises a counterclaim in court proceedings which is covered by an arbitration agreement, the party insisting on the enforcement of the arbitration agreement can invoke the parties' agreement to arbitrate as a defence before the national court. The arbitration defence may be invoked in court proceedings if proceedings on the same subject matter and between the same parties are already pending before the arbitral tribunal, but also if such proceedings have not yet been initiated, provided that the matter in dispute is subject to a valid arbitration agreement between the parties. As a protective barrier between international commercial arbitration and national court systems, it is a general rule codified by the New York Convention, the UNCITRAL Model Law and by most national arbitration laws that national courts seized in

spite of a valid arbitration agreement are not competent to adjudicate on such cases (unless the parties themselves have submitted to the jurisdiction of the national court and have thereby waived their right to invoke the arbitration defence). This study seeks to analyse in this chapter what the party invoking the arbitration defence needs to demonstrate and what the national courts' practice is regarding the interpretation and enforcement of arbitration agreements.

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National courts may also review the arbitration agreement's validity with actions in support of arbitration, i.e. when called upon to appoint an arbitrator.⁽³⁹⁶⁾ The national courts' practice of reviewing arbitration agreements with such actions will, however, not be subject of the following analysis.

[1]. Arbitration Defence in the New York Convention

Article II(1) New York Convention holds that each contracting state shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. This general acceptance of arbitration agreements for disputes having at their core an arbitrable issue has its logical consequence in Article II(3) New York Convention: a national court of a signatory state seised of an action in a matter in respect of which the parties have concluded an arbitration agreement shall, based on Article II(3) New York Convention, at the request of one of the parties, refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

[a]. Basic Requirements

Article II(3) New York Convention is applicable to all court proceedings in conflict with the jurisdiction of an already initiated arbitration or a future arbitral tribunal, i.e. it is irrelevant whether arbitral proceedings have already been commenced or not.⁽³⁹⁷⁾ As an exception hereto, this provision does not apply to court proceedings for interim or provisional relief and to judicial proceedings initiated in support of arbitration (such as an application to remove an arbitrator).⁽³⁹⁸⁾ The national court's obligation to refer the parties to arbitration under Article II(3) New York Convention applies equally to arbitration agreements providing for an arbitral seat in the jurisdiction where litigation is initiated and to those providing for an arbitral seat outside the jurisdiction concerned.⁽³⁹⁹⁾

According to the wording of Article II(3) New York Convention, a valid arbitration agreement is not to be observed by the national courts on their own initiative, but upon request of one of the parties only.⁽⁴⁰⁰⁾ The legislative history in this respect reveals that the delegate from the United Kingdom proposed to add the words 'of their own motion or' before 'at the request of one of the parties'; this proposal that the national court observe a valid arbitration agreement both ex officio and upon a party's request, [page "73"](#) however, was subsequently refused by the conference.⁽⁴⁰¹⁾ Since arbitration is based on the principle of party autonomy, the parties should retain the freedom to renounce any agreement to arbitrate concluded at an earlier stage.⁽⁴⁰²⁾ By asserting that the national court lacks jurisdiction, the party invoking the arbitration agreement carries the burden of proving that the arbitration agreement meets the formal requirement of Article II(1) New York Convention (the agreement to arbitrate needs to be in writing or based on an exchange of letters, faxes or telegrams), that the arbitration clause is binding on the parties, and that the subject matter of the dispute is within the scope of the arbitration agreement.⁽⁴⁰³⁾ Consequently, the onus shifts to the party resisting arbitration to prove that the agreement is null and void, inoperative or incapable of being performed.⁽⁴⁰⁴⁾

Article II(3) New York Convention does not provide for the form or the time limit within which the party challenging the national court's jurisdiction must invoke the arbitration agreement.⁽⁴⁰⁵⁾ These questions are hence determined by the law of the forum.⁽⁴⁰⁶⁾ Irrespective of different form and time requirements under the laws of the contracting states, a party that submits its defence on the merits without alleging the national court's lack of jurisdiction based on a valid and binding arbitration agreement between the parties to the dispute is generally presumed to have accepted the jurisdiction of the national court to hear the case.⁽⁴⁰⁷⁾

[b]. Interpretation of the Validity of the Arbitration Agreement

General requirements for a valid arbitration agreement are the ones mentioned in Article II(1) and (2) New York Convention: the dispute must have arisen in respect of a defined legal relationship, the subject matter of the arbitration agreement must be capable of settlement by arbitration, and the arbitration agreement must be in writing. As far as the interpretation of the arbitrability requirement is concerned, the law that governs this question at the stage of referral to arbitration is the subject of some controversy:⁽⁴⁰⁸⁾ it can be assumed, however, that the lex fori determines the question as to whether a subject matter is capable of being solved by arbitration.⁽⁴⁰⁹⁾ This view is, however, not universally accepted, in particular in situations where the dispute is arbitrable according to the law of the

forum where the case is brought, but not under the law of the seat of arbitration.⁽⁴¹⁰⁾ It is advocated in legal doctrine that, at least where there is a case of blatant non-arbitrability under the law of the place of arbitration, the arbitration agreement should be considered unenforceable also in the forum court.⁽⁴¹¹⁾ [page "74"](#) This opinion appears to be sensible, since even if the arbitral tribunal can be constituted in such a case and renders a final award, this award is subject to challenge before the supervisory court according to Article V(2)(a) New York Convention.⁽⁴¹²⁾

In principle and as a general matter, an arbitration agreement should be qualified as null and void, inoperative or incapable of being performed in circumstances of insurmountable obstacles to the enforcement of the arbitration agreement only.⁽⁴¹³⁾ It will, however, be shown that the question as to which law is applicable to determine the validity of an arbitration agreement under Article II(3) New York Convention is the subject of some dispute.

The line of distinction between the terms 'null and void', 'inoperative' or 'incapable of being performed' is thin and under certain national laws very fuzzy. Furthermore, there are different approaches as to which law governs their interpretation:⁽⁴¹⁴⁾ the qualification of an arbitration agreement as 'null and void' is either defined by internationalised standards ('uniform international standard')⁽⁴¹⁵⁾, such as the notion of international public policy, internationally recognised defences like duress, mistake, fraud or waiver, or internationally recognised grounds of invalidity under the law governing the arbitration agreement ('maximum standard')⁽⁴¹⁶⁾.⁽⁴¹⁷⁾ A second school of thought ('choice-of-law approach and national law standard')⁽⁴¹⁸⁾ advocates the view that the interpretation of the term 'null and void' is determined by the *lex fori* (without recourse to international standards), or the national law applicable to the arbitration agreement by operation of Article V(1)(a) New York Convention is relevant (i.e. the law chosen by the parties or, failing such, the law of the country where the award was made).⁽⁴¹⁹⁾ The maximum standard represents a compromise between applying solely the national law at the forum or the one chosen by the parties and only considering defences known to international law; it thereby seeks to neutralise, on the one hand, the risk that the enforcement of arbitration agreements is obstructed due to parochial national law disfavoured arbitration, and, on the other hand, the uniform international standard's shortcoming that it lacks any substantive set of rules.⁽⁴²⁰⁾ Nevertheless, analysing whether a specific ground for invalidity is recognised internationally is not always a straightforward task.⁽⁴²¹⁾ It is generally held that these approaches also apply [page "75"](#) to the interpretation of the terms 'inoperative' and 'incapable of being performed'.⁽⁴²²⁾ As can be seen from these different approaches, there is no uniform interpretation of the terms constituting the invalidity of an arbitration agreement and hence there is no predictability on an international scale.⁽⁴²³⁾

The term 'inoperative' describes the situation where the arbitration agreement has ceased to have effect, such as, for instance, if the parties have waived the arbitration agreement or if a final arbitral award with *res judicata* effect has already been rendered on the same subject matter and between the same parties.⁽⁴²⁴⁾ Finally, the arbitration agreement is 'incapable of being performed' if it cannot be enforced, i.e. if the arbitration cannot be effectively set in motion, be it due to a pathological arbitration agreement beyond repair or by virtue of external factors, such as that arbitration is no longer possible at the agreed place of arbitration.⁽⁴²⁵⁾

The scope of review of the validity of an arbitration agreement by national courts is not specified in Article II(3) New York Convention, but depends on the *lex fori* and in particular on the extent to which the negative effect of competence-competence⁽⁴²⁶⁾ is recognised in the forum state.⁽⁴²⁷⁾ Judicial review might either follow the 'traditional approach' that permits a national court to fully review the validity of an arbitration agreement on the merits before referring the case to arbitration, or the 'modern approach' that is restricted to a *prima facie* review of the arbitration agreement.⁽⁴²⁸⁾

In conclusion, Article II(3) New York Convention does not offer useful guidance as to which law is applicable to determine the validity of an arbitration agreement in the first place, it does not clarify the scope of review against which the arbitration agreement may be measured, and it thereby does not guarantee a uniform view on the validity of arbitration agreements.

[c]. Effect of a Valid Arbitration Agreement

If a national court comes to the conclusion that an arbitration agreement is indeed valid, it does not have discretion, but must refer the parties to arbitration, i.e. the referral to arbitration is mandatory and supersedes domestic law.⁽⁴²⁹⁾ The exact meaning of the expression 'refer the parties to arbitration' is not clear; hence it is for the *lex fori* to determine its consequences, i.e. whether the national court must decline jurisdiction [page "76"](#) and dismiss the claim, whether it only stays the court proceedings, or whether it is even entitled to compel the parties to commence arbitration.⁽⁴³⁰⁾ Irrespective of the semantic appearance of the word 'refer', the expression is not to be interpreted, in principle, as obliging the parties to arbitrate.⁽⁴³¹⁾ The jurisdictional effect of Article II(3) New York Convention is that the first instance court, on application of this provision, becomes (partially) incompetent to judge the merits of the

dispute. A jurisdiction's national courts, however, are not rendered completely incompetent, since specific courts retain jurisdiction as supervisory courts for matters related to the smooth conduct of the arbitration, such as the appointment or replacement of arbitrators, support with regard to the evidence-gathering process, and concerning applications for setting the final award aside.⁽⁴³²⁾

[d]. Weaknesses of the Arbitration Defence under the New York Convention

In spite of this chapter's heading, the strength of Article II(3) New York Convention to enforce arbitration agreements worldwide should be given credit first: the restrictive interpretation of Article II(3) New York Convention, combined with the high standard of proving that an arbitration agreement is null and void, inoperative or incapable of being performed, have led to a generally strict court practice that very rarely declares agreements to arbitrate as invalid.⁽⁴³³⁾ Overall, the pro-arbitration approach taken by the New York Convention has been implemented successfully by the courts of the contracting states. The national courts' spirit of collaboration, cooperation and internationalism has indeed helped to promote an increasingly uniform interpretation of the New York Convention,⁽⁴³⁴⁾ but the wording of Article II(3) New York Convention nevertheless constitutes a source for less predictability and legal certainty as to the effectiveness of the arbitration defence before national courts. The question whether Article II(3) New York Convention is in fact a tool to manage parallel proceedings is therefore justified.

Article II(3) New York Convention is regarded as failing to offer effective protection of the parties' will to arbitrate and hence to avoid parallel proceedings before a national court and an arbitral tribunal. This is mainly due to the lack of a uniform interpretation concerning the validity of arbitration agreements; hence, there are different views as to which law or standards govern this question. The national courts of the contracting states of the New York Convention are given considerable leeway when interpreting the elements pertaining to the validity of an arbitration agreement, i.e. whether an arbitration agreement is null and void, inoperative or incapable of being performed.⁽⁴³⁵⁾ A party resisting arbitration might for tactical reasons choose to commence court proceedings in a jurisdiction with parochial national laws [page "77"](#) providing for a less arbitration-friendly approach. It has therefore been noted that Article II(3) New York Convention would be an effective remedy against parallel proceedings before a national court and an arbitral tribunal if it stipulated a uniform standard for deciding on the validity of the arbitration agreement,⁽⁴³⁶⁾ but current doctrine subjects the enforceability of international arbitration agreements to significant uncertainties and costs.⁽⁴³⁷⁾

In addition, there is a procedural weakness worth mentioning as regards the interplay between Article II(3) New York Convention and the requirements for recognition of foreign decisions under the Brussels Regulation/Lugano Convention: if the conditions to refer the parties to arbitration under Article II(3) New York Convention are met, but the national court nevertheless issues a decision on the merits of the dispute, recognition and enforcement of such a foreign judgment will, in principle, be possible under the Brussels and Lugano regime, since the recognising court is not authorised to review the jurisdiction of the court giving the judgment.⁽⁴³⁸⁾ Such an outcome is not satisfactory and in addition weakens the effectivity of the arbitration defence under the New York Convention.⁽⁴³⁹⁾ Hence, there are commentators who suggest a way to cure this undesirable interplay between the New York Convention and the Brussels Regulation/Lugano Convention: Hascher opines that there remains the possibility for the recognising court to consider the foreign judgment as relating to a matter excluded under the Brussels Regulation/Lugano Convention, and the court should therefore be allowed to exclude the provisions in Chapter III of the Brussels Regulation/Lugano Convention.⁽⁴⁴⁰⁾ Audit specifies that such an exclusion should be more seriously considered where the allegation of an arbitration agreement before the foreign court was a bona fide argument.⁽⁴⁴¹⁾ Furthermore, there are commentators who are of the opinion that in cases where the arbitration agreement has been blatantly disregarded by the national court, a review by the recognising court based on public policy would be justified (in accordance with Article 34(1) Brussels Regulation/Lugano Convention).⁽⁴⁴²⁾

These views on how to find a remedy for the lack of coordination between the New York Convention and the Brussels Regulation/Lugano Convention do not represent a general solution and, furthermore, do not seem to be very promising: firstly, the ECJ has held that, as long as the validity of the arbitration agreement is not the subject matter of a claim, such claim is dealt with under the Brussels Regulation.⁽⁴⁴³⁾ The ECJ's focus on the subject matter of the dispute is sensible insofar as holding otherwise could have the undesirable effect that the mere invocation of an arbitration agreement before a Regulation or Convention state court would bar the judgment from benefitting from [page "78"](#) the Brussels or Lugano simplified regime for recognition.⁽⁴⁴⁴⁾ Secondly, the public policy ground for refusing recognition of a judgment is, in principle, interpreted very narrowly and moreover subject to the respective Member State's notion of public policy.⁽⁴⁴⁵⁾

In summary, the interplay between the New York Convention and the Brussels Regulation or the Lugano Convention is not coordinated,

since the jurisdiction of a national court rendering a judgment is not allowed to be reviewed when recognition or enforcement of such a judgment is sought under the Brussels or Lugano regime; in other words, even if a judgment has been rendered in disregard of a valid arbitration agreement, recognition under the Brussels Regulation/Lugano Convention cannot be refused for want of jurisdiction.⁽⁴⁴⁶⁾ Even though the lack of coordination in this respect does not directly touch upon the regulation of pending parallel proceedings, it nevertheless enhances the risk of conflicting decisions being rendered and, moreover, reduces the effectivity of Article II(3) New York Convention as a safeguard for enforcing valid arbitration agreements.⁽⁴⁴⁷⁾

A commentator summarises the uncertainties created by Article II(3) New York Convention as follows:

"Art. II(3) of the New York Convention could well win its draftsmen an Olympic or world record gold medal for being able to pack into one sub-clause of the four-lined text more material, more issues and more judicial interpretation than any other sub-clause of any other four-lined article."⁽⁴⁴⁸⁾

In conclusion, this analysis shows that Article II(3) New York Convention seems to be tainted with several uncertainties and hence cannot guarantee to regulate the concomitant jurisdiction of a national court and an arbitral tribunal, even if the parties to the dispute have validly agreed to arbitrate. Although there are ideas and proposals on how to revise Article II(3) New York Convention, an amendment obtaining full acceptance by the arbitration community is still missing.⁽⁴⁴⁹⁾ The Recast Brussels Regulation, [page "79"](#) however, marks a step towards regulating the national courts' duties under the New York Convention within the ambit of the Regulation.⁽⁴⁵⁰⁾

[2]. Arbitration Defence under National Arbitration Laws

The UNCITRAL Model Law provides in Article 8(1) for an arbitration defence to be invoked in court proceedings – in a very similar manner to the provision in the New York Convention:

"A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

This provision has been modelled on Article II(3) New York Convention on purpose.⁽⁴⁵¹⁾ Article 8 UNCITRAL Model Law does not contain any recommendation on the scope with which the arbitration agreement should be reviewed, nor on whether the arbitral tribunal should be the first to rule on the arbitration agreement's validity.⁽⁴⁵²⁾ Article 8(1) UNCITRAL Model Law is further a non-territorial provision, meaning that a party can rely on it even if the place of arbitration is outside the adopting state.⁽⁴⁵³⁾ § 1032(1) ZPO, inspired by Article 8(1) UNCITRAL Model Law, provides for the arbitration defence under German arbitration law. It is a mandatory provision⁽⁴⁵⁴⁾ and applies even if the place of arbitration is located outside Germany or has not yet been determined.⁽⁴⁵⁵⁾ The German courts will not observe the arbitral tribunal's jurisdiction *ex officio*, but only on a party's plea.⁽⁴⁵⁶⁾

Under French arbitration law, Article 1448 CPC holds that a French court must decline jurisdiction if it is confronted with a dispute for which an arbitration agreement has been concluded between the parties, unless the arbitral tribunal has not yet been seised and provided that the arbitration agreement is manifestly null or inapplicable. Paragraph 2 of Article 1448 CPC reveals that the party opposing court litigation must invoke the arbitration defence, since French courts do not consider the arbitration agreement *ex officio*.⁽⁴⁵⁷⁾

Under Swiss law, the legal basis of the *exceptio arbitri* is bifurcated depending on where the arbitral tribunal has its seat: Article II(3) New York Convention applies only where the national court seised and the place of arbitration are not situated in the same country. Conflicts of competence between the supervisory court (*juge d'appui*) and an arbitral tribunal having its seat in the same jurisdiction or, where arbitral proceedings [page "80"](#) have not yet been initiated, an arbitration agreement providing for the seat of arbitration within Switzerland, are, for international disputes, governed under Swiss law by Article 7 SPILA.⁽⁴⁵⁸⁾ This provision holds that if a party to an arbitration agreement brings an action before a Swiss court as to a matter covered by the arbitration agreement, the court must decline jurisdiction, unless (a) the defendant has proceeded with its defence on the merits without raising any objection, (b) the arbitration agreement is null and void, ineffective, or incapable of being performed, or (c) the arbitral tribunal cannot be constituted for reasons manifestly attributable to the defendant in the arbitral proceedings.⁽⁴⁵⁹⁾ The purpose of the requirement listed last is to enable the party which, in principle, resists court litigation, but which is barred from arbitrating due to the defendant's successful obstruction to constituting the arbitral tribunal, at least to get access to the national courts.⁽⁴⁶⁰⁾ After

Switzerland withdrew the reciprocity reservation it had originally opted for under Article I(3) New York Convention in 1993, the scope of Article II(3) New York Convention was extended to have erga omnes effect.⁽⁴⁶¹⁾ In other words, Swiss courts will now also apply Article II(3) New York Convention to arbitration agreements where the designated place of arbitration is not within the territory of a contracting state of the New York Convention.⁽⁴⁶²⁾

Section 9 Arbitration Act holds that English courts shall grant a stay, provided that the statutory conditions are met, and unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.⁽⁴⁶³⁾ The statutory requirements are the following: the party applying for the stay must be a party to a written arbitration agreement and the subject matter of the dispute must be arbitrable; legal civil proceedings must be brought against the party applying for a stay; the proceedings must pertain to a matter which, under the arbitration agreement, is to be referred to arbitration; other dispute resolution procedures, as foreseen in multi-tier agreements, which must be conducted as a prerequisite to commencing arbitration, need not be exhausted; and the party applying for a stay must raise the application before making a step in the proceedings.⁽⁴⁶⁴⁾ Section 9 Arbitration Act is of mandatory [page "81"](#) nature and cannot be excluded by the parties to an arbitration agreement.⁽⁴⁶⁵⁾ This provision applies regardless of whether the seat of the arbitral tribunal is located in England and Wales or Northern Ireland, or abroad, or has not been designated or determined at all.⁽⁴⁶⁶⁾ Consequently, the application of section 9 Arbitration Act is also independent of whether or not the arbitral proceedings have already been commenced.⁽⁴⁶⁷⁾ An English court may, however, also grant a stay under its inherent jurisdiction in the interests of justice or in terms of case management where it considers it more sensible for the arbitral tribunal to deal with the matter first.⁽⁴⁶⁸⁾ The English court's inherent jurisdiction may be used to justify a stay where the court is not satisfied that there is an arbitration agreement and a decision by the arbitral tribunal on its own jurisdiction is imminent, for instance, or where the statutory requirements for a stay are not met, but the judge is of the opinion that the matter should nevertheless be referred to the arbitrators to rule on their jurisdiction.⁽⁴⁶⁹⁾

[a]. Procedural Requirements as to the Time by Which the Plea Should Be Raised

Article 8(1) UNCITRAL Model Law deviates from the parallel provision in the New York Convention in one respect:⁽⁴⁷⁰⁾ it stipulates expressly by which point in time the party resisting court litigation needs to invoke the arbitration defence, i.e. this party must raise the plea of a valid arbitration agreement at the latest when submitting its first statement on the substance of the dispute in order not to waive its right to insist on the enforcement of the agreement to arbitrate. Under German arbitration law, inspired by the UNCITRAL Model Law, the point in time by which the arbitration defence needs to be invoked is not the submission of the first statement on the substance of the dispute, but the party insisting on arbitration must raise the objection prior to the oral hearing on the substance of the dispute.⁽⁴⁷¹⁾

Similarly, under French arbitration law, the national courts are not entitled to raise the question of their lack of jurisdiction on their own initiative; the party must [page "82"](#) object to the national court's jurisdiction based on a valid arbitration agreement prior to any defence on the merits of the case.⁽⁴⁷²⁾

Since the procedural requirements of the arbitration defence are governed by the lex fori, the respective provisions in the SPILA or CCP determine – under both Article II(3) New York Convention and Article 7 SPILA – whether the exceptio arbitri has been raised in time, or whether the defendant has entered an appearance.⁽⁴⁷³⁾ Article 7 SPILA does not state this explicitly, but Swiss courts will observe the existence of a valid arbitration agreement leading to their decline of jurisdiction only provided that the defendant raises the arbitration defence timely; this requirement can be derived indirectly from the principle that an arbitration agreement is not to be observed if the defendant has voluntarily submitted to the jurisdiction of the national court by arguing on the merits of the case.⁽⁴⁷⁴⁾ According to Swiss procedural law, Article 18 CCP holds that the defendant submits to the jurisdiction of the court if he argues on the merits of the case without raising the plea of lack of jurisdiction; consequently, the arbitration defence must be raised before arguing on the merits of the case in order to assert the applicability of the arbitration agreement.⁽⁴⁷⁵⁾ However, recent Swiss case law demonstrates that the party insisting on arbitration is not entitled to wait until it submits the statement of defence to raise the arbitration defence in every case: under Swiss procedural law, legal proceedings before a Swiss civil court can, in principle, only be initiated if the claimant files a conciliation request with a state conciliatory authority first; if the parties fail to amicably settle the dispute between them, the conciliatory authority issues a permission to raise the action with the competent court. The Swiss Federal Supreme Court recently held that, if a party appears before the conciliatory authority without objecting to the national courts' jurisdiction (and the arbitration agreement itself does not expressly provide for the previous conduct of a hearing with the conciliatory authority), it recognises the Swiss courts' jurisdiction and is prevented from raising the arbitration defence at a later stage in

court proceedings.⁽⁴⁷⁶⁾

The application for a stay of court proceedings under English arbitration law cannot be made before the applicant takes an appropriate procedural step (if any) to acknowledge the legal proceedings against him, and cannot be made after the applicant has taken any step in the proceedings to answer the substantive claim.⁽⁴⁷⁷⁾ The test of 'any step in the proceedings' is less strict than that for proceedings under section 72 Arbitration Act; for this provision to apply, the party is required not to take part in the [page "83"](#) proceedings at all.⁽⁴⁷⁸⁾ English case law developed the following characteristics of a step in the proceedings: in order for an action to constitute a step in the sense of section 9(3) Arbitration Act, the action "*must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration.*"⁽⁴⁷⁹⁾ Nevertheless, even after a clear step a stay of the proceedings may still be possible if the step in the proceedings is combined with an unmistakable challenge to the court's jurisdiction:⁽⁴⁸⁰⁾ if the defendant explicitly challenges the national court's jurisdiction, but at the same time applies for a summary judgment, which normally constitutes a step in the proceedings, the arbitration agreement should nevertheless be upheld.⁽⁴⁸¹⁾ Raising a counterclaim, furthermore, demonstrates a clear step in the proceedings irrespective of whether the defendant is aware of the consequence of his action, i.e. the loss of his right to a stay.⁽⁴⁸²⁾

The time bar, explicitly established in certain arbitration laws, has the effect that if the arbitration defence is raised after a certain point in time, the party is considered to have waived any objection to the national court's jurisdiction based on a valid arbitration agreement and is deemed to have submitted to the jurisdiction of the national courts.

[b]. Interpretation of the Invalidity of the Arbitration Agreement

There are several circumstances under which an arbitration agreement might be declared invalid: the agreement may be invalid for formal reasons, the agreement's invalidity may be derived from it having been concluded under duress, or there is another defect in the arbitration agreement's substance, such as, for instance, that the dispute to be settled by arbitration is not capable of being arbitrated. Based on the separability doctrine, many sorts of defects affecting the legality of the main contract do not extend to the validity of the arbitration clause therein. Nevertheless, national case law has come up with diverging situations in which arbitration agreements were declared invalid and hence the arbitral tribunal's jurisdiction was denied by the state courts. Prior to giving examples of cases where the arbitration agreement has been declared invalid, the law according to which the arbitration agreement's validity is analysed will be examined.

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[i]. Law Governing the Interpretation of the Arbitration Agreement

Within the scope of the UNCITRAL Model Law, it is held that, by analogous application of Articles 34(2)(a)(i) and 36(1)(a)(i) UNCITRAL Model Law, the law to which the parties have subjected the arbitration agreement, or, failing such choice of law, the law of the place where the arbitral award was made should govern the interpretation of the validity of the arbitration agreement.⁽⁴⁸³⁾ From a German perspective, the law determining the formal requirements of an arbitration agreement is the law at the place of arbitration.⁽⁴⁸⁴⁾ The substance of the arbitration agreement is, in general, interpreted based on the law chosen by the parties; if the parties have not chosen a law, the proper law of the main contract is considered as an implied choice of law to govern the arbitration agreement.⁽⁴⁸⁵⁾ For want of an express or implicit choice of law, the law of the place of arbitration will govern the arbitration agreement.⁽⁴⁸⁶⁾

Where the parties have not chosen the law applicable to the arbitration agreement, it is held under French arbitration law that the courts will decide the rules of law applicable to the arbitration agreement in light of the parties' intention, any relevant mandatory rules of French law or rules of (French) international public policy.⁽⁴⁸⁷⁾ The principle behind this determination of the applicable law is also called the principle of the validity of the international arbitration agreement.⁽⁴⁸⁸⁾ This principle holds that an arbitration clause is governed by international rules regardless of the applicable rules of national law; in other words, the arbitration agreement is effective in accordance with the common intention of the parties regardless of any other condition regarding the validity under the applicable national law governing the agreement.⁽⁴⁸⁹⁾ Indicative of this approach is that French international arbitration law does not establish any [page "85"](#) requirement as to the form of the arbitration agreement,⁽⁴⁹⁰⁾ a provision introduced by the Decree leading to the revision of the CPC in 2011 that radically excluded any condition of form for international arbitration agreements.⁽⁴⁹¹⁾

As far as the interpretation of the arbitration agreement's formal validity under Swiss law is concerned, Article II(2) New York Convention, as a directly applicable provision of law, sets out the requirements.⁽⁴⁹²⁾ With regard to the substantive validity of the

agreement to arbitrate, the prevailing view holds that a Swiss court should apply the conflict of laws rule contained in Article V(1)(a) New York Convention (even though directed at the competent judicial authority before which recognition and enforcement of an arbitral award is sought).⁽⁴⁹³⁾ Swiss courts confronted with an arbitration defence within the ambit of Article 7 SPILA, however, must determine the arbitration agreement's validity considering the in favorem validitatis choice of law rule contained in Article 178(2) SPILA as the relevant *lex arbitri* (i.e. the law chosen by the parties, the law governing the subject matter of the dispute, or Swiss law).⁽⁴⁹⁴⁾ In other words, this broad pro-validation choice of law rule incorporates the principle that the parties' intention to have any dispute settled by arbitration shall be given effect.

Under English law, the law to which the parties have subjected the arbitration agreement is applicable to interpret the agreement's validity;⁽⁴⁹⁵⁾ if the choice of law pertains to the contract as a whole, the arbitration agreement may also be governed by that law.⁽⁴⁹⁶⁾ In the absence of a choice of the law governing the arbitration agreement or the main contract, the law of the seat of arbitration will be applicable as an implied choice of law governing the contract, provided that the parties have designated the seat of arbitration;⁽⁴⁹⁷⁾ if they have not, the law applicable to the substantive contract will be identified in accordance with the principles in the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and the arbitration agreement will also be subject to the law so determined.⁽⁴⁹⁸⁾ This cascade of laws corresponds to the common law conflict of laws rule to determine the proper law of the arbitration agreement.⁽⁴⁹⁹⁾ While English [page "86"](#) courts have traditionally followed the conflict of laws rule and hence applied – in the absence of a direct choice of law – the law governing the substantive contract to the arbitration agreement as an implied choice of law, recent case law has revealed a pro-validation approach favouring the law of the seat of arbitration as the proper law of the arbitration agreement.⁽⁵⁰⁰⁾ In a recent ruling, for instance, the Court of Appeal held that although there were powerful factors in favour of an implied choice of Brazilian law as the proper law of the arbitration agreement, inter alia because the parties to the dispute had subjected the main contract, an insurance policy, to Brazilian law, the choice of England as the seat of arbitration and the fact that Brazilian law would have undermined the arbitration agreement's validity tended to suggest that the parties did not intend the arbitration agreement to be governed by Brazilian law.⁽⁵⁰¹⁾ Hence, English courts seem to be eager to give effect to the parties' agreement to arbitrate by applying the law that gives effect to their agreement.⁽⁵⁰²⁾ The elements of a formally valid arbitration agreement are defined in section 5 Arbitration Act.

iii]. Invalidity of the Arbitration Agreement

Article 7 UNCITRAL Model Law – like Article II(1) New York Convention – sets out the elements of an effective arbitration agreement, the difference being that it does not mention the arbitrability of the subject matter explicitly. This inconsistency with the New York Convention, however, is not serious, since firstly, Article 1(5) UNCITRAL Model Law holds that the forum state's laws on arbitrability retain their force, and secondly, because the term 'null and void' is expected to include cases in which the dispute is not capable of being settled by arbitration.⁽⁵⁰³⁾ As in Article II(3) New York Convention, Article 8(1) UNCITRAL Model Law does not contain a definition or further explanation of the terms used to describe the invalidity of an arbitration agreement.⁽⁵⁰⁴⁾ Finally, there is also uncertainty as to the standard of judicial review that is to be applied by a national court when deciding on an arbitration agreement's validity under the UNCITRAL Model Law.⁽⁵⁰⁵⁾

§ 1032(1) ZPO obliges the German court seized of the action to reject the action as inadmissible, unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; these requirements for the validity of the arbitration agreement are based on Article II(3) New York Convention.⁽⁵⁰⁶⁾ [page "87"](#) § 1029(1) ZPO in connection with §§ 1030 and 1031 ZPO define the essential elements of a valid arbitration agreement. German case law has generated the following examples of arbitration agreements that have been held incapable of being performed: a lack of funding, since the rejection of the action before the state courts as inadmissible would bar the illiquid party's recourse to the courts, combined with the absence of legal aid in arbitral proceedings to any adjudicatory body.⁽⁵⁰⁷⁾ Furthermore, an arbitration agreement has been regarded as being incapable of being performed where it required the party-appointed arbitrators to have a particular qualification, but arbitrators with that specific qualification could not be appointed in accordance with German law.⁽⁵⁰⁸⁾ The German Federal Supreme Court, moreover, concluded that an arbitration agreement calling for arbitration before the East German Arbitration Court became inoperative with the dissolution of the East German Arbitration Court, since the difference between the successor court, i.e. the privately organised Berlin Arbitration Court, and the state controlled East German Arbitration Court, with its special features, was too significant to assume that the parties would have consented to arbitration before the Berlin Arbitration Court.⁽⁵⁰⁹⁾

As per Article 1448(1) CPC, French courts are barred from reviewing

an arbitration agreement once the arbitral tribunal has been seised of the matter. If such seisure, however, has not yet occurred, French courts are entitled to examine whether the agreement to arbitrate is manifestly null or manifestly inapplicable.⁽⁵¹⁰⁾ The grounds for the arbitration agreement's invalidity are interpreted restrictively by the French courts in order not to vacate the principle of competence-competence or the parties' will to arbitrate.⁽⁵¹¹⁾ In a case of a group of contracts, for instance, where the frame contract provided for arbitration and the subcontract contained a jurisdiction clause, the Paris Court of Appeal held that an arbitration agreement takes precedence over a jurisdiction clause in the same group of contracts and, even though the subcontract was concluded two years after the frame contract, the jurisdiction clause could not have caused a novation of the parties' original choice of arbitration.⁽⁵¹²⁾ In a later ruling, the French Supreme Court did not qualify an arbitration clause coexisting with a jurisdiction clause in the same contract as pathological, but again confirmed that the arbitration [page "88"](#) clause needs to be prioritised and that it is for the arbitrators to determine their jurisdiction in light of a conflicting forum selection clause.⁽⁵¹³⁾ This case law by the French courts is a striking testimony to the superiority of arbitration clauses over forum selection clauses and hence reflects the exceptionally liberal attitude towards arbitration in France.⁽⁵¹⁴⁾ In principle, it must be clear from the face of the purported arbitration agreement that it is not valid, i.e. the invalidity must be so evident that the national courts are not required to embark on any exercise of interpretation of the clause.⁽⁵¹⁵⁾ The invalidity ground of 'manifest inapplicability', i.e. encompassing cases where arbitration clauses cannot be performed for whatever reason, has been added in the wake of the revision of the CPC in 2011 and thereby incorporated the prevailing case law on the scope of review of the arbitration agreement.⁽⁵¹⁶⁾

A Swiss court can only consider an arbitration agreement as the basis for declining its jurisdiction provided that the arbitration agreement is not null and void, inoperative or incapable of being performed. Even though a distinction between these categories of invalidity is, at times, difficult to make, the following criteria have been developed: the arbitration agreement is null and void if it suffers from serious formal or material defects.⁽⁵¹⁷⁾ The arbitration agreement has become inoperative if it ceases to be valid by virtue of the parties' agreement, due to the expiration of a time limit, based on a defective conclusion (lack of legal capacity), or if it is contrary to a mandatory rule of law, public policy, *bonos mores* or fundamental personal rights, for instance.⁽⁵¹⁸⁾ With regard to an arbitration clause requiring claims to be asserted within 30 days from the failure of negotiations, for instance, the Swiss Federal Supreme Court set aside an award holding that the arbitration was commenced too late and hence the arbitration agreement had already expired.⁽⁵¹⁹⁾ Finally, an arbitration agreement may be considered incapable of being performed if the arbitral proceedings cannot be set in motion due to a failure to appoint the arbitrators even by the supervisory court, for instance.⁽⁵²⁰⁾

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The Arbitration Act has adopted the wording of Article II(3) New York Convention as regards the definition of an invalid arbitration agreement.⁽⁵²¹⁾ 'Null and void' covers a situation in which there is no effective agreement, normally right from the beginning, such as due to objective impossibility *ab initio*.⁽⁵²²⁾ English courts will, for instance, not give effect to arbitration agreements that conflict with mandatory rules of English law irrespective of the agreement's validity under its proper law: in the *AB Bofors-Uva CAV Ltd v AB Skandia Transport*⁽⁵²³⁾ case, even though the arbitration agreement was governed by Swedish law, the court refused to grant a stay, since the agreement infringed the Convention on the Contract for the International Carriage of Goods by Road incorporated into English law by the Carriage of Goods by Road Act 1965.⁽⁵²⁴⁾ The term 'inoperative' refers to the scope of the arbitration clause, the arbitrability of the subject matter, the termination or cancellation of the arbitration clause and the identities of the parties to the arbitration clause.⁽⁵²⁵⁾ In *Downing v Al Tameer Establishment*⁽⁵²⁶⁾, the Court of Appeal concluded that the arbitration agreement had become inoperative: the defendant in the court proceedings persistently denied in his pre-action correspondence entering into any binding agreement with the claimant; when the claimant commenced court proceedings the defendant, however, applied for a stay relying on the arbitration clause contained in the previously contested contract. The Court of Appeal held that the defendant had waived the arbitration agreement as a function of his constant denial and the claimant had accepted the defendant's repudiatory breach of the arbitration agreement by turning to the national courts, hence the arbitration agreement had become inoperative.⁽⁵²⁷⁾ Furthermore, Brightman J. denied that the risk of inconsistent results due to arbitration proceedings pending on the same issues of law and of fact as in parallel court proceedings renders the arbitration agreement inoperative.⁽⁵²⁸⁾ In a decision shortly following the aforementioned, however, the Commercial Court refused to grant a stay when confronted with an optional arbitration agreement where the party entitled to opt had already exercised the option in favour of the Commodity Futures Trading Commission in the US, stating that the agreement was either not an arbitration agreement at all, or one that was inoperative or incapable of being performed, since the arbitral tribunal will not [page "90"](#) arbitrate while there are parallel proceedings on foot.⁽⁵²⁹⁾ Last but not least, the phrase 'incapable of being performed' relates to the case in which one or

both parties are prevented by external factors from performing their obligation to arbitrate.⁽⁵³⁰⁾ As opposed to German case law, the English courts have denied that lack of sufficient funds to initiate or participate in arbitration proceedings was a circumstance capable of rendering the arbitration agreement inoperative or incapable of being performed.⁽⁵³¹⁾ An arbitration agreement may, however, be interpreted as incapable of being performed if it is rendered illegal or impossible of being enforced; this could be the case for instance where an EC Regulation setting up an EU trade embargo were to invalidate all contracts with a country including, specifically, arbitration agreements.⁽⁵³²⁾ Also, if an arbitrator with the necessary qualifications as agreed on by the parties and who is prepared to act at the place of arbitration cannot be found, it is arguable that the arbitration agreement is incapable of being performed.⁽⁵³³⁾ Furthermore, even though, in principle, a valid arbitration agreement remains binding and effective regardless of an event of insolvency, if a party to an arbitration agreement becomes bankrupt, a bankruptcy tribunal may require that otherwise arbitrable disputes be adjudicated before the national courts; hence, the arbitration agreement becomes incapable of being enforced.⁽⁵³⁴⁾ In conclusion, it needs to be mentioned that, after the Court of Appeal's decision in *Fiona Trust*, arbitration agreements are interpreted very widely by the English courts, hence objections against the arbitration clause's validity need to be of a manifest nature if they are to stand a chance of being successful.⁽⁵³⁵⁾

[c]. Effects of the National Court's Decision regarding the Arbitration Defence

Jurisdictions have given effect to the New York Convention's instruction to refer the parties to arbitration if one of the parties invokes a valid arbitration agreement in different ways. In addition, the possibilities of appealing against a national court's [page "91"](#) positive or negative jurisdictional decision and the preemptive effects accorded to such decisions may also differ, as will be seen below.

[i]. Is the Brussels Regulation/Lugano Convention Applicable to Court Decisions on the Arbitration Defence?

With regard to the effects attributed to a European national court's decision on the arbitration defence, whether the Brussels Regulation/Lugano Convention regime is applicable to such decisions needs to be examined. A substantive claim under a contract which itself gives rise to a preliminary issue as to the disputed existence of an arbitration agreement falls within the scope of the Brussels Regulation and the Lugano Convention, since the subject matter is not arbitration.⁽⁵³⁶⁾ Consequently, decisions on the merits which also incidentally rule on the arbitration agreement benefit from the recognition and enforcement scheme in the Brussels Regulation and the Lugano Convention.⁽⁵³⁷⁾ The decision rendered on the preliminary matter – even if given as a separate, preliminary decision – is also within the Regulation's/Convention's scope.⁽⁵³⁸⁾ The English Court of Appeal held in this respect: "A judgment on a preliminary issue in proceedings within the Regulation would be a judgment within the Regulation, even if, when looked at in isolation, the subject of the preliminary issue fell within the ambit of arbitration."⁽⁵³⁹⁾

Hence, a Spanish court judgment dealing with a damages claim and ruling that no arbitration clause was incorporated into the contract between the parties, whereupon the Spanish court refused to decline jurisdiction, was recognised as a judgment within the Brussels Regulation with res judicata effect on arbitral or court proceedings.⁽⁵⁴⁰⁾

As regards the effects of the simplified recognition and enforcement that such decisions on the merits – which have incidentally declared the arbitration agreement invalid – enjoy, it needs to be noted that the ground that the judgment was rendered in disregard of an arbitration agreement valid at the place of recognition or enforcement would not allow the enforcing Member State court to deny recognition or enforcement under the Brussels Regulation and the Lugano Convention.⁽⁵⁴¹⁾ Article 34 Brussels Regulation/Lugano Convention does not authorise the recognising court to review the adjudicating court's jurisdiction.⁽⁵⁴²⁾

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[ii]. National Court's Referral to Arbitration

As will be seen below, the instruction to refer the parties to arbitration contained in Article II(3) New York Convention has been enforced differently in the examined jurisdictions. It is, in any event, remarkable that none of the jurisdictions depicted below has incorporated an explicit referral of the parties to arbitration into their arbitration laws. The national courts' decisions on the arbitration defence will be open to appeal proceedings and, when final, will display a res judicata effect on national courts seised thereafter.

(a). Appeal Possibilities against a Negative Jurisdictional Decision by National Courts

The term 'refer the parties to arbitration' under Article 8(1)

UNCITRAL Model Law has no clear legal meaning. The proposal to replace 'refer to arbitration' by 'decline jurisdiction' was, however, rejected by the UNCITRAL Working Group for the sake of consistency with the New York Convention.⁽⁵⁴³⁾ Under German arbitration law, referral to arbitration has been established as a rejection of the action as inadmissible, i.e. the German court seised with the action declares it to be procedurally inadmissible, without entering into the merits.⁽⁵⁴⁴⁾ As a consequence of this interpretation of the effect of upholding a plea of a valid arbitration agreement, German courts see themselves bound to engage in a comprehensive review of the existence of a valid arbitration agreement instead of a prima facie examination.⁽⁵⁴⁵⁾ Such jurisdictional court decisions are open to general appeal proceedings under German law.⁽⁵⁴⁶⁾

The appearance of a valid arbitration agreement suffices for the French courts to declare themselves incompetent; hence, French courts decline jurisdiction when confronted with an arbitration agreement.⁽⁵⁴⁷⁾ If a Tribunal de Grande Instance is the court determining jurisdiction, an appeal may be filed against the judge's order before the competent Court of Appeal; if, however, the arbitration defence is raised before a lower court other than a Tribunal de Grande Instance, the judgment of that court may be subject to appeal in expeditious proceedings before the appropriate Court of Appeal according to Articles 80 ff. CPC.⁽⁵⁴⁸⁾

Article 7 SPILA requires that a Swiss court must decline jurisdiction if it finds that a disputed contract contains an arbitration clause providing for arbitration in Switzerland; some learned authors advocate the view – based on Article 7 SPILA's wording – that Swiss national courts shall decline jurisdiction ex officio irrespective of any party requesting to do so.⁽⁵⁴⁹⁾ Appeal proceedings against the Swiss courts' decision on the [page "93"](#) arbitration defence – irrespective of whether based on Article 7 SPILA or Article II(3) New York Convention – may be entertained, firstly before the deciding court (invoking defects in the court's legal and factual appraisal)⁽⁵⁵⁰⁾ and secondly before the Swiss Federal Supreme Court (solely based on the allegedly deficient application of the law)⁽⁵⁵¹⁾ ⁽⁵⁵²⁾

English law does not require national courts to decline jurisdiction if the parties to a dispute have concluded an arbitration agreement, but the effect of an arbitration agreement justifies the grant of a stay of proceedings until the arbitral tribunal has rendered an award.⁽⁵⁵³⁾ A historic interpretation of the effect of a valid arbitration agreement on court proceedings reveals that under common law an arbitration agreement could not deprive a court of its jurisdiction and, hence, a stay of the proceedings as opposed to a rejection of jurisdiction was the logical consequence.⁽⁵⁵⁴⁾ Since Article II(3) New York Convention leaves it to the contracting states to define how they intend to refer the parties to arbitration, staying the court proceedings is compatible with the spirit and purpose of the New York Convention.⁽⁵⁵⁵⁾ Even though the Arbitration Act does not say so explicitly, decisions based on section 9 Arbitration Act are subject to appeal, as has been confirmed by English case law.⁽⁵⁵⁶⁾ Decisions of national courts can be appealed with the permission of either the court in question or the Court of Appeal.⁽⁵⁵⁷⁾

(b). Res Judicata Effect of a Negative Jurisdictional Decision by National Courts

The prevailing view in German doctrine is that a court's judgment to reject an action as inadmissible binds courts subsequently called to decide on the validity of the arbitration agreement. Consequently, they are bound to declare actions infringing on the valid arbitration agreement as inadmissible.⁽⁵⁵⁸⁾ It is furthermore stated in German doctrine that the arbitral tribunal, too, should be regarded as being bound by the national court's determination of the arbitration agreement's validity.⁽⁵⁵⁹⁾ If, however, the arbitral tribunal denies to deal with the matter by virtue of finding the arbitration agreement invalid, the national courts may decide on the merits of the case in spite of [page "94"](#) their previous decision declining jurisdiction; if that were not so, the parties would be denied justice.⁽⁵⁶⁰⁾

Under French law, the national courts will only apply a prima facie analysis when examining the arbitration agreement's validity; the courts' interlocutory procedural ruling is held to be incapable of deploying preclusive effects in subsequent arbitral proceedings.⁽⁵⁶¹⁾

The effect of a Swiss court upholding a plea of arbitration is that such a decision means a bar to the exercise of the Swiss court's own jurisdiction and the jurisdiction of any other Swiss court seised thereafter with the same matter between the same parties, but it does not confer jurisdiction on the arbitral tribunal.⁽⁵⁶²⁾ Put differently: "A negative jurisdiction decision by the state court is not also a positive jurisdiction decision for an arbitral tribunal."⁽⁵⁶³⁾ An arbitral tribunal seised second will decide on its own jurisdiction and thereby re-examine with unfettered powers whether a valid and binding arbitration agreement indeed exists.⁽⁵⁶⁴⁾ Furthermore, in a domestic context, where the seat of the arbitral tribunal is located in Switzerland and the Swiss courts will therefore rule on the arbitration defence in accordance with Article 7 SPILA, the prima facie declaration of the lack of jurisdiction by the courts does not definitely settle the question of their jurisdiction, and even less that of the arbitral tribunal.⁽⁵⁶⁵⁾ Consequently, neither the Swiss courts nor the arbitrators are bound by a prima facie rejection of

jurisdiction.

Since English courts, when confronted with an arbitration defence, will stay the court proceedings unless the arbitration agreement is null and void, inoperative or incapable of being performed, they will not render a decision on the arbitration agreement's validity. Therefore, the granting of a stay by the English courts does not have preemptive effect on the arbitral tribunal's jurisdiction.⁽⁵⁶⁶⁾

[iii]. National Court's Refusal to Refer the Parties to Arbitration

If the national court concludes that the arbitration agreement is invalid it will continue to deal with the dispute and not refer the parties to arbitration. Such a positive jurisdictional decision by a national court in the jurisdictions examined below is open to appeal proceedings. In principle, such court decisions also have res judicata effect on [page "95"](#) arbitral proceedings with the result that any arbitral awards rendered after the court at the seat of arbitration has declared the arbitration agreement invalid may be set aside by the courts at the seat.

(a). Appeal Possibilities against a Positive Jurisdictional Decision by National Courts

If the German courts do not uphold the arbitration defence, they can either continue with the proceedings and give their reasons for disregarding the arbitration defence in their judgment on the merits, or they may proceed and render a separate judgment on the jurisdiction issue.⁽⁵⁶⁷⁾ When the court's judgment on the arbitration agreement's invalidity is rendered, it may be challenged in general appeal proceedings.⁽⁵⁶⁸⁾

The possibility of appealing against a French court's ruling deciding on its own jurisdiction when faced with an arbitration defence is independent of whether the judge affirms or declines jurisdiction; hence an appeal may be filed against an order of a Tribunal de Grande Instance and against a lower court's decision in expeditious proceedings by way of 'contredit'.⁽⁵⁶⁹⁾

The positive jurisdictional decision by the Swiss court is open to appeal.⁽⁵⁷⁰⁾

English courts may dismiss an application for a stay if the statutory requirements under section 9 Arbitration Act are not met or they consider the arbitration agreement to be null and void, inoperative or incapable of being performed and they do not exercise their discretion to stay the proceedings based on their inherent jurisdiction. Appeals to the Court of Appeal against decisions of the High Court – whether the court grants a stay under section 9 Arbitration Act or refuses to stay the court proceedings on the basis of an invalid arbitration agreement – are permitted.⁽⁵⁷¹⁾

(b). Res Judicata Effect of a Positive Jurisdictional Decision by National Courts

When a court's judgment on an arbitration agreement's invalidity becomes final, the arbitral tribunal will be bound by the court's decision under German arbitration law and any arbitral award rendered thereafter would be set aside by the German courts based on the arbitration agreement's invalidity according to § 1059(2)(1)(a) ZPO.⁽⁵⁷²⁾

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If a French court finds that an arbitration agreement is manifestly null or manifestly inapplicable, it takes jurisdiction with res judicata effect.⁽⁵⁷³⁾ As a result, an arbitral tribunal subsequently seised with the same dispute is bound by the court's ruling and hence needs to decline jurisdiction.

As regards the preclusive effect of positive jurisdictional decisions by Swiss courts, Swiss case law and legal doctrine agree that a preliminary court decision by which the court declares itself competent is binding on the arbitral tribunal.⁽⁵⁷⁴⁾ This decision on jurisdiction does not exclude the arbitral tribunal only, but also the jurisdiction of any other court seised at a later date.⁽⁵⁷⁵⁾ It is submitted that such res judicata effect of positive jurisdictional court decisions does not violate the arbitral tribunal's competence-competence, since the national court has the final say on the arbitral tribunal's jurisdiction.⁽⁵⁷⁶⁾ The Swiss Federal Supreme Court held that, even where the Swiss court admits to be competent to hear a case in application of Article 7 SPILA (i.e. by prima facie review of the arbitration agreement) in a preliminary decision, this decision is binding on an arbitral tribunal seated in Switzerland which is called upon to deal with the same question.⁽⁵⁷⁷⁾

In a case before the English courts, where the supervisory court held that there was no basis upon which the arbitrators had been vested with jurisdiction, the court called upon in the setting aside proceedings of the subsequent jurisdictional arbitral award concluded that the supervisory court's decision must be given res judicata effect, and hence annulled the arbitral tribunal's positive jurisdictional award.⁽⁵⁷⁸⁾ This ruling seems to suggest that the positive jurisdictional decision of the supervisory court, declaring the arbitration agreement invalid, is entitled to preclusive effect in any

subsequent arbitral proceedings.⁽⁵⁷⁹⁾ Hence, any award rendered in spite of such an earlier court ruling is highly likely to be set aside, since the court will almost always be bound by its earlier decision.⁽⁵⁸⁰⁾

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(c). *Excursus: Recognition of a Brussels Regulation/Lugano Convention Judgment Rendered in Disregard of an Arbitration Agreement*

Actions seeking declaratory relief as to the arbitration agreement's (in)validity fall outside the scope of the Brussels Regulation/Lugano Convention, since arbitration is at the core of such actions.⁽⁵⁸¹⁾ In contrast, substantive actions during which the defendant raises the arbitration defence and where the competent court renders a judgment on the merits by ruling on the arbitration agreement's invalidity as a preliminary matter are not covered by the arbitration exception in Article 1(2)(d) Brussels Regulation/Lugano Convention.

Assuming that a Member State court, i.e. the court at the seat of the arbitral tribunal, has rendered a judgment declaring the arbitration agreement valid and the national court located in a different Member State, that is the 'torpedo court', has issued a decision on the merits incidentally declaring the arbitration agreement null and void, the battleground is moved to the field of recognition of these contradictory decisions within the EU or the Lugano area.⁽⁵⁸²⁾ the declaratory judgment of the seat court falls outside the recognition scheme of the Brussels Regulation/Lugano Convention, whereas the substantive judgment by the torpedo court is capable of being recognised under the Brussels Regulation/Lugano Convention, even if given in breach of a valid arbitration agreement. This is so because judgments under the Brussels Regulation/Lugano Convention are not subject to a review of whether the court giving the judgment was in fact competent to hear the case. The grounds for refusing recognition of a foreign judgment under the Brussels Regulation and the Lugano Convention are the following: manifest violation of public policy of the recognising state,⁽⁵⁸³⁾ failure of service of relevant documents in ex parte proceedings,⁽⁵⁸⁴⁾ conflict of the foreign judgment with an earlier judgment in parallel proceedings⁽⁵⁸⁵⁾ or with Regulation/Convention provisions on consumer contracts, insurance or exclusive jurisdiction matters.⁽⁵⁸⁶⁾ As a result, every Member State/contracting state court, including the seat court declaring the arbitration agreement valid, is obliged to recognise an EU or EFTA court decision, even if in disregard of an arbitration agreement, within the limits of Articles 34 f. Brussels Regulation/Lugano Convention.

This legal situation gives rise to unequal treatment of foreign EU and EFTA decisions compared to decisions rendered outside the EU and the EFTA. Swiss and English law are examples demonstrating such unequal treatment:⁽⁵⁸⁷⁾ a decision of a Swiss cantonal court recognising a Lugano court judgment rendered in disrespect of an arbitration agreement, was upheld by the Swiss Federal Supreme Court, since the Swiss court was not entitled to review the foreign court's jurisdiction under the exclusively [page "98"](#) listed grounds for refusing recognition in Articles 34 and 35 Lugano Convention.⁽⁵⁸⁸⁾ If the foreign court judgment had, however, been given by a non-EU or non-EFTA court, the Swiss courts would have been allowed to re-examine the foreign court's jurisdiction based on Article 25(a) SPILA.⁽⁵⁸⁹⁾ According to a view advocated in Swiss legal doctrine, an arbitral tribunal with its seat in Switzerland should, nevertheless, be authorised to review a Lugano Convention decision with regard to whether the case was capable of settlement by arbitration under Swiss law.⁽⁵⁹⁰⁾

Furthermore, a judgment that is given outside the scope of the Brussels Regulation/Lugano Convention will not be recognised by the English courts, based on section 32(1) Civil Jurisdiction and Judgments Act 1982, if it has been rendered in proceedings brought in disregard of a valid arbitration agreement.⁽⁵⁹¹⁾ In light of this provision, English courts are trying to overcome the rigid recognition and enforcement scheme under the Brussels Regulation/Lugano Convention: a recent decision by the Commercial Court indicated a certain reluctance to allow parties to breach arbitration agreements valid under the law governing them and held that it would be contrary to English public policy to recognise a Regulation judgment obtained in breach of an arbitration agreement that was valid by its proper law.⁽⁵⁹²⁾ The Court of Appeal, however, reversed the Commercial Court's ruling, rejecting the argument that public policy was being infringed: "*The English court in such circumstances is not entitled to examine for itself whether the clause is incorporated and that is the end of the matter.*"⁽⁵⁹³⁾ The Spanish judgment declaring the arbitration agreement invalid, which was qualified as a judgment benefitting from the recognition scheme under the Brussels Regulation, was thereby confirmed to give rise to issue estoppel in both arbitration proceedings and any other proceedings in an English court.⁽⁵⁹⁴⁾ Hence, the English courts and an arbitral tribunal seated in England are bound by the Spanish court's determination of the arbitration agreement's invalidity.

Article 35(3) Brussels Regulation/Lugano Convention furthermore explicitly holds that the jurisdiction of the court of the Member State/contracting state of origin may not be reviewed and that the test of public policy may not be applied to the rules relating to jurisdiction.⁽⁵⁹⁵⁾ It is considered by learned authors that it is rather

unlikely [page "99"](#) that the public policy exception in Article 34(1) Brussels Regulation/Lugano Convention could be successfully invoked to bar the recognition or enforcement of a court judgment ignoring a valid arbitration agreement.⁽⁵⁹⁶⁾ It may, however, be observed that English courts – probably as retaliation against this case law – have given leave to enforce a declaratory arbitral award as a judgment under section 66 Arbitration Act in order to preempt, by reference to Article 34(3) Brussels Regulation, an attempt to register in England a subsequent judgment from a Member State court in disregard of an arbitration agreement.⁽⁵⁹⁷⁾

In addition, the attractive enforcement system of the New York Convention has entered into competition with the facilitated recognition and enforcement of judgments within the Brussels and Lugano regime. The Member States' and contracting states' duty to recognise foreign judgments even if rendered in violation of an arbitration agreement, moreover, seems at odds with the states' obligations under Article II New York Convention ('conflit de conventions').⁽⁵⁹⁸⁾

The portrayal of the legal situation under the Brussels Regulation and the Lugano Convention also shows that parties within the Brussels and Lugano regime may be inclined and, in terms of strategy, may even aim at obtaining a judgment on the merits as soon as possible in order to benefit from the favourable recognition and enforcement scheme that does not permit review of the issuing court's jurisdiction. More precisely, such a judgment may have an impact both on the legitimacy of arbitral proceedings concerning the same claim, based on the same legal grounds, and between the same parties, and on the enforceability of an award rendered in such proceedings:

- If a judgment on the merits has been rendered by an EU or EFTA court, arbitral proceedings initiated subsequently on the same subject matter and between the same parties before an arbitral tribunal seated in an EU or EFTA state are [page "100"](#) highly likely to be declared inadmissible by the arbitrators, provided that a party raises the plea of res judicata in time and that the arbitrators consider the foreign judgment recognisable under the law at the seat of arbitration.⁽⁵⁹⁹⁾
- As far as the enforceability of an arbitral award is concerned, a party having obtained a foreign court judgment on the merits in its favour may challenge the arbitral award based on the ground that the arbitral tribunal lacked jurisdiction to hear the dispute, or perhaps even based on the res judicata effect of the court judgment if given prior to the award (procedural public policy exception)⁽⁶⁰⁰⁾. Even if the courts at the seat of arbitration would have declared the arbitration agreement valid, they are bound to recognise the EU or EFTA judgment and annul the award unless there are other irregularities that prohibit recognition of the foreign court decision.

In conclusion, the recognition of Regulation and Convention judgments that preliminarily decide on an arbitration agreement's validity gives rise not only to a lack of reciprocity as regards national and convention law (as portrayed under Swiss and English law), but also with regard to court judgments and decisions of an arbitral tribunal,⁽⁶⁰¹⁾ since the latter fall within the arbitration exception under the Brussels and Lugano regime.

It hence needs to be considered whether it would not be appropriate to add a new ground to the list in Article 34 Brussels Regulation/Lugano Convention, holding that a judgment shall not be recognised or enforced if it has been rendered in disregard of an arbitration agreement that is valid under the law of the country of recognition or enforcement.⁽⁶⁰²⁾ The Recast Brussels Regulation has chosen a different path: recital 12(2) Recast Brussels Regulation holds that a ruling by a Member State court as to the arbitration agreement's validity, irrespective of whether as a principal issue or an incidental question, is not subject to the rules of recognition and enforcement under the Regulation.⁽⁶⁰³⁾ It is, however, submitted that, also under the legal situation as per the [page "101"](#) status quo, it should be possible for an EU or EFTA court to at least deny recognition of a judgment obtained in a clearly abusive manner under the public policy exception.⁽⁶⁰⁴⁾

[3]. Comparative Conclusion

The analysis above illustrates that, even though the jurisdictions examined are contracting states of the New York Convention and thus give effect to the arbitration defence provided in Article II(3) New York Convention, the wording of this provision is too broad to establish clear standards. Essential questions regarding the implementation of Article II(3) New York Convention are left to the contracting states to answer in their legislation and court practice. The following are examples of aspects for which Article II(3) New York Convention does not offer any specific guidance: the law governing the interpretation of the arbitration agreement's (in)validity, the procedural requirements for raising the arbitration defence and the effects of the national courts' decision on their jurisdiction in light of an allegation of an arbitration agreement. Furthermore, Article II(3) New York Convention does not define the scope of review to be applied by the national courts, i.e. the choice between a comprehensive review or a prima facie examination of the arbitration agreement, either.⁽⁶⁰⁵⁾ Not only due to these omissions, it is held that Article II(3) New York Convention is insufficient to fully deal with

parallel proceedings because it does not provide for coordination between arbitration and court litigation.⁽⁶⁰⁶⁾ In other words, regardless of the uncertainties Article II(3) New York Convention may create, there will be fully competing court and arbitral proceedings at least while review of whether the arbitration agreement is valid is pending.⁽⁶⁰⁷⁾

Likewise, it can be concluded that Article 8(1) UNCITRAL Model Law does not substantially differ from Article II(3) New York Convention – except for explicitly defining the time frame within which the arbitration defence must be invoked to avoid waiver –, but takes over the uncertainties tied to its interpretation by national courts; hence the Model Law provision does not constitute any better or worse a tool to manage the parallel jurisdiction of a national court and an arbitral tribunal than Article II(3) New York Convention.

Even though Article II(3) New York Convention and its parallel provision in Article 8(1) UNCITRAL Model Law have their flaws and are responsible for several uncertainties when it comes to the interpretation of the (in)validity of an arbitration agreement, they still constitute an essential pillar of the instruments for enforcing a [page "102"](#) pro-arbitration approach. Nevertheless, different conclusions may be drawn from the diverging ways the arbitration defence in the New York Convention is implemented in the examined jurisdictions; the conclusions will be depicted from the national courts' perspective, the arbitrators' and the parties' point of view.

[a]. Conclusions from the Perspective of National Courts

As has been discussed, broad discretion is given to national courts to specify the conditions for a successful arbitration defence. In particular with regard to the scope of review of the arbitration agreement or the interpretation of the arbitration agreement's validity, the legislator's and the courts' attitude towards arbitration is reflected. It is hence characteristic for France's arbitration-friendly approach that the courts' review of the arbitration agreement is restricted to a prima facie examination, and furthermore that the principles governing the arbitration agreement's substantive validity are the parties' choice or intention, or failing which, the relevant mandatory rules of French law or the principles of French international public policy. In other words, as long as the arbitral tribunal has already been seised, there is no review of the arbitration agreement at all, and if the court is permitted to conduct a prima facie examination, i.e. before an arbitral tribunal has been seised with the matter, only the violation of the most fundamental principles of international law is capable of leading to the French courts' affirmation of their jurisdiction. It might be noted critically in passing that a seemingly arbitration-friendly approach might also be undermined by forcing the parties into arbitral proceedings in the absence of a valid arbitration agreement.

Even though the exceptions to the mandatory referral to arbitration under the New York Convention scheme are generally construed narrowly, the interpretation of an arbitration agreement's validity will nevertheless differ as a function of the national court's scope of review of the agreement and the criteria established for a valid arbitration agreement. Even though parties are free to choose the law applicable to their arbitration agreement, which renders a national court's interpretation of the agreement more predictable, the national courts' tendency to measure the agreement to arbitrate on their own law, i.e. the *lex fori*, should not be neglected.

In general, the provisions dealing with the arbitration defence in the jurisdictions examined are of a mandatory nature, i.e. national courts are bound to stay proceedings or to decline their jurisdiction if all the requirements for a valid arbitration defence are fulfilled. The English legal system, however, provides the courts – in addition to section 9 Arbitration Act – with an inherent power to stay proceedings in favour of arbitration where disputes regarding the existence or the scope of the arbitration agreement are pending and the necessary conditions for a stay under section 9 Arbitration Act are not met. The English courts' inherent jurisdiction offers a flexible approach that leaves room for considering the specific circumstances of a case and for avoiding situations of substantial injustice. This system might be criticised for rendering the grant of a stay by national courts unpredictable; it needs, however, to be kept in mind that the inherent jurisdiction is only restrictively applied by the English courts as a basis for granting a stay in favour of arbitral proceedings. In recent case law, Master Campbell ruled that [page "103"](#) considerations as to the efficiency of arbitral proceedings and the beneficial enforceability of an arbitral award in a specific jurisdiction carried little weight and hence refused to grant a stay based on the court's inherent jurisdiction.⁽⁶⁰⁸⁾ One might argue that an approach pursuant to the English court's inherent power to grant a stay is even preferable for the sake of identifying the forum where the case should be tried in accordance with the parties' original intention and, hence, in order to limit the risk of contradictory decisions.

There are jurisdictions where the issuance of the arbitral award may be quicker than the national court's decision on the arbitration defence when seised with the dispute on the merits.⁽⁶⁰⁹⁾ It is suggested that a national court at the seat of the arbitral tribunal should stay its proceedings in this situation to give the losing party the opportunity to challenge the award in a timely manner.⁽⁶¹⁰⁾ This solution also seems appropriate in light of procedural economy: if

the losing party is also the one challenging the arbitral tribunal's jurisdiction and if it has properly and timely objected to the arbitrators' jurisdiction during the arbitral proceedings, it may raise the ground of the arbitral tribunal's lack of jurisdiction in setting aside proceedings,⁽⁶¹¹⁾ so that the seat courts have to decide on the tribunal's jurisdiction in any case. If the party that objected to the arbitral tribunal's jurisdiction has, however, been favoured by the arbitral award, it is highly likely that it will have lost interest in the state proceedings and may ask for their termination.

[b]. Conclusions from the Arbitrators' View

If arbitral proceedings are already in progress and the tribunal has already been constituted, the question may be posed concerning how the arbitrators are to react if one of the parties to the arbitration commences court proceedings against the defendant(s) on the same subject matter as is in dispute in the arbitration. It needs to be taken into account, on the one hand, that the arbitrators are obliged to deal with the matter put before them in an efficient manner and are hence not allowed to unnecessarily delay the arbitral proceedings.⁽⁶¹²⁾ On the other hand, the arbitral tribunal should not risk conflicting decisions being given by the national courts, thereby complicating, if not impeding, the recognition and enforcement of the prospective arbitral award.

Even though an arbitral tribunal is internationally recognised as able to decide on its jurisdiction by virtue of the principle of competence-competence independent of the national court's jurisdictional decision, and although it is often stated in national [page "104"](#) arbitration laws that the arbitral proceedings may be continued irrespective of proceedings being initiated in parallel before the national courts,⁽⁶¹³⁾ the following considerations regarding the arbitrators' behaviour seem to be reasonable. Given that a court's decision affirming its jurisdiction and rejecting the arbitration defence is likely to have preemptive effect binding the arbitral tribunal,⁽⁶¹⁴⁾ with the consequence that an award on the same subject matter and between the same parties, when challenged, will probably be set aside by the court that has already negatively adjudicated on the arbitration defence, the arbitral tribunal should consider a stay of the arbitral proceedings until the national court has decided on its jurisdiction.⁽⁶¹⁵⁾ The arbitral tribunal should, however, not do so unless one of the parties has objected to the tribunal's jurisdiction (which the party initiating court proceedings is in principle bound to do in order not to act contradictorily) and not without consulting with the parties, although the parties are – based on their positions in the court proceedings – highly likely to disagree on a proposed stay. The following questions may form part of a consideration of a stay of the arbitral proceedings: was the lawsuit filed in a legitimate manner or rather to 'torpedo' the arbitration? Will the court proceedings be unduly delayed or can it be expected that a decision will be given swiftly? Had the arbitration already advanced substantially before the court proceedings were initiated? Are the court proceedings commenced before the courts at the seat of arbitration, or is a foreign court decision on the arbitration agreement's validity likely to be recognised by the seat court?

Where the arbitral tribunal is convinced that the parties have validly agreed to settle their disputes by arbitration, or where the party opposing arbitration seems to have commenced court proceedings in an abusive manner to obstruct the arbitration, the arbitral tribunal should not stay the arbitral proceedings.

If a national court's decision on the arbitration defence is unduly delayed by the court or a party, the arbitral tribunal might consider lifting the stay in order not to infringe its obligation to efficiently proceed with the arbitration.

An arbitral tribunal deciding on whether to stay arbitral proceedings due to a positive jurisdictional decision by a national court should, furthermore, consider and consult with the parties on whether the national court dealing with the arbitration defence is the court at the seat of the arbitral tribunal, a court in a jurisdiction closely connected to the dispute (also possibly for enforcement purposes), or any other competent national court: the seat court's positive jurisdictional decision is most likely to result in the arbitral award being annulled in setting aside proceedings or its enforcement being inhibited on the ground that there was no valid arbitration agreement. If the competent national court is not situated in the country where the seat of the arbitral tribunal is located, but is otherwise relevant for the enforcement or recognition of the award, the arbitral tribunal should consider that the court's decision [page "105"](#) could jeopardise the enforcement or recognition of the arbitral award in that jurisdiction. Any other competent national court seemingly unrelated to the dispute before which a party initiated proceedings, perhaps to take advantage of that jurisdiction's arbitration-hostile case law or its wide interpretation of the exceptions to a valid arbitration agreement, should not seriously influence the arbitral tribunal's decision to stay the arbitral proceedings, since such a court decision is likely not to be recognised by any enforcement court reviewing the tribunal's jurisdiction. Assuming, however, that such a court's decision's preemptive effect extends to the national courts within a defined legal area, which the seat court is part of, the decision on the arbitration defence might nevertheless present an obstacle to the enforcement of the award. This example is reminiscent of the current legal situation under the Brussels Regulation and the Lugano Convention, according to which a decision preliminarily deciding that the arbitration agreement is not valid must be recognised by the

Member States and the Lugano States without being entitled to review the issuing court's jurisdiction.⁽⁶¹⁶⁾ But an arbitral tribunal (and the courts of contracting states of the New York Convention likewise) should not consider itself (themselves) bound by a court decision that either ignores Article II New York Convention or relies on a mandatory national law to deny effect to an otherwise valid arbitration agreement.⁽⁶¹⁷⁾ In such a case, the arbitral tribunal should continue with its own determination of the arbitration agreement's validity. In any event, the arbitral tribunal should comply with its mandate to render an enforceable award in order not to render redundant the parties' time and cost.

If the national court affirms its jurisdiction and continues with the proceedings, the arbitral tribunal should take into account the specific circumstances of the case and again consult with the parties on the way forward, especially in light of the preemptive effect of the court's decision, rendering it impossible to enforce the award in the parallel arbitral proceedings before the same courts. The risk of contradictory decisions being rendered if the court proceedings and the arbitration are continued in parallel should also be part of these considerations.

[c]. Conclusions from the Parties' View

A party intending to raise the arbitration defence should, before doing so, check the jurisdiction's requirements for invoking an arbitration agreement. Especially the questions as to the law governing the interpretation of the arbitration agreement's validity, the court's scope of review of the agreement, and whether the exceptions to the arbitration agreement's validity are interpreted restrictively or broadly necessitate further inquiry of the jurisdiction's doctrine and case law, since they substantially [page "106"](#) influence a court's decision on the arbitration defence. In particular, when considering that the claimant may commence proceedings in a national court of competence that is not the seat court, being acquainted with the latter court's case law is paramount for the defendant's presentation of his arguments.

As regards the procedural conditions to be met in order not to risk being held to have waived the right to raise the *exceptio arbitri* in a national court, again the specific requirements of the *lex fori* need to be examined. Because the point in time by which the arbitration defence must be raised differs in the jurisdictions examined, ranging from the point in time before the first step in the proceedings is taken⁽⁶¹⁸⁾ to the point in time before the oral hearing on the substance of the dispute is held⁽⁶¹⁹⁾, the defendant should, for the sake of risk minimisation, make sure that he clearly articulates his objection as soon as possible in the court proceedings.⁽⁶²⁰⁾ The defendant should expressly indicate his intention to raise the *exceptio arbitri* and throughout the proceedings reserve all rights when defending his position on the merits before the national court.

From a practical standpoint, the defendant should also make sure that the relevant documents to prove the existence and the validity of the arbitration agreement are available and not blocked in the arbitral proceedings or barred from being used in the court proceedings by a confidentiality agreement.⁽⁶²¹⁾

What is, in addition, worth considering before an arbitration defence is raised is whether the reasons upon which a stay or the decline of jurisdiction is requested are sufficient, or at least congruent, with previous case law of the respective national court to grant the stay or decline its jurisdiction; in other words, if the applicant fails to win, he is in the unfortunate position that he needs to return to the court he has described inappropriate to hear his claim.⁽⁶²²⁾ Furthermore, it should be taken into account that there is usually more than one level of appeal against the national court's decision on the arbitration defence, hence objecting to the court's jurisdiction might be a long haul, especially considering differences in the efficiency of adjudicatory bodies in different jurisdictions. Last but not least, pending court proceedings on the validity of the arbitration agreement always mean a threat to the enforcement of any prospective award on the same subject matter.

[B]. Exceptio Litis Pendentis

From a civil law perspective, a party is entitled to challenge the jurisdiction of the court seised second if the proceedings before the second court concern the same relief sought, based on the same legal grounds, and are between the same parties as the [page "107"](#) proceedings before the court seised first. The *exceptio litis pendens* is a self-restraining instrument by which the court seised second stays jurisdiction based on the temporal priority of the determination of jurisdiction of the court seised first. This effective means of regulating parallel proceedings is applied in civil law countries and has also been incorporated into the Brussels Regulation and the Lugano Convention. Even though the *lis pendens* doctrine is taken for granted from a civil law perspective, it is not self-evident that it also pertains to cross-border case constellations and to cases that involve other dispute resolution mechanisms.⁽⁶²³⁾

It is therefore worthwhile to analyse whether the plea of *litispendence* may also be effectively raised in court proceedings where the 'court' first seised is, in fact, an arbitral tribunal. For this purpose, some comments will first be made on the origins of the principle of *lis pendens* and the 'equivalent' principle in common law.

In a second step, whether there are provisions in international conventions supporting the application of the *lis pendens* rule in the context of arbitration will be examined, including a review of the New York Convention, the European Convention, the UNCITRAL Model Law and the Brussels and Lugano regime. Thirdly, the effects of the plea of *lis pendens* when raised before different European national courts seized second will be elaborated.

[1]. General Introduction

[a]. Origins of the Principle of *Lis Pendens* in Civil Law Jurisdictions

The legal concept of *lis (alibi) pendens* came into existence in a domestic setting in civil law jurisdictions.⁽⁶²⁴⁾ *Lis pendens* describes a situation and a point in time in which parallel proceedings involving the same parties, the same cause of action, and identical legal grounds are simultaneously pending in two different states or before two different fora.⁽⁶²⁵⁾ *Lis pendens* is also a normative concept.⁽⁶²⁶⁾ This doctrinal meaning calls to exclude court jurisdiction in favour of the court first seized when proceedings with the same claim, based on the same legal grounds, and between the same parties are already pending.⁽⁶²⁷⁾ The decisive and only factor taken into account to determine which of the courts seized can retain jurisdiction is the time factor.⁽⁶²⁸⁾ Meanwhile, the *lis pendens* rule has also extended to cross-border matters as foreseen in multilateral treaties, such as the Brussels Regulation⁽⁶²⁹⁾ and the Lugano Convention⁽⁶³⁰⁾. However, there does not exist a clear and global transnational principle of *lis pendens* yet, since arbitration and court proceedings are governed by separate jurisdiction and enforcement conventions, [page "108"](#) and these conventions are silent on the interface between simultaneous arbitration and court jurisdiction.⁽⁶³¹⁾

As far as the policy considerations behind the principle of *lis pendens* are concerned, the principle's aim is to eliminate wasteful expenditure of public funds and avoid the risk of conflicting outcomes.⁽⁶³²⁾ Considering the motive of avoiding contradictory decisions, it could be reasoned that the applicability of the *lis pendens* doctrine where parallel proceedings are pending before a national court and an arbitral tribunal should not be doubted. It has, however, rightly been held in legal scholarship that there is principally no room for the application of the *lis pendens* rule in the context of parallel arbitral and court proceedings, since a valid arbitration agreement precludes the concurrent exercise of jurisdiction by public authorities.⁽⁶³³⁾ In other words, the situation is different with an arbitration agreement insofar as there are not two presumptively competent fora in which the case could be tried, but there is a contractual agreement made by the parties to exclude jurisdiction of the national courts entirely.⁽⁶³⁴⁾ The question arises as to what occurs if there are two presumptively competent fora capable of resolving the same issue due to one party's objection as regards the arbitral tribunal's jurisdiction; if a party challenges the existence or validity of an arbitration agreement, both an arbitral tribunal and a national court may be equally competent to decide on this question.⁽⁶³⁵⁾

[b]. Common Law Doctrine of *Forum Non Conveniens*

Common law countries, by contrast, are dominated by a different approach to how to determine their jurisdiction when parallel proceedings are pending in a cross-border context: the *forum non conveniens* doctrine takes into account several connecting factors and considerations, one of which is the existence of parallel proceedings, in order to identify the most suitable forum for settling the dispute.⁽⁶³⁶⁾ The doctrine of *lis pendens* and the *forum non conveniens* doctrine share, however, a common motivation, i.e. to provide an appropriate solution to bona fide litigants and to curtail abusive behaviour often linked to parallel proceedings.⁽⁶³⁷⁾

In England, the competent court is entitled to decide, on a case-by-case basis, whether to decline jurisdiction where another, more appropriate, foreign forum is available.⁽⁶³⁸⁾ English courts comply with the *forum non conveniens* doctrine when deciding upon their extraterritorial jurisdiction, which allows a court to dismiss a case due to the inconvenience or inappropriateness of the chosen forum. The doctrine of *forum non conveniens* retains its significance outside the Brussels and Lugano regime [page "109"](#) in section 49 of the Civil Jurisdiction and Judgments Act 1982, which preserves the ability of the English courts to grant a stay on the grounds of *forum non conveniens* except where such a stay is in conflict with the Brussels Convention and now the Brussels Regulation.⁽⁶³⁹⁾ The Scottish doctrine of *forum non conveniens* was introduced into English law in the decision of the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd*⁽⁶⁴⁰⁾.⁽⁶⁴¹⁾ This doctrine has at its core the concept of the natural forum with which the action has the most real and substantial connection.⁽⁶⁴²⁾ The attractiveness of the *forum non conveniens* doctrine lies in considerations of fairness and equity when deciding upon jurisdiction;⁽⁶⁴³⁾ the doctrine seeks to identify the tribunal that has competent jurisdiction, "*in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.*"⁽⁶⁴⁴⁾ The English case law has clarified that the existence of simultaneous proceedings is no more than a factor relevant to the determination of the appropriate forum,⁽⁶⁴⁵⁾ and

that, consequently, the principles enunciated in the *Spiliada* case apply regardless of whether there are other proceedings already pending in the alternative forum.⁽⁶⁴⁶⁾ The fact that there are parallel proceedings pending, one of which has been initiated prior to the other set of proceedings, is hence merely one of the considerations to be weighed up as part of the overall assessment and does not raise a presumption in favour of a stay.⁽⁶⁴⁷⁾

[c]. *Lis Pendens Rule in International Arbitration Law*

It needs to be established in the first place whether international arbitration conventions, such as the New York Convention, the European Convention or the UNCITRAL Model Law, recognise a *lis pendens* rule. Mention will also be made of the effect of the *lis pendens* rule, as established in the Brussels and Lugano regime, in the context of an arbitration.

[i]. Article II(3) New York Convention

The New York Convention, as the most important multilateral treaty dealing with the recognition and enforcement of foreign arbitral awards, does not contain a *lis pendens* [page "110"](#) rule or instructions on how to find the most suitable forum in the event of parallel proceedings (*forum non conveniens* doctrine).⁽⁶⁴⁸⁾ It, however, holds in Article II(3) New York Convention that the court of a contracting state, when seised of an action in a matter in respect of which the parties have concluded a valid arbitration agreement, shall, when one of the parties so requests, refer the parties to arbitration. In other words, upon the request of one of the parties the national court shall give precedence to the jurisdiction of an arbitral tribunal. On the one hand, this provision does not constitute a first-in-time rule, but rather an instruction on how to exercise jurisdiction when faced with a valid arbitration agreement. On the other hand, the national court does not have a general duty to refer the parties to arbitration when they have validly agreed on arbitration, but shall only act in this way when one of the parties raises the defence of lack of jurisdiction due to a valid arbitration agreement between them. Article II(3) New York Convention, therefore, does not represent an obligation that must be fulfilled by the national court *ex officio*, but only upon one of the parties' request. Therefore, this provision does not share the main characteristics of a *lis pendens* rule, i.e. the clear reference to a time-oriented rule of priority when at least two proceedings with the same claim, based on the same legal grounds, and between the same parties are pending before different fora and which must be applied regardless of the parties' claims or objections brought forward.

[ii]. Article VI(3) European Convention

The European Convention establishes the rule that the national court seised after arbitral proceedings have been initiated shall stay its proceedings to give precedence to the arbitrators' determination of jurisdiction:⁽⁶⁴⁹⁾

"Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary."

This provision is said to establish a real *exceptio litis alibi pendens*, since it does not require any review of jurisdiction, but relies solely on the chronological priority of the arbitral proceedings.⁽⁶⁵⁰⁾ The phrase 'good and substantial reasons' seeks to encompass the exceptions regarding the arbitration agreement's validity which justify refusing a stay of the court proceedings under Article II(3) New York Convention;⁽⁶⁵¹⁾ the phrase may furthermore be applied where a plea of *res judicata* precluding arbitral proceedings is raised.⁽⁶⁵²⁾

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[iii]. Article 8 UNCITRAL Model Law

Article 8(1) UNCITRAL Model Law – a provision very similar to Article II(3) New York Convention⁽⁶⁵³⁾ – does not constitute a *lis pendens* rule either: firstly, it does not indicate a chronological priority rule in case of simultaneously pending proceedings, whether arbitral or court proceedings; secondly, the national court is obliged to refer the parties to arbitration only if the parties do not plead to the substance of the case, but one of them requests that the arbitration agreement be enforced, and only provided that the arbitration agreement is valid.

Article 8(2) UNCITRAL Model Law even goes further and holds that where a competing action has been commenced in the local courts in a matter subject to an arbitration agreement, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the national court.⁽⁶⁵⁴⁾ In other words, Article 8(2) UNCITRAL Model Law, by clear wording,

authorises the parties to initiate parallel arbitral proceedings even where court litigation has already been commenced in the same matter. This provision therefore constitutes exactly the opposite principle from the *lis pendens* doctrine. Article 8(2) UNCITRAL Model Law hence does not offer a *lis pendens* plea to parties to parallel court proceedings and the national court is not entitled to decline its jurisdiction *ex officio* due to *lis pendens*, either.⁽⁶⁵⁵⁾

[iv]. Brussels and Lugano Regime

The Brussels and Lugano regime have incorporated the *lis pendens* rule by unambiguous wording: in the event of proceedings involving the same cause of action and between the same parties being initiated in parallel, Article 27 Brussels Regulation/Lugano Convention holds that any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established; if the court first seised has established its jurisdiction, any court other than the court first seised must declare itself incompetent (Article 27(2) Brussels Regulation/Lugano Convention). Where the actions pending in the courts of different Member States or contracting states are only related, any court other than the court first seised may stay its proceedings (Article 28(1) Brussels Regulation/Lugano Convention). And if the actions fall within the exclusive jurisdiction of two courts, Article 29 Brussels Regulation/Lugano Convention provides that the court seised second must decline jurisdiction in favour of the court first seised. The point in time when a court is deemed to be seised is no longer left to be decided by the *lex fori*, but is defined in [page "112"](#) Article 30 Brussels Regulation/Lugano Convention. The question, however, remains as to whether section 9 of the Brussels Regulation/Lugano Convention is also applicable where one of the courts seised in parallel is an arbitral tribunal.

Article 27 Brussels Regulation/Lugano Convention is not applicable in the context of arbitration: an arbitral tribunal seised second is thus not obliged to stay the proceedings due to *lis pendens*, nor is a national court seised second when proceedings are already pending before an arbitral tribunal.⁽⁶⁵⁶⁾ The *lis pendens* rule under the Brussels Regulation/Lugano Convention is directed exclusively at the national courts of the contracting parties and hence it is not binding upon arbitral tribunals.⁽⁶⁵⁷⁾ Article 28 Brussels Regulation/Lugano Convention, likewise, does not find any application in respect of arbitral proceedings.⁽⁶⁵⁸⁾ The national rules of the *lex fori* are decisive to deal with parallel judicial and arbitral proceedings.⁽⁶⁵⁹⁾

[2]. Effectiveness of the Plea of Litispendence before National Courts

This chapter will focus on whether it is advisable to raise the plea of *litispendence* in court proceedings if the dispute pertaining to the identical subject matter and between the same parties was first filed with an arbitral tribunal. In other words, it will be looked at whether the preclusive effect of the civil law notion of *lis pendens*, which leads to the continuance of only one of the pending proceedings,⁽⁶⁶⁰⁾ is likely to materialise in the event of parallel arbitral proceedings. The German, French and English law approach will be depicted first; the prevailing opinion in Swiss doctrine will be dealt with second.

[a]. German, French and English Law Perspectives

With regard to German law, it has been established above that the German notion of the arbitrators' competence-competence does not adopt the negative effect doctrine; hence, a German court may review an arbitration agreement even though an arbitral tribunal has already been constituted.⁽⁶⁶¹⁾ So the mere fact that there are parallel proceedings in progress before an arbitral tribunal (having its seat in Germany or abroad)⁽⁶⁶²⁾ does not force the state court to stay the proceedings and wait for the jurisdictional decision of the arbitral tribunal.⁽⁶⁶³⁾ Even though the *lis pendens* rule is [page "113"](#) applied in a litigation context in Germany,⁽⁶⁶⁴⁾ the party insisting on arbitration is not recommended to solely rely on the *lis pendens* objection before the German courts in order to have the parallel judicial proceedings stayed.

The stance of the French courts as regards the application of the *lis pendens* rule where an arbitral tribunal is seised with proceedings prior to the national courts being seised in parallel needs to be singled out: as seen above,⁽⁶⁶⁵⁾ French law has adopted the negative effect of competence-competence; as a result, once the arbitral tribunal (having its seat in France or abroad) has been fully constituted, the national courts must decline jurisdiction and leave the determination of the tribunal's jurisdiction to the arbitrators in the first place. To raise the plea of *litispendence* will hence, in general, not be necessary at all, since the French courts are bound by Article 1448(1) CPC in any case, provided that the party insisting on arbitration raises the arbitration defence correctly and in time.⁽⁶⁶⁶⁾ It could hence be concluded that the doctrine of the negative effect of competence-competence adopted by French law establishes a unilateral '*lis pendens*' rule in favour of the arbitral tribunal, at least with regard to its effect, i.e. the court declining jurisdiction.

English law, furthermore, stands out as not having a tradition of

applying the *lis pendens* rule in civil litigation proceedings in a cross-border context; the *lis pendens* doctrine is hence not applied to situations where proceedings are pending in parallel before an English court and a foreign court, but *lis pendens* is solely an additional factor in determining which is the appropriate forum to hear the case.⁽⁶⁶⁷⁾ Key factors that may help the respondent to secure a stay in such a situation are in particular that the parallel proceedings are being conducted bona fide, that the proceedings have already advanced further than in the forum seised second and/or that the foreign forum is capable of resolving all aspects of a multidimensional transnational dispute.⁽⁶⁶⁸⁾ It is, however, rather doubtful that these arguments might also convince an English court to stay its proceedings in respect of foreign arbitral proceedings. Due to the fact that the English courts are not familiar with the *lis pendens* rule in a litigation context (outside the Brussels and Lugano regime) and failing any provision recognising the chronological priority rule where the parallel proceedings are conducted before an arbitral tribunal, it does not appear to be promising for the party loyal to the arbitration agreement to rely on the plea of *litispendence* in order to have the court proceedings stayed.

It, however, seems necessary to make some in-depth comments about the status of the *lis pendens* objection raised with a Swiss court, if parallel proceedings have first been initiated before an arbitral tribunal.

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[b]. Swiss Law Perspective

While Swiss national courts have long applied the principle of *litispendence* concerning parallel proceedings in civil litigation at both domestic and international levels,⁽⁶⁶⁹⁾ the situation is less clear when parallel proceedings are pending before a national court and an arbitral tribunal. The wording of the provisions regarding parallel judicial proceedings under Swiss law is silent on the interface between court and arbitration proceedings.⁽⁶⁷⁰⁾ Consequently, it can be observed that there is no hard law in domestic and international Swiss law that would coordinate parallel judicial and arbitral proceedings.

[i]. With Previous Domestic Arbitral Proceedings

Domestic arbitral proceedings in this chapter means the situation where the arbitral tribunal seised first has its seat in the same country as the national court seised second, i.e. in Switzerland.

There is opinion in legal doctrine that Article 372(2) CCP⁽⁶⁷¹⁾, which is technically only applicable to domestic (internal) arbitration, should be extended by way of analogy to an international arbitral tribunal with its seat in Switzerland.⁽⁶⁷²⁾ In other words, Swiss courts are considered to revert – by analogy – to the *lis pendens* principle provided in Article 372(2) CCP and hence would have to stay their proceedings until the arbitral tribunal (first seised) has decided on its jurisdiction. This application by analogy has, however, not been confirmed by Swiss case law to date. It therefore seems too uncertain to rely on the Swiss court's stay of the proceedings *ex officio*. Furthermore, the party's plea of *litispendence* should not form the single line of argumentation either, since the Swiss court is neither bound by hard law nor by case law to observe *lis pendens* of an arbitral tribunal with its seat in Switzerland seised prior to the national courts.

Moreover, some authors are of the opinion that the *lis pendens* rule is applicable only unilaterally, that is the national court's jurisdiction is ousted by the prior jurisdiction of the arbitral tribunal, but not the other way round.⁽⁶⁷³⁾ Others support the equal application of the *lis pendens* doctrine by national courts and arbitral tribunals page "115" regardless of whether the national court is seised prior to the arbitral tribunal or vice versa.⁽⁶⁷⁴⁾

[ii]. With Previous Foreign Arbitral Proceedings

How effective is the plea of *litispendence* raised in Swiss court proceedings where the arbitral tribunal seised first has its seat abroad.

The prevailing opinion in Swiss legal doctrine is that national courts should apply Article 9(1) SPILA⁽⁶⁷⁵⁾ by analogy.⁽⁶⁷⁶⁾ Berger and Kellerhals furthermore hold that such application per analogiam is justified, since the Swiss Federal Supreme Court itself concluded that the principle of temporal priority is of such fundamental importance that it is a matter of public policy.⁽⁶⁷⁷⁾ Although the Swiss Federal Supreme Court has not decided yet how the national court would have to react if it were seised second in parallel to an arbitral tribunal having its seat abroad, it is, in principle, in favour of applying the principle of *litispendence* to parallel judicial and arbitral proceedings.⁽⁶⁷⁸⁾ In an obiter dictum, the Swiss Federal Supreme Court held that:

"Issues which may give rise to a conflict of jurisdiction [between courts and arbitral tribunals] must be resolved by applying the rules governing lis pendens (cf Art. 9 SPILA, for instance), res judicata or the

recognition and enforcement of foreign judgments (Art. 25 ff. SPILA).^{(679) (680)}

The application of Article 9(1) SPILA per analogiam would lead to more satisfactory results than a mere chronological rule of precedence, since Article 9(1) SPILA does not demand that the court stay the proceedings based on the principle of temporal priority only, but the court needs to check, in addition, whether the foreign decision is expected to be recognisable in Switzerland. Hence, the Swiss court would have to examine whether the foreign arbitral award is, in principle, expected to be recognisable under Swiss law. The recognition of foreign arbitral awards is governed by the New York Convention, which has been incorporated into Swiss law and is directly applicable.⁽⁶⁸¹⁾ The Swiss court would therefore have to examine whether any ground to refuse recognition of the arbitral award as provided in Article V New York Convention applies.⁽⁶⁸²⁾ Since the arbitral proceedings might not, in most cases, have evolved *page "116"* beyond an initial stage at the time when the Swiss court examines, in accordance with Article 9(1) SPILA, the grounds in Article V New York Convention, one may assume that, in particular the examination of the grounds in Article V(1)(a) New York Convention (regarding the validity of the arbitration agreement) and Article V(2)(a) New York Convention (concerning the arbitrability of the matter in dispute), would be paramount to the Swiss court.⁽⁶⁸³⁾

In conclusion, there is, at least to a certain extent, a chance that a Swiss national court would stay proceedings if a party raises a plea that the same cause of action, based on the same legal grounds, is already pending between the same parties before an arbitral tribunal with its seat abroad.⁽⁶⁸⁴⁾ Given the fact, however, that there are no internationally acknowledged rules on *lis pendens* in arbitration to date, and being aware that the application of Article 9(1) SPILA to situations where the Swiss court is confronted with the plea of arbitral proceedings being initiated abroad first has been strongly suggested by the prevailing legal doctrine, but is no hard law either, it does not seem advisable to solely rely on the plea of *lis pendens* before a Swiss court. This view is furthermore confirmed by Besson's opinion that, due to the legislator's attitude of being largely unconcerned about coordinating arbitrations and court proceedings as conveyed by enacting Article 186(1*bis*) SPILA⁽⁶⁸⁵⁾, a Swiss court will most probably be reluctant today to apply Article 9(1) SPILA by analogy if arbitral proceedings have been initiated first abroad.⁽⁶⁸⁶⁾

[3]. Comparative Conclusion

As analysed in this chapter, the statutory arbitration laws and the case law of the jurisdictions examined do not stipulate a chronological priority rule to regulate parallel judicial and arbitral proceedings, even though there is a trend towards placing arbitral tribunals and national courts on an equal footing.⁽⁶⁸⁷⁾ In an international context, outside the scope of application of the Brussels and Lugano regime, the English courts apply the *forum non conveniens* doctrine, for which the existence of parallel proceedings is merely one element to identify the forum that is the most appropriate one to hear the case. In the words of Fawcett: "[...] *lis pendens* is not a doctrine in its own right but [it] is regarded as being overall a facet, albeit an important one, of the doctrine of *forum non conveniens*."⁽⁶⁸⁸⁾ Swiss legal doctrine advocates that certain provisions constituting a *lis pendens* rule, such as Article 9(1) SPILA concerning cross-border parallel proceedings before national courts and Article 372(2) CCP (applicable to domestic arbitration), should be applied by analogy to regulate parallel proceedings in the context of international arbitration. Such findings as developed in Swiss legal doctrine have not, however, been confirmed by Swiss legislation or the Swiss Federal Supreme *page "117"* Court's case law yet. Nor does the New York Convention or the UNCITRAL Model Law contain any provision as to the priority of either court or arbitral proceedings based on chronological grounds. Solely Article VI(3) European Convention provides that the court seised second (either on the merits or on the subject of the arbitration agreement's validity) shall stay its proceedings on the jurisdiction of the arbitral tribunal, until the arbitral award is made in the arbitral proceedings commenced first.

[a]. Conclusions from the Perspective of National Courts

If a party to arbitration raises the arbitration defence in court proceedings in time, the national judge will, in principle, decline its jurisdiction or stay the proceedings, unless it declares the arbitration agreement to be null and void, inoperative, or incapable of being performed. If the arbitration defence, however, is not raised in court proceedings, but the party insisting on arbitration only invokes the *lis pendens* created by the arbitral proceedings, the question remains as to whether a national judge should nevertheless stay the proceedings on the grounds of the chronological priority of the arbitral proceedings. Even if the *lis pendens* doctrine is not known in the jurisdiction before which the court proceedings are initiated, or the principle's use is not acknowledged in the context of arbitration, it should be in the court's discretion to decide whether to stay the proceedings in favour of the ongoing arbitration, based on considerations of efficiency, fairness, and the status of the respective proceedings,⁽⁶⁸⁹⁾ similar to an English court's application of the *forum non conveniens* doctrine. Where a party, for instance, has commenced court proceedings with the abusive intention of

sabotaging the arbitration, and the arbitral proceedings have already advanced to the evidence-taking phase or even past the oral hearing of the witnesses and experts, a national court should carefully consider these circumstances. If, after having weighed up these factors, the national court concludes that it – regardless of the non-application of the *lis pendens* rule – considers it reasonable to stay the proceedings, it should do so.

[b]. Conclusions from the Parties' View

No *lis pendens* rule has been established to deal with parallel judicial and arbitral proceedings in the jurisdictions examined above. It is hence of little avail to a party intending to object to a national court's jurisdiction to raise the plea of *litispence*. Under English law – where *lis pendens* is just a factor for the court to consider in the process of weighing up the circumstances that favour a stay of the judicial proceedings –, however, it may be, in addition to pleading that the arbitral proceedings have been initiated prior to the court proceedings, more encouraging to argue that the parallel court proceedings give rise to substantial and irreparable damage, or that the arbitral proceedings have already well advanced beyond the initial stage of the proceedings.⁽⁶⁹⁰⁾ *page "118"* But the English courts are left with a high degree of discretion whether to stay the proceedings or not, and, furthermore, the factors mentioned have, to the knowledge of the author, not been weighed up yet when a court has been confronted with parallel proceedings before an arbitral tribunal.

Based on these uncertainties, there is a high chance that a plea of *litispence* of arbitral proceedings will not be effective; the party intending to have court proceedings terminated should hence focus on invoking the existence and validity of the arbitration agreement in the first place,⁽⁶⁹¹⁾ possibly combined with the plea of *litispence*. This recommendation is reinforced by the fact that national courts, when faced with a plea of a valid arbitration agreement, do not have discretion to refer the parties to arbitration, but are obliged to do so.⁽⁶⁹²⁾ Furthermore, the party relying on arbitration will risk submitting to the jurisdiction of the national court if it only raises the plea of *litispence*; this is the logical conclusion, since the plea of *litispence* is based on the argument of the chronological priority of the arbitration only, and not on the priority of the arbitration as the preferred dispute resolution mechanism chosen by the parties.

It is hence submitted that the plea of *litispence* may be combined with or argued in the alternative to the plea that there is a valid arbitration agreement between the parties as provided in Article II(3) New York Convention, but never on a stand-alone basis. From a procedural standpoint, the plea of *litispence*, like the arbitration defence, needs to be raised as soon as possible in court proceedings in order not to risk waiving any jurisdictional objection.

[C]. Action for Injunctive Relief

A means of actively restraining a national court's or an arbitral tribunal's jurisdiction is to file an action for injunctive relief with the state courts. The acceptance of such actions for injunctive relief is, in general and in any event, perceived differently in the context of arbitration in the jurisdictions examined below. The Brussels and the Lugano regime have disapproved of such injunctive relief if it unduly interferes with the determination of jurisdiction by the courts of other Member States or contracting states.⁽⁶⁹³⁾

A distinction needs to be made between injunctions restraining court proceedings pending in parallel to arbitral proceedings or in breach of an arbitration agreement to protect the jurisdiction of the arbitral tribunal ('anti-suit injunctions'), and injunctions *page "119"* issued by a national court to restrain arbitral proceedings initiated in parallel ('anti-arbitration injunctions'). Anti-suit injunctions in support of arbitration may be of avail where proceedings on the merits have been initiated before the courts at the seat of arbitration or before the courts of another jurisdiction in parallel to arbitral proceedings on the same subject matter and between the same parties. The party opposing the court proceedings may therefore file an action for injunctive relief with the court at the seat of the arbitration or with another competent court. The injunctions listed second are directed against arbitral proceedings and may be sought in addition to the relief sought on the merits by the party having commenced court proceedings. The aspects regarding anti-suit and anti-arbitration injunctions will be dealt with separately below.

[1]. Injunctions Restraining Parallel Court Proceedings (Anti-suit Injunctions)

An anti-suit injunction is an order directed at the claimant in foreign proceedings, requiring it not to commence or to cease to pursue the foreign action. A failure to comply with the order places the claimant in contempt of court.⁽⁶⁹⁴⁾ Whereas anti-suit injunctions are a popular instrument in England – indeed, they originate from common law jurisdictions –, they are regarded with suspicion in Switzerland, for instance.⁽⁶⁹⁵⁾ In general, one can observe that civil law doctrine regards anti-suit injunctions as a particularly serious affront to the dignity of the foreign court, even though the injunction is not directed at the court itself. By contrast, common law doctrine opines that it is contrary to legal justice if a person is sued in an inappropriate forum, so the dominant consideration is where a dispute should

justly be resolved.⁽⁶⁹⁶⁾

Anti-suit injunctions may be sought at different stages of the proceedings and may pursue different goals in the context of arbitration: to prevent a party from initiating court proceedings or to disrupt foreign court proceedings commenced in disregard of an arbitration agreement, to halt or prevent proceedings to set aside an arbitral award, or to block the enforcement of an arbitral award ('anti-enforcement injunction').⁽⁶⁹⁷⁾

Based on the different attitudes towards anti-suit injunctions, it will be analysed which jurisdictions declare anti-suit injunctions as permissible in the context of arbitration, what are the considerations in legal doctrine in favour or against anti-suit injunctions and, finally, what are the effects of court decisions granting injunctive relief.

[a]. Admissibility of Anti-suit Injunctions

In German case law, a petitioner who was granted an anti-suit injunction in England requested service of the injunction in Germany; the German Central Authority returned [page "120"](#) the request on the grounds that service was likely to infringe on the sovereignty of Germany and therefore the request for service had to be refused pursuant to Article 13 of the 1965 Hague Convention (on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters).⁽⁶⁹⁸⁾ The petitioner then applied to the Regional Court of Appeal, which dismissed the application for the following reasons:

"Anti-suit injunctions constitute an infringement of the jurisdiction of Germany, and thus the sovereignty of that state, because the German courts alone decide, in accordance with the procedural laws governing them and in accordance with existing international agreements, whether they are competent to adjudicate on a matter, or whether they must respect the jurisdiction of another domestic or foreign court."⁽⁶⁹⁹⁾

The German court further held that the constitutional right of parties to have free access to the German courts is undermined by such injunctions.⁽⁷⁰⁰⁾ Hence, German courts will not actively grant anti-suit injunctions,⁽⁷⁰¹⁾ presumably also not to protect the enforcement of an arbitration agreement.⁽⁷⁰²⁾

The French courts have not taken a stand yet as regards the admissibility of an anti-suit injunction in support of an arbitration agreement. Even though it is a civil law jurisdiction, French case law has recently become more receptive to observing an anti-suit injunction under certain circumstances: the French Supreme Court has ruled that an anti-suit injunction issued by a US court prohibiting a party to initiate or continue proceedings in France will be recognised and is not contrary to international public policy where the order is based on an exclusive jurisdiction clause agreed to by the parties, and therefore protects a contractual agreement previously made by the parties.⁽⁷⁰³⁾ The enforcement of an anti-suit injunction – outside the ambit of the Brussels Regulation/Lugano Convention – for the benefit of party autonomy seems to suggest that the French courts would also be inclined to pursue this path to protect a valid arbitration agreement.⁽⁷⁰⁴⁾ Likewise, Debourg seems to argue in favour of the permissibility of anti-suit injunctions in support of arbitration on the grounds that such orders support party autonomy and represent an effective mechanism to counter abusive procedural tactics.⁽⁷⁰⁵⁾ Clavel, however, considers that the admissibility of [page "121"](#) injunctions in support of arbitration is even more questionable than those issued against arbitration, since the latter simply ignore the arbitral tribunal's competence-competence, but the former interfere with the state courts' authority and thereby intrude on the national courts' sovereignty.⁽⁷⁰⁶⁾ There is, however, no legal basis for the French courts to issue anti-suit injunctions to date.

In Switzerland, the courts have no tradition in issuing injunctions against a party to Swiss proceedings restraining it from initiating substantive proceedings abroad.⁽⁷⁰⁷⁾ The Swiss Federal Supreme Court established that the prevailing Swiss doctrine rejects the issuance of anti-suit injunctions and that it argues that such orders are rendered futile in any event by the principles of litispendence, res judicata, and the provisions on the recognition and enforcement of foreign judgments, with the consequence that there is no legitimate interest in issuing such an injunction.⁽⁷⁰⁸⁾ The majority of Swiss commentators indeed consider orders by a foreign court restraining Swiss proceedings as being contrary to public international law which will therefore not be enforced.⁽⁷⁰⁹⁾ It is further held in Swiss doctrine that Article 7 SPILA prevents anti-suit injunctions in support of arbitration from being issued or enforced, since Article 7 SPILA allows the national court to 'passively' decline jurisdiction if the parties to the dispute are bound by a valid arbitration agreement, but not to 'actively' compel a party to arbitrate; an anti-suit injunction in support of arbitration which is aimed at preventing a party from litigating a dispute would be at odds with Article 7 SPILA.⁽⁷¹⁰⁾

English courts have a long tradition of ordering parties to refrain from initiating or continuing a lawsuit in foreign courts to ensure respect for a London arbitration agreement.⁽⁷¹¹⁾ Respect has also been paid to arbitral awards at the end of the arbitral [page "122"](#) proceedings insofar as the Court of Appeal has upheld the

grant of an anti-suit injunction to prevent a party from bringing court proceedings to challenge an arbitral award in a forum other than the courts of the seat of arbitration, since by choosing London as the seat of the arbitration the parties had agreed that proceedings to challenge or review the award should be those permitted by English law.⁽⁷¹²⁾ Temporary anti-suit injunctions in support of arbitration are based on section 44(2)(e) Arbitration Act, whereas permanent orders may be granted by the courts pursuant to section 37 of the Supreme Court Act 1981.⁽⁷¹³⁾ It has recently been confirmed by the Court of Appeal that a court has jurisdiction under section 37 of the Supreme Court Act 1981 to grant an anti-suit injunction restraining foreign proceedings brought in breach of an arbitration agreement, even in the absence of an actual, proposed or intended arbitration.⁽⁷¹⁴⁾ In this decision, it has further been held that where an injunction is sought to restrain foreign proceedings in breach of an arbitration agreement – whether on an interim or a final basis and whether at a time when arbitral proceedings are or are not on foot or proposed – the source of the power to grant such an injunction is to be found not in section 44 of the 1996 Act, but in section 37 of the 1981 Act.⁽⁷¹⁵⁾ A person who takes no part in the arbitration may also question whether there is a valid arbitration agreement, or what matters have been submitted to arbitration in accordance with the arbitration agreement, by seeking an injunction from the court.⁽⁷¹⁶⁾ The English courts' discretion to grant or to deny injunctive relief is broad. Where an English court has jurisdiction over the defendant, the requirements for the grant of an anti-suit injunction are the following: the court must be convinced that a valid arbitration agreement exists, the application for injunctive relief must be made without undue delay,⁽⁷¹⁷⁾ the foreign action is not well advanced, and there is no other good reason why the injunction [page "123"](#) should not be granted, such as the risk of conflicting decisions or that the foreign forum could be described as the natural forum.⁽⁷¹⁸⁾ It may be concluded that an English court, in general, exercises its discretion to grant injunctive relief with caution when the ends of justice require it.⁽⁷¹⁹⁾ If the applying party's interests may also be safeguarded by a means less radical than an anti-suit injunction, the courts will refrain from granting injunctive relief.⁽⁷²⁰⁾

It has been held in English case law that injunctions in support of enforcing an arbitration agreement may be issued with a lesser degree of caution than other injunctions protecting the forum's jurisdiction, since they are giving force to the parties' agreement to arbitrate.⁽⁷²¹⁾ In other words, the principle that the parties should be kept to their bargain unless there is a good reason to the contrary has been established in English case law so as to create a presumption that an anti-suit injunction will most likely – if it is just and convenient for the court – be granted to restrain proceedings brought in breach of an English arbitration agreement.⁽⁷²²⁾ English courts, however, do not seem to issue anti-suit injunctions to assist an arbitration taking place in another jurisdiction; this observation may lead to the conclusion that anti-suit injunctions in support of arbitration are granted by the court at the seat of the arbitration only.⁽⁷²³⁾ It has, however, been held in a recent decision that the English courts may grant anti-suit injunctions in support of an arbitration agreement irrespective of where the seat of the arbitration is located.⁽⁷²⁴⁾

Within the purview of the Brussels Regulation, the ECJ's case law in respect of the admissibility of anti-suit injunctions among the Member States has resulted in a prohibition of the English courts' practice.⁽⁷²⁵⁾ In other words, the ECJ's ruling in *West Tankers* [page "124"](#) has removed anti-suit injunctions from the power of English courts in relation to other Member States' courts. The Recast Brussels Regulation does not seem to rehabilitate the English courts' practice of enforcing arbitration agreements by way of injunctive relief against court proceedings in other Member States, either.⁽⁷²⁶⁾ In relation to non-EU/EFTA cases the English courts' power to grant anti-suit injunctions, however, remains unfettered.⁽⁷²⁷⁾

[b]. Doctrinal Considerations behind the (In)Admissibility of Anti-suit Injunctions

It is often argued that anti-suit injunctions are, in general, disruptive.⁽⁷²⁸⁾ Especially in civil law countries, anti-suit injunctions are considered as an unacceptable intrusion on their jurisdiction and will therefore not be enforced.⁽⁷²⁹⁾ In common law jurisdictions, however, enabling the party to try its case in the natural or agreed forum is paramount.

At first sight, anti-suit injunctions supporting the arbitral process seem to be an efficient means in favour of arbitration.⁽⁷³⁰⁾ Baum, however, stresses that things are never that simple:

"As many would agree, there has been a general feeling in the arbitration world that this is one more door opening for court interference in what is supposed to be a non-court, private procedure; it is the thin end of a new and dangerous wedge."⁽⁷³¹⁾

Conversely, the opinion is held that anti-suit injunctions in aid of arbitration have a different nature, i.e. to preserve the parties' agreement to arbitrate, and are hence to be distinguished from other anti-suit injunctions that are issued to correct or alter wrongful or unconscionable conduct; in other words, the parties have agreed on a specific dispute settlement mechanism which the courts seek to

uphold by restraining a party from attempting to circumvent its promise to arbitrate.⁽⁷³²⁾

The following considerations will shed light on the opinions advocated in legal doctrine as to whether anti-suit injunctions (in general or with special regard to orders supporting arbitration) should be admissible, or simply create an additional source of cumbersome court interference with the arbitration process. The solutions found in the jurisdictions examined need to be understood in the context of these diverging views and the different prevailing legal cultures.

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[i]. Comity and the Protection of the Foreign State's Sovereignty

The admissibility of anti-suit injunctions raises several questions of a political nature which concern the respect for and the cooperation with a foreign state's judiciary: issues of comity, the foreign state's sovereignty, and the mutual trust between the Member States of the European Union will hence be dealt with.

It is frequently argued that anti-suit injunctions constitute an intrusion in a foreign state's sovereignty: even though anti-suit injunctions are not addressed to the foreign court, but to one of the parties, it is obvious that they are designed to protect the forum's jurisdiction, which prevails, in the opinion of the court issuing the injunction, over the jurisdiction of another forum and thereby de facto impacts on the foreign forum's jurisdiction.⁽⁷³³⁾ A prohibitive order by a national court directed at a claimant in ongoing or anticipated foreign proceedings essentially second-guesses the political choices of the foreign state in relation to the functioning of its judiciary and is, therefore, frequently declared contrary to public international law.⁽⁷³⁴⁾ These arguments are said to reflect the civil law legal culture, which gives priority to public judicial authority rather than to private justice.⁽⁷³⁵⁾

Would considerations of comity justify the withholding of an anti-suit injunction against parties to a foreign litigation?⁽⁷³⁶⁾ The principle of comity is defined as the deference that should be given to foreign judicial proceedings, a deference which arises not because those proceedings are considered correct but because they are the judicial proceedings of a friendly state.⁽⁷³⁷⁾ The ambit of this principle is very fuzzy insofar as its effects on the admissibility of anti-suit injunctions may be interpreted three ways: firstly, the principle of comity may be considered the basis why anti-suit injunctions should not or virtually never be granted; secondly, considerations of comity may be recognised to be relevant, but no more than as a factor to be weighed up by the trial judge in the overall exercise of his discretion; and thirdly, it may be argued that comity is of no or only little significance when deciding on an application for an anti-suit injunction, save in situations where there is some demonstration of likely damage to the international relations of the sovereign states whose courts are seised of the matter.⁽⁷³⁸⁾

Another aspect in the discussion on the admissibility of anti-suit injunctions within the EU was raised by AG Kokott in her opinion on the seminal *West Tankers* decision: anti-suit injunctions would undermine the system of mutual trust established [page "126"](#) between the judiciaries of the EU.⁽⁷³⁹⁾ Consequently, the ECJ has ruled that, based on the principle of mutual trust enshrined by the Brussels Regulation, each Member State is to apply the rules of jurisdiction in the Brussels Regulation; an injunction restraining a party from proceeding with an action under the Brussels Regulation undermines the Member State court's jurisdiction under the Brussels Regulation.⁽⁷⁴⁰⁾

[ii]. (In)Compatibility with International Law

The New York Convention does not contain an explicit provision in respect of the admissibility of anti-suit injunctions in the context of arbitration. The mere absence of express wording, however, is not a satisfactory reason for advocating either the compliance or the incompatibility with the Convention.⁽⁷⁴¹⁾ Authors who are of the opinion that anti-suit injunctions are not compatible with the New York Convention, in particular Article II(3), draw on the following reasoning: every contracting state of the New York Convention is given the authority to review – in accordance with its own mandatory law – whether an arbitration agreement invoked before its courts is valid or not without having its competence rendered futile by the assessment of a foreign court issuing an injunction.⁽⁷⁴²⁾ An anti-suit injunction would hence interfere with the system and the spirit of the New York Convention.⁽⁷⁴³⁾ An argument has also been raised pertaining to mutual trust between the contracting states of the New York Convention, which must be given the opportunity to determine their jurisdiction in accordance with their duties under Article II(3) New York Convention.⁽⁷⁴⁴⁾

Authors advocating that the issuance of anti-suit injunctions is consistent with the contracting states' duties under the New York Convention argue the following: since anti-suit injunctions in aid of arbitration enforce the negative obligations imposed by international arbitration agreements, their issuance is compatible with the New York Convention.⁽⁷⁴⁵⁾ It is further argued that the wording of the New York Convention does not suggest that a judge confronted with a dispute where one of the parties invokes the existence of a valid arbitration agreement is entitled to rule on the situation exclusively.

⁽⁷⁴⁶⁾ English case law, in this respect, held that an application to enforce the agreement to arbitrate by means of an application for an anti-suit injunction would not offend principles of comity or the scheme established in the New York Convention.⁽⁷⁴⁷⁾

The UNCITRAL Model Law does not contain a provision entitling a national court to issue an anti-suit injunction in support of arbitration, either; one could therefore [page "127"](#) conclude that anti-suit injunctions issued by a national court constitute an undue court intervention prohibited under Article 5 UNCITRAL Model Law.⁽⁷⁴⁸⁾

[iii]. Principle of Competence-Competence

A German court declared an English anti-suit injunction aimed at restraining proceedings brought in Germany in disregard of an arbitration clause to amount to a violation of the German courts' competence-competence as safeguarded by the German procedural codes and by the German Basic Law ("Grundgesetz").⁽⁷⁴⁹⁾ It could be argued against this statement that the arbitrators' competence-competence, by contrast, is protected by anti-suit injunctions in aid of arbitration, since they aim precisely at leaving the decision on jurisdiction to the arbitrators.

[iv]. Practicality

Anti-suit injunctions are, on the one hand, often praised as an instrument that curbs parallel proceedings; on the other hand, however, they are said to be the source of contradictory decisions, since they may give rise to a chain of injunctions directed against the original order, thereby involving battles in the state courts of more than one jurisdiction.⁽⁷⁵⁰⁾

Furthermore, the enforcement level is said to reveal further defects in the concept behind anti-suit injunctions, since the enforcement of such injunctions does not depend on the grounds on which they are based, but on the severity of the sanctions a jurisdiction offers to enforce such orders, or on the successful localisation of, and access to, the enjoined party's assets. In other words, it is not the party presenting better grounds for the issuance of an anti-suit injunction that will necessarily succeed, but practical issues such as the nature of the sanctions available or the location of the recalcitrant party's assets attain more significance.⁽⁷⁵¹⁾

[c]. Effects of Decisions on Applications for Injunctive Relief

Firstly, whether anti-suit injunctions issued by a Member State court directed at a party in proceedings before another Member State court are covered by the Brussels Regulation and the Lugano Convention will be examined. Secondly, the question as to which effects such an injunction has on the enjoined party and whether such orders are open to appeal proceedings will be elaborated.

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[i]. Is the Brussels Regulation/Lugano Convention Applicable to Anti-suit Injunctions in Support of Arbitration?

Starting with the landmark decision in *Turner v Grovit*⁽⁷⁵²⁾, the ECJ held – for the relationship between two court proceedings – that the Brussels Convention precluded the grant of an injunction, by which a Member State court seeks to prohibit a party to proceedings pending before it from commencing or continuing legal proceedings before another Member State court, even if this litigation is in breach of an exclusive forum selection clause. In doing so, the ECJ gave consideration to the mutual trust between the Member State courts to determine their own jurisdiction.⁽⁷⁵³⁾ Even though there uncontestedly are parallels between an exclusive forum selection clause and an arbitration agreement, the case in which foreign court proceedings are in breach of an arbitration agreement does not necessarily have to be treated identically, since the Brussels Regulation excludes arbitration from its scope.⁽⁷⁵⁴⁾ The ECJ, however, held in the later seminal case of *West Tankers* that proceedings designed to enforce a right to arbitrate cannot themselves come within the scope of the Brussels Regulation,⁽⁷⁵⁵⁾ but they are nevertheless inadmissible under the Regulation if they interfere with a Member State court resolving a question of disputed jurisdiction under the Brussels Regulation.⁽⁷⁵⁶⁾ The same reasoning also pertains to the contracting states of the Lugano Convention.⁽⁷⁵⁷⁾ As a result, anti-suit injunctions in support of arbitration, although not covered by the ambit of the Brussels Regulation/Lugano Convention, are designed precisely to interfere with a foreign court's determination and exercise of its jurisdiction and hence can be contemplated to be contrary to the Brussels and Lugano regime.⁽⁷⁵⁸⁾

Furthermore, there does not seem to be a change to the ECJ's case law under the Recast Brussels Regulation,⁽⁷⁵⁹⁾ so anti-suit injunctions will remain controversial because they are considered to interfere with the principle of mutual trust between the Member State courts, a principle that remains untouched by the revision of the Brussels Regulation.

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[ii]. Enforcement of Anti-suit Injunctions in Support of Arbitration

Outside the ambit of the Brussels Regulation/Lugano Convention, the English courts may still issue anti-suit injunctions to safeguard a valid arbitration agreement.

Appeals to injunctions granted by an English court are permissible; leave of the court is required for such an appeal.⁽⁷⁶⁰⁾

An order not to sue or not to continue litigating before the courts of a particular state is normally made on pain of penalties, such as a fine or even jail.⁽⁷⁶¹⁾ For an anti-suit injunction to be effective, the enjoined party and/or its property must be located within the jurisdiction of the national court likely to enforce the order; if, however, neither the party nor its assets are situated in the territory of the issuing court, nor are they located in a jurisdiction likely to enforce the order, non-compliance remains without consequences.⁽⁷⁶²⁾

A national court of a civil law country is highly likely neither to enforce nor recognise a foreign court-ordered anti-suit injunction, based mainly on public policy grounds, such as violation of the principle of access to justice, of the principle of a state's sovereignty and its competence to be the master over its jurisdiction.⁽⁷⁶³⁾ Recognition of an anti-suit injunction must also be refused on public policy grounds within the ambit of the Brussels Regulation and the Lugano Convention.⁽⁷⁶⁴⁾ The English courts, however, which have a long tradition of issuing anti-suit injunctions, have indicated that they would not be offended if a claimant were enjoined from commencing or continuing proceedings in breach of an agreement to arbitrate in England.⁽⁷⁶⁵⁾ It should further be considered that the classic grounds for refusal to recognise an anti-suit injunction, such as the right of access to the national courts, might not be justified when dealing with injunctions in aid of arbitration, since such orders aim at holding parties which have agreed to settle their disputes in arbitration to their bargain.⁽⁷⁶⁶⁾ Nevertheless, recognition and enforcement of a court-ordered anti-suit injunction in a foreign forum remains a major difficulty.

As far as indirect enforcement is concerned, any foreign judgment rendered in defiance of an anti-suit injunction is not enforceable in England, since it violates public policy.⁽⁷⁶⁷⁾

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[2]. Injunctions Restraining Parallel Arbitration Proceedings (Anti-arbitration Injunctions)

Anti-arbitration injunctions are defined as orders issued against a party (or, at times, even against arbitrators) to preclude the initiation or continuation of an arbitration or the enforcement of an arbitral award ('anti-enforcement injunction') on the grounds that the parties' arbitration agreement was either invalid or did not cover the claims asserted before the arbitrators.⁽⁷⁶⁸⁾ The authority on jurisdictions issuing anti-arbitration injunctions is growing; even certain civil law courts have made use of anti-arbitration injunctions in spite of their general refusal to grant anti-suit injunctions.⁽⁷⁶⁹⁾

[a]. Admissibility of Anti-arbitration Injunctions

In the civil law jurisdictions examined in this study, there is no legal basis for the issuance of anti-arbitration injunctions: the German courts are not authorised to prohibit or impede the continuance of the arbitral proceedings.⁽⁷⁷⁰⁾ Since the French arbitration law incorporates the negative effect of the arbitrators' competence-competence, which the issuance of an anti-arbitration order would seriously infringe, the French courts will not order such injunctions nor recognise them,⁽⁷⁷¹⁾ and have confirmed this approach towards anti-arbitration injunctions in their case law.⁽⁷⁷²⁾ The Swiss courts have, so far, also refused to recognise anti-arbitration injunctions: in a decision by the Geneva Court of First Instance, the court refused to issue an anti-arbitration injunction or to enforce a foreign anti-arbitration injunction based on the principle of the arbitrators' competence-competence.⁽⁷⁷³⁾ Article 186(1*bis*) SPILA holds that arbitrators rule on their authority irrespective of any court proceedings pending on the same subject matter and between the same parties. Besson construes this provision as providing arbitrators in Switzerland with an additional argument to disregard an anti-arbitration injunction issued by a foreign court.⁽⁷⁷⁴⁾

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The English courts' jurisdiction to grant injunctive relief under section 37(1) of the Supreme Court Act 1981 is broad enough to encompass an order to restrain a party from taking steps in an identified arbitration.⁽⁷⁷⁵⁾ The English courts are prepared, in principle, to issue anti-arbitration injunctions, but show great restraint to actually do so, particularly where the seat of arbitration is located outside England.⁽⁷⁷⁶⁾ Anti-arbitration injunctions are of a subsidiary nature, since the court will normally issue a declaration under section 72(1) (a) Arbitration Act (where a party does not take part in the arbitral proceedings), unless there is an indication that the party or the arbitral tribunal intends not to comply with the court's declaration that there is no valid arbitration agreement.⁽⁷⁷⁷⁾

The Court of Appeal set out the following guidelines for granting an anti-arbitration injunction: firstly, such an order must not cause injustice to the claimant in the arbitration, and secondly, the court must be satisfied that the continuation of the arbitration would be oppressive or vexatious or an abuse of the process of the court.⁽⁷⁷⁸⁾ In *Elektrim SA v Vivendi Universal SA*⁽⁷⁷⁹⁾, an English court refused to injunct an English arbitration, even though there was a parallel foreign arbitration between the same parties. The court held that, even assuming that continuation of the English-seated arbitration were 'vexatious, oppressive, or unconscionable', the court should not make use of its power to grant an injunction to halt the arbitral proceedings, since to do so would be contrary to the parties' agreement to arbitrate and would thereby undermine the principles of the Arbitration Act, and would grant the court a general supervisory power which it has never had.⁽⁷⁸⁰⁾ It needs to be considered, when referring to this dictum, that the arbitration agreement's validity remained uncontested in this case. Hence, it may be inferred from this ruling that the respect for a parties' valid agreement to arbitrate trumps any interest in stopping even abusive proceedings. In *Republic of Kazakhstan v Istil Group Inc*⁽⁷⁸¹⁾, an English court enjoined the continuation of an English-seated international arbitration based on the existence of a previous English court judgment, which declared that no valid arbitration agreement existed between the parties and thereby annulled the arbitral tribunal's jurisdictional award upholding [page "132"](#) the existence of a valid arbitration agreement;⁽⁷⁸²⁾ the attempt at repeated re-litigation (or re-arbitration respectively) was considered vexatious and unconscionable and the injunction was granted.⁽⁷⁸³⁾ Furthermore, an application for the issuance of an anti-arbitration injunction must be filed promptly – as applies to anti-suit injunctions – failure to do so may lead to the application being dismissed for delay.⁽⁷⁸⁴⁾

Although the limits to granting an anti-arbitration injunction are not yet entirely clear, it can be observed that an injunction will only be granted on an exceptional basis if there is good reason for holding that the submission to arbitration is invalid.⁽⁷⁸⁵⁾ Such extreme circumstances were found to exist in *Albon v Naza Motor Trading SDN Bhd*⁽⁷⁸⁶⁾, where the Court of Appeal granted an injunction to restrain the further conduct of an arbitration in Malaysia, since the claimant in the English court proceedings alleged that the arbitration agreement was contained in a document dishonestly created after the dispute had arisen in order to try to defeat the jurisdiction of the English state courts.⁽⁷⁸⁷⁾ Furthermore, the Commercial Court most recently granted an anti-arbitration injunction on the basis that the competent judge considered England as the natural forum for determining whether the non-signatory defendants were party to the arbitration agreement at all and held that the continuation of the arbitral proceedings in New York would have been unconscionable, oppressive, vexatious or otherwise an abuse of due process.⁽⁷⁸⁸⁾

It may be summarised that the English courts will, where it is accepted that an arbitration agreement has been concluded, but its binding force is challenged, intervene to restrain the arbitral proceedings only in very exceptional circumstances; where it is contended that no arbitration clause has ever been agreed at all, the approach towards granting an injunction may be broader.⁽⁷⁸⁹⁾ Where the question as to whether a [page "133"](#) claim is covered by the arbitration agreement is in dispute the grant of an anti-arbitration injunction is usually not possible.⁽⁷⁹⁰⁾

[b]. Doctrinal Considerations behind the (In)Admissibility of Anti-arbitration Injunctions

The question as to whether anti-arbitration injunctions are admissible or not gives rise to concerns and arguments on the same subjects as discussed in respect of anti-suit injunctions.

[i]. Sovereignty and Denial of Justice

Anti-arbitration injunctions do not per se violate a state's sovereignty.⁽⁷⁹¹⁾ Nevertheless, national courts are viewed as lacking jurisdiction to enjoin arbitrators from proceeding in another jurisdiction, and hence anti-arbitration injunctions may be issued by the national courts at the seat of the arbitration only.⁽⁷⁹²⁾

It is further argued that the issuance of an anti-arbitration injunction would cause a situation where access to justice is denied not to the national courts, but to the arbitral process for which the parties have opted.⁽⁷⁹³⁾

[ii]. Compatibility with International Law

It is argued that the issuance of anti-arbitration injunctions is contrary to the basic legal framework for international arbitration established by the New York Convention, regardless of whether the injunction is issued by a court at the arbitral seat or otherwise.⁽⁷⁹⁴⁾ According to this view, contracting states to the New York Convention should not interfere with each other's ability to give effect to their respective obligations under the Convention.⁽⁷⁹⁵⁾ By issuing an order forbidding the commencement or continuance of an arbitration, the court issuing the injunction prohibits the arbitral tribunal's decision on jurisdiction and hence the seat court's review of the arbitration agreement's existence or validity, with the effect of foreclosing the seat court's application of the New York Convention

provisions. The English Court of Appeal decided accordingly when it refused to grant an injunction against an arbitration in Switzerland. The court based its decision on the ground that it would infringe the [page "134"](#) general scheme of the New York Convention to interfere with a foreign arbitration, since any relevant challenge to the arbitration agreement should be made either to the arbitrators or to the supervisory courts at the seat of arbitration.⁽⁷⁹⁶⁾ The contrary view is that it cannot be seen how one can derive from this provision that anti-arbitration injunctions are incompatible with the New York Convention, since Article II(3) New York Convention does not provide for priority to be given to the arbitrators to determine their jurisdiction and does not stipulate specifically how the national courts are to react when confronted with a valid or invalid arbitration agreement.⁽⁷⁹⁷⁾

As regards the compatibility of anti-arbitration injunctions with the UNCITRAL Model Law, it may again be argued (as with anti-suit injunctions in support of arbitration) that such orders issued by a national court as a form of court control of the legality of the arbitral process fall within the ambit of Article 5 UNCITRAL Model Law and are therefore inadmissible for lack of explicit reference in the Model Law.⁽⁷⁹⁸⁾

[iii]. Principle of Competence-Competence

In jurisdictions where the negative effect of competence-competence is recognised, such as in France, this effect offers a basis for prohibiting anti-arbitration injunctions, since arbitrators have priority to rule on their own jurisdiction and national courts should therefore not be allowed to purportedly block arbitral proceedings by issuing anti-arbitration injunctions, at least prior to any preliminary award on jurisdiction.⁽⁷⁹⁹⁾ Also in Switzerland, anti-arbitration injunctions are considered irreconcilable with the principle of the arbitrators' competence-competence.⁽⁸⁰⁰⁾ This argument against the permissibility of anti-arbitration injunctions might, however, not be consistent where a jurisdiction has not adopted the negative effect doctrine of competence-competence, since national law then permits that the courts determine interlocutory jurisdictional disputes where the validity of an arbitration agreement is in question.⁽⁸⁰¹⁾ There is, however, the opinion that the issuance of anti-arbitration injunctions, in principle, tampers with the arbitrators' competence-competence as an internationally recognised principle.⁽⁸⁰²⁾

[iv]. Practicality

From a practical standpoint it is again argued that anti-arbitration injunctions lead to parallel litigation before various fora, contradictory decisions, and to a competition between various jurisdictions on the recognition and enforcement level.⁽⁸⁰³⁾

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[c]. Effects of Decisions on Applications for Injunctive Relief

At the outset, it will be reviewed whether anti-arbitration injunctions benefit from the recognition and enforcement scheme of the Brussels Regulation or the Lugano Convention, before the effects of such orders on the enforcement level will be discussed.

[i]. Is the Brussels Regulation/Lugano Convention Applicable to Anti-arbitration Injunctions?

Injunctions to enjoin an arbitration from being commenced or continued clearly fall within the arbitration exception in Article 1(2)(d) Brussels Regulation/Lugano Convention; recognition and enforcement of such injunctions is therefore not covered by the Brussels or Lugano regimes.⁽⁸⁰⁴⁾ Likewise, it can be concluded from the ECJ's ruling in *West Tankers* that the prohibition does not appear to apply in circumstances where the proceedings in the Member State are themselves arbitral proceedings not covered by the Brussels Regulation;⁽⁸⁰⁵⁾ in other words, the issuance of anti-arbitration injunctions does not seem to be touched by *West Tankers*, since it does not affect the determination of jurisdiction by a Member State court.⁽⁸⁰⁶⁾

[ii]. Enforcement of Anti-arbitration Injunctions

As regards the possibility of appealing the issuance of an anti-arbitration injunction, such appeal is again possible on the basis of section 44(7) Arbitration Act. As already mentioned above, the criminal sanctions tied to any non-compliance with the order may be enforced only where the enjoined party and/or its property is located within the jurisdiction of the issuing or enforcing court.⁽⁸⁰⁷⁾

The exact effects of anti-arbitration injunctions on an ongoing arbitration are unclear. What can be said is that if the anti-arbitration order is issued by the courts at the seat of the arbitral tribunal, it should be taken seriously by the tribunal in light of the risk of non-enforcement of any arbitral award rendered in disregard of such an injunction before the seat courts.⁽⁸⁰⁸⁾ The effect of anti-arbitration injunctions issued in a foreign jurisdiction is more uncertain, since it is entirely contingent upon recognition by the courts at the seat of arbitration or by any other enforcing court.⁽⁸⁰⁹⁾ In a jurisdiction like

France, for instance, where an anti-arbitration injunction would clearly contradict the negative effect of competence-competence, an award rendered in [page "136"](#) disregard of an order issued by a foreign court to stop the arbitral proceedings would still be open for recognition.⁽⁸¹⁰⁾

[3]. Comparative Conclusion

As has been analysed above, civil law countries as well as several arbitration scholars, consider anti-suit and anti-arbitration injunctions as offensive means and rather fearsome weapons which should be scarcely and prudently used, if at all.⁽⁸¹¹⁾ A limited role might, however, be attributed to such injunctions to oppose vexatious and abusive tactics aimed at manipulating arbitration proceedings. There seems to be a consensus that such orders should only be granted under exceptional circumstances where arbitral or court proceedings are clearly commenced in bad faith.⁽⁸¹²⁾

There is a wide range of arguments, according to which the issuance of anti-suit or anti-arbitration injunctions might either be opposed or defended that reflect the considerations presented above. From this ambivalent standpoint, several conclusions can be drawn for national courts that are faced with applications for anti-suit or anti-arbitration injunctions, for arbitrators as the possible addressees of anti-arbitration injunctions, or if they are directed against the claimant in the arbitration, and for the parties either applying for or arguing against the issuance of such injunctions.

[a]. Conclusions from the Perspective of National Courts

An anti-suit injunction is an offensive means of enforcing an arbitration agreement and should therefore not be granted too easily. A cautious use of such orders is advisable, since it may affect the delicate balance of powers between national courts and arbitral tribunals.⁽⁸¹³⁾ Where a party commences proceedings in a national court in clear breach of the negative obligations of an international arbitration agreement, and other mechanisms for enforcing the parties' agreement, such as the obligation of the New York Convention to refer the parties to arbitration, fail, an anti-suit injunction would, however, be justifiable.⁽⁸¹⁴⁾ Likewise, where a national court is convinced that such an order does not unjustly deprive the claimant in the foreign proceedings of a legitimate advantage, an anti-suit injunction may be acceptable.⁽⁸¹⁵⁾

Is it an option for a national court opposed to the recognition of anti-suit injunctions to refuse to notify the addressee of a foreign anti-suit injunction?⁽⁸¹⁶⁾ This question must be answered in the negative, since such behaviour would not have a [page "137"](#) bearing on the effectiveness of the order, which would remain binding within the issuing court's territory and could still be enforced against the party travelling to that country; the risk of conflicting decisions could thereby not be minimised either.⁽⁸¹⁷⁾

National courts should also be reluctant to issue anti-arbitration injunctions, since they thereby intervene with the national courts' obligations under the New York Convention. The issuance of such an injunction is conceivable only when issued by the seat court, thereby not depriving any other national court of its right to determine jurisdictional issues in accordance with the New York Convention, but not where the seat of arbitration is located abroad. In addition, only where a court is certain that it will be impossible to obtain enforcement of an arbitral award over which it has jurisdiction may the issuance of an anti-arbitration injunction be justified.⁽⁸¹⁸⁾ The national court's only concern, when deciding on an application for the issuance of an anti-arbitration order, must be the validity of the arbitration agreement; grounds of comity, convenience or vexatious or oppressive proceedings should not serve as the sole basis of such an order.⁽⁸¹⁹⁾

Furthermore, a national court should definitely refrain from retaliating against an anti-suit or an anti-arbitration injunction by issuing an anti-anti-suit injunction or an anti-anti-arbitration order, respectively, since such a counter measure would only fuel additional litigation resulting in international legal chaos.⁽⁸²⁰⁾

[b]. Conclusions from the Arbitrators' View

There is only little authority on the arbitral tribunal's reaction to orders preventing them from continuing with the proceedings. In a number of cases, however, the arbitrators have refused to comply with anti-arbitration injunctions based on their internationally recognised competence to rule on their own jurisdiction.⁽⁸²¹⁾ But what behaviour is recommendable to arbitrators that know that the parties are ignoring a court order, but at the same time intend to properly fulfil their mission to render an enforceable award?

The late Fouchard stressed in this context: "*In short, in international arbitration, indifference is a virtue.*"⁽⁸²²⁾ So should arbitrators not observe anti-arbitration injunctions? An arbitral tribunal has discretion as to whether or not it complies with an anti-arbitration injunction; such orders are not automatically binding on arbitral tribunals.⁽⁸²³⁾ Due to this discretion, the reasons on which arbitrators base their decision to follow the order of an anti-arbitration injunction should be explored, together with the grounds that would be insufficient to convince the arbitrators to halt the arbitration: it

seems to make a difference whether the injunction is issued by the court at the [page "138"](#) seat of the arbitration or by another national court.⁽⁶²⁴⁾ If such restraining orders are issued by the courts at the seat of arbitration, the arbitral tribunal would be well advised to observe the order, unless the application for the injunction is brought in an evidently abusive manner, such as in clear breach of the applicable arbitration law of the seat, or in disrespect of a valid arbitration agreement.⁽⁶²⁵⁾ If the arbitrators ignore the injunction, proceed and render a final award, the arbitral award might not be enforceable in the seat country. Consequently, an anti-arbitration injunction may bind arbitrators from a technical perspective in light of their duty to render an enforceable award.⁽⁶²⁶⁾ If, however, the injunction is not issued by the supervisory court or by another court before which the parties are likely to seek enforcement of an award, the arbitral tribunal may continue with the proceedings if it considers itself competent to hear the dispute. Hence, arbitrators are called upon to strike a fair balance between their duties to safeguard the parties' choice to arbitrate, and not to jeopardise the enforceability of an arbitral award.⁽⁶²⁷⁾ Even if the injunction is directed exclusively at the claimant in the arbitral proceedings, the arbitrators taking note of the issuance of the injunction should have regard to the same considerations, in particular as regards the enforceability of the award to be rendered.

Arbitrators, when confronted with an anti-arbitration injunction, furthermore, need to consider all the circumstances of a case: in the only case known to the author where an English court issued an anti-arbitration injunction against arbitral proceedings seated in England, the English courts had previously come to the conclusion that there was no valid arbitration agreement and consequently had set aside the arbitrators' positive jurisdictional award.⁽⁶²⁸⁾ Therefore, the legal basis for issuing an anti-arbitration agreement was reinforced by the preemptive effect of the courts' previous judgment on the invalidity of the arbitration agreement. Setting aside proceedings against any award rendered by the arbitrators in disregard of the anti-arbitration injunction and, in particular, in disregard of the previous court judgment on the invalidity of the arbitration agreement, would have been highly likely to result in the award's annulment. This case is an evident example that the issuance of an anti-arbitration injunction needs to be understood in light of the entire procedural history of a dispute.

From a practical standpoint, if arbitrators need to travel extensively for cases, an outstanding anti-arbitration injunction issued by a national court against the arbitrators personally (even though it is a fundamental principle of the law of anti-suit injunctions that they are not directed against the foreign court/tribunal itself)⁽⁶²⁹⁾ is sure to influence an arbitrator's flexibility to travel for work obligations and would cause [page "139"](#) substantial disruption to the continuance of the arbitral proceedings.⁽⁶³⁰⁾ Such practical aspects need to be considered by arbitrators so that they do not carelessly run the risk of delaying the arbitral proceedings. In such situations, arbitrators may propose – on an exceptional basis – to hold the evidentiary hearing in another country than the seat country or to conduct video conferences where a joint meeting in person is not possible.

In English case law on the subject of anti-arbitration injunctions Sir John Donaldson M.R. gave the following opinion:

"If, therefore, an Arbitrator has reason to believe that he is being asked to decide issues which the Court currently has under consideration, he should ask himself whether the Court, if asked, would be likely to enjoin him from proceeding. If the answer is 'Yes', he should indicate his view and give the parties an opportunity of applying to the Court for a mandatory injunction requiring him to proceed. If the answer is 'No', he should indicate his view and give the parties an opportunity of applying to the Court for a prohibitory injunction restraining him from proceedings."⁽⁶³¹⁾

Such an anticipatory consideration by the arbitrators of a court's reaction, if confronted with an application to issue a restraining order to halt the arbitral proceedings, seems to be rather exceptional. Involving the parties in such matters could be comprehensible where there is a real threat that injunctive relief against the arbitrators is sought before the national court involved, and only in light of preserving an arbitration's ultimate goal, i.e. to render an enforceable award; but otherwise the legitimacy of the arbitrators' behaviour, i.e. actively sharing the possibility of asking for injunctive relief in the court proceedings with the parties, would, on the contrary, be highly questionable considering the tribunal's duty to proceed efficiently and not to cause any delay to the proceedings.

A retrospective means of how the arbitrators may take into account a party's application for an anti-arbitration injunction before the national courts is proposed by Lew: where a party has sought an anti-arbitration injunction without there being any merit, the arbitral tribunal might react – as a mechanism to penalise such a party – by imposing a cost order on the respective party separate from any cost orders made at the end of the arbitration.⁽⁶³²⁾ It is unclear what the basis of such cost calculation will be, since the costs incurred in the parallel injunction proceedings cannot be the subject of the arbitrators' assessment. At any rate, the imposition of such cost orders may, at the very least, act as a deterrent to the parties applying for an anti-arbitration injunction, although they are not

expected to seriously influence the respective party in its decision whether to seek injunctive relief or not.

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[c]. Conclusions from the Parties' View

Even though civil law courts have generally refused to grant anti-suit orders, some of them, such as Brazil, Ethiopia and Indonesia have recently issued anti-arbitration orders;⁽⁸³³⁾ so the parties to a dispute need to consider the risk that the same rationale as has been used to grant anti-arbitration injunctions could support the issuance of anti-suit orders by civil law courts in the future.⁽⁸³⁴⁾ The French Supreme Court, furthermore, has recently recognised an anti-suit injunction issued by a US court to protect an exclusive jurisdiction clause; there is hence reason to believe that a French court might also recognise such an order (issued by a non-EU court) whose purpose it is to condemn the breach of an arbitration agreement. Parties should thus carefully review the development of case law with regard to anti-suit and anti-arbitration injunctions also in civil law jurisdictions. In the best case, the parties should keep in mind a jurisdiction's practice on the issuance of anti-suit injunctions in support of arbitration, and of anti-arbitration injunctions, when choosing the seat of arbitration, especially taking into account that the ECJ's case law has enabled a pro-litigation type of forum shopping by prohibiting the issuance of anti-suit injunctions among the Member States of the EU and the Lugano States.⁽⁸³⁵⁾

There is a range of arguments that may be used against or in favour of injunctive relief concerning arbitral proceedings, such as state sovereignty, comity, mutual trust, denial of justice (in)compatibility with international law, competence-competence, or other practical considerations, but they all will, in general, not suffice to convince an English court with which an application for injunctive relief is filed. A party seeking an anti-suit injunction in aid of an arbitration before English courts is well advised to highlight the parties' express and valid agreement to arbitrate the dispute and to refer the court to its duty in having the parties' contractual consent enforced. The respondent in such proceedings may, even though it will most likely not being a rewarding task where a valid and binding contractual agreement exists, still argue that to serve the ends of justice the dispute should be tried in the foreign forum and the court should hence not grant an injunction.⁽⁸³⁶⁾ As regards the issuance of anti-arbitration orders by the English courts, it does not appear to be sufficient for the party seeking injunctive relief to demonstrate that continuation of the arbitration would be 'vexatious, oppressive or unconscionable'; the party applying for an anti-arbitration order should rather depict the extraordinary and exceptional nature of the circumstances at hand, which should lead to the arbitral proceedings being restrained, such as where a previous English court judgment has already ruled on the arbitration agreement's invalidity and the arbitration is nevertheless continued. Therefore, in the exceptional case where the invalidity of the arbitration agreement has already been declared by a court or where page "141" the agreement's invalidity is otherwise evident, domestic or foreign arbitral proceedings may be restrained by the English courts.

Parties may seek a counter anti-suit or anti-arbitration injunction, i.e. an injunction enjoining a party from requesting an anti-suit injunction or an anti-arbitration order, as a means of possible defence against an anti-suit or an anti-arbitration injunction. In addition to concerns as to these measures' admissibility (based on the same reasons according to which anti-suit and anti-arbitration injunctions are declared inadmissible in certain jurisdictions),⁽⁸³⁷⁾ such a counter measure is highly likely to lead to a battle between the different fora involved and to cause a deadlock of litigation, with every forum blocking access to the other.⁽⁸³⁸⁾

[i]. Enforcement Considerations

It might also be useful for parties to consider the practical use of injunctive relief when intending to seek such measures before national courts: enforcement of anti-suit or anti-arbitration injunctions in civil law jurisdictions will not be possible, or at least seriously aggravated. In common law jurisdictions, if the party at which the injunction is directed refuses to comply with the order, it needs to be considered – in particular where the court issuing the injunction is located at the seat of the arbitration, where there are other direct relations with the issuing jurisdiction, or if this jurisdiction is a major international transit hub – that if the enjoined party travels to the respective state, it may well find itself liable to pay a penalty, contempt of court, or other similar sanctions for breaching the court's order.⁽⁸³⁹⁾ Furthermore, unless the addressee of the injunction has assets in the issuing state which could be attached if he continues to take steps in the proceedings in breach of the court's order, enforcement is often not possible.⁽⁸⁴⁰⁾ As regards the practical value of such restraining orders, it may be summarised that injunctions to halt foreign proceedings are hardly ever enforced by states, and if enforcement should nevertheless be granted it will not be effective as long as the enjoined party is not domiciled in the respective jurisdiction or at least has assets that could be attached in the territory of the enforcing country.

In addition, anti-arbitration injunctions may also interfere with the enforcement of the prospective award.⁽⁸⁴¹⁾ In other words, parties or arbitrators ignoring an anti-arbitration injunction issued by the seat

court will risk that an award rendered in such arbitral proceedings will not be enforceable in the seat country or by any other enforcing court recognising anti-arbitration orders.⁽⁸⁴²⁾ When deciding to ignore the injunction, the party should also make sure that the arbitral tribunal cooperates. Since an anti-arbitration injunction may also be directed at the arbitrators personally, a tribunal might be reluctant to proceed not only because it may potentially be the [page "142"](#) subject of sanctions for breach, but also in light of its mandate to render an enforceable award, which might be put at risk by such recalcitrant behaviour.⁽⁸⁴³⁾

[ii]. Alternatives to Anti-suit/Anti-arbitration Injunctions

Parties should always consider that the issuance of anti-suit and anti-arbitration injunctions is intertwined with complex questions of admissibility that are answered differently in common law and civil law jurisdictions, that the process of being granted such relief is time-consuming and costly, since the parties embark on a second set of proceedings, and that there is a real question of how practical such orders are due to their difficult enforcement.⁽⁸⁴⁴⁾ It hence seems worth considering whether there are viable alternatives to applications for injunctive relief that achieve the same goal, i.e. that halt illegitimate court or arbitral proceedings:

- The party insisting on the validity of the arbitration agreement may counter a foreign judgment expected to be given in disregard of the arbitration agreement by taking the following course: the party may file an application for a declaration that there is a valid arbitration agreement (where the arbitration is taking place in England or Germany)⁽⁸⁴⁵⁾ before the foreign court has reached a decision; a positive court judgment declaring the arbitration agreement to be valid will consequently have a preemptive effect on any later foreign decision in disregard of the arbitration agreement.⁽⁸⁴⁶⁾ There is, however, a catch to this conclusion: if the national court giving the judgment on the merits of the case, and hence having preliminarily decided that the arbitration agreement is not valid, is located in a Member State of the EU or the EFTA, English or German courts are obliged to recognise such a judgment according to Article 34 Brussels Regulation/Lugano Convention without being entitled to review the issuing court's jurisdiction.⁽⁸⁴⁷⁾ It seems rather unlikely that the res judicata effect of such a prior declaratory judgment could lead to the non-recognition of the EU/EFTA judgment on the merits based on the public policy nature of res judicata or based on the foreign judgment conflicting with a prior judgment within the recognition state.⁽⁸⁴⁸⁾
- One could also endeavour to efficiently proceed with the arbitral proceedings in order to reach either a declaration in the form of an award from the arbitrators that they possess jurisdiction over the dispute, or the final award, [page "143"](#) before any court judgment could be rendered in the foreign court proceedings; the final award would then be capable of having preemptive effect, thereby precluding the foreign judgment from taking effect.⁽⁸⁴⁹⁾ In addition, there is the possibility of having a declaratory arbitral award enforced according to section 66 Arbitration Act so that a judgment is entered on the terms of the award. This procedure has been recognised by recent English case law in the context of an inconsistent judgment rendered in a Member State and thereby jeopardising the enforcement of arbitral awards made by tribunals seated in England.⁽⁸⁵⁰⁾ This case law hence offers an alternative to the impermissible restraining of foreign proceedings before a Member State court in disregard of a valid arbitration agreement.⁽⁸⁵¹⁾ The Commercial Court held that local judgments giving leave to enforce the award of an arbitral tribunal can be interpreted as judgments given in a dispute between the same parties in the Member States in which recognition is sought in the sense of Article 34(3) Brussels Regulation, thereby offering a ground for declining recognition of the conflicting EU judgment.⁽⁸⁵²⁾ These English rulings add to a party's artillery, even though they cannot halt competing court proceedings with quite the efficacy of an anti-suit injunction, but they will certainly reduce the likely benefits of such proceedings.⁽⁸⁵³⁾ It is, however, not always possible to expedite the arbitral proceedings to reach an award before the foreign court gives a judgment, in particular considering that the defendant in the arbitration is not willing to cooperate and rather intends to slow the arbitration down to await the outcome of the court proceedings he initiated.
- Another option would be to file an application for an anti-suit injunction with the arbitrators, since arbitrators are not subject to the Brussels Regulation or the ECJ's ruling in *West Tankers*.⁽⁸⁵⁴⁾ For a detailed discussion of the arbitrators' competence to grant injunctive relief against a national court and such order's enforceability, see Chapter 3, §3.02[C] below.
- Merkin also suggests the possibility of seeking preemptive anti-suit relief if there is urgency and if there are grounds for believing that foreign proceedings [page "144"](#) in breach of arbitration are imminent;⁽⁸⁵⁵⁾ apart from the practical difficulties of proving the imminent risk of court proceedings (and to specify where they will be brought), it is unclear whether such preemptive measures are also affected by the ECJ's ruling in *West Tankers*, since the ECJ, in general, prohibited a Member State court from restraining a person from commencing or continuing proceedings before another Member State court.⁽⁸⁵⁶⁾
- An alternative course against abusive arbitral proceedings may be

to have the jurisdictional issue decided by a national court (either by filing an application for declaratory relief – where admissible – or by initiating court proceedings on the merits and waiting for the defendant to raise the arbitration defence) and then to challenge the enforcement of any prospective award by invoking the preemptive effect of the court judgment declaring the arbitration agreement invalid.⁽⁶⁵⁷⁾ This route would surely be less confrontational than an application for an anti-arbitration injunction, but it also necessitates additional costs to continue with the arbitration until an award is rendered, especially if the arbitration has not yet progressed very far. In addition, there are certain risks in relying on a court judgment while the arbitration is progressing, since, frequently, more than one level of appeal is available against court judgments and the award might therefore be rendered before the court's ruling becomes final.

– It might also be enquired whether anti-enforcement injunctions, a variant of anti-suit injunctions, constitute an admissible and effective alternative to anti-suit or anti-arbitration injunctions: even though an anti-enforcement injunction, as an order restraining a party from enforcing an arbitral award or a court judgment, may seem to be less intrusive and thus more compatible with the principle of national sovereignty and the national courts' jurisdictional competence, it remains, however, to be seen whether anti-enforcement injunctions give rise to the same or similar concerns only at a later stage of the proceedings. An injunction against the enforcement of a court judgment, on the one hand, could be reproached for wasting the judicial resources of the issuing country; an order not to enforce an arbitral award, on the other hand, may in turn be criticised on the basis of the state court's jurisdiction to review the arbitral award's validity in setting aside or enforcement proceedings and hence as a violation of the contracting states' obligations under the New York Convention. The particular circumstances of a case may also be relevant: interim anti-enforcement injunctions might be justified where the claim to be enforced is closely connected to the claims raised in parallel proceedings still [page "145"](#) pending and if enforcement of the decision reached first would thereby prejudice the outcome of the proceedings still in progress.⁽⁶⁵⁸⁾ It is, however, not clear from the English courts' previous case law on the granting of anti-enforcement injunctions whether the fact that the foreign proceedings on the merits had been in breach of a London arbitration clause would suffice to warrant the grant of such an order.⁽⁶⁵⁹⁾

In summary, it may be concluded that there is no alternative equivalent measure to the effects of an anti-suit or anti-arbitration injunction restraining a court or arbitral proceedings from being initiated at all or from being continued, since – except for the preemptive application for such injunctions whose admissibility is highly questionable – the alternatives described above relate to a later stage in the proceedings, i.e. where a judgment or an award has already been rendered. In other words, the alternatives depicted are not capable of stopping abusive proceedings directly, but can only have an impact on the enforcement of the decisions made in such proceedings (which rather pertain to the effects of anti-enforcement injunctions). Nevertheless, it seems to be reasonable, in light of the wide-spread reservations against these injunctions' admissibility and national courts' general reluctance to recognise and enforce such foreign injunctions, not to make use of them unless exceptional circumstances justify resorting to such measures.

[D]. Action for Declaratory Relief

In circumstances where proceedings are already pending before the arbitral tribunal, or where the commencement of such is imminent, and the party opposing the tribunal's jurisdiction has initiated court proceedings on the merits in a jurisdiction other than where the seat of the arbitral tribunal is located, the parties may – under the statutory arbitration laws of specific jurisdictions – obtain a declaration as to the arbitration agreement's (in)validity from the court at the seat of arbitration or by a foreign court.

The New York Convention and the European Convention do not expressly allow parties to seek declaratory relief regarding the arbitration agreement's validity before national courts. Not many jurisdictions provide for specific actions to determine preliminary points of jurisdiction before national courts, and the ones that do normally limit the scope of application of such actions to the extent that the parties' agreement to arbitrate is not undermined.⁽⁶⁶⁰⁾

The admissibility in general and the policy considerations for allowing the parties to seek declaratory relief as to the arbitration agreement's validity before national courts will be examined before elaborating on the effects that the courts' declarations will have.

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[1]. Admissibility of Declaratory Relief

An action in national courts concerning the validity of the arbitration agreement or the jurisdiction of the arbitral tribunal is inadmissible under French arbitration law.⁽⁶⁶¹⁾ The negative effect of competence-competence incorporated into the CPC is exhaustive and leaves no room for such a direct action.⁽⁶⁶²⁾

The SPILA does not contain any provision allowing actions for declaratory relief as to the arbitral tribunal's jurisdiction before national courts. There is consensus in Swiss doctrine that an action seeking a declaration that the arbitration agreement is valid is not admissible, since the claimant lacks a legitimate interest for such a declaration.⁽⁸⁶³⁾ The admissibility of an action seeking negative declaratory relief, however, is discussed controversially.⁽⁸⁶⁴⁾ The case law has not categorically abandoned the idea of seeking declaratory relief as to the arbitration agreement's (in)validity before the national courts, but to date only came as close as stating that such a declaratory action should be allowed only with the greatest restraint.⁽⁸⁶⁵⁾

A direct action in state courts to have the arbitral tribunal's jurisdiction determined, however, is foreseen by the German and English statutory arbitration laws, as will be discussed in detail below.

[a]. Declaratory Relief under German Arbitration Law

§ 1032(2) ZPO holds that, prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible, i.e. covering both positive and negative declarations. This provision does not find any basis in the UNCITRAL Model Law.⁽⁸⁶⁶⁾ § 1032(2) ZPO is a mandatory provision which cannot be derogated from by the parties.⁽⁸⁶⁷⁾ Based on § 1025(2) ZPO, it follows that a direct action as to the arbitration's admissibility will also be available if the place of arbitration is outside Germany.⁽⁸⁶⁸⁾

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Any application by a party must be made to the Higher Regional Court designated in the arbitration agreement or, failing such designation, to the Higher Regional Court in whose district the place of arbitration is situated, or, if the place of arbitration is outside Germany, to the Higher Regional Court where the party opposing the application has its place of business or place of habitual residence, or where assets of that party are located.⁽⁸⁶⁹⁾ The German legislator has put a time restriction on applications for declaratory relief, with the consequence that the constitution of the arbitral tribunal precludes the parties from having the national court determine the arbitration's admissibility.⁽⁸⁷⁰⁾ The prevailing opinion considers the arbitral tribunal to be constituted as soon as all arbitrators have accepted their nomination.⁽⁸⁷¹⁾ After constitution of the arbitral tribunal, the inadmissibility of arbitration must be argued before the arbitral tribunal.⁽⁸⁷²⁾ To determine whether the arbitration is admissible or not, the court will – in accordance with the scope of review under § 1032(1) ZPO – examine whether the arbitration agreement covers the dispute in question and whether it is null and void, inoperative or incapable of being performed.⁽⁸⁷³⁾ Where an application for declaratory relief is pending, arbitral proceedings may nevertheless be commenced or continued and an arbitral award may be made.⁽⁸⁷⁴⁾

It is discussed controversially in German doctrine whether a party seeking declaratory relief in court needs to show a legitimate interest for doing so. According to the prevailing view, such a legitimate interest is absent where a party has already filed an action on the merits with a first instance court, in the course of which the defendant has raised the arbitration defence according to § 1032(1) ZPO.⁽⁸⁷⁵⁾ This additional condition for seeking declaratory relief is reasonable, since a court confronted with the *exceptio arbitri* is already called upon to decide on the admissibility of the arbitration. In other words, the procedure before the first instance court under § 1032(1) ZPO takes precedence over the declaratory action before the Higher Regional Court under § 1032(2) ZPO, regardless of the chronological priority of the court seized first.⁽⁸⁷⁶⁾ *page "148"* Therefore, if the Higher Regional Court is seized with an application according to § 1032(2) ZPO prior to proceedings being initiated before the first instance court, it is assumed that the action for declaratory relief becomes inadmissible and should be rejected once court proceedings have been commenced in which the arbitration defence according to § 1032(1) ZPO is raised.⁽⁸⁷⁷⁾

[b]. Declaratory Relief under English Arbitration Law

The following possibilities of seeking declaratory relief as to the existence or the validity of an arbitration agreement exist under English arbitration law: firstly, filing an application under section 32(2) Arbitration Act seeking a positive or negative declaration as to the arbitral tribunal's jurisdiction, secondly, filing an action for declaratory relief under section 72(1) Arbitration Act, which is available only to the party that takes no part in the arbitral proceedings. Based on section 2(1) Arbitration Act, it may be assumed that direct actions seeking declaratory relief are available only where the seat of arbitration is in England, Wales or Northern Ireland.

In English arbitration law, the court may, on the application of a party to arbitral proceedings, determine any question as to the substantive jurisdiction of the tribunal.⁽⁸⁷⁸⁾ There is no comparable provision in the UNCITRAL Model Law.⁽⁸⁷⁹⁾ Such an application, however, will not be considered unless all the parties to the proceedings agree in writing,⁽⁸⁸⁰⁾ or (alternatively) the application is

made with the permission of the arbitral tribunal and the court is satisfied that substantial savings in costs may be expected from such a court determination, that the application was made without delay, and that there is a justified ground why the matter should be decided by the court.⁽⁸⁸¹⁾ Such a justified ground might be the saving of time or questions of bona fides.⁽⁸⁸²⁾ In addition, the provision regarding the statutory waiver in section 73(1) Arbitration Act also pertains to section 32(2) applications to the court;⁽⁸⁸³⁾ consequently, unless the objection to the tribunal's substantive jurisdiction has been duly raised not later than the time the party takes the first step in the proceedings to contest the merits of the matter in dispute, or as soon as possible after the matter alleged to be beyond the tribunal's jurisdiction is raised, a preliminary question of jurisdiction cannot be brought to court under section 32 Arbitration Act.⁽⁸⁸⁴⁾ This section is a mandatory provision.⁽⁸⁸⁵⁾ The court's power under section 32 Arbitration Act is restricted to the determination of the tribunal's jurisdiction.⁽⁸⁸⁶⁾ Section 32 Arbitration Act, however, [page "149"](#) creates a high threshold to be satisfied prior to judicial intervention, so recourse to the court will remain the exception.⁽⁸⁸⁷⁾ Under specific circumstances, however, it seems to be appropriate for a party to apply for a judicial determination of the arbitral tribunal's jurisdiction: where an issue of jurisdiction is raised with the arbitral tribunal and a party thereafter refuses to proceed with the arbitration, it is assumed that it will be quicker and cheaper to apply to the court than to proceed ex parte to an award that could thereafter be challenged.⁽⁸⁸⁸⁾ Moreover, where difficult matters of law are at issue and oral evidence and expert evidence are required, the case might more appropriately be tried before court, since national courts have coercive power to force the giving of evidence and the costs of the evidence-taking procedure are, in general, lower than in arbitral proceedings.⁽⁸⁸⁹⁾ A court judgment given based on section 32(2) Arbitration Act may, furthermore, be a substitute for an arbitral award where the arbitrators have no power under the terms of the arbitration clause to rule on their own jurisdiction.⁽⁸⁹⁰⁾

The requirements in section 32(2) Arbitration Act, however, have not been interpreted as a strict barrier to applications for declaratory relief by English case law: in particular where both declaratory and injunctive relief have been sought, the Court of Appeal has upheld the grant of the declaration, even though it did not appear that the parties had agreed on such an action or had the permission of the tribunal to bring such a claim (as required by section 32(2) Arbitration Act).⁽⁸⁹¹⁾ Also, where foreign court proceedings are competing with English arbitral proceedings, English courts have shown no hesitation in granting declarations as to the validity of arbitration agreements, even without any reference to section 32 Arbitration Act.⁽⁸⁹²⁾ It furthermore seems that the case law has given real application to the scheme of the Arbitration Act only where the arbitral tribunal was constituted.⁽⁸⁹³⁾ Furthermore, the arbitral tribunal may continue the arbitral proceedings and make an award while an application for the judicial determination of a preliminary point of jurisdiction is pending, unless the parties have agreed to the contrary.⁽⁸⁹⁴⁾ For the same circumstances, section 31(5) Arbitration Act, however, holds that the arbitral tribunal may in any case, and shall if [page "150"](#) the parties so agree, stay proceedings whilst an application is made to the court under section 32 Arbitration Act.

A party may also apply to the court for a declaration whether there is a valid arbitration agreement under section 72(1) Arbitration Act; for such an application to be considered, the applicant cannot have participated in the arbitral proceedings.⁽⁸⁹⁵⁾ Participating in the appointment of an arbitrator is considered to be a step in the arbitral proceedings which precludes an application based on section 72 Arbitration Act. In other words, a party which does not wish to participate in the arbitration at all, but which intends to challenge the jurisdiction of the arbitral tribunal, may apply to the national court for a declaration without having to meet the several conditions required under section 32(2) Arbitration Act.⁽⁸⁹⁶⁾ The Court of Appeal in *Fiona Trust*, however, emphasised that the courts should be cautious as to the invocation of jurisdiction under section 72(1) Arbitration Act, since the arbitral tribunal should be the first to rule on its own jurisdiction.⁽⁸⁹⁷⁾ Furthermore, the interaction between sections 9 and 72(1) Arbitration Act have been determined in *Fiona Trust*: where a party brought substantive proceedings, then was confronted with the defendant's application to stay the proceedings based on section 9 Arbitration Act, and, as a reaction, the claiming party sought the determination of the question of the validity of the arbitration agreement pursuant to section 72(1) Arbitration Act, the court held that the stay application was the primary matter to be dealt with.⁽⁸⁹⁸⁾

[2]. Considerations behind the (In)Admissibility of Declaratory Relief

Poudret and Besson state that direct judicial control of the arbitration agreement's validity *"is tending to disappear with the growing success of the principle of competence/competence, or only to survive exceptionally."*⁽⁸⁹⁹⁾ This accurate observation reflects one side of the main conflict in which the question of whether the national courts may directly be called upon to decide on the (in)validity of the arbitration agreement is entangled; the other side involves considerations of efficiency of the proceedings.

On the one hand, it is argued that direct applications to a national

court enable jurisdictional problems to be resolved in one hearing rather than two or three, and once the court has disposed of the application, the arbitration can proceed smoothly to what will usually be an unchallengeable award on the merits.⁽⁹⁰⁰⁾ In jurisdictions where the court system is geared towards encouraging arbitration and hence will ensure that pre-arbitration jurisdictional applications are given high priority, such declaratory [page "151"](#) actions are, if they are answered in the affirmative, less prone to improperly delay the making of the final award.⁽⁹⁰¹⁾ Furthermore, such early judicial determination of the (in)validity of the arbitration agreement reduces the risk of having to spend large amounts of time and money in producing an arbitral award that is ultimately unenforceable by virtue of a defect in the arbitral agreement.⁽⁹⁰²⁾ On the other hand, the preservation and strengthening of the arbitrators' competence-competence is held to be a superior goal for the benefit of arbitration as a whole.⁽⁹⁰³⁾ It is therefore interesting to investigate the policy considerations behind a deliberate disinclination to issue declaratory relief. By contrast, the motivation in favour of such relief is also of interest, particularly since a party opposing arbitration is able to file an action on the merits with a national court and wait for the defendant to raise the arbitration defence, which would most often also lead to the court ruling on the arbitration agreement's (in)admissibility.

[a]. National Legislators' Policy Considerations

The German legislator has incorporated the possibility of seeking a declaration that the arbitration is admissible or inadmissible in court as long as the arbitral tribunal has not been constituted yet. This provision's objective is to uphold procedural economy insofar as it provides parties to an arbitration agreement with the possibility of an early decision on the jurisdiction issue without being bound to set up a tribunal and have the jurisdictional issue decided by the arbitrators first.⁽⁹⁰⁴⁾ It may also be observed that the German Higher Regional Courts are rather quick to decide on applications for declaratory relief; in general, decisions are rendered in less than six months.⁽⁹⁰⁵⁾ This efficient case-handling by the German courts is surely a relevant factor when deliberating on the concept of declaratory relief. It can be assumed that the competence conferred on the national courts to decide on an arbitration agreement's validity requires a firm trust in the courts' efficient and legally correct decision-making process, since such a process risks rendering the gains in efficiency expected from early declaratory relief redundant.

Furthermore, the argument that the possibility of seeking declaratory relief as to an arbitration agreement's validity before national courts promotes dilatory tactics is, in principle, unfounded, since arbitrators are entitled, according to German and English arbitration law, to commence or continue arbitral proceedings and even to render an award while such action is pending before the state courts.⁽⁹⁰⁶⁾

To allow, at all times, an action before the national courts on the validity of the arbitration agreement would create serious risks of obstructing the arbitral proceedings; indeed, such a remedy would not justify the savings in time and money to which [page "152"](#) it presumably leads.⁽⁹⁰⁷⁾ It can be assumed that this concern has also been shared by the German and English legislators, who have drafted the provisions on declaratory relief narrowly: § 1032(2) ZPO contains a time restriction regarding the point in time until which the application for declaratory relief can be made to the court. Section 32 Arbitration Act requires either the consent of the parties or the permission of the arbitral tribunal, together with certain qualitative conditions of which the court seized must be convinced. Section 72(1) Arbitration Act, however, is less restrictive, since it only requires that the applicant has not participated in the arbitration at all. It may be noted in passing that it is striking that, under English arbitration law, the parties can, by agreement, exclude the arbitral tribunal's authority to decide on its jurisdiction (due to the non-mandatory nature of section 30 Arbitration Act), but they cannot, by contrast, consent to the arbitrators determining their jurisdiction first, since section 32 Arbitration Act is compulsory and enables parties to have a preliminary point of jurisdiction decided by the national courts.⁽⁹⁰⁸⁾

The time restriction under German law seems to be reasonable, since as soon as the arbitral tribunal is constituted, the arbitrators' jurisdiction can adequately be challenged in the arbitral proceedings. Likewise, the consensual undertaking by the parties and the unilateral request supported by the arbitral tribunal, such as under English arbitration law, are reasonable, since these conditions for seeking declaratory relief are based on party autonomy and considerations of efficiency. It can thus be observed that the possibility of seeking declaratory relief before the national courts as to the arbitral tribunal's jurisdiction represents an exceptional procedure and has not become the ordinary method of challenging the tribunal's jurisdiction under German and English arbitration law. This cautious attitude towards declaratory relief pertains to arbitration laws in Germany and England; the Swedish Arbitration Act, for instance, provides for direct actions to the national courts to determine the tribunal's jurisdiction simply at the request of a party, without any further limitations.⁽⁹⁰⁹⁾

Admittedly, allowing actions seeking declaratory relief as to the arbitration agreement's (in)validity without any restriction would provide fertile ground for undermining the system whereby jurisdictional objections are raised directly with the arbitral tribunal,

its decision being in any event open to judicial review.⁽⁹¹⁰⁾ Consequently, the restrictions introduced under German and English arbitration law are appreciated. But it is worth considering what the additional benefit of such declaratory actions for the parties to an arbitration agreement is if the actions' ambit is highly limited and applicable only under exceptional circumstances. A party opposing arbitration is free to call on the national courts to decide on the merits of the case, including the existence or validity of the arbitration agreement, if the defendant raises the arbitration defence. Against this background, the restricted possibility of seeking declaratory relief before the national courts is rather reminiscent of a now superfluous relic evolved under former arbitration schemes – prior to the firm manifestation of the [page "153"](#) principle of competence-competence in international arbitration – that was hallmarked by broad judicial intervention into arbitral proceedings.

As demonstrated above, neither the French and Swiss statutory arbitration laws nor these jurisdictions' case law have established the general rule that parties are entitled to independently seek declaratory relief on an arbitration agreement's (in)admissibility in court. In particular when considering the uncompromising priority given to the arbitrators' competence to be the first to determine their jurisdiction under French arbitration law, it seems only logical that the negative effect of competence-competence is favoured over any determination of the tribunal's jurisdiction prior to the arbitrators' assessment.

[b]. Necessity of Declaratory Relief

When considering the means a party may resort to to contest an arbitral tribunal's jurisdiction the following can be said: a party opposing arbitration may either initiate court proceedings and wait for the defendant to raise the arbitration defence, or it may – if arbitral proceedings are already in progress – raise a jurisdictional objection directly before the arbitral tribunal.⁽⁹¹¹⁾ As regards the party's right to judicial review of the arbitral tribunal's jurisdictional determination, a preliminary award on jurisdiction as well as the final award on the merits are, in principle, open to setting aside proceedings before the national courts.⁽⁹¹²⁾ Hence, a party's right to have the issue decided by a national court is preserved. It may, therefore, be concluded that the interests of the claimant seeking a declaration on the tribunal's jurisdiction before a national court do not justify such an action, since those interests are already adequately protected by the legal possibilities provided under national arbitration laws.⁽⁹¹³⁾

It is, however, argued in Swiss doctrine that there may be situations in which it seems justified to allow direct control of the arbitrators' authority by the national courts: if, for instance, there is not even the appearance of a valid arbitration agreement, or where the arbitration agreement is evidently invalid, it is argued that an action for negative declaratory relief should be admissible in order not to burden the party invoking the invalidity with unnecessary time and cost outlays.⁽⁹¹⁴⁾ An exception is also held to be appropriate where the arbitral tribunal postpones the determination of the jurisdictional issue to the final award.⁽⁹¹⁵⁾ In the first situation mentioned, where there is not even the appearance of a valid arbitration agreement, the supervisory courts and arbitration institutions should be trusted not to cooperate in the constitution of the tribunal in the first place and it will hence be impossible to set up an arbitral tribunal in the majority of cases.⁽⁹¹⁶⁾ If the arbitral tribunal can, nevertheless, be [page "154"](#) constituted in such a situation, the party opposing arbitration may, however, either raise a jurisdictional objection before the arbitrators or file an action on the merits with a national court. On the enforcement level, a court's decision on the merits of the dispute, in addition, benefits from the recognition scheme provided in the Brussels Regulation and the Lugano Convention, which is not applicable to decisions having the tribunal's jurisdiction at their subject.⁽⁹¹⁷⁾ Considering the exceptional case listed second, it needs to be borne in mind that an arbitral tribunal, in general, only postpones its decision on jurisdiction to when it renders the final award if the jurisdictional issue is closely connected to the merits of the dispute, or where the jurisdictional objection is manifestly unfounded.⁽⁹¹⁸⁾ In these cases, it would not be appropriate to have a national court issue a declaration for the following reasons: in the event of a close connection between the jurisdictional issue and the merits of the case, the court would also have to review the merits to make a declaration. Where the jurisdictional objection is patently ill-founded, the court's decision will confirm the arbitrators' authority in any case.⁽⁹¹⁹⁾ So, also under these exceptional circumstances, the party seeking declaratory relief does not seem to have a legitimate procedural interest worthy of protection.

[c]. Interim Conclusion

In conclusion, direct actions for declaratory relief before national courts as to an arbitral tribunal's jurisdiction may be criticised for being an unhelpful intrusion into the system of the arbitral tribunal's competence-competence, for not being vital to preserve a party's right to have the tribunal's jurisdiction determined by a state court, and for increasing the risk of provoking contradictory judgments in the absence of a single forum.⁽⁹²⁰⁾ The effect of undermining the arbitrators' competence-competence is more striking where the declaratory action is filed after the arbitral tribunal has already been constituted and would be in a position to determine its own

jurisdiction.⁽⁹²¹⁾ In any case, where the applicant is only bringing an action for a negative declaration before a court to prevent the arbitral tribunal from being the first to decide on the validity of the arbitration agreement, such a forum shopping attempt should not be protected where the agreement to arbitrate is not manifestly null and void.⁽⁹²²⁾ The most pressing concern, however, of the overzealous approach of such direct actions before national courts pertains to the danger of inconsistent decisions and the associated 'race to enforcement' of the contradictory court decisions and arbitral awards it encourages.

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[3]. Effects of the Declaratory Judgment on the Arbitration Agreement's (In)Validity

As examined above, the English and German statutory arbitration laws expressly provide for declaratory relief as regards the arbitral tribunal's jurisdiction. The effects of such a declaratory judgment will now be established, firstly with regard to the appeal proceedings available against the judgment, and secondly concerning the preclusive effect such a decision might have on the arbitral proceedings.

[a]. Is the Brussels Regulation/Lugano Convention Applicable to Court Decisions on Declaratory Relief?

A claim for declaratory relief as to the existence of a binding agreement to arbitrate should – based on the ECJ's subject matter test – fall outside the scope of the Brussels Regulation and the Lugano Convention, since the subject matter of such a claim is arbitration.⁽⁹²³⁾ Consequently, a court decision on declaratory relief does not benefit from the Brussels Regulation's or Lugano Convention's recognition regime.⁽⁹²⁴⁾

[b]. Court's Declaration on the Arbitration Agreement's Validity

It is possible to appeal against a court's judgment declaring that the arbitration agreement is valid and such a judgment binds courts that subsequently address the same questions.

[i]. Possibility of Appealing against a Positive Declaratory Judgment

A decision of a Higher Regional Court declaring the arbitration admissible or inadmissible in accordance with § 1032(2) ZPO may be challenged before the German Federal Supreme Court on a point of law.⁽⁹²⁵⁾

An applicant may argue either that the conditions in section 32(2) Arbitration Act have not been met, or that the court's decision as to the substantive jurisdiction of the arbitral tribunal was wrong.⁽⁹²⁶⁾ An appeal against a court's decision as to whether the conditions for a judicial determination of jurisdiction are met is available, subject to the first instance court giving leave.⁽⁹²⁷⁾ Leave to appeal against a court's decision on [page "156"](#) the question of jurisdiction will be given, provided only that the first instance court considers that the issue involves a point of law which is one of general importance, or is one which for some other special reason should be considered by the Court of Appeal.⁽⁹²⁸⁾ A residual discretion by the Court of Appeal to permit an appeal, despite the judge's refusal of permission, where that refusal can be challenged on the grounds of unfairness, has, however, evolved in English case law.⁽⁹²⁹⁾ An appeal to the Court of Appeal also exists against a judgment rendered on the basis of section 72(1) Arbitration Act.⁽⁹³⁰⁾

[ii]. Res Judicata Effect of a Positive Declaratory Judgment

If a German Higher Regional Court has declared the arbitral proceedings admissible, the arbitral tribunal is regarded as being bound by this court's decision and should not decline its jurisdiction with a holding that the arbitration agreement is invalid.⁽⁹³¹⁾ If the arbitrators nevertheless decline their jurisdiction, the arbitral proceedings become incapable of being performed and the case may be decided by the national courts.⁽⁹³²⁾ The court's decision on the admissibility of the arbitration excludes the German courts from adjudicating the dispute; if a party nevertheless initiates court proceedings in a matter covered by the arbitration agreement, the court is obliged to decline jurisdiction upon the defendant's plea of res judicata.⁽⁹³³⁾

A bare declaration of a right or a state does not lack finality; a declaratory order that disposes of the proceedings is final and has res judicata effect.⁽⁹³⁴⁾ There is no indication that this should not hold true for declarations as to the arbitral tribunal's substantive jurisdiction.

[c]. Court's Declaration on the Arbitration Agreement's Invalidity

The effects of negative declaratory court judgments as regards the possibility of appealing against them and the res judicata effect they will have are, in principle, the same as in respect of court decisions declaring the arbitration agreement valid.

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[i]. Possibility of Appealing against a Negative Declaratory Judgment

A decision of a Higher Regional Court declaring the arbitration admissible or inadmissible in accordance with § 1032(2) ZPO may be challenged before the German Federal Supreme Court on a point of law.⁽⁹³⁵⁾

The conditions to appeal against a negative declaratory court judgment are the same as for positive declaratory judgments.⁽⁹³⁶⁾

[ii]. Res Judicata Effect of a Negative Declaratory Judgment

If a German Higher Regional Court has declared the arbitral proceedings inadmissible, the arbitral tribunal is bound by this decision, which means that arbitral proceedings cannot be commenced and an arbitration in progress can no longer be continued.⁽⁹³⁷⁾ If the arbitrators nevertheless render an award on the merits, this award is null and void ipso iure.⁽⁹³⁸⁾ If the court's decision declaring the arbitral proceedings inadmissible becomes final only after the arbitral tribunal has – based on § 1032(3) ZPO – rendered an arbitral award on the merits, the prevailing view in German doctrine is that the award becomes void ipso iure.⁽⁹³⁹⁾

An English court's declaration as to the arbitral tribunal's substantive jurisdiction under section 32 Arbitration Act seems to have res judicata effect regardless of whether the court decides in favour or against the arbitrators' authority.⁽⁹⁴⁰⁾

[4]. Comparative Conclusion

Apart from the fact that the legitimacy of direct declaratory actions in national courts is discussed controversially, their statutory existence needs to be considered by the national courts, the arbitrators and the parties in the following specific constellations.

[a]. Conclusions from the Perspective of National Courts

As has been seen, the strict conditions that must be met to seek a declaration as to the arbitral tribunal's jurisdiction reflect the reticence towards direct judicial control of arbitrators' authority. The requirements established in German and English arbitration law hence need to be interpreted restrictively in order not to extend the scope of application of such declaratory actions.

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In addition to a narrow interpretation of the statutory requirements to seek declaratory relief, the national courts should review closely whether a party seeking a declaration as to the arbitration agreement's (in)validity has a legitimate interest to do so in order to avoid wasted cost and time. Where the party seeking declaratory relief is also a party to court proceedings on the merits in the same matter, or where the party requesting a declaration before the national courts has made contradictory submissions before the arbitral tribunal, the national court should reject to grant a declaration for want of a legitimate interest.

[b]. Conclusions from the Arbitrators' View

Under English arbitration law, the arbitral tribunal is, on the one hand, entitled to continue with the proceedings and even render an award while an application for declaratory relief is pending before court, but, on the other hand, the tribunal may stay the proceedings whilst such an application is made to the court.⁽⁹⁴¹⁾ If the parties, upon consultation by the arbitrators, agree on a course of action, the tribunal is of course bound to act accordingly. Assuming that the parties cannot agree on a common proposal – given their opposite positions in the proceedings – the arbitrators should consider the following: as long as the 'sword of Damocles' hangs over the admissibility of arbitration in the form of a court's binding declaration of whether the arbitration is admissible or not, especially where a direct action is pending before the courts at the seat of arbitration, the arbitral tribunal should stay the proceedings, unless urgent circumstances necessitate that the proceedings be continued (such as, for instance, the imminent loss of evidence) or if the arbitrators are convinced that the action is unfounded.⁽⁹⁴²⁾ It will be prudent to stay the arbitration, until the national court has issued a declaration, not only to avoid a waste of resources, but also not to jeopardise the enforceability of an arbitral award.⁽⁹⁴³⁾

Furthermore, the arbitrators should do their part to encourage the parties to have the issue as to the arbitration agreement's validity decided before the arbitrators only. This can be done, for instance, by offering to render a preliminary award on jurisdiction upon a party's jurisdictional objection and not to delay the determination of the objection until the tribunal gives the final award. Only where the arbitral tribunal has serious doubts as to whether the arbitration agreement is valid should it – for the sake of the enforceability of any award rendered – give permission for a party to raise an action for declaratory relief based on section 32(2)(b) Arbitration Act.

[c]. Conclusions from the Parties' View

From a practical point of view, a party challenging an arbitral tribunal's jurisdiction must – in addition to showing that it fulfils the respective statutory requirements – [page "159"](#) consider the following when intending to seek declaratory relief before the national courts:

- the party needs to consistently contest the arbitral tribunal's jurisdiction; if arbitral proceedings are already in progress, the party must object to the arbitrators' authority as soon as possible in the arbitral proceedings, otherwise the defendant in the court proceedings may ask the court to interpret claimant's contradictory behaviour as having submitted to the tribunal's jurisdiction;⁽⁹⁴⁴⁾
- the party should be in a position to demonstrate that it has a legitimate interest for seeking declaratory relief; and
- if arbitral proceedings are pending, the party should explicitly request that the arbitral tribunal stay the proceedings until the national court has issued a declaration.

In addition, where the admissibility of an application for declaratory relief is dependent on whether the arbitral tribunal has already been constituted – as is the case under § 1032(2) ZPO – the party opposing arbitration should, where it is evident that the party insisting on arbitration is about to initiate arbitral proceedings or the commencement of arbitration is otherwise imminent, in order to safeguard its interests, file an application for declaratory relief with the national court. Furthermore, even if an arbitral award rendered in violation of a court's decision on the (in)admissibility of arbitration is considered to be null and void ipso iure by German legal doctrine, the party should nevertheless challenge the award.⁽⁹⁴⁵⁾

Before embarking on an application for declaratory relief as to the arbitral tribunal's jurisdiction to the national courts, a party should consider the advantages of an action on the merits: if the defendant fails to timely raise the objection of a valid arbitration agreement, the claimant may continue before the national courts without any interruption and without having to face the arbitration defence at the enforcement stage. Since actions on the merits are not contingent upon specific requirements established in the national statutory arbitration laws, they may be initiated before any court that is competent to hear the dispute. In addition, court decisions on the merits – even if they include an incidental ruling on the invalidity of the agreement to arbitrate – are covered by the scope of application of the Brussels Regulation or Lugano Convention (if rendered in a Member State or Lugano state) and hence benefit from the Regulation's/Convention's recognition regime, i.e. they have binding force on any enforcement court within the EU or the Lugano countries.⁽⁹⁴⁶⁾ Where the party opposing arbitration is not yet in a position to sufficiently quantify and substantiate its claim on the merits, but intends to preliminarily clarify the jurisdictional issue, an application for declaratory relief as to the tribunal's jurisdiction is of course more appropriate.

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A specific application of section 32 Arbitration Act has established or has even been urged by the Court of Appeal's ruling in *National Navigation*⁽⁹⁴⁷⁾: where arbitral proceedings have been initiated in England and a 'torpedo action' has been filed with a foreign court, especially if the foreign court is an EU or EFTA court with a reputation for a more strict interpretation of the validity of the arbitration agreement, the party insisting on arbitration may wish to seek declaratory relief as to the arbitral tribunal's jurisdiction before the courts in light of the binding effect of the court's decision on the arbitration's admissibility.⁽⁹⁴⁸⁾ It is essential that the party files for a declaration by the English courts as soon as court proceedings are initiated abroad, but certainly before the foreign court issues a preliminary decision on the arbitration agreement's validity or a judgment on the merits. The English courts are expected to consider it appropriate to grant a declaration where competing court proceedings have been brought abroad in disregard of an arbitration agreement held valid under English law.⁽⁹⁴⁹⁾

The question, however, as to whether such a declaratory judgment by an English court declaring the arbitration agreement valid is capable of impeding the recognition of an EU or EFTA judgment on the merits under the Brussels Regulation/Lugano Convention is still open. Waller LJ in *National Navigation* also enquired whether it would make any difference if the English court had already granted a declaration that an arbitration clause was incorporated before an EU court had considered whether to grant a stay; he concluded that a claimant in England could proceed with the arbitration and obtain a judgment in England and, if that were inconsistent with the judgment obtained in the Member State, Article 34(3) Brussels Regulation could be invoked.⁽⁹⁵⁰⁾ The judge appears to suggest that if no arbitration award on the merits had been obtained which could be enforced as a court judgment according to section 66 Arbitration Act, a prior court declaration as to the validity of the arbitration agreement would not preclude enforcement of an EU or EFTA judgment on the merits rendered in disregard of the arbitration agreement.⁽⁹⁵¹⁾ Such a view on the ineffectiveness of declaratory judgments seems, in principle, reconcilable with the grounds for refusing recognition under the Brussels Regulation/Lugano

Convention.⁽⁹⁵²⁾ Hence, applications [page "161"](#) for a court declaration as to the arbitration's admissibility do not appear to be an effective weapon against EU or EFTA judgments on the merits, which have preliminarily declared the agreement to arbitrate to be invalid. Quite another thing is, however, the preemptive effect of a negative declaration as to the arbitration's inadmissibility on a later arbitral award before the courts having rendered the declaratory judgment.

[E]. Exceptio Rei Judicatae

This chapter is dedicated to a further 'preclusion doctrine'⁽⁹⁵³⁾ dealing with subsequent proceedings, i.e. to the doctrine of res judicata. The general principle of res judicata holds that a judgment rendered on the merits precludes a subsequent action on all or part of the same claim.⁽⁹⁵⁴⁾ In most developed states, the rules of preclusion have evolved mainly in the context of domestic litigation.⁽⁹⁵⁵⁾ This is why, without prejudice to res judicata as a general principle of international law, it needs to be examined hereinafter whether the principle of res judicata extends to arbitral awards, and to which parts of a decision the binding effect of the res judicata principle is attached, since this might vary depending the applicable national laws.⁽⁹⁵⁶⁾

This plea of res judicata is, technically speaking, not of a mere jurisdictional nature; it rather renders the subsequent proceedings inadmissible, since the claim can no longer be heard in any forum.⁽⁹⁵⁷⁾ Nevertheless, the exceptio rei judicatae is an instrument designed for situations where consecutive parallel proceedings on the same subject matter and between the same parties are brought before a second forum, creating jurisdiction in a matter that has already been conclusively decided by a different forum.

The following comments will analyse the res judicata effect of an arbitral award on the merits where court proceedings have subsequently been initiated on the same subject matter and between the same parties. The preemptive effects of a preliminary or partial award on the arbitrators' jurisdiction will be portrayed below in Chapter 3, §3.02[A][2]. Ultimately, a conclusion will be made on the question of whether, in the scenario of consecutive proceedings, the parties may rely on the plea of res judicata to challenge the admissibility of the proceedings before the court seized after an award was rendered in the same dispute.

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[1]. General Introduction

[a]. The Civil Law Notion of the Principle of Res Judicata

The principle of res judicata has a formal and a substantive effect: in procedural terms, res judicata indicates that a decision is final between the parties and may not be appealed or challenged; on the substantive level, the preclusion effect of the res judicata principle (also called *ne bis in idem*) prevents the same dispute from being re-litigated again between the same parties.⁽⁹⁵⁸⁾

The application of the res judicata principle is contingent upon a so called triple identity test in most civil law countries; this test, which is generally interpreted narrowly, requires that the claim, the legal grounds and the parties in the decision and the subsequent proceedings be the same.⁽⁹⁵⁹⁾ Using the example of Swiss law, as far as the requirements of the identical claim are concerned, a distinction needs to be made between an objective and subjective element: objectively, the subject matter of the new claim must be identical to the one adjudicated on in the earlier proceedings, i.e. the claim or counterclaim put forward must be the same, as must the totality of the facts related to such claim or counterclaim.⁽⁹⁶⁰⁾ With regard to the identity of the set of facts involved, the Swiss Federal Supreme Court holds that there is identity of the facts regardless of whether the parties were aware of those facts, have put them forward or whether the judge has considered them as proven or not.⁽⁹⁶¹⁾ Such an identity of claim and facts, however, does not encompass the legal arguments brought forward in the earlier proceedings; this consequence is rooted in the principle of *iura novit curia*, i.e. that a Swiss court and also arbitral tribunals know the law and hence the parties to a dispute are not obliged to plead on the law.⁽⁹⁶²⁾ The subjective scope of res judicata extends only to those individuals or legal entities that have been parties to the earlier proceedings.⁽⁹⁶³⁾ The procedural position of the parties in the first and second proceedings is irrelevant, so if the roles of the parties have changed between the first and the second proceedings, identity of the parties in the sense of the res judicata principle might still be held to exist.⁽⁹⁶⁴⁾

Furthermore, the res judicata effect of the earlier judgment is usually restricted to its dispositive parts.⁽⁹⁶⁵⁾ The reasons upon which the decision is based may, however, be [page "163"](#) consulted in order to determine the exact meaning, the nature and the precise scope of the dispositive part.⁽⁹⁶⁶⁾

[b]. Common Law Concept of Res Judicata

The term 'res judicata', as established by English case law, refers to

the general doctrine that an earlier and final adjudication by a court is conclusive in subsequent proceedings involving the same subject matter, the same legal bases and the same parties or their privies.⁽⁹⁶⁷⁾ In common law jurisdictions, the preclusion effect of the res judicata principle is basically twofold: on the one hand, there is cause of action estoppel, which precludes a party from re-litigating the same cause of action which gave rise to a final and conclusive decision, including the claims and defences raised in the earlier proceedings; on the other hand, a party in the second proceedings may plead issue estoppel if the issues raised and decided in the earlier proceedings between the same parties are the same, even if the causes of action are not identical with the earlier proceedings.⁽⁹⁶⁸⁾ The concept of res judicata is, however, broader in common law systems like England, since it encompasses two more preclusive pleas, i.e. the plea of former recovery and the plea of abuse of process. The different preclusive pleas of res judicata will be developed further in the following.

[i]. Cause of Action Estoppel

In the context of this doctrine, all claims or rights of legal action arising from a single event or a single set of facts and based on the same evidence are treated as the same cause of action.⁽⁹⁶⁹⁾ If such a claim has previously been adjudicated on in proceedings between the same parties, re-litigation of the same claim in subsequent proceedings involving the same parties is prevented by cause of action estoppel.⁽⁹⁷⁰⁾ To raise the plea of cause of action estoppel, a party simply needs to prove the res judicata status of the judgment and then establish that the same claim as was determined by the judgment in the previous proceedings is now the subject of subsequent proceedings between the same parties or privies as are bound by the previous judgment.⁽⁹⁷¹⁾ The cause of action estoppel plea is also available in the foreign context, i.e. a defendant may rely on a foreign judgment in its favour to estop the claimant from re-litigating the same claim.⁽⁹⁷²⁾

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[ii]. Issue Estoppel

According to the doctrine of issue estoppel, an issue of fact or law which has already been distinctly raised and finally decided in earlier proceedings between the same parties or privies must not be contradicted by findings in subsequent proceedings.⁽⁹⁷³⁾ The issue must fulfil the following requirements in order to be capable of provoking issue estoppel:⁽⁹⁷⁴⁾

- the issue must be one of fact or law, but a procedural decision cannot give rise to a plea of issue estoppel; and
- the issue must represent a significant and decisive factor to the court's decision in the earlier judgment, it must hence be part of the legal foundation or justification for the court's conclusion (not merely an obiter dictum).

If the party opposing the plea of issue estoppel is in a position to present further evidence relevant to the correctness or incorrectness of the issue which it could not have produced in the previous proceedings, since it has become available only after closing of the previous proceedings, the plea of issue estoppel is not to be heard.⁽⁹⁷⁵⁾

Since estoppel is considered as a rule of evidence in England and hence is governed by the lex fori, a foreign judgment can also give rise to issue estoppel even if this sub-category of estoppel is not recognised under the law of the foreign court.⁽⁹⁷⁶⁾ Furthermore, a preliminary issue (either determined by an English or a foreign court) which usually, in civil law jurisdictions, cannot create res judicata effect because it lacks the form of a final decision is, under the doctrine of issue estoppel, capable of having res judicata effect.⁽⁹⁷⁷⁾

[iii]. Former Recovery

The doctrine of former recovery prohibits double recovery based on the same cause of action.⁽⁹⁷⁸⁾ Hence, once the monetary obligations in a judgment have been fulfilled or the judgment has otherwise been honoured, the paying party can rely on the principle of former recovery to oppose reassertion of the same claim in subsequent proceedings.⁽⁹⁷⁹⁾

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Under English law, a party that obtains a foreign judgment in its favour is not thereby prevented from subsequently recovering in the local forum based on the same cause of action.⁽⁹⁸⁰⁾ This is because a foreign judgment, at common law, does not merge with the underlying claim, and therefore does not operate as a bar to further recovery; the successful party may hence either initiate proceedings to enforce the foreign judgment or sue again in England for further relief upon the same claim, if the foreign judgment remains unsatisfied.⁽⁹⁸¹⁾ This non-merger rule prompted the enactment of section 34 of the Civil Jurisdiction and Judgments Act 1982, which reads as follows:⁽⁹⁸²⁾

"No proceedings may be brought by a person in

England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales or, as the case may be, in Northern Ireland."

Preclusive effect is hence also accorded to foreign judgments.⁽⁹⁸³⁾ It should, however, be mentioned that section 34 Civil Jurisdiction and Judgments Act 1982 may be the subject of waiver, estoppel or contrary agreement and hence does not offer absolute protection from reassertion of the same cause of action notwithstanding the res judicata status of the foreign judgment.⁽⁹⁸⁴⁾

[iv]. Abuse of Process

The extended doctrine of res judicata is concerned with avoiding duplicative proceedings initiated with an abusive intention, i.e. where the subject matter of later proceedings could and should have been rendered res judicata had it been litigated in the earlier proceedings with all due diligence by the parties.⁽⁹⁸⁵⁾ Hence, an English judge might also preclude subsequent proceedings if they are abusive insofar as they imply an unfairness to another party or such proceedings are likely to discredit the administration of justice.⁽⁹⁸⁶⁾ The application of this doctrine wholly lies within the competent judge's discretion.⁽⁹⁸⁷⁾

This preclusion doctrine evolved under English case law: in an early ruling,⁽⁹⁸⁸⁾ another form of issue estoppel was formulated according to which a party which could, but did not, raise a material issue of fact or law in earlier proceedings cannot raise that same issue in subsequent proceedings.⁽⁹⁸⁹⁾ In a decision of the House of Lords⁽⁹⁹⁰⁾ this [page "166"](#) form of issue estoppel was considered as a category of abuse of the English court's process, rather than an extension of the principles of estoppel.⁽⁹⁹¹⁾

The question as to whether the plea of abuse of process also applies in the international context, i.e. if an English court were to consider it an abuse of process for parties to open the same subject matter of litigation in respect of a matter that might have been brought forward in earlier foreign proceedings, but which was not, is, in general, answered in the affirmative.⁽⁹⁹²⁾ Key considerations when deciding upon a plea of abuse of process when confronted with an earlier foreign judgment, however, should be:⁽⁹⁹³⁾

- did the party have an opportunity to raise the subject matter in the foreign proceedings at all, and was the foreign court the most appropriate forum in which to raise the subject matter; and
- would granting the relief in the later proceedings before the English courts render the previous foreign judgment contradictory.

[2]. Effectiveness of the Exceptio Rei Judicatae

There is no doubt that res judicata corresponds to a general principle of international law recognised by civilised nations.⁽⁹⁹⁴⁾ but do the effects of finality and preclusion also expand to arbitral awards? The UNCITRAL Model Law does not directly refer to the res judicata effect of an arbitral award, but provides that an arbitral award shall be recognised as binding in Article 35(1).⁽⁹⁹⁵⁾ Article III New York Convention, by similar wording, also holds, with regard to foreign awards, that each contracting state shall recognise arbitral awards as binding. Judging from the wording of these two provisions, there are no express provisions as to the preclusive effect of arbitral awards in contemporary arbitration conventions, although Article 35(1) UNCITRAL Model Law and Article III New York Convention imply that an arbitral award has such an effect.⁽⁹⁹⁶⁾

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[a]. Law Applicable to Determine Arbitral Awards' Preclusive Effect

As far as the law applicable to determine the precise scope of the preclusion effects of international arbitral awards in national courts is concerned, it is questionable, on the one hand, whether the law at the seat of the arbitral tribunal is decisive, since the links of the dispute to the seat often (and in fact in most situations) are weak and random, since the seat may have been chosen for reasons of neutrality or mere convenience.⁽⁹⁹⁷⁾ On the other hand, declaring the law at the recognising or enforcing jurisdiction as decisive⁽⁹⁹⁸⁾ might lead to unpredictable results and might promote a race to judgment in the forum with the least effective rules of preclusion.⁽⁹⁹⁹⁾ Nevertheless, the national courts are often tempted to assess the res judicata effect of arbitral awards by applying rules mirroring those of their own legal system.⁽¹⁰⁰⁰⁾

Either of these suggestions is convincing for serving the needs of international arbitration. The focus should therefore be on the parties' agreement and their expectations, rather than – as with court judgments – on national preclusion rules designed for domestic litigations.⁽¹⁰⁰¹⁾ By way of example: if a dispute between parties domiciled in civil law jurisdictions and to which Swiss law is

applicable on the merits has been decided by an arbitral tribunal having its seat in England, the parties are not necessarily aware of the estoppels per rem judicatam available under English law. Would it be just in this situation if the party invoking the res judicata effect of the final award in subsequent proceedings before English courts were allowed to bring forward the doctrine of abuse of process or the principle of issue estoppel to block certain claims, which could not have been blocked pursuant to a civil law notion of res judicata, based only on the fact that the seat of arbitration was England? Such a behaviour appears to be unpredictable and rather unjust, unless there is a strong indication that the extended notion of res judicata played an important role for the parties for choosing England as the place of arbitration or the party opposing the application of these principles otherwise obviously acts in bad faith.

[b]. Arbitral Awards' Preclusive Effect under National Arbitration Laws

In civil law countries, the doctrine of res judicata is well-established and often codified.⁽¹⁰⁰²⁾ § 1055 ZPO holds that the arbitral award has the same effect between the parties as a final and binding court judgment, i.e. equating arbitral awards to national court judgments entitled to the same preclusive effects as a judgment.⁽¹⁰⁰³⁾ There are, however, certain differences as regards the preclusive effects of arbitral awards and [page "168"](#) court judgments: the prevailing opinion holds that a German court does not consider the binding effect of an arbitral award ex officio, i.e. the courts will only dismiss a case as being inadmissible provided that one of the parties has raised a plea of res judicata of an earlier award on the same subject matter.⁽¹⁰⁰⁴⁾ Furthermore, based on the principle of party autonomy, the parties are free to set aside the binding effect of the award.⁽¹⁰⁰⁵⁾ It is moreover vital to note that an arbitral award has preclusive effect regardless of any deficiencies in the arbitral proceedings or any other grounds for setting the award aside, since an application for setting an award aside is not considered as an ordinary means of recourse.⁽¹⁰⁰⁶⁾ This effect does, however, not extend to arbitral awards that are null and void *ab initio* and hence do not need to be set aside.⁽¹⁰⁰⁷⁾

Under French arbitration law, Article 1484(1) CPC explicitly provides that the arbitral award, from the moment it has been rendered, has res judicata effect in relation to the dispute that it has determined.⁽¹⁰⁰⁸⁾ Accordingly, once rendered, an international arbitral award may be invoked in proceedings before a French court to prevent re-litigation of the same matter between the same parties;⁽¹⁰⁰⁹⁾ a French court must then hold inadmissible any action seeking resolution of a dispute already decided by arbitration.⁽¹⁰¹⁰⁾ In addition, the notion of res judicata has recently been extended in the context of domestic arbitration by French case law – originating from civil law litigation⁽¹⁰¹¹⁾ – to the entirety of the circumstances of a case, more specifically to all the legal grounds and claims that could be raised with regard to the specific case ('concentration des moyens et des demandes').⁽¹⁰¹²⁾ In other words, whereas prior to [page "169"](#) this case law, an arbitral award had res judicata effect only with regard to proceedings wherein the same claims were made based on the same legal grounds between the same parties, the res judicata effect according to this recent case law also prevents further decision from being rendered based on a different legal argument or a different claim, if the argument or the claim is based on the same circumstances as the case that already led to a binding award, and the grounds or claims could have been invoked in the earlier proceedings. This broad understanding of identity leads to the practical result that parties need to make all claims they ever intend to invoke with respect to the case concerned, since later on they may be estopped from doing so based on the res judicata effect of any prior award.⁽¹⁰¹³⁾ This extension of the res judicata effect bears a striking resemblance to the abuse of process doctrine under English law, precluding a party from making a claim that it could have made earlier in the proceedings before a decision was made.⁽¹⁰¹⁴⁾ Criticism has been expressed of the French court's decision to transfer this extension of the notion of res judicata to arbitration, since it is alleged to violate the principle of party autonomy; furthermore, this extension is reproached for posing practical difficulties, such as an increase in the arbitrators' fees, since the subject matter of the arbitration becomes unnecessarily inflated, and the intensified responsibility of the counsels preparing the arguments in the legal briefs.⁽¹⁰¹⁵⁾ To ease the discussion, it has been suggested that it cannot be inferred from the fact that French case law applies the principle of concentration ('concentration des moyens et des demandes') to civil litigation and domestic arbitration that it also pertains to international arbitration.⁽¹⁰¹⁶⁾ The Paris Court of Appeal has, meanwhile, held that the principle of concentration is not applicable before an arbitral tribunal in the international context.⁽¹⁰¹⁷⁾

Furthermore, the fact that an award is still challengeable or actually is challenged at the seat of arbitration does not deprive the award of res judicata effect in France.⁽¹⁰¹⁸⁾ Since res judicata is, however, not considered to be a matter of public policy, a court or an arbitral tribunal cannot raise the preclusive effect of a previous decision on its own initiative.⁽¹⁰¹⁹⁾ It is hence advisable, from the perspective of a party, to raise the plea of res judicata as soon as possible in the court proceedings.

Article 190(1) SPILA states that an arbitral award is final from its

notification. Apart from this provision on the finality of an arbitral award, however, there is no statutory rule under Swiss law stating that an arbitral award has the preclusive effect [page "170"](#) of res judicata. The Swiss Federal Supreme Court holds that principles governing the res judicata effect of Swiss court judgments apply mutatis mutandis to arbitral awards.⁽¹⁰²⁰⁾ A Swiss court must observe the existence of a final and conclusive decision on the same subject matter and between the same parties ex officio.⁽¹⁰²¹⁾

Section 58(1) Arbitration Act, furthermore, only provides that an arbitral award made by a tribunal pursuant to an arbitration agreement is final and binding, unless agreed otherwise by the parties, and unless and until there is a successful challenge to the award;⁽¹⁰²²⁾ this provision hence parallels Article 35(1) UNCITRAL Model Law, but does not address the arbitral award's preclusive effect.⁽¹⁰²³⁾ English case law holds that an arbitral award can justify a plea of cause of action and issue estoppel.⁽¹⁰²⁴⁾ In *Comings v Heard*⁽¹⁰²⁵⁾, it was argued that an award cannot have res judicata effect, since an arbitral award is distinguishable from a judgment insofar as the award is adjudicated on by an arbitral tribunal appointed by the parties to the proceedings and not constituted by sovereign power.⁽¹⁰²⁶⁾ Lush J gave the following answer to this proposed distinction between arbitral awards and judgments for the sake of res judicata:

"It is impossible, to my mind, to suggest any good ground of distinction between these two, when we consider that the reason, why a matter once adjudicated upon is not permitted to be opened again, is because it is expedient that there should be an end to litigation. When once a matter has been decided between parties, the parties ought to be concluded by the adjudication, whatever it may be."⁽¹⁰²⁷⁾

Lord Diplock in *Fidelitas Shipping Co Ltd v. V/O Exportchleb*⁽¹⁰²⁸⁾, moreover, confirmed that issue estoppel applies to arbitration as it does to litigation.⁽¹⁰²⁹⁾ Hence, a valid award will create estoppel with regard to the matters with which it deals, with the result of [page "171"](#) preventing either party from pursuing those matters in subsequent proceedings (arbitral and court proceedings).⁽¹⁰³⁰⁾

As for the remaining two preclusion doctrines, i.e. the doctrine of former recovery and the doctrine of abuse of process, it is highly questionable whether they can apply to arbitration at all.⁽¹⁰³¹⁾ The application of the abuse of process doctrine to arbitrations was confirmed by previous rulings.⁽¹⁰³²⁾ The question was, however, raised again in a later decision, i.e. *Associated Electric and Gas Insurance Services Ltd (Aegis) v European Reinsurance Co of Zurich (European Re)*, and left open.⁽¹⁰³³⁾ Some commentators have suggested that the abuse of process doctrine should not be extended to arbitral proceedings and arbitral awards, since parties do not have the same obligations to raise issues in arbitrations as in national court litigation.⁽¹⁰³⁴⁾ This conclusion does not seem to correspond to the logic of arbitral proceedings: parties entering into an arbitration agreement strive to achieve a prompt, efficient and final resolution of their disputes. It would therefore be contrary to the parties' expectations of finality and efficiency to withhold certain claims, even though the respective party intends to nevertheless raise them at a later stage, and thereby prevent a prompt and comprehensive resolution of the dispute between the parties. Hence, a party to an arbitration agreement should be precluded from bringing in bad faith only some, but not all, of the claims against the opposing party solely in order to pursue selected claims, that it has deliberately held back, later in subsequent proceedings.⁽¹⁰³⁵⁾

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[i]. With a Previous Domestic Arbitral Award

An arbitral award rendered by a tribunal sitting in Germany becomes automatically binding once it fulfils all the mandatory requirements set out in § 1054 ZPO and has been notified to the parties.⁽¹⁰³⁶⁾ Since there is a debate in legal doctrine as to whether a German court is held to recognise the res judicata effect of an arbitral award of its own motion, or only if one of the parties raises the respective objection,⁽¹⁰³⁷⁾ it is, in any case, advisable that the party wishing to contest the claim's admissibility invokes the existence of a prior arbitral award on the same subject matter as soon as possible in court proceedings.

Based on Article 1484(1) CPC, a French court must declare itself incompetent if a party raises a plea of res judicata showing that an arbitral tribunal has already reached a decision on the merits regarding the same subject matter, the same cause and the same parties.⁽¹⁰³⁸⁾ Although Article 125(2) CPC holds that a judge may consider the res judicata effect of its own motion, it is recommended that a respective plea is raised as soon as possible in court proceedings.

If a case with an identical claim and between the same parties is argued before the Swiss courts that has already been conclusively decided by an arbitral tribunal with its seat in Switzerland, the Swiss court is to declare such a claim inadmissible.⁽¹⁰³⁹⁾ Only where an arbitration agreement has been concluded in a matter that is not capable of being solved by arbitration under Swiss law does the non-arbitrability of the subject matter prevent res judicata effect.⁽¹⁰⁴⁰⁾

Furthermore, not only do final decisions by an arbitral tribunal with its seat in Switzerland bind the Swiss courts when confronted with a case involving an identical claim between the same parties, but they are also capable of prohibiting recognition and enforcement in Switzerland of a foreign court judgment on the same subject matter and between the same parties (regardless of whether the Lugano Convention or the SPILA applies to the recognition or enforcement).

⁽¹⁰⁴¹⁾ The effectiveness of the plea of res judicata to be filed with the identical dispute pending before the Swiss courts is hence supported by Swiss case law. Even though a Swiss court is principally obliged to respect the res judicata effect of a previous award in the same dispute on its own initiative, it is nevertheless advisable that the party wishing to have the court proceedings stayed raises the plea explicitly.

In the *Fidelitas Shipping* decision, the Court of Appeal held that an award rendered in an arbitration in London estopped the parties from reopening the same issue that was dealt with in the award.⁽¹⁰⁴²⁾

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[ii]. With a Previous Foreign Arbitral Award

The Brussels and Lugano regime only applies to judgments that do not fall within any of the excluded areas of law; since arbitration is excluded from the scope of application of the Brussels Regulation and the Lugano Convention, the recognition and enforcement of arbitral awards are not covered by these instruments.⁽¹⁰⁴³⁾

Under German arbitration law, foreign arbitral awards also have res judicata effect in Germany from the moment they become binding based on the procedural law which applies to that arbitral award.

⁽¹⁰⁴⁴⁾ On the merits, the question whether an arbitral award given by a tribunal having its seat outside Germany has preclusive effect in Germany is contingent upon the recognition and enforcement of the award according to the New York Convention.⁽¹⁰⁴⁵⁾ Consequently, the grounds for refusal of recognition or enforcement under Article V New York Convention could potentially block the res judicata effect of an arbitral award in Germany. As far as the moment from which the arbitral award has preclusive effect is concerned, the following difference between domestic and foreign awards needs to be explained: a domestic award is capable of preventing re-litigation of the same subject matter before German courts from the moment it is delivered to the parties whereas, when confronted with a foreign award, a German court will review, as a preliminary question, whether the award is compatible with the New York Convention (i.e. also dealing with applications to refuse enforcement filed by the opposing party), before it respects the foreign award's res judicata effect.⁽¹⁰⁴⁶⁾

Arbitral awards rendered abroad cannot have res judicata effect unless they are recognised by the French courts; foreign arbitral awards benefit from a simplified recognition process, according to which recognition or enforcement is granted unless recognition or enforcement of the foreign award is manifestly contrary to international public policy.⁽¹⁰⁴⁷⁾

If a party seizes a Swiss court, raising an identical claim between the same parties which has already been the subject of an arbitral award rendered in a foreign jurisdiction, the Swiss court shall declare such claim inadmissible, but only provided that the foreign arbitral award is recognisable according to the New York Convention.⁽¹⁰⁴⁸⁾ The New York Convention is applicable due to the reference made in Article 194 SPILA. Formally, Article IV(1) New York Convention holds that the party seeking recognition of the foreign arbitral award shall produce the duly authenticated original award and the original arbitration agreement or certified copies of these documents; on the merits, recognition may be denied by the Swiss courts if the party opposing [page "174"](#) recognition invokes an annulment ground provided in Article V New York Convention.⁽¹⁰⁴⁹⁾ If no ground stated in Article V New York Convention can successfully oppose recognition of the foreign arbitral award, it is equivalent to an arbitral award rendered in Switzerland.⁽¹⁰⁵⁰⁾ The Swiss Federal Supreme Court has further held that such a foreign arbitral award may have res judicata effect only to the extent provided by the procedural law of the jurisdiction where the award was made and also limited by Swiss procedural law.⁽¹⁰⁵¹⁾ If a foreign award complies with the recognition and enforcement scheme in the New York Convention, a plea of res judicata raised before a Swiss court is highly likely to be successful.

Under English law, the equal treatment of court judgments and arbitral awards with regard to their res judicata effect entails that foreign arbitral awards, i.e. awards rendered outside the United Kingdom, must be recognised before they can have res judicata effect. A foreign arbitral award not made in a contracting state of the New York Convention will be recognised as a defence to the bringing of a subsequent claim, if the arbitral award is in accordance with an agreement to arbitrate which is valid by its applicable law, and provided that the arbitral award is valid and final according to the law governing the arbitration proceedings.⁽¹⁰⁵²⁾ Further defences to recognition of a foreign arbitral award are: if the arbitrators lacked jurisdiction to render the award, if the arbitral award was obtained by fraud, if its recognition would be contrary to public policy, or if the proceedings in which the arbitral award was obtained were opposed to natural justice.⁽¹⁰⁵³⁾ Recognition of a foreign arbitral award made

in the territory of a state which is a contracting party to the New York Convention can be refused if one of the grounds listed in Article V New York Convention (in connection with section 103 Arbitration Act) has eventuated.⁽¹⁰⁵⁴⁾

[3]. Comparative Conclusion: Conclusions from the Parties' View

International arbitral awards are principally accorded the same preclusive effect as are national court judgments. The preclusion rules, however, vary between different legal systems, with English law affording arbitral awards broader preclusive effect than the civil law jurisdictions examined.⁽¹⁰⁵⁵⁾ In civil law jurisdictions, the requirements for a judgment to have res judicata effect, firstly, seem to be defined more narrowly by application of the triple identity test; secondly, the scope of res judicata is in principle restricted to the judgment's dispositive part (the reasoning is relevant only to the extent that it helps to clarify the dispositive portions); and thirdly, there does not appear to be an equivalent to the doctrine of abuse of process as part of the estoppels per rem judicatam (with the exception of the 'concentration des moyens et des demandes' as recently evolved in French case law, but recently denied application in international [page "175"](#) arbitration by the Paris Court of Appeal).⁽¹⁰⁵⁶⁾ From these differences, the following caveats directed at the parties and their counsels may be inferred.

Parties should, already at an earlier stage, i.e. when the award is rendered, endeavour to ensure that the award is capable of having res judicata effect with respect to all the claims brought before the arbitral tribunal. For this purpose, parties should carefully check the wording of the dispositive part of the award, since it is this part of the award which has preemptive effect in the civil law jurisdictions examined.⁽¹⁰⁵⁷⁾ The dispositive part hence needs to be worded as precisely as possible and should cover all the claims raised by the parties. If a party is not satisfied with the extent of specificity with which the dispositive part is drafted, or with the number of claims dealt with, it may ask the arbitral tribunal for a correction or an additional award.⁽¹⁰⁵⁸⁾

Since parties are in a more favourable position as regards their knowledge of already final decisions on the same subject matter between them, it is advisable that an opposing party raise the res judicata objection as soon as possible at the beginning of the subsequent proceedings – regardless of any obligation of a national court to observe res judicata of its own motion. On the merits, the party must show that litigation in the subsequent proceedings is between the same parties as are bound by the arbitral award, and that the claims raised and legal grounds brought forward in the arbitral proceedings and in the later proceedings are identical. The triple identity requirement is interpreted rather narrowly before civil law courts when compared to English courts: the preclusive effect of res judicata is cast more widely under English law, since it does not only include matters in which the cause of action or legal or factual issues are identical, but also extends to prevent double recovery and abusive proceedings. The extension of the abuse of process doctrine to the preclusive effect of a final arbitral award is strongly advocated, since a party should not be permitted to knowingly hold back claims in order to have them re-litigated in subsequent proceedings, and thereby delay a final resolution of a dispute and perhaps even undermine the content of the earlier decision. The adoption of this doctrine to international arbitration, on the one hand, would serve to enhance the effectiveness of an arbitral award's res judicata effect and thereby would help to minimise parallel proceedings and conflicting decisions; on the other hand, this doctrine would potentially reduce the predictability of an award's preemptive effect, insofar as a national court could declare an action inadmissible due to the award's res judicata, even though the subsequent action does not include claims that were adjudicated on in the previous award, but which could have been dealt with by the arbitral tribunal.

In a cross-border context, an arbitral award needs to be recognised before it is capable of having res judicata effect in court proceedings abroad. Even though the defences that may be invoked against a plea of res judicata of a foreign arbitral award (in particular the grounds for refusal in Article V New York Convention) are intended [page "176"](#) to frustrate the res judicata objection, they should not be overstated by the party opposing the res judicata plea, since they are defined rather narrowly and because courts hearing such defences are not allowed to review the foreign decisions on the merits save regarding the refusal ground of public policy.

[F]. Summary

In the event that a party to an arbitration agreement initiates proceedings before a national court, the most straightforward strategy to oppose litigation before a state court is to raise the arbitration defence arguing that there is a valid arbitration agreement between the parties. The exceptio arbitri seems to be the most promising of the jurisdictional pleas and actions depicted above, not least because it has its basis in the New York Convention, which has been ratified by the majority of civilised nations and enjoys wide acceptance by the national courts. On closer inspection, however, the inclusive wording of Article II(3) New York Convention fails to specify the scope of review of the arbitration agreement by the state courts, the law applicable to the interpretation of the exceptions mentioned in Article II(3) New York Convention, i.e. the law

applicable to the arbitration agreement's validity, the procedural requirements for raising the arbitration defence in court, and the effects of the national court's decision on the arbitration agreement's validity. Hence, the contracting states of the New York Convention are trusted with the specification of these aspects. In other words, there is no uniform practice for interpretation of Article II(3) New York Convention on which a party invoking the arbitration defence could rely. Moreover, the uncertainties created by this provision's wording concern issues on which the contracting states traditionally have very distinct opinions. The question of whether a national court, when confronted with the arbitration defence, is to conduct a prima facie or a full review of the arbitration agreement is a good example illustrating the diverging standards in the contracting states of the New York Convention: whereas French courts are allowed to, prima facie, review only whether the arbitration agreement is manifestly void or manifestly inapplicable and also only in the event that the arbitral tribunal has not been seised of the matter yet, German and English courts are traditionally entitled to fully review the validity of the arbitration agreement themselves. Consequently, whereas a party invoking the arbitration agreement in a French court stands a relatively high chance of being referred to arbitration, a party raising the defence before the German or English courts needs to make detailed submissions on the arbitration agreement's validity. In spite of the high international acceptance and enforcement of Article II(3) New York Convention, the arbitration defence may turn out not to be the safest bet for a party wishing to have the court proceedings stopped.

So far, no internationally recognised rule of *lis pendens* has been developed regarding parallel proceedings pending before a national court and an arbitral tribunal. When considering international arbitration conventions, solely Article VI(3) European Convention explicitly requests that a national court seised second stay its proceedings until the arbitral award is rendered by the arbitral tribunal seised first. Statutory [page "177"](#) arbitration laws and case law in Germany, France, Switzerland and England do not contemplate the *lis pendens* rule in the context of arbitration. Consequently, based on the status quo, it constitutes a very risky undertaking for a party insisting on arbitration to only rely on the plea of *litispendence* in its pleadings before the national court seised second.

Injunctions issued by courts to enjoin a party from commencing or continuing proceedings before a foreign court, even if such an order has the intention of enforcing a valid arbitration agreement between the parties to a dispute, are, in principle, frowned upon in civil law jurisdictions. The ECJ has, furthermore, rendered a clear verdict against the admissibility of anti-suit injunctions in the ambit of the Brussels Regulation. Only *vis-à-vis* non-EU and non-EFTA states can the English courts still issue anti-suit injunctions in support of arbitration. Despite their utility as an effective tool to prohibit parallel court proceedings in disregard of a valid arbitration agreement, the offensive and intrusive nature of anti-suit injunctions strongly impedes their acceptance within the EU/EFTA. With regard to injunctions enjoining the claiming party from commencing or continuing arbitral proceedings, civil law countries again take a clear stance against issuing or recognising such orders. English courts may grant anti-arbitration injunctions, but do so only with great restraint, where the specific circumstances of a case justify such a drastic measure. Since anti-suit injunctions in support of arbitration and anti-arbitration injunctions are primarily directed against the claiming party, their enforcement is seriously aggravated, if not rendered impossible, if the claimant has neither his domicile nor any assets in the territory of the issuing court. Furthermore, where the courts before which enforcement of the orders is requested do not recognise such injunctions, as is, in principle, the case in civil law jurisdictions, the effectiveness of such injunctive relief is further impaired.

Bringing a direct action with a state court as to the arbitral tribunal's jurisdiction is explicitly provided for in the German and English statutory arbitration law. Due to the requirements of time and the high qualitative criteria to be fulfilled when seeking declaratory relief, such direct actions will remain the exception. Declarations by the courts that an arbitration agreement is not valid – if not appealed or after having been confirmed in appeal proceedings – have binding and preclusive effect on the arbitral tribunal dealing with claims covered by the same arbitration agreement. Under French arbitration law, the adoption of the negative effect of competence-competence leaves no room for a direct action on the arbitration's admissibility in the national courts. The Swiss statutory arbitration law, the SPILA, does not provide for a direct action as to the arbitration agreement's validity; the Swiss Federal Supreme Court has not granted declaratory relief either to date, but has held that such relief should be granted only on a very limited basis. A party intending to seek declaratory relief as to the arbitration agreement's invalidity under the German or English statutory arbitration law might nevertheless consider raising an action on the merits instead, provided that it is able to quantify its claim, since German and English courts can also review the arbitration agreement's validity if objections to their jurisdiction are raised based on the allegation of a valid arbitration agreement. With an action on the merits in German or English [page "178"](#) courts, the claimant will not have to fulfil the strict requirements pertaining to direct actions, the defendant will have to play an active role and object to the courts' jurisdiction by raising the arbitration defence. Any judgment rendered by the court benefits from the recognition and enforcement scheme of the Brussels Regulation and the Lugano Convention. But, of course, under

specific circumstances, seeking declaratory relief may be the only adequate avenue of recourse.

The principle that a matter finally and conclusively decided should not be retried between the same parties enjoys international acceptance. Even though the preclusive effect attributed to a final and conclusive arbitral award has not been explicitly incorporated into the statutory arbitration laws of the jurisdictions examined, these jurisdictions recognise that an arbitral award is equated with a court judgment as regards its *res judicata* effect. English case law accords broader preclusive effect to arbitral awards than civil law jurisdictions do, including issue estoppel, cause of action estoppel and likely also the abuse of process doctrine. A plea of the *res judicata* effect of a previous arbitral award filed in court proceedings on the same claim, based on the same legal grounds, and between the same parties should, as a rule, be heard in the jurisdictions examined.

§3.02. Pleas and Actions to Be Invoked before Arbitral Tribunals

Since an arbitral tribunal is competent to rule on its own jurisdiction, a party opposing arbitral proceedings may object to the tribunal's authority in different ways. The parties to arbitral proceedings are, to a considerable extent, equipped with the same preclusive or offensive means to challenge jurisdiction as were depicted above with respect to national courts. The requirements and the effectiveness of the jurisdictional pleas and actions to be raised before arbitral tribunals will be analysed in the chapters below.

[A]. Plea of Lack of Jurisdiction

Where a party opposing arbitration initiates court proceedings in parallel to the arbitration, this party must challenge the arbitral tribunal's jurisdiction. Otherwise, the defendant in the court proceedings may argue that the claimant (in the court proceedings) has submitted to the arbitrators' authority. The claimant in the court proceedings then runs the risk of being estopped from pleading in good faith in the same matter before national courts. This chapter therefore seeks to examine the requirements for raising a jurisdictional objection before the arbitral tribunal, as well as the effects of the arbitrators' decision on their jurisdiction.

The New York Convention is silent on the effect of a party's plea that the arbitral tribunal lacks jurisdiction, which is comprehensible given the Convention's scope of application. The European Convention, however, contains a plea as to the arbitrators' lack of jurisdiction based on the fact that the arbitration agreement was either [page "179"](#) non-existent or null and void or had lapsed, or based on the fact that an arbitrator has exceeded the terms of reference.⁽¹⁰⁵⁹⁾

Most institutional arbitration rules contain provisions as to the admissibility and the procedure involved with raising a plea that the arbitral tribunal lacks jurisdiction.⁽¹⁰⁶⁰⁾ If the parties have not agreed on the application of a set of institutional rules, the conditions for raising an objection to the tribunal's jurisdiction are provided in the national arbitration laws:

The UNCITRAL Model Law provides for a party's plea that the arbitral tribunal lacks jurisdiction to hear the case or that it exceeds the scope of its authority in Article 16(2). The German arbitration law has adopted Article 16(2) UNCITRAL Model Law in Article 1040(2) ZPO verbatim.

Article 1465 CPC implicitly encompasses the parties' right to contest the arbitral tribunal's jurisdiction by stating that only the arbitrators are competent to decide on pleas concerning the tribunal's jurisdictional powers. This provision also applies to international arbitration.⁽¹⁰⁶¹⁾

Under Swiss arbitration law, Article 186(2) SPILA establishes that a plea of lack of jurisdiction may be filed with the arbitral tribunal.

Under the English arbitration law, section 31 Arbitration Act determines that a party may raise an objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings or that the tribunal is exceeding its substantive jurisdiction during the course of the arbitral proceedings. It needs, however, to be borne in mind that the parties are free to confer the right to determine the arbitral tribunal's jurisdiction upon the national courts;⁽¹⁰⁶²⁾ any objections need then be raised before the national courts.

Furthermore, it is generally acknowledged that arbitrators have to examine their jurisdiction *ex officio* where it is doubtful that the subject matter is capable of being settled by arbitration, even if none of the parties objected to the tribunal's jurisdiction.⁽¹⁰⁶³⁾

[1]. Procedural Requirements as to the Time by Which the Plea Should Be Raised

Most arbitration laws provide for a certain time limit within which to raise the objection that the arbitral tribunal is not competent to hear the case in order not to be deemed to have waived the right to challenge jurisdiction for the rest of the proceedings.

Article V(1) European Convention obliges a party intending to raise a plea as to the arbitrators' jurisdiction based on an invalid arbitration

agreement to do so not later [page "180"](#) than the delivery of its statement of claim or defence relating to the substance of the dispute.

As regards the requirement to timely raise the plea of lack of the tribunal's jurisdiction, § 1040(2) ZPO fully adopts Article 16(2) UNCITRAL Model Law and stipulates that the objection shall be raised not later than the submission of the statement of defence. The time limit within which the jurisdictional objection is to be raised before the arbitral tribunal is overall shorter than the one for raising the arbitration defence before the court.⁽¹⁰⁶⁴⁾ The party's appointment of an arbitrator or its participation therein does not preclude it from raising a jurisdictional objection.⁽¹⁰⁶⁵⁾ The plea that the arbitral tribunal is exceeding the scope of its authority must be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.⁽¹⁰⁶⁶⁾ The arbitral tribunal, however, has, in either case, discretion to admit a later plea if it considers that the party has justified the delay.⁽¹⁰⁶⁷⁾ It is argued that, in light of the serious consequences, a failure to raise a jurisdictional objection in time will result in the exercise of the arbitral tribunal's discretion.⁽¹⁰⁶⁸⁾ No appeal is available against the tribunal's decision excusing the delay; if, however, the arbitral tribunal declares the objection to be out of time, the tribunal's decision is subject to review by national courts either in proceedings under § 1040(3) ZPO or at the challenge or enforcement stage based on § 1059(2)(1)(d) ZPO.⁽¹⁰⁶⁹⁾ The defendant who has not taken part in the arbitral proceedings at all is not precluded from raising the plea of lack of the arbitral tribunal's jurisdiction in later court proceedings.⁽¹⁰⁷⁰⁾

In French arbitration law, the point in time by which a plea that the arbitral tribunal lacks jurisdiction should be raised is not mentioned. It may, however, be derived from case law that a party that does not raise a plea of lack of jurisdiction before the arbitrators forfeits its right to challenge the award on this ground later on.⁽¹⁰⁷¹⁾

Article 186(2) SPILA holds that a plea of lack of jurisdiction must be raised prior to any defence on the merits. Where the defendant enters an unconditional appearance, without reservations concerning the tribunal's jurisdiction, such behaviour constitutes an irrevocable waiver of his right to contest the arbitrators' jurisdiction under Swiss law.⁽¹⁰⁷²⁾ As a result, such a waiver confers jurisdiction upon the arbitral tribunal. A party submitting to the jurisdiction of the tribunal is precluded from contesting the arbitrators' jurisdiction both before the tribunal and the Swiss Federal Supreme Court in setting aside proceedings, and it is also recognised that such a waiver [page "181"](#) bars the party from invoking the tribunal's lack of jurisdiction in subsequent recognition and enforcement proceedings.⁽¹⁰⁷³⁾ The parties to an arbitration and the tribunal are, however, entitled – within their discretion to determine the rules applicable to the proceedings – to specify the point until which the plea of lack of jurisdiction is still raised in time in accordance with the mandatory Article 186(2) SPILA.⁽¹⁰⁷⁴⁾ The defaulting party does not, in general, lose the right to contest the tribunal's jurisdiction, but if it fails to challenge an award on jurisdiction within the time limit provided by law it forfeits the right to plead the lack of jurisdiction.⁽¹⁰⁷⁵⁾ The defendant does not need to give reasons for a plea that the tribunal lacks jurisdiction, an objection in general terms is sufficient as long as it is possible to infer from it that the defendant is asking the arbitrators to decline jurisdiction.⁽¹⁰⁷⁶⁾

The point in time until which the plea of lack of jurisdiction must be raised in order not to risk an unconditional appearance before the arbitral tribunal is bifurcated under section 31 Arbitration Act: the objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised prior to or with the first step in the proceedings;⁽¹⁰⁷⁷⁾ any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond the tribunal's jurisdiction is raised.⁽¹⁰⁷⁸⁾ Any step taken before the notice of arbitration has been filed will not count as a step in the proceedings.⁽¹⁰⁷⁹⁾ It does not constitute a first step in the proceedings, either, if a party has appointed or participated in the appointment of an arbitrator.⁽¹⁰⁸⁰⁾ Furthermore, preliminary negotiations with the arbitral tribunal before any hearing has taken place have been considered not to constitute a step in the proceedings.⁽¹⁰⁸¹⁾ A distinct difference between the relevant points in time for raising the jurisdictional objection such as 'any step in the proceedings to answer the substantive claim' as provided for in section 9(3) Arbitration Act, and 'the first step in the proceedings to contest the merits' as worded under section 31(1) Arbitration Act cannot be identified, so it may be assumed that the interpretation is very similar.⁽¹⁰⁸²⁾ The arbitral tribunal may, however, allow an objection made after the relevant points in time, according to statutory law, if it considers the delay justified:⁽¹⁰⁸³⁾ the tribunal is likely to accept as a valid reason for a late objection that the grounds giving rise to the objection were not known and could not, with reasonable diligence, have been discovered earlier.⁽¹⁰⁸⁴⁾ The tribunal's decision on a belated objection under section 31(3) Arbitration Act constitutes a procedural [page "182"](#) matter and hence cannot be challenged, unless there is any irregularity in the making of this decision which affects the award. In such circumstances, a challenge under section 68 Arbitration Act might be available.⁽¹⁰⁸⁵⁾ Section 31 Arbitration Act must be read in conjunction with section 73(1) Arbitration Act, hence if a party

opposing the tribunal's jurisdiction does not raise the objection in time and takes a step to contest the merits of the case without any reservation, it will be prevented from challenging the arbitrators' authority later on, according to section 67 Arbitration Act, and from contesting enforcement of an award under section 66(3) Arbitration Act.⁽¹⁰⁸⁶⁾ Equally, the party's right to seek a preliminary ruling as to jurisdiction from the national court under section 32 Arbitration Act will be lost.⁽¹⁰⁸⁷⁾ A party that timely raised a jurisdictional objection in accordance with section 31(1) Arbitration Act at the outset of the arbitral proceedings, arguing that the arbitration agreement was not binding under the applicable law, and which later challenged the arbitral award on jurisdictional grounds, claiming that it was not a party to the agreement containing the arbitration clause, was considered to have raised the objection in time, but had nevertheless lost the right to challenge the award based on section 73(1) Arbitration Act due to the different jurisdictional grounds invoked.⁽¹⁰⁸⁸⁾ Hence, raising a jurisdictional objection in time is as crucial as pleading the grounds for a lack of jurisdiction consistently.

[2]. Effects of the Arbitral Tribunal's Decision on Jurisdiction

An arbitral tribunal, in principle, has three options for dealing with a party's objection to its jurisdiction: first, the arbitral tribunal can decide at the outset that it has no jurisdiction, which means the end of its mandate; second, the arbitrators can issue an interim award on jurisdiction; and third, the tribunal may deal with the jurisdictional objection in the final award if the issue of jurisdiction depends on facts that are closely connected with the merits of the dispute.⁽¹⁰⁸⁹⁾ Put differently, it is within the arbitral tribunal's discretion to decide on its jurisdiction before embarking on the merits, i.e. by a preliminary award, or to decide on a jurisdictional issue together with the merits. In general, arbitrators render a preliminary award deciding on their jurisdiction, not least in the interest of procedural efficiency.⁽¹⁰⁹⁰⁾ Where it is evident that the plea of lack of jurisdiction is unfounded and that the party raising the objection to the tribunal's jurisdiction does so in an attempt to delay the proceedings, the arbitrators may also consider rendering a single award on its jurisdiction and the merits of the case.⁽¹⁰⁹¹⁾ [page "183"](#) Furthermore, if the defendant who objects to the tribunal's jurisdiction fails or refuses to take part in the arbitral proceedings, the tribunal might consider it appropriate to proceed with the case and to deal with the jurisdictional issue together with the merits of the dispute.⁽¹⁰⁹²⁾ In the event that the arbitral tribunal intends to defer the decision until it renders the final award on the merits, it should consult with the parties and allow them to express a view on the procedure.⁽¹⁰⁹³⁾

Furthermore, court control available against a tribunal's decision on jurisdiction will also be elaborated below. The comments are bifurcated into decisions affirming the arbitral tribunal's jurisdiction, on the one hand, and decisions denying the arbitrators' authority, on the other hand. Furthermore, such a decision's effects after avenues of court review have been exhausted are also of interest. In general, national arbitration laws recognise that an arbitral award has res judicata effect immediately after being rendered;⁽¹⁰⁹⁴⁾ it will be analysed below what the preemptive effect of an award on the tribunal's jurisdiction is in the selected jurisdictions.

[a]. Form of the Decision on Jurisdiction

In Article V(3) European Convention, it is held that the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part, subject to any subsequent judicial control provided for under the lex fori.

Article 16(3) UNCITRAL Model Law provides that the arbitral tribunal may rule on an objection that it lacks jurisdiction either as a preliminary question or in an award on the merits.

§ 1040(3) ZPO holds that if an arbitral tribunal considers that it has jurisdiction, it rules on a plea that it lacks jurisdiction, in general, by means of a preliminary ruling. In this case, any party may request, within one month after having received written notice of that ruling, that the court decide the matter. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. The arbitral tribunal may, however, decide otherwise and deal with the jurisdictional issue no sooner than in its final award on the merits.⁽¹⁰⁹⁵⁾ This provision differs from Article 16(3) UNCITRAL Model Law insofar as it unmistakably formulates its preference for a preliminary award.⁽¹⁰⁹⁶⁾ The parties may not derogate from the system of judicial control of the tribunal's preliminary award or the final award on the merits by conferring competence upon the arbitrators to finally and conclusively decide on their jurisdiction.⁽¹⁰⁹⁷⁾

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Also under French arbitration law, the arbitral tribunal has, in principle, two possibilities for dealing with objections to its jurisdiction: either it renders a partial award on the jurisdictional issue, or it decides on its jurisdiction in the final award on the merits.⁽¹⁰⁹⁸⁾

Article 186(3) SPILA articulates a clear preference, stating that the

arbitral tribunal shall, as a rule, decide on its jurisdiction by preliminary award; the arbitrators may, nevertheless, decide on the jurisdictional issue in the final award if they deem it more appropriate.⁽¹⁰⁹⁹⁾ If the parties have mutually agreed and request that the arbitral tribunal rule on a plea of lack of jurisdiction either in form of a preliminary award, or the final award on the merits, there is no longer any scope for the discretion offered to the arbitrators under Article 186(3) SPILA.⁽¹¹⁰⁰⁾ The arbitral tribunal is competent to decide on its jurisdiction, even if an action on the same subject matter between the same parties is already pending before a national court, unless there are serious reasons to stay the proceedings.⁽¹¹⁰¹⁾ It is the subject of some debate whether the arbitrators' decision to stay the proceedings for serious reasons is open to annulment proceedings under Article 190(2)(b) SPILA, even though such a decision is not an arbitral award.⁽¹¹⁰²⁾ The Swiss Federal Supreme Court has held that decisions of a merely procedural nature, such as the tribunal's decision under Article 186(1*bis*) SPILA to stay the proceedings, are in principle not open to court control, unless the arbitrators impliedly also determine their jurisdiction when deciding on the stay of the proceedings.⁽¹¹⁰³⁾

Under English arbitration law, the arbitral tribunal may rule on its own jurisdiction either in a preliminary jurisdictional award or in the award on the merits.⁽¹¹⁰⁴⁾ Since the choice between the two forms of decisions is left to the arbitrators' discretion, the tribunal's decision on which course to follow will not be open to challenge itself, unless the decision is one that no reasonable tribunal could reach.⁽¹¹⁰⁵⁾ The arbitral tribunal's discretion as to the form of a decision on its own jurisdiction, however, is negated if the parties have agreed on the course that the tribunal should take; in this case the arbitrators are obliged to proceed as the parties wish.⁽¹¹⁰⁶⁾

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[b]. Effect of the Decision Admitting Jurisdiction

It is generally accepted in the European jurisdictions examined that a preliminary award on jurisdiction or a final award that also rules on jurisdiction is challengeable on jurisdictional grounds before the national courts of the country where the arbitral tribunal has its seat. The res judicata effect of such awards on national courts determining their jurisdiction is also, in principle, recognised.

[j]. Possibility of Court Control of an Arbitral Tribunal's Positive Decision on Jurisdiction

If the arbitral tribunal rules, as a preliminary question, that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the competent national court specified in Article 6 UNCITRAL Model Law to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.⁽¹¹⁰⁷⁾ If the arbitrators, however, choose to wait with their decision on jurisdiction until they are ready to render the final award on the merits, this award may consequently be challenged on jurisdictional grounds, either based on the alleged lack of a valid arbitration agreement according to Article 34(2)(a)(i) UNCITRAL Model Law, or based upon an award that allegedly exceeds the scope of the arbitration agreement pursuant to Article 34(2)(a)(iii) UNCITRAL Model Law. In summary, the arbitral tribunal has the choice of either rendering a preliminary ruling that is open to a final decision on the arbitral tribunal's jurisdiction by the court, or to postpone its decision until it delivers the arbitral award on the merits, in which case the national court will review the arbitral tribunal's jurisdiction if a party institutes setting aside proceedings.⁽¹¹⁰⁸⁾

If an arbitral tribunal regards the arbitration agreement as valid and hence affirms its jurisdiction in a preliminary award, any party has the right to challenge this ruling within one month after having received written notice of that ruling before the German Higher Regional Court.⁽¹¹⁰⁹⁾ The tribunal's preliminary award is the arbitrators' final assessment of their jurisdiction, but must not be regarded as a final award that is subject to challenge proceedings according to § 1059 ZPO. The preliminary award on the tribunal's jurisdiction is a decision sui generis which is subject to court control under § 1040(3) ZPO only before the Higher Regional Court whose decision will not be open for appeal.⁽¹¹¹⁰⁾ If the arbitral tribunal, however, determines its jurisdiction in the final award on the merits, the award is subject to court control at the challenge or enforcement stage according to §§ 1059 ff. ZPO, not pursuant to § 1040(3) ZPO.⁽¹¹¹¹⁾ An appeal may be launched before the German Federal Supreme Court against a judgment [page "186"](#) of the Higher Regional Court, but only on a point of law.⁽¹¹¹²⁾ An appeal on a point of law requires that the legal matter be of fundamental significance, or that an appeal be admissible for the development of the law or the need to secure uniform case law.⁽¹¹¹³⁾ Hence, the German ZPO provides for two levels of appeal against a final award confirming the arbitral tribunal's competence.

An arbitral award in international matters rendered by an arbitral tribunal with its seat in France – be it a partial award on jurisdiction or be the jurisdictional issue dealt with in the final award on the merits – may be challenged by "recours en annulation" on the grounds provided for in Article 1520 CPC (in connection with Article

1518 CPC): either on the ground that the arbitral tribunal has wrongly found in favour of or against its jurisdiction (Article 1520(1) CPC) or the arbitrators' decision is not compatible with the terms of their mandate (Article 1520(3) CPC).⁽¹¹¹⁴⁾ The court is to conduct a thorough examination of the factual and legal elements which allow assessing the scope of the arbitration agreement and the consequences on the arbitral tribunal's mandate.⁽¹¹¹⁵⁾ The challenge must be filed within one month of the notification of the award.⁽¹¹¹⁶⁾ An appeal may be raised before the French Supreme Court against the court's decision. The CPC, however, has, in the wake of the code's revision in 2011, introduced the possibility of waiving all setting aside proceedings against the award by express party agreement;⁽¹¹¹⁷⁾ if the parties have validly done so, the arbitral tribunal's jurisdictional determination will be final.⁽¹¹¹⁸⁾

Swiss arbitration law explicitly provides for recourse against an arbitral tribunal's decision admitting or denying jurisdiction in Article 190(3) in connection with Article 190(2)(a)/(b) SPILA. Recourse can be had by an appeal in civil matters within 30 days from notification of the award based on limited grounds, such as the lack of jurisdiction or the improper constitution of the arbitral tribunal.⁽¹¹¹⁹⁾ The Swiss Federal Supreme Court is entitled to examine the legal findings of the arbitrators with unfettered powers of review.⁽¹¹²⁰⁾ The Swiss Federal Supreme Court's decision cannot be challenged.⁽¹¹²¹⁾ If none of the parties has its domicile, habitual residence or business establishment in Switzerland and if the parties have waived, by express statement in advance, all setting aside proceedings against the award based on Article 192 SPILA, the ruling is final.⁽¹¹²²⁾ If such an award, however, violates fundamental principles of public policy, a [page "187"](#) challenge against the award must be available despite the parties' explicit waiver.⁽¹¹²³⁾ Furthermore, the ground that the arbitration agreement is invalid and that the tribunal hence lacked jurisdiction may still be relied on by parties to an arbitration for recognition and enforcement of the award in Switzerland.⁽¹¹²⁴⁾

A tribunal's ruling on its jurisdiction may be challenged by any available arbitral process of appeal or review.⁽¹¹²⁵⁾ Once arbitrators have exercised their power to determine their jurisdiction, section 67 Arbitration Act allows a de novo judicial review of the arbitral award.⁽¹¹²⁶⁾ Section 67 Arbitration Act applies to the challenge of both awards as to jurisdiction by the tribunal, and to the final award on the merits.⁽¹¹²⁷⁾ The applicant must first have exhausted any available arbitral process of appeal or review and any available recourse under section 57 Arbitration Act (i.e. correction of the award or an additional award) before bringing an application to set the award aside⁽¹¹²⁸⁾ and this application must be made within 28 days of the date of the award.⁽¹¹²⁹⁾ An appeal from the court decision to the Court of Appeal is available on the condition that the Court of First Instance, i.e. the judge of the High Court, gives leave to appeal.⁽¹¹³⁰⁾ If a party opposing the tribunal's jurisdiction fails to timely challenge the tribunal's award affirming that it has substantive jurisdiction, this party is precluded from objecting to the tribunal's substantive jurisdiction later on in recognition and enforcement proceedings.⁽¹¹³¹⁾ The right to challenge an arbitral award on grounds of substantive jurisdiction is mandatory.⁽¹¹³²⁾ A rather recent decision in England, however, appears to allow the parties to empower the tribunal to decide with binding effect on the courts.⁽¹¹³³⁾ Consequently, a challenge under section 67 Arbitration Act will fail if it is shown that the award is made on the agreement of the parties that the arbitral tribunal should rule on jurisdiction.⁽¹¹³⁴⁾

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[ii]. Res Judicata Effect of an Arbitral Tribunal's Positive Decision on Jurisdiction

If arbitrators affirm their authority in a preliminary award and this award is not challenged or the national court approves the tribunal's decision, the jurisdiction of the tribunal can no longer be disputed and the parties are barred from challenging the final award resulting from the arbitral proceedings on this ground.⁽¹¹³⁵⁾ Foreign arbitral awards are also capable of having res judicata effect on German courts provided that they have become binding according to the procedural law applicable to the arbitral award and assuming that they are capable of recognition under the New York Convention.⁽¹¹³⁶⁾ There are different constellations of overlapping jurisdiction of an arbitral tribunal and a national court reviewing the arbitrators' decision on jurisdiction:

- The opinions in legal doctrine diverge as to what happens to an award that is given, after the court has, upon appeal against the tribunal's preliminary award, finally declared the arbitrators to be indeed incompetent to hear the case: some commentators argue that such an award is null and void,⁽¹¹³⁷⁾ and others are of the opinion that the award is challengeable in setting aside proceedings.⁽¹¹³⁸⁾
- In the event that an arbitral award is rendered before the court's judgment approving the jurisdictional objection has become final (what is possible due to § 1040(3) sentence 3 ZPO), the award on the merits becomes null and void with the court judgment becoming legally binding.⁽¹¹³⁹⁾ For the sake of legal certainty, however, it seems advisable to challenge such an award in any

case.⁽¹¹⁴⁰⁾ The expenses of such annulment proceedings should not be too high, since the national court's judgment under § 1040(3) ZPO will be binding on the court deciding on the challenge.⁽¹¹⁴¹⁾

- If the arbitral tribunal renders the final award before the national court has adjudicated on the appeal under § 1040(3) ZPO, and the national court considers the arbitrators not competent to hear the case, it has to stay the court proceedings to allow the party to commence setting aside proceedings.⁽¹¹⁴²⁾

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Should the arbitral tribunal have decided to deal with the jurisdictional issue in the final award, the preclusive effect of such an award is put on an equal footing with the effect of a court judgment according to § 1055 ZPO; hence the final award binds the German courts if a challenge is not successful.⁽¹¹⁴³⁾

Article 1484(1) CPC holds that the arbitral award is final and binding the moment it is rendered; this stipulation of the award's res judicata effect also applies to international arbitration by way of reference in Article 1506(4) CPC.⁽¹¹⁴⁴⁾ Hence, the parties are precluded from instituting proceedings between them based on the same facts before a national court; the French courts are therefore bound to dismiss proceedings brought in violation of an arbitral award confirming jurisdiction.⁽¹¹⁴⁵⁾

Article 190(1) SPILA also states that once the award has been notified it is final, which means that it is both res judicata and enforceable.⁽¹¹⁴⁶⁾ An award by which an arbitral tribunal with its seat in Switzerland accepts jurisdiction must be recognised by any Swiss court seised at a later date with the same matter between the same parties if the Swiss Federal Supreme Court has approved the tribunal's authority in challenge proceedings or if no challenge has been filed in time.⁽¹¹⁴⁷⁾ An award accepting jurisdiction made by an arbitral tribunal with its seat abroad also has res judicata effect if the award can be recognised in Switzerland under the New York Convention.⁽¹¹⁴⁸⁾ Res judicata effect is attributed to the final award on the merits of an arbitral tribunal having its seat in Switzerland to the same extent as to a court judgment; the final award is hence binding on the courts.⁽¹¹⁴⁹⁾

An award on jurisdiction by the arbitrators is a full award in every sense.⁽¹¹⁵⁰⁾ Under English arbitration law, subject to any party agreement to the contrary, an award made by the tribunal pursuant to an arbitration agreement is final and binding, which implies that it has res judicata effect between the parties.⁽¹¹⁵¹⁾ English case law further explicitly holds that an arbitral award can justify a plea of cause of action and issue estoppel.⁽¹¹⁵²⁾ The Supreme Court, however, held in the *Dallah* ruling that an arbitral tribunal's decision as to the existence of its own jurisdiction could never bind a party [page "190"](#) which had not submitted the question of jurisdiction to the arbitral tribunal.⁽¹¹⁵³⁾ This case law shows that a foreign award has res judicata effect only provided that the requirements set out in Article V New York Convention are met; in the cited case the party against which enforcement was sought was found not to be a party to the arbitration agreement.

[c]. Effect of the Decision Denying Jurisdiction

There is no general consensus among the jurisdictions examined that negative jurisdictional decisions by the arbitral tribunal should be defined as arbitral awards and, as a logical consequence, be open to setting aside proceedings before national courts.

[j]. Possibility of Court Control of an Arbitral Tribunal's Negative Decision on Jurisdiction

Article 16(3) UNCITRAL Model Law only deals with affirmative rulings where the arbitral tribunal concludes that it has jurisdiction. Where the arbitral tribunal denies jurisdiction, the competent national court must be approached to adjudicate on the matter.⁽¹¹⁵⁴⁾ Likewise, the jurisdictional grounds for challenging an arbitral award under Article 34 UNCITRAL Model Law do not apply to negative jurisdictional determinations.⁽¹¹⁵⁵⁾ The missing consideration in the UNCITRAL Model Law of how to handle negative jurisdictional decisions of an arbitral tribunal might cause substantial injustice to a party intending to enforce the arbitration agreement: if the arbitral tribunal has denied jurisdiction and setting aside proceedings are not available under the law in the country where the arbitral tribunal has its seat, either because the tribunal's negative jurisdictional decision is not qualified as an arbitral award, but merely as an order that cannot be challenged under Article 34 UNCITRAL Model Law, or that the grounds for challenging an award do not capture the case where an arbitral tribunal incorrectly denies jurisdiction, the parties are bound to have the dispute resolved by national courts.

A German judgment on the challenge of an arbitral tribunal's decision denying jurisdiction has led to the discussion of basic questions on how to handle such negative decisions and has also proffered criticism. The judgment and some of the comments made in its respect will therefore be reviewed in detail.

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The Federal Supreme Court in Germany, a jurisdiction that has adopted the UNCITRAL Model Law, concluded in a case regarding the challenge of an arbitral tribunal's negative decision on jurisdiction that – even though the decision was qualified as an arbitral award – there were no grounds under § 1059(2) ZPO (being the equivalent of Article 34 UNCITRAL Model Law) for annulling the award because it reached an incorrect negative jurisdictional determination.⁽¹¹⁵⁶⁾ § 1059(2)(1)(a) ZPO was held not to be applicable, since in the case at hand it was not argued that a valid arbitration agreement was missing, but, by contrast, that there was a valid arbitration agreement; reliance on § 1059(2)(1)(b)/(d) ZPO was also denied, since the claimant did not allege defects in the proceedings, but rather in the decision itself. § 1059(2)(1)(c) ZPO defining ultra petita decisions of the arbitral tribunal as a ground for setting aside the arbitral award was not considered by the German Federal Supreme Court, since this ground was not directed at the arbitral tribunal denying jurisdiction altogether.⁽¹¹⁵⁷⁾ The German Federal Supreme Court concluded that a case where an arbitral tribunal incorrectly denies jurisdiction cannot be compared to the incorrect assumption of jurisdiction, since in the former case the parties could still seek legal protection by bringing their claims before the national courts.⁽¹¹⁵⁸⁾

Three findings by the German Federal Supreme Court are to be welcomed:⁽¹¹⁵⁹⁾

- the arbitral tribunal was held competent to decide on costs even if it denied jurisdiction on the merits;⁽¹¹⁶⁰⁾
- the arbitral tribunal's decision declining jurisdiction was qualified as an arbitral award;⁽¹¹⁶¹⁾
- and that an action to set aside such an arbitral award is generally admissible.

The German Federal Supreme Court's decision as to the merits of such an application, however, gives rise to specific comments: the German Federal Supreme Court adopted [page "192"](#) a literal and restrictive interpretation of the grounds for setting aside an arbitral award in § 1059(2) ZPO and hence came to the conclusion that the incorrect denial of jurisdiction fulfilled none of them.⁽¹¹⁶²⁾ This interpretation was not the only interpretation available: the grounds for setting aside an arbitral award set out in Article 34 UNCITRAL Model Law are not carved in stone, but can be expanded in national arbitration laws and the respective case law.⁽¹¹⁶³⁾ Furthermore, Münch argues that the lack of a specific ground for challenging the arbitral tribunal's decision denying jurisdiction could have been cured by analogous application of the core principle of several existing grounds (such as § 1059(2)(1)(a)/(c) ZPO or § 1059(2)(2)(a) ZPO).⁽¹¹⁶⁴⁾ Such a broad and generous interpretation of the grounds for challenging an arbitral award denying jurisdiction seems necessary also to address cases where the arbitral tribunal incorrectly declares itself competent or incompetent.⁽¹¹⁶⁵⁾ Furthermore, Born holds as a criticism to this judgment that, even though the review of negative jurisdictional decisions is not explicitly provided for in the UNCITRAL Model Law, such review can be accommodated by the Model Law by way of Article 34(2)(a)(iv) UNCITRAL Model Law, since a wrongful refusal to give any effect to an arbitration agreement should not be treated less favourably than a refusal to apply the arbitral procedure as agreed to by the parties.⁽¹¹⁶⁶⁾ Under the premise that the arbitral tribunal's decision on its own jurisdiction is not final, but always subject to the national court's review, the same control mechanism as for the arbitral tribunal's positive determination of jurisdiction should also apply to negative decisions on jurisdiction by the arbitral tribunal.

If the German Federal Supreme Court's decision is developed further, it blocks the claimant's enforcement of the arbitration agreement entirely: firstly, the claimant's alternative relief, seeking a declaration that the arbitral tribunal was competent to hear the case based on § 1032(2) ZPO, would be dismissed, because the arbitral tribunal – although denying its jurisdiction – had already been constituted; secondly, the party insisting on arbitration could no longer invoke the *exceptio arbitri* before a German court based on § 1032(1) ZPO due to the negative jurisdictional award's preemptive effect according to § 1055 ZPO.⁽¹¹⁶⁷⁾ The German Federal Supreme Court, however, does not seem to be troubled by this consequence, since it held that the parties' rights are sufficiently protected, given that they can still refer to their 'lawful' judge. It is, however, incomprehensible how the national court can be the lawful judge if the parties have agreed to have their dispute referred to arbitration. The lawful judge is then the arbitrator and not the national courts.⁽¹¹⁶⁸⁾ The German Federal Supreme [page "193"](#) Court's finding in this respect seems to confirm the suspicion that the national judicial system is still assumed to be superior to arbitration.⁽¹¹⁶⁹⁾

As regards the qualification of a negative jurisdictional award under French law, it already seemed under the 1981 version of the CPC that negative jurisdictional decisions by the arbitral tribunal were considered to be arbitral awards and hence could be challenged.⁽¹¹⁷⁰⁾ To treat negative jurisdictional decisions differently would mean granting different guarantees to the parties.⁽¹¹⁷¹⁾ With Article 1520(1) CPC expressly stating that setting aside proceedings are available if the arbitral tribunal has incorrectly declared itself competent or not competent to hear the case, it has been made clear beyond doubt that negative jurisdictional determinations by the arbitral tribunal may be challenged under French law.⁽¹¹⁷²⁾

Swiss arbitration law explicitly provides for recourse against an arbitral tribunal's decision denying jurisdiction in Article 190(3) in connection with Article 190(2)(b) SPILA by an appeal in civil matters within 30 days from notification of the award.⁽¹¹⁷³⁾ This provision further clarifies that a tribunal's decision denying jurisdiction must be rendered in the form of a final arbitral award;⁽¹¹⁷⁴⁾ this award hence must also allocate the costs of the proceedings and the party compensation between the parties.⁽¹¹⁷⁵⁾ The Swiss Federal Supreme Court's decision is final and cannot be challenged by the parties.⁽¹¹⁷⁶⁾ Swiss case law has held that, if the Swiss Federal Supreme Court affirms the tribunal's jurisdiction upon review of the tribunal's preliminary award denying its jurisdiction, the tribunal's jurisdictional decision is set aside and the arbitral tribunal formerly competent is to resume its jurisdiction and to decide on the merits of the case.⁽¹¹⁷⁷⁾

With regard to decisions in which the arbitral tribunal concludes that it lacks jurisdiction under English arbitration law, the legal doctrine holds that any such decision should be rendered in the form of an arbitral award and can hence be reviewed under section 67 Arbitration Act.⁽¹¹⁷⁸⁾

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[ii]. Res Judicata Effect of an Arbitral Tribunal's Negative Decision on Jurisdiction

Even though German case law has attributed an arbitral tribunal's decision denying jurisdiction the qualities of an arbitral award and concluded that setting aside proceedings are, in principle, admissible against such a decision, it was held that none of the grounds available to set aside an arbitral award is applicable to the award denying the tribunal's jurisdiction. It is held that, in such situations, the national courts are again competent to hear the case, since the arbitral proceedings have become incapable of being performed based on the ineffective arbitration agreement.⁽¹¹⁷⁹⁾ One could also conclude that the negative jurisdictional arbitral award becomes final and as such is binding on the national courts subsequently seised in the same matter by virtue of § 1055 ZPO.⁽¹¹⁸⁰⁾

Since negative jurisdictional decisions by arbitral tribunals are also qualified as arbitral awards which become binding as soon as they are rendered according to Article 1484(1) CPC,⁽¹¹⁸¹⁾ the national courts are bound also to the tribunal's negative assessment of its jurisdiction.⁽¹¹⁸²⁾ Hence, if confronted with an arbitration defence – when the arbitral tribunal has already held itself incompetent by award – the French courts need to declare the arbitration defence inadmissible by virtue of the res judicata effect of the tribunal's negative jurisdictional award.⁽¹¹⁸³⁾

An award declining jurisdiction by an arbitral tribunal with its seat in Switzerland is binding upon any Swiss court seised at a later date with the same subject matter between the same parties.⁽¹¹⁸⁴⁾ The same applies to a foreign arbitral award declining jurisdiction, provided that such an award is capable of recognition under the New York Convention.⁽¹¹⁸⁵⁾

No difference in treatment is made between positive and negative jurisdictional decisions by arbitral tribunals for the purposes of challenging these awards. It may therefore be assumed that an arbitral award denying that the tribunal has jurisdiction is not treated differently from an award confirming jurisdiction as regards its preclusive effect under English arbitration law. Consequently, an award denying jurisdiction is also attributed cause of action and issue estoppel,⁽¹¹⁸⁶⁾ and hence precludes any court decision to the contrary.

[3]. Comparative Conclusion

It is generally acknowledged that arbitral tribunals are competent to decide on their own jurisdiction. Except in cases where there are obstacles to the dispute's [page "195"](#) arbitrability, the arbitral tribunal will not consider its jurisdiction on its own initiative, with the consequence that the party intending to contest the tribunal's jurisdiction must object in clear terms in order not to waive its right to challenge the arbitrators' authority during the proceedings and in subsequent setting aside or enforcement proceedings. Special attention must be paid to the time requirement for raising such plea of lack of jurisdiction, since the specific point in time is defined differently in national arbitration laws, and the legal consequence of the failure to raise the plea in time, in principle, is the waiver of the right to challenge jurisdiction.

As regards the remedies that can be taken against the arbitral tribunal's decisions on its jurisdiction, the jurisdictions reviewed, in principle, all recognise that the positive jurisdictional decision by the arbitral tribunal is qualified as an arbitral award and may therefore be challenged for lack of jurisdiction before the national courts. Under German law, however, decisions of the arbitral tribunal denying its jurisdiction are qualified as arbitral awards, but are not challengeable, since none of the grounds for setting arbitral awards aside is available where the arbitral tribunal wrongly denies jurisdiction. It is submitted that negative jurisdictional decisions by the arbitral tribunal should likewise be considered as arbitral awards against which challenge proceedings before national courts are

available, in order not to deny the right to legal review of the tribunal's decision. Sanders takes the same position and suggests that negative jurisdictional decisions should be mentioned on par with affirmative ones in Article 16(3) UNCITRAL Model Law.⁽¹¹⁸⁷⁾

Where the arbitral tribunal has given a negative award on jurisdiction based on the invalidity of the arbitration agreement or the scope thereof, the court before which the plea of a valid arbitration agreement has been invoked in proceedings on the merits must reject the arbitration defence. The national court must not contradict the tribunal's decision, but it is free to rule on its own jurisdiction and thus does not need to declare itself automatically competent.⁽¹¹⁸⁸⁾ The decision on jurisdiction by an arbitral tribunal seated in another jurisdiction than the courts dealing with the merits of a dispute must further be capable of being recognised in accordance with the requirements provided for in the New York Convention, before national courts will recognise the jurisdictional award's preemptive effect.⁽¹¹⁸⁹⁾ An arbitral award on the tribunal's jurisdiction which does not conform to the conditions set out in Article V New York Convention should not be attributed any binding effect on national courts.

The analysis of the plea of lack of jurisdiction before the arbitral tribunal produces different results for national courts, arbitrators and the parties to a jurisdictional objection; the conclusions presented below primarily concern the interaction between national courts and arbitral tribunals.

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[a]. Conclusions from the Perspective of National Courts

If a plea of lack of jurisdiction is pending before the arbitral tribunal, and either of the parties subsequently initiates court proceedings with the same relief based on the same legal grounds and between the same parties as in the arbitral proceedings, there is no clear instruction on how the national court is to react. If the national court does not refer the parties to arbitration, as would normally be the case if the defendant raises the arbitration defence and the arbitration agreement is null and void, inoperative or incapable of being performed, it should, in such a situation, consider staying the proceedings until after the arbitral tribunal has rendered a decision on its jurisdiction or until after the remedies against such a decision have been exhausted or the time limits for such remedies have expired.⁽¹¹⁹⁰⁾ Such a stay of court proceedings is, in general, not expected to severely delay the party's right to a judicial assessment of the jurisdictional issue, since arbitral tribunals having the mandate to efficiently solve the dispute brought before them will, in principle, not take long to determine their jurisdiction. To stay the court proceedings also makes sense in view of the res judicata effect of the arbitral tribunal's final determination of its jurisdiction binding the national courts. The national court, however, should not apply such a stay as a rule of litispendence, where the arbitral tribunal had already been seised when the court proceedings were initiated, but rather decide on a stay of the proceedings on a case-by-case basis, taking into account the circumstances of the case. If the national court has, for instance, taken note of the arbitral tribunal's intention not to deal with the jurisdictional objection until it adjudicates on the merits in the final award, the national court might consider nevertheless continuing with its proceedings. It is essential that the national court integrates in its appraisal of which course it might best take considerations as to a possible 'race for a judgment' provoked by the parties and the resulting risk that the decisions rendered by the adjudicatory players might not be compatible.

[b]. Conclusions from the Arbitrators' View

As already pointed out, there are certain grounds that justify a tribunal's adjudication on the jurisdictional objection at the end of the arbitral proceedings in the final award, such as the obvious dilatory and disruptive intent of a party or the close connection between the jurisdictional issue and the merits of the case. Even where national arbitration laws do not explicitly state so, an arbitral tribunal should, for the benefit of the smooth and efficient course of the arbitration, as a rule consider rendering a preliminary award on jurisdiction. If the arbitral tribunal, however, identifies urgent grounds to postpone the decision on the jurisdictional objection to the final award, it should at least inform the parties thereof and invite their comments.

If an arbitral tribunal has rendered a preliminary award on its jurisdiction based on an objection made by a party, any party may refer this award to national courts for [page "197"](#) review. Some arbitration laws expressly provide for the possibility of continuing the arbitral proceedings and even rendering an award while court proceedings as to the admissibility of the jurisdictional objection before the tribunal are pending, such as expressly in Article 16(3) UNCITRAL Model Law and § 1040(3) ZPO. It may, as a matter of good arbitral practice, often be advisable for the arbitral tribunal to consider staying the arbitral proceedings until the court has decided on an application regarding the jurisdictional objection to avoid unnecessary expenses and also the risk of an arbitral award that will not be enforceable.⁽¹¹⁹¹⁾ If a national court allows the action and hence rejects the arbitral tribunal's jurisdiction, any award to be rendered by the arbitral tribunal can no longer be enforced before the national courts at the seat of arbitration based on the court judgment's preemptive effect. To continue with the arbitration in such

a situation could also jeopardise the smooth and amicable functioning of the arbitral process, since an arbitrator not willing to stay the proceedings while a challenge to his jurisdiction is pending before the courts could lose his appearance of neutrality.⁽¹¹⁹²⁾

Where an arbitrator, however, has certain knowledge that the decision by the court cannot be expected promptly or where he is convinced that the jurisdictional challenge is unfounded and is only being made in bad faith to disrupt the proceedings, he should consider continuing with the arbitration before the court has issued its ruling.⁽¹¹⁹³⁾ In any case, arbitrators should consult with the parties before they decide on whether to stay the proceedings for the duration of the challenge proceedings before the national court.

[c]. Conclusions from the Parties' View

A party which is convinced that the arbitral tribunal is not competent to hear the case, because, for instance, the party never agreed to arbitration or the arbitration agreement suffers from a flaw that cannot be remedied, should object to the arbitrators' authority as soon as possible in the arbitral proceedings. From a procedural view, the objecting party is recommended to pay due attention to the following aspects of a plea of lack of jurisdiction.

Firstly, the party should raise the matter of jurisdiction at the earliest possible stage in the arbitral proceedings. It should make itself fully acquainted with the governing arbitration law's definition of the point in time by which the objection must be raised in order not to waive the right to challenge the tribunal's jurisdiction. The point in time specified as the first or any step in the proceedings might materialise prior to the submission of the statement of defence (with special reference to section 31(1) Arbitration Act). In addition to the time requirement, the party should take care to express the objection in clear and unmistakable terms.

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Secondly, the party should explicitly ask for the determination of the objection in the form of a preliminary award,⁽¹¹⁹⁴⁾ unless there is some urgent reason that speaks in favour of the decision on this issue in the final award. The party's explicit request for a preliminary award is vital, since most of the national arbitration laws examined above confer discretion upon the arbitral tribunal to choose between adjudication in a preliminary or in the final award without any clear guidance as to which to prefer under certain circumstances. If the party opposing the tribunal's jurisdiction has failed to specify in which form the arbitrators' decision is requested to be rendered, the party insisting on arbitration might consider filing unsolicited comments in this respect; that is to say, it is also in the interest of the party opposing the plea of lack of jurisdiction that this objection be dealt with as efficiently as possible at the outset of the proceedings.

Thirdly, if the arbitral tribunal confirms that it has jurisdiction, the defendant should, in addition to initiating appeal proceedings before the competent national court (and subsequently resisting attempts to obtain recognition or enforcement of the award), continue to participate in the arbitration under the express and unmistakable reservation of his position to the matter of jurisdiction.⁽¹¹⁹⁵⁾ Needless to say, the party opposing the tribunal's jurisdiction should refrain from any contradictory behaviour. Where, for instance, the defendant raises an objection before the arbitral tribunal, even though it had previously raised the arbitration defence in court proceedings, its jurisdictional objection before the arbitrators will most probably be rejected since it is made in violation of good faith.⁽¹¹⁹⁶⁾

[B]. Exceptio Litis Pendentis

Where arbitral and court proceedings on the same subject matter and between the same parties are pending in parallel, it needs to be analysed whether the recalcitrant party could successfully raise the plea of litispendence before the arbitral tribunal, if the national court was seised first.

Firstly, it will be considered whether it is appropriate at all to apply the principle of *lis pendens* – originally developed in state court litigation – to arbitral proceedings; secondly, the soft law rules offering guidance to arbitrators on how to deal with parallel proceedings before a national court first seised will be depicted; thirdly, the stance of national arbitration laws towards having the *lis pendens* rule applied by an arbitral tribunal will be examined.

[1]. Appropriateness of the Application of the *Lis Pendens* Doctrine in the Context of Arbitration

Criticism has been made of the *lis alibi pendens* doctrine as evolved in civil litigation: the *lis pendens* rule is said to encourage 'races to the courthouse' and hence to promote page "199" preemptive strikes in the form of bad faith proceedings (i.e. 'torpedo actions'), in which a party seeks negative declaratory relief before the preferred competent state court in order to foreclose any other competent court's jurisdiction. The *lis pendens* doctrine is further held not to be intended primarily to benefit the individual litigant, but to serve a system of legal certainty and predictability in a certain defined area.⁽¹¹⁹⁷⁾ The phenomenon of the 'race to the courthouse' is also the reason why the *lis pendens* rule does not act as a disincentive to

the commencement of parallel proceedings, but rather as an incentive.⁽¹¹⁹⁸⁾ Furthermore, the lis pendens rule is considered to be too narrow in scope, since the requirements that the subject matter and the parties need to be identical are generally interpreted rather restrictively,⁽¹¹⁹⁹⁾ so only in the rare instance where there are proceedings involving identical claims and parties could the doctrine of lis pendens play a role at all.⁽¹²⁰⁰⁾ The merit of the lis pendens rule, however, is believed to be its simple application and its mandatory nature, whereby it assists in avoiding the occurrence of parallel proceedings, although not permitting a discretionary stay of proceedings based on the particular circumstances of a specific case (as foreseen by the common law based forum non conveniens doctrine).⁽¹²⁰¹⁾

In addition to the weaknesses of the lis pendens rule just mentioned, there are certain concerns with special regard to the nature of arbitration, if this principle were applicable to proceedings pending in parallel before a national court and an arbitral tribunal: there is, of course, the issue of preserving party autonomy as a sacred principle in arbitration. Even if the mechanical approach of the lis pendens rule were to order the arbitral tribunal seised second to stay its proceedings until the national court seised first has decided on its jurisdiction, this would not prevent the parties from settling the dispute between them by arbitration if the national courts applied Article II(3) New York Convention. There is, however, no uniform application of Article II(3) New York Convention,⁽¹²⁰²⁾ so if the jurisdiction where the parallel judicial proceedings were initiated is not a contracting state of the New York Convention, or where the national courts do not take an arbitration-friendly stance and hence interpret the formal and substantive requirements of a valid arbitration agreement in an overly rigid manner, the lis pendens rule might in fact cause unjust results and undermine the party's original choice of arbitration.

Furthermore, if the principle of lis pendens is applied to parallel proceedings before a national court and an arbitral tribunal in exactly the same manner as it is construed in parallel litigation in civil law countries, a further principle of international arbitration would be called into question: where a national court is the court seised first, an arbitral tribunal seised second must decline jurisdiction if the national court confirms its jurisdiction. Such an automatism contradicts the competence-competence of the arbitral tribunal. It is recognised that an arbitral tribunal's determination of its jurisdiction is subject to final determination by national courts, but the fact that the [page "200"](#) arbitral tribunal would have to decline jurisdiction without being given a chance to decide on its own jurisdiction appears to be in stark contrast to the substance of the competence-competence principle. Could Article II(3) New York Convention act as a safeguard to have the arbitrators' competence-competence restored? The lack of a uniform interpretation of Article II(3) New York Convention among the contracting states leads to an answer in the negative. As already mentioned, Article II(3) New York Convention leaves wide discretion to the national courts as regards the definition of invalid arbitration agreements. Hence, the party raising the plea of a valid arbitration agreement in court proceedings might, depending on the national court's stance towards arbitration – and the consequent interpretation of Article II(3) New York Convention – be deprived of its choice to have any dispute settled by arbitration, since an arbitral tribunal seised second would have to decline jurisdiction if a national court negates the existence of a valid arbitration agreement and hence declares itself competent.

In addition, the application of the lis pendens rule to parallel proceedings before a national court and an arbitral tribunal necessitates a substantial amount of trust between these two adjudicatory systems, which has not uniformly developed to the same extent throughout different jurisdictions.⁽¹²⁰³⁾

This analysis shows that there are several arguments against adopting the lis pendens rule in the arbitration context, among which the risk to core principles in arbitration, such as party autonomy and the arbitrators' competence-competence, weighs most heavily. It will be examined below how the international arbitration community reacts to this criticism and how the statutory arbitration laws and the arbitrators themselves deal with the lis pendens argument.

[2]. ILA Recommendations on Lis Pendens

Since the role that lis pendens plays in international commercial arbitration has not been clear for a considerable period of time, the International Law Association ('ILA') has conducted a survey on the significance of the lis pendens doctrine in this field and has formulated recommendations on how to deal with parallel proceedings. The ILA recommendations on lis pendens are addressed specifically to arbitrators and they seek to reconcile the need for efficiency in conducting arbitral proceedings, the need for finality of arbitral awards, and also the need for preservation of party autonomy in arbitral proceedings.⁽¹²⁰⁴⁾ These recommendations seem to offer useful assistance to arbitrators dealing with parallel court proceedings (although it is not clear how well-received they are in practice), but they do not represent hard law, i.e. the discretion to apply them lies with the arbitrators.

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With regard to parallel proceedings pending before a national court and an arbitral tribunal simultaneously, the ILA held, in their first

recommendation, that an arbitral tribunal that considers itself competent (in accordance with a prima facie review of the arbitration agreement and in application of the principle of competence-competence) should proceed with the arbitration regardless of any other proceedings pending before a national court 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.⁽¹²⁰⁵⁾ This recommendation is, however, put into perspective by the subsequent recommendation that advises the arbitral tribunal, for the sake of smooth conduct of the arbitration and also to properly fulfil its mandate to render an enforceable final award, to take into account the following considerations when determining its jurisdiction with parallel court proceedings:⁽¹²⁰⁶⁾

- Recommendation 3: where parallel proceedings are pending before a court of the jurisdiction at the place of arbitration, the arbitral tribunal should consider the law at the place of arbitration (*lex arbitri*), in particular in so far as the *lex arbitri* might contain provisions rendering the setting aside of the arbitral award possible in the event of a conflict between the arbitral award and the court judgment.⁽¹²⁰⁷⁾
- Recommendation 4: where parallel proceedings are pending before a court other than of the jurisdiction at the place of arbitration, the arbitral tribunal should proceed with the arbitration and determine its own jurisdiction in accordance with the principles of competence-competence, unless the party initiating the arbitration has effectively waived its right to rely on the arbitration agreement or save in other exceptional circumstances.⁽¹²⁰⁸⁾ This recommendation seems to be based on the assumption that the parallel judicial proceedings may take a considerable time, in general longer than arbitral proceedings, and that any judgment by a court outside the jurisdiction where the arbitral tribunal has its seat may not be recognised in the jurisdiction of the place of arbitration.⁽¹²⁰⁹⁾

In Recommendation 6, the ILA makes reference to a guideline in favour of sound and cautious case management by the arbitral tribunal: to avoid the negative effects parallel proceedings potentially have, the arbitral tribunal may grant a stay of the arbitral proceedings, even if the case constellation does not meet the traditional requirements for *lis pendens* (i.e. regardless of whether the parallel court proceedings are between the same parties and relating to the same subject matter), under the following cumulative conditions:⁽¹²¹⁰⁾ [page "202"](#)

- that such a stay is compatible with the applicable law;
- that the outcome of the parallel court proceedings is material to the outcome of the arbitral proceedings; and
- that such a stay is without prejudice to the party opposing the stay.

In the final Recommendation 7, the ILA clarifies that the *lis pendens* doctrine is generally not considered to form part of public policy and consequently, the arbitral tribunal is not obliged to consider *lis pendens* of its own motion.⁽¹²¹¹⁾

In conclusion, the ILA recommendations are exclusively addressed to arbitral tribunals to give them guidance as to when they should stay or terminate arbitral proceedings based on an objection of *lis pendens* so as to avoid both conflicting decisions and the duplication of costs, and to protect parties and arbitral tribunals from abusive tactics.⁽¹²¹²⁾ The recommendations' corollary with regard to a conflict of jurisdiction between a national court and an arbitral tribunal is that an issue of *lis pendens* between national courts and arbitral tribunals, in fact, for the latter, amounts to a matter of competence-competence.⁽¹²¹³⁾ In other words, the arbitral tribunal should, even if one party to the arbitral proceedings has raised the objection of *lis pendens*, in the first place decide on its own jurisdiction, in particular, taking into account the risk of annulment of the prospective arbitral award. This applies with even more force if the competent national court lies in the same jurisdiction as the place of arbitration.⁽¹²¹⁴⁾

[3]. Effectiveness of the Plea of *Litispence*

It will be elaborated first whether a plea of *litispence* to be raised before the arbitral tribunal has been established in the German, French and English statutory arbitration laws or these jurisdictions' court practice. The Swiss law approach needs to be singled out and discussed in detail in a separate chapter due to the Swiss Federal Supreme Court's case law and the subsequent legislation on this subject.

[a]. German, French and English Law Perspectives

When reviewing German arbitration law, one notices a provision explicitly excluding the *lis pendens* objection before arbitral tribunals (having their seats in Germany or abroad) where parallel proceedings are pending before a German court: § 1032(3) ZPO⁽¹²¹⁵⁾, which is based on Article 8(2) UNCITRAL Model Law, states that where an action on the merits or an action for declaratory relief as to the arbitration agreement's validity has been brought with a court, arbitral proceedings may nevertheless be commenced or continued, and an arbitral award may be made, while the issue is [page](#)

"203" pending before the court. Therefore, the continuance of the proceedings initiated second before the arbitral tribunal is explicitly permitted by German statutory arbitration law. The wording of § 1032(3) ZPO hence prompts the conclusion that the party objecting to the arbitral tribunal's jurisdiction should not rely on the *lis pendens* defence to have the arbitral proceedings stayed.⁽¹²¹⁶⁾

As elaborated above,⁽¹²¹⁷⁾ French arbitration law has adopted the negative effect of competence-competence, i.e. granting the arbitral tribunal the priority to determine its own jurisdiction. Therefore, in a situation where the national courts are seised first and one of the parties invokes the existence of an arbitration agreement, the court is obliged to refer the parties to arbitration, unless – if the arbitral tribunal has not been seised yet – the agreement to arbitrate is manifestly null or manifestly inapplicable.⁽¹²¹⁸⁾ Because of the explicit stipulation of this rule of priority in favour of the arbitrators to be the first to determine their jurisdiction, a situation of proceedings being conducted concomitantly before a French court and an arbitral tribunal is not likely to occur, and even if it would, an arbitral tribunal with its seat in France seems unlikely to stay its proceedings for the benefit of the parallel court proceedings. Accordingly, the following arbitral tribunals with their seat in Paris have refused to apply the *lis pendens* rule:⁽¹²¹⁹⁾ in ICC Case No 5103, the arbitral tribunal faced with parallel proceedings before the Tunisian courts recognised the cogency of the *lis pendens* principle only as between equally competent jurisdictions, which was not the case, since the authority of the French (arbitral) jurisdiction and the Tunisian (judicial) jurisdiction was determined solely according to the existence, validity and scope of the arbitration clause.⁽¹²²⁰⁾ In ICC Case No 6142 the arbitrator (seated in Paris) confronted with court proceedings in Spain concluded that the plea of *lis pendens* is principally applied prior to raising the arbitration defence, since once the validity of the arbitration agreement has been established, there is no longer any room for raising the plea of *litispence*.⁽¹²²¹⁾ Furthermore, the plea of *litispence* was declared inapplicable in that case, since the parties – if they are identical at all – did not have the same legal status in both proceedings.⁽¹²²²⁾ Consequently, it can be concluded that if confronted with a plea of *litispence* of a parallel proceeding before the French or foreign courts a French arbitral tribunal is highly likely not to stay its proceedings and proceed if it considers itself competent to hear the dispute.

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The Arbitration Act, very similar to § 1032(3) ZPO, holds in section 32(4) that unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under section 32 of the Act is pending. The arbitral tribunal may, however, in accordance with section 31(5) Arbitration Act also exercise its discretion to stay the proceedings whilst an application is made to the national court under section 32 Arbitration Act, or shall do so, if the parties agree accordingly. In summary, whilst an application to the national courts for a declaration that the arbitration agreement is (in)valid is pending, the arbitral tribunal may, provided that the parties have not requested the arbitrators to stay the proceedings, exercise its discretion in two ways: firstly, it may stay the arbitral proceedings, or secondly, it may continue with the proceedings and render an award.⁽¹²²³⁾ The possibility of continuing the already pending arbitral proceedings has been established to prevent a plea of want of jurisdiction being used as a device to delay the conduct of the arbitral proceedings.⁽¹²²⁴⁾ According to Schedule 1 to the Arbitration Act, both section 31 and section 32 Arbitration Act are mandatory. Section 32(4) Arbitration Act seems to have adopted Article 8(2) UNCITRAL Model Law, since an arbitral tribunal is authorised to continue arbitral proceedings notwithstanding any objection to the arbitral tribunal's jurisdiction pending before national courts. One notices, however, that the scope of application of section 32(4) Arbitration Act is limited to court applications for declaratory relief to the English courts under section 32 Arbitration Act, and does not explicitly include applications to stay judicial parallel proceedings on the merits under section 9 Arbitration Act. There is, however, no provision which commands that arbitration proceedings be stayed while legal proceedings on the same subject matter and between the same parties have been initiated first, either. In conclusion, it can be assumed that there is no chronological priority rule under English statutory arbitration law giving precedence to the adjudicatory body first seised; quite to the contrary, sections 32(4) and 31(5) Arbitration Act work at the exact cross-purpose to a *lis pendens* rule by explicitly allowing the conduct of arbitral proceedings and court proceedings in parallel.

[b]. Swiss Law Perspective

Again, it is justified to take a closer look into Swiss arbitration law, especially considering the case law by the Swiss Federal Supreme Court and the legislative developments in this respect, as regards the admissibility and effectiveness of the plea of *litispence* in the arbitral context. To introduce the relevant provision in the Swiss statutory arbitration law in the context of the case law that preceded it, the situation with respect to previous foreign court proceedings will be examined first.

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[i]. With Previous Foreign Court Proceedings

The situation where a foreign court has been seised first and an arbitral tribunal having its seat in Switzerland second was decided by the Swiss Federal Supreme Court in the judgment *Fomento de Construcciones y Contratas SA v Colon Container Terminal SA* ("*Fomento*")⁽¹²²⁵⁾. The Supreme Court came to the conclusion that an arbitral tribunal with its seat in Switzerland shall apply Article 9(1) SPILA⁽¹²²⁶⁾ by analogy.⁽¹²²⁷⁾

As an answer to the *Fomento* decision, and to the debate that evolved around it, the Swiss legislature decided to amend the provisions on international arbitration and introduced Article 186(1*bis*) SPILA, which took effect on 1 March 2007.⁽¹²²⁸⁾ According to Article 186(1*bis*) SPILA, an international arbitral tribunal with its seat in Switzerland is thus obliged to decide on its own jurisdiction and hence to proceed with the arbitration, unless there are serious reasons to stay the proceedings.⁽¹²²⁹⁾ Hence there is – by clear wording – no *lis pendens* rule forcing an international arbitral tribunal with its seat in Switzerland to stay the proceedings if a foreign national court has been seised first with the same subject matter between the same parties. In other words, the Swiss legislator has, by enacting Article 186(1*bis*) SPILA, deliberately accepted the risk that parallel proceedings might occur.⁽¹²³⁰⁾ The circumstances that led to this legislative coup will be dealt with in detail below.

(a). *The Swiss Federal Supreme Court's Fomento Decision*

In an early decision, *Société G v X AG and Arbitral Tribunal* ("*Société G*")⁽¹²³¹⁾, the Swiss Federal Supreme Court held in general terms that an arbitral tribunal, as well as a national court, are entitled to decide on their own jurisdiction.⁽¹²³²⁾ It observed further that the arbitral tribunal's competence to decide on the existence or validity of an arbitration agreement is not exclusive, but that a Swiss court could also be competent to decide on these questions in light of a plea of a valid arbitration agreement raised by [page "206"](#) a party to the dispute.⁽¹²³³⁾ In direct reference to this deliberation, the Supreme Court concluded that this kind of conflict of competence must be resolved by applying the rules of *litispence*, *res judicata*, or by way of the recognition and enforcement of foreign decisions.⁽¹²³⁴⁾ Hence, judging from the wording and the sequence of the Supreme Court's deliberations in *Société G*, it can be established that the jurisdictional conflicts described by the Supreme Court refer to the conflicting competence between national courts and arbitral tribunals. The Swiss Federal Supreme Court consequently considered the doctrine of *lis pendens* to be a means of coordinating jurisdictional conflicts between a Swiss court and an arbitral tribunal, but it only did so in an *obiter dictum*⁽¹²³⁵⁾ and without specifying how exactly this general principle should apply.

In the second relevant case, *Compañía Minera Condesa SA und Compañía de Minas Buenaventura SA v BRGM-Pérou S.A.S. and Arbitral Tribunal CIA* ("*Condesa*")⁽¹²³⁶⁾, the appellants argued that the arbitral tribunal with its seat in Switzerland should have stayed the arbitral proceedings in accordance with Article 9(1) SPILA, since a national court in Peru had been seised first in the same matter.⁽¹²³⁷⁾ The arbitral tribunal refused to stay its proceedings on the grounds that the rule of *litispence* is applicable solely in parallel court litigation.⁽¹²³⁸⁾ The Swiss Federal Supreme Court deliberated that it is controversially discussed in Swiss legal doctrine whether the principle of *lis pendens* is applicable to parallel judicial and arbitral proceedings.⁽¹²³⁹⁾ The Supreme Court did, however, not decide on this question at all, but left it open, since even if the *lis pendens* doctrine had been applicable to this case, the arbitral tribunal in Switzerland would not have had to stay its proceedings because the decision by the Peruvian court was not capable of being recognised under Swiss law (because the Peruvian court ignored a valid arbitration agreement invoked by the defendant).⁽¹²⁴⁰⁾ Even though the Swiss Federal Supreme Court in the *Condesa* decision has left the question of the applicability of the *lis pendens* principle in the context of arbitration unanswered, the result would have been identical if the arbitral tribunal had been obliged to apply Article 9(1) SPILA by analogy, due to the Peruvian court's decision not being capable of recognition in Switzerland.

Thirdly, in the *Fomento* decision, the Swiss Federal Supreme Court finally held that arbitral tribunals having their seat in Switzerland must apply Article 9(1) SPILA by analogy if court proceedings have been initiated abroad between the same parties and on the same subject matter prior to the commencement of the arbitral proceedings.⁽¹²⁴¹⁾ The Supreme Court reasoned that the spirit and purpose of Article 9(1) SPILA is based on public policy considerations, i.e. to avoid conflicting decisions on the same subject matter between the same parties, and there is no reason why the legal concept of [page "207"](#) avoiding conflicting decisions should not be equally applicable to arbitral tribunals with their seat in Switzerland.⁽¹²⁴²⁾ Based on this case law, an arbitral tribunal with its seat in Switzerland has to examine and to verify the following:⁽¹²⁴³⁾

- firstly, that there was a prior litigation before a foreign court between the same parties and on the same subject matter;
- secondly, that the foreign court would render a decision within a reasonable time period; and
- thirdly, that the decision would be recognisable in Switzerland (in

accordance with Articles 25-27 SPILA).

The Swiss Federal Supreme Court, furthermore, dismissed the argument that the applicability of Article 9(1) SPILA to arbitral tribunals could induce foreign courts to ignore arbitration agreements between the parties in order to secure its jurisdiction due to temporal priority. The Supreme Court reasoned that, if a valid arbitration agreement has in fact been concluded between the parties and the national courts' jurisdiction thereby excluded, the court's decision would not meet the requirement to be recognisable in Switzerland.⁽¹²⁴⁴⁾ Hence, the test as to whether the foreign court's decision can be expected to be recognised in Switzerland must be extended to the question whether the arbitration agreement between the parties is valid under Swiss arbitration law.⁽¹²⁴⁵⁾ If the arbitral tribunal were to refuse to observe Article 9(1) SPILA, the arbitral award could become challengeable based on Article 190(2) (b) SPILA due to lack of jurisdiction.⁽¹²⁴⁶⁾

In summary, the *Fomento* decision clarified that arbitrators do not have full discretion to decide whether to stay proceedings when faced with a *lis pendens* exception: *lis pendens* before a foreign national court needs to be observed by an arbitral tribunal having its seat in Switzerland as a matter of jurisdiction, and not of procedure that can be chosen by the parties to the arbitration.⁽¹²⁴⁷⁾ This case law has, however, elicited substantial criticism that culminated in a parliamentary initiative to strengthen the arbitral tribunal's competence to decide on its own jurisdiction notwithstanding any foreign court proceeding initiated prior to the arbitration. As a result of this initiative an arbitral tribunal with its seat in Switzerland has not been bound by Article 9(1) SPILA since 1 March 2007, the date of the entry into force of Article 186(1*bis*) SPILA.

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(b). Article 186(1*bis*) SPILA: Legislative History and Implications

The *Fomento* decision regarding the applicability of Article 9 SPILA to arbitral tribunals led to the filing of a parliamentary initiative (by Claude Frey), calling for a new provision in the twelfth chapter of the SPILA authorising the arbitral tribunal to decide on its own jurisdiction regardless of Article 9(1) SPILA.⁽¹²⁴⁸⁾ This initiative was motivated by the concern that the practice established by *Fomento* is highly likely to encourage situations where a party, even though it previously agreed to settle disputes by arbitration, will prevent the arbitration from continuing by randomly initiating an action before a foreign national court prior to the commencement of the arbitral proceedings; such strategic behaviour could result in a dent in Switzerland's reputation as an arbitration-friendly jurisdiction, and should therefore not be protected by the Swiss legislator.⁽¹²⁴⁹⁾ The negative impact this decision could have on Swiss arbitrations was considered even more imminent, since the Swiss Federal Supreme Court held in *Fomento* that the question whether the parties have waived the right to invoke the arbitration defence had to be answered by the *lex fori*, i.e. Panamanian law.⁽¹²⁵⁰⁾ As a consequence of such an interpretation and application of Article 9(1) SPILA, a party willing to sabotage the arbitration agreement could revert to a foreign jurisdiction that accepts only limited fields of law as arbitrable, or which calls for unduly excessive requirements for an arbitration agreement to be valid, for instance.⁽¹²⁵¹⁾

The Swiss National Council ('Nationalrat') and the Swiss Federal Council ('Bundesrat') finally approved the parliamentary initiative: they both opined that the economic importance of Switzerland's popularity as a place of arbitration which gives due effect to valid arbitration agreements should take precedence over any need to coordinate proceedings concurrently pending before a national court and an arbitral tribunal.⁽¹²⁵²⁾ They consequently advocated that it should be left to an arbitral tribunal's fullest discretion to decide on its own jurisdiction and eventually approved Article 186(1*bis*) SPILA with the following wording: [page "209"](#)

"The arbitral tribunal shall decide on its jurisdiction regardless of an action having the same subject matter and being between the same parties already pending before a national court or before another arbitral tribunal, unless serious reasons command to stay the proceedings."⁽¹²⁵³⁾

The wording of Article 186(1*bis*) SPILA provides that the arbitral tribunal is required to decide on its own jurisdiction, unless there are exceptional circumstances that justify a stay of the proceedings.⁽¹²⁵⁴⁾ In its recent case law, the Swiss Federal Supreme Court has stated that a party invoking the plea of *litispendence* carries the burden of proof to demonstrate the existence of serious reasons that justify a stay of the proceedings.⁽¹²⁵⁵⁾ Such exceptional circumstances have not yet been specified in Swiss legal doctrine or case law, but the Committee's Report on Article 186(1*bis*) SPILA referred to three examples in which a stay might be preferable:⁽¹²⁵⁶⁾

- if the arbitration agreement provides for a time limit within which the arbitral tribunal must be seised, and one of the parties seises the arbitral tribunal only in order to comply with such time limit, while proceedings are already pending before a foreign national court;
- if the arbitral tribunal with its seat in Switzerland was seised after the commencement of proceedings before an arbitral tribunal with

its seat abroad;

- if the respondent has not invoked the arbitration agreement at all in the foreign court proceedings and hence the arbitration agreement may have become inoperative.

It is submitted that all of these examples are not convincing as constituting serious reasons in the sense of Article 186(1*bis*) SPILA and hence justifying a stay of the arbitral proceedings. The first example seems to neglect that parties who initiate arbitral proceedings for the sole purpose of complying with a time limit might be seriously interested in continuing with the arbitration.⁽¹²⁵⁷⁾ The second example describes a situation captured precisely by the wording of Article 186(1*bis*) SPILA and hence seems rather contradictory.⁽¹²⁵⁸⁾ The example mentioned third corresponds to the circumstances found in the *Fomento* decision, where the Panamanian court held that the respondent had failed to timely raise the arbitration defence, and it was therefore assumed that the respondent waived its right to invoke the arbitration agreement in the court proceedings. In other words, the Swiss legislator seems to suggest that an arbitral tribunal should stay proceedings in the same situations as in the *Fomento* case, even though the legislative intention behind Article 186(1*bis*) SPILA was to prevent an [page "210"](#) arbitral tribunal from staying its proceedings under circumstances comparable to *Fomento*.⁽¹²⁵⁹⁾

Regardless of the examples that the Swiss legislator gave, the following aspects should be taken into account when analysing whether serious grounds exist that might justify a stay of the proceedings:⁽¹²⁶⁰⁾

- the nature of the action filed with the foreign national court, i.e. has the action been filed in a legitimate manner or to 'torpedo' the arbitration;
- the stage of the foreign court proceedings, i.e. have the court proceedings already advanced significantly or have they been initiated shortly before the arbitration;
- and last but not least, the foreign decision's capability of being recognised in Switzerland.

These considerations in evaluating whether there are serious grounds to stay the proceedings might, in the end, not differ greatly from the test to be applied under Article 9(1) SPILA (i.e. whether a decision is expected to be rendered within a reasonable period of time and which will be recognisable under Swiss law).⁽¹²⁶¹⁾

In summary, by enacting Article 186(1*bis*) SPILA, the *Fomento* decision has become moot.⁽¹²⁶²⁾ The new provision strengthens an arbitral tribunal's competence to determine its own jurisdiction and, in the same way, improves the efficiency of international arbitration in Switzerland, since arbitral proceedings initiated in Switzerland will, in principle, be continued even if a party seeks to circumvent a valid arbitration agreement by seising the national courts first.⁽¹²⁶³⁾ The Swiss legislator has hence prioritised efficiency considerations and measures to protect Switzerland's good reputation among the arbitration community over the risk of conflicting decisions and [page "211"](#) the associated waste of resources.⁽¹²⁶⁴⁾ Article 186(1*bis*) SPILA blatantly rejects the first-in-time rule of *lis pendens* for an arbitral tribunal seised second with its seat in Switzerland. This provision negates the preclusion effect of *lis pendens* and hence accepts and gives the occurrence of parallel judicial and arbitral proceedings the green light in the same way as Article 8(2) UNCITRAL Model Law. Nevertheless, the arbitral tribunal may, under exceptional circumstances – if serious grounds justify it – still stay its proceedings.

[ii]. With Previous Domestic Court Proceedings

Domestic court proceedings are to be understood as court proceedings taking place in Switzerland in parallel to an arbitration also conducted in Switzerland.

The wording of Article 186(1*bis*) SPILA does not differentiate between whether the national court first seised is located abroad or in Switzerland. It could, therefore, be concluded that it was the legislature's intention to treat both situations equally. There are, however, authors who argue that Article 186(1*bis*) SPILA does not capture the situation where the dispute is pending before a Swiss court, since this provision was introduced as a reaction to the *Fomento* decision, in which the national court seised first was located abroad.⁽¹²⁶⁵⁾ The legislator, indeed, refers only to the constellation in the *Fomento* case in the legislative documents and does not explicitly stipulate that the same provision shall be applicable where the national court seised first is located in Switzerland.⁽¹²⁶⁶⁾ Berger and Kellerhals therefore hold that the wording of Article 186(1*bis*) SPILA must be limited by way of teleological interpretation to cross-border conflicts, and that the same provisions as apply to domestic arbitral tribunals should be relevant if the court seised first is located in Switzerland.⁽¹²⁶⁷⁾ According to this interpretation, an international arbitral tribunal with its seat in Switzerland should stay its proceedings until the Swiss court has decided on its jurisdiction.⁽¹²⁶⁸⁾

Again, the risk remains that the plea of *lis pendens* before the arbitral tribunal might be refused, since Article 186(1*bis*) SPILA does not specify whether the arbitral tribunal shall decide on its own

jurisdiction solely in cases where the national court first seised is located abroad (as in the *Fomento* case), or also concerning a parallel proceeding pending before a Swiss court.

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[4]. Comparative Conclusion

The national arbitration laws studied above do not incorporate the arbitrators' obligation to respect the *lis pendens* of prior parallel court proceedings and hence the duty to stay the arbitral proceedings upon a party invoking the *lis pendens*. As has been shown above, there is no provision in Swiss arbitration law which provides for the application of the legal doctrine of *lis pendens* in the arbitration context, either. Case law, however, has formulated, in the infamous *Fomento* decision, the duty of an arbitral tribunal with its seat in Switzerland to stay the arbitral proceedings if a foreign national court was seised first and provided the conditions under Article 9(1) SPILA are met. The Swiss legislator, however, was very swift to counteract such case law and enacted Article 186(1*bis*) SPILA, by virtue of which an arbitral tribunal is obliged to decide on its own jurisdiction notwithstanding any *lis pendens* before a national court or another arbitral tribunal.

This legislative development in Switzerland, in particular, is a clear statement in favour of strengthening arbitrators' competence-competence: where an arbitral tribunal is convinced that there is a valid arbitration agreement and disputes arise as to its scope, to force the arbitral tribunal to stay proceedings in favour of the court first seised would fundamentally misconceive the concept of arbitration.⁽¹²⁶⁹⁾ The ILA recommendations on *lis pendens* also constitute uniform standards and guidelines which enjoy broad consensus in the arbitration community.⁽¹²⁷⁰⁾ They mainly focus on preserving the arbitral tribunal's competence to determine its own jurisdiction and recommending a stay of the arbitral proceedings for the benefit of pending court proceedings only under an accumulation of certain circumstances.

[a]. Conclusions from the Arbitrators' View

Parties, in general, agree to arbitrate in order to obtain a prompt and binding resolution of their dispute in a single contractually-selected forum; it is therefore considered contrary to the parties' agreement to arbitrate if arbitral proceedings are stayed until some other forum has decided on its jurisdiction.⁽¹²⁷¹⁾ The arbitral tribunal – even though not bound by the *lis pendens* objection – may, nevertheless, consider staying proceedings, especially where the judicial proceedings conducted in parallel have the potential to jeopardise the arbitral award's enforceability.

The ILA recommendations, establishing that an arbitral tribunal confronted with parallel proceedings before a court at the seat of arbitration should consult the national courts' law, demonstrate a useful starting point for the arbitrators' decision on whether to stay the proceedings or not.⁽¹²⁷²⁾ Considerations as to the *lex arbitri*'s qualification of the principle of *lis pendens* seem to be paramount, since it was held in the Swiss *Fomento* decision that "*the principle of lis pendens is a fundamental principle of* page "213" *procedural fairness and justice which is normally considered to form part of procedural public policy in most legal systems.*"⁽¹²⁷³⁾ There is, however, some doubt whether the principle of *lis pendens*, which is not uniformly recognised and adopted by civil law and common law jurisdictions, indeed pertains to the procedural public policy to be respected under Article V(2)(b) New York Convention. An obligation on an arbitral tribunal to stay its proceedings on public policy grounds is, however, hard to reconcile with statutory arbitration laws, which explicitly state that arbitral proceedings may either be commenced or continued with court proceedings pending in parallel, such as Article 186(1*bis*) SPILA, § 1032(3) ZPO, or section 32(4) Arbitration Act. The ILA's Interim Report on Public Policy analyses that the prohibition of the misuse of the law and the principle of good faith belong to the fundamental principles of law in particular in many civil law countries.⁽¹²⁷⁴⁾ It can be inferred therefrom that, where court proceedings have obviously been initiated as a tactical manoeuvre to disrupt an arbitration or with any other intention of an abusive nature, the arbitrators' decision to proceed with the arbitration would, in addition to being demanded by the nature of the arbitrators' mandate, be protected by basic principles of law that would counter any public policy allegations potentially invoked against the arbitral award based on a *lis pendens* argument.

In addition to public policy considerations, it is, in particular, worth anticipating whether a foreign judgment by the court before which the parallel action is pending would be capable of recognition according to the law at the seat of the arbitration.⁽¹²⁷⁵⁾ The situation is especially delicate where foreign judgments have been given by an EU or EFTA court: as already established,⁽¹²⁷⁶⁾ judgments on the merits in which an EU or EFTA court has preliminarily ruled on the validity of an arbitration agreement are covered by the scope of the Brussels Regulation and the Lugano Convention and, hence, benefit from the convenient recognition and enforcement scheme. Consequently, where the seat of arbitration is located in a Member State of the EU or the EFTA, the seat courts must recognise these judgments and can refuse recognition only based on very limited grounds.⁽¹²⁷⁷⁾ It is striking, in particular, that the fact that a foreign

judgment was given in disregard of an arbitration agreement valid under the law of the seat court does not constitute a ground on which recognition of the EU or EFTA judgment could be denied. (1278) In other words, where the foreign EU or EFTA court has declared the arbitration agreement invalid and the court proceedings have already [page "214"](#) considerably advanced, it might be reasonable to stay arbitral proceedings conducted in another EU or EFTA country for the sake of the enforceability of a prospective award, unless there is a strong indication that recognition of the foreign judgment will be denied due to other serious irregularities. (1279)

Given the fact that Swiss law (in particular Article 186(1*bis*) SPILA) knowingly admits the occurrence of parallel proceedings, it may be worth enquiring whether the same effect as with a *lis pendens* rule may be achieved by reference to the 'serious reasons' exception in Article 186(1*bis*) SPILA. In light of the examples the Swiss legislator gave for situations in which a stay of the proceedings can nevertheless be appropriate, it is unclear what arbitrators confronted with such a decision will make of the 'serious reasons' exception. If, however, considerations as to the legitimacy of the action filed, the stage to which the court proceedings have advanced, and the foreign decision's capability of recognition in Switzerland influence the interpretation of the 'serious reasons' exception, the test to be applied under Article 186(1*bis*) SPILA would come to resemble the one conducted under Article 9(1) SPILA. It remains within the arbitral tribunal's discretion to decide when to apply the 'serious reasons' exception and, hence, to stay the proceedings until the national court has decided on its jurisdiction. A case constellation as described in the previous paragraph (where an EU or EFTA court seised first has declared the arbitration agreement to be invalid) could fall under the 'serious reasons' exception, for instance. It is, in particular considering the Swiss legislator's signal against coordinating parallel judicial and arbitral proceedings, not to be expected that arbitrators will make extensive use of the 'serious reasons' exception in favour of a national court's determination of jurisdiction.

[b]. Conclusions from the Parties' View

Since there is no established rule that *lis pendens* will be recognised by an arbitral tribunal in the event of prior court proceedings on the same subject matter and between the same parties, it is a risky enterprise for a party intending to challenge the arbitrators' jurisdiction to solely rely on the plea of *litispendence*. Such a plea may, at best, be raised coupled with a jurisdictional objection based on the arbitration agreement not being valid or in-existent, or due to the dispute not being covered by the agreement to arbitrate. Such combined line of action, furthermore, seems indispensable, since a party objecting to the jurisdiction of the arbitral tribunal otherwise risks waiving its right to challenge the arbitrators' jurisdiction in the arbitral proceedings. Similar to the arbitration defence, (1280) a plea of *litispendence* likewise needs to be raised as soon as possible in the arbitral proceedings in order not to waive the right to invoke this plea.

The English Arbitration Act explicitly mentions the parties' options as regards the continuance of arbitral proceedings initiated subsequent to court proceedings: the parties may either agree that the arbitral tribunal stay the proceedings whilst an [page "215"](#) application is made to the court under section 32 (as per section 31(5) Arbitration Act), or they may declare that the arbitral tribunal continue the arbitral proceedings and make an award while such a court application is pending (as per section 32(4) Arbitration Act). If the parties have not reached an agreement, the party favouring a stay of the arbitral proceedings can make arguments to guide the arbitrators' exercise of their discretion, such as the effects a declaration on the arbitration agreement's invalidity would have on the arbitral proceedings, the stage to which the court proceedings have already advanced, or any contradictory behaviour by the opposing party capable of prejudging the arbitral proceedings. Likewise, the party opposing the arbitral proceedings may, also under Swiss law, present to the arbitrators grounds for a stay in the sense of the 'serious reasons' exception under Article 186(1*bis*) SPILA. To date, there is no case law giving guidance as to the sorts of serious reasons that are likely to convince an arbitral tribunal, but it can be said that the arbitrators' decision on whether to stay the proceedings should be governed by considerations of efficiency, fairness, and safeguarding an arbitral award's enforceability. It is, furthermore, acknowledged that a stay of arbitral proceedings may also be sought under German law where a court has been seised first in the same matter between the same parties, in particular with regard to the preemptive effect of a court judgment declaring that arbitration is not admissible. (1281)

[c]. Action for Injunctive Relief

The fact that it is generally accepted that arbitrators are entitled to grant interim relief – unless the parties agree otherwise – begs the question whether arbitrators have the power to issue anti-suit injunctions and, if so, whether it is appropriate for them to do so. The term 'anti-suit injunctions' in this chapter comprises orders by an arbitral tribunal enjoining a party from initiating court proceedings or ordering it to withdraw a lawsuit, as well as orders blocking the enforcement of a court judgment. Injunctions issued by arbitrators to restrain other arbitral proceedings or the enforcement of an arbitral

award are not the subject of this analysis.

[1]. Admissibility of Anti-suit Injunctions Issued by Arbitrators

Competence to issue anti-suit injunctions is derived from the arbitral tribunal's authority to grant interim measures. This authority is determined in accordance with the arbitration agreement's terms, including any incorporated institutional arbitration rules, and with the relevant procedural law of the arbitration:⁽¹²⁸²⁾ if the arbitration agreement does not expressly empower the arbitrators to issue anti-suit injunctions or interim measures, as may rarely be the case, the applicable arbitration rules have to be consulted provided the parties have opted for institutional arbitration proceedings. Several arbitration rules leave sufficient room for the issuance of anti-suit injunctions [page "216"](#) by defining the scope of conservatory or interim measures that can be ordered by the tribunal widely.⁽¹²⁸³⁾ If neither the arbitration clause nor the institutional arbitration rules contain information on the admissibility of anti-suit injunctions or interim measures respectively, the *lex arbitri* needs to be considered.

The revised version of the UNCITRAL Model Law explicitly provides for the arbitrators' authority to issue anti-suit injunctions;⁽¹²⁸⁴⁾ the new provision has been clarified in relation to the wording of Article 17 of the 1985 UNCITRAL Model Law with the special intention of recognising the arbitrators' power to issue anti-suit injunctions for the sake of protecting the integrity and effectiveness of the arbitral process against the parties' obstructive tactics.⁽¹²⁸⁵⁾

§ 1041(1) ZPO holds that the arbitral tribunal may, at the request of a party, order interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, subject to any agreement by the parties to the contrary. At first glance, the arbitrators' power to grant interim relief is worded broadly and the arbitral tribunal, hence, does not seem to be limited to German-style interim measures of protection.⁽¹²⁸⁶⁾ The link to the subject matter required for interim relief to be granted, however, is submitted to exclude the issuance of anti-suit injunctions, since these measures serve to protect the arbitral process rather than the subject matter in dispute.⁽¹²⁸⁷⁾

Even though the CPC does not state so expressly, it is held in doctrine that, even where the parties have not provided for the power of the arbitral tribunal to order interim or conservatory measures (either directly in the arbitration clause or indirectly by reference to institutional arbitration rules), the arbitrators may nevertheless make such orders as they deem necessary within the scope and for the proper performance of their mandate.⁽¹²⁸⁸⁾ Based on this broad power to grant injunctive relief, it seems, in principle, possible that arbitral tribunals seated in France may issue anti-suit injunctions. It, however, appears to be rather unlikely that French courts will recognise and hence enforce such injunctions.⁽¹²⁸⁹⁾

There are several Swiss arbitral proceedings known in which the arbitrators have considered the possibility for an anti-suit injunction to be granted, or where the tribunal has issued an order that a party should refrain from continuing court [page "217"](#) proceedings due to the parties' valid and binding agreement to arbitrate the dispute.⁽¹²⁹⁰⁾ The scope of Article 183 SPILA is broad enough to allow an arbitral tribunal to issue anti-suit injunctions upon a party's request, as long as the principles of equal treatment of the parties and the right to be heard in adversarial proceedings are respected by the tribunal.⁽¹²⁹¹⁾ In an arbitration under the auspices of the ICC, a sole arbitrator sitting in Geneva on a party's request, issued an interim award enjoining a party to the proceedings from pursuing domestic court proceedings it had brought against the other two parties on the same object of the dispute due to the breach of the arbitration agreement; the arbitrator also held that such a measure to enforce the arbitration agreement further constitutes a guarantee of the efficiency and credibility of international arbitration.⁽¹²⁹²⁾ Tribunals with their seat in Switzerland have based their power to issue anti-suit injunctions on their competence to determine their own jurisdiction.⁽¹²⁹³⁾ Another tribunal sitting in Lausanne, when asked to declare that an action pending before the national courts was abusive, ordered in its partial award that the parties must abstain from any action likely to have a prejudicial effect on the execution of the forthcoming decision, and, in general, refrain from committing any act likely to aggravate or to prolong the dispute.⁽¹²⁹⁴⁾ As far as the enforcement of anti-suit injunctions issued by arbitral tribunals is concerned, it appears that such orders have not yet been enforced by Swiss courts.⁽¹²⁹⁵⁾ In light of the Swiss courts' hostile attitude towards the enforcement of anti-suit injunctions,⁽¹²⁹⁶⁾ why Swiss courts should be willing to treat anti-suit injunctions issued by an arbitral tribunal differently from the ones issued by a national court is hard to understand, since their effect is identical.

Parties are free to agree that an arbitral tribunal shall have the power to order, on a provisional basis, any relief which it would have the power to grant in a final award.⁽¹²⁹⁷⁾ English arbitration law, furthermore, expressly states that an arbitral tribunal has the same powers as a national court to order a party to do or refrain from doing anything, which also pertains to the issuance of anti-suit injunctions.⁽¹²⁹⁸⁾ Parties are, hence, free under English arbitration law to confer upon a tribunal the power to grant the full range of interim measures, whether by way of order or interim [page "218"](#) declaration.⁽¹²⁹⁹⁾ It has, however, been held in English case law that, based on a

systematic interpretation, section 48 Arbitration Act applies to awards only, which will mean that anti-suit injunctions may be ordered in the final award, but not when granting interim relief.⁽¹³⁰⁰⁾ As regards the enforcement of anti-suit injunctions issued by a foreign arbitral tribunal, it cannot be seen how this is possible under the Arbitration Act, since section 42 Arbitration Act (regarding court orders to enforce the peremptory orders of the arbitral tribunal) is applicable only if the situs of arbitration is in England, Wales or Northern Ireland.⁽¹³⁰¹⁾

As regards the influence of the Brussels Regulation and the ECJ's case law on arbitrators' competence to issue anti-suit injunctions, it can be said that arbitral proceedings fall outside the ambit of the Brussels Regulation and the Lugano Convention, and that there does not appear to be anything in the ECJ's ruling in *West Tankers* to prohibit arbitrators from making such an order in the first place.⁽¹³⁰²⁾ The argument that the principle of mutual trust precludes the granting of anti-suit injunctions by arbitrators where the other proceedings are before the courts of another Member State goes too far, since the principle of mutual trust only applies between the courts of the Member States and does not extend to the excluded realm of arbitration.⁽¹³⁰³⁾ The ECJ will soon have to decide on this explicit matter, since the Supreme Court of Lithuania, on 14 October 2013, requested a preliminary ruling regarding the question as to whether a court of a Member State may refuse to recognise an award that orders an anti-suit injunction based on the jurisdiction conveyed to it by the Brussels Regulation.⁽¹³⁰⁴⁾ It remains, furthermore, doubtful whether an EU or EFTA court will enforce an anti-suit injunction issued by an arbitral tribunal, since it also has the effect of curtailing the Member State or contracting state court's own determination of jurisdiction.⁽¹³⁰⁵⁾

In general, the following requirements for granting interim measures should be considered by arbitrators when intending to issue an anti-suit injunction:⁽¹³⁰⁶⁾ parties will frequently request the ordering of an anti-suit injunction before the arbitral tribunal has determined its jurisdiction. It is therefore crucial, in the first instance, that the arbitrators find themselves competent to hear the case at least on a prima facie basis; secondly, the arbitrators need to examine whether the parallel court proceedings are covered by the arbitration agreement, i.e. whether they concern the same subject [page "219"](#) matter and whether they are between the same parties as the arbitral proceedings;⁽¹³⁰⁷⁾ the applicant, thirdly, must demonstrate that it cannot be expected to wait for a decision until the rendering of the final award and for this purpose it should file the application without undue delay (in a case of particular urgency the issuance of an ex parte anti-suit injunction might also be justified);⁽¹³⁰⁸⁾ fourthly, the arbitral tribunal needs to be convinced that the applicant would face imminent or irreparable harm, for instance in the form of severe financial problems, if the party gets involved in a second set of proceedings, or for the sake of the protection of business secrets or other interests of confidentiality publicly dealt with in state court proceedings, or that the dispute would at least be aggravated if the arbitrators refused to grant injunctive relief; last but not least, the anti-suit injunction must be proportional, so that the arbitrators need to balance the interest in protecting the applicant's right against the possible damage that could be caused to the addressee of the injunction. It might, however, be prudent to review the prerequisites for classic interim relief, such as urgency and irreparable harm, in a less strict manner where the applicant seeks an anti-suit injunction due to a breach of the arbitration agreement.⁽¹³⁰⁹⁾

[2]. Doctrinal Considerations on Arbitrators' Competence to Issue Anti-suit Injunctions

Concerns regarding the admissibility of anti-suit injunctions issued by arbitrators are based on the scope of the competences exercised by arbitrators rather than on considerations of state sovereignty, since arbitrators, as private persons, do not represent the interests of a state.⁽¹³¹⁰⁾

There is the view that an arbitral tribunal's competence-competence also includes an inherent jurisdiction to issue anti-suit injunctions.⁽¹³¹¹⁾ This view is contrasted by the following argument: "*Jurisdiction is something that is declared, not something that can be ordered.*" If an arbitrator declares himself competent to hear the case, he is entitled to rule on the merits of the dispute, but this authority does not comprise the power to exclude jurisdiction of other judicial bodies.⁽¹³¹²⁾ Furthermore, it has been held [page "220"](#) in doctrine that a party should not be deprived by an anti-suit injunction of its fundamental right to seek relief before national courts.⁽¹³¹³⁾

There is also the opinion that the basis for arbitrators' jurisdiction to issue anti-suit injunctions can be found in their power to sanction violations of the arbitration agreement and to take any measure necessary to avoid the complication of the dispute or to protect the effectiveness of the final award, which is put at risk when there are multiple and possibly divergent decisions on the same matter.⁽¹³¹⁴⁾ Taking this basis for arbitrators to issue anti-suit injunctions a step further, it is argued that arbitrators' authority to grant injunctive relief to remedy a breach of the arbitration agreement derives from the agreement to arbitrate itself.⁽¹³¹⁵⁾

In principle, it is widely accepted in international commercial arbitration that arbitrators have the power to order interim measures, but the crucial aspect lies in the modalities of exercising this

authority.⁽¹³¹⁶⁾ In other words, even if it is recognised that arbitrators have the power to issue anti-suit injunctions, whether it is advisable for the arbitrators to issue such orders is a different matter. The answers to the question of the appropriateness of these orders range from a categorical refusal of such injunctions to the admissibility of such orders where a party tries to frustrate a valid arbitration agreement by commencing abusive court proceedings.⁽¹³¹⁷⁾ Moloo, for instance, argues that an arbitral tribunal should be authorised to issue anti-suit injunctions only where the arbitration agreement explicitly calls for arbitration to be the sole means of resolving the dispute between the parties, that is to say, only where there exists an exclusive arbitration agreement.⁽¹³¹⁸⁾

This is not the place to evaluate the strength of these arguments, but it can be inferred from them that there might be different approaches towards the issuance of anti-suit injunctions in a three-member arbitral tribunal. Since the arbitral tribunal has discretion to issue such a measure, it might be useful to consider the potential for different attitudes towards anti-suit injunctions.

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[3]. Effects of Anti-suit Injunctions Issued by Arbitrators

Firstly, it needs to be established what the procedural nature of an arbitrator's order enjoining a party from initiating or continuing court proceedings abroad could be, and which benefits or shortcomings are tied to those forms of decisions. Secondly, the means available to the arbitrators to have the injunction enforced vis-à-vis a recalcitrant party in case of non-compliance will be examined.

[a]. Form of Anti-suit Injunction: Arbitral Award or Procedural Order?

Anti-suit injunctions can either be ordered in the form of an arbitral award, usually an interim award, or of a procedural order. The form can, in principle, be chosen freely by the arbitral tribunal on a case-by-case basis, unless the parties have reached consensus on this question or the procedural rules provide for a specific form.⁽¹³¹⁹⁾

Issuing an interim measure by a procedural order responds to the questions of urgency, since such orders may usually be given at any stage of the proceedings without providing full reasoning.⁽¹³²⁰⁾ When considering enforcement of the injunction, issuing an order in the form of an award appears to be the safer option. Procedural orders are generally not acknowledged as qualifying as 'awards' in the sense of the New York Convention and are therefore not certain of benefitting from the recognition and enforcement scheme under the Convention.⁽¹³²¹⁾ There are, however, national arbitration laws that do not distinguish, for the sake of enforceability, between interim measures issued as a procedural order and interim awards.⁽¹³²²⁾ Needless to say, if issued as an interim award, the interim measure may be open to setting aside proceedings, such as under Swiss arbitration law, but only on limited grounds,⁽¹³²³⁾ which in terms of efficiency might not be desirable.⁽¹³²⁴⁾

[b]. Effectiveness of Anti-suit Orders

The effectiveness of anti-suit injunctions ordered by arbitrators is rather weak, since an arbitral tribunal, as opposed to a national court, lacks coercive power. It will hence be examined which national laws provide for a support mechanism, by which the arbitrators or the parties, respectively, have the right to seek the national courts' assistance for the enforcement of an order on the recalcitrant party. It is, furthermore, worth analysing what kind of 'sanctions' an arbitral tribunal can impose on an enjoined party in the event of non-compliance with an order.

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[i]. Support by National Courts to Enforce an Anti-suit Injunction

§ 1041(2) ZPO provides for court support upon a party's request to permit enforcement of a measure ordered by an arbitral tribunal – even if rendered by a tribunal with its seat outside Germany.⁽¹³²⁵⁾ According to Article 183(2) SPILA, an arbitral tribunal may request the assistance of a state judge if the enjoined party does not voluntarily comply with the measure; the judge will apply his own law and will adapt the interim measure granted by the arbitral tribunal to a measure provided by the lex fori where required.⁽¹³²⁶⁾ Even though the wording does not state so, the predominant opinion is that a competent Swiss court can entertain an enforcement request under Article 183(2) SPILA even where the seat of arbitration is abroad.⁽¹³²⁷⁾ Swiss courts will review whether – on a prima facie basis – there is a valid arbitration agreement, the tribunal was correctly constituted, and whether the arbitrators have prima facie jurisdiction to order the granted measure.⁽¹³²⁸⁾

Under English arbitration law, parties are, in general, free to agree on the powers of the arbitral tribunal if a party fails to do something necessary for the proper and expeditious conduct of the arbitration.⁽¹³²⁹⁾ Section 41(5) Arbitration Act, furthermore, empowers an arbitral tribunal to make a peremptory order, i.e. an order including a

sanction for non-compliance, in addition to the main order, in case the enjoined party fails to comply with an order by the arbitrators.⁽¹³³⁰⁾ If the recalcitrant party still refuses to comply, the arbitral tribunal may pursue 'soft' measures, such as issuing an order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance,⁽¹³³¹⁾ or it (or, with the arbitrators' permission, the applicant in the arbitration) may apply, upon notice to the parties, to the national court seeking an order requiring the recalcitrant party to comply with the arbitrators' peremptory order.⁽¹³³²⁾ The scope of application of section 42 Arbitration Act is, however, territorially limited to arbitral tribunals having their seat in England, Wales or Northern Ireland.⁽¹³³³⁾

An English court, if granting such an order to comply with the arbitrators' peremptory order, supplements the sanctions available to the tribunal with the sanctions available to the court for the breach of a court order, i.e. fines or imprisonment.⁽¹³³⁴⁾ In other words, an arbitral tribunal may request the national courts' support in enforcing an anti-suit injunction against a party to foreign court proceedings. Therefore, the question is obvious as to whether a court order according to section [page "223"](#) 42(1) Arbitration Act issued against judicial proceedings in a Member State of the EU or EFTA is precluded by the ECJ's reasoning in *West Tankers*. It is argued that a court, when making such an order, does not rule on the substance of the case, but is merely enforcing a procedural order made by the arbitrators, with the consequence that the order can be said to be primarily about arbitration and therefore outside the Brussels Regulation.⁽¹³³⁵⁾ The subject matter of the anti-suit injunction issued in the *West Tankers* case, however, was also outside the Brussels Regulation, and the ECJ's *effet utile* argumentation rendered the injunction against the Italian court proceedings incompatible with the Regulation. It may, hence, be inferred from the ECJ's ruling in *West Tankers* that an English court might be rather reluctant to make an order based on section 42(1) Arbitration Act directed at a party in proceedings before another EU or EFTA Member State court.

Furthermore, even though national courts should not review the substance of an order when assisting the arbitral tribunal in enforcing the sanctions for non-compliance with such an order, a national court is highly likely to deny assistance if the order is contrary to its notion of public policy.⁽¹³³⁶⁾ So, when asking a national court to have an anti-suit injunction enforced, arbitrators and parties should consider the risk that such an application may be refused, in particular by courts in civil law jurisdictions. It is accordingly held in German doctrine that an anti-suit injunction against foreign proceedings in a Member State of the EU or EFTA issued by an arbitral tribunal cannot be enforced by the German courts, since enforcement of the injunction by the German judge would interfere with the foreign court's power to review its jurisdiction.⁽¹³³⁷⁾

[ii]. Possible Sanctions to Be Ordered by an Arbitral Tribunal

If an arbitrator's order is not complied with voluntarily – although voluntary compliance is advisable to remain on good terms with the tribunal that is going to render an award in the matter – a tribunal may make use of the following means to substitute its lack of coercive power.

As an ex post means, arbitrators can order a party failing to comply with an injunction to pay the unnecessary costs generated by having abusively initiated or continued court proceedings in disregard of the tribunal's injunction.⁽¹³³⁸⁾ The arbitral tribunal may, hence, consider the recalcitrant party's behaviour when allocating the costs of the arbitration; even if the party having initiated proceedings in parallel before the national courts prevailed in the arbitration on the merits, the tribunal can 'penalise' this party by shifting the financial burden for the costs of the arbitration to it.⁽¹³³⁹⁾ Pursuant to an aggrieved party's claim, arbitrators may also grant damages properly [page "224"](#) quantified for a recalcitrant party's commencement or continuation of court proceedings in breach of the arbitration agreement.⁽¹³⁴⁰⁾ An aggrieved party may, for instance, seek compensation for the costs caused by the enjoined party's breach of the arbitration agreement, such as the fees paid to its lawyer for representation in the abusive court proceedings.⁽¹³⁴¹⁾ These monetary amounts can compensate a party for the loss incurred by the breach of the arbitration agreement; they do, however, not sanction a recalcitrant party directly, nor is their deterrent effect substantial, especially for a financially strong party.⁽¹³⁴²⁾

Apart from these compensatory means, a punitive sanction like *astreinte* would probably be more apt to force an enjoined party to comply with an injunction. *Astreinte* is the threat of civil penalty ensuring compliance with a decision of a judge originating from French law.⁽¹³⁴³⁾ It needs to be questioned whether an arbitrator is entitled to order *astreinte* and whether such an order could be enforced in order to have a deterrent effect on a recalcitrant party. An arbitral tribunal with its seat in France under the aegis of the ICC and to which French procedural law was applicable concluded that it could order an injunction coupled with a fine, which had been requested by the respondent and which was part of the Terms of Reference.⁽¹³⁴⁴⁾ It is recognised in French case law and doctrine that an arbitral tribunal may reinforce its decision by ordering payment of an *astreinte*.⁽¹³⁴⁵⁾ Accordingly, the French arbitration law has newly adopted a provision, with the Decree of 13 January 2011, explicitly empowering an arbitral tribunal to order an *astreinte* with a

provisional measure if the arbitrators consider it necessary.⁽¹³⁴⁶⁾ It seems sensible to infer that, if either the parties so agree or if the applicable procedural law allows it, an arbitral tribunal may order astreinte as a remedy.⁽¹³⁴⁷⁾ Enforcement of an astreinte is, however, a different matter: in general, an arbitral tribunal lacks coercive power and, hence, cannot effectively order sanctions if an enjoined party does not comply with an injunction. Arbitrators may, however, seek the assistance of a national court to have sanctions imposed on their injunctions.⁽¹³⁴⁸⁾ If astreinte is ordered as the judicial penalty for non-compliance with a provisional measure, a Swiss state court, for instance, will not enforce such an order, since astreinte is not available as a means of enforcement before Swiss courts.⁽¹³⁴⁹⁾ If an [page "225"](#) arbitral award grants injunctive relief combined with an astreinte, the order, however, would have to pass the public policy test of the enforcing court in order to become effective.⁽¹³⁵⁰⁾

Furthermore, even if an arbitral tribunal coupled an anti-suit order with the threat of a criminal sanction as an incentive for an enjoined party to voluntarily comply with an order, enforcement of such criminal sanctions is reserved to national courts.⁽¹³⁵¹⁾ Such sanctions will not be effective unless the addressee of the injunction is domiciled in the issuing country or unless he is temporarily situated within the jurisdiction of the court, for instance when he travels to this country for the evidentiary hearing, or unless assets of his are located in this country which can be attached.

[iii]. Recognition and Enforcement of Anti-suit Injunctions Abroad

If an addressee of an injunction is not subject to the jurisdiction of the court enforcing the arbitrators' order in the sense of Article 183(2) SPILA, section 42 Arbitration Act, or § 1041(2) ZPO, the sanctions ordered by the state judge are without effect. In this situation, it must be checked whether the arbitral tribunal's order (not the enforcement sanctions themselves) will be recognised and enforced by a foreign court.⁽¹³⁵²⁾

The recognition and enforcement scheme under the New York Convention arguably covers only arbitral awards dealing with an issue in a final decision; the scope of application of the Convention hence excludes interim measures.⁽¹³⁵³⁾ In any event, enforcement of an anti-suit injunction in the form of an arbitral award under the New York Convention would still have to pass the public policy test. In other words, if a national court's determination of its own jurisdiction is curtailed by an injunction, it might not be compatible with that state court's procedural public policy. A national court is, however, upon a party's request according to Article V(1)(a) New York Convention, in a position to review whether there is a valid arbitration agreement and, hence, whether the dispute needs to be settled in arbitration instead of before the state courts; if the state judge finds, in such a situation, that the agreement to arbitrate is valid it should not be reluctant to enforce an anti-suit injunction.⁽¹³⁵⁴⁾ But one cannot help noticing that anti-suit injunctions (issued by a state court) have been enforced only on very rare occasions, especially by civil law countries;⁽¹³⁵⁵⁾ hence, it is still to be seen how these courts will deal with anti-suit injunctions ordered by a foreign arbitral tribunal.

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[4]. Comparative Conclusion

It may be concluded from the comments made above that the issuance of an anti-suit injunction by an arbitral tribunal is generally possible, provided that the arbitration agreement is sufficiently broad and that the applicable procedural law does not state otherwise:⁽¹³⁵⁶⁾ arbitrators may temporarily enjoin a party from commencing or continuing court proceedings, or issue a permanent anti-suit injunction in the form of a final award.⁽¹³⁵⁷⁾

It may be expected that the number of applications for anti-suit injunctions to arbitrators will increase – at least with regard to arbitral tribunals having their seat in Member States of the EU and EFTA where parallel court proceedings have been commenced in another Member State –, since the possibility of granting anti-suit injunctions in aid of arbitration within the EU and EFTA has been effectively blocked by the ECJ's case law in *West Tankers*.

[a]. Conclusions from the Perspective of National Courts

A party opposed to the initiation of court proceedings in parallel with a pending arbitration usually raises the arbitration defence in court proceedings in order not to submit to the jurisdiction of that court. If the national court declines jurisdiction when ruling on the arbitration defence, the arbitral tribunal will be the only judicial body competent, whereby any injunction to refrain from continuing with the foreign court proceedings is rendered irrelevant. If the national court, however, affirms jurisdiction and declares that the arbitration agreement is invalid, it has, in most cases, nothing to fear from an injunction ordered by the arbitrators, since enforcement of the order is rarely successful.

[b]. Conclusions from the Arbitrators' View

It is still argued that the New York Convention's mandate to its contracting states to enforce arbitration agreements and to stay or dismiss proceedings if they are brought in breach of a valid arbitration agreement should suffice to address the concerns of parallel proceedings.⁽¹³⁵⁸⁾ In an ideal world this would be the case, since the national courts would then refer to an arbitration-friendly and uniform interpretation of an arbitration agreement's validity. But, in reality, a party intending to disrupt the conduct of arbitral proceedings often commences parallel proceedings before national courts of competence whose parochial and hostile interpretation and application of the New York Convention are known. Nevertheless, an arbitral tribunal before which injunctive relief is sought should await the national court's decision on the arbitration defence raised by the respondent in the court proceedings according to Article II(3) New York [page "227"](#) Convention, unless the court's decision in the parallel judicial proceedings is heavily delayed. If the national court declines jurisdiction or stays the proceedings based on the validity of the arbitration agreement, the arbitral tribunal could spare the parties further costs and delay of the arbitral proceedings. It might further be questioned whether the requirement of urgency or the prerequisite of a legitimate interest for seeking injunctive relief is fulfilled, before the national court before which the parallel proceedings have been initiated and are pending has declared itself competent, thereby creating competing jurisdiction between itself and the arbitral tribunal.

For practical reasons, arbitrators should combine a time limit for compliance with an order;⁽¹³⁵⁹⁾ this will enable the tribunal to act timely if the order is not complied with voluntarily. Furthermore, under English arbitration law, for instance, the imposition of such a time limit, and its expiration, respectively, are significant for an application to a national court to enforce the arbitrators' peremptory order.⁽¹³⁶⁰⁾

It is argued that the issuance of anti-suit injunctions may jeopardise the enforceability of a prospective award, since national courts may refuse to enforce the award on the grounds that the award violates public policy or that the arbitrators lacked impartiality.⁽¹³⁶¹⁾ It is hard to see how the argument of an alleged lack of impartiality could be successful, since the arbitrators, by issuing an anti-suit injunction, make a statement that the arbitration agreement is valid and that they are therefore competent to hear the dispute. It is internationally accepted that arbitrators have the power to decide on their own jurisdiction; they can therefore not be reproached for prejudgment or for protecting their own interests by having exercised this right.⁽¹³⁶²⁾ As far as the refusal to enforce an award based on public policy reasons is concerned, two situations need to be distinguished: where an anti-suit injunction has been issued in the form of an award, recognition or enforcement may be refused if the enforcing courts are not familiar with such injunctions and, in addition, regard them as being contrary to public policy. Where, however, an injunction is not made the subject of the award, but has been issued in the form of a procedural order during the arbitral proceedings and on the basis of a valid arbitration agreement, it is not conceivable – absent any serious irregularities during the proceedings – how this will affect the award's enforceability.⁽¹³⁶³⁾

In contrast, the argument of protecting the award's enforceability could also be used to advise arbitrators to issue an anti-suit injunction, since foreign court proceedings on the same subject matter and between the same parties may potentially result in a decision contrary to the one reached in the arbitral proceedings – especially in a jurisdiction where the courts are rather hostile towards arbitration and interpret the exceptions in Article II(3) New York Convention broadly in order to declare themselves, instead of the arbitrators, competent to hear a dispute. Article 41 ICC Rules, for instance, holds explicitly that the arbitral tribunal shall make every effort to make sure [page "228"](#) that the award is enforceable at law. It may, hence, be queried whether, in a situation of pending parallel proceedings before the courts of a hostile jurisdiction, it is not the arbitrators' duty to take steps against the risk of contradictory decisions being rendered and, hence, against the resulting jeopardisation of the award's enforceability.

Arbitrators should nevertheless be very cautious in issuing anti-suit injunctions and do so only if the circumstances of the case justify, such as if one of the parties has engaged in abusive court proceedings to frustrate a valid arbitration agreement.⁽¹³⁶⁴⁾ The issuance of an anti-suit injunction should, hence, always be made contingent upon a case-by-case analysis and should be considered, only provided that the arbitral tribunal finds that it is the competent forum before which the dispute should be resolved. If it is then evident that the foreign court, before which a recalcitrant party has initiated proceedings in disrespect of the arbitration agreement, will not refer the parties to arbitration upon the applicant party's request, the arbitral tribunal should be willing to issue an anti-suit injunction. For the sake of preservation of the integrity of the arbitral process, it seems to be justifiable or even advisable for arbitrators to restrain an alleged breach of a valid arbitration agreement and to hold parties to their bargain.⁽¹³⁶⁵⁾

The revision of specific sets of institutional rules has brought into existence, or at least fortified, the role of emergency arbitrators before the arbitral tribunal has been fully constituted.⁽¹³⁶⁶⁾ Hence, the question arises as to whether these emergency arbitrators are also equipped with the power to issue anti-suit injunctions: apart from the fact that parties need to show a special urgency as to why

the interim measures concerned cannot wait until the arbitral tribunal is constituted,⁽¹³⁶⁷⁾ an applicant would also have to present arguments to the arbitrator as regards the validity and binding nature of the arbitration agreement. Without having established – at least prima facie – whether the parties are bound by a valid arbitration agreement, an emergency arbitrator should not proceed to issue an anti-suit injunction.

[c]. Conclusions from the Parties' View

Requesting the issuance of an anti-suit order before the arbitral tribunal might constitute a genuine alternative to applying for an anti-suit injunction in aid of arbitration before a national court; this may be because the supervisory court does not have a common law background, and therefore does not issue such injunctions, or the supervisory court is prevented from doing so by the ECJ's ruling in *West Tankers*, or because the requirements for obtaining an anti-suit injunction in support of arbitration by the national courts are stricter.⁽¹³⁶⁸⁾ For this purpose, parties should consider wording the arbitration agreement so as to give arbitrators the permission to issue interim measures or even to grant injunctive relief, in particular where the *lex arbitri* does not state so explicitly, for instance under French arbitration law, or where such power is [page "229"](#) not worded broadly enough, such as under § 1041(1) ZPO, or the chosen institutional arbitration rules are silent on such a tribunal's power.

As far as the requirements to file an application for an anti-suit injunction are concerned, it may be inferred from the considerations above that a party stands a high chance of being granted injunctive relief if it is capable of showing, on the substance, that the arbitration agreement is valid, that the subject matter of the court proceedings is covered by the arbitration agreement (i.e. proof of genuine parallel proceedings), and that it faces irreparable harm or an aggravation of the dispute if the court proceedings continue, such as the cost burden, the delay of the arbitral proceedings, and, last but not least, the risk of conflicting decisions being rendered in the same matter, which could lead to vacating any prospective final award.⁽¹³⁶⁹⁾ From a procedural perspective, the applicant should not unduly delay its application, since the arbitral tribunal might, in that case, refuse to issue an injunction based on lack of urgency. In order not to incur unnecessary costs and to delay the arbitral proceedings, and also for the sake of showing a legitimate interest, the applicant should consider filing the application – if the foreign court proceedings are already in progress – after the national court has ruled positively on its jurisdiction in accordance with Article II(3) New York Convention, i.e. after it has declared itself competent.

If a party has breached a valid arbitration agreement by initiating proceedings on the same subject matter against the same party before a national court, the opposing party should, when intending to seek injunctive relief before the arbitrators, concurrently claim for damages for breach of the arbitration agreement.⁽¹³⁷⁰⁾ As regards the basis for a damages claim, it should be noted that, if the aggrieved party limits its claim to damages and fails to seek injunctive relief to stop the illegitimate court proceedings, it is likely to run the risk of being reproached for not having sufficiently mitigated the damages.⁽¹³⁷¹⁾ A quantification of the damages incurred will most likely be possible, since the opposing party needs to be represented in the court proceedings, unless, of course, the national court has allocated the costs of the proceedings and the compensation for both parties' attorneys' fees fully to the claimant. The damages claim is, furthermore, independent of whether the application for injunctive relief is granted or not.⁽¹³⁷²⁾ There is, however, a high likelihood that an award for damages due to a breach of the arbitration agreement might not be enforceable, particularly before the national courts that confirmed the judicial proceedings commenced by the recalcitrant party.⁽¹³⁷³⁾ If faced with the risk that a prospective award of damages by the arbitral tribunal for a breach of the arbitration agreement might not be enforceable against the recalcitrant party, the aggrieved party could try to seek an interim order from the arbitrators obliging the party in breach of the arbitration agreement to provide security for the likely damage caused.⁽¹³⁷⁴⁾

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It is argued that, under English arbitration law, i.e. section 48(5)(a) Arbitration Act, an arbitral tribunal can grant injunctive relief in the final award only. It might, hence, not satisfy the applicant's desire for an urgent measure to stop the foreign court proceedings if it has to wait until the arbitral tribunal renders the final award. But, on the other hand, the injunctive relief granted in an arbitral award is open to enforcement under the New York Convention, which is generally held not to be available for the enforcement of interim measures.

Again, the limited effectiveness of an anti-suit injunction by an arbitral tribunal needs to be considered before embarking on a respective application: an anti-suit injunction issued by an arbitral tribunal is not in and of itself enforceable before the national courts before which parallel proceedings may have been initiated.⁽¹³⁷⁵⁾ Even if the arbitral tribunal is authorised by the law at the seat of arbitration to order an *astreinte*, for instance, with the injunction, as under French arbitration law, such a sanction has no impact without enforcement by the national courts having coercive power. In addition, enforcement of anti-suit injunctions is, especially as regards civil law jurisdictions, unlikely to be successful in practice.

Moreover, in the territory of the EU or EFTA, enforcement has the 'sword of Damocles' named *West Tankers* hanging over it.⁽¹³⁷⁶⁾ Furthermore, the issuance of anti-suit injunctions bears the risk that the enjoined party likewise seeks injunctive relief to counter the anti-suit injunction, so that a chain of contradictory orders is issued in parallel proceedings causing costs, delay and procedural chaos.⁽¹³⁷⁷⁾

In conclusion, in a jurisdiction that is hostile towards the issuance of anti-suit injunctions the party relying on arbitration and opposing the court proceedings – after having unsuccessfully invoked the arbitration defence before the national court – might be limited to requesting an anti-suit injunction from the arbitrators being aware of the difficult enforcement of such orders. If the seat of arbitration is located in a jurisdiction, however, that is favourable towards the issuance of anti-suit injunctions, such as England, and if the national court before which parallel proceedings have been initiated is not an EU or EFTA court, the party might prefer to file an application for an anti-suit injunction in support of arbitration with the seat court.⁽¹³⁷⁸⁾

[D]. Exceptio Rei Judicatae

In this chapter, the question is examined whether the jurisdiction of an arbitral tribunal or the admissibility of arbitral proceedings as such may be successfully challenged by raising the plea of *res judicata*, if the same claims, based on the same legal grounds, and between the same parties which are subject to the arbitral proceedings have already been finally decided by a national court. This constellation, however, is not expected to be very frequent, since if the parties have concluded an arbitration agreement, the [page "231"](#) matters in dispute between them will, in principle, be dealt with by an arbitral tribunal in the first place; however, where an issue, after having been decided by a state court, also becomes relevant in subsequent arbitral proceedings, the effectiveness of a *res judicata* plea is relevant.⁽¹³⁷⁹⁾

Strictly speaking, the *exceptio rei judicatae* is not a jurisdictional plea, but rather affects the admissibility of the claim as such, since the claim can no longer be heard in any forum if it has *res judicata* effect.⁽¹³⁸⁰⁾ It will, nevertheless, be analysed under this heading, since the plea of *res judicata* has the potential of curbing consecutive parallel proceedings and thereby directly impacts an arbitral tribunal's jurisdiction.

It is internationally recognised that *res judicata* is a general principle of law.⁽¹³⁸¹⁾ It has been established above that arbitral awards, in principle, have the same *res judicata* effect as a court judgment does, hence arbitral awards are capable of forcing a national court to dismiss a case for want of jurisdiction.⁽¹³⁸²⁾ Does a final court judgment have the same effect on arbitral proceedings dealing with the same subject matter between the same parties? This topic will be elaborated below with due reference to the ILA recommendations on *res judicata* directed primarily at arbitrators.

[1]. The ILA Recommendations on Res Judicata

The International Commercial Arbitration Committee of the ILA was mandated to study and report on the proliferation and the effects of *lis pendens* and *res judicata* in arbitration. The recommendations this Committee came up with in connection with *lis pendens* have already been explained above.⁽¹³⁸³⁾ The Committee, furthermore, issued a separate report and recommendations with regard to *res judicata*. These recommendations constitute a body of evolving international arbitration soft law⁽¹³⁸⁴⁾ and, as such, offer useful guidance to arbitrators having to deal with *res judicata* situations, but they may also serve as authority for national courts when considering the effects of *res judicata* of international commercial arbitral awards.⁽¹³⁸⁵⁾

In the interim report on *res judicata* and arbitration, the ILA defines the doctrine of *res judicata* as follows:

"The term res judicata refers to the general doctrine that an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties (the so-called 'triple-identity' criteria)."⁽¹³⁸⁶⁾

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Unlike the ILA recommendations on *lis pendens*, the recommendations on *res judicata* do not deal with the relationship between national courts and arbitral tribunals and hence do not give guidance as to what the arbitral tribunal is to do when faced with a prior national judgment.⁽¹³⁸⁷⁾ The Committee's Final Report on *Res Judicata*, nevertheless, suggests that arbitrators take into account the recommendations also in this respect.⁽¹³⁸⁸⁾

The scope of application of the ILA recommendations on *res judicata* is limited to arbitral awards, be they partial or final, and, hence, does not cover provisional awards, awards regarding interim measures or procedural decisions; the qualification of such arbitral awards and decisions is governed by the law of the seat where the respective arbitral award or decision was rendered.⁽¹³⁸⁹⁾

Recommendation 3, for instance, provides that:

"an arbitral award has conclusive and preclusive effects in further arbitral proceedings if:

- it has become final and binding in the country of origin and there is no impediment to recognition in the country of the place of the subsequent arbitration;*
- it has decided on or disposed of a claim for relief which is sought or is being reargued in the further arbitration proceedings;*
- it is based upon a cause of action which is invoked in the further arbitration proceedings or which forms the basis for the subsequent arbitral proceedings; and*
- it has been rendered between the same parties."⁽¹³⁹⁰⁾*

In summary, the conditions to be met for an arbitral award to have conclusive and preclusive effect are defined in a four-prong test comprising, in short, the following elements: finality of the award, identity of claim or relief sought, identity of cause of action and identity of parties involved. These elements appear to be of a rather universal and uncontroversial nature, for which reason they should also well serve as indicators to convey conclusive and preclusive effect to final decisions by arbitral tribunals and national courts.

As far as the exact scope of the res judicata effect of the final decision is concerned, Recommendation 4 provides that the conclusive and preclusive effect of the arbitral award pertains to, on the one hand, the determinations and relief contained in the dispositive part and in the reasoning necessary thereto, and, on the other hand, to the issues of fact or law which have been debated between the parties, determined in the arbitral award or at least incidental in the arbitral tribunal's determination, and which were material to the dispositive part of the award.⁽¹³⁹¹⁾ The ILA recommendations on res judicata hence endorse an extensive notion of res judicata which encompasses [page "233"](#) both claim estoppel and the common law concept of issue estoppel.⁽¹³⁹²⁾ Such a broad approach towards the effects of res judicata is regarded as supporting procedural efficiency and, hence, avoiding the duplicative and wasteful decision-making regarding already finally and bindingly adjudicated matters. In Recommendation 5, the net has been cast even wider:

"An arbitral award has preclusive effects in the further arbitral proceedings as to a claim, cause of action or issue of fact or law, which could have been raised, but was not, in the proceedings resulting in that award, provided that the raising of any such new claim, cause of action or new issue of fact or law amounts to procedural unfairness or abuse."⁽¹³⁹³⁾

In other words, a party may also be barred from arbitrating new claims and relief sought if any such arbitration constitutes a procedural unfairness or is otherwise abusive.⁽¹³⁹⁴⁾ This recommendation expands the notion of res judicata even further, but the application of this guideline is left to the sound and reasonable exercise of the arbitral tribunal's discretion.⁽¹³⁹⁵⁾ For the sake of procedural efficiency, the extension of the res judicata effect to abusive procedural tactics is desirable, but only if it is wisely applied by the respective adjudicatory bodies with due regard to the specific circumstances of the case.

Unlike the conclusive effects which may be invoked in subsequent proceedings at any time permitted under the applicable procedure, Recommendation 7 holds that the preclusive effect of res judicata should be raised on a party's initiative as soon as possible in the proceedings.⁽¹³⁹⁶⁾ This distinction is based on the ILA's qualification of the conclusive effect as being a matter of substance and of the preclusive effect as pertaining more to procedure.⁽¹³⁹⁷⁾ Arbitrators are, hence, not bound to observe the res judicata effect of a prior arbitral award ex officio. Recommendation 7, furthermore, conveys the view that the conclusive and preclusive effect of arbitral awards does not form part of public policy and may hence be waived by a party.⁽¹³⁹⁸⁾ Whether such a view is reconcilable with national case law on res judicata will be analysed below.⁽¹³⁹⁹⁾

[2]. Effectiveness of the Exceptio Rei Judicatae

It may be observed that an arbitral tribunal also applies the triple identity test when determining the res judicata effect of a prior judgment: *"Where there is, cumulatively, identity as regards parties, subject matter of the dispute petitem, and causa petendi, [page "234"](#) between a prior judgment and a new claim, the new claim is barred by the principle of res judicata."⁽¹⁴⁰⁰⁾*

National court judgments should have the same preclusive effect in arbitral proceedings as in national court litigation.⁽¹⁴⁰¹⁾ Basic principles of fairness demand that arbitral tribunals, as adjudicatory bodies principally on par with national courts, should also recognise the res judicata effect of a final court judgment, even more so since the parties to both the judgment and the arbitral proceedings are also bound by the previous judicial determination of their rights and

duties.⁽¹⁴⁰²⁾ Before portraying the arbitrators' approach towards the preclusive effect of a prior court judgment, the relevant law to determine the scope of the preclusive effect needs to be established.

[a]. Law Applicable to Determine Res Judicata Effect of Court Judgments

Since there are no uniform international standards defining the rules of preclusion to be applied by an international arbitral tribunal – and absent any party agreement thereto –, arbitrators first need to establish the applicable law governing the rules of preclusion. It might not be appropriate for arbitrators to mechanically apply the preclusion rules as defined by the national law and the courts' case law at the arbitral seat, since the parties may have opted for a neutral situs for the arbitration having no connection whatsoever to the matter in dispute nor to the parties.⁽¹⁴⁰³⁾

There are examples of arbitral tribunals having relied exclusively on the law of the place of arbitration in order to decide whether a court decision or an arbitral award previously rendered in a different country should be attributed res judicata effect.⁽¹⁴⁰⁴⁾ In an ICC case, likewise, the arbitral tribunal seated in France applied French law to determine the effect to be given to the defences of res judicata of a prior Swiss arbitral award; however, it took into account that French law does not conflict on the issue of res judicata with Swiss law principles or international arbitral precedents applying both civil law and common law provisions.⁽¹⁴⁰⁵⁾ An arbitral tribunal sitting in Paris vested with the power to decide as 'amiable compositeur', however, held in later ICC proceedings that French law would merely constitute a source of inspiration to determine the law governing the res judicata.⁽¹⁴⁰⁶⁾ There does not seem to be an established practice among arbitral tribunals as to which law to apply to determine the res judicata effect of a prior judgment. The ILA recommendations on res judicata may be consulted as a set of transnational soft law rules by analogy, but do not have a [page "235"](#) binding character. Nevertheless, arbitrators still tend to lean on notions of domestic law.⁽¹⁴⁰⁷⁾

[b]. Court Judgments' Preclusive Effect under National Arbitration Laws and Practice

The German, French and English arbitration laws and practice on the res judicata effect of prior court judgments on arbitral proceedings will be referred to first, and second, the Swiss law approach will be discussed separately.

[i]. German, French and English Law Perspectives

There is no German arbitration known to the author in which the arbitrators have reasoned on the res judicata effect of a prior court judgment on the same subject matter and between the same parties.

An arbitral tribunal seated in France dismissed a claim already ruled upon under an earlier award.⁽¹⁴⁰⁸⁾ As regards the English doctrine of abuse of process, which has recently been introduced into domestic arbitration by French case law ('concentration des moyens et des demandes'),⁽¹⁴⁰⁹⁾ its applicability in international arbitration has been refused by an arbitral tribunal seated in France.⁽¹⁴¹⁰⁾ It is argued that, in jurisdictions recognising a division between domestic and international arbitration rules, which is not the case in England, the delocalised nature of the rules applicable to international arbitration does not directly include the principles prevailing in state court proceedings and in domestic arbitration, such as the doctrine of the concentration of claims.⁽¹⁴¹¹⁾ On an exceptional basis, however, – excluding a simple omission of a claim – an international arbitral tribunal may nevertheless consider applying the abuse of process doctrine if a claimant knowingly holds back claims capable of being dealt with by the same arbitral tribunal with the abusive intention of systematically harming the opponent's position by mandating two arbitral tribunals consecutively with the same subject matter.⁽¹⁴¹²⁾ It may be assumed that an arbitral tribunal seated in France would make the same fundamental considerations when confronted with a previous court judgment.

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The res judicata effect of a prior US Federal Court judgment was reviewed by an arbitral tribunal sitting in London under English law; since the arbitral tribunal found that no arbitration agreement existed, deciding the res judicata issue became moot.⁽¹⁴¹³⁾ In a later decision, the Court of Appeal confirmed that a judgment of a foreign court can give rise to estoppel by res judicata and that this principle is routinely applied in arbitration proceedings.⁽¹⁴¹⁴⁾ As regards the res judicata effect of judgments rendered on the merits by a EU or EFTA court (in disregard of an arbitration agreement), it has been held by the Court of Appeal in the seminal *National Navigation* ruling that such a Brussels-Lugano judgment must be recognised, not only by the English courts, but also by an arbitral tribunal applying English law.⁽¹⁴¹⁵⁾

[ii]. Swiss Law Perspective

A clear distinction as to recognising the preclusive effect of a previous court judgment is made in Swiss legal doctrine depending on whether an arbitral tribunal sitting in Switzerland is confronted with a judgment given by a Swiss, or by a foreign court.

(a). With Domestic Court Decision

If the court having decided on the matter first is located in the same country as where the arbitral tribunal has its seat, Swiss law has developed the following solution regarding the court judgment's res judicata effect on the arbitral proceedings.

If an arbitral tribunal with its seat in Switzerland is seised with an identical claim to one that has already been conclusively decided by a Swiss court between the same parties, the arbitral tribunal seised second cannot disregard the principle of res judicata and is to observe the res judicata effect of the earlier court judgment.⁽¹⁴¹⁶⁾ The Swiss court's adjudication in respect of an arbitration agreement between the parties is also binding on the arbitral tribunal and, hence, cannot be reviewed by the arbitral tribunal.⁽¹⁴¹⁷⁾

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(b). With Foreign Court Decision

In the event that a judgment was given – prior to the commencement of arbitral proceedings – by a national court outside the jurisdiction where the arbitral tribunal has its seat, it needs to be examined whether such a judgment is to first pass the requirements for recognition before being considered res judicata by the arbitrators.

If seised with an identical claim to one that has already been decided between the same parties by a foreign court, an arbitral tribunal with its seat in Switzerland shall declare such a claim inadmissible, provided that the foreign court judgment may be recognised in Switzerland.⁽¹⁴¹⁸⁾ The relevant conditions for recognition depend on the jurisdiction in which the foreign judgment was rendered.

If the judgment was made in the jurisdiction of a contracting state of the Lugano Convention, Articles 33 to 37 Lugano Convention are applicable: Article 33(1) Brussels Regulation/Lugano Convention holds that a judgment given in a contracting state shall be recognised in another contracting state without any special procedure being required, i.e. ipso iure. The grounds for refusing recognition of a judgment under the Lugano Convention are the following: manifest violation of the recognising state's public policy,⁽¹⁴¹⁹⁾ failure of service of relevant documents in ex parte proceedings,⁽¹⁴²⁰⁾ conflict of the foreign judgment with an earlier judgment in parallel proceedings⁽¹⁴²¹⁾ or with Regulation/Convention provisions on consumer contracts, insurance or exclusive jurisdiction matters.⁽¹⁴²²⁾

The ability for judgments rendered in another jurisdiction to be recognised in Switzerland must be reviewed – as a preliminary issue – according to Articles 25 to 27 SPILA.⁽¹⁴²³⁾ A foreign decision is capable of recognition under the SPILA, if the foreign court was competent to adjudicate on the matter, if the foreign judgment is final, and if none of the grounds for refusal of recognition can be invoked successfully.⁽¹⁴²⁴⁾ A foreign judgment will not be recognised if one of the below listed grounds of refusal applies:

- if the recognition of the decision in Switzerland would clearly be contrary to Swiss public policy;⁽¹⁴²⁵⁾
- if a party proves that it was not correctly summoned to appear before court (either according to the law at its domicile or the law at its habitual residence), unless the party voluntarily appeared before court;⁽¹⁴²⁶⁾ page "238"
- if a party proves that the decision was rendered in disregard of fundamental principles of Swiss procedural law, in particular by denying that party the right to be heard;⁽¹⁴²⁷⁾
- if a party demonstrates that proceedings on the matter at hand have previously been initiated in Switzerland or that the matter has already been adjudicated on in Switzerland or abroad and that this decision is capable of recognition in Switzerland.⁽¹⁴²⁸⁾

Even though Article 186(1bis) SPILA has vacated the Swiss Federal Supreme Court's decision in *Fomento* on the scope of application of the lis pendens principle on an arbitral tribunal with its seat in Switzerland, this provision does not impact the binding effect of foreign judgments on proceedings before an arbitral tribunal with its seat in Switzerland; hence the res judicata doctrine applies to arbitral tribunals with their seat in Switzerland.⁽¹⁴²⁹⁾

[3]. Res Judicata: A Principle of International Public Policy?

As concerns the principle of res judicata, it has been clarified that this concept pertains to a general principle of law. Can one conclude, therefore, that the doctrine of res judicata is part of public policy and should hence be observed by national courts and arbitral tribunals alike?

If an award is rendered in disregard of a legally binding previous judgment or another arbitral award, the award may violate public

policy under German law: where the conflict of the two decisions relates to the jurisdiction of the arbitral tribunal, i.e. where a court has previously determined that the arbitral tribunal lacks jurisdiction, any subsequent arbitral award is contrary to public policy.⁽¹⁴³⁰⁾ Where the conflict concerns the merits of the award, the conflict must be obvious to constitute a violation of public policy.⁽¹⁴³¹⁾ It may be observed that the fact alone that there exists a prior final decision on the same subject matter and between the same parties does not seem to be sufficient for a violation of public policy, but rather the severity of the conflict between the decisions is the decisive factor.

In one early decision, the Paris Court of Appeal annulled an arbitral award reasoning that the failure to give preclusive effect to a prior judgment was contrary to French public policy.⁽¹⁴³²⁾ This finding has, however, not been repeated by recent French case law. The res judicata effect of a court decision was in a later decision held not to be part of the rules of international public policy by the Paris Court of Appeal.⁽¹⁴³³⁾ [page "239"](#) More precisely, the Paris Court of Appeal clarified that res judicata rights are of a private nature and do not enjoy public policy status.⁽¹⁴³⁴⁾ A party to an arbitral award rendered by a tribunal seated in France challenged the award, arguing that it ignored the res judicata effect of a previous award between the same parties and on the same subject matter, and thereby violated international public policy. The Paris Court of Appeal held on this application that the party had not shown that the arbitral award conflicted with a decision capable of enforcement in France and hence public policy had not been infringed.⁽¹⁴³⁵⁾ It therefore seems that the res judicata effect of a prior arbitral award, by itself, is not sufficient to render a later decision contrary to public policy, but if the decisions on the same subject matter and between the same parties are irreconcilable, the later decision may be annulled based on public policy reasons.⁽¹⁴³⁶⁾

Swiss courts, by contrast, have recognised the principle of res judicata as pertaining to procedural public policy on several occasions in the past.⁽¹⁴³⁷⁾ Only recently, the Swiss Federal Supreme Court, for the first time, annulled an arbitral award ignoring the conclusive and preclusive nature of an earlier decision based on the public policy ground.⁽¹⁴³⁸⁾

Furthermore, English case law has also held that the principle of res judicata is a rule of public policy.⁽¹⁴³⁹⁾

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Based on this analysis, it can be observed that Swiss and English case law have explicitly confirmed that ignoring the conclusive and preclusive effect of an earlier final decision is contrary to (procedural) public policy. French case law seems – in order to declare an arbitral award contrary to public policy – to require, in addition to the violation of the res judicata effect, that the decisions (rendered in the previous and the later proceedings) are in clear conflict with each other. Under German law, likewise, the res judicata effect combined with a conflict between the decisions may lead to a violation of public policy. As discussed above,⁽¹⁴⁴⁰⁾ Recommendation 7 of the ILA recommendations on res judicata seems to suggest that the principle of res judicata does not comprise international public policy.

The ILA, however, does not protect the behaviour by which a party systematically takes advantage of contradicting decisions rendered on the same subject matter between the same parties: the ILA has, in its Interim Report on Public Policy⁽¹⁴⁴¹⁾, analysed that it constitutes a violation of public policy if an arbitral award that is contrary to and inconsistent with a prior judgment of a national court on the same subject matter is enforced.⁽¹⁴⁴²⁾ This report further holds that if proceedings are initiated in bad faith and in disregard of a final and conclusive decision on the same subject matter and between the same parties, public policy objections might stand a higher chance of being considered.⁽¹⁴⁴³⁾ In other words, in situations of manifest abuse of process (i.e. with regard to proceedings that serve no legitimate purpose), arguments based on general principles of procedural or substantive law might be heard to prevent evident injustice.⁽¹⁴⁴⁴⁾

In conclusion, even though the courts in the jurisdictions examined do not pronounce the principle of res judicata as being a public policy rule to the same extent, they nevertheless recognise the potential of the res judicata doctrine to take the position of a rule of public policy, especially when used in a clearly abusive manner or when combined with a situation of clear conflict between decisions rendered on the same subject matter and between the same parties.

[4]. Comparative Conclusion

It can be taken as established that the doctrine of res judicata, as an internationally recognised principle, applies also in the context of international arbitration.⁽¹⁴⁴⁵⁾ Hence arbitral tribunals, too, should be bound by the res judicata effect of a court judgment.⁽¹⁴⁴⁶⁾ Born justifies this conclusion in the following words: "*The policies of fairness, efficiency, upholding the integrity of the judicial/arbitral process and effectuating the* [page "241"](#) *parties' intentions apply with essentially equal force in arbitral, as well as judicial, forums.*"⁽¹⁴⁴⁷⁾

[a]. Conclusions from the Arbitrators' View

The ILA recommendations on res judicata represent an appropriate set of guidelines and an excellent starting point for the development of transnational rules on res judicata in the arbitration context, to which arbitrators may refer when confronted with a conclusive court judgment rendered prior to the initiation of the arbitration.

Even though national statutory arbitration laws usually do not contain a duty to observe the res judicata effect of a final court judgment, arbitrators are, in general, expected to do so in light of the international acceptance of the principle of res judicata to avoid the unnecessary duplication of proceedings and to protect the parties' desire for finality. Arbitrators are, however, also obliged to respect the preclusive effect of a final court judgment in consideration of their mandate to issue an enforceable arbitral award: as regards the conduct of proceedings in clear disregard of a final and valid prior court judgment or arbitral award given on the same subject matter and between the same parties, there is good reason to assume that it is internationally recognised that such proceedings and the subsequent decision contradicting the earlier decision are contrary to public policy. Based on these findings, an arbitral tribunal is well advised to terminate the proceedings (or, in the case of a foreign judgment, at least to stay the proceedings until the court decision has been successfully enforced), if a decision has been rendered in previous proceedings on the same claims, the same legal grounds and between the same parties, if this decision has become final and was not rendered in disregard of a valid arbitration agreement or without the parties having voluntarily appeared in court.

Public policy is not the only ground that may be invoked against an arbitral award ignoring the res judicata effect of a prior decision. Basically such an arbitral award might also give rise to challenges of lack of a valid arbitration agreement, of an ultra vires decision by the arbitral tribunal or of a violation of due process.⁽¹⁴⁴⁸⁾

Arbitrators should, in any case, seriously consider a party's defence that the court delivering the prior judgment was not competent to do so or that the procedure in which the judgment was rendered has violated the party's right to be heard.⁽¹⁴⁴⁹⁾ This [page "242"](#) question becomes even more acute if the arbitral tribunal is confronted with a court judgment given in a country outside the jurisdiction where the arbitral tribunal has its seat: the arbitral award is exposed to the risk of being annulled if the arbitral tribunal ignores the judgment previously given on the same subject matter and between the same parties and the judgment is successfully enforced in the seat country.⁽¹⁴⁵⁰⁾ If the arbitral tribunal terminates the arbitration based on the previous court judgment which is subsequently declared unenforceable the arbitrators might be reproached for not having fulfilled their mandate. It is therefore advisable for an arbitral tribunal to review whether the foreign court judgment is capable of recognition in the country where the arbitral tribunal has its seat – in analogy to the seat court's procedure for recognising a foreign judgment.⁽¹⁴⁵¹⁾ A commentator has even suggested that arbitrators may themselves provoke court control of a foreign judgment said to have res judicata effect if they have doubts about the judgment's recognisability by the courts at the seat of arbitration.⁽¹⁴⁵²⁾

It may also be enquired whether an arbitral tribunal is to apply the extended res judicata effect foreseen by the abuse of process doctrine originally developed in common law jurisdictions.⁽¹⁴⁵³⁾ The ILA Recommendation 5 suggests that arbitrators should make use of this doctrine with great caution. The preclusive effect of a final judgment regarding claims that have not been raised in the previous proceedings, but which could have been raised should be treated with even more restraint where the doctrine of abuse of process is not an integral part of the law applicable to determine the res judicata effect. Hence, only where a party has acted evidently against good faith by initiating arbitral proceedings on an issue it could have already raised without difficulty in previous court proceedings, and which it did not hold back for any good reason, may the arbitrators, for the sake of the integrity of the process, regard the issue as precluded by the prior judgment.⁽¹⁴⁵⁴⁾

[b]. Conclusions from the Parties' View

Based on the paramount principle of party autonomy characteristic of arbitration, and the mandate conveyed to the arbitrators by the parties to render an award regarding certain issues, it seems very unlikely that it is within an arbitral tribunal's responsibility to observe the preclusive effects of a prior court judgment involving the same legal grounds and claims between the same parties of its own motion.⁽¹⁴⁵⁵⁾ This conclusion holds even more weight because the policy consideration behind res judicata being observed ex officio by a state judge is to avoid the unnecessary and uneconomic [page "243"](#) duplication of judicial proceedings, a principle that is not equally relevant in arbitration, which is guided by party autonomy.⁽¹⁴⁵⁶⁾ It is submitted, in accordance with ILA Recommendation 7, that a party opposing the continuance of the arbitral proceedings must raise the plea of res judicata.

From a procedural perspective, the plea of res judicata should be raised as soon as possible in arbitral proceedings in order not to waive a party's right to invoke the preclusive effect of a prior court judgment on the arbitral proceedings. The party raising the plea should plead on the triple identities, and also on the scope and the

exact contents of the res judicata effect, considering, in particular, the parties' common expectations, since it is not always justified that the preclusive effect is determined solely by the law at the seat of arbitration. Furthermore, as regards foreign judgments, the party raising the plea should also show that the foreign decision meets the requirements for recognition and enforcement under the law where the arbitral tribunal is seated; if the party initiates recognition or enforcement proceedings before the courts at the seat of arbitration for this purpose, the arbitral tribunal's discretion to refuse the plea of res judicata for doubts of the decision's enforceability in the seat country is considerably limited.

English case law has furthermore shown that where one party commences arbitral proceedings so as to re-arbitrate matters already conclusively decided against it by a national court, the English courts are highly likely to grant an anti-arbitration injunction against such a party upon application.⁽¹⁴⁵⁷⁾

[E]. Summary

The counterpart to the arbitration defence before a national court in parallel proceedings is the plea of lack of jurisdiction before the arbitral tribunal. This plea needs to be raised as soon as possible in the arbitral proceedings in order not to risk waiving the right to object before the arbitral tribunal. The seemingly strictest time requirement is again stipulated by the Arbitration Act, since section 31(1) provides that a party must raise the objection not later than when it takes the first step in the proceedings to contest the merits of the case. Based on the internationally accepted principle of competence-competence in arbitration, the arbitrators are entitled to deal with jurisdictional objections and to themselves determine whether the claim is based on a valid arbitration agreement or whether the issue in question is covered by the agreement to arbitrate. The arbitral tribunal is free either to issue a preliminary award on its jurisdiction, or to determine this issue in the final award on the merits. Both awards accepting the arbitral tribunal's jurisdiction, and negative jurisdictional awards, are open to court control before the national courts at the seat of arbitration. It is, however, held in German case law that none of the grounds based on which awards may be challenged (according to § 1059 ZPO) is available to request the setting aside of an [page "244"](#) award by which the arbitrators have allegedly wrongly declared themselves incompetent. The arbitral tribunals' jurisdictional awards have res judicata effect on the national courts, unless the courts have overturned the awards when asked to review the arbitrators' decision.

The chronological priority of court proceedings initiated prior to arbitral proceedings (on the same subject matter and between the same parties) does not, in general, give rise to arbitrators staying arbitral proceedings. It is, furthermore, doubtful that it is, in principle, adequate to apply the principle of lis pendens in the context of arbitration. The ILA recommendations on lis pendens, likewise, do not establish an obligation on the arbitrators to stay the proceedings if seised second to a national court, but emphasise the importance of preserving the arbitral tribunal's competence-competence. The national arbitration laws examined have not opted for a lis pendens rule binding an arbitral tribunal, either: arbitral tribunals seated in France seem to give preferential force to the existence of a valid arbitration agreement ousting the jurisdiction of a national court even if seised prior to the arbitral tribunal. And under the German, Swiss and English statutory arbitration laws, it is explicitly held that arbitral proceedings may or should continue while proceedings dealing with the same relief, based on the same legal grounds, and between the same parties are pending before a national court.

Unless explicitly excluded by the parties, arbitrators are generally, upon request of a party, empowered to issue anti-suit injunctions based on their competence to grant interim relief. An arbitral tribunal has discretion as to whether to do so in the form of a procedural order or an arbitral award. An injunction's effectiveness, however, is fully dependent on its enforcement by national courts in case of non-compliance by the enjoined party, since the arbitrators do not have coercive power. That is exactly the order's weakness: in jurisdictions familiar with anti-suit injunctions, the courts might assist the arbitrators in having the order enforced; jurisdictions that do not recognise anti-suit orders, however, will most likely be reluctant to help enforce such measures. In addition, the enforcement of anti-suit injunctions issued by arbitrators is called into question by the ECJ's ruling in *West Tankers*, since they also have the effect of interfering with the Member State courts' determination of their jurisdiction. Consequently, an anti-suit injunction's effectiveness should be considered closely on a case-by-case basis by the requesting party and the arbitrators alike in order to avoid a waste of cost and time.

Even if the national statutory arbitration laws do not provide so explicitly, it is generally recognised that arbitral tribunals should also observe the res judicata effect of a prior court judgment having dealt with the same claims, based on the same legal grounds, and between the same parties as the pending arbitral proceedings, provided that the court judgment is capable of being recognised by the courts at the seat of arbitration. Swiss and English case law have even declared the principle of res judicata to pertain to public policy. There is, however, an uncertainty regarding the law applicable to the determination of a judgment's preclusive effect. Practice shows that arbitral tribunals often turn to the law at the

place of arbitration, even though the links to the *lex arbitri* are often weak and random. Furthermore, the ILA has set up recommendations representing useful guidelines for arbitrators, and an attempt to [page "245"](#) formulate transnational rules when it comes to the *res judicata* effect of prior arbitral awards; it is submitted that these recommendations also provide useful guidance on the handling of prior court judgments. A party that is able to demonstrate, as soon as possible in the arbitration, the triple identities between the prior court judgment and the arbitral proceedings, and the judgment's recognisability by the courts at the place of arbitration with the legitimate intention of avoiding conflicting decisions and the unnecessary duplication of proceedings, stands a high chance of successfully bringing the arbitration to an end.

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- ³⁹⁵ Cf for a discussion of instituting a damage claim for breach of an arbitration clause: Dutson, 97 ff.; for recent Swiss case law, cf Swiss Federal Supreme Court Decision 4A_232/2013.
- ³⁹⁶ Cf Lew/Mistelis/Kröll, paras 14-75 ff.
- ³⁹⁷ Cf Schramm/Geisinger/Pinsolle, 100, 103.
- ³⁹⁸ Schramm/Geisinger/Pinsolle, 100 f.
- ³⁹⁹ Born, 1025 f., 277 ff.
- ⁴⁰⁰ Cf Friedland/Hornick, 182 f.; Wilske/Fox, Art. II para. 200. There are, however, commentators who construe Art. II(3) New York Convention as allowing the national *lex fori* to provide that the parties can be referred to arbitration even without an objection (cf references in Schramm/Geisinger/Pinsolle, 103 fn 235).
- ⁴⁰¹ van den Berg (1994), 137 f.
- ⁴⁰² Cf van den Berg (1994), 138.
- ⁴⁰³ Schramm/Geisinger/Pinsolle, 102.
- ⁴⁰⁴ Lamm/Sharpe, 304.
- ⁴⁰⁵ Schramm/Geisinger/Pinsolle, 103.
- ⁴⁰⁶ van den Berg (1994), 139; cf Samuel, 198 ff.; Poudret/Besson, para. 492.
- ⁴⁰⁷ Cremades/Madalena, 510 f.; cf Poudret/Besson, para. 492.
- ⁴⁰⁸ Cf Holtzmann/Neuhaus, 304; van den Berg (1994), 152 f. For a general detailed discussion of the law applicable to arbitrability cf: Hanotiau (1999), 146-167.
- ⁴⁰⁹ By analogy to Art. V(2)(a) New York Convention; van den Berg (1994), 152 f.
- ⁴¹⁰ Cf Kröll (2009), 342.
- ⁴¹¹ Kröll (2009), 342 f. with references to commentators advocating this view.
- ⁴¹² Cf Kröll (2009), 343.
- ⁴¹³ Cf Schramm/Geisinger/Pinsolle, 103; van den Berg (1994), 155.
- ⁴¹⁴ Cf Schramm/Geisinger/Pinsolle, 103; cf for a detailed overview also Born/Koepp, 60 ff.
- ⁴¹⁵ Bishop/Coriell/Medina Campos, 288 ff.; cf Born/Koepp, 67 ff.
- ⁴¹⁶ Bishop/Coriell/Medina Campos, 290 ff.
- ⁴¹⁷ Schramm/Geisinger/Pinsolle, 104.
- ⁴¹⁸ Bishop/Coriell/Medina Campos, 287 f.
- ⁴¹⁹ Singhvi, 214; Wilske/Fox, Art. II paras 228 ff. Van den Berg advocates the view that the content of the words 'null and void, inoperative or incapable of being performed' is to be determined in accordance with the law applicable to the arbitration agreement (van den Berg (1994), 169); cf Di Pietro/Platte, 107 f.; cf reference in Schramm/Geisinger/Pinsolle, 104 f. Bernardini holds the *lex fori* to be relevant to determine the validity of the arbitration agreement under Art. II(3) New York Convention, but argues that Art. V(1)(a) New York Convention is applicable to requests for enforcement only (Bernardini, 200; Friedland/Hornick, 156 ff.).
- ⁴²⁰ Cf Bishop/Coriell/Medina Campos, 290 f.
- ⁴²¹ Cf Bishop/Coriell/Medina Campos, 293.
- ⁴²² Cf for references hereto Schramm/Geisinger/Pinsolle, 105 fn 249.
- ⁴²³ Cf Schramm/Geisinger/Pinsolle, 105; Born/Koepp, 59.
- ⁴²⁴ Schramm/Geisinger/Pinsolle, 105 f.; Wilske/Fox, Art. II para. 309; van den Berg (1994), 158. For further examples of inoperative arbitration agreements and of those that do not qualify as inoperative cf: Lamm/Sharpe, 306 ff.; cf Di Pietro/Platte, 113 ff.
- ⁴²⁵ Schramm/Geisinger/Pinsolle, 108; van den Berg (1994), 159; cf Wilske/Fox, Art. II paras 311 ff.; Di Pietro/Platte, 115 ff. For a detailed discussion of the notion of 'incapable of being performed' cf: Kröll (2009), 326 ff.
- ⁴²⁶ See for a definition of the negative effect of competence-competence Chapter 2, §2.02[B] and §2.02[E] above.
- ⁴²⁷ Cf Schramm/Geisinger/Pinsolle, 109.
- ⁴²⁸ Cf for a detailed discussion of the traditional and modern approach: Bishop/Coriell/Medina Campos, 280 ff.
- ⁴²⁹ Schramm/Geisinger/Pinsolle, 110; van den Berg (1994), 135.
- ⁴³⁰ Schramm/Geisinger/Pinsolle, 110 f.; cf Wilske/Fox, Art. II para. 318; Poudret/Besson, para. 494.
- ⁴³¹ van den Berg (1994), 129; cf Poudret/Besson, para. 494.
- ⁴³² van den Berg (1994), 131; cf Samuel, 200.
- ⁴³³ Lamm/Sharpe, 306; van den Berg (1999), 25.
- ⁴³⁴ Lamm/Sharpe, 321.
- ⁴³⁵ Cf Friedland/Hornick, 156 f.
- ⁴³⁶ Cf van Houtte (2001), 46.
- ⁴³⁷ Born/Koepp, 59, 63.

- ⁴³⁸ Cf Schramm/Geisinger/Pinsolle, 112; see for a detailed discussion Chapter 3, §3.01[A][2][c][iii] point (c) below.
- ⁴³⁹ Cf also Born, 1048.
- ⁴⁴⁰ Hascher (1997), 57; cf van Haersolte-van Hof, 36.
- ⁴⁴¹ Cf Audit (1993), 22.
- ⁴⁴² van Haersolte-van Hof, 36 f.; Perret, 338 with further references; cf van Houtte (2001), 48, 52 f.
- ⁴⁴³ See for a detailed discussion of the ECJ's case law hereto Chapter 2, §2.03[A][1] above.
- ⁴⁴⁴ Audit (1993), 21 f.
- ⁴⁴⁵ Cf van Haersolte-van Hof, 37; van Houtte (2001), 52 f.
- ⁴⁴⁶ The Commercial Court, nevertheless, refused recognition of a Spanish judgment rendered in disregard of an arbitration agreement valid by its proper law reasoning that such recognition would be manifestly contrary to public policy in the United Kingdom (*National Navigation Co v Endesa Generacion SA* [2009] EWHC 196 (Comm), [2009] 1 CLC 393 (Comm) 444 ff.; agreeing: Collins (*Dicey, Morris & Collins*), para. 14-210; Briggs/Rees, para. 7.08, in particular at 681). The Commercial Court's ruling has, however, been reversed by the Court of Appeal: *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397 (CA), [2009] 2 CLC 1004 (CA).
- ⁴⁴⁷ It remains to be seen how recital 12 Recast Brussels Regulation will improve the interplay between the New York Convention and the Brussels Regulation (see for a discussion of recital 12 Recast Brussels Regulation Chapter 2, §2.03[B][2] above).
- ⁴⁴⁸ Singhvi, 204.
- ⁴⁴⁹ Van den Berg has argued in favour of defining the scope of review in the wording of Art. II(3) New York Convention, which, in his opinion, should be a prima facie review (van den Berg (2009), 655). Veeder holds that it remains impossible to amend the New York Arbitration Convention, since it could open Pandora's box and would divide the world in 'new' and 'old' contracting states (Veeder (2006), 808.). Other commentators suggest that it would be more effective if the UNCITRAL prepared a recommendation on how to interpret Art. II(3) New York Convention, since it already exists for Art. II(2) New York Convention, see for instance Berger (2011), 44.
- ⁴⁵⁰ See for a discussion of recital 12 Recast Brussels Regulation Chapter 2, §2.03[B][2] above.
- ⁴⁵¹ Binder, para. 2-082; Holtzmann/Neuhaus, 302; Broches, Art. 8 para. 2.
- ⁴⁵² Brekoulakis/Shore, 602 f.
- ⁴⁵³ Art. 1(2) UNCITRAL Model Law.
- ⁴⁵⁴ Huber, § 1032 para. 42.
- ⁴⁵⁵ § 1025(2) ZPO; Poudret/Besson, para. 495.
- ⁴⁵⁶ Saenger, § 1032 para. 2; Schwab/Walter, Kapitel 7 para. 1; Reichold, § 1032 para. 2; Münch (2013), § 1032 para. 2; Prütting, § 1032 para. 1.
- ⁴⁵⁷ Cf also Vidal, para. 135.
- ⁴⁵⁸ Swiss Federal Supreme Court Decision 122 III 139 consideration 2a; Swiss Federal Supreme Court Decision 121 III 38 consideration 2; cf Oetiker (2003), para. 146; Müller (2013), Art. 372 para. 39; Berti/Droese, Art. 7 para. 4; Poudret/Besson, para. 499; Berger/Kellerhals, para. 307; Kaufmann-Kohler/Rigozzi, para. 433.
- ⁴⁵⁹ Cf Schramm/Geisinger/Pinsolle, 97.
- ⁴⁶⁰ Berti/Droese, Art. 7 para. 17; Volken, Art. 7 para. 45.
- ⁴⁶¹ Volken, Art. 7 para. 15.
- ⁴⁶² Cf Berger/Kellerhals, para. 312.
- ⁴⁶³ Cf Poudret/Besson, para. 497. In a recent judgment, Aikens LJ emphasised that a distinction needs to be drawn between cases where the court was unable to determine whether the requirements of section 9(4) Arbitration Act were satisfied without also dealing with the substantive issues in dispute between the parties, in which case a stay would be granted if there was an arguable case that the arbitration clause was valid, and cases in which the court could resolve the section 9(4) issue without touching substantive matters, in which case the ordinary standard of proof and not merely a good arguable case of validity would be required for the grant of a stay (*Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784 (CA), Merkin (November 2013), 5-8, 7 f.).
- ⁴⁶⁴ Cf Tweeddale/Tweeddale, paras 25.50 ff.; Harris/Planterose/Tecks, paras 9C ff.; Joseph, paras 11.07 ff.; Sutton/Gill/Gearing, paras 7-027 ff.; Hill/Chong, paras 21.2.6 ff.
- ⁴⁶⁵ Tweeddale/Tweeddale, para. 25.50; Joseph, para. 11.02.
- ⁴⁶⁶ Section 2(2) Arbitration Act.
- ⁴⁶⁷ Poudret/Besson, para. 497; Sutton/Gill/Gearing, para. 7-041.
- ⁴⁶⁸ Tweeddale/Tweeddale, paras 25.45 ff.; Hill/Chong, para. 21.2.39; Joseph, paras 11.57 ff.; Sutton/Gill/Gearing, para. 7-055. For a case where a stay was granted on case management grounds cf. *Turville Heath Inc v Chartis Insurance UK Ltd* [2012] EWHC 3019 (TCC), reported in Merkin (October 2013), 4-6.
- ⁴⁶⁹ *Channel Tunnel Group Ltd and Another v Balfour Beatty Construction Ltd and Others* [1993] AC 334 (HL); *Reichhold Norway ASA & Anor. v Goldman Sachs International* [2000] 1 WLR 173 (HL); *Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] CLC 647 (CA); *Albon (t/a NA Carriage Co) v Naza Motor Trading SDN Bhd (No 3)* [2007] EWHC 665 (Ch), [2007] 2 All ER 1075 (Ch); Collins (*Dicey, Morris & Collins*), paras 16-082 ff. with further references to case law. A recent case confirms the court's inherent jurisdiction to stay the proceedings in favour of arbitration and reiterates that the courts will exercise this discretion under exceptional circumstances only: *Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky and Others*, reported in Merkin (October 2012), 1-2; cf also *Lombard North*

Central plc and Another v GATX Corporation, reported in Merkin (September 2012), 6-7.

⁴⁷⁰ Binder, para. 2-083.

⁴⁷¹ § 1032(1) ZPO; cf Lionnet/Lionnet, 186.

⁴⁷² Delvolvé/Pointon/Rouche, para. 143; Vidal, para. 136; Bensaude (2010), 881.

⁴⁷³ Berger/Kellerhals, para. 308.

⁴⁷⁴ Cf for the same opinion: Berti/Droese, Art. 7 para. 6; Oetiker (2003), para. 150; Rüede/Hadenfeldt (1993), 79; disagreeing Poudret/Besson, para. 500, who advocate that the Swiss courts must apply the general principle under Swiss procedural law according to which courts must examine their own jurisdiction *ex officio*, save in the case where the parties voluntarily appear before the national court.

⁴⁷⁵ Cf Art. 18 CCP (in connection with Art. 6 SPILA or Art. 24 Lugano Convention); Volken, Art. 7 para. 29; Berger/Kellerhals, paras 308, 575 ff.; Swiss Federal Supreme Court Decision 111 II 62 consideration 2; Kaufmann-Kohler/Rigozzi, paras 435 f.; Oetiker (2003), para. 151.

⁴⁷⁶ Swiss Federal Supreme Court Decision 4C.161/2005 consideration 2.5.2; cf Kaufmann-Kohler/Rigozzi, para. 435a.

⁴⁷⁷ Section 9(3) Arbitration Act.

⁴⁷⁸ Cf Sutton/Gill/Gearing, para. 7-043.

⁴⁷⁹ *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 (CA) 361; cf also *Capital Trust Investments Ltd v Radio Design TJ AB and Others* [2002] EWCA Civ 135 (CA), [2002] CLC 787 (CA) 805.

⁴⁸⁰ Cf Tweeddale/Tweeddale, para. 25.56.

⁴⁸¹ *Capital Trust Investments Ltd v Radio Design TJ AB and Others* [2002] EWCA Civ 135 (CA), [2002] CLC 787 (CA) 806; cf also for cases with the same conclusion: *Pitchers Ltd v Plaza (Queensbury) Ltd* [1940] 1 All ER 151 (CA); *Patel v Patel* [2000] QB 551 (CA) (as to whether an application to set aside a default judgment constitutes a step in the proceedings); Merkin/Flannery, 39 and Sutton/Gill/Gearing, para. 7-043 with further references to case law.

⁴⁸² Tweeddale/Tweeddale, para. 25.59; cf Sutton/Gill/Gearing, para. 7-043. Furthermore, participating in the Case Management Conference and seeking relief from the court without reserving its rights in any way was also considered as a step in the proceedings (*Nokia Corporation v HTC Corporation* [2012] EWHC 3199 (Pat), reported in Merkin (November 2013), 4-5).

⁴⁸³ Holtzmann/Neuhaus, 303.

⁴⁸⁴ Trittman/Hanefeld, § 1029 para. 14.

⁴⁸⁵ Trittman/Hanefeld, § 1029 para. 11; Bayerisches Oberstes Landgericht, 16 January 2004 (4Z Sch 22/03) (2004) SchiedsVZ 163-165; Hanseatisches Oberlandesgericht Hamburg, 24 January 2003 (2005) YB Comm Arb XXX 509; disagreeing due to the separable nature of the arbitration agreement Lionnet/Lionnet, 170; Schlosser (2002), § 1029 para. 41.

⁴⁸⁶ Trittman/Hanefeld, § 1029 para. 11 with further references; Lionnet/Lionnet, 170.

⁴⁸⁷ Delvolvé/Pointon/Rouche, paras 432, 93; cf Vidal, paras 93 ff., 553; *Municipalité de Khoms El Mergib c société Dalico*, Cour de Cassation, 20 December 1993 (1994) Revue de l'Arbitrage 116-125 with a note by Hélène Gaudemet-Tallon; *American Bureau of Shipping c Copropriété Maritime Jules Verne et autres*, Cour d'Appel de Paris, 4 December 2002 (2003) Revue de l'Arbitrage 1286-1295, 1290 with a note by Emmanuel Gaillard: "Considérant que le principe de validité de la convention d'arbitrage international et celui selon lequel il appartient à l'arbitre de statuer sur sa propre compétence sont des règles matérielles du droit français de l'arbitrage international qui consacrent, la première, la licéité de la clause d'arbitrage indépendamment de toute référence à une loi étatique – se distinguant ainsi de ce qui est prévu en la matière aux articles II et V de la Convention de New York sur les conditions de forme et de fond de la clause où il est notamment fait appel à l'application de lois étatiques pour valider la clause – mais sans toutefois dispenser la partie qui l'invoque de prouver son existence, [...]". Gaillard/Savage, paras 435 ff.; Lew/Mistelis/Kröll, paras 6-65 ff. The Dalico ruling has recently been confirmed by the French Supreme Court in *Société d'études et représentations navales et industrielles (Soerni) et autres c société Air Sea Broker Ltd (ASB)*, Cour de Cassation, 8 July 2009 (2009) Revue de l'Arbitrage 529-538 with a note by Daniel Cohen.

⁴⁸⁸ Castellane, 373; Vidal, paras 552 f.; cf *M Zanzi c J de Coninck et autres*, Cour de Cassation, 5 January 1999 (1999) Revue de l'Arbitrage 260-262.

⁴⁸⁹ Castellane, 373; cf Vidal, paras 552 ff. with references to case law.

⁴⁹⁰ Castellane, 374.

⁴⁹¹ Art. 1507 CPC; Carducci (2012), 150.

⁴⁹² Swiss Federal Supreme Court Decision 110 II 54 considerations 2, 3a; cf Berger/Kellerhals, para. 310.

⁴⁹³ Swiss Federal Supreme Court Decision 5C.215/1994 consideration 2b; cf Berger/Kellerhals, para. 311; Volken, Art. 7 paras 26 ff.

⁴⁹⁴ Berger/Kellerhals, para. 314; cf Berti/Droese, Art. 7 para. 7; Gaillard/Savage, paras 447 ff.

⁴⁹⁵ Collins (*Dacey, Morris & Collins*), para. 16-017; *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116 (CA) 119; *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Limited* [2007] EWHC 1713 (Comm), [2008] 1 Lloyd's Rep 93 (Comm); Sutton/Gill/Gearing,

para. 2-095.

⁴⁹⁶ *Sonatrach Petroleum Corporation v Ferrell International Limited* [2002] 1 All ER 627 (Comm); *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and Another* [2005] EWHC 2437 (Comm), [2005] 2 CLC 965 (Comm); Collins (*Dicey, Morris & Collins*), para. 16-017 with further references to case law; Sutton/Gill/Gearing, para. 2-095.

⁴⁹⁷ *Oldendorff v Libera Corp* [1996] 2 CLC 482 (Comm); Collins (*Dicey, Morris & Collins*), para. 16-019 with further references to case law; Sutton/Gill/Gearing, para. 2-096.

⁴⁹⁸ Collins (*Dicey, Morris & Collins*), para. 16-019; *Star Shipping AS v China National Foreign Trade Transportation Corporation (The "Star Texas")* [1993] 2 Lloyd's Rep 445 (CA) 448 f.

⁴⁹⁹ Pearson, 117.

⁵⁰⁰ Pearson, 115.

⁵⁰¹ *Sulamérica Cia Nacional de Seguros SA & Ors. v Enesa Engenharia SA & Ors.* [2012] EWCA Civ 638, [2012] 2 CLC 216 (CA); following the test laid out in *Sulamérica in Arsanovia Limited, Burley Holdings Limited, Unitech Limited v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm); *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm). Further cf. *XL Insurance Ltd v Owens Corning* [2001] CLC 914 (Comm) for the ruling marking the turning point towards the pro-validation case law; Trukhtanov, 140 f.

⁵⁰² Pearson, 126; Trukhtanov, 141.

⁵⁰³ Holtzmann/Neuhaus, 304.

⁵⁰⁴ Cf Binder, para. 2-087; cf for references to case law of UNCITRAL Model Law contracting states: Brekoulakis/Shore, 604 f.

⁵⁰⁵ Born, 881.

⁵⁰⁶ Cf Huber, § 1032 para. 17.

⁵⁰⁷ With references to case law Huber, § 1032 para. 18; Saenger, § 1032 para. 6; Reichold, § 1032 para. 3; Bundesgerichtshof, 14 September 2000 (III ZR 33/00) (2000) NJW 3720-3722; Kammergericht Berlin, 13 August 2001 (2 W 8057/99) (2003) SchiedsVZ 239 f.; cf also Lew/Mistelis/Kröll, para. 14-48. Criticised by Wilske/Fox, Art. II para. 315.

⁵⁰⁸ With reference to case law Huber, § 1032 para. 19; Kammergericht Berlin, 6 May 2002 (23 Sch 01/02) (2003) SchiedsVZ 185-187.

⁵⁰⁹ Bundesgerichtshof, 20 January 1994 reported in Kröll (2009), 333; cf for a similar decision by the Brussels Commercial Court: *Pierreux NV v Transportmaschinen Handelshaus GmbH, Rechtsbank van Koophandel*, 6 May 1993 (1997) YB Comm Arb XXI 631-636.

⁵¹⁰ Art. 1448(1) CPC.

⁵¹¹ Cohen, 926; Vidal, para. 141; cf Racine (2005), 691; Strickler, 192.

⁵¹² *Société Distribution Chardonnet c société Fiat Auto France*, Cour d'Appel de Paris, 29 November 1991 (1993) *Revue de l'Arbitrage* 617-623, 620 with a note by Laurent Aynès: "Considérant qu'en effect la portée de la clause compromissoire comme expression de la volonté des parties est beaucoup plus large que celle d'une clause attributive de compétence, en ce qu'elle a pour effet de donner aux arbitres le pouvoir de juger, excluant par là-même l'intervention des juridictions de l'Etat, alors que la clause attributive de compétence ne fait que désigner la juridiction territorialement compétente pour trancher le litige."

⁵¹³ *Société civile immobilière (SCI) La Chartreuse et autre c M Thierry Cavagna*, Cour de Cassation, 18 December 2003 (2004) ASA Bulletin 796-799.

⁵¹⁴ Chang (Eric), 813.

⁵¹⁵ Delvolvé/Pointon/Rouche, para. 141.

⁵¹⁶ Delvolvé/Pointon/Rouche, para. 142; cf Cadiet, Art. 1458 para. 11 with references to case law; Poudret/Besson, para. 506; Bensaude (2010), 882; *Société Quarto Children's books Ltd c société Editions du Seuil et société Editions Phidal Inc*, Cour de Cassation, 16 October 2001 (2002) *Revue de l'Arbitrage* 919-926 with a note by Daniel Cohen; *Association Tuv Zertifizierungsgemeinschaft Ev et autres c Association française pour la certification par tierce partie des systèmes d'assurance qualité des entreprises*, Cour de Cassation, 16 November 2004 (2005) *Revue de l'Arbitrage* 673-692 with a note by Jean-Baptiste Racine; *Tinnes c société Système U Centrale Régionale Est*, Cour de Cassation, 8 November 2005 (2005) *Revue de l'Arbitrage* 1101 f.; *SELAFA Fidal c de Bourgerel*, Cour de Cassation, 22 November 2005 (2005) *Revue de l'Arbitrage* 1103 f.

⁵¹⁷ Berti/Droese, Art. 7 para. 14.

⁵¹⁸ Berger/Kellerhals, paras 540 ff.; Berti/Droese, Art. 7 para. 15; cf Volken, Art. 7 para. 42.

⁵¹⁹ Swiss Federal Supreme Court Decision 4P.284/1994 of 17 August 1995 published in (1996) 14(4) ASA Bulletin 673-679; for critical remarks on this decision cf: Friedland, 111-116; Karrer/Kälin-Nauer, 31-38.

⁵²⁰ Berti/Droese, Art. 7 para. 16.

⁵²¹ Section 9(4) Arbitration Act.

⁵²² Cf Sheppard, 736; Tweeddale/Tweeddale, paras 25.61, 4.34 ff. with references to case law; Collins (*Dicey, Morris & Collins*), para. 16-077.

⁵²³ *AB Bofors-UVA CAV Ltd and George Kuikka Ltd v AB Skandia Transport, The Felixstowe Dock and Rail Co and Croxson European Transport Ltd* [1982] 1 Lloyd's Rep 410 (Comm).

⁵²⁴ *AB Bofors-UVA CAV Ltd and George Kuikka Ltd v AB Skandia Transport, The Felixstowe Dock and Rail Co and Croxson European Transport Ltd* [1982] 1 Lloyd's Rep 410 (Comm); cf Hill/Chong, para. 21.2.28.

- ⁵²⁵ Sheppard, 736; cf Tweeddale/Tweeddale, paras 25.62, 4.39 ff.; Collins (*Dicey, Morris & Collins*), para. 16-078.
- ⁵²⁶ *Downing v Al Tameer Establishment & Another* [2002] EWCA Civ 721 (CA), [2002] CLC 1291 (CA).
- ⁵²⁷ *Downing v Al Tameer Establishment & Another* [2002] EWCA Civ 721 (CA), [2002] CLC 1291 (CA) 1297 ff.; cf Lew/Mistelis/Kröll, paras 7-96 ff.; Joseph, para. 11.49; Bonnell, 113.
- ⁵²⁸ *Lonrho Ltd (UK) and Another v The Shell Petroleum Company Ltd (UK) and Others*, High Court of Justice, Chancery Division, 31 January 1978 (1979) YB Comm Arb IV 320-323, in particular 322 f.; cf Broches, Art. 8 para. 16.
- ⁵²⁹ *Fowler v Merrill Lynch*, High Court of Justice, Queen's Bench Division (Commercial Court), 10 June 1982 (1985) YB Comm Arb X 499-503; cf Broches, Art. 8 para. 18.
- ⁵³⁰ Sheppard, 736; cf Tweeddale/Tweeddale, paras 25.63, 4.44 ff.; Collins (*Dicey, Morris & Collins*), paras 16-077 ff.
- ⁵³¹ *The Rena K* [1979] 1 QB 377, 392 ff., in particular 393 on the argument that if an award were made in the arbitration, the party resisting the application for a stay would not be able to honour the award due to the lack of funds; *Paczy v Haendler & Natemann GmbH* [1981] FSR 250 (CA) where the party resisting the application for a stay argued that it was unable to afford the deposit for the costs of arbitration; cf Poudret/Besson, para. 497; Lew/Mistelis/Kröll, para. 14-48; Kröll (2009), 343 ff.
- ⁵³² Cf Born, 763 f.; cf also *Fincantieri – Cantieri Navali Italiani SpA v Ministry of Defence, Armament and Supply Directorate of Iraq*, Genoa Corte di Appello, 7 May 1994 (1996) YB Comm Arb XXI 594.
- ⁵³³ *Gatoil International Inc v National Iranian Oil Co*, High Court of Justice, Queen's Bench Division, 21 December 1988 (1992) YB Comm Arb XVII 587-593; cf Collins (*Dicey, Morris & Collins*), para. 16-077.
- ⁵³⁴ Cf Born, 810; Burn/Grubb, 126 f.
- ⁵³⁵ Cf Sheppard, 736.
- ⁵³⁶ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc*. [2009] ECR I-663; *Youell and Others v La Réunion Aérienne and Others* [2009] EWCA Civ 175 (CA), [2009] Bus LR 1504 (CA); Joseph, para. 13.17; Sachs/Schmidt-Ahrendts, 21; Acocella, Art. 1 para. 133.
- ⁵³⁷ Debourg (2012), para. 162.
- ⁵³⁸ Illmer (2011), 653.
- ⁵³⁹ *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397 (CA), [2009] 2 CLC 1004 (CA) 1017 (para. 35).
- ⁵⁴⁰ *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397 (CA), [2009] 2 CLC 1004 (CA).
- ⁵⁴¹ Cf Acocella, Art. 1 para. 136.
- ⁵⁴² See for a detailed discussion Chapter 3, §3.01[A][2][c][iii] point (c) below.
- ⁵⁴³ Broches, Art. 8 para. 6.
- ⁵⁴⁴ § 1032(1) ZPO; Saenger, § 1032 para. 10; Prütting, § 1032 para. 5; Poudret/Besson, para. 495.
- ⁵⁴⁵ Huber, § 1032 para. 6.
- ⁵⁴⁶ Lionnet/Lionnet, 187; cf §§ 511 ff. ZPO.
- ⁵⁴⁷ Art. 1448(1) CPC; cf Boucaron-Nardetto (2013), 41 ff.
- ⁵⁴⁸ Delvolvé/Pointon/Rouche, para. 143; Pellerin, 288 f.; Boucaron-Nardetto (2011), paras 304, 308.
- ⁵⁴⁹ Poudret/Besson, para. 500; see for a disagreeing view fn 474 above.
- ⁵⁵⁰ Arts 308 ff. CCP.
- ⁵⁵¹ Arts 72 ff. of the Swiss Law on the Swiss Federal Supreme Court of 17 June 2005 (SR 173.110).
- ⁵⁵² Cf Kaumann-Kohler/Rigozzi, paras 447 ff.; Berger/Kellerhals, para. 686.
- ⁵⁵³ Gaillard/Savage, para. 665.
- ⁵⁵⁴ Poudret/Besson, para. 497; Harbst, 43.
- ⁵⁵⁵ Cf Poudret/Besson, para. 497.
- ⁵⁵⁶ *Inco Europe Ltd and Others v First Choice Distribution and Others* [2000] 1 WLR 586 (HL); cf Collins (*Dicey, Morris & Collins*), para. 16-067; Merkin/Flannery, 42; Harris/Planterose/Tecks, para. 9N; Sutton/Gill/Gearing, para. 7-053.
- ⁵⁵⁷ *Inco Europe Ltd and Others v First Choice Distribution and Others* [2000] 1 WLR 586 (HL); Aeberli, 283.
- ⁵⁵⁸ Huber, § 1032 para. 24; Münch (2013), § 1032 para. 21; Lionnet/Lionnet, 187; Geimer (Zöller), § 1032 para. 12. Disagreeing: Voit, § 1032 para. 9; Haas, 200 f.
- ⁵⁵⁹ Huber, § 1032 para. 25; Lionnet/Lionnet, 187.
- ⁵⁶⁰ Cf Huber, § 1032 para. 25; Lionnet/Lionnet, 187.
- ⁵⁶¹ Boucaron-Nardetto (2011), paras 337 f.; Born, 2920; Poudret/Besson, para. 515.
- ⁵⁶² Swiss Federal Supreme Court Decision 120 II 155 consideration 3b.bb; cf Schott/Courvoisier, Art. 186 paras 43, 45; Wenger, Art. 186 para. 7; Poudret/Besson, para. 515; Berger/Kellerhals, para. 677a.
- ⁵⁶³ Wenger, Art. 186 para. 7.
- ⁵⁶⁴ Berger/Kellerhals, para. 677a; Schott/Courvoisier, Art. 186 para. 45; Swiss Federal Supreme Court Decision 120 II 155 consideration 3b.bb.
- ⁵⁶⁵ Poudret/Besson, para. 515.
- ⁵⁶⁶ Cf Born, 2920; Poudret/Besson, para. 515; disagreeing Samuel, 192 holding that where a court has deferred in favour of an arbitration due to take place in its own country, the arbitrators will be bound by the court's decision on the jurisdictional issue; Samuel, however,

seems to assume that the court does not confine itself to staying the proceedings, but takes a decision on the arbitral tribunal's jurisdiction.

⁵⁶⁷ Huber, § 1032 paras 26 ff.

⁵⁶⁸ Lionnet/Lionnet, 187; cf Huber, § 1032 paras 26 ff.; cf §§ 511 ff. ZPO.

⁵⁶⁹ See fn 548 above.

⁵⁷⁰ See for references fn 550-552 above; cf Liatowitsch, 72.

⁵⁷¹ *Inco Europe Ltd and Others v First Choice Distribution and Others* [2000] 1 WLR 586 (HL); cf Collins (*Dacey, Morris & Collins*), para. 16-067; Merkin/Flannery, 42; Harris/Planterose/Tecks, para. 9N; Sutton/Gill/Gearing, para. 7-053.

⁵⁷² Lionnet/Lionnet, 187; cf Huber, § 1032 paras 26 ff.; Haas, 202. Arguing that such an award is not only challengeable, but also null and void ipso iure: Geimer (Zöller), § 1032 para. 16; Saenger, § 1032 para. 11.

⁵⁷³ Boucaron-Nardetto (2011), paras 339 ff.; Poudret/Besson, para. 515.

⁵⁷⁴ Liatowitsch, 70 ff., 95 with further references; Born, 2922 f.; Schott/Courvoisier, Art. 186 paras 41, 44; Müller (Zuständigkeit des Schiedsgerichts), 146; Poudret/Besson, para. 515; Rüede/Hadenfeldt (1993), 232 f.; cf Swiss Federal Supreme Court Decision 120 II 155 consideration 3b.bb; Swiss Federal Supreme Court Decision 124 III 83 consideration 5a. Confirmed in Swiss Federal Supreme Court Decision 127 III 279 consideration 2c.bb. Disagreeing due to the court's decision being of a preliminary nature and hence not being capable of deploying res judicata effect: Perret, 341.

⁵⁷⁵ Poudret/Besson, para. 515.

⁵⁷⁶ Liatowitsch, 72.

⁵⁷⁷ Swiss Federal Supreme Court Decision 4P.114/2004 consideration 7.3; 'A v BC, DC and others, Tribunale federale, I Corte civile, 4P.114/2004, 13 September 2004' (2005) ASA Bulletin 23(1) 145-150. Criticised by Poudret/Besson, para. 502; Poudret (2005), 406: "*Il nous paraît en tout cas exclu d'attribuer, [...], l'autorité de la chose jugée à une décision sur exception d'arbitrage rendue sur la base d'un examen sommaire.*"

⁵⁷⁸ *Republic of Kazakhstan v Istil Group Inc* [2007] EWHC 2729 (Comm), [2007] 2 CLC 870 (Comm) 894.

⁵⁷⁹ Born, 2922; further pursuit of the arbitration proceedings would at the very least be oppressive, vexatious and in consequence unconscionable (Seriki (2013), 50 f.).

⁵⁸⁰ Samuel, 192.

⁵⁸¹ See for a detailed discussion Chapter 3, §3.01[D][3][a] below.

⁵⁸² Cf Illmer (2011), 652 f.

⁵⁸³ Art. 34(1) Brussels Regulation/Lugano Convention.

⁵⁸⁴ Art. 34(2) Brussels Regulation/Lugano Convention.

⁵⁸⁵ Art. 34(3)/(4) Brussels Regulation/Lugano Convention.

⁵⁸⁶ Art. 35(1) Brussels Regulation/Lugano Convention.

⁵⁸⁷ The situation seems to be the same under French law (Audit (2010), paras 466 ff.) and German law (§ 328 ZPO; Rauscher, paras 2458 ff.).

⁵⁸⁸ Swiss Federal Supreme Court Decision 127 III 186 consideration 2; Mosimann, 92 f.

⁵⁸⁹ Mosimann, 93; cf Swiss Federal Supreme Court Decision 124 III 83 consideration 5b: the Swiss Federal Supreme Court held that because the Peruvian court did not refer the parties to arbitration, even though the conditions for the application of Art. II(3) New York Convention had been met, the foreign court's decision could not be recognised in Switzerland. Berger/Kellerhals, para. 1512b; Liatowitsch, 76 ff.

⁵⁹⁰ Berger/Kellerhals, para. 1512c; Liatowitsch, 92 ff.

⁵⁹¹ Briggs/Rees, para. 7.60.

⁵⁹² *National Navigation Co v Endesa Generacion SA* [2009] EWHC 196 (Comm), [2009] 1 CLC 393 (Comm); cf Byford/Sanwar, 33.

⁵⁹³ *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397 (CA), [2009] 2 CLC 1004 (CA) 1026 (para. 62) Waller LJ.

⁵⁹⁴ *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397 (CA), [2009] 2 CLC 1004 (CA) 1025 f. (para. 59), 1041 f. (para. 118).

⁵⁹⁵ Cf Case C-456/11 *Gothaer Allgemeine Versicherung AG et al. v Samskip GmbH* [2012] Judgment of 15 November 2012 (para. 30).

⁵⁹⁶ Cf Acocella, Art. 1 para. 136; Mankowski, Art. 1 para. 31a.

⁵⁹⁷ Collins (*Dacey, Morris & Collins*), para. 14-211; *West Tankers Inc v Allianz SpA* [2011] EWHC 829 (Comm), [2011] 1 CLC 553 (Comm) 561 (para. 28) Field J: "*Where, however, as here, the victorious party's objective in obtaining an order under s. 66(1) and (2) is to establish the primacy of a declaratory award over an inconsistent judgment, the court will have jurisdiction to make a s. 66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award.*" Confirmed on appeal: *West Tankers Inc v Allianz SpA and Another* [2012] EWCA Civ 27, [2012] Bus LR 1701 (CA). Further cf: *African Fertilizers & Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei KG* [2011] EWHC 2452 (Comm), [2011] 2 CLC 761 (Comm). These decisions affirm the English courts' pro-arbitration approach, but it remains to be seen whether such preemptive strikes will be sufficient to prevent any contradictory Italian judgment from being enforced in England under the Brussels regime.

⁵⁹⁸ Born, 1048; van Houtte (1997), 88 f.; cf Liatowitsch, 88 ff. Van Houtte suggests that such a conflict between the New York Convention and the Brussels Regulation/Lugano Convention could be dissolved by applying the public policy exception in Art. 34(1)

Brussels Regulation/Lugano Convention blocking recognition of the court decision (van Houtte (1997), 88). Disagreeing ruling by the English Court of Appeal: "*The United Kingdom's obligation under the New York Convention to give effect to arbitration agreements does not as it seems to me require the English court not to be bound by a decision of a court of a fellow member state and co-signatory of the New York Convention that there was no arbitration clause; [...]*" (National Navigation Co v Endesa Generacion SA [2009] EWCA Civ 1397 (CA), [2009] 2 CLC 1004 (CA) 1028 (para. 69) Waller LJ and likewise 1044 (para. 127) Moore-Bick LJ).

⁵⁹⁹ See for the discussion of the res judicata effect of court judgments on subsequent arbitral proceedings Chapter 3, §3.02[D] below.

⁶⁰⁰ See for further considerations Chapter 3, §3.02[D][3] below.

⁶⁰¹ Cf *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397 (CA), [2009] 2 CLC 1004 (CA) 1019 (para. 41) Waller LJ: "*Perhaps even more unsatisfactory would appear to be the result which leaves the court in member state A where the proceedings on the merits have been commenced free to ignore a judgment in arbitration proceedings in state B the seat of the arbitration, but if a preliminary ruling can be obtained early enough in state A, the courts in state B are bound by the result of the preliminary ruling in state A.*"

⁶⁰² Cf Submission to the European Commission on the review of the Brussels Regulation presented by the Arbitration Committee of the International Bar Association on 15 June 2009, para. 14 (to be downloaded under: <http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx#brussels> accessed 23 February 2014). Also in favour: van Houtte (2005), 520 f.

⁶⁰³ See for comments to recital 12 Recast Brussels Regulation Chapter 2, §2.03[B][2] above. Recital 12(2) Recast Brussels Regulation hence reverses the position adopted by the ECJ in *West Tankers*.

⁶⁰⁴ An example of such a violation of fundamental principles of good faith could be the following: the party having initiated court proceedings has unconditionally appeared before the arbitral tribunal, the national court abroad has declared the arbitration agreement invalid (irrespective of the claimant having submitted to the jurisdiction of the arbitral tribunal) and issued a judgment on the merits of the case, and the claimant (in the court proceedings) finally invokes the court judgment in setting aside proceedings against the arbitral award.

⁶⁰⁵ See for a discussion of the incorporation of the negative competence-competence into national law Chapter 2, §2.02[B] above.

⁶⁰⁶ Kaufmann-Kohler, 112.

⁶⁰⁷ Kreindler (2005), 179.

⁶⁰⁸ *Assaubayev and Others v Michael Wilson & Partners Ltd* [2012] EWHC 90223 (Costs), reported in Merkin (April 2013), 7-8, 8.

⁶⁰⁹ For instance explicitly permitted under Art. 8(2) UNCITRAL Model Law, § 1032(3) ZPO, Art. 186(1*bis*) SPILA and section 32(4) Arbitration Act.

⁶¹⁰ Cf Haas, 201 f.

⁶¹¹ Art. 34(2)(a)(i)/(iii) UNCITRAL Model Law, § 1059(2)(1)(a)(b) ZPO, Art. 1520(1) CPC, Art. 190(2)(b) ZPO; section 67 Arbitration Act.

⁶¹² Hobér emphasises that, since it is the arbitrators' duty to adjudicate on the dispute in a speedy manner, a stay due to parallel court proceedings against the will of one of the parties could be seen as depriving the party of its right to have the case efficiently heard by the arbitrators, which again could lead to the setting aside of the award (Hobér, 256 f.).

⁶¹³ Cf for instance Art. 8(2) UNCITRAL Model Law, § 1032(3) ZPO, Art. 186(1*bis*) SPILA and sections 31(5) and 32(4) Arbitration Act.

⁶¹⁴ Explicitly so according to Swiss case law and German legal doctrine (see Chapter 3, §3.01[A][2][c][iii] above).

⁶¹⁵ Cf Huber, § 1032 para. 62; Reichold, § 1032 para. 6; see for a discussion of whether the principle of res judicata belongs to public policy Chapter 3, §3.02[D][3] below.

⁶¹⁶ According to recital 12(2) Recast Brussels Regulation, a Member States' court's ruling as to the arbitration agreement's validity will not be subject to the recognition and enforcement scheme of the Brussels Regulation any longer; as long as the Lugano Convention 2007 is not amended accordingly, it may be expected that the previous ECJ's case law is still relevant for Lugano Convention judgments (see for detailed comments to the Recast Brussels Regulation Chapter 2, §2.03[B] above).

⁶¹⁷ Born, 1046 ff., 2927; cf Swiss Federal Supreme Court Decision 124 III 83 consideration 5b; *Tracom SA v Sudan Oil Seeds Co Ltd* [1983] 1 WLR 1026 (CA).

⁶¹⁸ Section 9(3) Arbitration Act.

⁶¹⁹ § 1032(1) ZPO.

⁶²⁰ It should, furthermore, be noted as a caveat that there are jurisdictions that do not permit conditional appearances, thus, in such jurisdictions an application for a stay may be held to constitute a submission on the merits to the foreign court (Bell, para. 4.43). Such a step in the proceedings will then preempt the respective party to challenge the jurisdiction later on.

⁶²¹ Cf Hobér, 257.

⁶²² Cf Bell, para. 4.54.

⁶²³ Cf Söderlund, 301.

⁶²⁴ Cf Söderlund, 303; Cuniberti, 382 f.

⁶²⁵ Cf Fawcett, 27; cf Müller-Chen/Keller, 772; Volken, Art. 9 para.

- 2.
- ⁶²⁶ Gebauer, 90.
- ⁶²⁷ van Houtte (2001), 36.
- ⁶²⁸ Cuniberti, 382.
- ⁶²⁹ Section 9 (Arts 27-30) Brussels Regulation.
- ⁶³⁰ Section 9 (Arts 27-30) Lugano Convention.
- ⁶³¹ van Houtte (2001), 53; cf Reichert, 238.
- ⁶³² Söderlund, 303.
- ⁶³³ ILA Report on Lis Pendens, para. 4.4 with further references to the authors who share this view; cf Born, 2935.
- ⁶³⁴ Cf Born, 2935; Debourg (2012), para. 586.
- ⁶³⁵ Cf Born, 2937; cf ILA Report on Lis Pendens, para. 4.5; Debourg (2012), para. 586.
- ⁶³⁶ Schneider (1990), 108; cf Carducci (2011), 184; Reichert, 239.
- ⁶³⁷ Orrego Vicuña, 208.
- ⁶³⁸ Shany, 135; cf Lookofsky/Hertz, 201.
- ⁶³⁹ Joseph, para. 2.122; Collins (*Dicey, Morris & Collins*), para. 12-014.
- ⁶⁴⁰ *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (HL); the leading Scottish case: *Sim v Robinow* (1892) 19 R 665, 668. The *Spiliada* case is also discussed in Lookofsky/Hertz, 207 ff.; Hartley (2009), 212 ff.; Beaumont, 209 ff.
- ⁶⁴¹ Bell, para. 3.82; Lookofsky/Hertz, 208; Collins (*Dicey, Morris & Collins*), paras 12-007 ff.
- ⁶⁴² *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (HL) 478; Bell, para. 3.82; Collins (*Dicey, Morris & Collins*), para. 12-033.
- ⁶⁴³ Bell, para. 3.87.
- ⁶⁴⁴ *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (HL) 476; *Sim v Robinow* (1892) 19 R 665, 668.
- ⁶⁴⁵ *The Abidin Daver* [1984] AC 398 (HL) 411 f.; *MacShannon v Rockware Glass Ltd* [1978] AC 795 (HL) 806; *Arkwright Mutual Insurance Co v Bryanston Insurance Co Ltd and Others* [1990] 2 QB 649, 665; cf also Layton/Mercer, para. 1.049.
- ⁶⁴⁶ *De Dampierre v De Dampierre* [1988] AC 92 (HL) 108; cf Collins (*Dicey, Morris & Collins*), para. 12-043.
- ⁶⁴⁷ Hill/Chong, para. 9.2.26; cf Layton/Mercer, para. 1.049.
- ⁶⁴⁸ Cf Balkanyi-Nordmann, 190; Carducci (2011), 185.
- ⁶⁴⁹ Art. VI(3) European Convention.
- ⁶⁵⁰ Poudret/Besson, para. 509.
- ⁶⁵¹ Wilske/Fox, Art. II para. 325.
- ⁶⁵² Hascher (1995), 1028 f. (para. 56).
- ⁶⁵³ Broches, Art. 8 para. 2; Cremades/Madarena, 4; Holtzmann/Neuhaus, 302.
- ⁶⁵⁴ The legislative history to Art. 8(2) UNCITRAL Model Law reveals that the Secretariat of the Working Group that prepared and drew up the UNCITRAL Model Law added the words “*unless the court orders a stay or suspension of the arbitral proceedings*” to the second paragraph of Art. 8 UNCITRAL Model Law; but the Working Group eventually deleted this addendum (Broches, Art. 8 para. 23; cf also the legislative history as depicted in: Holtzmann/Neuhaus, 307 ff.).
- ⁶⁵⁵ Oetiker (2003), para. 197; cf Liatowitsch, 142.
- ⁶⁵⁶ Rohner/Lerch, Art. 1 para. 113; Geimer (2010), Art. 27 para. 21; Liatowitsch/Meier, Art. 27 paras 1, 4; Dasser, Art. 27 para. 28; Liatowitsch, 139; van Houtte (2001), 50; Mabillard (2011), Art. 27 para. 19.
- ⁶⁵⁷ Killias (2002), 126 f.
- ⁶⁵⁸ Liatowitsch/Meier, Art. 28 para. 4.
- ⁶⁵⁹ Mabillard (2011), Art. 27 para. 19; Killias (2002), 127; Geimer (2010), Art. 27 para. 21.
- ⁶⁶⁰ Müller-Chen/Keller, 773. All the effects the lis pendens doctrine entails are comprehensively illustrated in: Oetiker (2003), paras 135 ff.
- ⁶⁶¹ See comments made in Chapter 2, §2.02[A] above.
- ⁶⁶² § 1025(2) ZPO.
- ⁶⁶³ Huber, § 1032 para. 34; Haas, 196; Schwab/Walter, Kapitel 16 para. 4; Münch (2013), § 1032 para. 2; Prütting, § 1032 para. 2. The Austrian Code of Civil Procedure stipulates that an Austrian court must recognise the litispence before the arbitral tribunal and thus shall reject an action brought before the court based on the same claim (section 584(3) Austrian Code of Civil Procedure).
- ⁶⁶⁴ § 261(3) ZPO.
- ⁶⁶⁵ See Chapter 2, §2.02[B].
- ⁶⁶⁶ See Chapter 3, §3.01[A][2][a]; cf Debourg (2012), para. 589; Cadiet, Art. 1458 para. 1.
- ⁶⁶⁷ See for a discussion of the forum non conveniens doctrine Chapter 3, §3.01[B][1][b] above.
- ⁶⁶⁸ Bell, para. 4.45.
- ⁶⁶⁹ Lévy (2001), N28.
- ⁶⁷⁰ Cf Art. 64 CCP; Art. 9 SPILA.
- ⁶⁷¹ Art. 372(2) CCP reads (own translation): “*If actions on the same subject matter and between the same parties are simultaneously pending before a national court and an arbitral tribunal the court seised second stays the proceedings until the court seised first has decided on its jurisdiction.*”
- ⁶⁷² Berger/Kellerhals, para. 949; Liatowitsch/Meier, Art. 27 para. 7. In favour of applying Art. 64(1)(a) CCP by analogy: Schott/Courvoisier, Art. 186 para. 27.
- ⁶⁷³ Müller (Zuständigkeit des Schiedsgerichts), 112; Walter/Bosch/Brönnimann, 123 f. reasoning that the unilateral preclusion effect of the prior arbitral proceedings is sensible, since

lis pendens must be observed ex officio, whereas the national court is not obliged to honour a valid arbitration agreement of its own motion, but only upon a party's request. For further references to authors who support the unilateral application of the lis pendens principle cf. Liatowitsch, 107 ff.

⁶⁷⁴ Wenger, Art. 186 para. 9; Rüede/Hadenfeldt (1993), 231 and Rüede/Hadenfeldt (Supplement), 47. For references to further authors cf. Liatowitsch, 110 f.

⁶⁷⁵ Art. 9(1) SPILA reads (own translation): "*If a foreign court has been seised with an action with the same subject matter and between the identical parties as is pending before the Swiss court, the latter shall stay the proceedings, provided that the foreign court is to render a decision in due course which is recognisable in Switzerland.*"

⁶⁷⁶ Oetiker (2003), para. 190; Liatowitsch/Meier, Art. 27 para. 7; Besson (2007), 75 f.; Dasser, Art. 27 para. 30; Wittibschlager, 76 f.; cf for further references Berger/Kellerhals, para. 949a fn 23.

⁶⁷⁷ Berger/Kellerhals, para. 949a.

⁶⁷⁸ Cf Swiss Federal Supreme Court Decision 121 III 495.

⁶⁷⁹ Berger/Kellerhals, para. 949a fn 24.

⁶⁸⁰ Swiss Federal Supreme Court Decision 121 III 495 consideration 6c.

⁶⁸¹ Art. 194 New York Convention.

⁶⁸² Cf Oetiker (2003), paras 188 ff.

⁶⁸³ Cf Oetiker (2003), para. 188.

⁶⁸⁴ Cf Oetiker (2003), para. 190.

⁶⁸⁵ See for the discussion of the legal history of Art. 186(1bis) SPILA Chapter 3, §3.02[B][3][b][i] point (b) below.

⁶⁸⁶ Besson (2007), 76.

⁶⁸⁷ Cf Geisinger/Lévy, 56.

⁶⁸⁸ Fawcett, 29.

⁶⁸⁹ Cf Born, 2940.

⁶⁹⁰ English courts are more likely to grant a stay if the foreign proceedings are already well advanced (cf Hill/Chong, para. 9.2.26; Bell, para. 3.104; *De Dampierre v De Dampierre* [1988] AC 92 (HL) 108. A stay of the English proceedings was, for instance, granted in a case where proceedings in Ohio had been in progress for over two years and substantial pre-trial expenses had been incurred (*Cleveland Museum of Art v Capricorn Art International SA & Anor.* [1989] 5 BCC 860 (Comm) 869). For further references to case law cf. Collins (*Dicey, Morris & Collins*), para. 12-043 fn 207 f.; Beaumont, 215; Fawcett, 29).

⁶⁹¹ See for detailed comments to the arbitration defence Chapter 3, §3.01[A] above.

⁶⁹² § 1032(1) ZPO, Art. 1448(1) CPC, Art. 7 SPILA, section 9(4) Arbitration Act; see for a detailed discussion of the respective provisions Chapter 3, §3.01[A][2] above.

⁶⁹³ See for a detailed discussion of the ECJ's decision in *West Tankers* Chapter 2, §2.03[A][1][c] above.

⁶⁹⁴ Hartley (2009), 206 f.; cf Poudret/Besson, para. 1019; Raphael (2008), para. 1.05; Mosimann, 7 f.

⁶⁹⁵ van Haersolte-van Hof, 32.

⁶⁹⁶ Hartley (2009), 207; Raphael (2008), para. 1.22.

⁶⁹⁷ Cf Stacher (2005), 645.

⁶⁹⁸ Oberlandesgericht Düsseldorf, 10 January 1996 (3 VA 11/95) Re the Enforcement of an English Anti-Suit Injunction [1997] ILPr 320-324, 321.

⁶⁹⁹ Oberlandesgericht Düsseldorf, 10 January 1996 (3 VA 11/95) Re the Enforcement of an English Anti-Suit Injunction [1997] ILPr 320-324, 320; cf Noussia, 321 f.

⁷⁰⁰ Oberlandesgericht Düsseldorf, 10 January 1996 (3 VA 11/95) Re the Enforcement of an English Anti-Suit Injunction [1997] ILPr 320-324, 323 f.

⁷⁰¹ Cf Naumann, 207 f.; Probst, 202.

⁷⁰² Disagreeing and arguing in favour of the German courts' competence in principle to issue anti-suit injunctions in support of arbitration: Schlosser (2006), 487 f., 491.

⁷⁰³ *In Zone Brands International Inc c In Beverage International*, Cour de Cassation, 14 October 2009, as commented in Debourg (2012), para. 614. Boucaron-Nardetto (2011), para. 191 with references to case law: "*Bien que certains signes d'une moindre hostilité à son égard se fassent jour – les juges français ayant récemment accepté de reconnaître et d'exécuter une telle injonction prononcée par une juridiction étrangère –, les récentes tentatives des plaideurs devant le tribunal de grande instance de Paris sont restées infructueuses.*"

⁷⁰⁴ Cf Debourg (2012), para. 622.

⁷⁰⁵ Cf Debourg (2012), para. 623.

⁷⁰⁶ Clavel, 705 f.; concurring Boucaron-Nardetto (2013), 53 f.: "*Imaginons que l'ensemble des ordres juridiques se reconnaisse le pouvoir d'émettre de telles injonctions. La scène juridictionnelle mondiale ne serait plus qu'un champ de bataille désordonné, où pourrait fuser de toute part (de tout ordre juridique) et à tout instant (avant l'instance afin d'interdire d'engager une instance, pendant l'instance afin d'interdire au plaideur de poursuivre cette procédure, et après l'instance afin de faire obstacle à la reconnaissance ou l'exécution du jugement visé dans un autre ordre juridique que celui dont émane l'injonction) une injonction anti-suit, à laquelle succéderait une injonction anti-anti-suit « dans un mouvement sans fin ».*"

⁷⁰⁷ Cf Favalli/Augsburger, Art. 31 para. 52.

⁷⁰⁸ Swiss Federal Supreme Court Decision 138 III 304 consideration 5.3.1; cf Liatowitsch, 151. The argument that the

issuance of anti-suit injunctions is not necessary in light of Art. II(3) New York Convention obliging a national court faced with a plea of a valid arbitration agreement to refer the parties to arbitration is not entirely convincing, since the idea of uniform courts, uniform procedures and uniform quality of decision-making across the New York Convention states – on which such an argument must be based – is not realistic, because there is no centralised interpretation system for the contracting states.

⁷⁰⁹ Cf Scherer/Giovannini, 1303; Scherer/Jahnel, 68 f.; Kaufmann-Kohler/Rigozzi, para. 458b; Berger/Kellerhals, para. 616; Liatowitsch, 151 f.; Wyss, 71. Mosimann, however, argues that Swiss law, in principle, allows for the issuance of an interim measure prohibiting a party from instituting or continuing other proceedings and that such an interim measure equivalent to an anti-suit injunction ordered by a Swiss judge is enforceable in Switzerland (Mosimann, 47, 86 f.).

⁷¹⁰ Stacher (2005), 650; commented critically by Mosimann, 47.

⁷¹¹ *Pena Copper Mines Ltd v Rio Tinto Co Ltd* [1911] 105 LT 846 (CA); *Tracomin SA v Sudan Oil Seeds Co Ltd* [1983] 1 WLR 1026 (CA); *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace")* [1995] 1 Lloyd's Rep 87 (CA); *Noble Assurance Co & Shell Petroleum Inc v Gerling-Konzern General Insurance Co – UK Branch* [2007] EWHC 253 (Comm), [2007] 1 CLC 85 (Comm); *Starlight Shipping Co & Anor. v Tai Ping Insurance Co Ltd, Hubei Branch & Anor.* [2007] EWHC 1893 (Comm), [2007] 2 CLC 440 (Comm); *Ecom Agroindustrial Corporation Ltd v Mosharaf Composite Textile Mill Ltd* [2013] EWHC 1276 (Comm), reported in Merkin (October 2013), 7-8; cf Poudret/Besson, para. 1022; Born, 1036 f.; Arkins, 611 ff.; Noussia, 318 ff.; Collins (*Dacey, Morris & Collins*), para. 16-088.

⁷¹² *C v D* [2007] EWCA Civ 1282 (CA), [2008] Bus LR 843 (CA) 851 f.; cf Foster, 104-109; Joseph, para. 12.105; Noussia, 320 f.; Lew (2009), 524.

⁷¹³ Sheppard, 788 f.; Merkin/Flannery, 110; Collins (*Dacey, Morris & Collins*), para. 16-090; Raphael (2008), paras 7.36, 13.08 ff.; Mosimann, 23 f.

⁷¹⁴ *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647, [2012] Bus LR 330 (CA); confirmed in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 WLR 1889 (SC).

⁷¹⁵ *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 WLR 1889 (SC), para. 48.

⁷¹⁶ Section 72(1)(a)/(c) Arbitration Act; cf *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa)* [2002] EWHC 762 (Comm) and 2033 (Comm), [2003] EWCA Civ 938, [2003] 2 CLC 207 (Comm/CA).

⁷¹⁷ Cf for a case where the application for an injunction was considered belated: *Internet Fzco and Others v Ansol Ltd and Others* [2007] EWHC 226 (Comm), 2007 WL 504758 (Comm), commented in Lew (2009), 504 ff.; *Alfred C Toepfer International GmbH v Molino Boschi Srl* [1996] CLC 738 (Comm), where the Commercial Court held that an application for injunctive relief filed in 1995 against court proceedings in Italy commenced already in 1988 was clearly belated; cf *Schiffahrtsgesellschaft Detlev von Appen GmbH v Wiener Allianz Versicherungs AG* [1997] CLC 993 (CA), where the Court of Appeal has not declared an application for injunctive relief unduly delayed where the foreign proceedings before the Brazilian court were initiated in February 1993 and the application for the anti-suit injunction was filed in December 1994. For further references cf: Sutton/Gill/Gearing, para. 7-015; Seriki (2011), 25 f.

⁷¹⁸ Lew/Mistelis/Kröll, para. 15-30; cf Merkin/Flannery, 111; for a case where the judge declined on discretionary grounds to restrain proceedings in Florida brought in breach of a London arbitration clause, since Florida appeared to be the natural forum: *Sokana Industries Inc and Others v Freyre & Co Inc and Another* [1994] 2 Lloyd's Rep 57 (Comm); cf also *Donohue v Armco Inc & Ors.* [2001] UKHL 64 (HL), [2002] CLC 440 (HL); cf Bell, para. 4.163; for a detailed overview of the prerequisites for the issuance of an anti-suit injunction by English courts cf: Mosimann, 11 ff., 23 ff.

⁷¹⁹ *Noble Assurance Co & Shell Petroleum Inc v Gerling-Konzern General Insurance Co – UK Branch* [2007] EWHC 253 (Comm), [2007] 1 CLC 85 (Comm) 107; *Donohue v Armco Inc & Ors.* [2001] UKHL 64 (HL), [2002] CLC 440 (HL) 447; *Société Nationale Industrielle Aerospatiale v Lee Kui Jak and Another* [1987] 1 AC 871 (PC) 892.

⁷²⁰ Cf *Noble Assurance Co & Shell Petroleum Inc v Gerling-Konzern General Insurance Co – UK Branch* [2007] EWHC 253 (Comm), [2007] 1 CLC 85 (Comm) 111 f., where the Commercial Court granted declaratory relief instead of an anti-suit injunction to enjoin court proceedings in the United States, since a declaration declaring the scope and affirming the validity of the award would provide a platform for *res judicata* and for collateral estoppel.

⁷²¹ *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace")* [1995] 1 Lloyd's Rep 87 (CA) 96; *Ultisol Transport Contractors Ltd v Bouygues Offshore SA and Comité d'Etudes et de Services des Assureurs Maritimes et Transports de France* [1996] 2 Lloyd's Rep 140 (QB); cf Sutton/Gill/Gearing, para. 7-014 with further references to case law; Stacher (2005), 643 f.; Seriki (2011), 23.

⁷²² Hill/Chong, paras 11.2.22 f.

⁷²³ Poudret/Besson, para. 1022.

⁷²⁴ *Malhotra v Malhotra and Another* [2012] EWHC 3020 (Comm),

- reported in Merkin (August 2013), 1-3.
- ⁷²⁵ See discussion of *West Tankers* in Chapter 2, §2.03[A][1][c] above; cf Pfeiffer; Schroeder, 218 f.; Lew (2009), 523.
- ⁷²⁶ Carducci (2013), 487. See for a discussion of recital 12 Recast Brussels Regulation Chapter 2, §2.03[B][2] above.
- ⁷²⁷ Seriki (2011), 27 f.
- ⁷²⁸ Poudret/Besson, para. 1018.
- ⁷²⁹ Cf Lew/Mistelis/Kröll, paras 15-33; Clavel, 680.
- ⁷³⁰ Cf Stacher (2005), 654.
- ⁷³¹ Baum, 20.
- ⁷³² Lew (2009), 518.
- ⁷³³ Cf Poudret/Besson, para. 1019; Stacher (2005), 642; Bachand, 104; Debourg (2012), para. 610.
- ⁷³⁴ Bachand, 102 f.; cf Raphael (2008), para. 1.19.
- ⁷³⁵ Raphael (2008), para. 1.22.
- ⁷³⁶ Cf *World Pride Shipping Ltd v Daiichi Chuo Kisen Kaisha (The "Golden Anne")* [1984] 2 Lloyd's Rep 489 (Comm) 498 (Lloyd J): "It seems to me that in those circumstances it would be much better that the District Court should itself rule on the motion for continuance and, if it thinks fit, stay all further proceedings on *World Pride's* cross-claim, in the light of the judgment I have given upholding the validity of Mr. Eckersley's appointment as arbitrator, rather than that I should seek to pre-empt, and perhaps even seem to dictate, the decision of a foreign Court."
- ⁷³⁷ Bell, para. 4.223; cf Raphael (2008), para. 1.11.
- ⁷³⁸ Bell, para. 4.225.
- ⁷³⁹ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663, Opinion of AG Kokott, paras 24, 28, 34; cf Noussia, 328 f.
- ⁷⁴⁰ Joseph, para. 1.17.
- ⁷⁴¹ Stacher, 647.
- ⁷⁴² Clavel, 679 ff.; cf Bachand, 105 f.; Illmer (2009), 316.
- ⁷⁴³ Cf Stacher (2005), 647 f.; Schwebel, 10 f.
- ⁷⁴⁴ Cf Kaufmann-Kohler/Rigozzi, para. 458b.
- ⁷⁴⁵ Born, 1044; Mosimann, 50.
- ⁷⁴⁶ Bollée, 235 f.
- ⁷⁴⁷ *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace")* [1995] 1 Lloyd's Rep 87 (CA) 94, 96; cf Joseph, para. 12.85; Clavel, 680.
- ⁷⁴⁸ Cf Bachand, 101 f.
- ⁷⁴⁹ Oberlandesgericht Düsseldorf, 10 January 1996 (3 VA 11/95) *Re the Enforcement of an English Anti-Suit Injunction* [1997] ILPr 320-324, 320; cf Born, 1042; Swiss Federal Supreme Court Decision 138 III 304 consideration 5.3.1.
- ⁷⁵⁰ Cf Debourg (2012), para. 626 with further references; Karrer, 230; Swiss Federal Supreme Court Decision 138 III 304 consideration 5.3.1; Raphael (2008), para. 1.19.
- ⁷⁵¹ Cf Pfeiffer.
- ⁷⁵² Case C-159/02 *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* [2004] ECR I-3565.
- ⁷⁵³ Case C-159/02 *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* [2004] ECR I-3565, para. 27; cf Poudret/Besson, para. 1031; Born, 1043.
- ⁷⁵⁴ Cf Born, 1043 f.
- ⁷⁵⁵ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663, paras 22 f.; cf Joseph, para. 12.67; Probst, 294.
- ⁷⁵⁶ Case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663, paras 27 f.; cf Joseph, para. 12.68.
- ⁷⁵⁷ Swiss Federal Supreme Court Decision 138 III 304 consideration 5.3.1 (313); Dasser, Art. 1 para. 104, Art. 27 para. 26; Killias (2011), Art. 23 para. 155; Acocella, Art. 1 para. 131, Vorbem. Art. 2 paras 29 ff. Disagreeing: Markus/Giroud, 245; Scherer/Jahnel, 68.
- ⁷⁵⁸ Cf Acocella, Vorbem. Art. 2 para. 35; Favalli/Augsburger, Art. 31 para. 53.
- ⁷⁵⁹ See for further comments Chapter 2, §2.03[B] above.
- ⁷⁶⁰ Section 44(7) Arbitration Act.
- ⁷⁶¹ Bachand, 104.
- ⁷⁶² Cf Fernández Rozas, 76.
- ⁷⁶³ Mosimann, 88; cf for a case where the English courts have noted that the foreign courts will not recognise the English anti-suit injunction: *Starlight Shipping Co & Anor. v Tai Ping Insurance Co Ltd, Hubei Branch & Anor.* [2007] EWHC 1893 (Comm), [2007] 2 CLC 440 (Comm) 449 (para. 26).
- ⁷⁶⁴ Domej/Oberhammer, Art. 34 para. 26; Walther, Art. 34 para. 24; Favalli/Augsburger, Art. 31 para. 53.
- ⁷⁶⁵ *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Association Co Ltd* [2004] EWCA Civ 1598 (CA), [2004] 2 CLC 1189 (CA) 1226 (para. 91); cf Raphael (2008), para. 1.25.
- ⁷⁶⁶ Cf Mosimann, 89.
- ⁷⁶⁷ *Philip Alexander Securities & Futures Ltd v Bamberger & Others/Philip Alexander Securities & Futures Ltd v Gilhaus* [1997] EuLR 63 (Comm/CA), 87, 97, Waller J: "It would seem to me, *prima facie*, that if someone proceeds in breach of, and with notice of, an injunction granted by the English court to obtain judgments abroad, those judgments should not, as a matter of public policy, be recognised in the United Kingdom." For further references cf: Dutson, 94 f.; Clavel, 699; Raphael (2008), para. 15.30.

- ⁷⁶⁸ Born, 1048 f.; Debourg (2012), para. 616; cf Lew (2005), 26; Mosimann, 7 f. For an overview of situations in which the need to seek anti-arbitration injunctions may arise: Seriki (2013), 43 f.
- ⁷⁶⁹ Born, 1049 f.
- ⁷⁷⁰ Lachmann, para. 667; cf Haas, 207.
- ⁷⁷¹ Cf Debourg (2012), para. 618.
- ⁷⁷² *LV Finance Group Ltd c CCI*, Tribunal de Grande Instance Paris, 24 June 2004 (2005) *Revue de l'Arbitrage* 1037-1039; *République de Guinée équatoriale c Société Fitzpatrick Equatorial Guinea Ltd et autres*, Tribunal de Grande Instance de Paris, 29 March 2010 (2010) *Revue de l'Arbitrage* 390 f.; cf Vidal, para. 576.
- ⁷⁷³ *Air (PTY) Ltd v International Air Transport Association (IATA) and C. SA*, Geneva Court of First Instance, 2 May 2005 (C/1043/2005-15SP) reported and commented in Jarvin/Magnusson, 1291 ff.; Scherer/Giovannini, 1307, 1309; Scherer/Jahnel, 66 f.; Roney/Geisinger, N67-70; Kaufmann-Kohler/Rigozzi, para. 460; Berger/Kellerhals, para. 616.
- ⁷⁷⁴ Besson (2007), 76; cf Wyss, 71; Schott/Courvoisier, Art. 186 para. 9. Although it could be argued against this reasoning, that section 32(4) Arbitration Act also allows the arbitrators to determine their jurisdiction, even though court proceedings are pending, but English case law nevertheless has proven itself receptive of recognising anti-arbitration injunctions issued by English courts.
- ⁷⁷⁵ Joseph, para. 12.88.
- ⁷⁷⁶ Seriki (2013), 47; Born, 1050 f.; Sutton/Gill/Gearing, para. 7-062; cf for a detailed discussion of English case law concerning anti-arbitration injunctions: Lew (2009), 500 ff.
- ⁷⁷⁷ Sutton/Gill/Gearing, para. 7-061.
- ⁷⁷⁸ *Compagnie Nouvelle France Navigation, SA v Compagnie Navale Afrique du Nord (The "Oranie" and The "Tunisie")* [1966] 1 Lloyd's Rep 477 (CA) 487; confirmed in *Weissfisch v Julius & Ors.* [2006] EWCA Civ 218 (CA), [2006] 1 CLC 424 (CA) 435.
- ⁷⁷⁹ *Elektrim SA v Vivendi Universal SA & Ors.* [2007] EWHC 571 (Comm), [2007] 1 CLC 227 (Comm).
- ⁷⁸⁰ *Elektrim SA v Vivendi Universal SA & Ors.* [2007] EWHC 571 (Comm), [2007] 1 CLC 227 (Comm) 247 (para. 75), commented by Angenieux, 139-144; cf Joseph, para. 12.95; Lew (2009), 503 f.; Raphael (2008), para. 11.09.
- ⁷⁸¹ *Republic of Kazakhstan v Istil Group Inc* [2007] EWHC 2729 (Comm), [2007] 2 CLC 870 (Comm).
- ⁷⁸² *Republic of Kazakhstan v Istil Group Inc* [2007] EWHC 2729 (Comm), [2007] 2 CLC 870 (Comm) 895 (para. 48); cf Joseph, paras 12.90, 12.96.
- ⁷⁸³ Joseph, para. 12.96.
- ⁷⁸⁴ Seriki (2013), 46; *Internet Fzco and Others v Ansol Ltd and Others* [2007] EWHC 226 (Comm), 2007 WL 504758 (Comm) paras 24 f.
- ⁷⁸⁵ Cf Mustill/Boyd, 571 f.; Seriki (2013), 45. Where the circumstances were not held to be sufficiently exceptional to grant an anti-arbitration injunction: *Nomihold Securities Inc v Mobile Telesystems Finance SA (No 2)* [2012] EWHC 130 (Comm), [2012] Bus LR 1289 (Comm), reported in Merkin (June/July 2012), 1-3.
- ⁷⁸⁶ *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd* [2007] EWCA Civ 1124 (CA), [2007] 2 CLC 782 (CA).
- ⁷⁸⁷ *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd* [2007] EWCA Civ 1124 (CA), [2007] 2 CLC 782 (CA); cf Joseph, para. 12.97; Raphael (2008), para. 11.21; cf also *Claxton Engineering Services Ltd v TXM Olaj-és Gázkutató Kft* [2011] EWHC 345 (Comm), [2012] 1 CLC 326 (Comm) 335 ff., where there had been a ruling of the English courts that there was no arbitration agreement between the parties and hence the injunction against the arbitration taking place in Hungary in support of the UK court proceedings was granted (commented in Merkin (June/July 2011), 2 f.).
- ⁷⁸⁸ *Excalibur Ventures LLC v Texas Keystone Inc & Others* [2011] EWHC 1624 (Comm), [2011] 2 CLC 338 (Comm), in particular para. 69. Cf also *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi TBK Ltd and Another (The "Barito")* [2013] EWHC 1240 (Comm), reported in Merkin (October 2013), 1-4, where the balance of convenience test pointed towards the grant of an interim anti-arbitration injunction.
- ⁷⁸⁹ Cf Raphael (2008), paras 11.19 ff.
- ⁷⁹⁰ Probst, 185.
- ⁷⁹¹ Cf *Air (PTY) Ltd v International Air Transport Association (IATA) and C. SA*, Geneva Court of First Instance, 2 May 2005 (C/1043/2005-15SP) reported and commented in Jarvin/Magnusson, 1297. For further references cf: Clavel, 702; Fernández Rozas, 79 f.
- ⁷⁹² Poudret/Besson, para. 1020; cf Lew (2009), 510 agrees that no other than the court at the seat of arbitration has a right to interfere; cf Joseph, para. 12.88.
- ⁷⁹³ Schwebel, 12. The same argument has also been put forward against anti-suit injunctions in aid of arbitration (cf Oberlandesgericht Düsseldorf, 10 January 1996 (3 VA 11/95) *Re the Enforcement of an English Anti-Suit Injunction* [1997] ILPr 320-324, 320).
- ⁷⁹⁴ Born, 1053; cf Naumann, 112 ff.
- ⁷⁹⁵ Born, 1053; cf Stacher (2005), 652.
- ⁷⁹⁶ *Weissfisch v Julius & Ors.* [2006] EWCA Civ 218 (CA), [2006] 1 CLC 424 (CA); Joseph, para. 12.94.
- ⁷⁹⁷ Cf Poudret/Besson para. 1030; cf Born, 1052.
- ⁷⁹⁸ Bachand, 106 ff.; cf Lew (2009), 509 f.
- ⁷⁹⁹ Cf Poudret/Besson, para. 1030; Debourg (2012), para. 617; Clavel, 703.
- ⁸⁰⁰ Berger/Kellerhals, para. 616.

- ⁸⁰¹ Born, 1053 fn 244.
- ⁸⁰² Gaillard (2004), 60 f.; Stacher (2005), 653.
- ⁸⁰³ Karrer, 230; Lew (2009), 510.
- ⁸⁰⁴ Cf Poudret/Besson, para. 1031.
- ⁸⁰⁵ Joseph, para. 12.76; *Claxton Engineering Services Ltd v TXM Olaj-és Gázkutató Kft* [2011] EWHC 345 (Comm), [2012] 1 CLC 326 (Comm) 333 (para. 20).
- ⁸⁰⁶ Cf Acocella, Vorbem. Art. 2 para. 41; Favalli/Augsburger, Art. 31 para. 54; Probst, 369.
- ⁸⁰⁷ See Chapter 3, §3.01[C][1][c][ii] above.
- ⁸⁰⁸ Cf Debourg (2012), para. 618.
- ⁸⁰⁹ Debourg (2012), para. 618.
- ⁸¹⁰ Debourg (2012), para. 618.
- ⁸¹¹ Cf Scherer/Giovannini, 1315; Fouchard, 153; Lew (2005), 39; Schneider (2005), 64; de Boissésón (2005), 71; Fernández Rozas, 85.
- ⁸¹² Cf Kaufmann-Kohler/Rigozzi, paras 458c, 461.
- ⁸¹³ Fernández Rozas, 85; cf Clavel, 705.
- ⁸¹⁴ Born, 1045.
- ⁸¹⁵ Cf *Airbus Industrie GIE v Patel & Ors*. [1998] CLC 702 (HL).
- ⁸¹⁶ As has been done by a German court in defence against an anti-suit injunction issued by the High Court of Justice in London: Oberlandesgericht Düsseldorf, 10 January 1996 (3 VA 11/95) *Re the Enforcement of an English Anti-Suit Injunction* [1997] ILPr 320-324, 320.
- ⁸¹⁷ Schneider (2005), 42 ff.
- ⁸¹⁸ Fernández Rozas, 83.
- ⁸¹⁹ Lew (2009), 510.
- ⁸²⁰ Fouchard, 156.
- ⁸²¹ Cf Born, 1055 f. with further references.
- ⁸²² Fouchard, 155.
- ⁸²³ de Boissésón (2005), 67; cf Fernández Rozas, 84.
- ⁸²⁴ The same distinction is made in the ILA Recommendations on *Lis Pendens* No 3 and 4 in an attempt to safeguard the award's enforceability (cf Ma, 66 f.; see Chapter 3, §3.02[B][2] below for a further discussion).
- ⁸²⁵ Cf Poudret/Besson, para. 1025; de Boissésón (2005), 67; similarly Sutton/Gill/Gearing, para. 7-065; Fouchard, 156.
- ⁸²⁶ Fernández Rozas, 85.
- ⁸²⁷ Cf de Boissésón (2005), 71.
- ⁸²⁸ *Republic of Kazakhstan v Istil Group Inc* [2007] EWHC 2729 (Comm), [2007] 2 CLC 870 (Comm).
- ⁸²⁹ Raphael (2008), para. 11.25.
- ⁸³⁰ Lew (2005), 33.
- ⁸³¹ *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 1 QB 644 (CA) 673 f.
- ⁸³² Lew (2005), 27.
- ⁸³³ Born, 1050 with references to respective case law.
- ⁸³⁴ Born, 1043.
- ⁸³⁵ Cf Noussia, 335.
- ⁸³⁶ Cf *Noble Assurance Co & Shell Petroleum Inc v Gerling-Konzern General Insurance Co – UK Branch* [2007] EWHC 253 (Comm), [2007] 1 CLC 85 (Comm) 108.
- ⁸³⁷ Cf Schneider (2005), 59.
- ⁸³⁸ Stacher (2005), 645.
- ⁸³⁹ Scott, 330; cf Schneider (2005), 58.
- ⁸⁴⁰ Lew/Mistelis/Kröll, para. 15-33.
- ⁸⁴¹ Poudret/Besson, para. 1028.
- ⁸⁴² Lew/Mistelis/Kröll, para. 15-26.
- ⁸⁴³ Scott, 330.
- ⁸⁴⁴ Cf Baum, 21.
- ⁸⁴⁵ See for a discussion of actions for declaratory relief Chapter 3, §3.01[D] below.
- ⁸⁴⁶ Cf Merkin (April 2009), 8; cf Raphael (Supplement), para. 15.07; see also comments in Chapter 3, §3.01[D][3][b][iii] below.
- ⁸⁴⁷ Unlike under section 32(1) of the English Civil Jurisdiction and Judgments Act 1982 for the recognition of foreign judgments rendered by a non-EU and non-EFTA state (cf Hill/Chong, paras 12.4.19 ff.). See comments made in Chapter 3, §3.01[A][2][c][iii] point (c) above.
- ⁸⁴⁸ *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397 (CA), [2009] 2 CLC 1004 (CA) 1026 (para. 63); cf Raphael (Supplement), para. 15.29 (79). See also comments made in fn 952 below.
- ⁸⁴⁹ Cf Merkin (August 2012), 6; see for a discussion of the res judicata effect of arbitral awards Chapter 3, §3.01[E] below.
- ⁸⁵⁰ *West Tankers Inc v Allianz SpA* [2011] EWHC 829 (Comm), [2011] 1 CLC 553 (Comm); confirmed on appeal in *West Tankers Inc v Allianz SpA and Another* [2012] EWCA Civ 27, [2012] Bus LR 1701 (CA); also *African Fertilizers & Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei KG* [2011] EWHC 2452 (Comm), [2011] 2 CLC 761 (Comm).
- ⁸⁵¹ Cf Merkin (June/July 2011), 8; Zadkovich/Roberts, 55.
- ⁸⁵² *West Tankers Inc v Allianz SpA* [2011] EWHC 829 (Comm), [2011] 1 CLC 553 (Comm) 560 (para. 26); also *African Fertilizers & Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei KG* [2011] EWHC 2452 (Comm), [2011] 2 CLC 761 (Comm).
- ⁸⁵³ Zadkovich/Roberts, 55.
- ⁸⁵⁴ Cf *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm), [2008] 2 CLC 687 (Comm); Merkin (April 2009), 9; Raphael (2008), para. 7.41; Joseph, para. 12.79; Debourg

- (2012), para. 624; cf Sheppard, 795.
- ⁸⁵⁵ Merkin (April 2009), 7 f.; for the opinion that a Swiss court would refuse to grant such preemptive injunctive relief due to the lack of the applicant's justified legal interest cf. Jegher, 103.
- ⁸⁵⁶ Denying the admissibility of preemptive anti-suit relief, since it also affects the court's determination of jurisdiction: Acocella, Vorbem. Art. 2 para. 34.
- ⁸⁵⁷ See for the preemptive effect of a court judgment on the merits Chapter 3, §3.01[A][2][c][iii] point (b) above and for the effect of a declaratory court judgment Chapter 3, §3.01[D][3][c][ii] below.
- ⁸⁵⁸ Cf Favalli/Augsburger, Art. 31 para. 54.
- ⁸⁵⁹ Raphael (2008), para. 5.54; it did not suffice in: *Industrial Maritime Carriers (Bahamas) Inc v Sinoca International Inc (The "Eastern Trader")* [1996] 2 Lloyd's Rep 585 (Comm); *E.D. & F. Man (Sugar) Ltd v Yani Haryanto* [1991] ILPr 393 (CA).
- ⁸⁶⁰ Lew/Mistelis/Kröll, para. 15-23.
- ⁸⁶¹ *Société Coprodag et autre c Dame Bohin*, Cour de Cassation, 10 May 1995 (1995) Revue de l'Arbitrage 617-618; *M Zanzi c J de Coninck et autres*, Cour de Cassation, 5 January 1999 (1999) Revue de l'Arbitrage 260-262; Racine (2010), 748 f.; Delvolvé/Pointon/Rouche, para. 139; Debourg (2012), para. 161.
- ⁸⁶² Poudret/Besson, para. 487.
- ⁸⁶³ Cf Liatowitsch, 37; Wenger, Art. 186 para. 4; Heini, Art. 186 para. 2.
- ⁸⁶⁴ Cf for a discussion of the different opinions in the doctrine: Liatowitsch, 37 f.; Poudret (1994), 346 ff. In favour of the admissibility of actions for declaratory relief in general: Müller (Zuständigkeit des Schiedsgerichts), 144 f. Clearly against the admissibility of declaratory relief before the national courts: Poudret (1994), 351 ff.; Wenger, Art. 186 para. 4; Berger/Kellerhals, para. 615. Authorities deeming an action for declaratory relief admissible only in the event that there is not even the semblance of a valid arbitration agreement: Bucher, para. 130; Heini, Art. 186 para. 3; Liatowitsch, 40; Schott/Courvoisier, Art. 186 paras 6 ff.
- ⁸⁶⁵ Swiss Federal Supreme Court Decision 120 II 155 consideration 3b.bb (164); cf Müller (Swiss case law), 201.
- ⁸⁶⁶ Huber, § 1032 para. 41; Schlosser (2002), § 1032 para. 21; Saenger, § 1032 para. 13.
- ⁸⁶⁷ Huber, § 1032 para. 42.
- ⁸⁶⁸ Huber, § 1032 para. 44; Voit, § 1032 para. 10; Schlosser (2002), § 1032 para. 23; Prütting, § 1032 para. 6.
- ⁸⁶⁹ § 1062(1)(2) ZPO and § 1062(2) ZPO.
- ⁸⁷⁰ If the arbitral tribunal, however, unjustifiedly refuses to issue a preliminary award on jurisdiction which could then be challenged by the party opposing arbitration, an action for declaratory relief should nevertheless be heard by a national court even after the arbitral tribunal has been constituted (Voit, § 1032 para. 11).
- ⁸⁷¹ Huber, § 1032 para. 45; Lionnet/Lionnet, 188; Geimer (Zöller), § 1032 para. 25; Lachmann, para. 675; Schlosser (2002), § 1032 para. 21.
- ⁸⁷² See for details Chapter 3, §3.02[A] below. Huber, § 1032 para. 45; Lionnet/Lionnet, 188; Voit, § 1032 para. 11; Baumbach/Lauterbach/Albers/Hartmann, § 1032 para. 9.
- ⁸⁷³ Huber, § 1032 para. 52; cf Geimer (Zöller), § 1032 para. 23; Saenger, § 1032 para. 14.
- ⁸⁷⁴ § 1032(3) ZPO.
- ⁸⁷⁵ Huber, § 1032 para. 48; Voit, § 1032 para. 12; Geimer (Zöller), § 1032 para. 23; Baumbach/Lauterbach/Albers/Hartmann, § 1032 para. 9; Saenger, § 1032 para. 15; Prütting, § 1032 para. 6. Bayerisches Oberstes Landgericht, 7 October 2002 (4 Z SchH 8/02) (2003) SchiedsVZ 187-191 with a note by Daniel Busse. Disagreeing: Münch (2013), § 1032 para. 22; Schlosser (2002), § 1032 para. 21. According to the Higher Regional Court in Munich a legitimate interest must be denied as soon as court proceedings on the merits are pending regardless of whether the arbitration defence has been raised in the court proceedings or not: Oberlandesgericht München, 22 June 2011 (34 SchH 03/11) (2011) SchiedsVZ 340-342, 341 f.; Oberlandesgericht Frankfurt, 7 March 2012 (26 Sch 16/11), reported in Kröll (2013), 189; Oberlandesgericht Naumburg, 5 March 2013 (10 Sch 1/13) (2013) SchiedsVZ 237-238.
- ⁸⁷⁶ Huber, § 1032 para. 51.
- ⁸⁷⁷ Huber, § 1032 para. 49; Voit, § 1032 para. 12; Bayerisches Oberstes Landgericht, 7 October 2002 (4 Z SchH 8/02) (2003) SchiedsVZ 187-191 with a note by Daniel Busse.
- ⁸⁷⁸ Section 32(1) Arbitration Act.
- ⁸⁷⁹ Sheppard, 768; Aeberli, 273.
- ⁸⁸⁰ An agreement in writing can be made either before or after the parties' dispute arises (Aeberli, 273).
- ⁸⁸¹ Section 32(2) Arbitration Act.
- ⁸⁸² Tweeddale/Tweeddale, para. 24.42.
- ⁸⁸³ Section 32(1) second sentence Arbitration Act.
- ⁸⁸⁴ Aeberli, 274; Merkin/Flannery, 82; Harris/Planterose/Tecks, para. 32C.
- ⁸⁸⁵ Section 4(1) in connection with Schedule 1 Arbitration Act.
- ⁸⁸⁶ Tweeddale/Tweeddale, para. 24.40.
- ⁸⁸⁷ Cf Tweeddale/Tweeddale, para. 24.37; *ABB Lummus Global Ltd v Keppel Fels Ltd (formerly Far East Livingston Shipbuilding Ltd)* [1999] 2 Lloyd's Rep 24 (Comm); *Vale do Rio Doce Navegacao SA & Anor. v Shanghai Bao Steel Ocean Shipping Co Ltd & Anor.* [2000] CLC 1200 (Comm) 1211 ff.; cf Joseph, para. 13.26; Merkin/Flannery, 82.
- ⁸⁸⁸ Tweeddale/Tweeddale, para. 24.38.
- ⁸⁸⁹ Tweeddale/Tweeddale, para. 24.39; Joseph, para. 13.50; Azov

Shipping Co v Baltic Shipping Co [1998] CLC 1240 (Comm).

⁸⁹⁰ Merkin/Flannery, 82; Harris/Planterose/Tecks, para. 32B.

⁸⁹¹ *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Association Co Ltd* [2004] EWCA Civ 1598 (CA), [2004] 2 CLC 1189 (CA); *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa)* [2002] EWHC 762 (Comm) and 2033 (Comm), [2003] EWCA Civ 938, [2003] 2 CLC 207 (Comm/CA); *Steamship Mutual Underwriting Association (Bermuda) Ltd v Sulpicio Lines Inc* [2008] 2 Lloyd's Rep 269 (Comm); Joseph, paras 13.29 f.

⁸⁹² *Toepfer International GmbH v Société Cargill France* [1997] 2 Lloyd's Rep 98 (Comm); *Navigation Maritime Bulgare v Rustal Trading Ltd and Others (The "Ivan Zagubanski")* [2002] 1 Lloyd's Rep 106 (Comm); *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Association Co Ltd* [2004] EWCA Civ 1598 (CA), [2004] 2 CLC 1189 (CA); Raphael (2008), para. 15.07.

⁸⁹³ Joseph, para. 13.31.

⁸⁹⁴ Section 32(4) Arbitration Act.

⁸⁹⁵ Section 72(1) Arbitration Act. For the party not taking part in the arbitration section 72 Arbitration Act is mandatory (section 4(1) in connection with Schedule 1 Arbitration Act). There is no counterpart of this provision in the UNCITRAL Model Law (Merkin/Flannery, 175).

⁸⁹⁶ Cf Tweeddale/Tweeddale, paras 24.54 f.

⁸⁹⁷ *Fiona Trust & Holding Corp and Others v Yuri Privalov and Others* [2007] EWCA Civ 20, [2007] 1 CLC 144 (CA) 160 (in particular para. 34).

⁸⁹⁸ *Fiona Trust & Holding Corp and Others v Yuri Privalov and Others* [2007] EWCA Civ 20, [2007] 1 CLC 144 (CA) 160 (in particular para. 36); Joseph, para. 13.39.

⁸⁹⁹ Poudret/Besson, para. 483.

⁹⁰⁰ Samuel, 190.

⁹⁰¹ Cf Samuel, 190.

⁹⁰² Samuel, 203.

⁹⁰³ Cf Poudret/Besson, para. 485.

⁹⁰⁴ Cf Huber, § 1032 para. 41; concurring in Swiss doctrine: Müller (Zuständigkeit des Schiedsgerichts), 144 f.

⁹⁰⁵ Sachs/Schmidt-Ahrendts, 9.

⁹⁰⁶ Ahrendt, 62.

⁹⁰⁷ Cf Poudret/Besson, para. 487.

⁹⁰⁸ Cf Harbst, 41.

⁹⁰⁹ Section 2(1) Swedish Arbitration Act; cf Poudret/Besson, para. 486.

⁹¹⁰ Cf Liatowitsch, 39.

⁹¹¹ Cf also Liatowitsch, 39; Schott/Courvoisier, Art. 186 para. 6.

⁹¹² See for a detailed discussion Chapter 3, §3.02[A][2] below.

⁹¹³ Cf Poudret/Besson, para. 487.

⁹¹⁴ Cf Liatowitsch, 40; Heini, Art. 186 para. 3; Ahrendt, 62 f.; Bucher, para. 130.

⁹¹⁵ Ahrendt, 62.

⁹¹⁶ Cf Wenger, Art. 186 para. 4; Schott/Courvoisier, Art. 186 para. 7; Poudret (1994), 353.

⁹¹⁷ See comments in Chapter 3, §3.01[A][2][c][i] above and Chapter 3, §3.01[D][3][a] below.

⁹¹⁸ See for details Chapter 3, §3.02[A][2][a] below.

⁹¹⁹ Ahrendt, 62 f.

⁹²⁰ Poudret/Besson, para. 487.

⁹²¹ Cf Poudret (1994), 354.

⁹²² Cf Berger/Kellerhals, para. 615 fn 22.

⁹²³ Joseph, paras 13.17 f.; *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397 (CA), [2009] 2 CLC 1004 (CA); Illmer (2011), 652 f.; Acocella, Art. 1 para. 134; see also ECJ's case law discussed in Chapter 2, §2.03[A][1] above.

⁹²⁴ Illmer (2011), 653; *Legal Department du Ministère de la Justice de la République d'Irak c sociétés Fincantieri – Cantieri Navali Italiani, Finmeccanica et Armamenti e Aerospazio*, Cour d'Appel de Paris, 15 June 2006 (2007) *Revue de l'Arbitrage* 87-96, 92 with a note by Sylvain Bollée.

⁹²⁵ § 1065(1) in connection with § 1062(1)(2) ZPO; cf Huber, § 1032 para. 43.

⁹²⁶ Tweeddale/Tweeddale, para. 24.44.

⁹²⁷ Section 32(5) Arbitration Act.

⁹²⁸ Section 32(6) Arbitration Act.

⁹²⁹ *North Range Shipping Ltd v Seatrans Shipping Corpn* [2002] EWCA Civ 405, [2002] 1 WLR 2397 (CA); *CGU International Insurance plc and Others v AstraZeneca Insurance Co Ltd* [2006] EWCA Civ 1340, [2007] Bus LR 162 (CA).

⁹³⁰ *Inco Europe Ltd and Others v First Choice Distribution and Others* [1999] 1 WLR 270 (CA) 276; cf Poudret/Besson, para. 485; Merkin/Flannery, 176; Harris/Planterose/Tecks, para. 72F.

⁹³¹ Huber, § 1032 para. 59; Geimer (Zöller), § 1040 para. 4; Baumbach/Lauterbach/Albers/Hartmann, § 1032 para. 10; Saenger, § 1032 para. 16; Münch (2013), § 1032 para. 34. Disagreeing: Voit, § 1032 para. 13.

⁹³² Huber, § 1032 para. 59.

⁹³³ Lionnet/Lionnet, 189 f.

⁹³⁴ Handley, para. 5.12.

⁹³⁵ § 1065(1) in connection with § 1062(1)(2) ZPO; cf Huber, § 1032 para. 43.

⁹³⁶ See comments made in Chapter 3, §3.01[D][3][b][i] above.

⁹³⁷ Lionnet/Lionnet, 189; cf Haas, 202.

⁹³⁸ Saenger, § 1032 para. 17; Huber, § 1032 para. 58; Reichold, §

1032 para. 5; Voit, § 1032 para. 14; Geimer (Zöller), § 1059 para. 17. Claiming that the arbitral award should be annulled in setting aside proceedings according to § 1059(2)(1)(a) ZPO: Lionnet/Lionnet, 189; Münch (2013), § 1032 para. 34; Prütting, § 1032 para. 7.

⁹³⁹ Huber, § 1032 para. 60; Voit, § 1032 para. 15; Baumbach/Lauterbach/Albers/Hartmann, § 1032 para. 9.

⁹⁴⁰ See comments made in Chapter 3, §3.01[D][3][b][ii] above.

⁹⁴¹ Sections 31(5) in connection with 32(4) Arbitration Act. Corresponding in principle to § 1032(3) ZPO.

⁹⁴² Cf Lionnet/Lionnet, 189; Saenger, § 1032 para. 18; Münch (2013), § 1032 para. 33.

⁹⁴³ Cf Sheppard, 768.

⁹⁴⁴ See for a detailed discussion of the plea of lack of jurisdiction before the arbitral tribunal Chapter 3, §3.02[A] below.

⁹⁴⁵ Cf Huber, § 1032 para. 60.

⁹⁴⁶ See comments made in Chapter 3, §3.01[A][2][c][i] above.

⁹⁴⁷ *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397 (CA), [2009] 2 CLC 1004 (CA). For further comments to this case see Chapter 3, §3.01[A][2][c][iii] point (c) above.

⁹⁴⁸ Cf also Raphael (Supplement), para. 15.07: "*It seems to follow that the only technique available to protect an English arbitration clause which under English law and principles of private international law would be treated as valid, from being overridden by the law of another Brussels-Lugano state, is to obtain a prior declaration from the English courts (or a prior award from the arbitrators) as to its validity [...].*"

⁹⁴⁹ Raphael (Supplement), para. 15.07.

⁹⁵⁰ *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397 (CA), [2009] 2 CLC 1004 (CA) 1026 (para. 63).

⁹⁵¹ Cf Raphael (Supplement), para. 15.29 (79).

⁹⁵² The preemptive effect of a declaratory judgment declaring the arbitration admissible could give rise to the public policy ground for refusal of recognition (Art. 34(1) Brussels Regulation/Lugano Convention) or to the ground of a prior judgment with which the Regulation or Convention judgment is inconsistent (Art. 34(3) Brussels Regulation/Lugano Convention): even if *res judicata* is a concept of public policy it usually asks for triple identity, but the relief sought in the two actions (the action on the merits and the action on the arbitral tribunal's jurisdiction) was different. In addition, if both judgments referred to under Art. 34(3) Brussels Regulation/Lugano Convention, the prior and the inconsistent one, are defined as judgments in the sense of Art. 32 Brussels Regulation/Lugano Convention, i.e. as judgments within the ambit of the Regulation/Convention, a declaratory judgment as to the arbitration's admissibility anyway falls within the arbitration exception and may hence not be qualified as a judgment under Art. 34(3) Brussels Regulation/Lugano Convention.

⁹⁵³ Pauwelyn/Salles, 86.

⁹⁵⁴ Lookofsky/Hertz, 715.

⁹⁵⁵ Born, 2881.

⁹⁵⁶ Cf Schneider (1990), 114.

⁹⁵⁷ Cf for a detailed comment that *res judicata* affects the admissibility of a claim: Walters, 651-680.

⁹⁵⁸ Cremades/Madalena, 519; cf Hanotiau (2003), 43 f.; Kremslehner, 133; de Ly/Sheppard (Interim Report on *Res Judicata*), 36; Söderlund, 301 f.; Blackaby/Partasides/Redfern/Hunter, para. 9.140; von Schlabrendorff/Sessler, § 1055 para. 1; Walters, 652 f.

⁹⁵⁹ Born, 2886; cf Art. 1351 French Civil Code; Delvolvé/Pointon/Rouche, para. 348; von Schlabrendorff/Sessler, § 1055 paras 18 ff.

⁹⁶⁰ Berger/Kellerhals, para. 1506a; Swiss Federal Supreme Court Decision 121 III 474 consideration 4a.

⁹⁶¹ Swiss Federal Supreme Court Decision 115 II 187 consideration 3b; Berger/Kellerhals, para. 1506a.

⁹⁶² Cf Berger/Kellerhals, para. 1506b.

⁹⁶³ Berger/Kellerhals, para. 1507.

⁹⁶⁴ Cf Berger/Kellerhals, para. 1507.

⁹⁶⁵ Born, 2886, 2909; Arts 480 et 455 CPC; Vidal, para. 357; Debouq (2012), paras 488 ff.; Hanotiau (2003), 46; §§ 322, 325 ZPO; von Schlabrendorff/Sessler, § 1055 para. 17; Münch (2013), § 1055 para. 15; Voit, § 1055 para. 9; Prütting, § 1055 para. 6; Swiss Federal Supreme Court Decision 128 III 191 consideration 4a: "*L'autorité de la chose jugée ne s'attache qu'au seul dispositif du jugement ou de la sentence. Elle ne s'étend pas aux motifs.*" Confirmed in Swiss Federal Supreme Court Decision 136 III 345 consideration 2.1.

⁹⁶⁶ Swiss Federal Supreme Court Decision 128 III 191 consideration 4a; Berger/Kellerhals, para. 1508; cf Zürcher, Art. 59 para. 42.

⁹⁶⁷ Veeder (2003), 74.

⁹⁶⁸ Cf Cremades/Madalena, 519; Hanotiau (2003), 45.

⁹⁶⁹ de Ly/Sheppard (Interim Report on *Res Judicata*), 42; Born, 2883.

⁹⁷⁰ Veeder (2003), 74; cf Barnett, para. 1.39. For a definition cf: *Arnold and Others v National Westminster Bank plc* [1991] 2 AC 93 (HL) 104.

⁹⁷¹ Barnett, para. 4.18; cf Handley, paras 7.02 ff.

⁹⁷² Barnett, para. 4.20 with references to case law.

⁹⁷³ de Ly/Sheppard (Interim Report on *Res Judicata*), 42; cf Barnett, paras 5.01 ff.; Handley, paras 8.01 f. For a classic definition of issue estoppel cf also: *Mills v Cooper* [1967] 2 QB 459 (QB) 468 f.

⁹⁷⁴ Cf de Ly/Sheppard (Interim Report on *Res Judicata*), 42; *Mills v*

Cooper [1967] 2 QB 459 (QB) 468 f.; *Arnold and Others v National Westminster Bank plc* [1991] 2 AC 93 (HL) 97; cf Barnett, paras 1.40, 5.99 ff.; Born, 2883.

⁹⁷⁵ de Ly/Sheppard (Interim Report on Res Judicata), 42.

⁹⁷⁶ Hartley (2009), 376; cf Barnett, paras 5.10 ff.; *D.S.V. Silo- und Verwaltungs-Gesellschaft m.b.H. v Owners of The Sennar and 13 other ships (The Sennar No 2)* [1985] 1 WLR 490 (HL) 493; *Carl Zeiss Stiftung v Rayner and Keeler Ltd and Others* [1967] AC 853 (HL) 918, 967.

⁹⁷⁷ Hartley (2009), 376.

⁹⁷⁸ Cf de Ly/Sheppard (Interim Report on Res Judicata), 43.

⁹⁷⁹ de Ly/Sheppard (Interim Report on Res Judicata), 43; cf Hau, 72 f.; Barnett, paras 1.41; Handley, paras 19.01 ff.

⁹⁸⁰ Barnett, para. 1.44 with references to case law.

⁹⁸¹ Barnett, para. 4.28.

⁹⁸² Barnett, para. 1.44.

⁹⁸³ Handley, para. 20.03. For detailed comments to the statutory response to the non-merger rule cf. Barnett, paras 4.29 ff.

⁹⁸⁴ Barnett, para. 4.28 ff., 9.07.

⁹⁸⁵ Barnett, para. 1.46.

⁹⁸⁶ Cf de Ly/Sheppard (Interim Report on Res Judicata), 43.

⁹⁸⁷ de Ly/Sheppard (Interim Report on Res Judicata), 43.

⁹⁸⁸ *Henderson v Henderson* [1843] 3 Hare 100; cf Barnett, paras 6.11 ff.; Handley, paras 26.03 f.

⁹⁸⁹ Veeder (2003), 74.

⁹⁹⁰ *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL) 4 ff.

⁹⁹¹ de Ly/Sheppard (Interim Report on Res Judicata), 43; Veeder (2003), 74 f.; cf Barnett, para. 1.46; *Brisbane City Council and Myer Shopping Centres Pty Ltd v Attorney-General for Queensland* [1979] AC 411 (PC) 425; *Talbot v Berkshire County Council* [1994] QB 290 (CA) 296 ff.; cf for further case references Barnett, para. 1.46.

⁹⁹² Barnett, para. 6.132; cf for a detailed discussion Barnett, paras 6.133 ff.

⁹⁹³ Cf Barnett, para. 6.190.

⁹⁹⁴ Hanotiau (2003), 51; de Ly/Sheppard (Interim Report on Res Judicata), 36, 55; cf Kremsehner, 129; Shany, 171; Born, 2881; Walters, 656 f.

⁹⁹⁵ The legislative history of Art. 35 UNCITRAL Model Law reveals that it was suggested to add the words "*between the parties*" after the word "*binding*" in order to help convey the concept of res judicata; the Working Group, however, declined to adopt the Secretariat's suggestion (Holtzmann/Neuhaus, 1010).

⁹⁹⁶ Born, 2889 ff., 2894 f.

⁹⁹⁷ Radicati di Brozolo, 132; cf Born, 2910 f.

⁹⁹⁸ Cf Brekoulakis/Shore, 650.

⁹⁹⁹ Born, 2912 f.

¹⁰⁰⁰ Radicati di Brozolo, 134.

¹⁰⁰¹ Born, 2912. The focus should not be any different when analysing the preclusion principles applied by arbitral tribunals to prior final court judgments (cf Born, 2918 f.).

¹⁰⁰² de Ly/Sheppard (Interim Report on Res Judicata), 49.

¹⁰⁰³ Cf Born, 2894 f.; Geimer (Zöller), § 1055 para. 1; Saenger, § 1055 para. 6; Münch (2013), § 1055 para. 14.

¹⁰⁰⁴ von Schlabrendorff/Sessler, § 1055 para. 23; Saenger, § 1055 para. 5; Reichold, § 1055 para. 2; cf Baumbach/Lauterbach/Albers/Hartmann, § 1055 para. 4; Münch (2013), § 1055 paras 8, 12; Schlosser (2002), § 1055 para. 5. Disagreeing: Voit, § 1055 para. 5; Schwab/Walter, Kapitel 21 para. 6; Geimer (Zöller), § 1055 para. 8.

¹⁰⁰⁵ von Schlabrendorff/Sessler, § 1055 para. 24; Saenger, § 1055 para. 9; Münch (2013), § 1055 para. 28; cf Baumbach/Lauterbach/Albers/Hartmann, § 1055 para. 4; Schlosser (2002), § 1055 para. 4; Geimer (Zöller), § 1055 para. 10. Disagreeing: Schwab/Walter, Kapitel 21 para. 7.

¹⁰⁰⁶ von Schlabrendorff/Sessler, § 1055 paras 5, 29; Saenger, § 1055 para. 10; cf Geimer (Zöller), § 1055 para. 14; Münch (2013), § 1055 para. 11; Voit, § 1055 para. 3.

¹⁰⁰⁷ von Schlabrendorff/Sessler, § 1055 para. 29; cf Geimer (Zöller), § 1059 para. 17; Schlosser (2002), § 1059 para. 7.

¹⁰⁰⁸ This provision finds application to international arbitral awards by Art. 1506(4) CPC. For references to case law cf. Cadiet, Art. 1476 para. 1.

¹⁰⁰⁹ Bensaude (2010), 892; Delvolvé/Pointon/Rouche, para. 349; cf for cases in which the French Supreme Court vacated a lower court judgment for failure to respect the res judicata effect of a previous arbitral award: *Lafargue c Société Prodim*, Cour de Cassation, 5 March 2009 (2009) *Revue de l'Arbitrage* 239 f.; *Consorts Castagnos c Société Prodim*, Cour de Cassation, 2 July 2009 (2009) *Revue de l'Arbitrage* 655 f.

¹⁰¹⁰ Gaillard/Savage, para. 1419.

¹⁰¹¹ Decision in *Césaréo* of 7 July 2006 as cited in: Loquin, 202 ff.; Vidal, para. 359; Debourg (2012), para. 542.

¹⁰¹² "[...] *qu'il incombe au demandeur de présenter dans la même instance toutes les demandes fondées sur la même cause et qu'il ne peut invoquer dans une instance postérieure un fondement juridique qu'il s'était abstenu de soulever en temps utile*" (*Société G et A Distribution c Prodim*, Cour de Cassation, 28 May 2008 (2008) *Revue de l'Arbitrage* 461-472, 463 with a note by Laura Weiller); on remand *Prodim c G et A Distribution*, Cour d'Appel de Paris, Judgment of 18 March 2010 (2010) *Revue de l'Arbitrage* 347-351; *Société Carrefour c Société Codis Aquitaine et autre*, Cour de Cassation, 12 April 2012 (2013) *Revue de l'Arbitrage* 121-128 with a note by Yves Strickler; Loquin, 204; Vidal, para. 359; Debourg

(2012), para. 543; Radicati di Brozolo, 135; Debourg (2011), 979 f. with further references to case law.

¹⁰¹³ Cf Vidal, para. 360.

¹⁰¹⁴ See for detailed comments Chapter 3, §3.01[E][1][b][iv] above.

¹⁰¹⁵ Cf Vidal, paras 361 ff.; Loquin, 215 ff.; Debourg (2012), paras 562 ff.

¹⁰¹⁶ Vidal, para. 366; cf Mayer (2011), 418, 421.

¹⁰¹⁷ "Le principe de concentration des moyens qui fait obligation à la partie qui saisit le tribunal arbitral de regrouper ses demandes au titre d'un même contrat dans une seule et même instance, est inapplicable dans l'ordre international." (*Somercor Sarl c TND Gida Ve Temizlik Mad Dagtim A.S. Sarl*, Cour d'Appel de Paris, 5 May 2011 (2011) *Revue de l'Arbitrage* 1093); Debourg (2011), 980.

¹⁰¹⁸ Bensaude (2010), 892.

¹⁰¹⁹ Delvolvé/Pointon/Rouche, para. 349.

¹⁰²⁰ Berger/Kellerhals, para. 1513a; Swiss Federal Supreme Court Decision 128 III 191 consideration 4a; Rüede/Hadenfeldt (1993), 309; Müller (Zuständigkeit des Schiedsgerichts), 117.

¹⁰²¹ Art. 59(2)(e) in connection with Art. 60 CCP; cf Spühler/Dolge/Gehri, 7. Kapitel para. 218; Gehri, Art. 59 para. 18.

¹⁰²² Sutton/Gill/Gearing, para. 6-008.

¹⁰²³ Cf Born, 2904 fn 118.

¹⁰²⁴ *Doe d Davy v Haddon* [1783] 3 Doug KB 310 (KB); *Comings v Heard* [1869] LR 4 QB 669, 672; *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 (CA); *Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd ("The Smaro")* [1999] CLC 301 (Comm); *Associated Electric and Gas Insurance Services Ltd (Aegis) v European Reinsurance Co of Zurich (European Re)* [2003] UKPC II, [2003] 1 WLR 1041 (PC) para. 15; *Peoples' Insurance Company of China, Hebei Branch, China National Feeding Stuff Import/Export Corporation v The Vysanthi Shipping Company Ltd* [2003] EWHC 1655 (Comm).

¹⁰²⁵ *Comings v Heard* [1869] LR 4 QB 669.

¹⁰²⁶ *Comings v Heard* [1869] LR 4 QB 669, 672 f.

¹⁰²⁷ *Comings v Heard* [1869] LR 4 QB 669, 673.

¹⁰²⁸ *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 (CA).

¹⁰²⁹ *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 (CA) 643; relying on an earlier award to found a plea of issue estoppel in later arbitral proceedings was also approved by English case law: *Associated Electric and Gas Insurance Services Ltd (Aegis) v European Reinsurance Co of Zurich (European Re)* [2003] UKPC II, [2003] 1 WLR 1041 (PC); Beeley/Senki, 112. The establishment of issue estoppel was, however, denied in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania, AB Geonafta*, since the judge was of the opinion that the arbitral award did not finally and conclusively determine the relevant issue ([2005] EWHC 9 (Comm), 2005 WL 62239 (Comm) para. 38; Beeley/Senki, 113).

¹⁰³⁰ Sutton/Gill/Gearing, para. 6-176.

¹⁰³¹ Cf de Ly/Sheppard (Interim Report on Res Judicata), 46; Veeder (2003), 75. Handley, however, holds that the principle of former recovery extends to awards rendered by competent tribunals (Handley, para. 19.01).

¹⁰³² *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 (CA) 640, where Lord Denning MR held that: "The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. But this again is not an inflexible rule. It can be departed from in special circumstances [...]. Like principles apply to arbitration." cf also *Arnold and Others v National Westminster Bank plc* [1991] 2 AC 93.

¹⁰³³ *Associated Electric and Gas Insurance Services Ltd (Aegis) v European Reinsurance Co of Zurich (European Re)* [2003] UKPC II, [2003] 1 WLR 1041 (PC) para. 16; after holding that a decision by the arbitrators also binds the parties to the dispute, the court stated with regard to the doctrine of abuse of process: "For the sake of completeness, it should be added that the use in later distinct proceedings of the *Henderson v Henderson* (1843) 3 Hare 100 principle may fall on the other side of the line since that principle relates to issues that might have been raised but were not and therefore depends not upon matters of decision but upon matters which might have been decided but were not."; cf Veeder (2003), 75. In *Nomihold Securities Inc v Mobile Telesystems Finance SA*, it was held that there was no relevant difference between the ambit of the powers available to tribunals to dispose of claims and the power that a court would have to dispose of complaints on the basis of argument such as re-arbitration complaints including the principle in *Henderson v Henderson* ([2012] EWHC 130 (Comm), para. 44); cf Lacoste, 372.

¹⁰³⁴ Cf Mustill/Boyd, 412 f.; Veeder (2003), 74 f.; de Ly/Sheppard (Interim Report on Res Judicata), 46.

¹⁰³⁵ Cf Born, 2893 f., 2906.

¹⁰³⁶ von Schlabrendorff/Sessler, § 1055 para. 3; cf Baumbach/Lauterbach/Albers/Hartmann, § 1055 para. 2; Schlosser (2002), § 1055 para. 1; Münch (2013), § 1055 para. 4; Geimer (Zöller), § 1055 para. 5.

¹⁰³⁷ See references made in fn 1004 above.

¹⁰³⁸ Debourg (2012), para. 500.

¹⁰³⁹ Berger/Kellerhals, para. 1511; cf Swiss Federal Supreme

Court Decision 128 III 191 consideration 4a; Liatowitsch, 69 f.; Müller (Zuständigkeit des Schiedsgerichts), 116 f.

1040 Cf Liatowitsch, 70.

1041 Cf Liatowitsch, 96 ff.

1042 *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 (CA).

1043 Art. 1(2)(d) Brussels Regulation/Lugano Convention; cf Collins (*Dacey, Morris & Collins*), para. 16-164.

1044 von Schlabrendorff/Sessler, § 1055 para. 30; cf Baumbach/Lauterbach/Albers/Hartmann, § 1055 para. 2; Münch (2013), § 1061 para. 3; Voit, § 1061 para. 1.

1045 § 1061(1) ZPO; von Schlabrendorff/Sessler, § 1055 para. 30; cf Schlosser (2002), § 1055 para. 25; Voit, § 1061 para. 2.

1046 Cf Geimer (Zöller), § 1055 para. 15.

1047 Art. 1514 CPC; Debourg (2012), para. 500; cf Pinna, para. 27 (707).

1048 Berger/Kellerhals, para. 1511a.

1049 Swiss Federal Supreme Court Decision 4A_508/2010 consideration 3.2.

1050 Swiss Federal Supreme Court Decision 4A_508/2010 consideration 3.3.

1051 Swiss Federal Supreme Court Decision 4A_508/2010 consideration 3.3.

1052 Collins (*Dacey, Morris & Collins*), para. 16R-103 with references to case law.

1053 Collins (*Dacey, Morris & Collins*), para. 16R-122 with references to case law.

1054 Cf also Collins (*Dacey, Morris & Collins*), paras 16R-136 ff.

1055 Born, 2889.

1056 Cf Born, 2886 f.

1057 Cf Hanotiau (2003), 49 declaring in general (not limited to a civil law notion) that *res judicata* applies to the dispositive part of the arbitral award only.

1058 As provided for in several institutional arbitration rules: Art. 35 ICC Rules, Arts 36 and 37 Swiss Rules, Art. 27 LCIA Rules.

1059 Art. V(1) European Convention.

1060 For instance: Art. 23 UNCITRAL Arbitration Rules, Art. 21 Swiss Rules, Art. 23 LCIA Rules.

1061 Delvolvé/Pointon/Rouche, para. 173; Gaillard/Savage, para. 655.

1062 Section 30(1) Arbitration Act.

1063 Huber, § 1040 para. 24; Born, 835 f.; Müller (Zuständigkeit des Schiedsgerichts), 128; Furrer/Girsberger/Schramm, Art. 182-186 para. 30; Liatowitsch 35; Kaufmann-Kohler/Rigozzi, para. 426; Schott/Courvoisier, Art. 186 para. 89.

1064 Cf § 1032(1) ZPO.

1065 § 1040(2) sentence 2 ZPO.

1066 § 1040(2) sentence 3 ZPO.

1067 § 1040(2) sentence 4 ZPO.

1068 Huber, § 1040 para. 15; cf Voit, § 1040 para. 7.

1069 Huber, § 1040 para. 18 with further references; cf Lachmann, para. 706; Münch (2013), § 1040 para. 45.

1070 Saenger, § 1040 para. 7.

1071 Poudret/Besson, para. 471 fn 73 with references to case law.

1072 Swiss Federal Supreme Court Decision 128 III 50 consideration 2c.aa; Swiss Federal Supreme Court Decision 120 II 155 consideration 3b.bb; Berger/Kellerhals, para. 577.

1073 Kaufmann-Kohler/Rigozzi, paras 424 f.

1074 Schott/Courvoisier, Art. 186 para. 103; Heini, Art. 186 para. 11.

1075 Swiss Federal Supreme Court Decision 120 II 155 consideration 3b.bb; Müller (Swiss case law), 199; Berger/Kellerhals, para. 682.

1076 Berger/Kellerhals, paras 630 ff.; Schott/Courvoisier, Art. 186 paras 92 f.

1077 Section 31(1) Arbitration Act.

1078 Section 31(2) Arbitration Act.

1079 Tweeddale/Tweeddale, para. 24.30.

1080 Section 31(1) Arbitration Act in connection with Art. 16(2) UNCITRAL Model Law.

1081 Cf Tweeddale/Tweeddale, para. 24.32; Harris/Planterose/Tecks, para. 31D.

1082 Cf Aeberli, 261; Sheppard, 766; Joseph, para. 13.44.

1083 Section 31(3) Arbitration Act.

1084 Aeberli, 264.

1085 Tweeddale/Tweeddale, para. 24.34.

1086 Merkin/Flannery, 79; cf for the discussion of the relationship between sections 31 and 73(1) Arbitration Act: Aeberli, 263 f.

1087 Merkin/Flannery, 79.

1088 *Athletic Union of Constantinople v National Basketball Association and Others* [2002] 1 Lloyd's Rep 305 (Comm) 311 (paras 24 ff.); cf Tweeddale/Tweeddale, para. 24.29.

1089 Blackaby/Partasides/Redfern/Hunter, para. 5.114; cf Poudret/Besson, para. 474; Lew/Mistelis/Kröll, paras 14-23 f.; Harbst, 30; Müller (Zuständigkeit des Schiedsgerichts), 149; Berger/Kellerhals, para. 658.

1090 Art. 186(3) SPILA; Liatowitsch, 34 f.; Lew/Mistelis/Kröll, para. 14-25.

1091 Lew/Mistelis/Kröll, para. 14-24; Huber, § 1040 para. 27; Harbst, 30; Sanders (1999), 179; Berger/Kellerhals, para. 657.

1092 Blackaby/Partasides/Redfern/Hunter, para. 5.116.

- ¹⁰⁹³ Berger/Kellerhals, para. 659; Schott/Courvoisier, Art. 186 para. 121.
- ¹⁰⁹⁴ Poudret/Besson, para. 475.
- ¹⁰⁹⁵ Huber, § 1040 para. 27; Saenger, § 1040 para. 11.
- ¹⁰⁹⁶ Huber, § 1040 para. 29; Harbst, 29 f.
- ¹⁰⁹⁷ Huber, § 1040 para. 26; Münch (2013), § 1040 para. 51; Bundesgerichtshof, 13 January 2005 (III ZR 265/03) (2005) SchiedsVZ 95-100, in particular 96 f.
- ¹⁰⁹⁸ Vidal, para. 85.
- ¹⁰⁹⁹ Müller (Swiss case law), 201; Ahrendt, 60; Liatowitsch, 34 f.; Kaufmann-Kohler/Rigozzi, para. 429; Schott/Courvoisier, Art. 186 para. 118.
- ¹¹⁰⁰ Berger/Kellerhals, para. 651; Schott/Courvoisier, Art. 186 para. 119.
- ¹¹⁰¹ Art. 186(1bis) SPILA.
- ¹¹⁰² In favour of the admissibility of challenge proceedings based on the equal treatment of the parties: Berger/Kellerhals, para. 951k. Disagreeing: Besson (2007), 74 arguing that since the assessment of the serious reasons is within the discretion of the arbitrators a challenge should not be available; cf for further references Swiss Federal Supreme Court Decision 4A_428/2011 consideration 5.1.1.
- ¹¹⁰³ Swiss Federal Supreme Court Decision 136 III 597 consideration 4.2.
- ¹¹⁰⁴ Section 31(4) Arbitration Act; cf Merkin/Flannery, 153.
- ¹¹⁰⁵ *AOOT Kalmneft v Glencore International AG & Anor.* [2001] CLC 1805 (Comm); Aeberli, 265; Harris/Planterose/Tecks, para. 31E.
- ¹¹⁰⁶ Section 31(4) Arbitration Act.
- ¹¹⁰⁷ Art. 16(3) UNCITRAL Model Law; cf for a discussion of the strengths and weaknesses of Art. 16(3) UNCITRAL Model Law: Pavić, 387-410.
- ¹¹⁰⁸ Cf Sanders (1999), 178 f.
- ¹¹⁰⁹ § 1040(3) ZPO in connection with § 1062(1)(2) ZPO.
- ¹¹¹⁰ Huber, § 1040 para. 32; cf Voit, § 1040 para. 11; cf Geimer (Zöllner), § 1040 para. 11.
- ¹¹¹¹ Huber, § 1040 para. 45; Saenger, § 1040 para. 14.
- ¹¹¹² § 1065(1) ZPO; Harbst, 39; Lionnet/Lionnet, 194.
- ¹¹¹³ Becker/Schartl, § 1065 para. 4; Harbst, 39.
- ¹¹¹⁴ Cf Gaillard (2009), para. 6.33; Delvolvé/Pointon/Rouche, para. 173; Vidal, para. 87.
- ¹¹¹⁵ Vidal, para. 87 with references to case law.
- ¹¹¹⁶ Art. 1519(2) CPC.
- ¹¹¹⁷ Art. 1522(1) CPC; Vidal, paras 735, 745.
- ¹¹¹⁸ In spite of such an express agreement, the parties may, nevertheless, appeal within a month against the exequatur order on one of the five grounds for which the "recours en annulation" is available under Art. 1520 CPC (Art. 1522(2) CPC).
- ¹¹¹⁹ Art. 190(2)(b) SPILA in connection with Arts 92(1) and 100(1) of the Swiss Law on the Swiss Federal Supreme Court of 17 June 2005 (SR 173.110); cf Berger/Kellerhals, para. 682; Schott/Courvoisier, Art. 186 para. 125.
- ¹¹²⁰ Berger/Kellerhals, para. 608.
- ¹¹²¹ Müller (Swiss case law), 202.
- ¹¹²² Poudret/Besson, para. 457; Born, 907; Schott/Courvoisier, Art. 186 paras 125 f.; Ahrendt, 69 f.; with critical remarks Müller (Zuständigkeit des Schiedsgerichts), 136 ff.
- ¹¹²³ Müller (Zuständigkeit des Schiedsgerichts), 139; Walter/Bosch/Brönnimann, 259 f.
- ¹¹²⁴ Art. 192(2) SPILA; Berger/Kellerhals, para. 608.
- ¹¹²⁵ Section 30(2) Arbitration Act.
- ¹¹²⁶ Sections 31, 66(3) and 67 Arbitration Act; Shine, 221; Merkin/Flannery, 152; Aeberli, 265; Joseph, para. 13.49.
- ¹¹²⁷ Section 67(1)(a), (b) Arbitration Act; Tweeddale/Tweeddale, para. 24.23; Harbst, 39.
- ¹¹²⁸ Section 67(1) in connection with section 70(2) Arbitration Act.
- ¹¹²⁹ Section 67(1) in connection with section 70(3) Arbitration Act.
- ¹¹³⁰ Section 67(4) Arbitration Act; Joseph, para. 13.52.
- ¹¹³¹ Section 73(2) in connection with section 66(3) Arbitration Act; cf for a discussion of the relationship between sections 67 and 73(2) Arbitration Act: Aeberli, 270 f.
- ¹¹³² Section 67 and 4(1) in connection with Schedule 1 Arbitration Act.
- ¹¹³³ *LG Caltex Gas Co Ltd and Another v China National Petroleum Corpn and Another* [2001] EWCA Civ 788 (CA), [2001] 1 WLR 1892 (CA) 1897; cf Kröll (2004), 55; Harris/Planterose/Tecks, para. 67B; Harbst, 31 f.
- ¹¹³⁴ *LG Caltex Gas Co Ltd and Another v China National Petroleum Corpn and Another* [2001] EWCA Civ 788 (CA), [2001] 1 WLR 1892 (CA) 1905, per Lord Phillips of Worth Matravers MR: "Section 67(1) (a) entitles a party to challenge an award of an arbitrator as to his substantive jurisdiction. However, if it is shown that the award is made under a separate agreement that he should rule on that matter, the challenge will fail." For further references cf. Tweeddale/Tweeddale, para. 24.23.
- ¹¹³⁵ von Schlabrendorff/Sessler, § 1055 para. 13; Voit, § 1032 para. 8, § 1040 para. 13; Geimer (Zöllner), § 1040 paras 11 f.; Schlosser (2002), § 1040 para. 12.
- ¹¹³⁶ Cf von Schlabrendorff/Sessler, § 1055 para. 30; Münch (2013), § 1061 para. 3; Voit, § 1061 para. 1.
- ¹¹³⁷ Voit, § 1040 para. 12; Geimer (Zöllner), § 1032 para. 14; cf Huber, § 1040 para. 36; Haas, 207 ff. Haas furthermore holds that after the time limit for initiating setting aside proceedings has

expired, an action for a declaration that the arbitral award is null and void may be filed (Haas, 209).

¹¹³⁸ Münch (2013), § 1059 para. 45; Schroeter, 295 f.

¹¹³⁹ Voit, § 1040 para. 12, § 1032 para. 15; Huber, § 1040 para. 40; cf Haas, 202, 207 ff.

¹¹⁴⁰ Cf Huber, § 1040 para. 41.

¹¹⁴¹ Cf Huber, § 1040 para. 42.

¹¹⁴² Geimer (Zöller), § 1032 para. 13; Oberlandesgericht Dresden, 26 July 2012 (3 Sch 1/12), reported in Kröll (2013), 191; Bundesgerichtshof, 19 September 2013 (III ZB 37/12) (2013) SchiesVZ 333-334, 334.

¹¹⁴³ Cf Geimer (Zöller), § 1055 para. 3.

¹¹⁴⁴ Cf Vidal, paras 356, 710; Poudret/Besson, para. 475; Gaillard/Savage, para. 1419; Hascher (2001), 18 ff.

¹¹⁴⁵ Delvolvé/Pointon/Rouche, para. 349; *Lardenois c Société Journal l'Union*, Cour de Cassation, 19 March 1981 (1982) *Revue de l'Arbitrage* 44-46.

¹¹⁴⁶ Swiss Federal Supreme Court Decision 117 la 166 consideration 5a; Heini, Art. 190 para. 2; Wenger, Art. 186 para. 8; Rüede/Hadenfeldt (1993), 309 ff.

¹¹⁴⁷ Berger/Kellerhals, para. 678; Schott/Courvoisier, Art. 186 para. 48; Liatowitsch, 73 f.

¹¹⁴⁸ Berger/Kellerhals, para. 678; Schott/Courvoisier, Art. 186 para. 47.

¹¹⁴⁹ Liatowitsch, 69 f.; Rüede/Hadenfeldt (1993), 309 ff.; Müller (Zuständigkeit des Schiedsgerichts), 116 f.; Schott/Courvoisier, Art. 186 para. 48.

¹¹⁵⁰ Merkin/Flannery, 80.

¹¹⁵¹ Section 58(1) Arbitration Act; cf Poudret/Besson, para. 475.

¹¹⁵² *Doe d Davy v Haddon* [1783] 3 Doug KB 310 (KB); *Comings v Heard* [1869] LR 4 QB 669, 672; *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 (CA); *Associated Electric and Gas Insurance Services Ltd (Aegis) v European Reinsurance Co of Zurich (European Re)* [2003] UKPC II, [2003] 1 WLR 1041 (PC) para. 15; *Peoples' Insurance Company of China, Hebei Branch, China National Feeding Stuff Import/Export Corporation v The Vysanthe Shipping Company Ltd* [2003] EWHC 1655 (Comm); see for a detailed discussion Chapter 3, §3.01[E][2] above.

¹¹⁵³ *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46 (SC), [2011] 1 AC 763 (SC) 837 (para. 104) per Lord Collins of Mapesbury JSC: "It follows that the English court is entitled (and indeed bound) to revisit the question of the tribunal's decision on jurisdiction if the party resisting enforcement seeks to prove that there was no arbitration agreement binding upon it under the law of the country where the award was made." For further comments cf. Grierson/Taok, 413.

¹¹⁵⁴ Sanders (2004), 98; cf also Holtzmann/Neuhaus, 486 f.; Kröll (2004), 60 f. Also only providing for the challenge of awards in which arbitrators accept jurisdiction: Art. 1052(4)/(5) of the Dutch Code of Civil Procedure (if the tribunal declares that it has no jurisdiction the competence of the national courts revives), § 1040(3) ZPO.

¹¹⁵⁵ Born, 895.

¹¹⁵⁶ Bundesgerichtshof, 6 June 2002 (III ZB 44/01) (2003) SchiesVZ 39-43, 39 f. with a note by Joachim Münch; cf Born, 897 f.

¹¹⁵⁷ Bundesgerichtshof, 6 June 2002 (III ZB 44/01) (2003) SchiesVZ 39-43, 40 with a note by Joachim Münch; Kröll (2004), 57; confirmed in Oberlandesgericht Frankfurt am Main, 17 January 2013 (26 Sch 24/12) (2013) SchiesVZ 341-344, 343.

¹¹⁵⁸ Kröll (2004), 57 f.; Oberlandesgericht Frankfurt am Main, 17 January 2013 (26 Sch 24/12) (2013) SchiesVZ 341-344, 343.

¹¹⁵⁹ Cf Kröll (2004), 62.

¹¹⁶⁰ Confirmed in Oberlandesgericht Frankfurt am Main, 17 January 2013 (26 Sch 24/12) (2013) SchiesVZ 341-344, 343; cf for a detailed discussion Thiel/Pömbacher, 295-300.

¹¹⁶¹ Baumbach/Lauterbach/Albers/Hartmann, § 1040 para. 4. Sanders, for example, advocates the view that a negative decision on jurisdiction cannot constitute an arbitral award, since the arbitrators issuing a negative ruling declare that they are not in a position to render an award (Sanders 1999), 185; cf for further references Berger (1993), 360 fn 1013; Voit, § 1040 para. 8). This opinion, however, runs counter to the premise inherent in the principle of competence-competence, since this competence is granted to the arbitral tribunal by law and is not contingent upon the validity of the arbitration agreement (Kröll (2004), 63; cf Born, 897). Furthermore, there is no justification to treat negative jurisdictional determinations differently from other forms of arbitral decisions terminating the arbitration; such an unequal treatment would lead to different possibilities of preclusive effects and judicial review (Born, 897 fn 234): a tribunal's decision denying jurisdiction would hence not be challengeable and would not have res judicata effect with the consequence that arbitral proceedings could be re-initiated consistently until one tribunal finally assumes jurisdiction (Kröll (2004), 64).

¹¹⁶² Kröll (2004), 65.

¹¹⁶³ Cf Münch (2003), 41.

¹¹⁶⁴ Münch (2003), 42; Münch (2013), § 1040 para. 30.

¹¹⁶⁵ Münch (2003), 42; cf Kröll (2004), 69.

¹¹⁶⁶ Born, 898 f.; cf also Lionnet/Lionnet, 194 f.; Haas, 205.

Considering the position of the German Federal Supreme Court as correct: Huber, § 1040 para. 47.

¹¹⁶⁷ Cf Münch (2003), 42; Berger (1993), 361 f.

¹¹⁶⁸ Cf Kröll (2004), 66; Münch (2003), 42.

- 1169 Cf Kröll (2004), 71.
- 1170 *Société Nationale des Chemins de Fer Tunisiens c société Voith*, Cour d'Appel de Paris, 26 October 1995 (1997) *Revue de l'Arbitrage* 553-555; cf Kröll (2004), 60; Gaillard/Savage, para. 1629; Dimolitsa, 232; Racine (2010), 735 ff.
- 1171 Gaillard/Savage, para. 1629.
- 1172 Cf Vidal, para. 87. See for further details on appeal procedure 0 above. For a discussion of the consequences of the French court annulling the tribunal's negative jurisdictional award and consequently approving the arbitrators' authority cf: Racine (2010), 772 ff.
- 1173 Art. 190(2)(b) SPILA in connection with Arts 92(1) and 100(1) of the Swiss Law on the Swiss Federal Supreme Court of 17 June 2005 (SR 173.110); Schott/Courvoisier, Art. 186 para. 126.
- 1174 Kröll (2004), 59; Müller (Zuständigkeit des Schiedsgerichts), 141; cf Berger/Kellerhals, paras 654, 669.
- 1175 Schott/Courvoisier, Art. 186 para. 126.
- 1176 Müller (Swiss case law), 202.
- 1177 Swiss Federal Supreme Court Decision 117 II 94 consideration 4; cf Berger/Kellerhals, para. 674; Ahrendt, 65 f.; Müller (Zuständigkeit des Schiedsgerichts), 142; Kaufmann-Kohler/Rigozzi, para. 431a.
- 1178 Cf Kröll (2004), 60; Merkin/Flannery, 80, 153. See for further comments regarding the requirements for having the decision reviewed by the national courts Chapter 3, §3.02[A][2][b][i] above.
- 1179 Voit, § 1032 para. 8.
- 1180 Cf von Schlabrendorff/Sessler, § 1055 para. 14.
- 1181 Cf Racine (2010), 748.
- 1182 Racine (2010), 750.
- 1183 Racine (2010), 750.
- 1184 Berger/Kellerhals, para. 677; Schott/Courvoisier, Art. 186 para. 48.
- 1185 Berger/Kellerhals, para. 677.
- 1186 See for a detailed discussion Chapter 3, §3.01[E][2] above.
- 1187 Sanders (1999), 185 f.
- 1188 Poudret/Besson, para. 475.
- 1189 Poudret/Besson, para. 476.
- 1190 Cf Schott/Courvoisier, Art. 186 para. 13.
- 1191 Cf Huber, § 1040 para. 43; Samuel, 222.
- 1192 Samuel, 223.
- 1193 Samuel, 223.
- 1194 Cf Blackaby/Partasides/Redfern/Hunter, para. 5.127.
- 1195 Cf Blackaby/Partasides/Redfern/Hunter, para. 5.127.
- 1196 Cf Huber, § 1040 para. 25; Schott/Courvoisier, Art. 186 para. 115.
- 1197 Cf Hartley (2009), 241; Reichert, 239; Gebauer, 94; Hau, 229.
- 1198 Cf Fawcett, 35.
- 1199 Cf Reinisch, 121.
- 1200 Rivkin, 295; cf Pauwelyn/Salles, 110.
- 1201 Joseph, para. 1.13; cf Hau, 228 f.
- 1202 See for a detailed discussion of Art. II(3) New York Convention Chapter 3, §3.01[A][1] above.
- 1203 Cf as an argument to the same end, the opinion that the first-seised-rule makes sense between hierarchically equal and similarly domestic courts only, but not with regard to international tribunals (Cuniberti, 383 f.; Pauwelyn/Salles, 106 f.). "*Cette logique de pure priorité chronologique ne se justifie en réalité que lorsqu'il s'agit de départager des juridictions ayant une égale vocation à trancher un même litige.*" (Gaillard (2005), 317).
- 1204 ILA Report on Lis Pendens, para. 1.13, 4.1; de Ly/Sheppard (ILA Recommendations), 83.
- 1205 Cf ILA Report on Lis Pendens, para. 5.13, Recommendation 1.
- 1206 Cf ILA Report on Lis Pendens, para. 5.13, Recommendation 2.
- 1207 Cf ILA Report on Lis Pendens, para. 5.13, Recommendation 3.
- 1208 Cf ILA Report on Lis Pendens, para. 5.9, 5.13, Recommendation 4.
- 1209 Ma, 59.
- 1210 Cf ILA Report on Lis Pendens, para. 5.11, 5.13, Recommendation 6.
- 1211 Cf ILA Report on Lis Pendens, para. 5.12.
- 1212 Bensaude (2007), 420.
- 1213 Bensaude (2007), 421.
- 1214 Cf Bensaude (2007), 422; Ma, 58 f.; Seraglini, para. 17 (921).
- 1215 In connection with § 1025(2) ZPO for the territorial application of § 1032(3) ZPO independent of where the seat of the arbitration is situated.
- 1216 Cf Huber, § 1032 para. 62; Haas, 194 f.
- 1217 See Chapter 2, §2.02[B] above.
- 1218 Art. 1448(1) CPC.
- 1219 Reichert, 243 f.
- 1220 ICC Case No 5103 (1988) *Journal du Droit International* 1206-1215, 1210; cf Debourg (2012), para. 586; Boucaron-Nardetto (2011), para. 178: "*[...] la litispendance est applicable aux seules hypothèses de compétence concurrente; dès lors que la compétence est exclusive, il ne peut s'agir que d'une exception d'incompétence.*"
- 1221 ICC Case No 6142 (1990) *Journal du Droit International* 1039-1046, 1041.
- 1222 "*Attendu, cependant, qu'il n'y a manifestement aucune litispendance entre les deux causes, les parties, si elles sont identiques, n'agissant pas en mêmes qualités; que le Tribunal de*

première instance ... est en effet saisi d'une demande dirigée par la première défenderesse au présent litige contre la demanderesse et la seconde défenderesse." (ICC Case No 6142 (1990) Journal du Droit International 1039-1046, 1041).

¹²²³ Cf Harris/Planterose/Tecks, para. 32D.

¹²²⁴ Merkin/Flannery, 81.

¹²²⁵ Swiss Federal Supreme Court Decision 127 III 279.

¹²²⁶ If the parallel proceedings are pending between a Swiss court and a foreign court that is not located in a contracting state of the Lugano Convention Art. 9(1) SPILA stipulates that if a foreign court has been seised with an action with the same subject matter and between the identical parties as is pending before the Swiss court, the latter shall stay the proceedings, provided that the foreign court is to render a decision in due course which is recognisable in Switzerland.

¹²²⁷ For a detailed discussion of the Swiss Federal Supreme Court's findings in the *Fomento* decision cf Chapter 3, §3.02[B][3][b][i] point (a) below.

¹²²⁸ Cf Berger/Kellerhals, para. 951c; for a detailed discussion of Art. 186(1bis) SPILA cf Chapter 3, §3.02[B][3][b][i] point (b) below.

¹²²⁹ Cf Berger/Kellerhals, para. 951d. Berger and Kellerhals furthermore are of the opinion that Art. 186(1bis) SPILA should be applied by analogy by a domestic arbitral tribunal with its seat in Switzerland when confronted with proceedings involving the same cause of action between the same parties pending before a foreign national court (instead of Art. 372(2) CCP) (Berger/Kellerhals, para. 951i; cf also Besson (2007), 71 f.; Dasser, Art. 27 para. 30).

¹²³⁰ Liatowitsch/Meier, Art. 27 para. 9.

¹²³¹ Swiss Federal Supreme Court Decision 121 III 495.

¹²³² Swiss Federal Supreme Court Decision 121 III 495 consideration 6c.

¹²³³ Swiss Federal Supreme Court Decision 121 III 495 consideration 6c.

¹²³⁴ Swiss Federal Supreme Court Decision 121 III 495 consideration 6c.

¹²³⁵ Liatowitsch, 114; Poudret/Besson, para. 512.

¹²³⁶ Swiss Federal Supreme Court Decision 124 III 83.

¹²³⁷ Swiss Federal Supreme Court Decision 124 III 83 consideration 5.

¹²³⁸ Swiss Federal Supreme Court Decision 124 III 83 consideration 5.

¹²³⁹ Swiss Federal Supreme Court Decision 124 III 83 considerations 5a, 5b.

¹²⁴⁰ Swiss Federal Supreme Court Decision 124 III 83 considerations 5a, 5b.

¹²⁴¹ Swiss Federal Supreme Court Decision 127 III 279 considerations 2c.cc, 2d.

¹²⁴² Cf Swiss Federal Supreme Court Decision 127 III 279 considerations 2b, 2c.cc.

¹²⁴³ Swiss Federal Supreme Court Decision 127 III 279 consideration 2d; Scherer (2001), 453; Oetiker (2002), 144.

¹²⁴⁴ Cf Swiss Federal Supreme Court Decision 127 III 279 consideration 2c.dd; Scherer (2001), 453 f.

¹²⁴⁵ Scherer (2001), 457. In the *Fomento* case the parties originally concluded an arbitration agreement, but the crucial question before the Panamanian court was whether the respondent in the court proceedings had waived its right to invoke the arbitration agreement, which was a question that needed to be determined by Panamanian law (cf Swiss Federal Supreme Court Decision 127 III 279 consideration 2c.ee).

¹²⁴⁶ Swiss Federal Supreme Court Decision 127 III 279 consideration 2d.

¹²⁴⁷ Lévy/Liatowitsch, N63; cf Swiss Federal Supreme Court Decision 127 III 279 consideration 2c.dd.

¹²⁴⁸ Parlamentarische Initiative zur Änderung von Artikel 186 des Bundesgesetzes über das International Privatrecht: Bericht der Kommission für Rechtsfragen des Nationalrates vom 17. Februar 2006, BBl 2006 4677-4687 (hereinafter 'Committee's Report on Art. 186(1bis) SPILA'); Parlamentarische Initiative zur Änderung von Artikel 186 des Bundesgesetzes über das Internationale Privatrecht: Bericht vom 17. Februar 2006 der Kommission für Rechtsfragen des Nationalrates, Stellungnahme des Bundesrates vom 17. Mai 2006, BBl 2006 4691-4694 (hereinafter 'Bundesrat's Report on Art. 186(1bis) SPILA'); Berti/Droese, Art. 9 para. 26.

¹²⁴⁹ Cf Committee's Report on Art. 186(1bis) SPILA, 4678.

¹²⁵⁰ Cf Committee's Report on Art. 186(1bis) SPILA, 4681 (referring to Swiss Federal Supreme Court Decision 127 III 279 consideration 2c.ee); Markus (2006), 446.

¹²⁵¹ Committee's Report on Art. 186(1bis) SPILA, 4681. Geisinger and Lévy are, however, of the opinion that the risk of bad-faith litigation in arbitration-hostile jurisdictions was overstated, since actions in a national court in clear disregard of a valid arbitration agreement would have led to the rejection of a stay due to the *lis pendens* test under Art. 9 SPILA because such a foreign judgment could not have been expected of being recognisable under Swiss law (Geisinger/Lévy, 65).

¹²⁵² Cf Committee's Report on Art. 186(1bis) SPILA, 4684, 4685 f.; Bundesrat's Report on Art. 186(1bis) SPILA, 4694.

¹²⁵³ It needs, furthermore, be mentioned that Art. 181 SPILA even though captioned with '*lis pendens*' does not entail a first-in-time rule to coordinate parallel judicial and arbitral proceedings, but only defines the point in time when arbitral proceedings can be declared pending.

- ¹²⁵⁴ Cf Born, 2942.
- ¹²⁵⁵ Swiss Federal Supreme Court Decision 4A_428/2011 consideration 5.2.2.
- ¹²⁵⁶ Committee's Report on Art. 186(1*bis*) SPILA, 4685; Berger/Kellerhals, para. 951e; Besson (2007), 67.
- ¹²⁵⁷ Berger/Kellerhals, para. 951e.
- ¹²⁵⁸ Cf Berger/Kellerhals, para. 951e; Besson (2007), 67.
- ¹²⁵⁹ Cf Berger/Kellerhals, para. 951e; Besson (2007), 67. Berger and Kellerhals furthermore mention a specific situation that should prompt the application of the 'serious grounds' exception for respect of the mutual trust established by the Lugano regime: if the foreign court seised first is located in a Lugano Convention state, the arbitral tribunal with its seat in Switzerland should recognise the priority given to the court first seised to decide on its jurisdiction based on Art. 27 Lugano Convention; although arbitration is excluded from the Lugano Convention, the system of mutual trust should extend to arbitral tribunals having their seat in Switzerland (cf Berger/Kellerhals, para. 951g).
- ¹²⁶⁰ Cf Besson (2007), 74; Berger/Kellerhals, para. 951f.
- ¹²⁶¹ Cf Besson (2007), 74; or in the words of Berger and Kellerhals, the controversy leading up to Art. 186(1*bis*) SPILA could, in light of such an interpretation of the 'serious reasons', be described as much ado about nothing (cf Berger/Kellerhals, para. 951f). Although this observation certainly has merit, the difference between Art. 9(1) SPILA and Art. 186(1*bis*) SPILA – save for their having been designed for different areas of law according to their systematic position in the SPILA – is that an arbitral tribunal would have to stay its proceedings in principle under Art. 9(1) SPILA, whereas, under Art. 186(1*bis*) SPILA, it is allowed to continue its proceedings except where it considers that serious reasons justify a stay. In other words, even though the result under Art. 9(1) SPILA and Art. 186(1*bis*) SPILA might be identical under certain circumstances, the starting point under these provisions is different as to what is stipulated as the rule and the exceptions.
- ¹²⁶² Furrer/Girsberger/Schramm, Art. 182-186 para. 27; cf Poudret/Besson, para. 512.
- ¹²⁶³ Schott/Courvoisier, Art. 186 para. 13.
- ¹²⁶⁴ Cf Committee's Report on Art. 186(1*bis*) SPILA, 4685 f.; Besson (2007), 68.
- ¹²⁶⁵ Berger/Kellerhals, para. 952b; Besson (2007), 71. Dasser disagrees and holds that a Swiss court must as well respect Art. 186(1*bis*) SPILA and shall hence comply with the arbitral tribunal's decision on whether to stay its proceedings (Dasser, Art. 27 para. 30); also disagreeing Dutoit, Art. 7 para. 3.
- ¹²⁶⁶ Cf Besson (2007), 68; cf for the legislative history: Committee's Report on Art. 186(1*bis*) SPILA, 4677-4687, in particular 4684 f.; Bundesrat's Report on Art. 186(1*bis*) SPILA, 4691-4694.
- ¹²⁶⁷ Berger/Kellerhals, para. 952b. Disagreeing: Schott/Courvoisier, Art. 186 para. 24.
- ¹²⁶⁸ In application of Art. 372(2) CCP by analogy (Berger/Kellerhals, para. 952b) or by applying the serious reasons exception in Art. 186(1*bis*) SPILA (Liatowitsch/Meier, Art. 27 para. 10).
- ¹²⁶⁹ Born, 2945.
- ¹²⁷⁰ Cf Berger/Kellerhals, para. 1513d.
- ¹²⁷¹ Cf references to this opinion in Born, 2936.
- ¹²⁷² Similarly Poudret/Besson, para. 521.
- ¹²⁷³ Hobér, 253 citing from the Swiss Federal Supreme Court Decision 127 III 279 considerations 2b, 2c.cc.
- ¹²⁷⁴ International Law Association, London Conference (2000), Committee on International Commercial Arbitration, Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, 20 (to be downloaded under <<http://www.ila-hq.org/en/committees/index.cfm/cid/19>> accessed 23 February 2014; hereinafter "ILA Interim Report on Public Policy").
- ¹²⁷⁵ Cf Huber, § 1032 para. 62; see for a detailed discussion of the res judicata effect of court decisions on the arbitration agreement's validity or scope Chapter 3, §3.01[A][2][c] and §3.01[D][3] above.
- ¹²⁷⁶ See Chapter 3, §3.01[A][2][c][i] above.
- ¹²⁷⁷ Arts 34 f. Brussels Regulation/Lugano Convention.
- ¹²⁷⁸ See for detailed comments Chapter 3, §3.01[A][2][c][iii] point (c) above.
- ¹²⁷⁹ See for detailed considerations on the arbitral tribunal's contemplation of a stay Chapter 3, §3.01[A][3][b] above.
- ¹²⁸⁰ See detailed comments on the time requirement in Chapter 3, §3.01[A][2][a] above.
- ¹²⁸¹ Cf Huber, § 1032 para. 62.
- ¹²⁸² Joseph, para. 12.157.
- ¹²⁸³ Cf Mosimann, 103 f.; Moloo, 682 f. Examples of institutional rules granting the arbitrators broad discretion to issue interim measures: Art. 28(1) ICC Rules, Art. 26(1) Swiss Rules, Art. 25.1(c) LCIA Rules.
- ¹²⁸⁴ Art. 17(2)(b) UNCITRAL Model Law: "An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself." Mosimann interprets the non-amended 1985 version of Art. 17 UNCITRAL Model Law as also empowering the arbitral tribunal to issue anti-suit injunctions (Mosimann, 108 f.).

- ¹²⁸⁵ Gaillard (2007), 261; cf Mosimann, 108; Joseph, para. 12.154.
- ¹²⁸⁶ Cf Kreindler/Schäfer, § 1041 para. 21.
- ¹²⁸⁷ Kreindler/Schäfer, § 1041 para. 13 with further references; disagreeing Schlosser (2006), 491 f.
- ¹²⁸⁸ Delvolvé/Pointon/Rouche, para. 222; cf Vidal, para. 566.
- ¹²⁸⁹ See for further comments Chapter 3, §3.01[C][1][a] above.
- ¹²⁹⁰ Cf for a detailed overview of such arbitral proceedings: Gaillard (2007), 251 ff.; cf Moloo, 685 ff.; Wyss, 69, 71; Wirth, 36; Scherer/Jahnel, 70 ff.; von Segesser/Kurth, 74 ff.
- ¹²⁹¹ Mosimann, 107.
- ¹²⁹² ICC Case No 8307 reported in Gaillard (Anti-Suit Injunctions), 313 f. and in Scherer/Giovannini, 1314 f.; cf Scherer/Jahnel, 70; Moloo, 691 f.
- ¹²⁹³ Scherer/Jahnel, 72.
- ¹²⁹⁴ ICC Case No 3896 partly reported in Gaillard (2007), 253 f.
- ¹²⁹⁵ Cf Mosimann, 157; Wyss, 71.
- ¹²⁹⁶ See Chapter 3, §3.01[C][1][a] above.
- ¹²⁹⁷ Section 39(1) Arbitration Act.
- ¹²⁹⁸ Section 48(5)(a) Arbitration Act, which is not mandatory and can hence be agreed differently by the parties pursuant to section 4(2) in connection with Schedule 1 Arbitration Act; Merkin/Flannery, 122; Sheppard, 795; cf *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa)* [2002] EWHC 762 (Comm) and 2033 (Comm), [2003] EWCA Civ 938, [2003] 2 CLC 207 (Comm/CA) 236 (para. 35). Walker J furthermore observed obiter that an arbitrator could, under English law, himself grant an anti-suit injunction in *Steamship Mutual Underwriting Association (Bermuda) Ltd v Sulpecio Lines Inc* [2008] 2 Lloyd's Rep 269 (Comm) 274 (para. 33).
- ¹²⁹⁹ Sections 38(1), 39(1) and 48(5) Arbitration Act; Joseph, para. 12.159.
- ¹³⁰⁰ Harris/Planterose/Tecks, para. 48E; cf *Kastner v Jason* [2005] 1 Lloyd's Rep 397 (CA) 401 (para. 16); Sheppard, 795.
- ¹³⁰¹ Section 2 Arbitration Act; Mosimann, 157.
- ¹³⁰² Joseph, para. 12.79; cf *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm), [2008] 2 CLC 687 (Comm) 705 ff. (paras 41-47); Merkin (April 2009), 9; *West Tankers Inc v Allianz SpA (formerly known as Riunione Adriatica Scurita) & Another* [2012] EWHC 854 (Comm), [2012] 1 CLC 762 (Comm), commented on in Merkin (August 2012), 5 f.; Sheppard, 795.
- ¹³⁰³ Raphael (2008), para. 12.26; cf *Sheffield United Football Club Ltd v West Ham United Football Club Plc* [2008] EWHC 2855 (Comm), [2008] 2 CLC 741 (Comm) 752 (para. 30).
- ¹³⁰⁴ Case C-536/13 *Gazprom OAO v Republic of Lithuania*.
- ¹³⁰⁵ See for further comments Chapter 3, §3.02[C][3][b][i] below.
- ¹³⁰⁶ For a detailed discussion of the prerequisites to issue an anti-suit injunction cf: Mosimann, 110 ff.; cf also Joseph, paras 12.155, 12.173.
- ¹³⁰⁷ Even if the proceedings are not held to be strictly parallel, i.e. if the merits of the case are not identical, but the court proceedings deal with certain aspects of the dispute only, the court proceedings can be found to be improper and hence worth being restrained (Scherer (2011), 46).
- ¹³⁰⁸ It is submitted that an application for an anti-suit injunction is not belated or filed with undue delay, if the applicant awaits the national court's decision in accordance with Art. II(3) New York Convention, after having raised the arbitration defence.
- ¹³⁰⁹ Scherer (2011) 46.
- ¹³¹⁰ Lévy (2005), 116; Landau, 287.
- ¹³¹¹ Cf Gaillard (2007), 238; Landau, 292; cf also the references made by Moloo, 679 f.
- ¹³¹² Lévy (2005), 120; disagreeing Gaillard (2007), 242 f. who argues that the arbitrators have the right to determine their jurisdiction first and the national court's power of full scrutiny is limited until the end of the arbitral process.
- ¹³¹³ Cf Lévy (2005), 123 f. This defence against anti-suit injunctions issued by arbitrators is somewhat unpersuasive due to the fact that the parties entered into an arbitration agreement, unless only directed at the parties' right to seek interim relief with the supervisory court for reasons of speed or effectiveness (cf Gaillard (2007), 241 f. refusing Lévy's concern).
- ¹³¹⁴ Gaillard (2007), 237 ff.; critically Landau, 291 f.
- ¹³¹⁵ Moloo, 680 f.
- ¹³¹⁶ Lévy (2005), 124.
- ¹³¹⁷ Cf for a discussion of the different opinions: Gaillard (2007), 261 ff. Advocating the view that anti-suit injunctions should not be encouraged in any kind of litigation or arbitration (Fouchard, 153); in favour of a limited use of anti-suit injunctions issued by arbitrators in case of fraud or otherwise abusive behaviour by a party to revoke the arbitration agreement (Lévy (2005), 126; cf Moloo, 684 f.).
- ¹³¹⁸ Moloo, 684 f. One might, however, object that Moloo's limitation to an exclusive arbitration agreement is somewhat tautologous, since the parties' standard choice for arbitration is already to be understood broadly and as having the effect of excluding the national courts' jurisdiction entirely, unless of course in the unusual case where the parties have explicitly excluded certain disputes from settlement by arbitration.
- ¹³¹⁹ Mosimann, 160; cf for institutional arbitration rules that suggest the issuance of an interim award: Art. 26(2) Swiss Rules; or which leave the choice to the arbitrators: Art. 28(1) sentence 3 ICC Rules.
- ¹³²⁰ Mosimann, 161; cf Born, 2014.
- ¹³²¹ Born, 2014; cf Gaillard (2007), 266.
- ¹³²² Art. 183(2) SPILA, section 42(1) Arbitration Act; Born, 2014.

- 1323 Art. 190(3) SPILA.
- 1324 Applications to annul an interim award are, however, not permitted under German law (Oberlandesgericht Frankfurt, 10 May 2007 (26 Sch 20/06) (2007) SchiedsVZ 278 f.).
- 1325 Kreindler/Schäfer, § 1041 paras 3, 27; Poudret/Besson, para. 636.
- 1326 Wyss, 69.
- 1327 Poudret/Besson, para. 637 with further references; cf Vischer, Art. 183 para. 9; Rüede/Hadenfeldt (1993), 254.
- 1328 von Segesser/Boog, 122.
- 1329 Section 41(1) Arbitration Act.
- 1330 Cf Harris/Planterose/Tecks, para. 41E.
- 1331 Section 41(7)(d) Arbitration Act.
- 1332 Section 42 Arbitration Act, which is of a non-mandatory nature as per section 4(2) in connection with Schedule 1 Arbitration Act.
- 1333 Section 2(1) Arbitration Act.
- 1334 Harris/Planterose/Tecks, para. 42B; cf Sheppard, 784.
- 1335 Merkin (April 2009), 9; cf Poudret/Besson, para. 641.
- 1336 Vischer, Art. 183 para. 16; Mabillard (2013), Art. 183 para. 18; cf von Segesser/Boog, 122.
- 1337 Voit, § 1041 para. 4; C-185/07 (*Englisch*) *Allianz SpA, vormals Riunione Adriatica Di Sicurtà SpA, Generali Assicurazioni Generali SpA gegen West Tankers Inc.*, European Court of Justice, 10 February 2009 (2009) SchiedsVZ 120-122, 121 f.
- 1338 Lévy (2005), 127; cf Gaillard (2007), 256 f.; ICC Case No 8307 reported in Gaillard (Anti-Suit Injunctions), 315.
- 1339 Cf Mosimann, 124 ff.
- 1340 Cf Mosimann, 127 ff.; von Segesser/Boog, 121.
- 1341 Cf ICC Case No 8887 commented in Gaillard (2007), 256; Moloo, 698.
- 1342 Cf Mosimann, 130.
- 1343 Mosimann, 133.
- 1344 ICC Case No 7895 commented in Mosimann, 137.
- 1345 Delvolvé/Pointon/Rouche, para. 222 with further references; *Société Otor Participations et autres c Carlyle Holdings 1 et autre*, Cour d'Appel de Paris, 7 October 2004 (2005) *Revue de l'Arbitrage* 737-750 with a note by Emmanuel Jeuland; cf Jarrosson/Pellerin, 34.
- 1346 Art. 1468(1) in connection with Art. 1506(3) CPC; cf Jarrosson/Pellerin, 34.
- 1347 Cf Mosimann, 138.
- 1348 Lévy (2005), 128; cf for example Art. 183(2) SPILA, section 42(1) Arbitration Act, § 1041(2) ZPO.
- 1349 Art. 183(2) SPILA; cf Mosimann, 139. German arbitration law knows the same principle provided in § 1041(2) ZPO: an issue ordered by the arbitral tribunal may be recast by the court requested to enforce the measure in order to translate the tribunal's order into orders available in the enforcement system prevailing in German civil procedural law (Kreindler/Schäfer, § 1041 para. 22).
- 1350 According to Mosimann the *astreinte* would not be declared contrary to public policy by the Swiss courts if ordered in a reasonable amount and the award containing such penalty could hence be enforced (Mosimann, 140 f.).
- 1351 Cf Mosimann, 141 ff. Swiss courts, for instance, can enforce an interim measure granted by the arbitral tribunal by threatening punishment according to Art. 292 Swiss Penal Code of 21 December 1937 (SR 311.0) (cf Mosimann, 149 f.; Wirth, 39).
- 1352 Mosimann, 150 f.
- 1353 Cf Mosimann, 151; Poudret/Besson, para. 633; for a detailed discussion of the recognition and enforcement of provisional measures under the New York Convention cf: Poudret/Besson, paras 639 f.
- 1354 Cf Mosimann, 154 f.
- 1355 See comments made in Chapter 3, §3.01[C][1][c][ii] above.
- 1356 Cf Mosimann, 98.
- 1357 Mosimann, 95 ff.
- 1358 Landau, 286.
- 1359 Mosimann, 123.
- 1360 Merkin/Flannery, 101.
- 1361 Lévy (2005), 125.
- 1362 Agreeing: Gaillard (2007), 244; Mosimann, 159 f.
- 1363 Cf Mosimann, 159.
- 1364 Lévy (2005), 126.
- 1365 Joseph, para. 12.164.
- 1366 For instance as to Appendix V ICC Rules or Art. 43 Swiss Rules.
- 1367 Appendix V, Art. 1(3)(e) ICC Rules; Art. 43(1)(a) Swiss Rules.
- 1368 Cf Moloo, 678.
- 1369 Cf Scherer/Jahnel, 73.
- 1370 Cf Moloo, 698.
- 1371 Mosimann, 127.
- 1372 Cf Mosimann, 127.
- 1373 Landau, 294.
- 1374 Scherer (2011), 45.
- 1375 Gaillard (2007), 264; Landau, 286.
- 1376 Proceedings for a preliminary ruling pending before the ECJ (Case C-536/13 *Gazprom OAO v Republic of Lithuania*).
- 1377 Cf Gaillard (2007), 264; Debourg (2012), para. 625.
- 1378 Cf Mosimann, 172.
- 1379 Cf Born, 2916.

- 1380 Cf for a detailed discussion: Walters, 651-680.
- 1381 See for general remarks on the principle of res judicata in civil law and common law jurisdictions Chapter 3, §3.01[E][1] above.
- 1382 See for detailed comments Chapter 3, §3.01[E][2] above.
- 1383 See Chapter 3, §3.02[B][2].
- 1384 Berger/Kellerhals, para. 1513d.
- 1385 de Ly/Sheppard (Interim Report on Res Judicata), 39; de Ly/Sheppard (Final Report on Res Judicata), 69.
- 1386 de Ly/Sheppard (Interim Report on Res Judicata), 36.
- 1387 de Ly/Sheppard (Final Report on Res Judicata), 69.
- 1388 de Ly/Sheppard (Final Report on Res Judicata), 69.
- 1389 Cf de Ly/Sheppard (Final Report on Res Judicata), 72.
- 1390 de Ly/Sheppard (ILA Recommendations), 85.
- 1391 Cf de Ly/Sheppard (ILA Recommendations), 85; de Ly/Sheppard (Final Report on Res Judicata), 79.
- 1392 Cf de Ly/Sheppard (Final Report on Res Judicata), 77 f. See for an introduction into these kinds of issue estoppels Chapter 3, §3.01[E][1][b] above.
- 1393 de Ly/Sheppard (ILA Recommendations), 85.
- 1394 de Ly/Sheppard (Final Report on Res Judicata), 76.
- 1395 Cf de Ly/Sheppard (Final Report on Res Judicata), 80.
- 1396 Cf de Ly/Sheppard (ILA Recommendations), 85.
- 1397 Cf de Ly/Sheppard (Final Report on Res Judicata), 81; Bensaude (2007), 419.
- 1398 Cf de Ly/Sheppard (Final Report on Res Judicata), 81 f.
- 1399 See Chapter 3, §3.02[D][3] below.
- 1400 Final award in ICC Case No 6363 of 1991 (1992) YB Comm Arb XVII 186-211, para. 35 (198); cf Grigera Naón, 168 ff.; ICC Case No 4126 of 1984 (partial award), reported in Jarvín/Derains, 511-515, 513 f.
- 1401 Born, 2915.
- 1402 Cf Schlosser (2001), 24.
- 1403 Cf Born, 2917 f.; Debourg (2012), para. 503 ff.; see for the same arguments the discussion regarding the law applicable to determine arbitral awards' preclusive effect in Chapter 3, §3.01[E][2] [a] above.
- 1404 Grigera Naón, 171; ICC Case No 7438 as reported in Hascher (2001), 19; ICC Case Nos 2475 and 2762 as reported in Jarvín/Derains, 325-331, in particular 328.
- 1405 Grigera Naón, 169 ff. (ICC Case No 5901); cf Hascher (2001), 19.
- 1406 ICC Case No 13509 (2008) Journal du Droit International 1204-1213, 1205.
- 1407 Radicati di Brozolo, 143.
- 1408 Cf Radicati di Brozolo, 139.
- 1409 See Chapter 3, §3.01[E][2] above.
- 1410 *Société Marriott International Hotels INC c Société Jnah Development SAL*, Cour d'Appel de Paris, 9 September 2010: "[...] que le tribunal ajoutait qu'il ne connaissait pas 'de théorie juridique applicable en matière d'arbitrage international qui soit similaire à la théorie anglaise Henderson c/ Henderson, laquelle imposerait à JNAH de brûler toutes ses munitions dans une même procédure d'arbitrage.'" as cited in Mayer (2011), 422-424, 424; cf Mayer (2011), 417 ff.; Debourg (2011), 979. Cf for a recent article discussing the desirability of a duty to raise all arguments related to the same facts in a single proceeding in arbitration: Lacoste, 349 ff.
- 1411 Mayer (2011), 418; see for comments to the concentration doctrine Chapter 3, §3.01[E][2] above.
- 1412 Mayer (2011), 419; Loquin, 214 f.
- 1413 Grigera Naón, 171 (ICC Case No 10574).
- 1414 *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397 (CA), [2009] 2 CLC 1004 (CA) 1041 f. (para. 118).
- 1415 *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397 (CA), [2009] 2 CLC 1004 (CA) 1041 f. (para. 118); reversing the ruling in *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm), [2008] 2 CLC 687 (Comm) 706 f. (paras 45 f.) where Burton J agreed with the arbitrators that the Brussels Regulation – excluding arbitration from its scope – did not bind the arbitral tribunal to recognise a French judgment; Merkin (April 2009), 11 f.; cf Raphael (Supplement), para. 15.29(b).
- 1416 Cf Berger/Kellerhals, para. 1512; cf Swiss Federal Supreme Court Decisions 136 III 345 consideration 2.1 and 127 III 279 consideration 2c.bb; Rüede/Hadenfeldt (1993), 232 and Rüede/Hadenfeldt (Supplement), 47.
- 1417 Cf Berger/Kellerhals, para. 1512.
- 1418 *A v Z*, Order, 2 April 2002 (2003) ASA Bulletin 21(4) 810-821, 814 f., 816 f.; Berger/Kellerhals, para. 1512a; Swiss Federal Supreme Court Decisions 127 III 279 consideration 2c.bb and 120 II 155 consideration 3b.bb; cf Besson (2007), 75; Rüede/Hadenfeldt (1993), 232 and Rüede/Hadenfeldt (Supplement), 47.
- 1419 Art. 34(1) Lugano Convention/Brussels Regulation.
- 1420 Art. 34(2) Lugano Convention/Brussels Regulation.
- 1421 Art. 34(3)/(4) Lugano Convention/Brussels Regulation.
- 1422 Art. 35(1) Lugano Convention/Brussels Regulation.
- 1423 Cf Berger/Kellerhals, para. 1512a.
- 1424 Art. 25 SPILA.
- 1425 Art. 27(1) SPILA.
- 1426 Art. 27(2)(a) SPILA.
- 1427 Art. 27(2)(b) SPILA.
- 1428 Art. 27(2)(c) SPILA.
- 1429 Besson (2007), 74 f.; cf Berger/Kellerhals, para. 1512a;

Stacher (2006), 522 ff.

¹⁴³⁰ Kröll (2007), § 1061 para. 128; Schlosser (2002), Anhang § 1061 para. 154.

¹⁴³¹ Kröll (2007), § 1061 para. 128.

¹⁴³² *Raymond Chantepie c Philippe Vincent*, Cour d'Appel de Paris, 28 September 1979 (1980) *Revue de l'Arbitrage* 506-512 with a note by Pierre Roland Lévy; cf Born, 2916.

¹⁴³³ *Société Iro-Holding c Société Sétilex*, Cour d'Appel de Paris, 9 June 1983 (1983) *Revue de l'Arbitrage* 497-506 with a note by Michel Vasseur; cf Gaillard/Savage, para. 1662.

¹⁴³⁴ *Société Iro-Holding c Société Sétilex*, Cour d'Appel de Paris, 9 June 1983 (1983) *Revue de l'Arbitrage* 497-506, 499 with a note by Michel Vasseur: "Considérant en effet qu'en droit interne français la règle de l'autorité de la chose jugée est d'intérêt privé et non d'ordre public; qu'il ne saurait en être autrement en ce qui concerne l'ordre public au sens du droit international privé français."

¹⁴³⁵ *Société Marriott International Hotels INC c Société Jnah Development SAL*, Cour d'Appel de Paris, 9 September 2010, as cited in Mayer (2011), 422-424, 424; cf also *Redes Energeticas Nacionais SGPS SA c Société Amorim Energia BV*, Cour d'Appel de Paris, 17 November 2011 (2011) *Revue de l'Arbitrage* 1104 f.; Debourg (2011), 986.

¹⁴³⁶ *Société Papillon Group Corporation c République Arabe de Syrie et autres*, Cour d'Appel de Paris, 26 March 2009 (2010) *Revue de l'Arbitrage* 525-547, 536 with a note by Vincent Chantebout; *Planor Afrique SA c Société Emirates Télécommunications corporation "Etisalat"*, Cour d'Appel de Paris, 17 January 2012 (2012) *Revue de l'Arbitrage* 569-586 with a note by Marie-Laure Niboyet. Also emphasising the risk of annulment of an arbitral award in conflict with a final court judgment on the same subject matter and between the same parties: Hascher (2001), 28.

¹⁴³⁷ Cf Swiss Federal Supreme Court Decision 128 III 191 consideration 4a: "Le tribunal arbitral viole l'ordre public procédural s'il statue sans tenir compte de l'autorité de la chose jugée d'une décision antérieure ou s'il s'écarte, dans sa sentence finale, de l'opinion qu'il a émise dans une sentence préjudicielle (Vorentscheid) tranchant une question préalable de fond." Also in Swiss Federal Supreme Court Decision 127 III 279 consideration 2b.

¹⁴³⁸ Swiss Federal Supreme Court Decision 136 III 345 consideration 2.1. The arbitral award was set aside, even though the parties in the previous court and the subsequent arbitral proceedings were not identical, which basically is a necessary requirement under the triple identity test. It must, however, be emphasised that the subject of the previous decision rendered in the proceedings before the Commercial Court of the Canton of Zurich was the annulment of a resolution of an association which deployed erga omnes effects and was therefore also binding and conclusive on the parties to the setting aside proceedings before the Swiss Federal Supreme Court (cf Swiss Federal Supreme Court Decision 136 III 345 consideration 2.2.2).

¹⁴³⁹ *Vervaeke (formerly Messina) v Smith and Others* [1983] AC 145 (HL) 157, 160 f.: "Issue estoppel is also an application of the same rule of public policy followed by the courts in England, as applies to cause of action estoppel." *E.D. & F. Man (Sugar) Ltd v Yani Haryanto* [1991] ILPr 393 (CA) 402 f.

¹⁴⁴⁰ See Chapter 3, §3.02[D][1] above.

¹⁴⁴¹ See the reference made in fn 1274 above.

¹⁴⁴² ILA Interim Report on Public Policy (fn 1274 above), 29; but contrary hereto de Ly/Sheppard (Final Report on Res Judicata), paras 81 f.

¹⁴⁴³ ILA Interim Report on Public Policy (fn 1274 above), 20.

¹⁴⁴⁴ Cf Kremsehner, 141.

¹⁴⁴⁵ de Ly/Sheppard (Interim Report on Res Judicata), 37; Born, 2887.

¹⁴⁴⁶ Schlosser (2001), 19.

¹⁴⁴⁷ Born, 2915.

¹⁴⁴⁸ Hanotiau (2003), 47 f. The Paris Court of Appeal has, however, refused to annul an arbitral award on the ground that the arbitrators were no longer competent due to the arbitration agreement having expired (based on the res judicata effect of a prior arbitral award) and hence held that it is not competent to review the arbitral tribunal's factual and legal considerations based on which the arbitrators declared themselves competent (*Société Marriott International Hotels INC c Société Jnah Development SAL*, Cour d'Appel de Paris, 9 September 2010, as cited in Mayer (2011), 422-424, 424). Furthermore, it is submitted under Swiss law that the ground for challenge of Art. 190(2)(b) SPILA (i.e. lack of jurisdiction) is not available if the res judicata effect of a prior decision is ignored, but only a challenge by virtue of a violation of public policy (Müller (Swiss case law), 194; this view is also supported by the Paris Court of Appeal as cited in Walters, 667).

¹⁴⁴⁹ Cf Mayer (2004), 199.

¹⁴⁵⁰ Cf Mayer (2004), 199; Pinna, para. 47 (713 f.).

¹⁴⁵¹ Cf Debourg (2012), para. 514.

¹⁴⁵² Cf Pinna, paras 24, 54 (706, 716).

¹⁴⁵³ See for detailed comments Chapter 3, §3.01[E][1][b][iv] above.

¹⁴⁵⁴ Cf Radicati di Brozolo, 141, 147.

¹⁴⁵⁵ Cf Debourg (2012), para. 508.

¹⁴⁵⁶ Cf Schlosser (2002), Anhang § 1061 para. 154.

¹⁴⁵⁷ Seriki (2013), 49; *Republic of Kazakhstan v Istil Group Inc* [2007] EWHC 2729 (Comm), [2007] 2 CLC 870 (Comm) 894. See for the discussion of anti-arbitration injunctions Chapter 3, §3.01[C][2] above.

Chapter 4: Final Conclusion

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Source

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Since both national courts and arbitral tribunals are equally in charge of determining their own jurisdiction based on the principle of competence-competence, situations where a national court and an arbitral tribunal are both seised in parallel may eventuate. The analysis in this book was limited to situations where the same claim, based on identical legal grounds, and between the same parties is subject to proceedings simultaneously or consecutively pending before a national court and an arbitral tribunal. In such situations, parties have different pleas and actions at their disposal, either to challenge the arbitral tribunal's jurisdiction or to insist on the arbitration agreement's validity and, hence, to contest the national courts' intervention. This study has sought to show the admissibility and the strengths and weaknesses of these pleas and actions in a European context. The considerations on this subject have revealed substantial differences in the statutory arbitration laws and the national case law, in particular as regards England as a common law country as opposed to the civil law countries of Germany, France and Switzerland. An awareness of these differences is fundamental. Conventions to be directly applied by the Member States of the EU and within the EFTA zone, and the ECJ's case law, must also be given due respect, as the Brussels Regulation and the Lugano Convention, as well as the ECJ's *West Tankers* ruling, for instance, show. Parallel proceedings pending before a national court and an arbitral tribunal demonstrate how important a smooth interaction between the state courts and an arbitral tribunal seated in that state is so that such a system cannot be abused by a party intending to delay the proceedings.

In this final chapter, the effects that parallel proceedings may have will be summarised first. Secondly, the characteristics of the pleas and actions which are at a party's disposal in situations of parallel proceedings before national courts and arbitral tribunals will be summarised and an evaluation of these pleas and actions will be attempted with special regard to their effectiveness and enforceability in the jurisdictions examined. In order to place the pleas and actions depicted in this study in a specific practical context, their benefits and shortcomings will also be summarised in four scenarios of parallel proceedings.

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§4.01. Effects of Parallel Proceedings

The following concerns represent the possible effects that parallel proceedings may have, on the one hand, ensuing from the parties' and their counsels' perspective of having to deal with the burden of simultaneously pleading before two courts, and, on the other hand, as regards the systemic effects.

[A]. Party-Related Concerns

Parallel proceedings are bound to cause delay: the parties need to present their arguments before multiple fora; several evidentiary hearings need to be held, at times even in different jurisdictions; ⁽¹⁴⁵⁸⁾ parties have different possibilities to raise objections or to otherwise oppose the concurrently pending court and arbitral proceedings. These aspects of parallel proceedings also raise the costs of the litigation or the arbitration. In respect of expert opinions and the hearing of witnesses too, parties will be able to substantially reduce the costs of proceedings by having just one proceeding instead of separate ones. ⁽¹⁴⁵⁹⁾

From an organisational standpoint, the parties need to coordinate the availability of the documents necessary to prove their case if they plead in parallel proceedings. The defence before multiple fora might thus also cause logistical problems, as well as imposing resource constraints on a party's ability to prepare properly for all the different sets of proceedings. ⁽¹⁴⁶⁰⁾ The multiple use of evidence that was gained initially for a single purpose can be problematic, in particular with regard to the questioning of witnesses; ⁽¹⁴⁶¹⁾ the risk of a witness giving contradictory testimony when being questioned in different fora can hardly be controlled. As to the argumentation to be followed, the parties need to align the arguments that they are to present in the simultaneously pending proceedings. This applies with even more force if the parties are also litigating before a national court following the common law tradition, which may apply pre-trial discovery rules, or where the parties have agreed to apply discovery rules in arbitral proceedings. Given that new facts may be unearthed through discovery which would otherwise not have been brought to the knowledge of the opposing party, the line of arguments followed by the parties needs to be consistent as far as any new facts revealed in the discovery process are concerned. What is more, the sharing of documents in court proceedings is not only problematic in light of the loss of efficiency and the increase in the costs involved, but also when considering the essentially confidential nature of arbitration. ⁽¹⁴⁶²⁾

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[B]. System-Related Concerns

The effects of parallel proceedings are claimed to be mostly negative, as multiple proceedings may undermine the very advantages of arbitration.⁽¹⁴⁶³⁾

In any event, parallel proceedings waste scarce resources that could be saved were the concurrent proceedings to be concentrated in a single proceeding; parallel proceedings, therefore, are a burden not only on the litigant parties but also on the judicial system and hence on society as a whole.⁽¹⁴⁶⁴⁾

The worst-case scenario of parallel proceedings materialises when contradictory decisions are made and a party tries to enforce the judgment or the award.⁽¹⁴⁶⁵⁾ European legislation also takes into account, in recital 15 of the Brussels Regulation, that it is necessary in the interest of the harmonious administration of justice to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. Parallel proceedings, hence, constitute a threat to the predictability and enforceability of judicial and/or arbitral decision-making.

In addition, irreconcilable judgments or awards may result in contradictory legal relationships, since a contract may be declared effective by one judgment and rescinded in another, for instance. The enforcement of one judgment, therefore, often leads to the violation of the other judgment rendered with regard to the same dispute and thereby gives rise to the commencement of further post-arbitration or post-litigation proceedings.⁽¹⁴⁶⁶⁾ Multiple arbitrations and 'races to judgment' are also likely to lead to more challenges of awards and to encourage double recovery in some instances.⁽¹⁴⁶⁷⁾

[C]. Interim Conclusion

One might also argue that multiple, overlapping proceedings could create a healthy level of competition.⁽¹⁴⁶⁸⁾ Apart from the fact that this argument implies a certain distrust in the efficiency and integrity of adjudicatory bodies on a wide scale, the supposed benefits of jurisdictional competition, such as enhancing the quality of rulings and their expediency, cannot outweigh the various party-related and system-related concerns that parallel proceedings give rise to. In a most severe case, parallel proceedings culminate in the unattractive prospect of conflicting decisions being given on the same set of facts. The effects analysed above show how important it is for a party that intends to dissolve the concomitant jurisdiction of the arbitral tribunal and the national court to proactively make use of the pleas and actions examined in this book.

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§4.02. Evaluation and Comparison of the Jurisdictional Pleas and Actions in the Context of Parallel Proceedings

Both a party insisting on the arbitration agreement and a party opposing the arbitration have the possibility of raising pleas or actions to challenge the jurisdiction of the national court or of the arbitral tribunal respectively. The pleas and actions available do not all enjoy equal acceptance by law or by the international arbitration community. They will be evaluated based on the analysis in this work in respect of their effectiveness and appropriateness considering the interface between litigation and arbitration and compared with regard to their similarities or differences when raised before national courts or arbitral tribunals.

[A]. Exceptio Arbitri before National Courts and Plea of Lack of Jurisdiction before Arbitral Tribunals

[1]. Scope of Review of National Courts/Arbitral Tribunals

Article II(3) New York Convention is a provision often praised for helping to coordinate the interplay between the state courts and arbitral tribunals. When examined in detail, however, this provision is worded openly and, hence, gives the contracting states wide discretion to specify the several aspects underlying the arbitration defence.

To start with, Article II(3) New York Convention does not stipulate the scope of review to be applied by the national courts when examining the validity of the arbitration agreement. Consequently, the scope of review can range from a prima facie review to a comprehensive review of the arbitration agreement. The French legislator has made a clear statement advocating the priority of the arbitrators to determine their jurisdiction by implementing the negative effect of competence-competence in French statutory arbitration law. A prima facie review of the arbitration agreement is admissible only if the arbitral tribunal has not yet been seised of the matter. German and English courts, however, are more willing to fully review the arbitration agreement based on Article II(3) New York Convention. In addition, English courts have an inherent jurisdiction to stay the proceedings, even if the defence does not meet the procedural requirements under section 9 Arbitration Act or if the

arbitration agreement is declared valid, to prevent a situation of substantial injustice from materialising. This approach is very typical of the English courts' flexible review of their jurisdiction. Furthermore, the Swiss Federal Supreme Court's case law suggests two different approaches as regards the scope of review of the arbitration agreement: an arbitration agreement providing for a situs in Switzerland will be analysed on the basis of a prima facie examination, whereas where the seat of the arbitration has been designated to be outside Switzerland the courts are permitted to conduct a full review.

Article II(3) New York Convention does not specify which law is applicable to interpret the exceptions to the arbitration agreement's validity, either. The jurisdictions examined agree that the law governing the arbitration agreement itself is relevant to [page "250"](#) identify whether it is valid or not. The minimum feature common to all jurisdictions examined is that the law governing the arbitration agreement must be determined by the parties' choice in the first place. If the parties have not explicitly chosen a law to govern the arbitration agreement, which is often the case, the views differ as to whether the proper law of the main contract, the law at the seat of arbitration, a specific national law, or mandatory rules of a national law should be applied. The law applicable when interpreting whether an arbitration agreement is null and void, inoperative, or incapable of being performed is, however, crucial, since it indirectly decides whether the court proceedings can be continued or not. A parochial interpretation of arbitration agreements may, hence, be used to prevent a referral to arbitration under Article II(3) New York Convention. By contrast, if a national court is too quick to refer the parties to arbitration, such as, under French law, at the mere appearance of an arbitration agreement, a party may be caught in the arbitral proceedings, even if it has a sound claim that the arbitration agreement is, in fact, invalid.

Since an arbitral tribunal is the master of its own jurisdiction, it also deals with objections against its authority. It is recognised in international arbitration that a party arguing that the arbitration agreement is not valid or that the issue at stake is not covered by the arbitration agreement is entitled to file a jurisdictional objection with the tribunal. An arbitral tribunal reviews the question of its jurisdiction with unfettered powers.

[2]. Substantive and Procedural Requirements

As regards the merits of a plea of lack of jurisdiction before arbitral tribunals and national courts, the arbitration agreement's (in)validity is the focus of any challenge to jurisdiction. Hence, the interpretation of the arbitration agreement is pivotal: on the one hand, the arbitration agreement's validity will have the effect of excluding the national courts' jurisdiction; on the other hand, the arbitration agreement's invalidity will result in the arbitral tribunal declaring itself incompetent to decide the dispute. The standard of what the party challenging jurisdiction needs to show before national courts differs depending on whether the jurisdiction concerned has incorporated the negative effect of competence-competence. If so, the party should demonstrate that there is at least an appearance of a valid arbitration agreement. Where, however, a comprehensive review of the arbitration agreement is conducted, the party's argumentation needs to be more detailed and extends beyond establishing the mere appearance of an arbitration agreement. An arbitral tribunal, by contrast, fully reviews the arbitration agreement's validity if its jurisdiction is challenged; so the arguments of the party challenging the arbitral tribunal's jurisdiction should be comprehensive in any case.

From a procedural point of view, raising the plea of lack of jurisdiction before national courts and arbitral tribunals is dependent upon a time restriction; if the party challenging the jurisdiction does not comply with this time limit it is estopped from doing so later on in the proceedings. The exact point in time after which the party is held to have waived its right to raise the defence and is considered to have submitted [page "251"](#) to the court's jurisdiction, however, varies: whereas, under French and Swiss law, the arbitration defence should be made prior to any defence on the merits of the case, German law provides that the objection needs to be raised before the oral hearing on the substance of the dispute is held. Under English law, the situation is least certain, since the Arbitration Act stipulates that the objection may no longer be made after the applicant has taken any step in the proceedings to answer the substantive claim. As regards the plea of lack of jurisdiction before arbitral tribunals, the arbitration laws examined all require that such an objection be made as soon as possible in the arbitral proceedings for reasons of legal certainty and predictability of the proceedings. The plea of lack of jurisdiction must, in principle, be raised prior to any defence on the merits of the case. The objection must furthermore be substantiated. It is essential that a party opposing the arbitral tribunal's jurisdiction consistently sticks to the grounds based on which the arbitral tribunal is allegedly not competent, otherwise the party may be accused of inconsistent behaviour by the arbitral tribunal or the national courts seised with setting aside proceedings at a later stage.

Article II(3) New York Convention, although stipulating that the national court shall, upon a party's request, refer the parties to arbitration if there is a valid arbitration agreement, is not interpreted literally by any of the jurisdictions examined with respect to a 'referral' to arbitration. Instead, courts either decline jurisdiction or declare the proceedings to be inadmissible when confirming the

arbitration agreement's validity, or they stay the proceedings as do the English courts. As regards the arbitrators, they are given discretion to choose the form of its jurisdictional decision. Some statutory arbitration laws provide a recommendation in favour of a preliminary award on jurisdiction, such as § 1040(3) ZPO or Article 186(3) SPILA. But the arbitral tribunal is also free to rule on its jurisdiction in the final award on the merits, particularly where the objection is obviously made only to disrupt the arbitral proceedings or where there is a close connection between the jurisdictional issue and the merits of the case, for instance. The arbitrators should, in any case, consult the parties, and the party filing the plea should – for the sake of procedural efficiency – explicitly request that the decision be made in a preliminary award. The arbitral tribunal's determination of its jurisdiction is open to court control, regardless of whether issued in the form of a preliminary or the final award. In this respect, it is interesting to note that, under Swiss arbitration law, and most recently also under French arbitration law, the parties can waive setting aside proceedings against an arbitral award.

[3]. Res Judicata Effect of Decision on Jurisdiction

As regards the effects of a court judgment on the validity or invalidity of an arbitration agreement the following can be said: it is widely accepted that a court decision declaring an arbitration agreement invalid is attributed res judicata effect, precluding arbitral proceedings concerning the same claim, based on the same legal grounds, between the same parties, and thus also exposing an arbitral award rendered in such arbitral proceedings to setting aside proceedings. It is further of relevance whether such [page "252"](#) a court decision is capable of benefitting from the simplified recognition and enforcement scheme of the Brussels Regulation and the Lugano Convention. The ambit of the arbitration exclusion in the Brussels Regulation and the Lugano Convention has been increasingly blurred by the ECJ's case law, with the consequence that judgments on the merits refusing an arbitration defence, as a preliminary question, made by a court within the EU or the Lugano States are recognised as benefitting from the recognition and enforcement scheme of the Brussels Regulation and the Lugano Convention. Consequently, the recognising or enforcing EU or EFTA court is not allowed to re-examine whether the court issuing the decision had jurisdiction or not. With regard to the preclusive effect of awards on jurisdiction, an award by which the arbitral tribunal confirms that it is competent is binding on the national courts, if no appeal has been raised against it or, if it was challenged, the court rejected the appeal and approved the arbitral tribunal's jurisdiction. Hence, the parties to the arbitration will be precluded from pursuing claims covered by the arbitration agreement in litigation. A negative jurisdictional award, likewise, has preclusive effect insofar as the parties can no longer rely on the arbitration agreement in defence to litigation proceedings.

The res judicata effect of national courts' or arbitral tribunals' decisions on an arbitration agreement's (in)validity is again in accordance with the notion that arbitral tribunals and national courts are "peers" placed on an equal footing. Hence, even though there are minor differences in the formal requirements for raising a plea of lack of jurisdiction in court or arbitral proceedings, the main contents of each plea and the goals to be achieved are the same.

[B]. Plea of Litispendence before National Courts and Arbitral Tribunals

A party relying on arbitration might consider raising the plea of litispendence before a national court if arbitral proceedings having the same claim, based on the same legal grounds, and between the same parties as their subject were initiated first. Whereas the lis pendens rule is strictly applied to civil litigation in civil law jurisdictions, no internationally accepted rule of lis pendens has been established in the context of arbitration. Neither the New York Convention nor the UNCITRAL Model Law contains a lis pendens rule for proceedings pending in parallel before a national court and an arbitral tribunal. Solely Article VI(3) European Convention provides for a unilateral lis pendens rule in favour of the arbitral tribunal seised first, asking the national court seised second to stay the proceedings until an arbitral award is rendered.

With regard to the national arbitration laws examined, it can be summarised that there is no rule that the national court seised second must stay its proceedings if an arbitral tribunal, whether with its seat in the same country as the court seised, or abroad, was seised first. Concerning French law, it is emphasised that a lis pendens rule in favour of the arbitral tribunal seised first would be rendered futile in any case, since the negative effect of competence-competence, providing that the French courts – upon a party's request – are obliged to decline jurisdiction whenever an arbitral tribunal has already been seised of the dispute, already operates in the same way as a unilateral 'lis pendens' rule in favour of the arbitral tribunal. Likewise, under Swiss [page "253"](#) law, no lis pendens rule has been established in the context of arbitration; legal doctrine, however, suggests that a Swiss national court stay its proceedings when confronted with arbitral proceedings that were initiated first in Switzerland or abroad, provided that the arbitral award will be capable of recognition under the New York Convention.

Where the arbitral tribunal is the adjudicatory body seised second, raising the plea of litispendence before the arbitrators based on court proceedings having been commenced earlier on the same subject

matter and between the same parties, is likely not to lead to a stay of the arbitral proceedings. There is no rule of *lis alibi pendens* to be observed by arbitrators and the soft law on this subject does not stipulate one, either. The ILA recommendations on *lis pendens* provide that it is paramount that the arbitral tribunal is concerned with rendering an enforceable award why an arbitral tribunal should consider the *lex arbitri* as to the effects of the *lis pendens* rule on arbitration when court proceedings are pending in parallel before the supervisory court at the seat of arbitration. Apart from this specific situation, the recommendations conclude that the principle of the arbitrators' competence-competence takes priority and that the arbitral tribunal is, hence, to decide on its own jurisdiction irrespective of the parallel proceedings before a national court.

The national statutory arbitration laws of the jurisdictions examined do not contain a rule of *litispendence*, either; by contrast, they, at times, contain provisions explicitly allowing for arbitral and court proceedings to be conducted in parallel: German arbitration law expressly provides in § 1032(3) ZPO that, where proceedings either on the merits of a case or on an application of a declaration that the arbitration agreement is (in)valid are pending before a national court, arbitral proceedings may be initiated or continued and an award may be given. Furthermore, an arbitral tribunal seated in France is not likely to give effect to a plea of *litispendence* raised before it, since the existence of a valid arbitration agreement is contemplated to directly oust the national court's jurisdiction and, hence, also any chronological priority of a national court. Under English law, if the parties have not agreed otherwise, the arbitral tribunal has discretion to stay its proceedings if proceedings are pending before the national courts on an application for declaratory relief under section 32 Arbitration Act. It is, however, assumed that the plea of *litispendence* would not be observed by an arbitral tribunal seated in England. Swiss law has been forced to conquer a rocky path in permitting proceedings to be initiated or continued before an arbitral tribunal seated in Switzerland in parallel to court proceedings commenced first. The well-reputed *Fomento* decision in 2001 led to a large number of critical comments and finally to a legislative coup, which resulted in Article 186(1*bis*) SPILA being enacted on 1 March 2007. This provision states that the arbitrators shall decide on their jurisdiction notwithstanding court or arbitral proceedings on the merits already pending, except where serious reasons justify a stay. Even though the case law in Switzerland has not yet produced examples triggering the 'serious reasons' exception, it is submitted that the legitimacy of the foreign court action, the stage the court proceedings have advanced to, and the ability of the foreign court decision to be recognised by the courts at the seat of arbitration are important aspects to be taken into account by the arbitrators. The legal situation under Swiss law is, however, less clear with regard to [page "254"](#) domestic court proceedings conducted in parallel to a Swiss arbitration: even though Article 186(1*bis*) SPILA does not distinguish between court proceedings being initiated abroad or in Switzerland, the prevailing opinion seems to suggest that the arbitral tribunal should stay the proceedings – while proceedings are pending before a Swiss court – in accordance with an analogous application of Article 372(2) CCP, applicable to domestic arbitrations in Switzerland, or by applying the 'serious reasons' exception under Article 186(1*bis*) SPILA.

It can thus be finally concluded that, in addition to the fact that the *lis pendens* rule is not recognised as being applicable to parallel judicial and arbitral proceedings as the law stands now, it does not seem to be suitable for the needs of international commercial arbitration. The parties to parallel proceedings before an arbitral tribunal and a national court, hence, cannot expect direct support for one or the other proceedings by raising a *lis pendens* plea.

[C]. Applications for Anti-suit/Anti-arbitration Injunctions before National Courts and Applications for Anti-suit Injunctions before Arbitral Tribunals

In the context of arbitration, two major types of injunctions have been identified: injunctions restraining a claimant from commencing or continuing proceedings before a foreign national court in disregard of an arbitration agreement (anti-suit injunctions in support of arbitration), and injunctions enjoining a claimant from initiating or continuing arbitral proceedings (anti-arbitration injunctions).

Neither the German, French, nor Swiss courts have, to date, issued or recognised anti-suit injunctions intended to enforce the parties' original agreement to settle any arising disputes in arbitration. The French Supreme Court, however, held that an anti-suit injunction issued by a US court to prevent the breach of a forum selection clause did not contravene French international public policy; it hence remains to be seen whether French courts will take the same approach towards anti-suit injunctions in aid of arbitration agreements. The English courts, by contrast, have, based on their legal culture, a long tradition of issuing anti-suit injunctions and grant injunctive relief with an even lesser degree of caution where the order is intended to enforce an agreement between the parties calling for arbitration in England. The ECJ's ruling in *West Tankers* has, meanwhile, put an end to the English courts' practice regarding anti-suit injunctions vis-à-vis EU and EFTA courts. Outside the purview of the Brussels Regulation/Lugano Convention, however, the English courts still seem willing to enforce the parties' original choice of arbitration, as long as the applicant shows that there is a valid arbitration agreement, the application is made without undue delay, the foreign action has not considerably advanced yet, and

there is no other urgent reason why the injunction should not be granted.

The same applies as regards the acceptance of injunctions directed against claimants in arbitral proceedings in the jurisdictions examined: the German, Swiss and French courts neither issue nor recognise anti-arbitration injunctions. The English courts, however, issue such orders, although only in exceptional circumstances and [page "255"](#) only after carrying out a careful balancing act: where no injustice would thereby be caused to the claimant in the arbitration, and where the continuation of the arbitration would seem to be oppressive or vexatious or an abuse of process of court. English case law has, furthermore, set out the following distinction to be made by the competent judges: where the mere existence of the arbitration agreement is questionable, the courts' discretion in issuing anti-arbitration injunctions seems to be exercised more widely, whereas where the mere existence of an agreement to arbitrate is beyond doubt, but its binding force is challenged, the courts will grant restraining orders only under exceptional circumstances (such as, for instance, if the courts have previously and conclusively decided that the very same arbitration agreement is invalid). Anti-arbitration injunctions, furthermore, do not appear to be affected by the ECJ's ruling in *West Tankers*.

Anti-suit injunctions issued by an arbitral tribunal enjoining a claimant from initiating or continuing court proceedings in disrespect of the arbitration agreement are often referred to in EU and EFTA courts as an alternative to the eliminated anti-suit injunctions in support of arbitration. But on closer inspection, such injunctions do not serve as a viable substitute for the courts' injunctions.

Provided that the parties have not agreed otherwise, the arbitration agreement is sufficiently broad and the applicable procedural law does not state otherwise, arbitral tribunals seated in the jurisdictions examined seem to be competent to issue anti-suit injunctions. The injunction is, however, not in and of itself enforceable before the national courts where the parallel proceedings have been initiated. The measures available to an arbitral tribunal to secure enforcement of the injunction, or rather to increase the enjoined party's incentive to do so, are limited to grant, upon a party's request, damages for the breach of the arbitration agreement. Under the French statutory arbitration law, arbitrators are explicitly empowered to order an *astreinte* as a provisional measure if they deem it necessary; the enforcement of such *astreinte*, however, again depends on whether the enforcing courts recognise this kind of civil penalty. In the case of non-compliance by the enjoined party, arbitrators may seek the assistance of the national courts usually at the seat of arbitration (§ 1041(2) ZPO, Article 183(2) SPILA and section 42(1) Arbitration Act). If, however, the order for which enforcement is sought before the national courts violates the courts' notion of public policy, enforcement will not be supported by these courts. Since most civil law jurisdictions do not recognise anti-suit injunctions, enforcement of such orders will most likely not be possible. An EU or EFTA court might, furthermore, be reluctant to assist in the enforcement of an anti-suit injunction, since such an order would also prohibit the foreign court's determination of jurisdiction, which has been frowned upon since the ECJ's *West Tankers* ruling.

To conclude, the issuance of an anti-suit/anti-arbitration injunction requires, in the first place, satisfaction of a *prima facie* test that the arbitration agreement is valid, if the national judge or the arbitrator(s) are to issue an anti-suit injunction, or that it is invalid, if the national judge is to order an anti-arbitration injunction. A major difficulty, however, lies in the enforcement of anti-suit injunctions and anti-arbitration [page "256"](#) injunctions, respectively: direct enforcement is significantly impeded if neither the respective party nor its assets are located in the territory of the issuing court, and recognition of such orders in civil law countries is not conceivable, based on their interpretation of anti-suit injunctions as infringing public policy or the arbitrators' competence-competence, respectively. Therefore, the effectiveness of this remedy is dependent on additional measures if the party against which the injunction is directed does not comply voluntarily: national courts issue injunctions under the threat of sanctions, and orders issued by arbitral tribunals are reliant on the coercive power of the national courts. If such measures are directed against parties in foreign proceedings, the injunctions' enforceability is further contingent upon the foreign courts' recognition of such orders. Moreover, it is highly likely that the incompatibility of anti-suit injunctions with EU law also extends to anti-suit injunctions issued by arbitrators. Hence, injunctions either issued by an arbitral tribunal or a national court are both equally reproachable for – at least indirectly – imposing on an adjudicatory body's competence-competence.

[D]. Actions for Declaratory Relief

The German and English statutory arbitration laws explicitly provide for a direct action as to the arbitration agreement's (in)validity to be filed directly with the national courts. A party may apply to the German courts to determine whether the arbitration is admissible only prior to the constitution of the arbitral tribunal, whether seated in Germany or abroad, and if the party can show a legitimate interest in seeking declaratory relief. A legitimate interest is denied if proceedings on the merits are pending before a first instance court and the defendant in this set of proceedings raises the arbitration defence; in other words, § 1032(1) ZPO takes precedence over § 1032(2) ZPO. Judgments declaring the arbitration inadmissible, if not appealed or if confirmed in appeal proceedings, have *res judicata*

effect on the German courts subsequently called upon and on the arbitral tribunals dealing with claims covered by the same arbitration agreement. An award rendered in spite of the court's final negative declaratory judgment is at least challengeable (even though some commentators hold that such an award is void ipso iure).

Section 32 Arbitration Act also sets the threshold for seeking declaratory relief before the national courts high: all the parties to the arbitral proceedings either need to agree to a direct action in the courts or, if there is no joint consent, a direct action may be filed with the permission of the arbitral tribunal and if the court is satisfied that such an action may give rise to substantial savings in costs (economic consideration), the application is made without delay (estoppel/bad faith argument), and if there is good reason why the matter should be decided by the court (argument for preserving the arbitrators' competence-competence in principle). Declaratory relief may also be sought under section 72(1) Arbitration Act, but only if the party seeking such relief has not participated in the arbitral proceedings at all. The English case law has, however, held that section 72(1) Arbitration Act should be relied on with caution in order not to restrict the arbitrators' competence-competence.

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The negative effect of competence-competence incorporated into French arbitration law does not allow for a direct action as to the arbitration's admissibility. The Swiss statutory arbitration law does not provide for such a direct action either; the Swiss Federal Supreme Court held that declaratory relief – even though it has not granted it to date – should, in principle, be granted with greatest caution only, which is also a statement advocating the preservation of the arbitrators' competence-competence.

It can be observed that where parallel proceedings are pending before a national court and an arbitral tribunal a direct action as to the arbitration's admissibility will remain the exception in light of the strict criteria to be fulfilled in order to seek declaratory relief. The question on the necessity of declaratory relief, however, is justified, since the (in)validity of the arbitration agreement will also be reviewed (in most jurisdictions) if an action on the merits is raised with a state court and the defendant raises the arbitration defence. The benefits of raising the arbitration defence in proceedings on the merits are that it can be done regardless of whether arbitral proceedings have been initiated or not, irrespective of where the arbitral tribunal has its seat, and that a court decision on the merits may be enforced under the Brussels Regulation/Lugano Convention within Europe. Where there is not even the appearance of a valid arbitration agreement, negative declaratory relief should, however, be possible to avoid unnecessary outlays of time and cost. Positive declaratory relief may also serve as a preemptive strike against foreign competing court proceedings in disregard of an arbitration agreement, although not necessarily vis-à-vis EU or EFTA judgments. Furthermore, it needs to be taken into consideration that declaratory judgments as to the arbitration's admissibility do not, based on the ECJ's 'subject matter test', benefit from the recognition and enforcement scheme under the Brussels Regulation and the Lugano Convention.

[E]. Plea of Res Judicata before National Courts and Arbitral Tribunals

[1]. International Principle of Res Judicata

Since national courts and arbitral tribunals alike seek to avoid wasted resources and the risk of irreconcilable decisions, the concept of res judicata – which furthers both of these goals – thereby aids in enhancing legal certainty in the interface between state court litigation and arbitration.

Unlike the lis pendens principle, the concept of res judicata constitutes an internationally recognised general principle of customary law (since it is not codified in several jurisdictions). It hence also extends to arbitral awards. The case law in the jurisdictions examined has confirmed that arbitral awards have the same preclusive effect as domestic court judgments and therefore prohibit re-litigation of the same matter between the same parties. There is, however, no international consensus to date as to the law governing the preclusive effect of an arbitral award; the focus when establishing this law should be on the parties' agreement and their expectations, rather than on the lex arbitri or the law of the recognising and enforcing courts.

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As regards the opposite situation, where court proceedings have already led to a final judgment on the same claims, based on the same legal grounds, and between the same parties as the proceedings pending before the arbitral tribunal, it seems that in the jurisdictions examined a final court judgment satisfying the triple identity test and, if foreign, capable of recognition at the situs of arbitration, will be observed by an arbitral tribunal. The arbitral tribunal concerned can either stay the arbitral proceedings until the judgment has been successfully recognised by the courts at the place of arbitration, or, if there is no doubt about the judgment's recognisability, terminate the proceedings.

[2]. Procedural Requirements

Based on the international and comprehensive acceptance that the principle of *res judicata* enjoys, a party that is in a position to produce a final and conclusive decision against the same opponent on the same subject matter should, hence, raise the plea of *res judicata* as soon as possible in the subsequent proceedings (in order not to run the risk of waiving the *res judicata* objection), regardless of whether the decision is a court judgment to be invoked in arbitral proceedings or vice versa.

[3]. Preclusive Effect of *Res Judicata*

In some jurisdictions, the *res judicata* effect of a decision is a part of public policy. In others, national courts recognise the abuse of process doctrine, but its application in the context of international arbitral proceedings is uncertain.

Under German arbitration law, the arbitral award has the same effect as a court judgment. French case law has recently denied the extension of an arbitral award's preclusive effect to all the claims and legal grounds that principally can be raised with a specific matter in dispute, but not necessarily have been raised in the previous proceedings ('concentration des moyens et des demandes') in international arbitration. The principles governing the *res judicata* effect of a Swiss court judgment apply *mutatis mutandis* to arbitral awards. Last but not least, English case law has ruled that an arbitral award can justify a plea of cause of action and issue estoppel; the case law is, however, not clear as to the applicability of the pleas of former recovery and of abuse of process with regard to an arbitral award. Whereas the party raising the plea of *res judicata* with a civil law court, in principle, has to show that the court proceedings dealt with the same claims, based on the same legal grounds, and between the same parties as the previous award ('triple identity test'), the notion of the *res judicata* effect is broader under English law and precludes parties that have obtained an arbitral award from raising claims or issues dealt with in that award, or perhaps even claims that could have been raised in the arbitral proceedings, but were not. If the arbitral award has been rendered by an arbitral tribunal with its seat outside the court before which subsequent proceedings are brought, the jurisdictions examined seem to agree that the compatibility of the foreign arbitral award with the New York Convention – or, worded [page "259"](#) more liberally by French law, with international public policy – needs to be ensured before recognising the award.

The preclusive effect of *res judicata* in the arbitration context has not been set out expressly in statutory arbitration laws. Hence, the principle's applicability and, in particular, the exact scope of the preclusive effect of the *res judicata* concept are not exempt from uncertainties and difficulty, since it depends on the applicable law, whose determination mechanism is also subject to controversial discussions. The arbitrators should refrain from focussing blindly on the law of the place of arbitration to govern the preclusive effect of a prior court decision. The mere application of domestic law does not seem to offer adequate solutions in the arbitration context. The ILA has therefore established recommendations on *res judicata*. Even though they only address the *res judicata* effect of prior arbitral awards, they allow useful comparisons to the effect and the treatment of prior court judgments in arbitral proceedings. Recommendation 3, for instance, defines a four-prong test for establishing that a prior decision has *res judicata* effect: firstly, the decision must be final and capable of being recognised in the jurisdiction where the subsequent proceedings take place; secondly, the claims, thirdly, the cause of action, and fourthly, the parties in the previous and in the pending proceedings must be identical. If these requirements are convincingly proven by the party invoking the *res judicata* effect of a prior decision, the preclusive effect is defined broadly by the ILA recommendations, encompassing the common law concepts of cause of action and issue estoppel, and also of the abuse of process doctrine, but only limited to cases where special circumstances justify that claims that have not been, but could have been raised in the previous proceedings, are precluded.

It is worth mentioning – not least in light of the arbitral tribunal's mandate to render an enforceable award – that the principle of *res judicata* amounts to a public policy rule under Swiss and English law. French case law emphasises that *res judicata* rights are private rights, but if the award rendered in the arbitral proceedings conflicts with the prior court judgment, the award might violate international public policy. The same logic is followed under German law.

As regards the abuse of process doctrine, it can be concluded that it should be applied by an arbitral tribunal only under exceptional circumstances that justify blocking mala fide attempts of a party to have an unjustified 'second bite at the cherry'.

[F]. Conclusion on Evaluation and Comparison

In terms of effectiveness and enforceability no plea or action discussed in this book can be singled out as more straightforward than the others. The comparative findings on the effectivity of the pleas and action are summarised in Figure 4.1 and explained in the text below.

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Figure 4.1 Evaluation of the Effectiveness of Pleas and Actions Available in Parallel Proceedings before National Courts and Arbitral

Tribunals (Own Illustration)

	<i>How Effective are the Pleas and Actions in Regulating Parallel Proceedings?</i>	<i>How Effective is the Enforcement?</i>	<i>In which Jurisdiction is the Enforcement of the Pleas and Actions most Favourable?</i>
Exceptional Arbitri	effective (dependent on whether competence-competence is recognised/incorporated and on interpretation of exceptions to arbitration agreement's validity)	satisfactory	France (jurisdiction that has incorporated the negative effect of competence-competence)
Plea of Lack of Jurisdiction	effective (but within arbitral tribunal's discretion whether a preliminary award on jurisdiction is issued or a decision on jurisdiction is made in final award)	satisfactory	equally effective in jurisdictions examined
Exceptional Litis Pendens	highly effective (since it follows mechanical chronological approach)	uncertain/ non-existent	potentially in Switzerland (legal doctrine suggests application of lis pendens rule in certain constellations)
Action for Injunctive Relief	highly effective (but remedy remains within court's/arbitral tribunal's discretion)	uncertain	England (but not admissible vis-à-vis EU and EFTA courts)
Actions for Declaratory Relief	not very effective (more effective on recognition and enforcement level)	uncertain	England (but not effective vis-à-vis EU and EFTA court judgments that have initially declared arbitration agreement invalid)
Exceptional Rei Judicatae	highly effective (provided that there is a prior judgment or a prior arbitral award)	satisfactory	Switzerland/England (where principle of res judicata belongs to public policy)

In summary, even though the arbitration defence based on Article II(3) New York Convention may be brought before all contracting states' courts of competence, this provision does not grant parties a clear-cut means of coordinating proceedings pending in parallel before a national court and an arbitral tribunal. The New York Convention, [page "261"](#) however, does not specify the details of its application, such as the scope of review to be applied or the law according to which the exceptions to the arbitration agreement's validity need to be interpreted. Article II(3) New York Convention therefore is no safe haven in itself, but the national law's general stance on arbitration has a significant impact on the effectiveness of the arbitration defence. Even though the jurisdictions examined have adopted a favourable attitude towards arbitration and, hence, are opposed to unnecessary court intervention, their statutory law and case law varies with regard to the precise application of the arbitration defence. The effectiveness of the arbitration defence is greatest in jurisdictions that have adopted the negative effect of competence-competence, such as France, where a national court is not permitted to review the arbitration agreement provided that a party raises the arbitration defence and the arbitral tribunal has already been seised.

As regards the plea of lack of jurisdiction to be raised before an arbitral tribunal, the statutory arbitration laws of all the jurisdictions examined allow such a plea. It remains, however, within the discretion of an arbitral tribunal to decide on its jurisdiction in a preliminary award, or at the end of the arbitral proceedings in the final award together with the merits of the case. This plea's effectiveness is thereby diminished, since its temporal effect is not solely dependent on a respective party request. Overall, the plea of lack of jurisdiction is a widely accepted and straightforward means of objecting to an arbitral tribunal's jurisdiction, by which a party opposing the arbitration secures its right to challenge any award rendered based on a lack of jurisdiction.

Based on the fact that neither the case law nor the national legislation in Germany, France, Switzerland and England has established an obligation of the national courts to stay their proceedings where confronted with arbitral proceedings commenced

prior to the action in the state court, a party relying on arbitration is not recommended to raise the plea of *lis pendens* before a national court on a stand alone basis. It should consider combining the *exceptio litis pendentis* with the arbitration defence, particularly because, if the party only relies on the chronological priority of the arbitration, it may risk submitting to the jurisdiction of the national court.

Even though there are learned authors who suggest establishing a *lis pendens* rule with respect to parallel judicial and arbitral proceedings *de lege ferenda*,⁽¹⁴⁶⁹⁾ it may be summarised, based on the considerations explored in the relevant chapters above, that the adoption of a *lis pendens* rule binding on arbitral tribunals would not do justice to the paramount principles of party autonomy and the arbitrators' competence-competence. So, even though the rule of *lis pendens*, as such, is very straightforward, the doctrine of the arbitrators' competence-competence is still given priority over a merely chronological rule to determine jurisdiction. Furthermore, regardless of the sense or non-sense of applying the *lis pendens* rule to parallel judicial and arbitral proceedings, a prerequisite for such an undertaking would be the reciprocal trust of adjudicatory bodies on an international basis. Such a common basis of values is, [page "262"](#) however, difficult to achieve without a treaty-based arrangement to provide a frame of mutual rights and obligations.

Anti-suit injunctions are also, in principle, a highly effective means of restraining a party from initiating or continuing parallel court proceedings. In addition to the English courts' caution in issuing such orders, however, anti-suit injunctions are not enforceable in many civil law countries and, furthermore, have been prohibited in the EU and the EFTA. Anti-arbitration injunctions, however, are considered not to be affected by the ECJ's ruling in *West Tankers*, but the English courts' discretion to issue such orders is exercised only restrictedly and the enforceability of such orders against an arbitral tribunal is also uncertain. Moreover, it is generally held that arbitrators are also competent to issue anti-suit injunctions, unless agreed otherwise by the parties; the enforceability of such orders, especially in civil law countries, and their compatibility with the ECJ's case law is, however, still an unsettled matter.

The possibility of seeking declaratory relief as to the arbitral tribunal's jurisdiction before the national courts as provided under the English and German statutory arbitration laws mainly aims at barring recognition or enforcement of a contradictory judgment or award being rendered in parallel proceedings. However, in recent English case law, such declarations have been denied preemptive effect on an EU judgment containing the opposite finding on the arbitration agreement's validity.

Last but not least, the plea of *res judicata* can only be invoked if a national court or an arbitral tribunal is seised with a case that has already been finally and conclusively decided before another adjudicatory body, i.e. in consecutive parallel proceedings. The national courts of the jurisdictions examined are, upon a party's request, willing to observe the *res judicata* effect of a final arbitral award recognisable under the *lex fori*. Swiss and English case law have even declared the rule of *res judicata* as pertaining to public policy. Arbitrators likewise seem to observe pleas as to the preemptive effect of a court judgment if recognisable at least under the law at the seat of arbitration.

In conclusion, it may be observed that there is no panacea concerning which pleas or actions must be raised in the context of pending parallel proceedings; sometimes it may even be worth combining pleas or actions to challenge either the national court's or the arbitral tribunal's jurisdiction. What is certain is that the pleas and actions to be invoked in situations of parallel proceedings before state courts and arbitral tribunals are not harmonised in the European context, but are subject to different laws and case law, which are worth considering before choosing a specific seat for arbitration. Furthermore, even though the requirements for raising particular pleas or actions may slightly differ depending on whether such pleas or actions are brought before arbitral tribunals or national courts, it can be inferred from the comparison above that raising jurisdictional pleas or actions in both fora largely pursues identical goals. Thereby, we are back to square one, since the equal footing between these adjudicatory bodies in determining their jurisdiction again gives rise to parallel proceedings.

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§4.03. Conclusion in Scenarios

This chapter aims at providing a summary overview of which pleas and actions may be raised in a specific scenario. At the same time, caveats or recommendations directed at the stakeholders in the parallel proceedings, i.e. the national courts, arbitrators and, of course, the parties and their counsels, will be formulated.

[A]. Scenario No 1: Arbitral Proceedings Were Initiated Prior to Court Proceedings

The first scenario depicts the situation where arbitral proceedings had been initiated before a national court was seised with an action seeking identical relief, based on the same legal grounds, and concerning the same parties as in the arbitral proceedings. The illustration below summarises the pleas and actions available in this

constellation of parallel proceedings which will be explained in detail in the following chapters.

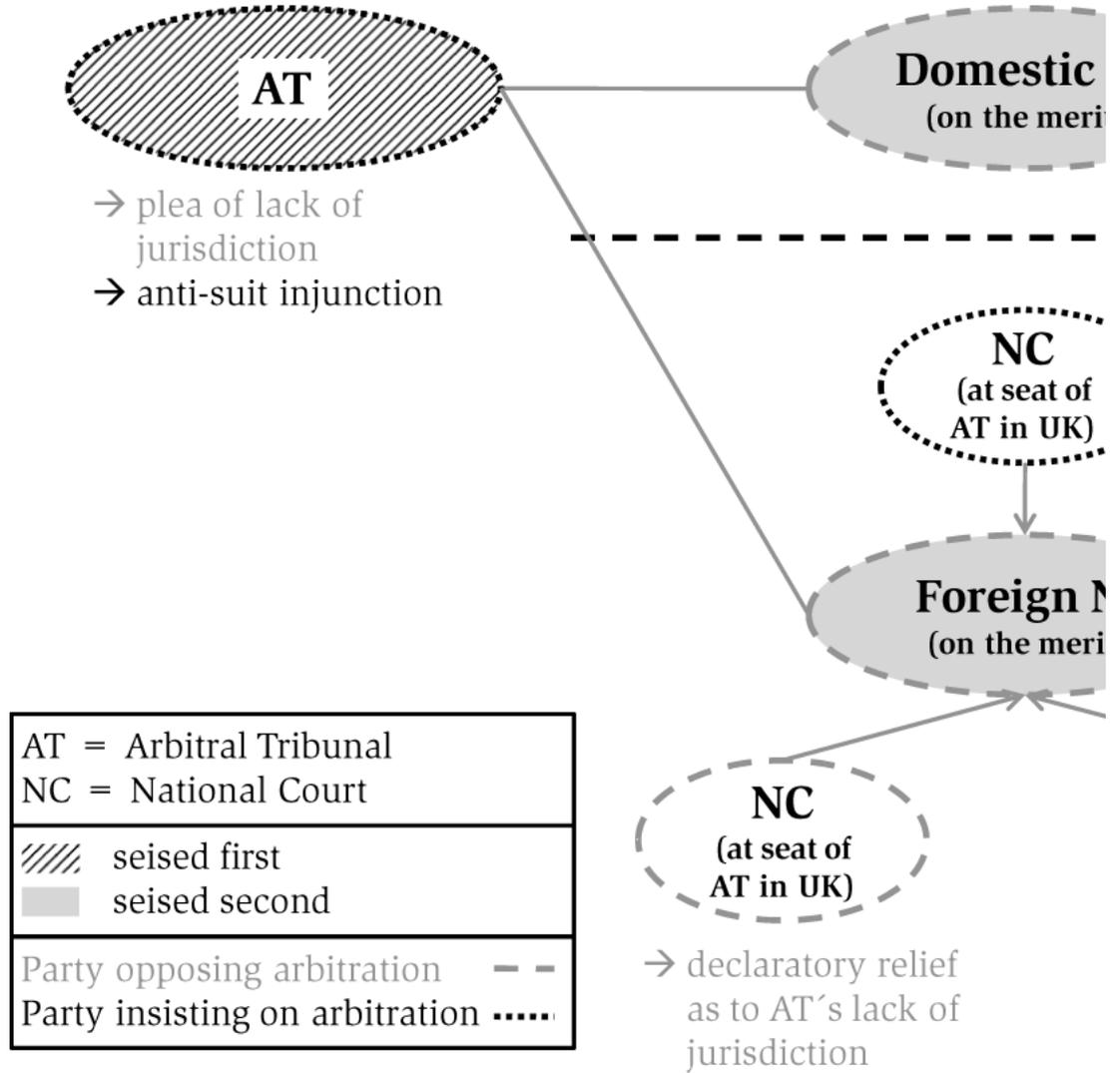


Figure 4.2 Jurisdictional Pleas and Actions Available with Arbitral Proceedings Initiated Prior to Parallel Court Proceedings (Own Illustration)

[1]. If the National Court Is Located at the Seat of Arbitration

The party insisting on arbitration may first and foremost raise the plea of a valid arbitration agreement before the national court in accordance with Article II(3) New York Convention. From a procedural perspective, the party should, as a matter of prudence, invoke the arbitration defence as soon as possible in the court proceedings, especially when considering the time requirement in section 9(3) Arbitration Act that the defence must be raised before the 'first step' is taken in the court proceedings. The [page "264"](#) arbitral tribunal may – if a party has objected to the tribunal's jurisdiction and after having consulted with the parties –, depending on the stage the arbitral proceedings have advanced to, consider staying the proceedings until the court at the seat of arbitration has decided on the arbitration defence. Such a stay might be justified in light of the preclusive effect such a court decision is likely to have on the arbitral proceedings, and considering the facilitated recognition of an EU or EFTA court judgment in another EU Member State or an EFTA state under the Brussels Regulation and the Lugano Convention. Where the arbitral tribunal, however, is convinced that there is no sound basis for the court proceedings and that they were initiated on a mala fide ground only (as a 'torpedo action', for instance), the arbitrators are obliged to proceed with the arbitration in light of the mandate conveyed to them to render an award.

The arbitration defence may be coupled with a plea of litispendence, since the arbitral tribunal was seised prior to the national court. The plea of the first-in-time-rule, however, will most likely not impress a national court, since the application of the lis pendens rule where arbitral proceedings have been commenced first is, in principle, not recognised. A national court confronted with a jurisdictional objection based on the lis pendens of an arbitral tribunal, may, however, – even in the absence of any obligation to observe litispendence in the context of arbitration – consider staying the proceedings, if the arbitral proceedings have advanced substantially, or where it is evident that the court proceedings have been brought for abusive purposes only (to disrupt the arbitral proceedings, for instance).

The party which has initiated the court proceedings, by contrast, must raise the plea of lack of jurisdiction before the arbitral tribunal at the beginning of the arbitral proceedings in order not to be estopped from filing an action on the merits with a national court. Otherwise, the party opposing the court proceedings is equipped with a further argument against the national court's jurisdiction, namely that the claimant's commencement of court proceedings contradicts his submission to the jurisdiction of the arbitral tribunal and is, therefore, abusive. If the national court, before which a parallel action is pending and before which the respondent has raised the arbitration defence, has certain knowledge that the arbitral tribunal is to deliver a preliminary award on its jurisdiction based on the plea raised by respondent (the claimant in the arbitral proceedings), it may consider staying the court proceedings until the arbitral tribunal has issued its jurisdictional award. Such a stay could be based on deliberations as to the preclusive effect of the tribunal's jurisdictional award. Furthermore, the courts of the same country will have to decide on the tribunal's jurisdiction if the award on jurisdiction is challenged in any case. National courts should, however, stay the proceedings only on a case-by-case basis and only provided that the arbitral tribunal's award on jurisdiction is imminent.

The party raising the plea of lack of jurisdiction before the arbitral tribunal should, for the sake of procedural efficiency, request that the arbitrators issue a preliminary award on their jurisdiction at an early stage of the proceedings. Such an award is subject to court control. The arbitral tribunal is generally not obliged to stay the proceedings if a party files an action to challenge the tribunal's jurisdictional decision with the national courts at the seat of arbitration (so explicitly in § 1040(3) [page "265"](#) ZPO). The situation might thereby materialise that the arbitral tribunal renders a final award before the seat court has finally ruled on the tribunal's award on jurisdiction. In such a situation of the final award 'outrunning' the court's final decision on jurisdiction, the national court should stay the proceedings to give the party opposing the arbitrators' jurisdiction the opportunity to challenge the final award before the seat courts.

The party pleading the validity of the arbitration agreement may also wish to make use of an offensive means to halt the court proceedings initiated in disregard of the arbitration agreement: an anti-suit injunction. If the parties have not agreed otherwise and, provided that the applicable procedural law allows it, the arbitrators may grant an anti-suit injunction directed against the claimant in the court proceedings. The arbitral tribunal must – at least on a prima facie basis – consider itself competent to hear the dispute before embarking on the issuance of an anti-suit injunction. The party requesting the issuance of such an order from the arbitrators must demonstrate that the court proceedings deal with the same subject matter and are between the same parties as the arbitral proceedings, that it cannot wait for a decision until the final award is rendered (urgency), that it would face imminent or irreparable harm by getting involved in a set of parallel proceedings, and that the issuance of an anti-suit injunction is not disproportional. The party should wait with its request for an anti-suit injunction from the arbitrators until the national court has decided on the arbitration defence invoked by it in the court proceedings; apart from considerations of procedural efficiency, it is rather doubtful that the applicant could show a legitimate interest in the issuance of an anti-suit order before the national court has ruled on the *exceptio arbitri*. The arbitrators should be careful when issuing anti-suit injunctions and should only do so based on a case-by-case analysis. Where one of the parties has engaged in abusive court proceedings to frustrate a valid arbitration agreement, the arbitral tribunal may seriously consider the issuance of an anti-suit order to preserve the integrity of the arbitral process. The applicant party and the arbitrators, however, need to consider the effectiveness of such injunctions, since the arbitral tribunal can combine the order only with a threat of a sanction; if the enjoined party does not comply with the order, the arbitrators cannot force the sanction on the recalcitrant party. The arbitral tribunal then has to seek assistance from the national courts. It remains doubtful whether civil law courts, which are rather hostile towards the concept of anti-suit injunctions, would help to enforce such orders or recognise them (also considering the *effet utile* argument in the ECJ's *West Tankers* ruling).

The party opposing arbitration may also seek an injunction from the national court at the seat of arbitration enjoining the claimant in the arbitral proceedings from continuing the arbitration. Since the issuance of such anti-arbitration injunctions is, however, more frequently sought before the English courts when the seat of arbitration is abroad, this situation will be dealt with in the following Chapter 4, §4.03[A][2].

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[2]. If the National Court Is Located Abroad

The party opposing the court proceedings in a foreign court may raise the arbitration defence based on Article II(3) New York Convention in the same way as with a court at the seat of arbitration. The arbitral tribunal's deliberations as to whether to stay the proceedings might be different when confronted with parallel proceedings commenced before a foreign court, which is, prospectively, not the court before which recognition or enforcement is expected to be sought. Assuming, however, that the foreign court

is located in an EU Member State or an EFTA state, the arbitral tribunal must bear in mind that the court's decision on the arbitration agreement's invalidity benefits from the facilitated recognition and enforcement scheme under the Brussels Regulation or the Lugano Convention and may, hence, easily have preclusive effect at the seat of arbitration.

The party opposing arbitration may also raise the plea of lack of jurisdiction before the arbitral tribunal, and the party insisting on arbitration may ask the arbitral tribunal to issue an anti-suit injunction as seen in scenario 1.1 above.

Based on section 37 Supreme Court Act 1981 or section 44 Arbitration Act, the English courts may grant injunctions against the claiming party in court, enjoining it from initiating or continuing foreign court proceedings if the applicant shows the satisfaction of certain requirements: the court must be convinced that a valid arbitration agreement exists, the application for injunctive relief is not unduly delayed, the foreign action is not well advanced and there is no other good reason why the injunction should not be granted; the predominant factor, however, seems to be the parties' express and valid arbitration agreement. The English courts have broad discretion in granting injunctive relief and, first and foremost, consider whether the issuance of such an order serves the ends of justice. Enforcement of such an injunction might, however, be complicated, either because the claimant does not have his domicile or any assets in the territory of the issuing court, or due to the foreign court, before which the proceedings to be enjoined are pending, not recognising such an order. Furthermore, if the foreign court is located in an EU or EFTA state, the issuance of anti-suit injunctions (also in support of arbitration) has been eliminated by the ECJ's ruling in *West Tankers*. Hence, only with regard to foreign proceedings in a non-EU and non-EFTA state, and only if that jurisdiction recognises such orders and their effect, are anti-suit injunctions an effective weapon for suppressing court proceedings in disregard of a valid arbitration agreement.

Again, as with anti-suit injunctions in support of arbitration, only the English courts' case law has produced examples of injunctions being granted against the claimant in arbitral proceedings. The English courts consider the following, in addition to the arbitration agreement's validity, when confronted with an application for an anti-arbitration injunction: would the granting of the injunction cause injustice to the claimant in the arbitration, would the continuation of the arbitration be oppressive, vexatious or otherwise an abuse of process, and last but not least, are the circumstances of the specific case exceptional enough as to justify the granting of such an injunction. The English courts are rather reluctant to issue anti-arbitration injunctions and do so only on an exceptional basis. The issuance of such orders does not appear to [page "267"](#) be affected by the ECJ's ruling in *West Tankers*. If an anti-arbitration injunction has been issued by the English courts at the seat of arbitration (scenario 1.1 above) and the tribunal in the pending arbitration proceedings has taken note of the order, it should consider the injunction when deciding on the way forward for the arbitration, especially with regard to the prospective award's enforceability. If the arbitrators, however, are convinced that the arbitration agreement is valid and that the application to the national courts is therefore without any merit, they should proceed with the arbitration.

A major situation in which the party insisting on the arbitral tribunal's jurisdiction may want to seek declaratory relief from the national courts as to the arbitration agreement's validity is the following: arbitral proceedings have been initiated in England. The defendant in the arbitral proceedings objects to the tribunal's jurisdiction and consequently raises a 'torpedo action' on the merits before another EU or EFTA court, for instance. The claimant in the arbitral proceedings, having raised the arbitration defence before the EU or EFTA court, may then wish to apply for a declaration as soon as possible that the arbitration agreement is valid before the High Court of Justice under section 32 Arbitration Act, but certainly before the foreign court has issued a preliminary judgment on the arbitration agreement's invalidity or the judgment on the merits directly. This is because the English courts are under an obligation to recognise the preliminary decision of the EU or EFTA court on the arbitration agreement's invalidity, except where serious irregularities prohibit such recognition, since the disregard of an arbitration agreement valid under English law does not qualify as a ground to refuse recognition under the Brussels Regulation. However, such a line of action does not ensure the award's enforceability in spite of the conflicting EU or EFTA judgment. Whereas it is, based on Article 34 Brussels Regulation/Lugano Convention, rather unlikely that a declaratory judgment could prevent recognition of a conflicting EU or EFTA judgment, a judgment entered on the terms of an arbitral award in accordance with section 66 Arbitration Act has been confirmed as giving rise to the refusal ground under Article 34(3) Brussels Regulation/Lugano Convention by recent English case law.

If an arbitral tribunal seated in England, upon an objection to its jurisdiction, confirms that it is competent to hear the case, the party opposing the arbitrators' authority – having initiated foreign court proceedings – may, in addition, consider seeking declaratory relief as to the arbitral tribunal's lack of jurisdiction before the English courts based on section 32 Arbitration Act (an application based on section 72(1) Arbitration Act is not available where the party has participated in the arbitral proceedings).⁽¹⁴⁷⁰⁾ There are, however, several uncertainties associated with such a line of action: it is

questionable in the first place whether the party can fulfil the statutory requirements to bring such a direct action, since the opposing party is hardly likely to give its consent to such court proceedings and the arbitral tribunal, having explicitly confirmed its jurisdiction, is not expected to give its permission to bring such a court *page "268"* action, either. Even if the arbitral tribunal were to give its permission to seek declaratory relief before the national courts and the latter considered the additional qualitative criteria to be met, it remains uncertain that an English court would declare the arbitration to be inadmissible and would render such a final declaration before the arbitral tribunal gives the award on the merits. Only if the court decision 'outruns' the issuance of tribunal's award could the party opposing the arbitral tribunal's jurisdiction challenge the award, invoking the final negative declaration of the English High Court or the English Court of Appeal.

[B]. Scenario No 2: Court Proceedings Were Initiated Prior to Arbitral Proceedings

The second scenario deals with the pleas and actions parties may raise to contest the national courts' or the arbitral tribunals' jurisdiction where court proceedings were initiated before an arbitral tribunal was seised with an action seeking identical relief based on the same legal grounds and concerning the same parties as in the court proceedings. The illustration below summarises the pleas and actions available in this constellation of parallel proceedings which will be explained in detail in the following chapters.

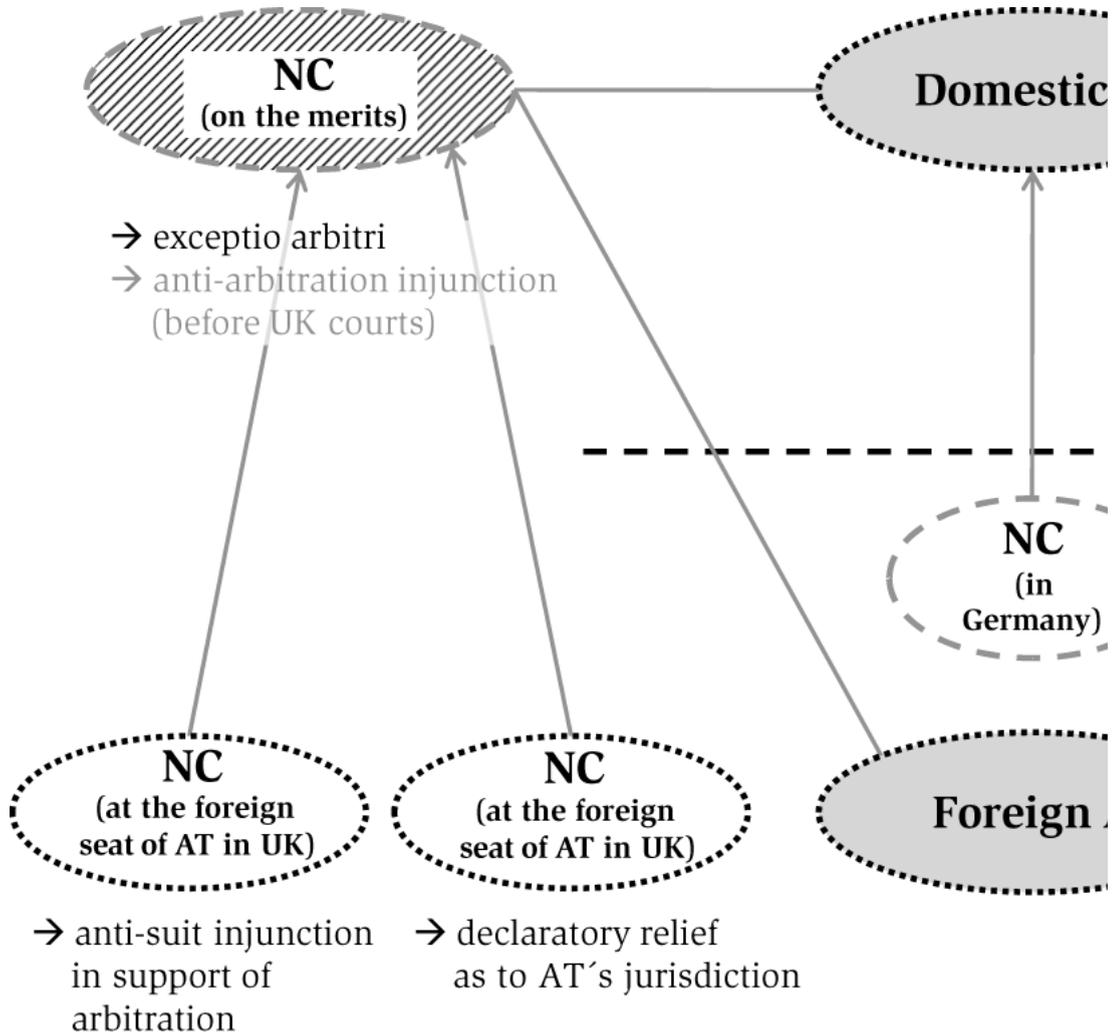


Figure 4.3 Jurisdictional Pleas and Actions available with Court Proceedings Initiated Prior to Parallel Arbitral proceedings (Own Illustration)

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[1]. If the Seat of the Arbitral Tribunal Is Located in the Same Country as the Court Proceedings

The party loyal to the arbitration agreement may invoke the arbitration defence before the national courts,⁽¹⁴⁷¹⁾ and may request the issuance of an anti-suit injunction from the arbitrators.⁽¹⁴⁷²⁾

The party which has initiated the court proceedings may combine its relief sought with a request for an anti-arbitration injunction if the court proceedings are taking place in England.⁽¹⁴⁷³⁾ If it participates in the arbitral proceedings, the party opposing arbitration may invoke the plea of lack of jurisdiction.⁽¹⁴⁷⁴⁾

Furthermore, in the jurisdictions examined, there are no statutory

provisions or any practice that arbitral tribunals should give effect to the chronological priority of court proceedings on the same subject matter and between the same parties. In the arbitration context, the doctrine of competence-competence seems to supersede the concept of *lis pendens* insofar as the arbitral tribunal's competence to determine its own jurisdiction prevails over any chronological rule giving priority to the court first seised. The party objecting to the arbitral tribunal's jurisdiction should, hence, raise the plea of *litispence* only coupled with the plea of lack of jurisdiction; such a combined line of action seems essential, not only due to the lack of effectiveness of the *lis pendens* rule in arbitration, but also because to act otherwise would give rise to the risk that the party objecting to the arbitrators' authority is held to have waived its right to object in the arbitral proceedings. Consequently, the pleas should also be raised as soon as possible in the proceedings. Nevertheless, it is within the arbitral tribunal's discretion to consider a plea of *lis pendens* raised by a party when deciding whether it has jurisdiction. Especially where judicial proceedings are pending before the national courts at the seat of arbitration in parallel to the arbitration, it should be reviewed whether the *lex arbitri* contains provisions that would subject the award to setting aside proceedings or would render the recognition and enforcement of the award more difficult if *litispence* is not observed. Needless to say, however, an arbitral tribunal should not protect parallel 'torpedo actions' filed with a national court for abusive reasons only.

An application for an action for declaratory relief is conceivable under specific circumstances: an action on the merits has been filed with a French court, for instance, which declined jurisdiction based on the defendant's arbitration defence without fully reviewing the arbitration agreement. The commencement of arbitral proceedings is imminent; therefore, the party objecting to the arbitral tribunal's jurisdiction wishes to seek a declaration as to the arbitration's inadmissibility before the German courts under § 1032(2) ZPO, since it expects that a prospective arbitral award is highly likely to be presented to the German courts for recognition and enforcement. The party filing for a declaration from the German courts must be able to demonstrate that the arbitral [page "270"](#) tribunal has not yet been constituted and that it has a legitimate interest in such a declaration (which might be manifest in the subsequent enforcement of an award in Germany in the situation depicted). Arbitral proceedings are later initiated in France. The party seeking declaratory relief should then also request that the arbitral tribunal stay its proceedings until a decision on the arbitration's admissibility is rendered by the German courts, since the tribunal is not obliged *ex lege* to stay the proceedings and may even render an award while such a court action is pending. The arbitral tribunal should stay the proceedings if it has serious doubts that the arbitration agreement is, in fact, valid. Where it is obvious that an arbitral award will be enforced in Germany, the arbitrators should, in addition, consider the *res judicata* effect that a German court judgment on the arbitration's (in)admissibility will have. Consequently, for the sake of a prospective arbitral award's enforceability and efficient use of the parties' resources, the arbitral tribunal should contemplate a stay unless the direct action before the German courts is clearly without any merit. If the German court decides that the arbitration is inadmissible and this ruling becomes final, the German courts subsequently called upon to enforce the arbitral award rendered in France are bound by the previous decision. Hence, the party opposing the award's enforcement in Germany can invoke the tribunal's lack of jurisdiction based on Article V(1)(a)(c) New York Convention by reference to the court's negative declaratory decision.

[2]. If the Seat of the Arbitral Tribunal Is Located Abroad

The party loyal to the arbitration agreement may invoke the arbitration defence before national courts⁽¹⁴⁷⁵⁾ and seek the issuance of an anti-suit injunction with an arbitral tribunal with a foreign seat.⁽¹⁴⁷⁶⁾ This party may, furthermore, file an application for the issuance of an anti-suit injunction in support of arbitration with the courts at the seat of the arbitration, if the arbitral proceedings take place in England and the court proceedings on the merits do not take place in an EU or EFTA court.⁽¹⁴⁷⁷⁾ A declaration as to the arbitral tribunal's jurisdiction may also be sought from the courts at the seat of arbitration if the seat is located in England (if the arbitral proceedings are imminent such a declaration may also be sought from the German courts).⁽¹⁴⁷⁸⁾

The party that commenced the court proceedings may, in addition, seek an anti-arbitration injunction from the national court (if the court proceedings take place in England),⁽¹⁴⁷⁹⁾ and may raise the plea of lack of jurisdiction in the arbitral proceedings.⁽¹⁴⁸⁰⁾

As the law stands now, an arbitral tribunal need not allow a plea of *litispence* filed due to court proceedings on the same subject matter and between the same parties having been commenced first before a foreign national court. In addition to what has [page "271"](#) been said in the chapter above, the following consideration might, for the sake of preserving a prospective award's enforceability, point to a stay: especially where the parallel court proceedings have already advanced substantially, the arbitrators should take into account whether any judgment rendered by that court is capable of being recognised by the courts at the seat of arbitration. Special regard should be given to the alleviated recognition and enforcement scheme, which does not allow any review of the issuing court's jurisdiction, an EU or EFTA judgment would benefit from when brought before an EU or EFTA court.

[C]. Scenario No 3: Final Court Judgment with Subsequent Arbitral Proceedings

In civil law jurisdictions, the party raising the plea of *res judicata*, in principle, must demonstrate that the arbitral proceedings deal with the same claims, based on the same legal grounds, and between the same parties as the previous court judgment. The requirements of this triple identity test are interpreted rather narrowly and therefore need to be established with great care. This triple identity test is also held applicable before an arbitral tribunal. In addition to these identity requirements, the party invoking the *res judicata* effect of a prior judgment should also plead on the law applicable to the determination of the preclusive effect of the judgment. This is particularly important, since past cases have shown that an arbitral tribunal is inclined to solely rely on the *lex arbitri* to determine the scope of the preclusive effect of a prior judgment. This may, however, lead to unsatisfying results, since the *situs* of arbitration frequently only has a very loose connection to the dispute, if at all, and the parties often do not envisage this consequence when choosing the *situs*. Demonstrating the parties' intentions and expectations as to the law applicable to the *res judicata* effect of a prior judgment might positively influence the tribunal's deliberations.

If the prior court judgment has been rendered outside the jurisdiction where the arbitral tribunal has its seat, the party should furthermore show that the judgment is capable of recognition by the seat courts. The arbitral tribunal is obliged to consider the judgment's recognisability in light of its duty to render an enforceable award: if the arbitrators wrongly ignore a valid and recognisable previous judgment, the enforceability of any prospective arbitral award on the same subject matter and between the same parties may be seriously jeopardised. It might help if the party initiates recognition proceedings before the seat courts to provide the arbitrators with a clear statement as to the judgment's validity under the law at the seat of arbitration.

The arbitral tribunal should also take into account that the principle of *res judicata* is accorded public policy character in certain jurisdictions, such as in Switzerland and England. For the sake of not exposing the parties to the arbitration to time and cost outlays rendered futile in subsequent setting aside proceedings, the arbitral tribunal should consider staying (or even terminating) the proceedings if there is a risk that they could violate public policy in the jurisdiction concerned.

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As regards the abuse of process doctrine, i.e. precluding not only the claims raised and conclusively decided in the previous proceedings, but also the claims that could have been raised in the initial proceedings, the arbitral tribunal should make use of this doctrine only in cases of manifest abuse of good faith.

Furthermore, if the party initiating arbitral proceedings intends to re-arbitrate matters that have already been conclusively decided by a national court it may be assumed based on recent case law that the English courts will be inclined in such a situation to grant an anti-arbitration injunction against such a party upon application.⁽¹⁴⁸¹⁾

[D]. Scenario No 4: Final Arbitral Award with Subsequent Court Proceedings

Arbitral awards are recognised as having the same *res judicata* effect as national court judgments. With international arbitral awards, it, however, always needs to be considered which law is applicable to determine the preclusive effect of the award. In general, the law at the seat of arbitration and the law of the recognising or enforcing court are considered first. More just and predictable results will, however, be produced if the parties' agreement and expectations are reviewed more closely. It is, hence, advisable that a party invoking the *res judicata* effect of a prior arbitral award not just convincingly demonstrate that the prior award fulfils the triple identity test, but also pleads on the law applicable to the scope of the preclusive effect that the award is capable of having.

Even though national law may provide that a court is to observe the *res judicata* effect of a previous arbitral award on the same subject matter and between the same parties of its own motion, such as under Swiss law, it is, nevertheless, advisable that the party opposing the admissibility of the subsequent proceedings raise the plea as soon as possible in the proceedings. Furthermore, since only the dispositive part of the arbitral award is capable of having *res judicata* effect in civil law jurisdictions, the parties should make sure, when the award is rendered, that the dispositive parts are worded in a sufficiently specific manner and deal with the entirety of the claims raised by the parties; failing this, a party may, in principle, request that the arbitral tribunal correct the award or render an additional award.

In addition, a caveat needs to be made with regard to claims not raised in the previous proceedings and, hence, not part of the arbitral award, but which could have raised in the arbitral proceedings: according to English case law, there is a certain risk that the *res judicata* effect of an arbitral award is extended to such claims, precluding the party from litigating them in separate court proceedings. The situation would, however, be different where the party could show that the specific claim is not covered by the

arbitration agreement and, hence, could not have been dealt with by the arbitral tribunal.

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Where the national court is confronted with the res judicata effect of a foreign arbitral award, i.e. rendered by an arbitral tribunal seated abroad, it will first review whether the arbitral award is compatible with the New York Convention, in particular with its Article V, or more basically with international public policy, as under French law, ⁽¹⁴⁸²⁾ before recognising it.

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- ¹⁴⁵⁸ Balkanyi-Nordmann, 186.
¹⁴⁵⁹ Poudret/Besson, para. 238.
¹⁴⁶⁰ Sals Report on Parallel Proceedings (November/December 2000) *European Business Law Review* 408, 408.
¹⁴⁶¹ Sals Report on Parallel Proceedings 409.
¹⁴⁶² Dessemontet, 157.
¹⁴⁶³ Rivkin, 271.
¹⁴⁶⁴ Cf Cuniberti, 414.
¹⁴⁶⁵ Cf Reinisch, 115.
¹⁴⁶⁶ Hau, 49 f.; Rivkin, 272.
¹⁴⁶⁷ Kreindler (2005), 191.
¹⁴⁶⁸ Pauwelyn/Salles, 80.
¹⁴⁶⁹ Cf Poudret/Besson, para. 998.
¹⁴⁷⁰ Such an action for declaratory relief would not be possible under § 1032(2) ZPO, since a declaration from the state courts as to the arbitration's (in)admissibility may be sought prior to the constitution of the arbitral tribunal only.
¹⁴⁷¹ See for detailed comments Chapter 4, §4.03[A][1].
¹⁴⁷² See for detailed comments Chapter 4, §4.03[A][1].
¹⁴⁷³ See for detailed comments Chapter 4, §4.03[A][2].
¹⁴⁷⁴ See for detailed comments Chapter 4, §4.03[A][1].
¹⁴⁷⁵ See for detailed comments Chapter 4, §4.03[A][1].
¹⁴⁷⁶ See for detailed comments Chapter 4, §4.03[A][1].
¹⁴⁷⁷ See for detailed comments Chapter 4, §4.03[A][2].
¹⁴⁷⁸ See for detailed comments Chapter 4, §4.03[A][2].
¹⁴⁷⁹ See for detailed comments Chapter 4, §4.03[A][2].
¹⁴⁸⁰ See for detailed comments Chapter 4, §4.03[A][1].
¹⁴⁸¹ See for further comments to anti-arbitration injunctions Chapter 4, §4.03[A][2] above.
¹⁴⁸² Art. 1514 CPC.

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