

How to Handle Parallel Proceedings: A Practical Approach to Issues such as Competence-Competence and Anti-Suit Injunctions

Gabrielle Kaufmann-Kohler*

The questions

It is quite a challenge to address the topic of parallel proceedings – one of the most difficult topics of international arbitration – just before lunch, immediately after Rusty, and in ten minutes. I will try to meet the challenge by asking three questions:

- First, what rules or tools do we have available in international arbitration to deal with parallel proceedings?
- Second, are these rules and tools satisfactory?
- Third, if not, how can they be improved in order to become satisfactory?

Before starting with the first question, I should mention the reasons for asking these questions. There is a general understanding that parallel proceedings are undesirable for three main reasons: the risk of contradictory decisions, the waste of resources due to duplication of proceedings, and the potential for harassment.

* Professor, Geneva University; Partner, Lévy Kaufmann-Kohler. Gabrielle Kaufmann-Kohler can be contacted at gabrielle.kaufmann@swlegal.ch.

What rules or tools are available in international arbitration to deal with parallel proceedings?

First, there is, of course, Article II(3) of the New York Convention. Under Article II(3), a court before which an action is brought in breach of a valid arbitration agreement must decline jurisdiction, unless the arbitration agreement is void, inoperative or incapable of being performed. This is a fundamental rule without which the international arbitral system would not have developed as it did in the last five decades.

Then there is the doctrine of competence-competence under national arbitration laws, which also underlies Article II(3). That doctrine asserts that arbitrators have the power to decide on their own jurisdiction. Accordingly, it allows arbitral tribunals to proceed even if parallel proceedings are pending. This is the so-called positive effect of competence-competence.

In a few jurisdictions – France being the foremost example – the doctrine of competence-competence also has a negative effect. Unlike the positive effect, the negative effect impacts the courts, not arbitrators. It prohibits courts from making any determination on the jurisdiction of an arbitral tribunal before the arbitrators have reached their own decision on the matter.

In addition to Article II(3) and competence-competence in its positive and negative forms, there are, of course, *anti-suit injunctions*. Anti-suit injunctions are one of the common law procedural instruments that can be used in handling parallel proceedings. Such injunctions traditionally are absent from civil law jurisdictions. These jurisdictions deal with parallel proceedings by resorting to the concept of *lis pendens*, which generally operates with a first-in-time rule. Injunctions can be issued by courts in support of or against arbitration. They also can be issued by arbitral tribunals against court litigation. They can be very powerful instruments for the benefit or to the detriment of arbitration.

As a tool of last resort, we should not forget non-enforcement of a judgment or arbitral award rendered in the undesirable parallel proceedings. Non-enforcement will not avoid the duplication of effort and the waste of resources, but it will avoid at least part of the consequences of conflicting decisions.

Are these rules and tools satisfactory?

The preceding discussion indicates that we *do* have rules and tools. This observation brings me to my second question: How do these tools perform? Obviously, they are not apt to avoid the proliferation of parallel proceedings which we witness today. Why not?

Article II(3) of the New York Convention was a brilliant, ground breaking

rule – a last-minute stroke of genius in 1958. Time has passed. It is still very valuable. However, it is insufficient to fully deal with parallel proceedings because it does not provide for coordination between arbitration and court litigation. Should one go first as a general policy? If so, which one should go first? What law governs these questions?

Similar issues arise with the positive effects of competence-competence. This is just the other side of the coin – the viewpoint of the arbitrator and not of the court. That viewpoint provides no coordination either.

We do not encounter the same difficulties with the negative effects of competence-competence. However, we face other problems. The absolute priority of the arbitrator – even if the arbitral tribunal is not constituted yet – comes at a cost. A party who never agreed to arbitrate must await the tribunal's jurisdictional decision and then challenge that decision in court at the place of arbitration before being able to bring its action on the merits in the courts of competent jurisdiction.

What about anti-suit or anti-arbitration injunctions? They are well established in the laws of certain jurisdictions. However, they also are heavily criticised for being in breach of public international law and fundamental principles of international arbitration.

- When the injunction targets foreign court proceedings, it encroaches on the foreign states' sovereign power to determine the jurisdiction of its courts.
- When the injunction targets arbitral proceedings, it infringes on the arbitrator's competence-competence and the supervisory powers of the courts at the place of arbitration.

The problem with anti-suit and anti-arbitration injunctions is that they adopt a unilateral logic – some call it 'unilateral judicialism' – when coordination is needed.

Admittedly, a number of courts recognise these difficulties and exercise self-restraint. The increasing number of US circuits adopting the so-called conservative approach is a manifestation of such self-restraint.

One court that has reached a radical conclusion from the inherent difficulties of anti-suit injunctions is the European Court of Justice (ECJ) in *Turner*. The ECJ decided there that a court of an EU Member State cannot enjoin a party from proceeding in the courts of another Member State. Why? Because EU Member States are bound by the Brussels Convention on Jurisdiction and Enforcement (now the Brussels Regulation) that implies 'mutual trust' and 'equality' between courts all bound by the Convention. Although articulated in an exclusively judicial context, this rationale applies well to arbitration and the New York Convention. Without ignoring that there are some differences, the essence is the same. Like the contracting states of the Brussels Convention, the contracting states of the New York

Convention are all bound by the same rules, in particular Article II(3) of the New York Convention.

What can be done to improve the regime of parallel proceedings?

Although welcome, courts exercising more self-restraint will not suffice to bring about a coherent regime for parallel proceedings. This leads to my third and last question: what can be done to remedy the present unilateral logic when it comes to parallel proceedings? Is it not time 50 years after the conclusion of the founding text of international arbitration to think about a multilateral treaty solution for parallel proceedings?

Some of you may, of course, object, saying, ‘Do not touch the New York Convention’. I do not believe that the New York Convention would disintegrate or vanish if we were to touch it. In any event, provisions on parallel proceedings could be incorporated into a protocol if the New York Convention must remain intact.

One may also object that drafting viable provisions on parallel proceedings is too difficult a venture. This is a more serious, but not a decisive, objection. After all, there is meaningful guidance from many sources on parallel proceedings. For example, there is a wealth of scholarly discussion including concrete guidelines and proposals, there is the 2006 International Law Association report on *lis pendens* with valuable recommendations, and there is the Hague Convention on choice-of-court agreements of 2006, which is helpful because exclusive choice-of-court clauses can be equated with arbitration agreements. In both cases, there is only one forum of competent jurisdiction – the chosen court or arbitral tribunal.

And then one may ask what the content of the rules on parallel proceedings would be. This is, indeed, a good question. The answer would take much longer than the time we have left. Let me simply say that a workable rule would give priority in time to the arbitrator’s decision and provide a limited measure of court control to prevent abuses. The rest is for another day.