

# Litigation & Dispute Resolution

Second Edition

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# Italy

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## Parallel state court and arbitral proceedings: the Italian perspective

A dispute may give rise to parallel proceedings between the same parties and in respect of the same or related disputes before different state courts, a state court and an arbitral tribunal, or different arbitral tribunals.

The parallel proceedings scenarios that are relevant from an Italian law perspective include proceedings in civil and commercial matters pending before: (a) two Italian courts; (b) an Italian and a foreign court; (c) an arbitral tribunal whose seat is in Italy and an Italian or a foreign court; (d) an arbitral tribunal whose seat is outside Italy and an Italian court; and (e) two arbitral tribunals, at least one of which is seated in Italy.

There are a number of reasons why parties may find themselves litigating and/or arbitrating the same or related disputes before two or more state courts and/or arbitral tribunals. For instance, a claimant may institute parallel state court proceedings in different *fora* to maximise the chances of a favourable judgment, or for other tactical reasons. In turn, a prospective or an actual defendant may seise a friendly state court to obtain an injunction aimed at preventing the institution, or the continuation of proceedings before another state court or an arbitral tribunal, or to obtain a judgment declaring an agreement to arbitrate null and void, inoperative or incapable of being performed.

These and other instances underscore the policy concerns behind the general disfavour towards parallel proceedings, i.e., to prevent conflicting decisions on the same or related matters, which could jeopardise the enforcement of a judgment or an award; to limit the scope for oppressive litigation or dilatory tactics; and to avoid duplicative proceedings, which would inevitably result in increased legal costs and other inefficiencies.

State courts and arbitral tribunals enjoy a variety of procedural devices to prevent or discourage the institution or the continuation of parallel proceedings. These include the power of a state court and an arbitral tribunal to:

- (i) Stay or dismiss one of the proceedings, based on: (a) the application of the *lis pendens* and *forum non conveniens* doctrines existing in both civil and common law jurisdictions; (b) Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the “Brussels Regulation”); and (c) international arbitration treaties such as the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (the “New York Convention”) and the 1961 European Convention on International Arbitration (the “Geneva Convention”).
- (ii) Restrain a party from instituting or continuing parallel state court or arbitral proceedings by issuing an anti-suit or anti-arbitration injunction.
- (iii) Resort to *res judicata* rules to address potential conflicting judgments and/or awards.
- (iv) Consolidate parallel proceedings.

This paper provides an overview of the Italian and the EU rules applicable to parallel court proceedings (Section I); the rules governing parallel court and arbitral proceedings in cases in which either the state court seised of the action is an Italian court or the seat of the arbitration is in Italy (Section II); and the rules applicable to parallel arbitral proceedings where the seat of at least one arbitration is in Italy (Section III).

## I. Parallel state court proceedings

The rules governing parallel proceedings pending before two or more Italian courts are found in Articles 39 and 40 of the Italian Code of Civil Procedure (“c.p.c.”), depending on whether the proceedings involve the same or related actions (1). If parallel state court proceedings are brought before an Italian court and the state court of another EU Member State, Articles 29-34 of the Brussels Regulation apply *in lieu* of the Italian rules of civil procedure (2).

### 1. Parallel proceedings pending before Italian courts

#### (a) *Lis pendens*

Under Italian law, the court seised of an action in a matter that is already pending before another (Italian) court must dismiss such action and allow the proceedings filed with the court first seised to continue (“first-in-time rule”). Specifically, pursuant to Article 39, first paragraph, c.p.c.:

“If the same action is brought before different courts, the court second seised shall, at any stage of the proceedings, also by its own motion, declare the *lis pendens* and dismiss the action.”

For the purposes of Article 39, first paragraph, c.p.c., a court is normally deemed seised when the defendant is served with the document instituting the proceedings (*atto di citazione*). There are cases, however, where proceedings are deemed pending when the document instituting the proceedings is first lodged with the relevant state court (*ricorso*) (e.g., labour law disputes). The criteria to determine which court is the first seised will therefore depend on the subject matter of the proceedings and the relevant procedural rules.

A dismissal pursuant to Article 39, first paragraph, c.p.c. requires that the parallel proceedings involve the same parties, the same cause of action (*causa petendi*), and the same relief (*petitum*) (“triple identity test”). In addition, the proceedings must be pending before the same judicial authorities (e.g., civil as opposed to administrative courts) and at the same level of review (e.g., first instance as opposed to appellate or cassation review). In contrast to, and unlike the Brussels Regulation regime discussed below, under Italian law, there is no requirement that the dismissal of the action by the state court second seised be preceded by a finding that the other court has jurisdiction to adjudicate the dispute.

#### (b) Related actions

If the triple identity test is not satisfied, but the parallel proceedings are nonetheless related, the court second seised, or the court before which the related action was brought, shall order the consolidation of the proceedings pending before it with those filed with the court first seised or before which the main action is pending. Specifically, pursuant to Article 40, first paragraph, c.p.c.:

“If two or more related actions are pending before different courts, and it is proper for them to be disposed of in a single proceeding, the court before which the related action was brought shall order the parties to consolidate it with the main action or with the proceedings pending before the court first seised within a set time-limit.”

For the purposes of Article 40, first paragraph, c.p.c., two actions are deemed related if they are so closely connected that it is expedient to address them together in order to avoid a risk of irreconcilable judgments. This is typically the case when two separate court proceedings are instituted by different claimants against the same defendant with respect to the same cause of action, but the claimants are seeking a different relief (e.g., a car accident involving two individuals each of whom suffered a harm).

### 2. Parallel proceedings pending before courts in EU Member States

As set out in Recital 21 of the Brussels Regulation:

“In the interests of the harmonious administration of justice, it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending.”

(a) *Lis pendens*

Pursuant to Article 29(1) and (3) of the Brussels Regulation:

“1. [W]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, 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.

[...]

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.”

The criteria to identify the court first seised are found in Article 32 of the Brussels Regulation. These are similar to those provided under Italian law and apply in relation to both *lis pendens* and related actions.

However, the rules on *lis pendens* in the Brussels Regulation differ from Article 39, first paragraph, c.p.c. on at least three key points.

First, unlike Article 39, first paragraph, c.p.c., Article 29(1) of the Brussels Regulation does not require that the court second seised “dismiss” the action pending before it, but simply provides that such court “stay” it until the jurisdiction of the court first seised is established. The rationale behind the rule set forth in Article 29(1) of the Brussels Regulation is to avoid forcing a claimant to institute new proceedings if the court first seised declines jurisdiction. This issue does not arise in the context of Article 39, first paragraph, c.p.c. because the ruling by which the court second seised dismisses the action pending before it may be challenged directly before the Supreme Court, and if the challenge is successful, the case is remanded before the court that erroneously dismissed the action (Article 49, second paragraph, c.p.c.). There is no analogous mechanism under the Brussels Regulation.

Second, the notion of *lis pendens* in the Brussels Regulation is broader than that existing under Italian law. Specifically, the application of the first-in-time rule contemplated in the Brussels Regulation does not require that the same relief be sought in the parallel proceedings. Thus, Article 29(1) of the Brussels Regulation applies so long as the parties in the parallel proceedings are the same, and the proceedings relate to the same cause of action, whether or not the relief sought by the parties is the same in both proceedings.

Third, the Brussels Regulation rules on *lis pendens* are “[w]ithout prejudice” to Article 31(2) and thus do not apply when the parties have agreed to a forum selection clause under Article 25 of the Brussels Regulation. Specifically, pursuant to Article 31(2) of the Brussels Regulation:

“Where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.”

As pointed out in Recital 22 of the Brussels Regulation, the *lis pendens* rule carve-out with respect to forum selection clauses is intended to “enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics [...] in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise.” In other words, the carve-out is intended to prevent a prospective defendant from relying on the first-in-time rule set forth in the Brussels Regulation, in order to institute proceedings before another competent Member State court in breach of a forum selection clause.

## (b) Related actions

Unlike Article 40, first paragraph, c.p.c., the Brussels Regulation does not contemplate a mechanism for the consolidation of related actions pending before different Member State courts. Specifically, pursuant to Article 30(1) of the Brussels Regulation, “[w]here related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings”.

A discretionary stay is therefore the only procedural device available to Member State courts to guarantee that conflicting decisions are not rendered in related proceedings. This rule is without

prejudice to the provisions of the Brussels Regulation which allow a Member State to refuse recognition and enforcement of a judgment rendered in another Member State in case of irreconcilable judgments (e.g., pursuant to Article 45(1)(c) of the Brussels Regulation).

## II. Parallel court and arbitration proceedings

The rules that are relevant for addressing issues concerning parallel state court and arbitral proceedings are found in the *lex fori* (i.e., the law of where the state court proceeding is pending) and the *lex arbitri* (i.e., the law of the seat of the arbitration). Theoretically, a national legal system can approach the issues relating to parallel state court and arbitral proceedings according to three different models:

- First, by not providing any *lis pendens* rule or other procedural devices to prevent the institution or the continuation of parallel state court and arbitral proceedings.<sup>1</sup> This approach may favour forum shopping, abusive litigation techniques and the risk of conflicting decisions on the same or related matters.
- Second, by making the rules on *lis pendens* and related actions in state court proceedings applicable also to parallel state court and arbitral proceedings.<sup>2</sup> This approach, too, may favour abusive litigation techniques, insofar as the *lis pendens* first-in-time-based rule incentivizes a prospective defendant to “rush to court” in an effort to frustrate the other party’s ability to institute arbitral proceedings under a valid arbitration agreement.
- Third, by requiring the state court seized of an action in respect of a matter for which there exists an arbitration agreement to stay the proceedings before it in order to allow the institution, or the continuation of the arbitration. This is the rule set forth in international arbitration conventions and the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”).<sup>3</sup> This approach should discourage forum shopping and abusive litigation techniques. It also accords with the parties’ agreement to arbitrate, and with the universally accepted principle that an arbitral tribunal has inherent jurisdiction to adjudicate its own jurisdiction (*kompetenz-kompetenz*).

Insofar as Italian law is concerned, the rules on *lis pendens* and related actions applicable to two or more parallel court proceedings (Articles 39 and 40 c.p.c.) do not apply to parallel court and arbitral proceedings. Parallel court and arbitral proceedings are governed by Articles 817 and 819 *et seq.* c.p.c., which apply whenever:

- (i) The seat of the arbitral proceedings is in Italy, and parallel state court proceedings are also pending in Italy.
- (ii) The seat of the arbitral proceedings is outside Italy, and parallel state court proceedings are pending in Italy.

Insofar as EU law is concerned, the Brussels Regulation does not apply to arbitration (Article 1(2)(d) of the Brussels Regulation), and thus the *lis pendens* and other rules set forth therein do not apply to parallel state court and arbitral proceedings. It follows that any issue arising out of parallel proceedings pending before the court of, and an arbitral tribunal whose seat is in, a Member State are governed by the *lex fori* and the *lex arbitri* of the relevant Member State(s).

Below we consider the issues arising out of parallel court and arbitral proceedings in Italy from the perspective of the state court (1) as opposed to that of the arbitral tribunal (2).

### 1. The state court perspective

Italy is a Contracting State of the New York Convention. Pursuant to Article II.3 thereof:

“[T]he Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an [arbitration] agreement [...] shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”<sup>4</sup>

The application of Article II.3 of the New York Convention requires that:

- (i) The defendant challenge the jurisdiction of the state court on the ground that there exists between the parties a valid and enforceable arbitration agreement.
- (ii) The state court does not find the arbitration agreement to be null and void, inoperative or incapable of being performed.

The application of these two requirements varies from country to country with respect to both the time limits within which the defendant may challenge the state court jurisdiction, and the extent to which the court must find that the arbitration agreement is valid, operative and capable of being performed (e.g., whether a *prima facie* analysis would suffice). It will also vary depending on the law applicable to the agreement to arbitrate, which may differ from the law applicable to the main agreement and the *lex arbitri*.

The Model Law<sup>5</sup> and several national arbitration statutes,<sup>6</sup> including Italian arbitration law, mirror the provisions of the New York Convention. Specifically, pursuant to Article 819-ter, first and third paragraphs, c.p.c.:

“The jurisdiction of an arbitral tribunal is not affected by the institution of parallel state court proceedings concerning the same or related matters. The decision by the court to decline or uphold its jurisdiction, when an arbitration agreement has to be considered, can be appealed [before the Supreme Court] pursuant to Articles 42 and 43 c.p.c. A challenge to the court’s jurisdiction on the ground that an arbitration agreement exists shall be made, at the latest, in the statement of defense. Failure to raise the challenge amounts to a waiver of the arbitration agreement with respect to the dispute pending before that court only.

[...]

Pending arbitral proceedings, a claim as to the non-existence or ineffectiveness of an arbitration agreement cannot be brought before a court.”

Thus, consistently with the New York Convention, the institution of proceedings before an Italian court in respect of a matter for which there exists an arbitration agreement does not deprive the arbitral tribunal – whether seated in Italy or abroad – of its jurisdiction. Moreover, if arbitral proceedings are already pending, no separate claim related to the existence or validity of an arbitration agreement can be brought before a state court.

Pursuant to Article 819-ter, first paragraph, c.p.c., the defendant in the state court proceedings has the burden to challenge, in its first written submission, the state court jurisdiction in favour of the arbitral tribunal.<sup>7</sup> The defendant’s failure to raise a jurisdictional challenge would normally amount to a waiver of the agreement to arbitrate. However, it is important to note that this waiver only applies with respect to the specific dispute brought before the state court. Thus, the arbitral tribunal should decline jurisdiction with respect to the dispute pending before the state court, but the waiver would not affect either party’s ability to rely on it in connection with another dispute at a later stage.

The court’s decision to decline or uphold its jurisdiction may be challenged directly before the Supreme Court, pursuant to Article 42 or 43 c.p.c. (*Regolamento necessario di competenza* or *Regolamento facoltativo di competenza*, depending on whether the court’s decision is challenged separately or together with the decision on the merits of the dispute.) If the Supreme Court upholds the court’s jurisdiction, the case is remanded before the court that erroneously dismissed the action (Article 49, second paragraph, c.p.c.).

In sum, Italian law provides for a mechanism aimed at preventing parallel court and arbitral proceedings, which centers on a defendant’s challenging the state court’s jurisdiction, in state court proceedings, in favour of the arbitral tribunal. If that challenge is upheld, the state court must decline jurisdiction, and arbitral proceedings would continue, without prejudice to the arbitral tribunal’s ability to find that the arbitration agreement is invalid. If, however, no jurisdictional challenge is raised in the state court proceedings, the agreement to arbitrate will normally be deemed waived, and the arbitral tribunal will likely decline its jurisdiction in favour of the state court.

If, notwithstanding Article 819-ter c.p.c., the state court and the arbitral proceedings continue to run in parallel, the potential conflicting decision between the state court and the arbitral tribunal will have to be addressed in the context of annulment proceedings or an appeal of the state court decision pursuant to Article 829, first paragraph, No. 8 c.p.c., or Article 395, No. 5, c.p.c. Specifically, pursuant to Article 829, first paragraph, No. 8, c.p.c., an award may be set aside, *inter alia*, if it is contrary to a previous final award between the same parties; conversely, pursuant to Article 395, No. 5, c.p.c., a



judgment may be annulled if it is contrary to “*a previous judgment having res judicata effect between the parties*”. Since, under Italian law, an award has the same value as a judgment rendered by a state court (Article 824-*bis* c.p.c.), one could argue that a court decision contrary to a previous final award may be appealed under Article 395, No. 5, c.p.c., although there appears to be no specific authority on this point.

## 2. The arbitral tribunal’s perspective

The arbitral tribunal is bound by the rules applicable to the arbitral proceedings chosen by the parties (either directly, in the arbitration agreement, or by reference to the rules of an arbitral institution) and the *lex arbitri*.

Virtually all the arbitration rules of major arbitral institutions, as well as the UNCITRAL Rules, recognise the *kompetenz-kompetenz* doctrine. For instance, Article 6(3) of the ICC Rules states:

“If any party against which a claim has been made does not submit an Answer, 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 or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal [...]”<sup>8</sup>

The *kompetenz-kompetenz* doctrine is also recognised in the Model Law, and in many domestic arbitration statutes, including Italian arbitration law. Specifically, Article 817, first paragraph, c.p.c. states:

“If the validity, content or scope of the arbitration agreement, or the proper constitution of the arbitral tribunal, is challenged during the arbitral proceedings, the arbitral tribunal has the power to rule on its own jurisdiction.”<sup>9</sup>

Critically, pursuant to Article 817, second paragraph, c.p.c., this rule applies “*even if the powers of the arbitral tribunal are challenged in any venue and on any ground during the arbitration*” (e.g., before a state court).

As with jurisdictional challenges brought with respect to the state court jurisdiction under Article 819-*ter*, first paragraph, c.p.c., a plea that the arbitral tribunal does not have jurisdiction must be raised no later than when the statement of defence is submitted. Specifically, pursuant to Article 817, second paragraph, c.p.c.:

“[T]he party failing to raise a jurisdictional objection with respect to the constitution of the arbitral tribunal because the arbitration agreement is non-existent, invalid or inoperative in the statement of defence may not, on this basis, challenge an arbitral award.”<sup>10</sup>

There are, however, three important exceptions to this rule:

- First, the time limit does not apply where the question of the validity of the arbitration agreement relates to the arbitrability of the dispute referred to arbitration (Article 817, second paragraph, last sentence, c.p.c.). Indeed, issues of arbitrability of the dispute may be raised at any stage of the arbitral proceedings, including in annulment proceedings (Article 829, first paragraph, No. 4, second part, c.p.c.) and to resist the recognition and enforcement of the award (Article 840, fifth paragraph, No. 1, c.p.c., and Article V.2(a) of the New York Convention).
- Second, Article 817, third paragraph, c.p.c. allows a party to object that the relief sought by the other party does not fall within the scope of the arbitration agreement “*during the arbitration proceeding*”. Unless the relevant objection is raised during the arbitral proceedings, and provided that it does not deal with a non-arbitrable matter, any decision by the arbitral tribunal that falls outside the scope of the arbitration agreement may not be challenged in annulment proceedings (Articles 817, third paragraph, and 829, first paragraph, No. 4, first part, c.p.c.). In contrast, it is arguably possible to resist recognition and enforcement of an award in Italy based on an award deciding matters that are outside the scope of the arbitration agreement, even if the relevant objection was not raised during the arbitral proceedings (Article 840, third paragraph, No. 3 c.p.c., and Article V.1(c) of the New York Convention).



- Third, if the arbitration clause is “vexatious”, pursuant to applicable EU consumer law, which is directly applicable in Italy, the arbitral tribunal may, on its own motion, decline its jurisdiction.<sup>11</sup>

Another issue that is relevant when encountering potential or actual parallel court and arbitral proceedings concerns the power of an arbitral tribunal to address matters which, while they themselves fall outside the scope of the arbitration agreement or are otherwise not arbitrable, are nonetheless pertinent for reaching a decision on the subject matter of the dispute. The basic rule is contained in Article 819 c.p.c., which reads as follows:

“The arbitral tribunal has the power to decide, without *res judicata* effect, all issues that are necessary to adjudicate the dispute subject matter of the arbitration, whether arbitrable or not, unless the law requires those issues to be adjudicated with *res judicata* effect.

Upon request of a party, the decision on a matter which is necessary to decide other matters in the arbitration has *res judicata* effect if it relates to an arbitrable matter. If these matters are outside the scope of the arbitration agreement, the *res judicata* effect of the decision of the arbitral tribunal requires the consent of all parties.”

In other words, an arbitral tribunal with a seat in Italy is entitled to address, *incidenter tantum* and without *res judicata* effect, any issue that is material for the final adjudication of the dispute, irrespective of whether such issue is arbitrable or falls within the scope of the arbitration agreement.

There are cases, however, where a non-arbitrable matter that is relevant for the adjudication of a dispute must be decided with *res judicata* effect (e.g., an issue concerning the status of an individual) or the matter is already pending before a court other than a civil court (e.g., before a criminal court or the Constitutional Court). In these circumstances, an arbitral tribunal seated in Italy must stay its own proceedings and wait for the resolution of the preliminary issue to be decided with *res judicata* effect. Specifically, pursuant to Article 819-*bis* c.p.c., the arbitral tribunal must stay the arbitral proceedings if:

- (i) The matter in the arbitration depends on, and will be determined by, the outcome of a related criminal proceeding.
- (ii) The arbitral tribunal must decide a non-arbitrable issue for which the law requires a decision with *res judicata* effects (e.g., an issue concerning the status of an individual or an issue of fraud of a public deed).
- (iii) The arbitral tribunal has seised the Constitutional Court to decide on the compatibility with the Italian Constitution of a statutory provision that is relevant for the adjudication of the arbitration.
- (iv) One of the parties relied on a state court judgment which is under appeal.

Pursuant to Article 819-*bis*, second paragraph, c.p.c., once the issue giving rise to a stay of the arbitral proceedings has been decided, each of the parties may request that the arbitral tribunal resume the proceedings within the time limit set by the arbitral tribunal, or within one year from the date of the decision.

### III. Parallel arbitral proceedings

Unlike parallel court and arbitral proceedings, there is no specific international arbitration convention or domestic arbitration statute addressing the issues arising out of parallel arbitration proceedings.

However, the inconvenience of having to face related parallel arbitral proceedings might be mitigated by accurately choosing the rules applicable to the arbitral proceedings. In fact, in some instances, these rules contemplate mechanisms that would allow the consolidation of the parallel arbitrations.

For instance, pursuant to Article 10(1) of the ICC Rules, “[t]he Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration”.

Article 10(1) of the ICC Rules contemplates three alternative conditions under which the ICC Court may consolidate parallel proceedings, namely: (i) the parties’ agreement to consolidation; (ii) the existence of multiple claims under the same arbitration agreement; or (iii) the existence of a dispute arising in connection with the same legal relationship, but the claims in the arbitrations are made under separate arbitration agreements, provided that these agreements are compatible and the arbitrations are pending among the same parties.

Article 22(3) of the Rules of the Chamber of Arbitration of Milan contemplates a similar provision: “[w]here multiple proceedings are pending before the Arbitral Tribunal, the Tribunal may order their consolidation, if it deems them to be connected.”

Although Italian law does not directly govern parallel arbitration proceedings, Italian arbitration law addresses one of the possible consequences arising out of these proceedings, i.e., the risk of conflicting awards.

Pursuant to Article 829, first paragraph, No. 8, c.p.c., an award issued by an arbitral tribunal whose seat is in Italy may be challenged when it “is contrary to a previous award, subject to no further appeal [...] provided that the award [...] has been filed during the proceedings”. The previous award, however, must have been rendered between the same parties and with respect to the same matter.

Moreover, the New York Convention contains a ground for the refusal of recognition and enforcement of an arbitral award which potentially comprises cases of conflicting awards issued in parallel arbitration proceedings rendered between the same parties and with respect to the same matter. Pursuant to Article V(2)(b) of the New York Convention, “recognition and enforcement of an arbitral award may also be refused if [...] [it] would be contrary to the public policy” of the country in which the recognition and enforcement is sought. Although there is no clear consensus on this issue, it may be argued, at least in certain countries, that the need to avoid conflicting decisions is a public policy issue that could justify refusal of recognition and enforcement of an award.

\* \* \*

## Endnotes

1. International Law Association, ‘Final Report on Lis Pendens and Arbitration’ (2006), para. 4.6.
2. *Ibid.*
3. As noted, this is also the rule set out in the Brussels Regulation with respect to forum selection clauses.
4. Italy is also a Contracting State of the Geneva Convention, which provides for a similar rule. Pursuant to Article VI(3) of the Geneva Convention:
 

“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.”
5. Article 8 of the Model Law.
6. See, e.g., Article 1448 of the French Code of Civil Procedure; Articles 7 and 186 of the Swiss Private International Law Act; and Section 9 of the 1996 English Arbitration Act.
7. Likewise, pursuant to Article VI(1) of the Geneva Convention:
 

“[P]lea as to the jurisdiction of the court [...] on the basis of the fact that an arbitration agreement exists shall, under penalty of estoppel, be presented by the respondent before or at the same time as the presentation of his substantial defence.”
8. Likewise, Article 23 of the UNCITRAL Rules provides: “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.”
9. Article 16(1) of the Model Law provides: “The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.”
10. Likewise, pursuant to Article V(1) of the Geneva Convention:
 

“[t]he party which intends to raise a plea as to the arbitrator’s jurisdiction based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed shall do so during the arbitration proceedings, not later than the delivery of its statement of claim or defence relating to the substance of the dispute.”
11. *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, C-168/05 [2006] ECR I-10421.

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