Kluwer Arbitration Blog

2024 PAW: Arbitration, Parallel Proceedings, and Conflicts of Decisions: A Comparative Perspective

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As part of Day 3 of the 8th edition of the Paris Arbitration Week ("PAW"), several arbitration networks for young practitioners and students, including the *Comité français de l'arbitrage* ("CFA-40"), the Arbitration Youth Forum ("AFM below 40"), the Italian Under 40 Arbitration Group ("AIA-Arblt 40 below"), the Swiss Arbitration Association below 40 ("ASAb40"), the *Club Español e Iberoamericano del Arbitraje* ("CEIA-40"), the International Chamber of Commerce Young Arbitration and ADR Forum ("ICC YAAF"), the International Centre for Dispute Resolution Young & International ("ICDR Y&I"), the Young International Arbitration Group ("YIAG"), the Netherlands Arbitration Institute ("NAI") Young Arbitration Practitioners, the Paris Very Young Arbitration Practitioners ("PVYAP"), the Young Austrian Arbitration Practitioners ("YAAP"), the Young Canadian Arbitration Practitioners ("YCAP"), the Young Istanbul Arbitration Centre ("ISTAC"), and the Young Romanian Arbitration Practitioners ("YRAP"), co-organised an event entitled "Arbitration, Parallel Proceedings and Conflicts of Decisions: A Comparative Perspective."

The panel was moderated by Judith Sawang (Ashurt) and composed of Professor Claire Debourg (Université Paris Nanterre), Holger Jacobs (Allen & Overy), Giovanni Zarra (Hogan Lovells), Luis Fernando Rodríguez (Wonders & Co), and Stephanie Forrest (Latham & Watkins).

The event was held under the Chatham House Rule; hence, this blogpost offers only a general overview of the issues discussed without revealing the identity or affiliation of any of the speakers.

Parallel Proceedings

Parallel proceedings can refer to a variety of scenarios both in international commercial and investment treaty arbitrations. It can represent proceedings conducted concurrently between identical parties based on a different agreement, or between different parties based on the same contract. Examples include proceedings on jurisdictional matters or on the merits pending simultaneously before an arbitral tribunal and a state court, or before distinct arbitral tribunals seated in different jurisdictions. An example in investment arbitration is the occurrence of separate proceedings being brought against a State by unrelated investors for the same or comparable measures.

The panel stressed that the risk of conflicting and contradicting decisions could undermine the credibility and legitimacy of international arbitration. The multiplicity of stakeholders, laws, and forums could not only lead to the inefficient use of legal resources, but also to the use of multiple forums. It was emphasised that the use of parallel proceedings represented a challenge to the rule of law since it raised issues with the finality of arbitral awards. The concerns remain even greater when the parallel proceedings lead to conflicting decisions.

Preventive and Curative Measures

Considering the large variety of scenarios involving parallel proceedings, it was acknowledged that there was simply no uniform solution to the occurrence of parallel proceedings. Nonetheless, the panellists shared with the audience preventive and curative measures which aim to avoid or remedy to parallel proceedings.

Clear Arbitration Agreements

The first preventive measure discussed by the panel was the importance for dispute resolution clauses to be well drafted. Even if arbitration practitioners are not necessarily involved in the drafting of arbitration agreements, the importance to let colleagues of other practice areas aware of the serious impact that this type of clause may have once a dispute has arisen was emphasized. While the language used in arbitration agreements is crucial, other elements must also be taken into consideration by the drafter, such as the inclusion of the same dispute resolution mechanism in projects where there is a multiplication of contracts and sub-contracts.

Joinder and Consolidation

As part of the other measures available amid parallel proceedings, the panel discussed the use of procedural mechanisms such as consolidation and joinder. Even if arbitration institutional rules may have specific requirements, the use of joinder is meant to allow a third-party to join an existing arbitration proceeding. The underlying issue of consent among the users and the parties joining the arbitration proceedings was accentuated by the panellists. The efficacity of this tool therefore depends on the willingness of the parties.

With regards to the other procedural mechanism, consolidation refers to the capacity to combine different arbitration proceedings. Once again, as a cornerstone principle of arbitration, consent remains important. However, it was pointed out that depending on the applicable arbitration rules, consent might be considered less relevant for the consolidation of arbitrations than for the joinder of additional parties. For example, consent has not been included as a mandatory requirement for the consolidation of arbitration in the last 2021 ICC Arbitration Rules when claims are made under the same agreements (Article 10(b)) or otherwise where arbitration agreements are found compatible and the same parties are involved with the same legal relationship (Article 10(c)).

If none of these procedural mechanisms is an option for parties, other agreements can still be reached with the assistance of the arbitral tribunal. For example, separate awards can be issued by the same tribunal, leading to the avoidance of contracting decisions, the preservation of the confidentiality of the parties and the dispute, and the guarantee of consistency between the decisions.

Stay of Proceedings by Arbitral Tribunals and National Courts

As part of other curative measure, the panel also discussed the use of stay of proceedings, both rendered by arbitral tribunals or by national courts. The stay of proceedings is a ruling made either by a national court or by an arbitral tribunal to pause the ongoing proceedings.

The panellists shared relevant points of discussions for arbitral tribunals faced with a request for a stay of the arbitral proceedings. Indeed, arbitral tribunals should take into consideration the authority conferred to them to pause proceedings, the impact on the efficiency of the proceedings, and the avoidance of undue delay, as well as the interest of justice and the respect of the fundamental right to due process. It was also stressed that there was a shared duty to avoid undue delay held by both the arbitral tribunal and the parties. This responsibility can be found either in the arbitration rules or in the national law.

Specific national tools may also be available to parties faced with parallel proceedings. The panellists notably shared with the audience the possibility to obtain before German courts a declaration in which the court determines the admissibility or inadmissibility of the arbitration proceedings (Section 1032(2) of the German Code of Civil Procedure). This tool is only available at an early stage of the proceedings for both commercial and investment state arbitrations, namely at any moment until the constitution of the tribunal. Since German ordinary courts of law have general jurisdiction, it is possible to initiate this type of proceedings even if no German party is involved in the proceedings. Foreign practitioners should therefore be aware that even if there are some limits regarding jurisdiction, German courts will find themselves competent if it can be argued that the enforcement of the arbitral award could be contemplated.

Anti-Suit Injunctions

Discussions were also held about the use of anti-suit injunctions, a legal order issued by courts to prevent a party to pursue arbitral proceedings or court proceedings in another jurisdiction. The panel highlighted that the use of this legal mechanism was controversial in certain jurisdictions, in particular civil law jurisdictions. Among the arguments used to dispute the use of this type of injunctions, the most popular ones are the breach of the other state jurisdiction and the infringement of the principle of *kompetenz-kompetenz*.

The debate was invigorated following a series of recent decisions in England considering the availability of anti-suit injunctions for foreign-seated arbitration proceedings. In *UniCredit Bank GmbH v RusChemAlliance LLC*, the English Court of Appeal decision granted an anti-suit injunction in support of an ICC arbitration seated in Paris where court proceedings had begun in Russia. The Russian Arbitrazh Court found that the arbitration agreement was not enforceable according to Article 248.1 of the Russian Arbitration Procedural Code, which provides exclusive jurisdiction to Russian courts over disputes stemming from foreign sanctions.

The English Court found that the arbitration agreement was governed by English law which gave the court sufficient interest to issue an anti-suit injunction. The Court of Appeal established that even if anti-suit injunctions were not available in France, French courts would enforce an anti-suit injunction rendered by a foreign court. The English Court also referred to its own obligations under the New York Convention, namely that national courts of Contracting Parties have an obligation to refer parties to arbitration unless the arbitration agreement is found to be “null and void, inoperative, or incapable of being performed” (Article II(3) of the New York Convention).

Final Remarks

The panellists agreed that parallel proceedings were a growing problem which would not disappear in the foreseeable future. As key take aways for arbitral tribunals, it was shared that the latter should not be afraid to get more information and to explain in full details its reasoning when rendering a decision. It was also noted that counsel should always be prepared to the eventuality of parallel proceedings.

Since there is a variety of possible scenarios, the panel noted that there is also a variety of solutions. While this does not offer definite guidance on the course of action, counsel had to be creative and strategic by ensuring a tailored response in each individual case.

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