LIS ALIBI PENDENS IN INTERNATIONAL ARBITRATION

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ABSTRACT

When a case involving the identical claim is already ongoing before an adjudicating authority in another jurisdiction, how should State courts and arbitral tribunals treat it. This issue of international lis pendens has generated debate for a very long time. financial globalisation has sparked a dramatic rise in the number of international arbitrations, which has brought forward new challenges including venue shopping and the relationship between arbitration and litigation. Parallel procedures and the many responses thereto over the past ten years have been among of the international arbitration community's most talked-about issues. Researchers and practitioners have worked hard in recent years to come up with sound answers to the lis alibi pendens issues that now plague arbitration. There may be concurrent hearings between several adjudicating bodies. Nevertheless, because it is well recognised that the lis pendens doctrine has rarely been defined, the research looked to academic publications and case law to ascertain its acceptance and content. It is crucial to remember that the lis pendens was initially thought of as a tool created to control domestic parallel court procedures. The paper comes to a conclusion by making the case that, according to civil law tradition, lis pendens is recognised as a separate concept in international commercial arbitration because it shares the same claim of being heard in many venues at once. In contrast, lis alibi pendens in common law jurisdictions is not recognised as a doctrine but rather as one of numerous contributing elements. Both civil and common law need identity between various parties and their claims to constitute lis pendens in two proceedings, and therefore, they have a conform and deep understanding of the concept.

INTRODUCTION

The legal lexicon's roots of the English notion "arbitration" are the Greek words "Diaitisia" and the Greek legal culture emphasised arbitration as the most effective dispute resolution method between 330 and 90 BC. useful social justice tool to resolve any property law-related disputes (Lew et al., 2003). When the Roman Empire and the Greeks came into touch, Greek arbitration and Roman diplomacy were combined to provide the first interstate legal standard for arbitration. Roman Republic Law's sophistication has a well-documented history in ancient law, and it paved the path for modern legal systems today. Real property might be legally owned and physically possessed separately under Roman law, known as "dominium proprietas," or rights to property. The Roman legal system was entirely reliant on the rule of law.

In the social “equity” or equality concept of Aristotle, the Greek legal philosophy is rooted deeply. Aristotle appropriately defines the saying of equity within arbitration’s parlance. It says, “it is better to prefer arbitration from judicial determination; because the arbitrator takes equity into consideration, whereas the judge solely the law. Furthermore, it is for this reason that an arbitrator appointed, that is, to apply equity.” In the parties' legal principle to the arbitration, contemporary international arbitration is firmly rooted, which is submitting fully so that a dispute settled via arbitration in a third forum. To the enforcement and recognition of the award, the parties also agree. International arbitration’s topic is complicated and vast. Arbitration has been confined into six broad categories by the legal scholars: 1) commercial arbitration, 2) ad hoc arbitration, 3) international arbitration, 4) non-commercial arbitration, 5) domestic arbitration, and 6) institutional arbitration. The doctrine of internal comity is related to the lex loci legal principle in private international law. International comity is a topic of international diplomacy that pertains to other states, legal systems, and legally non-binding deference. In cases governed by the lis alibi pendens doctrine, international arbitration presents complications, according to the literature. Due to the forum clause being excluded in arbitration agreements, these complications arose when the first-time rule was broken. When a court declines to exercise its jurisdiction over a case that is pending in another jurisdiction, the Lis Alibi Pendens doctrine emerges under private international law in matters involving international arbitration. If the case's facts are different, the Lib Alibi Pendens doctrine is inapplicable. The research would answer the following inquiries: What are the principles of arbitration and their legitimacy under international law? How is arbitration affected

by the practises of common law and civil law traditions? What function does the Lis Pendens doctrine serve in cross-border business arbitration? What obstacles do Lis Pendens, an increasing phenomenon, pose to international commercial arbitration? What might these problems be resolved by? The following goals and objectives would be covered by the study: To determine when parallel processes actually occur in international community arbitration, research the issue of parallel proceedings and the adoption of Lis Pendens in the common and civil law, respectively. This, to some extent study is twofold; it would embark upon presenting the parallel proceedings and lis pendens' issue through overall perspective while keeping in view a party-oriented approach.

SIGNIFICANCE

In this paper, an attempt has been made to contrast the civil and common law systems' fundamentally distinct approaches to lis pendens. Given the significant influence both traditions have had on international arbitration, this comparison can be deemed to be extremely intriguing. It is asserted in connection with this that the comparison won't focus on one or There aren't many countries with a civil or common law tradition, and it would also assist to show which tradition they are a part of. In other words, the study would cover two legal specialties and provide insight into two or more jurisdictions. Beginning with a basic standpoint on "common law tradition" and "civil law tradition," examples from various nations will be used to illustrate the points.

Many research use a descriptive approach to problem presentation, which later aids in the explanation of a solution to the problems. To address the issues and examine international arbitration at the national, institutional, and global levels, the current research has adopted a comparative approach to problem analysis. levels on a global scale. On international arbitration and international processes, a tonne of literature has been written. Such information would assist the researcher in carrying out this study.

Some Fundamental Features of Arbitration

Arbitration consists of "When two or more parties cannot resolve a disagreement among themselves, they agree that one or more private parties will do so on their behalf through arbitration, provided that the arbitration process is given a fair chance to proceed. It will not be

resolved through negotiation, mediation, or any other type of compromise, but by a decision that all parties must abide with." (2009) Garner It is asserted that arbitration is a process for resolving a disagreement between two parties who have entered into a contract. It is resolved by the arbitral tribunal using a binding and conclusive decision-making process, and the arbitral tribunal is made up of one or more arbitrators (Garner, 2009). while retaining awareness such a brief description, it is easy to identify some of Arbitration's fundamental features. First, it is essential to note that Arbitration plays its role as an alternative in formal court proceedings.

The parties have also agreed to remove the national court's jurisdiction from the arbitration agreement. Second, because the hearing is non-governmental, it is seen as a private tool for resolving disputes. It is either chosen by the parties or by an arbitration organisation. Third, the tribunal's ruling would be legally conclusive and final assessment of the rights and duties of the parties. According to the most important and widely accepted party autonomy principle, the parties' freedom to control the arbitration process through an agreement is known as its unique feature to the parties. The concept of arbitration leaves opens the question of whether or not arbitration is considered worldwide.

Arbitration that is classified as international can be easily distinguished from national or exclusively local arbitration (Rush, 1994). The way that academics see the concept of internationality has been modified using three different ways. The first strategy is based on the dispute's a transnational element is present in the contract, the arbitration is viewed as being international, or the parties send a dispute to the International Chamber of Commerce (ICC).

The second strategy, on the other hand, is purely focused on the nationality of the parties. Arbitration is supposed to be international rather than national if a party's nationality differs from the country in which its business is located. In terms of the third strategy, it can be described as a combination of the first two approaches and can also be called an adopted (George, 2017).

Arbitration does not now exist, but it eventually hinges on being permitted by national law. Additionally, arbitration is regarded as consensual, which means that in order for it to take place, the parties must first agree to it. There is no legal justification for parties to engage in arbitration. It has been argued that "national and international law must recognise the arbitration agreement

for it to have legal status, and for the ultimate arbitral award to follow". International treaties, conventions, laws, and institutional arbitration norms all have provisions governing arbitration. International conventions and treaties have been signed by powerful trading nations in order to promote foreign investment and trade.

Principle of Lis Pendens

A forum's complexity may rise if the arbitration is based on the concept of international comity in several jurisdictions. The principle of lis pendens is well established in the civil procedure rules of most countries, and [also] applies in arbitration proceedings governed by the Swiss Arbitration Act, according to a 2001 decision by the Swiss Federal Supreme Court in the case of Fomento de Construcciones y Contratas S.A. v. Colon Container Terminal S.A. (Redfern and Hunter, 2004). Jurisdictions like the City of Singapore and London acknowledge the doctrine of lis pendens in their arbitration's forum statutes. The lis pendens theory supports the 1958 New York Convention for Arbitration. UNCITRAL, the United Nations Commission on International Trade Law, and the New York Convention of 1958 International Trade Law Convention on the Recognition and Enforcement of Foreign Arbitral Awards. If there are jurisdictional issues between the court and an arbitration body, the lis pendens doctrine must be followed (Lewis, 2016). The lis pendens doctrine permits the court to halt its proceedings in favour of the arbitration panel. The lex fori principle dictates that this is the only way to continue the proceedings. If lex foxi is applicable and the arbitration renders the Agreement void and null, the Court's procedures shall control.

Lis pendens serves a crucial function in both traditions that deal with simultaneous processes, but it serves different purposes in each tradition to stop parallel proceedings. There is no single definition of lis pendens, and even fewer rules have been universally accepted for how to apply it, making the situation complex. An effort will be made in this paper to identify the problems with concurrent processes in international arbitration. For instance, the common law tradition has Lis pendens and the first-in-time rule, while the civil law tradition uses the triple identity test.

1) The forum uncomfortable doctrine is thought to include the idea of lis pendens

2) Lis pendens is a distinct doctrine that is well-known.

3) Identity-related requirements

The Characteristics of International Commercial Arbitration

International arbitration provides organisations in these well-known industries with the benefits of confidentiality, neutrality, timeliness, enforceability, flexibility, expertise, cost-effectiveness, efficiency, and finality. In the global setting, flexibility and neutrality are especially crucial.

Neutrality

By adopting international commercial arbitration as the method of resolving disputes, neither party is required to give the other side the benefit of the "home court" system. Instead, disagreements are resolved by unbiased arbitrators who are independent of any authority (Heuman, 2003). a variety International business arbitrators of various nationalities are available and act impartially. Parties frequently participate in the process of choosing arbitrators, although all arbitrators chosen by a party are sworn in to ensure impartiality. The party advocate arbitrators are occasionally permitted in US labour arbitration. They are unfamiliar with commercial arbitration, and there is ongoing discussion about whether or not an arbitrator (nominated by a party) can maintain impartiality, but impartiality is a reality, an expectation, and a rule.

Flexibility

The adaptability of arbitration is crucial in international cases since there may be discrepancies in the dispute resolution practises that parties from different countries are accustomed to, including contradicting Pre-Hearing "Discovery." US attorneys, for instance, have utilised and anticipated expansive discovery, with the production of thorough pre-hearing paperwork, questions for depositions, and requests for admission. This is infrequently permitted in international commercial arbitration. The International Centre for Dispute Resolution ("ICDR"), the international arm of the American Arbitration Association, explicitly states in Article 21 of its 2014 International Arbitration Rules that "depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures are generally not appropriate procedures for obtaining information under these Rules."

Hearing

In a typical international arbitration hearing while a US lawyer would be used to and expecting oral presentations, written arguments and evidence are more likely to be presented. In international commercial arbitration, it is customary for expert witnesses to present lengthy written reports, as well as written testimony from fact witnesses. Factual witness statements are typically exchanged between the parties prior to the hearing, including these. The arbitrators are given with statements (Born, 2014). These written declarations may precede direct examination or even take its place. The live testimony of witnesses is only allowed during cross-examination in hearings of international commercial arbitration. Written reports are invariably requested from expert witnesses. Before the hearing, the reports are presented to the arbitrators after being shared between the parties. The practise of "witness conferencing," sometimes known as "hot tubing," involves both factual and expert witnesses testifying and cross-examining each other while discussing the same issue. The international arbitrators actively interrogate the witnesses, and when witness conferencing is employed, they may even lead to interrogation. Most international arbitrators give counsel room to cross-examine with only sporadic interruptions, but some arbitrators step in early and at their discretion.

Award

International commercial arbitration awards are referred to as "reasoned" awards. Nothing in international commercial arbitration practise or rules is comparable to AAA Commercial Rule 46(b), which states, "The arbitrator need not render a reasoned award unless the parties request such an award before the appointment of the arbitrator or the arbitrator determines that a reasoned award is appropriate.

Costs

“Costs” (a term which includes fees of attorneys in international parlance) “follow the event” in most of the national legal systems, which is generally the “loser pays” in winner’s attorneys’ fees and also in “winner’s attorneys’ fees.” In a few national legal systems outside the US, the “American rule” is applied. The “loser pays” in most international commercial arbitrations.

LEGAL FRAMEWORK

It is designed according to the UNCITRAL Model Law on International Commercial Arbitration. The Model Law covers all phases of the arbitration process, including the creation of the arbitration agreement, the appointment of the arbitral panel, and the scope of the court's involvement in the identification and enforcement of the arbitral award (Fouchard and Goldman, 1999). The Model Law, which has been embraced by States from all over the world with different economic and legal systems, reflects the general international consensus on the key issues relating to the practise of international arbitration. The provisions of the UNCITRAL Model Law were added to the Arbitration Act of 1996, which superseded the Old Arbitration Act of 1940 in India. Model Law is just that—a model, as the name implies. The UNCITRAL Model Law harmonises arbitration between civil law and common law. The Model Law is a key component of UNCITRAL's mission to harmonise international trade and is regarded as a vital pillar of international arbitration (Mustill, 1989). It is advantageous to the parties involved in conflicts. It eliminates the irritation brought on when multiple states' national laws demand compliance. It provides a supportive setting and a structure for international business arbitration. The key component of UNCITRAL is universality.

Difficulties with less structured legal systems

It is still more likely that there will be uncertainty regarding lis pendens when the legal systems in which the parallel disputes take place do not offer the same level of integration or structure. For instance, the Inter American Court of Human Rights refused to refer advisory opinions requested regarding consular assistance to the International Court of Justice, basing this decision on the interest of all States parties to the Inter-American Convention to have the case reviewed under its own legal system. In connection with the release of a vessel, the Law of the Sea Tribunal has not deferred to a domestic court either, but in this case there is obviously parallelism between an international and a domestic court, with the latter frequently being on the weaker side of the options.

The complicated situation arising from the aforementioned SPP case, which also involved a domestic court and an international tribunal, led to the opposite resolution because the ICSID tribunal was different from the French Cour de Cassation.

Lis Pendens a Mean to Handle Parallelism

It is important to determine whether lis pendens applies to international arbitration before considering its function in the civil and common law traditions. In the context of parallelism, it is crucial to make a distinction between an arbitral tribunal and a national court as well as between two arbitral tribunals. According to recognised law, "a proper arbitration agreement grants the arbitral tribunal sole competence to hear the case, excluding the national court's jurisdiction. There is a presumption that there are two appropriate forums, and the arbitration agreement is essential in establishing the arbitral tribunal as the superior forum. Scholars claim that doctrine has been used in certain situations in international arbitration despite its "general inapplicability. The most typical instance of its applicability is when a party raises a jurisdictional objection and questions the existence, validity, and applicability of the arbitration agreement. There are several reliable forums. For hearing jurisdictional challenges in these cases.

Lis Pendens in the Civil Law Tradition

It's common to refer to the lis pendens concept as a civil law weapon. Although this approach is not consistently followed by civil law states. To determine whether the Lis Pendens doctrine applies or not, there is a "three indemnity test." The same parties cannot file the same claim in a second arbitration or court proceeding, thus there must be identification between two identical claims. Three traditional elements are required for identification by arbitral tribunals and national courts, namely:

(a) the parties (persona);

(b) the subject matter/ground; and

(c) the object.

The "triple identity test" is the common name for it. However, it is impossible to express a unified opinion about this doctrine and its requirements for identity. But these requirements have been formulated by national legislation somewhat differently. However, the current is not supposed to

explore these differences in detail. Furthermore, each element has been interpreted by the CJEU regarding the Lugano Convention.

Lis Alibi Pendens in the Common Law Tradition

Lis alibi pendens is not regarded as a separate doctrine in Australia, Canada, Britain, New Zealand, or Israel. When using the doctrine of forum non convenient, the adjudicator is aware of it as just one of several variables. However, in the US, lis alibi pendens and forum non-convenient are regarded as two very separate legal theories. The forum non-convenient doctrine is used in common law jurisdictions, giving a court power to deny jurisdiction when it would be more just to have the case heard by a different court. Through a large number of English court decisions, this doctrine was established, and the adoption of this doctrine led to a chain reaction among many other jurisdictions of common law, who had been quick in terms of following new English regimes.