Volume II Issue I ISSN NO : 2582-6034

LEGALFOXES LAW TIMES

THE DOCTRINE OF LIS PENDENS: Analysis and Overview.

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INTRODUCTION

Arbitration is a popular dispute settlement method amongst commercial partners making transnational business, as it provides the parties with a freedom without equivalence in traditional court litigation. The intention of introducing ADR methods is to cut short the pendency of legal litigations, thus it is important to restrict parallel proceedings for the same cause of action. The two important parallel Proceedings which cause serious impediment to Arbitrational Proceedings are ''Lis Pendens'' and 'Res Judicata'.The meaning of 'Lis Pendens' is - 'a pending legal action', wherein Lis means the 'suit' and Pendens means 'continuing or pending'. The doctrine has been derived from a Latin maxim "*Ut pendent nihil innovetur*" which means that during litigation nothing should be changed. The principle embodying the said doctrine is that the subject matter of a suit should not be transferred to a third party during the pendency of the suit. Whereas, Res Judicata is a phrase which has been evolved from a Latin maxim, which stand for *'the thing has been judged'*, meaning there by that the issue before the court has already been decided by another court, between the same parties.

The Concept of 'Lis Pendens' and Res Judicata has great amount importance when it comes to International Commercial Arbitration. The pendency and multiplicity of cases would defeat the sole purpose of Arbitration. Thus in this project, we will be analyzing the effect of 'Lis Pendens' and Res Judicata with respect to Indian and foreign positions such as (The United States of America and United Kingdom).

RELEVANCE

The Maxim "*Interest ReipublicaeUt Sit Finis Litium*" means "in the interest of society as a whole, litigation must come to an end" reveals the whole objective behind inclusion of the Alternate Dispute Resolution processes such as Arbitration. The main objective of Arbitration proceeding itself is to cut short the pendency of cases in the court and also to provide speedy redressal for the

complaint raised. But, parallel proceedings in different countries under their specific domestic law create a greater amount of impediments in the processes of legal redressal in national and international commercial arbitration. In this regard it is important to analyze impediments created by parallel proceedings in the legal redressal processes. It is pertinent to know how Municipal and International Law deal with this issue in hand and to make changes to the current position of law to make it more proactive to deal with the issue and provide better redressal mechanism to various International Commercial Arbitration in different countries. A detailed research on the topic would help to explore

1. Increase the efficiency of International Commercial Arbitration
2. Reduce the pendency of cases by the parties
3. Identify the effect of execution of Foreign awards

RES JUDICATE- INDIAN POSITION

The concept of 'Res Judicata' is one of the oldest legal doctrine. The Latin meaning of the word Res Judicata means 'matter already judged'. In other words 'Res Judicata' means "a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or the matter in litigation, and over the parties thereto."[1]According to Black's Law Dictionary Res Judicata is a rule that final judgment or decree on merits by court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits on points and matters determined in former suit.[2] Like in the case of ''Lis Pendens'' and Res Judicata evolved from the concept of 'ne bis in idem' and concept "Interest ReipublicaeUt Sit Finis Litium". Unlike ''Lis Pendens'' Res judicata is not only restricted to cases dealing with civil matter but it also extends Criminal Adjudication as well.

In India Section 10 and 11 of the Civil Procedure Code 1908 embodies the Idea of 'Res Juidcata'. Section 10 of CPC,1908 stays parallel proceedings of case where the subject matter is the same and Section11 prohibits both parties from reopening the same case once the final judgement has been made by the competent court. The Supreme Court in the case of Satyadhyan Ghosal v. Deorajin Debi has correctly pointed out the object and operation of the principle of res judicata. It was observed that

> "*The principle of res judicata is based on the need of giving finality to judicial decisions, what it says is that once a res judicata, it shall not be adjudicated again. Primarily, it applies as between past litigation and future litigation, when a matter - whether on a question of fact or of a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher*

[1]*STUDY ON PRINCIPLE RELATING TO RES JUDICATA: Volume 120 No. 5 2018 International Journal of Pure and Applied Mathematics, 2667-2676*

[2] *Epstein v. Soskin, 86 Misc.Rep. 94, 148 N.Y.S. 323, 324;*

court or because in appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceedings between the same parties to canvass the matter again."[3]

According to the observation of the Supreme Court it is in the best interest of the public to settle and adjudicate matters and to conclude a litigation .The Court observes the concept of 'Res Judicata' as an effective tool to meet this objective. Similarly, in the case of State of Karnataka v. All India Manufacturers Organisation the Supreme Court postulated three maxims as the base of 'Res Judicata'.

(1) Nemo debetbisvexari pro unoeteadem causa.--No man should be vexed twice for the same cause.

(2) Interest republiceutsit finis litium.--It is in the interest of the state that there should be an end to a litigation.

(3) Res judicata pro veritateacipiture.--A judicial decision must be accepted as correct.[4]

In this case also the court reckoned the importance of the concept of 'Res judicata' and the need to prohibit parallel proceedings which might result concurrent and contradictory positions.

The important challenge which raise with regard to 'Res Judicata' is with regard to the test of 'Res Judicata' often times it is not practically easy to point out cases with similar subject matter. For that the Courts in India has formulated a Seven Point test which helps to determine 'Res judicata' in cases where it is not easy. In the case of P.V. Shetty v. B.S. Giridhar, the Supreme Court put forth seven conditions to determine 'Res Judicata'

(1) The present section applies only to suits and not to applications and complaints.

(2) There must be two suits, one previously instituted and other subsequently instituted.

(3) The matter in issue in subsequent suit must be directly and substantially in issue in the previous suit.

(4) The parties in the previous suit and the subsequent suit are the same.

(5) The parties are litigating under the same title in both the suits.

(6) The previously instituted suit must be pending in the same court in which the subsequent suit is brought or in any other court in India or in any court beyond the limits of India established continued by the Central Government or before the Supreme Court.

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[3] *SatyadhyanGhosal v. Deorajin Debi, AIR 1960 SC 941: (1960) 3 SCR 590.*

[4] *State of Karnataka v. All India Manufacturers Organisation, MANU/SC/2206/2006 : AIR 2006 SC 1846: 2006 (4) Kant LJ 369: (2006) 4 SCALE 398: MANU/SC/2206/2006 : (2006) 4 SCC 683*

(7) The Court in which the previous suit is instituted must have jurisdiction to grant the relief claimed in the subsequent suit.[5]

So in order to stay proceedings in the name of 'Res Judicata' the court must consider all the seven points as stated by the Supreme Court and the given case must satisfy all the seven conditions. If the court or the party fails to comply with given conditions then it cannot be considered as case coming under 'Res Judicata' instead it will be considered as separate litigation.

THE DOCTRINE OF 'LIS PENDENS' –INDIAN POSITION

The doctrine of 'Lis Pendens'was evolved from the well-known Latin maxim:- *Pendente lite nihil innovature*, which means 'during pendency of litigation, nothing new should be introduced or changed'.6The concept of ''Lis Pendens'' is an outcome of the age old concept of 'ne bis in idem' which means "not twice against the same"[7].It was evolved from the concept "Interest ReipublicaeUt Sit Finis Litium" means "in the interest of society as a whole, litigation must come to an end" . When there is a multiplicity of legal proceedings it becomes impracticable to conclude a litigation and to realize the right of the true owner. But the concept of 'Lis Pendens' in India has acquired a separate and quite distinct meaning from that of the general meaning where the concept coalesced with interest in immovable property created pending litigation.

According to the said doctrine, during pendency of any suit or legal proceedings regarding title of a property, the parties to the suit shall not create any new interest in respect of the property. In general sense the doctrine of *'Lis Pendens'*prohibits the transfer of property in which 'the litigation is pending. The concept of 'Lis Pendens' is one of the oldest doctrines of the English common law which has evolved from time to time. As per the doctrine pf 'Lis Pendens', the judgements of a civil court deciding the question relating to the title of an immovable property has an overriding effect with regard to alienation of property done by any of the parties to the suit.

The principle of 'Lis Pendens' was incorporated into the Indian legal system under Section 52 of The Transfer of Property Act, 1882.According to Section 52 of the Statute 'Lis Pendens' restrain a party to the litigation from transferring or alienating or dealing with it in any manner or part of the same, which is subject matter of dispute, during the pendency of a suit so as to adversely affect the rights of the opposite party. It is equally well known that anybody dealing with such property in a pending suit is deemed to have noticed and the pendency of a suit is considered to be noticed to all whether party to the suit or not. If any transactions have taken place during pendency of the

[5]P.V. Shetty v. B.S. Giridhar, MANU/SC/0478/1981 : AIR 1982 SC 83: (1982) 3 SCC 403
[6]HiranyaBhusan Mukherjee v. GouriduttMaharaj and others, AIR (30) 1943 CALCUTTA 227
[7] BRENGESJÖ, Emil. Lis Alibi Pendens in International Arbitration. Reflections on the Swedish Position in the Context of International Trends and Approaches [online].Stockholm University, Faculty of Law, 2013, pp. 12, 15 [cit. 2016-03-6].

suit then it would abide the final result of the judgment and decree, which may be passed by the Court.[8]

As per the Indian concept, the existence of a pending lawsuit which potentially distress the title to real property had the legal a constructive notice of the suit to the prospective buyer of the property and also to the entire world ; the law creates a fiction where any person who acquires an interest in the property which was the matter of an ongoing suit took that interest subject to the litigants' rights as they might be eventually determined. In other words when a property is transferred or alienated to a Third party and the said party is under litigation ,the court presumes that the Third Party was properly informed about the pending suit and thus the third person is bound by any decision which the court decides in the said matter.

The said doctrine was incorporated into the legal system as a result of the public interest for better administration of justice when anyone of the parties indirectly tries to bypass the judgement of the Court by alienating the property. The alienation of a disputed property which is *subjudice* defeats the interest of the other party and thereby wholly undermines the purpose of litigation and seriously impairs the reputation of the judicial administration.

The lack of legal supervision to prohibit the transfer of property pending litigation would seem to trounce all suits regarding the said property would be rendered futile by successive alienations making it almost impossible for any common person to settle his rights in property through the process established by law.

"It is, as I think, a doctrine common to the Courts both of law and equity and rests as I apprehend, on the foundation that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendants alienating before the judgement or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceedings".[9]

But in an international perspective the doctrine of 'Lis Pendens' have different manifestation and connotation apart from that of Indian context.'Lis Pendens' is a "situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different states at the same time."[10] At the same time it is true that there is no universally accepted definition for les pendens but it is agreed that it is widely accepted principle of civil procedure . It aims to prevent parallel proceedings which delays the and defeats the processes of Judicial

[8]*Yogeshwar Education Trust vs. Gurmeet Kaur and Ors. (28.08.2008 - PHHC) : MANU/PH/1933/2008*
[9]*Bellamy v. Sabine (1857) 1 De G & J 566.*
[10]*Final Report on 'Lis Pendens' and Arbitration [online].International Law Association. Toronto Conference (2006). International Commercial Arbitration, p. 2 [cit. 2016-03-15]*

administration. In an International point of view 'Lis Pendens' is usually associated with res judicata.

The doctrine of 'Lis Pendens' is internationally recognized, and is ultimately used by an adjudicator to stay or suspend its own legal proceedings in the case of another, parallel proceeding before another judicial body[11]

APPLICATION OF 'LIS PENDENS' AND RES JUDICATA IN ARBITRATION- INDIAN POSITION

The first and foremost objective of Arbitration is for speedy redressal of disputes between the parties. One of most impediment which has conventionally delayed speedy redressal is the multiplicity of proceedings. Parallel Proceedings and Multiplicity of often makes litigation a time consuming processes and it also makes it difficult for the court to decide and conclude disputes once and for it all. When there are multiple cases before different forums it makes it practically impossible for the parties to realize his rightful interest over the property even after the conclusion of the dispute. Because, the pendency of case always creates a possibility for subsequent court or tribunal to come up with a contradictory position in the same subject matter. Such a situation puts both the parties as well the court in an awkward position.

Generally speaking the concept of Res Judicata and 'Lis Pendens' have a two folded application and it includes both Public and Private Interests.

1. It is the public interest which emphasis on the need to end litigation as early possible
2. The private interest mainly concerns about the interest of the parties to realize the rightful interest of the parties and not to be tried twice for the same cause of action.

The principle of 'Lis Pendens' has been considered as one of the possible solution to the issue of abuse of process by initiating parallel proceedings for the same subject matter and cause of action.[12]In case of municipal laws the national courts are allowed to suspend a suit or defer a pending proceeding in another court or forum in order to evade contradictory decisions, as well as to avoid the duplication of costs and the inefficiency of litigating.[13]Unlike the Domestic Situation it is really difficult to apply the doctrine of ''Lis Pendens'' in the case International Commercial Arbitration. In the case of Domestic application the two courts in question have the same jurisdiction and power ,but whereas when it comes to Arbitral Tribunal one hand and regular court

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[11] International Commercial Arbitration: Volume III: International Arbitral Awards, 2014, p. 3792.

[12]For a general discussion of the doctrine of 'Lis Pendens' in international arbitration, see Campbell McLachlan, ''Lis Pendens' in International Litigation' (2008) 336 Recueil des Cours 201; August Reinisch, 'The Use and Limits of Res Judicata and 'Lis Pendens' as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3 L Practice Intl Courts Tribunals 37; Laurent Le´vy and Elliot Geisinger, 'Applying the principle of litispendence' (2001) 3 IntlArb L Rev; Pierre Mayer, 'Litispendance, connexite´ et chose juge´edansl'arbitrage international' in Liber amicorum Claude Reymond (Litec, Paris 2004) 195–203

[13]Filip De Ly and Audley Sheppard, 'ILA Final Report on 'Lis Pendens' and Arbitration' (2009) 25 Arb Intl 3. Within Europe, the 'Lis Pendens' principle is embodied in Article 27(1) of the Brussels Regulation (Brussels I Regulation 4/2001/EC

on the other changes this dynamics. The arbitral tribunal unlike the regular court it acquires its power from the Arbitral agreement which was signed by the parties and the parties are presumed to have agreed that the both of them has consented to evade the jurisdiction of a regular national court by creating a tribunal who deals with this dispute. In such a case the Arbitral Tribunal's power overrides the power of the regular court. But, when it comes to municipal courts both the courts have the same jurisdiction to try the case and the other court cannot override the power of the subsequent court and it is generally not necessary to decide which court has legitimate jurisdiction, but instead it is necessary only to have a rule that determines which court should proceed to hear the merits of the case.[14]Thus it makes the doctrine of ''Lis Pendens'' generally inapplicable for International Arbitration but still it has limited applicability when it comes to some instances of International Arbitration.

The Doctrine of 'Lis Pendens' usually comes into play when any one of the parties usually generally when the respondent raises a Jurisdictional Objection (such as challenging the validity of the agreement, applicability of the arbitral agreement etc..) . In this case both the Municipal Courts and The Arbitral Tribunal have equal Jurisdiction to decide on the case. Because, according to the concept of Competence-Competence the Arbitrator has the power to rule on matters regarding its own Jurisdiction. The doctrine of competence-competence can in general terms be said to empower the arbitrators to rule on their own jurisdiction.[15]Article 16 (1) of the UNCITRAL Model Law also provides the Arbitral Tribunal the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.[16] In such a situation both tribunal and the court are equally footed which gives raise the situation for the application of 'Les Pendens'. Also, the parties might disagree with subject of Arbitrational Agreement. Where, one of the parties may consider an issue to be covered by the agreement, thus enables the arbitral tribunal to hear the case, while the other party might opposes such a contention, considering the issue to fall beyond the scope of the arbitration agreement. In such cases, a 'Lis Pendens' situation may arise, if the first party refers the dispute to a tribunal, while the other party concurrently initiates a regular court action. In short, in circumstances where the legitimacy of the arbitration agreement has been challenged, two parallel proceedings between courts and arbitral tribunals might take place, and thus, give rise to the application of the doctrine of 'Lis Pendens'.

When it comes to Res Judicata it is already a settled principle that Res Judicata applies to Arbitrational Proceedings. The concept of 'Res Judicata' was accepted as an important legal principle by the operation of Article 38 1 (c) of the International Court of Justice Statute. Article 38(1) (c) of the statute allows the applications of respected principles recognized by Civilized nations. It is an unequivocally accepted that the concept of Res Judicata is well accepted principle

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[14]Final Report on 'Lis Pendens' and Arbitration [online].International Law Association. Toronto Conference (2006). International Commercial Arbitration, p. 2 [cit. 2016-03-15]

[15] International Commercial Arbitration: Volume I: International Arbitration Agreements, 2014, p. 1047 et seq.

[16] Article 16(1) UNCITRAL Model Law,

in both Civil Law Countries and Common Law Countries..[17]Similarly in the case CME Czech Republic BV v The Czech Republic (2003) the Court has held that the doctrine of 'Res Judicata' applies to International Commercial Arbitration when the parties to the case are identical and where the subject matter of both the cases are the same.[18] It is generally considered that the judgments or decisions of the domestic court will not be constituted as 'Res Judicata' before International Courts and Tribunals. This is because disputes brought before tribunals from different legal orders are generally not of the required degree of similarity for the doctrine of res judicata to apply.[19]

There are mainly two circumstances which necessitates the courts and tribunal to decide whether claims or issues sought to be adjudged are barred by *res judicata* .The first instances refers to a situation when the issue of jurisdiction and the power of the arbitral tribunal of a dispute is already adjudged in a previous decision and subsequent to which one of the parties moves to arbitration tribunal to re-argue its claim.[20] In the second instance arises in the case when one of the parties to the litigation commences litigation in the face of prior valid arbitration agreement. Later, the party who lost reargues its same claim before the arbitration tribunal by invoking the arbitration clause in the contract. The two incidents create a preclusive effect for subsequent arbitral proceedings.

POSITION IN COMMON LAW COUNTRIES

In common law countries such as United Kingdom, Israel, United State of America, Australia and New Zealand the concept of 'Lis Pendens' is a widely accepted legal doctrine and it has its own Independent operation in domestic laws. But when it comes to Arbitration the concept of 'Lis Pendens' is coalesced with the idea of 'Forum Non Conveniens". The word meaning of 'Forum Non Conveniens' is 'Inconvenient Forum' according to this principle the forum non conveniens is applied in common law dominions, it empowers the courts to use its discretion to decide on the issue of jurisdiction where, in the interest of justice, the dispute should be tried in another court.[21]

The principle of 'Forum non conveniens' was established by the Common Law courts through a number of cases, and its implementation caused repercussions among other common law-jurisdictions such as (Australia, New Zealand, Italy Etc.) and these countries followed the English position.[22] The First English case which established the relationship between Forum non Conveniens and 'Lis Pendens' was in the Spiliada case [1987].In this case the House of Lords has

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[17] *K.V. George v. Secretary to Government, Water and Power Department (1989) 4 SCC 595*
[18]*CME Czech Republic BV v The Czech Republic, Final Award, 14 March 2003, paras 435 et seq.*
[19]*Helnan International Hotels A/S v The Arab Republic of Egypt, Award of 3 July 2008, para. 124.*
[20]*Gordon RD, (2006): "Only One Kick at the Cat: A Contextual Rubric for Evaluating Res Judicata and Collateral Estoppel in International Commercial Arbitration", Vol. 18, Florida Law Review, at 562.*
[21] *Forum Non Conveniens – History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements, 2007, p. 1.*
[22] *Andrews, Principles of Civil Procedure, 1994, p. 100.*

categorically made it clear that the doctrine of 'Forum Non Conveniens ' will be applicable only if the court is satisfied that an appropriate forum having jurisdiction is available.[23]

The renowned Jurist James Fawcett has rightly defined forum non conveniens as "discretionary power for a court to decide on its jurisdiction on the basis that the appropriate forum for trial is abroad or that the local forum is inappropriate."[24]In other sense the court will apply the concept of forum non conveniens only if it is satisfied that the party can file a case in a more appropriate forum to avail the remedy for the damage. The House of Lords in the case of The Abidin Dave[25]r case again dealt with relationship between 'Lis Pendens' and forum non conveniens . In this case there were two case instituted by the parties one in Turkey and another one in England. The plaintiff contested that the procedure was initially commenced before the Turkish Tribunal and thus the English court should say the proceedings by following the principle of Les Pendens. The House of Lords after going through the merit of the case of the case held that the test for 'Lis Pendnes' is not based on 'first in time' rule but instead it should be decided by taking the principle of 'Forum non convenience' into consideration. Lord Diplock also observed that if a simultaneous legal proceedings is underway in foreign country and a subsequent proceedings have been initiated before the English Courts, the court should only entertain such suit upon the consideration that the plaintiff gets a personal or judicial advantage by virtue of the subsequent proceedings.[26] With this, the court established lis alibi pendens as a factor of decisive importance in the discretion of the court to stay proceedings, i.e., in the application of the doctrine of forum non conveniens.[27]In conclusion, the application of the principle of forum non conveniens is not directly reliant on the existence of a parallel proceeding in pendency. Instead, it allows the court to decline its jurisdiction if it finds that there are other forums which are equally competent and appropriate.

United States of America

The concept of 'Lis Pendens' is also an accepted legal principle in US Legal System. Unlike the English position the doctrine of ''Lis Pendens'' and ' Forum non Conveniens' are considered as separate legal doctrine. The Concept of forum non conveniens is applied by the federal courts when the court finds that the parties are best served if the litigation were to be heard in another appropriate forum. In contrast to the common law principle the occurrence of ''Lis Pendens'' are considered separately and applies the doctrine in its own. In the case of *Turner Entertainment Co. v. Degeto Film GmbH*the Us Supreme Court dealt with the issue of application of 'Lis Pendens' in Foreign Disputes. In the given case two distinct lawsuits were filed in USA and Germany respectively, and the question which was raised in this case was *"whether a federal court in United States, which properly has jurisdiction over an action, should exercise its jurisdictions where*

[23]*Spiliada case [1987] A.C. 460*
[24] *The VishraAvay case [1989] 2 Lloyd's Rep. 558*
[25]*Abidin Dave [1984] 1 Lloyds Rep 339*
[26]*Lord Diplock at 344.*
[27] *Parallel Proceedings and the Doctrine of 'Lis Pendens' in International Commercial Arbitration, Denice Forstén,, Master's Thesis in Procedural Law (Arbitration),30 ECTS*

parallel proceedings are ongoing in a foreign nation." In this case the court observed that the principle of ''Lis Pendens'' is applicable in case even when the initial or the subsequent proceedings was commenced in Foreign Jurisdiction. The same rational was reiterated in by the federal court in *Colorado River Water Conservation District v. United States*, where the court observed that a subsequent proceeding in an US court will only be entertained only if it is proved that the case would be fully resolved only if it is tried by a US Court.[28]In conclusion the US position with regard to doctrine of ''Lis Pendens'' is clear and distinct. Unlike the English Position the US courts has completely differentiated the principle of ''Lis Pendens'' from 'Forum Non Conveniens' and the courts only consider the doctrine of 'Forum non convenience only if it feels that continuation of the case in US court would result in maximum Public and Private Utilization.

When it comes to Res Judicata the Common law principle is in agreement with that of the Indian Concept. According to the English Concept Res Judicata protects both the Public interest and private interest .The public interests mandates for a conclusion to litigation and the private interest protects the persons 'right against Double Jeopardy'. 'Res judicata' in common law mainly connotes a negative effect to, where a judgement from an appropriate judicial forum bars the parties form re-litigating the same issue before another forum. In common law countries 'Res Judicata ' applies only on the Final and conclusive Judgment passed by the competent judicial forum on the merits of the case. In Common Law countries the doctrine of Res Judicata is not restricted to Judgment alone but it extended to Cause of Action and the Issue as well.

Cause of Action Estoppel

Lord Diplock in the case of Thoday Vs Thoday has defined Cause of Action estoppel as follows

"[Cause of action estoppel] is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties"[29]

According to Lord Diplock if any party alleges cause of action estoppel then that party must show that the disputed cause of action has already been decided by the previous in court in its Judgment. In cause of action estoppel, if the court has determined the existence or denial of cause of action in its Judgement then the parties are estopped from raising that again before the subsequent and doctrine of 'Res judicata' applies to its cause of action.

Issue Estoppel

In issue estoppel the parties are barred from raising the same issue which was previously decided by the court in its final conclusive judgement. The concept of issue estoppel prohibits the re-litigation of a particular issue of fact or law which the prior has decided after going through the

[28]*Colorado River Water Conservation District v. United States 424 U.S. (1976)*
[29]Thoday v Thoday [1964] P 181, 197, CA.

merit of the case. Issue estoppel extends only to issues that were actually addressed and determined and only if the issues were necessary and fundamental to the earlier decision[30].

POSITION IN CIVIL LAW

The Civil Law Countries such as France, Switzerland, and Belgium has accepted the doctrine of 'Lis Pendens' in principle. At the same time it is true that there is no uniformity in its definition or in its interpretation and the main reason for the same is attributed to the lack of differentiation between Right and Remedy.[31] The Civil Law countries have failed to create a perfect dichotomy of Right and Remedies as developed by common law countries.

In France, the rule is called "exception de litispendance", and it may be raised in any proceedings started after another.[32]Article 100 and Article 101 of the New Code of Civil Procedure speaks about ''Lis Pendens''. According to Article 100of the NCCP , when two court of the same hierarchy is dealing with a case with same subject matter then the court seized last should relinquish its Jurisdiction. Here we can see that the Courts mainly focus on the time in which the case was instituted. This gives effect to the concept of Triple identity test and first-in-time rule

Triple Identity Test

According to Civil Law system in order to apply the principle of 'Lis Pendens' identity between the two parallel systems should be established. To establish this identity, the Courts follow a test called as Triple Identity Test where Identity of the parties(Persona) , Identity of the subject matter (Causa petendi), Identity of the object (petitum) should be the same.

1. Identity of Parties
   One of the most important requirement to apply the concept of ''Lis Pendens'' is that the parties who have initiated both the suites must be identical and the same. The difficulty arises when the parties to the suit are not the same but are closely related. In Civil law Jurisdiction there is no uniformity in the interpretation of this requisite, where some jurisdictions go for liberal interpretation but some requires a strict interpretation.

2. Identity of Subject Matter
   Another requisite for establishing 'Lis Pendens' is the similarity in subject matter of the case. Unlike the Identity of Parties the identity of subject matter is liberally interpreted where the court emphasis on the base and the grounds if the subject matter. In the case of

[30]*Good Challenger Navegante SA v Metalexportimport SA [2003] EWCA Civ 1668.*
[31]*Peter Schlosser, "The 1968 Brussels Convention and Arbitration", (1991) 7 Arbitration International 227.*
[32] *Vincent and Guinchard, ProcédureCivile, 26th edn (Dalloz, Paris, 2001*

GubischMaschinenfabrik KG v Giulio Palumbo[33], the court has observed that it is not necessary that the subject matter should be entirely identical claims.[34]

3. Identity of object
   In order to apply the doctrine of 'Lis Pendens', the same type of relief must be sought in the subsequent proceedings as well. The CJEU has held that actions should be deemed to have the same object when the results are essentially the same.[35]

EFFECT OF ''LIS PENDENS'' AND 'RES JUDICATA' IN INTERNATIONAL COMMERCIAL ARBITRATION

When we analyze all these difference we can see that there are some principle and fundamental differences between common law jurisdiction and civil law jurisdiction in the application and establishment of doctrines such as ' Les Pendens' and 'Res Judicata' . Meanwhile, both the jurisdictions have developed their own method to counter the effects of 'Parallel Proceedings'. But, often these differences have created greater amount impediments in judicial redressal processes. The case of Fomento de Construcciones y Contratas SA v Colon Container Terminal SA (2001),in the Swiss Federal Tribunal is an example for the same .

In this case the Swiss Federal Tribunal set aside the award of Swiss Arbitral Tribunal based on finding that the Arbitral Tribunal has decided the case without Jurisdiction because the another case was pending in a Foreign Court. In this case the Federal Court misapplied the ''Lis Pendens'' doctrine by setting aside an award. The Federal court also observed that the Arbitral Tribunal has erred in ruling its own Jurisdiction for pending case instead staying the proceedings. The strict compliance of legal position by the Swiss Federal court in the application of the doctrine has created a lot of ruckus in the legal field. This decision of the Federal Tribunal has also paved the way for parties to abuse the proceedings, by filing different proceedings in foreign courts prior to the initiation of arbitration in Switzerland, as a ploy to circumvent the arbitration process in Switzerland.[36] The Swiss parliament cleared the uncertainty which was created by The Federal Tribunal. The Swiss Legislature amended Article 186 of the PILA, and inserted the following provision in Article 186 '*the arbitral tribunal shall decide on its own jurisdiction without regard*

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[33] *GubischMaschinenfabrik KG v Giulio Palumbo [1987] ECR 4861*

[35] *Tatry, C-406/92.*

[36] *Emmanuel Gaillard and YasBanifatemi, 'Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators' in Emmanuel Gaillard and Domenico di Pietro (eds), Enforcement of Arbitration Agreements and International Arbitral Awards—The New York Convention in Practice (Cameron May 2008).*

to proceedings having the same object already pending between the same parties before another State court or arbitral tribunal, unless there are serious reasons to stay the proceedings'. [37]

When it comes to Res Judicata , it is undoubtedly clear that both 'Civil Law ' and 'Common Law' jurisdiction has incorporated it into their legal system. But the pertaining question was whether it is necessary to extend it to International Commercial Arbitration. The important question which puzzles is the transnational effect of Arbitral Awards. It is quite uncertain that whether the prior Arbitration award would apply as 'Res Judicata' in the subsequent country. According to ILA Recommendation No.3.1

"*A prior award may only operate as a res judicata in subsequent arbitration proceedings if it is capable of recognition in the country of the arbitral seat of the subsequent arbitration*."[38]

Here recognition means the transfer on arbitral award from a foreign country to another. The pertaining question is whether the Arbitral Tribunal has the power to adjudicate and verify whether a prior award is capable of recognition in the country of the arbitral seat of the subsequent arbitration. Here the National courts are mostly envisaged with right to recognition , So a formal request for recognition should be given to the regular courts and once the court allows the request then 'Res Judicata' would become applicable.[39]

COMPARATIVE ANALYSIS

When we closely analyze the different positions regarding the concept of ''Lis Pendens'' and "Res judicata' in Civil and Common Law Jurisdiction we can see that there is a paradigm shift in the approach in both Jurisdictions. It is also true that even the countries within the respective jurisdictions lacks a uniformity with regard to interpretation of the doctrine ''Lis Pendens'' and ' Res Judicata'. This mainly attributed to the basic changes with regard to concept of 'Rights ' and 'Remedies'.

In common law jurisdiction the concept of ''Lis Pendens' ; is closely associated with the concept of 'Forum non Conveniens'.Which provides the court the discretion to decline its jurisdiction if it finds that the initial case was instituted in the appropriate forum and the person will not be getting any additional advantage either personal or judicial if a subsequent proceedings is initiated by the plaintiff. In other words the court will only allow a parallel proceeding if it is satisfies that dispute will not resolved completely unless if it is tried in a different forum. Whereas the United States has a adopted a different standard in this issue. The US Federal courts has clearly differentiated

[37]Article 186 of Federal Statute on Private International Law, Switzerland.

[38]ILA Final Report on Res Judicata and Arbitration ,Filip de Ly (Chairman), Prof, *Arbitration International*, Volume 25, Issue 1, 1 March 2009

[39]MAYER, Litispendence, connexitéet chose jugéedansl'arbitrage international, pp. 202 et seq.

between the doctrines of ‘‘Lis Pendens’’ and ‘Forum Non Conveniens’ in such a way that both of them remains as a distinct doctrine within their well-defined precincts.

When it comes to Civil Law jurisprudence the concept of ‘Lis Pendens’ is applied in little more restricted manner. In Civil Law countries strict adherence to ‘Triple Identity Test’ is considered as a compulsory standard. Also the Civil law Jurisdiction postulates a different approach when it comes to doctrine of ‘‘Lis Pendens’’. In contrast to Common Law Countries the Civil Law Countries follows the concept ‘First in Time Rule’, whereby the court only promotes the jurisdiction of the first court which seized the case . Unlike the Common Law Jurisdiction the principle of ‘Forum Non Conveniens’ does not have any important application in Civil Law Jurisdiction when it comes to ‘‘Lis Pendens’’

Similarly a Common Law court has a discretion whether or not to stay its proceedings on the basis of forum non conveniens and the order in which the proceedings were commenced is only one of several factors that the court will take into account; whereas a Civil Law court will generally apply first-in-time rule.

Apart from above difference the Common Law countries and the Civil law Countries also have a different approach with regard to establishing ‘‘Lis Pendens’’. In Common Law Jurisdiction a liberal approach is opted when it comes to party identity and subject matter identity and very less importance is given to object identity. But the Civil Law Jurisdiction mandates a strict interpretation and compliance of Triple Identity Test is necessary. Where the party alleging ‘Lis Pendens’ must show that Parties, Subject matter and Remedies sought in the parallel proceedings should be identical. Whereas the Common Law Jurisdiction applies liberal interpretation with regard to Party Identity and Subject matter Identity.

In the case of res Judicata also the approaches of both the jurisdictions have conflicting and diverse principles. In common law jurisdiction mainly the Res Judicata applies to Judgement, Issue(issue estoppel) and Subject matter, which means that in common law countries the Res judicata is not only confined to the Judgement and the decision alone but it applies to Issue and Subject matter. When it comes to Civil law Jurisdiction ‘Res Judicata; has a very narrow application unlike Common Law Countries. In Civil Law countries ‘Res Judicata’ applies only to the Judgement and the operative part of the Judgement. Similarly on Civil Law Jurisdiction Res Judicata is not applicable to the ‘Ratio’ of the Judgement, whereas in Common Law jurisdiction ‘Res Judicata’ applies to the ‘Ratio’ provided in Judgement and Arbitral Award.

Another Important difference with regard to res judicata in civil and common law jurisdiction is about the concepts of ‘Positive ‘ and Negative Res Judicata. According to common Law principle both Positive Res judicata and negative Res judicata has an important application. Where, in the case Positive Res judicata the subsequent courts are also bound by the decision of the former court in the same subject matter. Whereas the common law jurisdiction does not make a differentiation between the application of positive and negative res judicata.

CONCLUSION

The aim and objective of this project is to find the application of doctrines of ‘‘Lis Pendens’’ and ‘Res Judicat’ in different jurisdiction mainly the Common Law Jurisdiction and Civil Law Jurisdiction. The Project also aimed to harmonies the two diverging position for the smooth functioning of When we evaluate the findings in this project we can see that doctrine of ‘Lis Pendens’ is proper civil law method to curb parallel proceedings and the delay in litigation. Whereas the common law tradition fails to recognize the doctrine of ‘‘Lis Pendens’’ as a separate doctrine and it is often considered as factual circumstance. The contrasting fact which comes out when we analyse the two contrasting positions is that, the rigid application of the doctrine have always turned to be counterproductive and defeat the very purpose of its inclusion. At the same time liberal application as done in common law jurisdictions is also something which is desired, because in such cases the discretion bestowed upon the court often results in conflicting views from the other. Apart from that the dominance of the doctrine of ‘ Forum Non Convenience’ also provides a lot of leverage to the party who wants to delay the proceedings. Thus it is important strict a proper balancing in this position by incorporating more uniformity in the approach.

In the case of res judicata, there is more amount of uniformity among the two legal traditions. Both the Civil Law and Common Law traditions apply and approves the idea in general. The differences among them only arise with regard to execution of that principle. Where the Civil law tradition again provides a more rigid approach compared to Common Law. But, there are areas where there conflicting ideas, like the standard of implementation, Issue Estoppel, Subject matter estoppel the application ‘Motif desicris’ and ‘Mottifdecisif’. It is also true that there is no internationally accepted method for the recognition of prior arbitral award by a foreign country. It is true that both the traditions have efficient method to curb the multiplicity of legal proceeding and parallel proceedings but the countries have different approach with regard to its execution. Meanwhile it is also important to bring down the complexity in International commercial arbitration by minimizing the parallel co-existence of different tribunals and courts and also by adopting standardized interpretation. This would help to improve the utilization of International Commercial Arbitration as a more helpful tool in the redressal processes. It is also important for us to recognize International Arbitration as a parallel alternative for the traditional Alternate Dispute Resolution methods.

SUGGESTIONS

1. An International Uniform test for establishing ‘‘Lis Pendens’’ and ‘Res Judicata’ should be formulated. This would help to ease the tension between ‘Forum Non Conveniens’ doctrine and ‘First in Time Rule’.
2. A Special International Rule should be adopted for Recognition of Arbitral Awards. A uniform rule for all legal system would substantially reduce the delay for recognition of Foreign Arbitral Awards.
3. The doctrine of ‘Forum Non Conveiens’ and ‘‘Lis Pendens’’ should be considered separate and independent doctrines as adopted by the United States America. The considering both doctrines in isolation would reduce the abuse of processes.

Postulate an International Standard rule for interpretation of the Doctrine of ‘‘Lis Pendens’’ and ‘Res Judicata’.