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## International Commercial Arbitration: Ambiguities Pertaining to Choice of Law, Recognition and Effects of Lis Alibi Pendens

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**Abstract:** *The lack of legal instruments and regulations pertaining to the coordination of the arbitral awards and the decisions of courts highlights the problems facing the implementation of arbitral awards in foreign jurisdictions. Since commercial arbitration is a discourse of international character which invariably involves parties from different jurisdictions, the case resultantly gives rise to issues such as conflict of laws, choice of laws and multiplicity of proceedings on the same cause of action. This situation allows parties to commence litigation at multiple forums, paving a way for issues like that of Lis Alibi Pendens to arise. This paper examines the principle of Lis Alibi Pendens in commercial arbitration and also assesses its application in different jurisdictions in general and in the context of Pakistan in particular. This article analyses existing cases and regulations on this subject and provides for an adequate level of understanding, certainty and reliability which is required by the parties in commercial arbitration. It also expounds on ambiguities and complex issues in order to equip policy makers and practitioners to better understand such concerns.*

**Key Words:** Commercial Arbitration, Choice of Law, Lis Alibi Pendens, Enforcement of Foreign Awards

### Research Methodology

The methodology employed in this paper is doctrinal which includes an analysis of relevant legal instruments, regulations and cases pertaining to the choice of law of litigating parties in commercial arbitration in different jurisdictions with different legal frameworks. The methodology used in this paper is required as the subject to international

commercial arbitration is of international character where the local conditions to compare with international standards are not necessarily required to be justified.

### Introduction

Lis Alibi Pendens is a Latin term that states that a suit pending in another judicial forum, EU

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Regulation 44/2001 recognises this doctrine and regulates relevant developing jurisdiction in this regard. Particularly, this principle encompasses the relationship of courts in respect of their jurisdiction on matters pertaining to the same parties and on the same cause of action. Article 27 of the said Regulation empowers courts of member states to issue injunctions in matters where a pending case is commenced before a court of law of another member state. The subsequent court can stay the proceedings in favour of a case prior in time. This principle was advised to apply on non member states like that of Pakistan as it was explained in the *Ferrexpo* judgment, where it was decided that articles 27 & 28 of this Regulation would have similar effects in terms of accepting and recognising the jurisdictions of other foreign states on non-member states. Here it is important to mention the case of *Owusu* which decides otherwise to the article 28 of this Regulation. Judicial Action and the Regulation categorically state that irrespective of the decision made in *Owusu* case, the article would remain effective. The article was further elaborated and interpreted in the *Sarrio* case, in which it was decided that where similar actions were underway, as the plaintiff chose to initiate proceedings against the defendant in Spain and later started another proceeding based on the law of tort against the same defendant in the United Kingdom, the apex court of the UK recognised the principle and refused to seize jurisdiction of the case.

Issues surrounding dispute resolution involve competency of the judicial forum, choice of law and recognition of judgment for the purpose of its enforcement. Such issues need settling where enforcement of a judgment rendered in a foreign court is sought to be enforced. Brussels Regulation is relevant in this regard to tackling the situation of multiple proceedings. The Regulation provides that pending litigation between the same parties and on the same cause of action bar another suit between them in another court. Article 28 of the Regulation empowers courts to stay parallel litigation. The underlying reason behind this principle is that of avoiding multiplicity of litigation and, for obvious reasons checking wasting of judicial resources and time. Article 33 of the Regulation further clarifies

that where a judgment is rendered, adopting a fair trial process and *audi alteram partem* principle are recognised and enforceable in other member states. For example, a judgment rendered by a court of the member state is enforceable in another member state provided that the impugned case is not pending in a court of law of the member state. Secondly, due process of law was adopted by the court competent to try the case. Thirdly, when a case is pending in one court, the other party appears to submit to the court but for the purpose of objecting to its jurisdiction, the submission does not amount to a submission to the jurisdiction of the court. Fourthly, where the same cause of action was tried by two different courts and the courts turned up with conflicting judgments, establishing the rights of the opponent parties contrary to each other.

A multiplicity of litigation is also discouraged in the United States, where pending litigation in a foreign jurisdiction bars litigation in domestic courts so as to honour the choice of litigant parties to accept jurisdiction of their own choice and also to issue an injunction to the proceedings which are against their choice. The choice of law and forum are also recognised by section 187(2) of the Regulation, provided that the choice of law and forum is not against the public policy concerns in a jurisdiction. The United States goes one step further in this regard and accepts the choice of law and forum even if the same is contrary to public policy concerns in the United States. The only concern that bars acceptance of choice of law and forum of the parties is that of the state policy in the United States.

Brussels Regulation is an international instrument which accepts and recognises judgments decided by courts of EU states under article 33. Domicile recognition is also accepted by article 3 of the Regulation. For example, when a party to the suit is domiciled in a member state or he/ she is undertaking his/her business in another member state or when the parties mutually agreed with the jurisdiction of any member state and also the major chunk of the subject matter exists in a member state, in all such eventualities, all the courts seizing the jurisdictions are competent to try proceedings.

Thus, article 38 of the Regulation allows enforcement of judgment rendered by the court of a member state.

However, the situation is unclear in states like Pakistan which is not a signatory to the Regulation and is free from such obligation. In the absence of such a Regulation and instrument, states like Pakistan which are not under the obligation of any Regulation or instrument to enforce foreign judgments, the common law principles on courts' proceedings and judgments would apply in Pakistan, being a common law country. Due process of law and parties to be heard are common law principles which are required to be followed and be given consideration before accepting a foreign judgment of enforcement. For enforcement purposes, section 32 of the Civil Jurisdiction Act is relevant as it declares judgments invalid which is rendered in contravention of the exclusive clause of the contract. Where a proceeding is started by a party in order to frustrate the due process of law and overlook the fundamental common law principle of parties to suits to be heard, that is not enforceable even non-EU states as per section 32 of the Act.

Moreover, Article 2 is significant in this regard which regards the protection of legal proceedings in EU states and bars similar proceeding in another court of the European Union State.

### **Jurisprudence Developed Pertaining to the Application and effects of Lis Alibi Pendens in Commercial Arbitration.**

The doctrine of natural justice and *audi alterum partem* are linchpin principles of a justice system, in the case of *Adam v Cap Industries Plc*. It was endorsed that where a judgment is rendered without hearing the other party, it will be taken as against the norms and canons of natural justice. Furthermore, it is pertinent to mention here article 6 of the European convention which requires a fair trial commenced in any jurisdiction and the same judgment is decided without taking into consideration the requirement of a fair trial; that judgment is not enforceable in a foreign jurisdiction. International application of article 6 is impliedly justified in jurisdictions other than

European Union as in the judgment of *USA v Montgomery*. It was held that the requirement set in the article applies to the United Kingdom equally in respect of decisions made in states, and be it a member state or otherwise. Giving reverence to other courts' proceedings was also endorsed in another decision of the second circuit court in the USA which held that where a submission is made in a court of a state, it cannot be recreated by the person who had submitted in another court. For example, where a proceeding is commenced in a jurisdiction, and the same action is sought in another jurisdiction on the cause of action similar to one in the prior case, the principle of *Lis Alibi Pendens* would be attracted to bar the subsequent proceedings in another state. This principle was upheld in a Canadian court's judgment, in which, the jurisdictional conflict in multiple proceedings was clarified in a way that where a case is initiated and the same case proceeding are undertaken by a court of another state, the proceeding prior in time would stand and the subsequent proceedings on the same cause of action would be set aside.

In order to protect arbitral proceeding in a court of state commenced first in time between the parties and cause of action similar thereof, the decision rendered in *Turner case*, it was expounded that the multiple proceedings are barred within the United States, and the same principle was established to be applied to courts of other nation states on the basis of *res Judicata*. The parallel proceedings were termed as wasteful of time and resources of the judiciary.

With giving reverence and acceptance to the principle of *Lis Alibi Pendens*, some limitations and conditions have been provided in the Brussels Regulations to exempt some contingencies. For example, article 35 of the Regulations provides that where a conflict of public policy in two different states is established, the enforcement of a judgment in question is barred on eventualities of public policy of the state in which judgment is sought to be enforced. The second condition, article 36 of the Regulations stipulate is *audi alterum partem* which is a recognised principle in a justice system. A party unheard in litigation cannot be justifiably denied the right to present his/her case.

However, where a party to litigation submits to a particular jurisdiction by any means and does not object to it, that submission would amount to an acceptance of the jurisdiction of the court. Other conditions stipulated by article 36 of the Regulations are judgment made in a foreign jurisdiction must be rendered on merit and entailing finality and conclusiveness. The same article was applied in Desert Sun's case, in which submission to jurisdiction and fact and merits of the case were required to be contested in litigation proceedings for the purpose of passing the litmus test of its recognition and enforceability in another jurisdiction. Moreover, under section 33(1) of the Civil Jurisdiction Act, this is expounded that in the eventuality of a party appearing and contests before a court for raising an objection to the validity of its jurisdiction, it would not amount to a submission to the jurisdiction of the court. In case a party to the suit objects to any point of law and fact of the case, such objections raised would not be considered as a submission to the jurisdiction.

Jurisprudence developed over a period of time in this regard further clarifies ambiguities pertaining to foreign courts' judgments and effects of Lis Alibi Pendens. For example, in the decision of, *Nouvioncase*, it was decided that the conclusiveness of a judgment is not affected by a mere right of appeal in the case because a final and conclusive judgment is enforceable in foreign states. The finality of the judgment is determined by rights sanctioned to the parties in the judgment, and also the same is not obtained by misrepresentation and fraud and, finally and most importantly, it is not rendered ex party/ arbitrarily.

Another decision, namely *Hilton v Guyot* clarifies that courts are required to respect verdicts given on merit and are not contrary to the public policy issues of other states in which the enforcement of those is sought. The decision further goes on to provide guiding principles for the US courts where they are recommended to accept the judgment of foreign courts for enforcement purposes. This gesture of respect and acceptance is also mandated by Model Law for the US courts. The supreme law, the US constitution, also states in its article 1V that the US court should tender respect

and acceptance to the verdicts of the courts of other states of the US. This policy guideline was originally aimed at recognition of the courts' judgments within the US, but this credit clause of the constitution is now being expanded to the judgments decided by the courts of other sovereign states. This recognition and acceptance of courts' decisions are based on comity gesture and on the ground of reciprocity. The UK reciprocal Enforcement Act 1933 is of significant importance in this regard which requires UK courts to recognise judgments of foreign courts for enforcement purposes with an intent to receive a reciprocal acceptance and recognition of the UK courts' judgments in other sovereign states.

This kind of reciprocity is also accepted and promoted by policy guidelines in the US. For example, the US Law Institute recommended denial of trying suits already pending in other foreign states and issuing injunctions for pending cases. The principle of Lis Alibi Pendens has gained recognition worldwide as a comity gesture to extend deference to courts' judgments of foreign states for an economic and judicial universality basis. For instance, in Germany, parallel litigation is ground to stay proceedings initiated subsequently between the same parties and on the same cause of action. Since there is no standardized Regulation on the application and effects of Lis Alibi Pendens, therefore, courts in Pakistan are required to recognise and issue injunctions on pending cases commenced in other foreign jurisdictions on merit and are not in conflict with the public policy concerns in Pakistan.

In respect of the application and recognition of Lis Alibi Pendens, jurists hold different opinions. One views the role of this doctrine to a limited degree and requires it to be invoked in extreme cases so it could not undermine the sovereignty of states. The other beliefs in its effectiveness in order to respect the litigant parties' choice of forum and law in resolving their disputes. Laws of many states as has been discussed earlier, recognise this doctrine. In Pakistan, the principle finds its justification and recognition under common law pretext.

The effects and recognition of a judgment rendered in one member state hold validity and are

executable in another member state similar to those of its effects in a state in which it was delivered following article 38 of this Regulation. However, the Regulation states that where a party applies to a court of execution in a member state, the procedural law of that member state would apply where the execution was sought. The same principle was adopted in the decision of the *Maharanees* case.

The above discussion reveals that the doctrine of *Lis Alibi Pendens* holds a significant role in a legal system which is aimed at protecting and respecting proceedings on merit in other states on a reciprocity basis. In this respect, the Administration of Justice Act 1920 has a significant example to mention which requires a reciprocal gesture of recognition and respect for the judgments of courts of commonwealth countries. The other legal instrument which establishes the sanctity of verdicts of foreign courts is the Foreign Judgment Act 1933 in the United Kingdom. This legislation accepts judgments' enforcement in the UK on reciprocal enforcement basis. In the absence of any clear arrangement among states for recognition of judgments so as to be enforceable there, being a member of the commonwealth, common law principles on enforcement of foreign judgments would apply and the doctrine of *Lis Alibi Pendens* of great significance in this context where proceeding on merit and for the preservation of the status of valid litigation is required.

## Conclusion

It is of prime importance to clarify ambiguities surrounding commercial arbitration and approaches toward parallel proceedings and the effects of *Lis Alibi Pendens*. This article tackles and examines it profoundly with an intent to outline options available for courts in Pakistan to follow in the absence of any engagement with foreign states for the enforcement of foreign judgments. Relevant laws and regulations and jurisprudence on the subject have been analysed in order to customise the role of *Lis Alibi Pendens* when arbitral tribunals come across parallel proceedings. This is important to examine legal instruments concerning parallel litigation in the context of Pakistan entering commercial engagements with regional states in an era of China – Pakistan Economic Corridor, where it would generate economic activity, equally it would give rise to commercial conflicts among businesses of foreign states. It further argues that cases of parallel proceedings are against natural justice and are most of the time used as an unfounded and vexatious tool to frustrate the finality of judgments and awards. Since in domestic laws of states, the multiplicity of proceedings is not tolerated by fixing legal bar on such proceedings, similarly, such parallel litigation should not be offensive to commercial arbitration.

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