Cutting the Gordian Knot: Enforcing Awards where an Application Has Been Made to Set Aside the Award at the Seat of the Arbitration

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Cutting the Gordian Knot: Enforcing Awards where an Application Has Been Made to Set Aside the Award at the Seat of the Arbitration

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One of the grounds where a New York Convention award may be refused recognition and enforcement is where the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[1] A similar provision exists in the English Arbitration Act 1996 s.103(2)(f). Under both the New York Convention and the Arbitration Act 1996 the word "may" is used which indicates that even if the award has been set aside at the seat of the arbitration it might still be enforced in another country. This article focuses on recent developments under English law as to how the courts have dealt with the enforcement of annulled awards.[2] We also examine the Arbitration Act 1996 s.103(5)[3] which provides that where an application for the setting aside or suspension of the award has been made to the relevant court, the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

In countries which have adopted modern arbitration laws there is an almost universally held pro-enforcement attitude when considering international arbitration awards. However, when an award is challenged, or has been set aside at the seat of the arbitration, the enforcing courts may have to consider the status of the award. One view is that an award that has been set aside at the seat has no legal status and therefore there is nothing to enforce. An opposing view is that the annulment of the award at the seat of the arbitration does not affect its validity. The English courts have, however, approached the question in a pragmatic way. They have rejected an approach based on legal theory and simply applied a test as to when an award, which has been set aside, should or should not be enforced.[4]

1. The Territorial Approach

The territorial approach takes the position that an award which has been annulled at the seat of the award can have no validity in that jurisdiction or any other jurisdiction. The annulment of the award at the seat makes the award non-existent. The rationale for this, as stated by A.J. van den Berg, is that by choosing a place for the arbitration the parties also agree that the arbitration will be overseen by the courts of that place.[5] The views of A.J. van den Berg are that when an award is set aside or annulled then there is nothing left to enforce; and that the "may" in the New York Convention art.V(1), as applied to subpara.(e),

[1] New York Convention 1958 art.V(e).

[2] There are numerous books dealing with this issue of enforcement of annulled awards: C. Alfons, *Recognition and Enforcement of Annulled Foreign Arbitral Awards: An Analysis of the Legal Framework and Its Interpretation in Case Law and Literature* (Oxford: Peter Lang, 2010); H. Kronke, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Alphen aan den Rijn: Kluwer Law International, 2010); H. Garavi, *The International Effectiveness of the Annulment of an Arbitral Award* (Alphen aan den Rijn: Kluwer Law International, 2002).

[3] An almost identical provision exists in the New York Convention art.VI.

[4] A similar approach has recently been taken by the courts in the US in *Corporación Mexicana de Mantenimiento Integral, S. De R.L de C.V v Pemex-Exploración y Producción*, No. 10 Civ. 206 (AKH), 2013 WL 4517225, (S.D.N.Y. Aug. 27, 2013).

[5] A.J. van den Berg, "Enforcement of Annulled Awards" (1998) 9(2) ICC Ct Bull (November) 15.

creates a legal impossibility[6] and therefore the "game is clearly over".[7] A party is not entitled to shop around until it finds a venue which will enforce the award.

Numerous lawyers, academics and judges have expressed similar views to those of A.J. van den Berg. Michael Kerr has stated that: "No one having the power to make legally binding decisions … should be altogether outside and immune from [the legal] system".[8] Similarly, Dr Francis Mann argued that there must be some control of awards at the arbitral situs, which he described as the *lex loci arbitri*,[9] and equally Professor Sanders argued that "enforcing a non-existing arbitral award would be an impossibility".[10]

The territorial approach has been recognised in a few jurisdictions.[11] Under the Italian Code of Civil Procedure[12] the annulment of an award at the seat of the arbitration creates a mandatory, not discretionary ground, for refusing to enforce the award. The Italian Code states:

> "The Court of Appeal shall refuse the recognition or the enforcement of the foreign award if in the opposition proceedings the party against which the award is invoked proves the existence of one of the following circumstances …".

However, most countries do not follow this approach.

2. Delocalised Arbitrations

The concept of a delocalised arbitration presupposes that an enforcing court is free to ignore the decisions of the court at the seat of the arbitration. The rationale for this, according to Paulsson, is that an international arbitration "cannot be deemed a manifestation of the State".[13] Paulsson's views were developed from those of Professors Berthold Goldman and Philippe Fouchard in the late 1960s. Goldman took the view that[14]:

> "Unless one adopts the irrational and unjustifiable system of attaching the arbitral process to its seat … any search for a way of grounding the arbitration in some system leads one unavoidably to the need for an autonomous non-national system."

In *Götaverken*,[15] the Cour d'appel of Paris followed the views of these leading French academics and stated:

> "the place of the arbitral proceedings, chosen only in order to assure their neutrality, is not significant; it may not be considered an implicit expression of the parties' intent to subject themselves, even subsidiarily, to the *loi procédurale française"*

. Although not expressly stated, it is implicit from the decision of the Cour d'appel in *Götaverken* that the court considered that an international arbitration was stateless and free

[6] van den Berg, "Enforcement of Annulled Awards" (1998) 9(2) ICC Ct Bull (November) 16.
[7] van den Berg, "Enforcement of Annulled Awards" (1998) 9(2) ICC Ct Bull (November) 15.
[8] M. Kerr, "Arbitration and the Courts: The UNCITRAL Model Law" (1985) 34 ICLQ 1, 15.
[9] F. Mann, "Lex Facit Arbitrum" in P. Sanders (ed.), *Liber Amicorum for Martin Domke* (The Hague: Martinus Nijhoff, 1967), p.157, reprinted in (1986) 2 Arb. Int'l 241; see also W. Park, "Lex Loci Arbitri and International Commercial Arbitration" (1983) 32 I.C.L.Q. 21.
[10] P. Sanders, "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1959) Netherlands Int'l L. Rev. 43, 55.
[11] These include Italy and Germany; see Bundesgerichtshof / III ZB 14/07, SchiedsVZ 2008, 195.
[12] (2000) Book 4, Title VIII Arbitration, art.840(5).
[13] J. Paulsson, "Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)" (1998) 9(1) ICC Ct Bull (May) 14, 21.
[14] B. Goldman, "Les Conflits de lois dans l'arbitrage international de droit privé" (1963) 109 *II Recueil des cours* 347, 379–380, 479–480.
[15] *AB Götaverken v Libyan General Maritime Transport Co* (1980) JDI 660; see J. Paulsson, "Arbitration Unbound: Award Detached from the Law of its Country of Origin" (1981) 30 I.C.L.Q. 358, 385 for an English translation of the dispositive passages.

from the *lex arbitri*. This issue was subsequently addressed in *Hilmarton Ltd v Omnium de Traitement et de Valorisation*.[16] The French Cour de cassation held that:

> "The award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy."[17]

Other decisions of the French courts which follow this approach include: *Générale de l'Aviation Civile de l'Emirat de Dubaï v Société International Bechtel Co*[18]; *Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices*[19]; *Chromalloy Aeroservices v Arab Republic of Egypt*[20]; and *Maximov v NLMK*.[21]

Paulsson has sought to justify the concept of a delocalised (or transnational) arbitration by arguing that[22]:

> "[t]he legal force of transnational arbitration is founded on the parties' creation of a contractual institution; the effect of the proceedings may be left to be controlled by whatever legal system is requested to recognise the award once it is rendered, and that system need not necessarily be that of the place of arbitration".

This approach is at odds with the territorial approach as expressed by A.J. van den Berg[23] that the annulment by the court at the seat of the arbitration rendered the award of no value[24] and that it could not subsequently be enforced in another country because there was nothing to enforce.[25]

It may be noted that arbitrations that are conducted under the Washington Convention appear to be delocalised. The review process of an arbitration award made under the International Centre for Settlement of Investment Disputes (ICSID) system is carried out not by state courts but by an ad hoc committee. A dissatisfied party can challenge the validity of an arbitral award by making an application for annulment, under the Washington Convention art.52(1). An ad hoc committee is constituted, which makes the final decision on annulment. If the award is not annulled it becomes binding on the parties by virtue of the Washington Convention arts 53(1) and 54(1). There is no further review process. The Convention therefore creates its own self-contained and "delocalised" award review regime that is internal to the ICSID system. Attempts to seek the annulment of ICSID awards before national courts have been unsuccessful.[26] However, there are strong policy reasons for treating state arbitrations differently from commercial arbitrations. First, no state would want itself to be the subject of judicial criticism from the courts of another country. ICSID

[16] (1999) 14(6) Mealey's International Arbitration Report A-1–A-5 (High Court of England and Wales); (1997) XXII Ybk Comm Arbn 696 (Cour de cassation, June 10, 1997); (1996) XXI Ybk Comm Arbn 594 (Cour d'appel Versailles, June 29, 1995); (1995) XX Ybk Comm Arbn 663 (Cour de cassation, March 23, 1994).

[17] This statement of the French Cour de cassation has been the subject of some criticism. See, for example, Eric Schwartz, "A Comment on Chromalloy Hilmarton, à l'américaine" (1997) 14(2) *Journal of International Arbitration* 125, 131, where he suggested that this part of the decision might be "a little bit presumptuous". Mr Schwartz rhetorically asked the question: "For on what authority can a French court decide what does or does not form part of the Swiss legal order? I would have thought that this was a matter for Swiss legislators and the courts, and not the French Court of Cassation, to decide."

[18] France, Cour d'appel de Paris 2004/07635 (2006) Rev. Arb. 695–709.

[19] 05-18.053, Jean Pierre, Rapport (2007) Rev. Arb. 507–515; E. Gaillard (2007) Rev. Arb. 517–522; T. Clay (2007) 4 JDI 23.

[20] *Chromalloy Aeroservices v Arab Republic of Egypt* (1997) XXII Ybk Comm Arbn 691, Paris Cour d'appel. The USA District of Columbia, 939 F. Supp. 907 (D.D.C. 1996), was also asked to enforce the award. The court enforced the award but for different reasons to those of the Paris Cour d'appel. The court relied on the New York Convention art.VII; i.e. the more favourable right provision.

[21] Tribunal de grande instance, Paris, May 16, 2012.

[22] Paulsson, "Arbitration Unbound: Award Detached from the Law of Its Country of Origin" (1981) 30ICLQ 363.

[23] van den Berg, "Enforcement of Annulled Awards" (1998) 9(2) ICC Ct Bull (November) 15.

[24] Applying the principle of *ex nihil nihil fit*—nothing can come of nothing.

[25] van den Berg, "Enforcement of Annulled Awards" (1998) 9(2) ICC Ct Bull (November) 15.

[26] *Tembec Inc v United States of America* 570 F.Supp.2d 137 (2008) (court held petition for *vacatur* was barred because of res judicata and collateral estoppel).

arbitration is successful because it is delocalised. Secondly, there would be the appearance of bias if the courts of a state involved in the arbitration were able to review the decision of the arbitral tribunal—one would then ask who should guard the guardians.

3. Recognition and Enforcement May Be Refused (A Test, not a Legal Theory)

English law does not adhere to either the territorial or the delocalised theory; but has considered the New York Convention art.V(1)(e) and the Arbitration Act 1996 s.103(2)(f) by interpreting the words and applying a test. In *Dowans v Tanzania Electric Supply Co Ltd*[27] Burton J held that there was no question of an automatic refusal simply because one of the grounds under s.103(2) had been satisfied. His Lordship stated that

> "even if an award has been set aside in the home jurisdiction upon one or other of the grounds set out in the subsections, the English courts still retain a discretion to enforce the award, though that jurisdiction will be exercised sparingly".

Similar statements had been made in *Apis AS v Fantazia KeresKedelmi KFT*[28] and *IPCO (Nigeria) Ltd v Nigerian National Petroleum Ltd*.[29] In *IPCO*, Gross J held that there was no doubt that the Arbitration Act 1996 s.103 embodies a pre-disposition to favour enforcement of New York Convention Awards, reflecting the underlying purpose of the New York Convention itself. His Lordship then stated that even when a ground for refusing enforcement is established the court retains a discretion to enforce the award.[30] Gross J stated at [12]:

> "… s.103(2)(f) is only applicable when there has been an order or decision suspending the award by the court in the country of origin of the award ('the country of origin'). Section 103(2)(f) is not triggered automatically by a challenge brought before the court in the country of origin.[31] This conclusion flows from the wording of section 103(2)(f) itself, it is supported by leading commentators[32] and it is consistent with the provisions of section 103(5)of the Act—which would be otiose, or at least curious, if an application to the court in the country of origin automatically resulted in the award being suspended."[33]

The discretion to enforce an award that has been set aside is not wide. In *Kanoria v Guinness*[34] Lord Phillips CJ expressed doubts about whether s.103(2) gives the court a broad discretion to allow enforcement of an award where one of the grounds set out in that subsection has been established. Similarly, in *Dardana Ltd v Yukos Oil Co*[35] Mance LJ expressed the view that s.103(2) cannot have been intended to give the court an open discretion but one based on some recognisable legal principle. Rix LJ considered this issue in *Dallah Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan*[36] in the Court of Appeal. Rix LJ concluded that there were only limited

[27] [2011] EWHC 1957 (Comm); [2011] Arb. L.R. 21 (Comm); [2011] 2 Lloyd's Rep. 475.
[28] *Apis AS v Fantazia KeresKedelmi KFT* [2001] 1 All E.R. (Comm) 348.
[29] [2014] EWHC 576 (Comm); [2008] EWCA Civ 1157; [2008] EWHC 797 (Comm); [2005] EWHC 726 (Comm).
[30] Here Gross J was referring to M.J. Mustill and S.G. Boyd, *Commercial Arbitration*, 2nd edn, 2001 Companion (London: LexisNexis Butterworths, 2001), p.87.
[31] See also *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 (TCC); [2014] 2 Lloyd's Rep. 133; [2014] B.L.R. 401.
[32] References omitted: A.J. van den Berg, *The New York Convention of 1958* (New York: Kluwer Law International, 1981), p.352; and E. Gaillard and J. Savage, *Fouchard Gaillard, Goldman on International Commercial Arbitration* (New York: Kluwer Law International, 1999), pp.980–981.
[33] In *Continental Transfert Technique Ltd v Nigeria & Ors* [2010] EWHC 780 Hamblen J agreed with Gross J's dicta.
[34] [2006] EWCA Civ 222; [2006] 1 Lloyd's Rep. 701.
[35] [2002] EWCA Civ 543; [2002] 2 Lloyd's Rep. 326.
[36] [2009] EWCA Civ 755 at [89]–[90]; [2010] 1 All E.R. 592; [2010] 2 W.L.R. 805.

circumstances when an award could be enforced where it had been set aside at the seat of the arbitration:

> "89. It seems to me that in context the expression 'may be refused … only if' (article V), especially against the background of the French text ('ne seront refusées'), and the expressions of the English statute 'shall not be refused except' and 'may be refused if' (section 103(1) and (2)), are really concerned to express a limitation on the power to refuse enforcement rather than to grant a discretion to enforce despite the existence of a proven defence. What one is left with therefore is a general requirement to enforce, subject to certain limited defences. There is no express provision however as to what is to happen if a defence is proven, but the strong inference is that a proven defence is a defence. It is possible to see that a defence allowed under Convention or statute may nevertheless no longer be open because of an estoppel (Professor van den Berg's view, see *The New York Convention 1958* at 265), or that a minor and prejudicially irrelevant error, albeit within the Convention or statutory language, might not succeed as a defence (as in China Agribusiness). But it is difficult to think that anything as fundamental as the absence of consent or some substantial and material unfairness in the arbitral proceedings could leave it open to a court to ignore the proven defence and instead decide in favour of enforcement.
>
> 90. As for the case of a successful or unsuccessful (or waived) challenge in the courts of the country of origin, that is a more controversial area. My own view is that a successful challenge is not only in itself a potential defence under the Convention or our statute but likely also to raise an issue estoppel …."

In the Supreme Court, Lord Mance considered the discretion to enforce an award which had been set aside and stated[37]:

> "In *Dardana Ltd v Yukos Oil Company* [2002] 1 All ER (Comm) 819 I suggested that the word 'may' could not have a purely discretionary force and must in this context have been designed to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have enforcement or recognition refused (paras 8 and 18).
>
> … it would be a remarkable state of affairs if the word 'may' enabled a court to enforce or recognise an award which it found to have been made without jurisdiction, under whatever law it held ought to be recognised and applied to determine that issue."

Paulsson has advanced a theory that awards which have been set aside for reasons which are not fundamental to their validity should still be enforced. He referred to this as a local standard annulment (LSA). An LSA is defined as being a ground for setting aside the award which is not an international standard annulment (ISA). An ISA is defined as being a ground set out in the New York Convention art.V(1)(a)–(d).[38] An ISA therefore arises where there is incapacity of a party, invalidity of the arbitration agreement or violation of due process, where the arbitral tribunal acts outside its scope or jurisdiction, or where there is irregularity in the composition of the arbitral tribunal or the procedure. Rix LJ in *Dallah Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* gave some support for this approach where he stated that an award may be enforced if it had been set aside for some "minor and prejudicially irrelevant error".

In *Yukos Capital SARL v OJSC Rosneft Oil Co*[39] both the English court and the Dutch court specifically had to address the question of whether they could enforce an award that

[37] [2010] UKSC 46 at [67]–[68]; [2010] 2 Lloyd's Rep, 691; [2010] 3 W.L.R. 1472.

[38] J Paulsson, "Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)" (1998) 9(1) ICC Ct Bull (May) 14, at 29.

[39] [2014] EWHC 2188 (Comm).

had been set aside at the seat of the arbitration. Four awards were made in favour of Yukos Capital on September 19, 2006. The seat of the arbitration was Russia. On May 23, 2007, the Moscow Arbitrazh Court (which was the relevant supervisory court) annulled each of the awards in judgments which were upheld on appeal. Despite these awards being set aside at the seat of the arbitration Yukos Capital sought to enforce the awards in the Netherlands. In a decision dated April 28, 2009, the Court of Appeal in Amsterdam enforced the awards and held that[40]:

> "[S]ince it is very likely that the judgments by the Russian civil judge setting aside the arbitration decisions are the result of a dispensing of justice that must be qualified as partial and dependent, said judgment cannot be recognized in the Netherlands. This means that in considering the application by Yukos Capital for enforcement of the arbitration decisions, the setting aside of the decision by the Russian court must be disregarded."

A.J. van den Berg criticised the judgment of the Court of Appeal in Amsterdam,[41] arguing that the existence of the arbitration award must be based upon the law to which the arbitration is subject. Therefore, he asserted, if under the law of the seat of the arbitration the award is invalid, it cannot have any validity in any other jurisdiction.[42]

OJSC Rosneft Oil failed to pay Yukos Capital despite the decision of the Court of Appeal in Amsterdam. Yukos Capital therefore commenced proceedings in the High Court in England in March 2010. Payment was then made of the principal sum in June 2010 and the issues remaining in the proceedings in England related solely to the entitlement to interest. As a preliminary question the court was asked to decide whether enforcement of arbitral awards that have been set aside at the seat by the courts of the seat is precluded by common law. Simon J referred to *Dicey & Morris*[43] with approval and held that:

> "In the absence of authority in England it is suggested that where [an award] has been set aside in the court of the seat, an arbitral award should be enforced only if recognition of the order setting aside the award would be impeachable for fraud or as being contrary to natural justice,[44] or otherwise contrary to public policy, in accordance with Rules 50 to 52."[45]

Simon J then referred to Rix LJ's judgment[46] in *Dallah Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan*. Simon J thereafter referred to the analysis of van den Berg[47] and concluded:

> "In my judgment the answer to the question is not provided by a theory of legal philosophy but by a test: whether the Court in considering whether to give effect to

[40] Cited by A.J. van den Berg, "Enforcement of Arbitral Awards Annulled in Russia. Case Comment on Court of Appeal Amsterdam, April 28, 2009" (2010) 27(2) JIA 187.

[41] van den Berg, "Enforcement of Arbitral Awards Annulled in Russia. Case Comment on Court of Appeal Amsterdam, April 28, 2009" (2010) 27(2) JIA 187.

[42] In *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat* (2011) 491569/KGRK 11-1722 the district court of Amsterdam refused to enforce an award which had been set aside by the Moscow Arbitrazh Court because there was no proof of any violation of the principle of proper judicial procedure. The Amsterdam Court of Appeal later affirmed this decision (2012) 200.100.508/01.

[43] Lord Morris of Mapesbury et al. (eds), *Dicey, Morris & Collins on the Conflict of Laws*, 15th edn (London: Sweet & Maxwell, 2014).

[44] In *Corporación Mexicana de Mantenimiento Integral, S. De R.L de C.V v Pemex-Exploración y Producción*, No. 10 Civ. 206 (AKH), 2013 WL 4517225, (S.D.N.Y. Aug. 27, 2013) the US District Court for the Southern District of New York confirmed an arbitral award even though it had been annulled at its seat in Mexico. The court found that the decision of the Mexican court "violated basic notions of justice". See also *TermoRio SAESP v Electranta SP* 06-7058, 2007 WL 1515069 (DC Cir May 25, 2007); and *Steel Corporation of the Philippines v International Steel Services Inc*, Case no 08-1853 / 08-2568.

[45] *Yukos Capital SARL v OJSC Rosneft Oil Co* [2014] EWHC 2188 (Comm) at [12].

[46] [2009] EWCA Civ 755 at [89]–[90]; [2010] 1 All E.R. 592; [2010] 2 W.L.R. 805.

[47] van den Berg, "Enforcement of Arbitral Awards Annulled in Russia. Case Comment on Court of Appeal Amsterdam, April 28, 2009" (2010) 27(2) JIA 187.

> an award can (in particular and identifiable circumstances) treat it as having legal effect notwithstanding a later order of a court annulling the award. In applying this test it would be both unsatisfactory and contrary to principle if the Court were bound to recognise a decision of a foreign court which offended against basic principles of honesty, natural justice and domestic concepts of public policy."[48]

In short Simon J has held that neither the territorial approach nor the transnational approach is applicable under English law. The award survives being set aside at the seat of the arbitration. However, under principles of comity, the enforcing court should not enforce an award which has been set aside, unless the court at the seat of the arbitration (that set aside the award) had offended basic principles of honesty, natural justice and domestic concepts of public policy. What Simon J did not directly address was whether the award could be enforced if it had been set aside at the seat of the arbitration for some minor and prejudicially irrelevant error.

4. The European Convention: A Constraint on the Discretion

The European Convention on International Commercial Arbitration 1961 has been signed by a number of East European countries as well as Belgium, France, Cuba, Germany, Italy and Spain, amongst others. Article IX(1) of the Convention provides that if the award is set aside under a specific ground in the Convention then recognition and enforcement may be refused *but otherwise it must be enforced*. The grounds, in summary, are: (a) the parties to the arbitration agreement were under some incapacity or the arbitration agreement was not valid; or (b) the party requesting the setting aside was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties. Article IX(2) then states:

> "In relations between Contracting States that are also parties to the New York Convention … paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above."

In *Ciments Français v Holding Co Sibirskiy Cement OJSC*,[49] an ICC arbitration took place in Turkey. The award was set aside by the Turkish courts on the basis that the arbitrators failed to deal with all the issues. The Kemerova Arbitrazh Regional Court enforced an ICC award which had been set aside at the seat of the arbitration. The court noted that the European Convention art.IX(1) limits the grounds of refusal to enforce an award which had been set aside. As the reason for the setting aside of the award did not fall within one of the grounds in art.IX(1) the Kemerova Arbitrazh Regional Court concluded that it had to enforce the award. A year later, the Federal Arbitrazh Court for the West Siberian District reversed the decision and the matter was then referred to the Supreme Arbitrazh Court. This court affirmed the Federal Arbitrazh Court's decision and held that to enforce an award that had been set aside at the seat of the arbitration was against domestic public order. This decision has, however, now been doubted.[50]

[48] *Yukos Capital SARL v OJSC Rosneft Oil Co* [2014] EWHC 2188 (Comm) at [20].

[49] Supreme Commercial [Arbitrazh] Court of the Russian Federation, Case No.VAS-17458/11, August 27, 2012 in A.J. van den Berg (ed.) (2013) XXXVIII Ybk Comm. Arbn 2013.

[50] There is now some question whether the decision of the Supreme Arbitrazh Court would be followed as the decision of the Russian national court on which the decision was based has been reversed: see L. Silberman and M. Scherer, "Forum Shopping and Post-Award Judgments", New York University Public Law and Legal Theory Working Papers 2013, Paper 447, p.316.

5. The More-Favourable-Right Provision

In *Dallah Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan*[51] Moore-Bick LJ considered the more-favourable-right provision which exists at art.VII(1) of the New York Convention. In passing his Lordship stated that he thought that the

> "discretion to permit enforcement may be somewhat broader than has previously been recognised and in particular whether there may be circumstances in which the court would be justified in exercising its discretion in favour of allowing enforcement of a foreign award notwithstanding that it had been set aside by the supervisory court. The question does not arise in this case, however, and I do not think that it would be helpful to do more at this stage than draw attention to the question."[52]

The English Arbitration Act 1996 did not, however, include a provision that was identical to art.VII(1) of the New York Convention. The closest provision is s.104 of the English Arbitration Act 1996 which states:

> "Nothing in the preceding provisions of this Part affects any right to rely upon or enforce a New York Convention award at common law or under section 66."

The discretion that exists at common law was considered in *Yukos Capital SARL v OJSC Rosneft Oil Co*.[53] The court concluded that there was only a narrow discretion and therefore the more-favourable-right provision has limited application in England.

6. Estoppel

English law recognises the principle of issue estoppel which may arise where the same issues are dealt with between the same parties in a different court. If a court is asked to enforce an award and refuses, then that decision can give rise to an estoppel where enforcement is sought in another jurisdiction. The issue came before the English High Court in *Diag Human Se v Czech Republic*.[54] Diag Human received an award against the Czech Republic in a sum of around US $200 million. Diag Human sought to enforce the award in France, Luxembourg, the US and Austria but was unsuccessful before the Austrian Supreme Court, which held that the award had not yet become binding. Diag Human then sought enforcement before the English courts. Counsel for the Czech Republic argued that the decision of the Austrian Supreme Court had created an issue estoppel and therefore Diag Human's claim for enforcement should be dismissed. The Austrian Supreme Court had held that the award was not binding because, under the terms of the arbitration agreement, it was subject to a review process by other arbitrators and that this formed part of the arbitral proceedings.

Counsel for the Czech Republic in the English High Court relied on the decisions of the House of Lords in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)*[55] and the *Sennar (No.2)*,[56] which provided that a decision of a foreign court on an issue can give rise to an estoppel *per rem judicatam* on that same issue in later proceedings, between the same parties, provided that: (i) the foreign court is recognised under English private international law as a court of competent jurisdiction; (ii) its decision on the issue is final and conclusive[57];

[51] [2009] EWCA Civ 755; [2010] 1 All E.R. 592; [2010] 2 W.L.R. 805.
[52] [2009] EWCA Civ 755 at [59]; [2010] 1 All E.R. 592; [2010] 2 W.L.R. 805.
[53] [2014] EWHC 2188 (Comm).
[54] [2014] EWHC 1639 (Comm).
[55] [1967] 1 A.C. 853; [1966] 2 All E.R. 536; 43 I.L.R. 23.
[56] [1985] 1 W.L.R. 490 (HL); [1985] 2 All E.R. 104.
[57] The mere fact that a party starts enforcement proceedings in one country and then abandons them does not give rise to an estoppel: *Glencore Grain Rotterdam BV v Shivbav Rai Harnarain (India) Co* (2008) CS(OS) 541/1998 (Delhi); and *Motorola Inc v Modi Wellvest Private Ltd*, reported in (2004) (3) Arb. L.R. 650 (Delhi).

and (iii) the decision was "on the merits". A decision on the merits in this sense is not a decision on the substantive issues of the case, but means a decision which: (i) establishes certain facts as proved or not in dispute; (ii) states what are the relevant principles of law applicable to such facts; and (iii) expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned.[58] Eder J agreed with the Czech Republic and held that an issue estoppel arose. The court emphasised that not every decision of a foreign court would bind an English court. Eder J, referring to *Yukos Capital v Rosneft Oil*,[59] stated that questions of arbitrability or public policy may be answered differently and that a decision in a foreign court, refusing to enforce an award on public policy grounds of that state, will not ordinarily give rise to an issue estoppel in England.[60]

Questions of issue estoppel also arose in *Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd*.[61] Coeclerici commenced an arbitration in London against Gujarat NRE Coke. Before the hearing a settlement was reached which provided that Coeclerici would be entitled to an immediate consent order if the sums that had been agreed were not paid. The settlement sum was not paid and Coeclerici applied to the arbitral tribunal for a consent award. The arbitral tribunal requested Gujarat NRE Coke to explain why it had not paid and its solicitors wrote back saying that they had not received instructions. They thereafter argued that they had not been given a reasonable opportunity to present their client's case. The consent award was made by the arbitral tribunal and Gujarat NRE Coke thereafter sought to have the award set aside by the High Court.[62] The High Court specifically had to deal with the question of whether Gujarat NRE Coke had been given a "reasonable opportunity" to present its case. Judge Mackie QC in a short and succinct judgment dismissed the application to set aside the award and held that:

> "The very able and courteous submissions of their Counsel should not be allowed to disguise the fact that the Claimants have repeatedly, deplorably and without justification failed to pay money which is plainly due to the Defendants."

Coeclerici then applied to have the award enforced in Australia. Gujarat NRE Coke again argued that it had not been given a "reasonable opportunity" to present its case and that therefore the award should not be enforced. The Federal Court enforced the award and held that there was an issue estoppel regarding the "reasonable opportunity" question raised by Gujarat NRE Coke, because that had been determined by the English High Court and so could not be re-litigated.

It appears to follow that if a party is unsuccessful in an application to set aside an award at the seat then this may give rise to an estoppel. The unsuccessful party may be prevented from running the same defence before another court. However, no estoppel arises where a party is successful in having the award set aside; although the decision of the court, because of comity, will carry significant weight.

7. Adjourning the Enforcement Decision When an Application to Set Aside Has Been Made

The English case of *IPCO (Nigeria) Ltd v Nigerian National Petroleum Ltd*[63] illustrates some of the problems arising from the wording of the Arbitration Act 1996 s.103(5) and the New York Convention art.VI. In October 2004 a distinguished panel of Nigerian arbitrators awarded IPCO over US $150 million. IPCO sought to enforce the award in England and an order to this effect was made ex parte on November 29, 2004. Nigerian

[58] [1985] 1 W.L.R. 490, 499F (per Lord Brandon).
[59] [2012] EWCA Civ 855; [2013] 3 W.L.R. 1329; [2013] 1 All E.R. 223.
[60] *Diag Human Se v Czech Republic* [2014] EWHC 1639 (Comm) at 58.
[61] [2013] FCA 882.
[62] *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] EWHC 1987 (Comm).
[63] [2014] EWHC 576 (Comm); [2008] EWCA Civ 1157; [2008] EWHC 797 (Comm); [2005] EWHC 726 (Comm).

National Petroleum Ltd (NNPL) applied to have the order enforcing the award set aside pursuant to the Arbitration Act 1996 s.103(2)(f) and (3). In the alternative, NNPC made an application that the enforcement of the order be adjourned pursuant to the Arbitration Act 1996 s.103(5). In 2005 Gross J considered this application.[64]

In regard to the application to adjourn enforcement under the Arbitration Act 1996 s.103(5), his Lordship, referring to *Fouchard*,[65] stated that the section "achieves a compromise between two equally legitimate concerns". These were stated as being:

> "On the one hand, enforcement should not be frustrated merely by the making of an application in the country of origin; on the other hand, pending proceedings in the country of origin should not necessarily be pre-empted by rapid enforcement of the award in another jurisdiction. Pro-enforcement assumptions are sometimes outweighed by the respect due to the courts exercising jurisdiction in the country of origin — the venue chosen by the parties for their arbitration: *Mustill & Boyd*,[66] at p.90."[67]

The court then went on to consider when to use its discretion to adjourn the decision on enforcement. The approach of Gross J was that there should be no fetter on this wide discretion; but that there were matters which might be considered relevant. These included[68]: (i) whether the application to set aside was brought bona fide and was not simply a delaying tactic; (ii) whether the application had a realistic prospect of success; and (iii) the extent of the delay occasioned by an adjournment and any resulting prejudice. Gross J then referred to the need to look at the circumstances of the individual case. He considered *Soleh Boneh v Uganda Goverment*,[69] which had referred to two important factors, being: (a) the strength of the argument that the award is invalid; and (b) the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult if enforcement is delayed. The court stated that if the award is manifestly invalid there should be an adjournment and no order for security. If the award is manifestly valid there should be either an order for immediate enforcement or else an order for substantial security. There is a sliding scale in between and the judge should be guided by his preliminary conclusion on the likelihood of success.[70]

Gross J then looked at the question of comity (i.e. respect for another court's decision). Gross J considered the position in which an award is made abroad in an arbitration between parties of the same nationality. His Lordship stated:

> "[I]n the exercise of the discretion under s.103(5) of the Act, the fact that the arbitration was domestic in the country of origin, must generally be likely to enhance the deference due to the court exercising supervisory jurisdiction in that country. Comity and common sense are likely to require no less; pre-empting the decision on a challenge to an award before the court exercising supervisory jurisdiction in the country of origin would be a strong thing in a case where all parties were domiciled or incorporated in that country".[71]

The issue of comity was again considered by the High Court in *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd*.[72] The facts were similar to *IPCO*[73] except that the parties were from different jurisdictions. The court acknowledged that both in the New

[64] [2005] EWHC 726 (Comm).
[65] E. Gaillard and J. Savage, *Fouchard Gaillard, Goldman on International Commercial Arbitration* (New York: Kluwer Law International, 1999), p.981.
[66] Mustill and Boyd, *Commercial Arbitration*, 2nd edn, 2001 Companion (2001).
[67] [2005] EWHC 726 (Comm) at [14].
[68] [2005] EWHC 726 (Comm) at [15].
[69] [1993] 2 Lloyd's Rep. 208 [212] per Staughton LJ.
[70] *Dardana v Yukos* [2002] EWCA Civ 543; [2003] 2 Lloyd's Rep. 326 (CA).
[71] [2005] EWHC 726 (Comm) at [16]. See also *Yukos Oil Co v Dardana Ltd* [2002] 2 Lloyd's Rep. 326 at [23] per Mance LJ.
[72] [2014] EWHC 2510 (Comm).
[73] [2014] EWHC 576 (Comm).

York Convention and under the Arbitration Act 1996 there was a strong predisposition to favour enforcement of the award and that the burden of proof was "firmly" on the party resisting enforcement. The court considered that comity was the overriding consideration and held that

> "where it is plain that a challenge to an award is being properly dealt with in the courts of the seat of the arbitration, common sense may indicate that an adjournment is preferable to a decision by the enforcing court dealing with the same issues".[74]

The court concluded that it "should avoid the risk of conflicting decisions, which would occur if the English court enforces the award and the New York court subsequently decides to set it aside".[75] Paying deference to principles of comity is an approach that has also found favour in other jurisdictions. In *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd and Danos and Curole Marine Contractors Inc*[76] the United States court made it clear that it would generally endorse decisions of the courts of foreign jurisdictions unless there were public policy reasons not to do so. See also *Spier v Calzaturificio Tecnica*[77] and *Yusuf Ahmed Alghanim & Son v Toys 'R' Us Inc*.[78]

On the facts in *IPCO*, Gross J held[79] that justice would be done by adjourning the enforcement of the order on terms, inter alia, requiring NNPC to pay the US $13 million indisputably due to IPCO and to provide appropriate security in London in an amount of US $50 million. Four years later a further application was made before the court to enforce the award. The application was made on the basis that the proceedings in Nigeria to set aside the award were taking substantially longer than originally foreseen. Tomlinson J was asked to reconsider the order of Gross J.[80] During the intervening period the application to set aside the award in Nigeria had ground to a halt. NNPL had challenged the competence of the judge hearing the case in Nigeria and the issue had been referred to the Nigerian Court of Appeal. It was noted by one judge that Nigeria was not geared up to deal with international arbitration and that "The mill of justice can grind very slowly in Nigeria".[81] Tomlinson J held that:

> "An adjournment granted pursuant to section 103(5) of the Arbitration Act 1996 is by its nature a temporary holding measure. The appropriateness of maintaining such a measure in place will be dependent, crucially, on developments before the supervisory court."[82]

His Lordship held on the facts that it was likely that IPCO would succeed in some of its claims and decided that a further partial payment of just over US $50 million should be paid to IPCO on an interim basis.

NNPC appealed the order on the basis that the court had no power to order the payment of a partial sum. NNPC argued that unless a court decided to enforce the award in its entirety all it could do is adjourn pursuant to the New York Convention art.VI and the Arbitration Act 1996 s.103(5) on terms as to security, if appropriate. The Court of Appeal disagreed and in a short judgment given by Tuckey LJ the appeal was dismissed.[83] NNPC appealed to the House of Lords; but leave to appeal was refused.

[74] *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd* [2014] EWHC 2510 (Comm) at [37].
[75] *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd* [2014] EWHC 2510 (Comm) at [73].
[76] (1999) 14(8) Mealey's International Arbitration Report D-1–D-2.
[77] (2000) XXV Ybk Comm Arbn 641.
[78] 126 F 3d 15 (2nd Cir 1997).
[79] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Ltd* [2005] EWHC 726 (Comm); [2005] 2 Lloyd's Rep. 326; [2005] 1 C.L.C. 613.
[80] [2008] EWHC 797 (Comm); [2008] 1 C.L.C. 738; [2008] 2 Lloyd's Rep. 59.
[81] [2008] EWHC 797 (Comm) at [53]; [2008] 1 C.L.C. 738; [2008] 2 Lloyd's Rep. 59.
[82] [2008] EWHC 797 (Comm) at [74]; [2008] 1 C.L.C. 738; [2008] 2 Lloyd's Rep. 59.
[83] [2008] EWCA Civ 1157.

NNPC further sought a stay of Tomlinson J's order and a stay was granted on an interim basis. Allegations of fraud were discussed by the parties and a Consent Order was agreed in June 2009 whereby the order of Tomlinson J was set aside and the parties agreed that issues of fraud ought to be resolved by the courts in Nigeria. In 2013 the deputy Director of Public Prosecutions wrote to IPCO stating that it was believed that the prosecution of the fraud claims was unsustainable as witnesses were not now prepared to give oral evidence. The prosecution therefore had no reasonable prospects of success.

The case once again came before the English High Court in 2014. At this time the application to set aside in Nigeria had still not been decided. It was submitted by counsel for IPCO that the allegations of fraud that had been made against IPCO were not bona fide, but had been made solely for the purposes of blocking enforcement, and that NNPC had known that its fraud allegations were false. The court disagreed and held that, despite the letter of the deputy Director of Public Prosecutions, the evidence relating to the fraud still existed in the face of the documents. Field J held that:

> "My conclusion that IPCO has failed to establish any change of circumstances justifying a further application to enforce the Award in whole or part means that Tomlinson J's order, as varied by the Consent Order, must remain undisturbed and IPCO's application must be dismissed."[84]

Field J further stated that if NNPC's fraud allegations were proven then there would be a risk that the whole award would be vitiated.[85] His Lordship's reasoning was that fraud unravels all.[86] Field J therefore dismissed IPCO's application to enforce the award. He stated that it is Nigeria where the enforceability of the award must be decided and for the sake of the parties and the Nigerian legal system this Gordian Knot must be cut as quickly as possible.

8. Summary

England's decision to adopt "a test" in order to determine when an annulled arbitral award should be enforced, rather than approach the issue using legal theory, brings with it a problem. Where an application is made to set aside the award at the seat of the arbitration the courts will usually adjourn enforcement unless it is clear that the application is not bona fide and a delaying tactic; or that the application does not have a realistic prospect of success; or there will be inordinate delay resulting in prejudice. The English courts do not rush to enforce awards if it is possible that the court at the seat will set aside the award. Nearly 10 years have now passed since the arbitral tribunal made its award in *IPCO* and there are no signs that the award will be either set aside or enforced in the near future. Given that Nigeria is not the only country where the mill of justice grinds slowly, the need to choose a seat for the arbitration, where the courts will act swiftly, is of paramount importance.

It is not enough that the arbitration is conducted quickly and efficiently through an administered scheme, such as the London Court of International Arbitration (LCIA) Rules or the International Chamber of Commerce (ICC) Rules. The main delays to receiving payment may not arise because of the arbitration procedure; they may occur after the award is given and the dissatisfied party decides to challenge the award. When deciding on a seat for the arbitration it is essential that parties ensure that the law of the seat of the arbitration permits only limited grounds for challenge and the courts of the seat of the arbitration deal with arbitration applications effectively and quickly. In this regard there are few jurisdictions which can match the English courts.

[84] [2014] EWHC 576 (Comm) at [93].

[85] [2014] EWHC 576 (Comm) at [95].

[86] *Fraus omnia corrumpit*—see *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6 at [15] per Lord Bingham; [2003] 1 C.L.C. 358; [2003] 2 Lloyd's Rep. 61.

The French solution of treating the award as delocalised from the seat has a superficial attraction as enforcement of an award can proceed quickly. The enforcing court need not have regard to the court at the seat of the arbitration and therefore the setting aside of the award becomes an irrelevance. However, there are two main drawbacks to such an approach. First, there is no effective supervisory control over the arbitral award at the seat. The review process has been said to be a fundamental part of the arbitral process because it provides a system of checks and balances. It has been described by one leading English judge as a "bulwark against corruption, arbitrariness and bias".[87] Secondly, there is the possibility of inconsistent decisions. This was clearly illustrated in *Hilmarton*[88] and *Putrabali*.[89] In *Putrabali* the annulled award was remitted back to the arbitral tribunal, which issued a different decision. France enforced the annulled award and then the party with the remitted or corrected award had to seek to recover the monies it had paid out under the initial award.

[87] M. Kerr, "Arbitration and the Courts: The UNCITRAL Model Law" (1985) 34 ICLQ 1, 15.

[88] *Hilmarton Ltd v Omnium de Traitement et de Valorisation* (1999) 14(6) Mealey's International Arbitration Report A-1–A-5 (High Court of England and Wales); (1997) XXII Ybk Comm Arbn 696 (Cour de cassation, June 10, 1997); (1996) XXI Ybk Comm Arbn 594 (Cour d'appel Versailles, June 29, 1995); (1995) XX Ybk Comm Arbn 663 (Cour de cassation, March 23, 1994).

[89] *Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices* 05-18.053, Jean Pierre, Rapport (2007) Rev. Arb. 507–515; E. Gaillard (2007) Rev. Arb. 517–522; T. Clay (2007) 4 JDI 23.