

Enforcing Annulled Arbitral Awards: Can the Unruly Horse be Tamed?

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Introduction

An important aspect of any arbitral process is the award that is rendered at the end of the proceedings. A successful party would always want to enforce any award that is rendered in the event that the other party fails to honor that award. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“**the New York Convention**”) deals with the recognition and enforcement of foreign arbitral awards. The New York Convention is by and large seen as very successful because it has greater acceptance internationally¹ than treaties for reciprocal enforcement of judgments². Furthermore, awards are seen as bringing finality to arbitral proceedings because there are limited grounds upon which they can be challenged³. Under the New York Convention, there are very limited grounds upon which an enforcing Court can refuse to enforce an award⁴. However, over the last few years, there has been a growing problem in relation to arbitral awards. Indeed, the arbitral community has had to deal with the vexed question of what an enforcing Court should do when it is faced with an award that has been annulled. Where an award is refused recognition and/or enforcement by a Court other than the Court of the seat of the arbitration, that award nevertheless remains valid and there is nothing controversial about this. What is more controversial is where an award has been set aside by the Courts of the seat of the arbitration. The problem with annulled awards is that there is the

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¹ There are currently 157 countries that are signatories to the New York Convention. See also Redfern and Hunter on International Arbitration (6th ed), Oxford University Press 2015, page 29.

² The only major multilateral treaty on recognition and enforcement of Court judgments is the Brussels I Regulation (Recast) EU 1215/2012.

³ For example, under the English Arbitration Act 1996, an award can only be challenged for lack of jurisdiction by the arbitrators under section 67 and serious irregularity under section 68. An appeal on a point of law is only permissible under section 69 if the parties have not excluded that right and the seat of the arbitration is England and the applicable law to the dispute is English Law.

⁴ See Article V of the New York Convention.

potential for the award creditor to forum shop until it finds a jurisdiction that is willing to enforce that annulled award. This could be particularly detrimental to the award debtor given that this award could potentially be shopped around signatory countries (where the award debtor has assets) thereby not giving finality to the award debtor. Consequently, this raises the difficult question of whether or not an arbitral award that has been set aside or annulled by the Courts of the seat of the arbitration should be enforced by the Courts of another country.

Various jurisdictions have taken different approaches to the issue of enforcing arbitral awards that have been set aside at the seat of the arbitration and indeed the effect *res judicata* may have on the enforcement of an arbitral award. The inconsistency that is starting to emerge is well illustrated by the number of cases that have been or are being considered in various jurisdictions⁵. For example, *Maximov v. Novolipetsk Steel Plant*⁶ has now come before the English Courts despite previous and ongoing proceedings in France and Holland⁷. The difficulty that is emerging is further highlighted by a recent case⁸ where the Luxembourg Court of Appeal refused to enforce a \$300million award against the Mexican State Oil and Gas Company, Pemex that was set aside at the seat of the arbitration. Although the parties settled their dispute before Luxembourg's Court of Appeal handed down its decision, it nevertheless demonstrates the differing approach that is emerging given the fact that the Luxembourg decision is at odds with an earlier decision of the US Court of Appeals for the Second Circuit that the award was indeed enforceable⁹. It is anticipated that there will be various enforcement proceedings that will arise from the ongoing Yukos¹⁰ arbitration that was conducted under the auspices of the Permanent Court of Arbitration arising out of the Energy Charter Treaty. It may be recalled that in 2014, the tribunal awarded shareholders in Yukos \$50 billion but the interim

⁵ Cases such as *Maximov* in the UK and the *Getma* case in the USA are all considered later in this article.

⁶ Nikolai Viktorovich Maximov v. OJSC Novolipetsky Metallurgichesky 491569/KG RK 11-1722, 17 November 2011 – Translated <https://www.pravo.unizg.hr/_download/repository/Netherlands_No._41.pdf> accessed 7 May 2017. [2017] EWHC 1911 (Comm).

⁷ See fn 50.

⁸ See *Corporacion Mexicana de Mantenimiento Intergral, S De RL De CV (“Commisa”) v Pemex- Exploracion y Produccion*.

⁹ This decision is discussed later in this article.

¹⁰ *The Russian Federation v Veteran Petroleum Limited, Yukos Universal Limited and Hulley Enterprises Limited* C/09/477160/HA ZA 15-1.

and final awards were subsequently set aside by the District Court of Hague in 2016 on jurisdictional grounds. The shareholders have appealed the decision of the District Court of Hague and are planning to exercise their rights to enforce the awards in various jurisdictions such as the USA, England, Germany, Belgium, India and France despite the fact that it has been set aside¹¹. This is likely to generate significant inconsistencies in terms of decisions from the various jurisdictions at significant expense and cost to the parties.

The inconsistencies are due to a number of reasons. First, the New York Convention doesn't define or deal with what the role of the seat of arbitration should be in the arbitral process. Secondly, the New York Convention doesn't provide that, where an award is annulled at the seat of the arbitration, that award should not be enforced by the Courts of another country. Rather, Article V (e) of the New York Convention simply states that an enforcing Court "may" refuse to enforce an annulled award. This permissive language has been seized upon by certain commentators¹² and jurisdictions¹³ as giving enforcing Courts unfettered discretion at the enforcement stage. Thirdly, there are two different schools of thought in terms of enforcing annulled awards. The first is the territorial approach which states that the seat of the arbitration has complete and effective control over the arbitration proceedings¹⁴. On the other hand, there are the proponents¹⁵ of the floating award and/or delocalized award that argue that awards are

¹¹ See <https://www.khodorkovsky.com/resources/former-majority-yukos-shareholders-to-continue-pursuing-50-billion-award-globally-despite-dutch-court-ruling/> accessed 25 August 2017. However in October 2017, the shareholders announced that they have decided to withdraw enforcement proceedings in France because most of the attachments they had obtained against Russian assets had been lifted by the French Courts. See <http://globalarbitrationreview.com/article/1148728/yukos-shareholders-give-up-on-enforcement-in-france> accessed 10 October 2017. In November 2017, a similar announcement was made by the shareholders that they would be abandoning their attempt to enforce the award in Belgium as well because "it no longer makes economic sense to pursue them. See <http://globalarbitrationreview.com/article/1149646/yukos-shareholders-abandon-belgian-front> accessed 2 November 2017.

¹² See fn 15.

¹³ This has been the approach adopted in France. This is discussed later in the article.

¹⁴ See for example, A.J Van Den berg, "Enforcement of Annulled Awards" (1998) 9(2) ICC bulletin (November) 15, M. Kerr "Arbitration and the Courts: The UNCITRAL Model Law" (1985) 34 ICLQ 1, at page 15, A. J van den Berg, "Enforcement of Arbitral Awards Annulled in Russia" (2010) 27(2) Journal of International Arbitration 189.

¹⁵ See E. Galliard, "The Representations of International Arbitration" (2007) New York Law Journal 67, J Paulsson, "Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA) (1998) 9 (1) ICC Bulletin 14.

not anchored to any seat or jurisdiction and the fact that an award has been annulled by the seat should not preclude enforcement in another country. In fact, some commentators have gone as far as to suggest that no attention should be paid to any annulment decision rendered by the supervisory Courts of the arbitration¹⁶.

This article examines the issue of annulled awards and their subsequent enforcement. It argues that the permissive wording of Article V of the New York Convention must be construed narrowly and enforcing Courts must show self-restraint when exercising this discretion. Indeed, one of the advantages of arbitration is finality and this advantage is now at risk given the emerging trend of enforcing annulled awards. Whilst the author doesn't argue for a unified approach, some degree of consistency is needed. It is the case that any decision made by the Courts of the seat of the arbitration remains important and should not be disregarded. It cannot be right that the Courts of the seat of the arbitration play an important role before and during arbitral proceedings but any decision rendered by the same in relation to an award rendered in that territory is rendered virtually redundant by an enforcing Court. An approach that seeks to put the enforcing Court at the heart of annulled awards for self-preserving reasons is self-defeating. It is self-defeating because it does nothing to promote consistency, international comity and party autonomy. Party autonomy is the cornerstone of arbitration and such an approach portrays arbitration as a dispute resolution mechanism that lacks any coherence. As Lord Mance recently noted¹⁷

*“Arbitration already faces problems in maintaining coherence in its own jurisprudence and confidence in its efficacy and appropriateness as a dispute resolution mechanism. I suggest that these could be exacerbated, if either arbitration or courts dealing with arbitration issues seek to declare unilateral independence”*¹⁸.

It is important that the agreement of the parties should be respected. Indeed, what is needed is a pragmatic approach that seeks to recognise the importance of the Courts of the seat of the arbitration and where careful judicial consideration is given to any decision that is rendered by

¹⁶ J Paulsson, “Enforcing Arbitral Awards notwithstanding a Local Standard Annulment (LSA)” (1998) 9(1) ICC Bulletin 14.

¹⁷ J. Mance “Arbitration: A Law unto itself” (2016), 32 Arbitration International 223.

¹⁸ Ibid at page 241.

the supervisory Courts in relation to the award rendered in that territory. This article also examines the effect of res judicata on annulled awards and argues that there is now a danger that an enforcing Court may be taking on a role not ascribed to it by the parties or the New York Convention.

The need for a party to enforce an annulled award may arise in various ways. An enforcing Court may be faced with the following scenarios:

(a) A party may seek to enforce an award in another country where that award has been set aside by the Courts of the seat of arbitration. This raises the question of whether or not the enforcing Court should simply refuse to enforce the award or does it have the discretion to enforce that award?

(b) By a judgment of the Court of the seat of arbitration, an award is set aside. The other party nevertheless seeks to enforce that award in another country where the award debtor has assets. Should the enforcing Court enforce that award or will the judgment of the Court of the seat of the arbitration preclude enforcement on the basis of issue estoppel?

(c) A party may seek to enforce an award in various jurisdictions and one jurisdiction refuses to grant leave to enforce the award under the New York Convention on the basis that the award has not yet become binding. Should that judgment be a bar to enforcement on the basis of issue estoppel?

(d) Where one party has unsuccessfully challenged an award at the seat of the arbitration on various grounds but subsequently seeks to add another ground to its challenge but is also unsuccessful, should an enforcing Court refuse to enforce the award where there might be public policy reasons for refusing to enforce the award? Or will the decisions of other enforcing Courts preclude enforcement on the basis of issue estoppel?

(e) Where a party seeks to enforce an award that is the subject of a challenge before the Courts of the seat of the arbitration, is that award enforceable in another country prior to setting aside the same? Or must the enforcing Court wait until that award has been set aside?

(f) Where a party has unsuccessfully sought to challenge an award at the seat of the arbitration, should an enforcing Court take the unsuccessful challenge into account at the enforcement stage?

New York Convention

The New York Convention is often seen as a highly successful Convention and it is cited as one of the advantages of arbitration¹⁹. There are limited grounds upon which an enforcing Court can refuse to enforce an arbitral award pursuant to Article V. However, the New York Convention does not exclude the right to enforce an award that has been set aside at the seat of the arbitration. Article V (1) (e) of the New York Convention simply provides that an award may be refused recognition or enforcement if:

“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”.

It is clear that an enforcing Court has discretion as to whether or not to enforce an annulled award and the basis upon which to do so. However, it is argued that this permissive language should not be seen as unfettered liberty for the enforcing Court to ignore any decision on the award by the supervisory Courts. This sits well with the argument that arbitration has a territorial link²⁰ to the seat and cannot exist in a vacuum. However, various jurisdictions have adopted different approaches to Article V (1)(e) of the New York Convention with a great deal of inconsistency. For example, in France, the approach has been that international arbitration is transnational and is not attached to any national legal regime²¹.

Seat of Arbitration: The English Approach

¹⁹ See Fn 1 and 2.

²⁰ See F. Mann *Lex Facit Arbitrum*, [1986] 2 *Arbitration International* 241. See also William Park, "Lex Loci Arbitri and International Commercial Arbitration" [1983] 32 *ICLQ* 21.

²¹ This reflects the delocalised approach discussed above. The French approach is further discussed below.

The seat of arbitration plays a vital role in the arbitral process and it is the geographical location which the arbitration is tied. The seat is important for a number of reasons. First, the seat will normally have the supervisory jurisdiction over the arbitration. It is normally the Courts of the seat of that arbitration that the parties turn to for supervisory power and/or supportive powers. For example, if the one party fails to appoint an arbitrator or the appointment procedure breaks down, it is normally the Courts of the seat of the arbitration that will appoint the arbitrators²². Likewise, where one party seeks to remove an arbitrator for bias or impartiality, that party will turn to the Courts of the seat of that arbitration²³. Furthermore, a party seeking an injunction will normally do so from the Courts of the seat of the arbitration²⁴. Secondly, the seat determines whether or not any award is enforceable under the New York Convention²⁵. Thirdly, the seat is important in determining whether the award is subject to review under the laws of the seat of the arbitration or the award is simply enforceable as a foreign award under the New York Convention²⁶. Accordingly, if one accepts that the Courts of the seat of the arbitration have supervisory powers over arbitral proceedings, then its decision on annulment must also be important at the enforcement stage. The English Courts have been consistent in their approach in stressing the importance of the seat of the arbitration and have always rejected the notion of a floating or delocalised arbitration²⁷. The English approach is that there is a contractual promise

²² For example, see section 18 of the Arbitration Act 1996.

²³ See for example, section 24 of the Arbitration Act 1996.

²⁴ See section 44 of the Arbitration Act 1996. The English Courts have however held that in certain circumstances a foreign Court and not the Courts of the seat of arbitration might be better placed to grant an interim order especially where the subject matter of the dispute is situated in that foreign jurisdiction. This was the position in *U & M Mining Zambia Ltd v Konkola Copper Mines PLC* [2013] EWHC 260 (Comm), [2013] 2 Lloyd's Rep 218, where Blair J held that the foreign Court was better placed to grant the relief sought given that it would have been difficult for the English Court to grant an interim order against a party who was present in England only because of the arbitration.

²⁵ See Article I(3).

²⁶ Under English Law, an award is deemed to be made in the place of the seat of the arbitration (sections 53 and 100(2)(b) of the Arbitration Act 1996). Consequently, if the award is made in England, it is subject to the review of the English Courts. Alternatively, if the award is not made in England it will be entitled to be enforced in England pursuant to section 101 of the 1996 Act or section 66 of the same.

²⁷ See *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 Lloyd's Rep 291. *Bank Mallet v Helliniki Techniki SA* [1984] 1 Q.B 291, *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2000]

by each of the parties by agreeing to the curial law to treat the Courts of the seat of the arbitration as having exclusive supervisory jurisdiction. This was the position in *A v B*²⁸ where the Court held that “the whole structure of the supervisory jurisdiction of the seat of an international arbitration would be completely undermined” if the Courts of the seat of arbitration did not have exclusive supervisory powers over arbitrations seated in that jurisdiction²⁹.

The English Courts have made it clear that where a party wants to challenge an award rendered in a London seated arbitration, it must do so in England. This was the case in *C v D*³⁰ where the English High Court restrained an insurer from challenging the partial award in New York as the seat of the arbitration was England. The need for the Courts of the seat of the arbitration to have supervisory powers over arbitral proceedings was evident in *Kazakhstan v Istil Group PLC*³¹ where the English Courts were prepared to exercise their supervisory powers to grant an injunction against a party that insisted on carrying on with arbitral proceedings despite the English Courts having set aside the initial award on the grounds of lack of jurisdiction under section 67 of the Arbitration Act 1996 (“**the Act**”).

In the author’s view, the starting point must be that if the Court of the seat of the arbitration has annulled an award rendered in its territory such award should ordinarily not be enforced elsewhere unless there are compelling reasons why that decision should not be respected by the enforcing Courts. Agreed, there might be situations where an enforcing Court may want to scrutinise the decision of the supervisory Courts, for example, where the Courts of the seat of arbitration have retrospectively applied a law that was not in existence at the time contract was made. This approach means that the enforcing Court retains the discretion afforded to it by Article V (e) of the New York Convention but at the same time proper consideration is given to the decision of the supervisory Courts. It is not acceptable to, on the one hand accept that the

EWHC 228 (Comm) [2001] 1 Lloyd’s Rep 265, *Halpern v Halpern*, [2007] EWCA Civ 291, [2007] 2 Lloyd’s Rep 56.

²⁸ *A v B* (No2), [2007] EWHC 54 (Comm), [2007] 1 All E.R. Comm 633.

²⁹ *Ibid* at para 52. See also *Nobel v Gerling* [2007] EWHC 253 (Comm), 1 C.L.C 85.

³⁰ [2007] EWHC 1541 (Comm), [2007] 2 All E.R. (Comm) 557.

³¹ [2007] EWHC 2729 (Comm) [2008] 1 Lloyd’s Rep. 382.

Courts of the seat of the arbitration have supervisory powers over the arbitration, but on the other hand ignore their decisions in relation to an award annulled by the same Courts.

Annulled Awards and Enforcement

In relation to scenario (a) above, a party may wish to enforce an award that has been set aside by the supervisory Courts. This raises the question whether or not that award should be enforced by the enforcing Court and what emphasis should be placed on the decision of the supervisory Courts. It has been argued that where an award has been set aside by the supervisory Court of the arbitration, then that award becomes non-existent at the seat of the arbitration³². The issue of whether an award that has been set aside at the seat of the arbitration should be enforced was considered by the English Courts in *Dallah Real Estate and Tourism Holding Company v the Ministry of Religious Affairs, Government of Pakistan*³³. Although the case did not involve an award that had been set aside at the seat of the arbitration, the English Courts nevertheless still considered this issue as the case involved the enforcement of an arbitral award that was rendered in another country, namely France. At first instance, Aiken J set aside an earlier order by Clarke J giving permission to Dallah to enforce a French award against the Government on the basis that there was no valid arbitration agreement between the parties. Aiken J's decision was upheld both at the Court of Appeal and the Supreme Court. The key question then becomes how the permissive wording "may" under Article V (e) of the New York Convention and section 103 (2)(f) of the Act should be interpreted. Earlier English cases³⁴ that considered section 103 (2) of the Act expressed the view that any discretion under the Act under section 103(2)(f) could not be an open one. Rix LJ in *Dallah* held that the discretion under the Act is a narrow one where one

³² See Van den Berg "Enforcement of Annulled Award (1998) ICC International Court of Arbitration Bulletin 15. This is known as the principle of *ex nihilo nil fit* which postulates that when an award has been annulled in the country of origin, it becomes non-existent in that country.

³³ [2008] EWHC 1901 (Comm), [2009] 1 All E.R. (Comm) 505, [2009] EWCA Civ 755, [2010] 1 All E.R. (Comm) 917, [2010] UKSC 46, [2011] 1 All ER (Comm) 383.

³⁴ In *Kanoria v Guinness* [2006] EWCA Civ 222, [2006] 1 Lloyd's Rep. 701, Lord Phillips noted that it was doubtful whether the Courts would have a broad discretion under the section if one party was able to satisfy one of the grounds under the same. A similar view was expressed by Mance LJ in *Dardana Ltd v Yukos Oil Company* [2002] EWCA Civ 543, [2002] 1 All E.R. (Comm) 819 that the discretion under the Act could not be an open discretion but one based on an established legal principle. See para 8.

of the defences is established³⁵. He went on to say that it was a delicate matter where an award has been improperly set aside by the supervisory Courts; it was simply not a matter of open discretion. The improper circumstances must be brought to the attention of and considered by the enforcing Courts³⁶. This would suggest that there are very limited situations where an award that has been set aside by the supervisory Courts can be enforced³⁷.

At the Supreme Court, Lord Mance's comments that "*an English judgment holding that the award is not valid could prove significant in relation to such proceedings, if French courts recognise any principle similar to the English principle of issue estoppel....*"³⁸ proved not be significant as the French Courts gave no consideration to the decision of the UK's Supreme Court that the arbitrators did not have jurisdiction. The Paris Court of Appeal held that the Government of Pakistan was bound by the arbitration agreement and refused to set aside the French award. For his part, Lord Collins noted that a determination by the Court of the seat of the arbitration may give rise to issue estoppel or some other preclusive effect in the Court in which enforcement is sought³⁹. Moore-Bick LJ in *Dallah* noted that it may be necessary to consider whether the discretion of the English Courts to enforce an award that has been set aside by the supervisory Court is broader than previously recognised⁴⁰. Consequently, what is clear is that the various judges in *Dallah* took the view that the discretionary language under the New York Convention and the Act is not an open one.

The opportunity to re-examine this discretion arose in *Yukos Capital SARL v OJSC Rosneft Oil Company*⁴¹ where four awards totaling over \$400million were issued in favour of Yukos against Rosneft in 2006. The seat of the arbitration was Russia and in 2007 the awards were set aside by

³⁵ See para 89.

³⁶ See para 91.

³⁷ See paras 89 to 90.

³⁸ See para 29.

³⁹ See para 98.

⁴⁰ See para 59.

⁴¹ [2014] EWHC 2188 (Comm), [2014] 2 Lloyd's Rep. 435. This was not the first trial of a preliminary issue in this case. In an earlier case, *Yukos Capital SARL v OJSC Rosneft Oil Co (No2)* [2011] 2 Lloyd's Rep. 443, Hamblen J considered whether the defendant was estopped by the Amsterdam decision and whether or not the principles of non-justiciable applied in the case. The first issue is discussed later in this article.

the Russian Arbitrazh Court. Despite this, enforcement proceedings were commenced in the Dutch Courts and at first instance the Dutch District Court initially refused leave to enforce the award. This was on the basis that an annulment decision by the Courts of the seat of the arbitration should only be disregarded in "extraordinary circumstances" and such circumstances had not been sufficiently asserted. In April 2009, the Amsterdam Court of Appeal gave leave to enforce the awards on the basis that the annulments in Russia were a result of "partial and dependent judicial process" and should not be recognised. Despite the leave to enforce, the awards remained unsatisfied and Yukos commenced proceedings in the English Courts to enforce the Russian awards that were set aside. Simon J considered two issues. First, whether in light of the set aside decisions, the awards could no longer be enforced at common law because they no longer existed. Rosneft argued that, given the set aside decisions, the awards no longer existed under Russian law and hence there was no longer any extant obligation on which Yukos could bring an action in the English Court. The judge held that the Court had the power to enforce the awards at common law despite the set aside decisions of the Russian Courts⁴² because it would be unacceptable if the English Courts were bound to recognise a decision of a foreign Court which offended the basic principles of "honesty, natural justice and domestic concepts of public policy"⁴³.

In order for the English Courts to enforce an award that has been set aside at the seat of the arbitration, positive and cogent evidence that the decision offended basic principles of honesty, natural justice and domestic concept of public policy will be needed⁴⁴. This was the position in *Malicorp Ltd v Government of Arab Republic of Egypt*⁴⁵ where Walker J had to consider whether or not to enforce an award that had been set aside in Egypt which was the seat of the arbitration. The dispute arose out of a concession agreement in relation to construction and operation of an airport in Egypt. In 2004, Malicorp commenced arbitration proceedings and in 2006 obtained an award of \$10 million plus costs and interest in its favour. In 2008, Malicorp unsuccessfully sought to enforce the award before both the Paris Court of Appeal and the Paris Court of

⁴² At para 22.

⁴³ At para 20.

⁴⁴ *Malicorp Ltd v Government of Arab Republic of Egypt* [2015] EWHC 361 (Comm), [2015] 1 Lloyd's Rep 423.

⁴⁵ [2015] EWHC 361 (Comm), [2015] 1 Lloyd's Rep 423.

Cassation. The award was subsequently set aside by the Cairo Court of Appeal⁴⁶. In 2012, Malicorp sought permission of the English Courts to enforce the Egyptian award that was set aside under section 101 (2) of the Act. This application was considered by Flaux J on paper and granted permission to enforce but reserving Egypt's right to apply for the order to be set aside. Given that the Cairo award was a New York Convention award, Walker J could only refuse enforcement if the case fell within sections 103(2) to 103(4) of the Act in particular section 103(2). Malicorp argued that the Egyptian decision to set aside should not be given effect for three reasons. First, it was tainted by bias. Secondly, it was contrary to natural justice and the Egyptian Courts deliberately misapplied Egyptian law. Lastly, the grounds on which the award was set aside were wrong and misconceived. On the last point, Walker J quickly dismissed this argument on the basis that this was not a sufficient basis upon which the English Courts could refuse to recognise that decision as the determination of foreign law was a matter for the foreign Court. In relation to the first two grounds of objection, Egypt's argument was that, given that the Cairo award had been set aside it should not be enforced by the English Courts restating the *ex nihilo nil fit* principle. Walker J did not find it necessary to consider the *ex nihilo nil fit* principle but simply proceeded on the basis that he had discretion whether or not to recognise the decision pursuant to section 103(2) of the Act. He cited the decision of Simon J in *Yukos* with approval and held that the evidence before him was not cogent enough to substantiate Malicorp's first two objections. Consequently, where it is established that the decision setting aside the award meets the test for recognition there is no need to exercise any discretion not to recognise it⁴⁷. Walker J's approach follows that of Simon J and it seems that the English Courts are only prepared to use their discretion to enforce an award that has been set aside by the supervisory Courts in limited circumstances.

Indeed, it seems that the level of cogency needed is a high one. This is evident from a recent case where the English Courts considered whether or not an award that had been set aside in Russia should be enforced in England. This was the issue Burton J considered in *Nikolay Viktorovich Maximov v Open Joint Stock Company Novolipetsky Metallurgichesky KomBinat*⁴⁸. The dispute

⁴⁶ The Court of Appeal's decision has been appealed to the Egyptian Court of Cassation.

⁴⁷ See para 28.

⁴⁸ [2017] EWHC 1911 (Comm).

arose out of a Share Purchase Agreement whereby the defendant agreed to acquire 50 % plus one share of the claimant's holding in a group of companies on the basis of a purchase price calculated in accordance with clauses 3 and 4 of the Share Purchase Agreement. A dispute arose between the parties as to the purchase price and this was resolved by an arbitral tribunal under the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation (ICAC) and the arbitrators awarded (by a majority) RUB 8.9 billion plus interest⁴⁹. OJSC appealed and the award was set aside by Moscow Arbitrazh Court in June 2011 on three grounds. First, that two of the arbitrators had failed to disclose links to the expert witnesses whose reports were submitted in the arbitration by the claimant, Maximov. The two other grounds upon which the award was set aside were public policy and non- arbitrability both of which were never fully argued before the Court. The decision of the Moscow Arbitrazh Court to set aside the award was upheld by the Federal Arbitrazh Court of Moscow in October 2011. A permission to appeal to the Supreme Arbitrazh Court of the Russian Federation was refused on paper in January 2012⁵⁰. Maximov sought to enforce the award in England under the New York Convention and at common law. Maximov argued that the Russian decision setting aside the award should not be recognised and urged the Court to infer bias from the perverse nature of the Russian Court's conclusions and the manner in which they were reached despite there being no evidence of actual bias. Burton J noted that the fact that a foreign Court's decision is manifestly wrong or perverse is not sufficient. The decision must be so wrong with evidence of bias or that a Court acting in good faith could not have arrived at such a decision. Secondly, the evidence or grounds must be cogent. Lastly, the decision of the foreign Court must be deliberately wrong and not simply wrong by incompetence⁵¹. Despite the criticisms⁵² of Burton J of the grounds

⁴⁹ The dissenting view was of little significance as there was only a 1% difference in the amount between the dissenting arbitrator and the majority.

⁵⁰ There had been other proceedings in France and Amsterdam. In the French proceedings, Maximov successfully applied to the Tribunal de Grand Instance of Paris to enforce the award and the defendant failed to overturn that decision at the Paris Court of Appeal. In the Dutch proceedings, Maximov applied to have the award enforced in the Amsterdam District Court which was refused. There was an unsuccessful appeal to the Amsterdam Court of Appeal in 2016 and there was an appeal to the Supreme Court of the Netherlands. This appeal was unsuccessful as in late 2017 the Supreme Court of Netherlands also refused to enforce the award.

⁵¹ See para 16.

upon which the award was set aside by the Russian Courts, he was not persuaded that the decision of the Russian Court was so extreme and perverse that it was tainted by bias against the claimant⁵³. The judge acknowledges the "harsh" nature of the Russian decision but noted that this might be a reflection of the approach of the Russian Courts towards arbitration⁵⁴. Consequently, given that there was no cogent evidence of bias against Maximov, the judge dismissed the claimant's application to enforce the award⁵⁵. Indeed, it is now the case that the English Courts have set a very high threshold that the applicant must satisfy as the Courts will not invoke the principles of honesty, natural justice and bias lightly. Accordingly, English Courts will only enforce an annulled award where compelling reasons have been demonstrated by the party seeking to enforce that award. Since Burton J's decision, the Supreme Court of the Netherlands has also refused to enforce the award that was set aside by the Russian Courts. Whilst the Supreme Court agreed with the decision of Amsterdam Court of Appeal that an award set aside at the seat of arbitration is not automatically unenforceable under the New York Convention, it nevertheless rejected the argument that the Moscow Arbitrazh lacked independence when it set aside the Russian awards. Given the comments of Burton J that "*...it is common ground that if it remained unchanged there would be issue estoppel on many if not most of the issues which fell to be determined by me, there is an outstanding appeal on two grounds by the Claimant to the Dutch Supreme Court...*" It remains to be seen what impact the decision of the Supreme Court of Netherlands will have on any appeal proceedings in London.

It is not unusual for a losing party in the arbitration proceedings wanting to challenge the award at the seat of the arbitration. There are instances where the award is yet to be set aside by the supervisory Court as the appeal may be pending or subject to further appeals. However, the

⁵² Burton J noted that on the issue of public policy, the first instance decision was hopeless and it was "*borderline arguable at best, not least in the light of her own previous sceptical treatment of allegations of breach of public policy where error of law could not succeed*". At para 56. In relation to arbitrability, the judge noted that the issue of non-arbitrability was adventurous given that there had been no material judicial decision in favour of it, albeit some academic support for the concept of non- arbitrability. In addition, the parties were not given any opportunity to address the Court on the point. At par 56.

⁵³ See para 62.

⁵⁴ See para 63.

⁵⁵ See paras 63 and 71.

successful party may nevertheless wish to exercise its right to enforce the award in another country. The enforcing Court is then faced with the difficult decision of whether or not to enforce an award that is the subject of an appeal at the seat of the arbitration. This is scenario (e) above. This obviously involves a balancing act on the one hand to ensure that enforcement is not delayed by a frivolous challenge at the seat of the arbitration and on the other not to pre-empt the outcome of the decision of the Courts of the seat of the arbitration by a quick enforcement. The New York Convention gives a degree of discretion to the enforcing Court under Article VI and it may adjourn the decision on enforcement and order security if appropriate. This issue has been considered on various occasions by the English Courts. In *IPCO (Nigeria) v Nigerian National Petroleum Corporation*⁵⁶ Gross J had to consider an application under section 103 (5) of the Act. The case concerned a \$150million award rendered in 2003 in Nigeria and NNPC sought to challenge the award before the Nigeria Courts⁵⁷. Gross J held that enforcement of the award should be adjourned but ordered that NNPC should pay \$13 to IPCO and provide security in London for \$50million. A similar approach was adopted by Burton J in *Dowans Holdings SA v Tanzania Electric Supply Co Ltd*⁵⁸ where the judge was prepared to adjourn enforcement of an award pending a challenge at the seat of the arbitration in Tanzania provided security in the sum

⁵⁶ [2005] EWHC 726 (Comm), [2005] 2 Lloyd's Rep. 326.

⁵⁷ This case has a long history. After the decision of Gross J in 2005, about 4 years later another application was made before the English Courts to enforce the award. On this occasion, Tomlinson J was asked to revisit Gross J's initial order [2008] EWHC 797 (Comm) [2008] 2 Lloyd's Rep 59 because no progress had been made in the challenge before the Nigerian Courts. Tomlinson J held that there was a likelihood that IPCO would succeed in some of its claim; hence he ordered a further partial payment of about \$50Million should be paid by NNPC on an interim basis. This decision was appealed by NNPC on the basis that the judge could not order payment on an interim basis- he could enforce the award in its entirety or adjourn the decision to enforce the award. The Court of Appeal rejected NNPC's appeal [2008] EWCA Civ 1157, [2009] 1 All E.R. (Comm) 611. In 2009, there was an allegation that the award was procured by fraud so the parties agreed by way of a consent order that Tomlinson J's order be set aside whilst the fraud allegation was resolved by the Nigerian Courts. In 2014, IPCO was back before the English Courts on the basis that the fraud allegation was made to simply frustrate the enforcement proceedings. Despite the passage of time, the application to set aside the award had still not been resolved. Field J on this occasion held that on the fraud allegation nothing had changed so as to lift the consent order. Furthermore, given the fraud allegation, there was real possibility that the whole award could be vacated. [2014] EWHC 576 (Comm) [2014] 1 Lloyd's Rep 625. see paras 93-95.

⁵⁸ [2011] EWHC 1957 (Comm), [2011] 2 Lloyd's Rep 475.

of \$5 million was provided by Electric Supply Company. In deciding whether or not to adjourn enforcement, the Court must consider the prospect of success of the application to set aside the award before the supervisory Courts. The test to be applied was laid down in *Soleh Boneh International Ltd v Government of the Republic of Uganda*⁵⁹. First, the strength of the argument that the award is invalid must be considered. If the award is manifestly invalid, there should be an adjournment and no order for security. Alternatively, if the award is manifestly valid, then the award should be enforced immediately or there should be an order for substantial security⁶⁰. Secondly, the Court must consider the ease or difficulty of the enforcement of the award and whether enforcement will become more difficult if enforcement is delayed. If enforcement is likely to be more difficult, then the case to order security is stronger⁶¹.

Where the English Court is convinced that the appeal before the supervisory Court is being properly dealt with, then the Courts will be minded to adjourn any enforcement proceedings and a security in the full amount of the award will be ordered. This was the position in *Travis Coal Restructured Holdings LLC v ESSAR Global Limited*⁶² where Essar sought to set aside a judgment enforcing an award rendered by an ICC tribunal in the USA. Essar argued that recognition and enforcement of the award should be adjourned pending the determination of proceedings filed by Essar challenging the award before the Southern District Court of New York. Travis opposed any adjournment on the basis the Court should order immediate enforcement of the award in full but in the event that the Court was minded to adjourn an order for suitable security should be ordered. Blair J held that a risk of conflicting decisions should be avoided given that there was a possibility that the award could be set aside by the New York Court⁶³. Consequently, the enforcement proceedings should be adjourned provided security in the full amount of the award is provided by Essar⁶⁴.

⁵⁹ [1993] 2 Lloyd's Rep 208.

⁶⁰ As per Staughton LJ at page 212.

⁶¹ Ibid.

⁶² [2014] EWHC 2510, [2014] 2 Lloyd's Rep. 494.

⁶³ Blair J was concerned about comity and noted that "... *the same kind of comity considerations can in my view arise, depending on the facts. 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. In such a case, the power to order security may be particularly*

Related to the issue of whether an award should be enforced pending an appeal at the seat of the arbitration is the question of when does an award become binding on the parties pursuant to section 103(f) of the Act. In *Dowans*, Burton J had to consider whether or not an award had become binding on the parties. Dowans sought to enforce an ICC Award arising out of an emergency power off –take agreement that was rendered in its favor in England. The defendant subsequently challenged the award before the Tanzanian Court being the supervisory Court. An order was initially granted to enforce the award in England but the Electric Supply Company sought to set aside the order on the basis of Section 103(2)(f) or to adjourn recognition or enforcement under section 103(5) of the Act. In relation to the former, the judge noted that it was for the English Court to decide whether or not the award had become binding. Burton J held that the award had become binding on the parties despite the defendant’s application to set aside the award before the Tanzanian Courts⁶⁵.

However, where the parties have agreed in their arbitration agreement that any award rendered by the tribunal must be subjected to another review process, this then raises the question at what stage during the process will the award become binding on the parties. This issue was considered by Eder J in *Diag*. Diag had obtained an award in its favour arising out of an agreement to modernise the Czech blood transfusion system. Following the breakdown of the relationship between the parties, Diag commenced adhoc arbitration proceedings and a “final award” (which was the subject of this application) was issued in 2008. However, the arbitration agreement contained an additional review process of any arbitral award rendered by the tribunal. Following the publication of the award, both parties sought to invoke the review process set out in the arbitration agreement but Diag eventually withdrew its review request and sought to enforce the award in France, USA, Luxembourg and Austria. There were no attempts to enforce at the seat of the arbitration. Those enforcement proceedings were unsuccessful except in Luxembourg and the USA which were still pending at the time the matter came before the English Courts. In

important to prevent the inevitable delay prejudicing the recovery prospects of the party in whose favour the award was made” At para 37. Similar comity points were raised by Gross J in *IPCO v NNPC* at para 16 and Mance LJ in *Yukos oil Company v Dardana Ltd* [2002] EWCA Civ 543, [2002] 2 Lloyd’s’ Rep 326 at para 23.

⁶⁴ At para 74.

⁶⁵ See paras 24-27.

April 2013, the Supreme Court of Austria held that the “final Award” had not yet become binding on the parties within the meaning of Article V (1)(e) of the New York Convention.

One of the issues that Eder J considered was whether or not the “final award” had become binding. Diag argued that the term “ordinary recourse”⁶⁶ referred to a “genuine appeal on merits”. The judge took the view that it would be inappropriate for him to give a definition of what will constitute ordinary or extraordinary recourse, and was not persuaded that “ordinary recourse” should be defined as suggested by Diag⁶⁷. He nevertheless held that the award was subject to “ordinary recourse” and the review process had been validly triggered. Consequently, the award was not binding for the purposes of section 103(f) of the Act.

Although Eder J refused to give any definition of ordinary and extraordinary recourse, the case is indicative of how the English Courts may deal with this type of rare application. Eder J noted that there might be a fine line between the two categories, he nevertheless took the view that if an award is subject to ordinary recourse, it will not be binding⁶⁸. It must be said that the position in *Diag* is rare given the fact that it is very unusual for parties to insert this type of review process in their arbitration agreement. In fact, one may even question whether or not the clause in the agreement is actually an arbitration agreement. In any event, a US court recently considered whether or not the same award should be enforced. In *Diag Human Se v Czech Republic – Ministry of Health*⁶⁹, the US District Court for the District of Columbia refused to enforce the award because “*the Resolution issued by the Third Review Tribunal nullified the 2008 Final Award and so there is nothing for the Court to enforce.*”

⁶⁶ In *Dowans Burton* J had considered the difference between ordinary recourse and extra ordinary recourse and noted that “...*the former which may not be permitted by the terms of the relevant agreement between the parties or the law governing the arbitration would ordinarily be subject of a time limit, after which no such ordinary recourse (if otherwise available) would be permitted. There is a possibility of extraordinary recourse, which would be some limited challenge to the award, in the courts of its home jurisdiction, by reference to the restrictive terms of the New York Convention. Once ordinary recourse is excluded the possible availability of extraordinary recourse does not prevent an award from being, or having become, binding*” at para 17.

⁶⁷ See para 21.

⁶⁸ See paras 18 &19.

⁶⁹ Case 1:13 –Cv -00355.

Res Judicata/Issue Estoppel

The doctrine of res judicata is well established as part of the English common law⁷⁰. It is based on two fundamental principles. First, that it is in the public interest and a matter of sound administration of justice that there be an end to litigation and secondly, that no person should be proceeded against twice for the same cause⁷¹. It is generally considered to encompass two principles of estoppel: (1) cause of action estoppel, and (2) issue estoppel. The first category creates a procedural bar, ensuring that if one party commences an action against another for a particular cause and judgment is given on it, he cannot bring another action against the same party for the same cause. The second category, issue estoppel, is based on the principle that, once an issue has been determined by a court, then neither the parties nor their privies can relitigate the issue afresh⁷². In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but which they failed to raise at that time⁷³.

For the doctrine to apply there must be a decision by a judicial tribunal with competent jurisdiction⁷⁴ and it must be final and conclusive on the merits. For a judgment to qualify as final and conclusive on the merits, a party needs to demonstrate that the subject matter in question was raised and argued before the earlier tribunal, such that it cannot be re-opened before that same court in further proceedings⁷⁵. The finality of a judgment is not simply assessed by reference to whether or not the judgment is final for the purposes of appeal. A decision is final if it is

⁷⁰ *Halsbury's Laws of England*, (4th ed. Reissue), at paras. 977-981.

⁷¹ P. Barnett, *Res judicata, Estoppel and Foreign Judgments in Private International Law* (Oxford University Press, London, 2001), at p.9.

⁷² Authorities show that in order to establish an issue estoppel, four conditions must be satisfied, namely that: (a) the judgment must be given by a foreign court of competent jurisdiction; (b) the judgment must be final and conclusive and on the merits; (c) there must be identity of parties; and (d) there must be identity of subject matter. See *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 A.C. 853; *The Sennar (No.2)* [1985] 1 W.L.R 490; *Desert Sun Loan Corporation v Hill* [1996] 2 All E.R. 847.

⁷³ *Henderson v Henderson* (1843) 3 Hare 100, 67 E.R. 313.

⁷⁴ *A-G for Trinidad & Tobago v Eliche* [1893] A.C. 518.

⁷⁵ *Eastwood & Holt v Studer* (1926) 31 Com. Cas. 251; *Nouvion v Freeman* (1889) 15 App. Cas. 1, 9. HL; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 A.C. 853.

incapable of revision by the court which pronounced it (for these purposes it is immaterial that it is capable of being rescinded or varied by an appellate court).⁷⁶ The Court made clear in *Fidelitas Shipping Co Ltd v V/O Exportchleb*⁷⁷ that the principles of *res judicata* apply to arbitration as well as litigation:

*“Issue estoppel applies to arbitration as it does to litigation. The parties having chosen the tribunal to determine the disputes between them as to their legal rights and duties are bound by the determination by that tribunal of any issue which is relevant to the decision of any dispute which is referred to that tribunal”*⁷⁸.

The principle of issue estoppel is particularly important where the supervisory Courts have set aside an award. In relation to scenario (b) above, the issue here is not whether the award itself should be recognised but whether the decision or judgment of the supervisory Court should be recognised. This issue was considered by the English High Court and the Court of Appeal in *Yukos Capital Sarl v OJSC Rosneft Oil Company*⁷⁹. At first instance, Hamblen J held that Rosneft was estopped by the decision of the Dutch Court of Appeal that the annulment decisions were the result of a “partial and dependent judicial process”⁸⁰. His decision was based on the fact that even though the Dutch ruling was determined in the context of a different legal question i.e. the Dutch public order that made no difference⁸¹. As such, the finding made by the Dutch Court

⁷⁶ *Nouvion v Freeman* (1889) 15 App. Cas. 1, 9 HL, *Colt Industries Inc v Sarlie (No.2)* [1996] 1 W.L.R. 1287. A decision that is reversed on appeal ceases to take effect as *res judicata* and the new decision becomes *res judicata* between the parties. See *Railways Comr (NSW) v Cavanough* (1935) 53 C.L.R. 220.

⁷⁷ *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 2 All E.R. 4, as approved by the Privy Council in *AEGIS v European Reinsurance Company of Zurich* [2003] 1 All E.R. (Comm) 253.

⁷⁸ [1965] 2 All E.R. 4, at p.10. See also *People's Insurance Company of China v Vysanthe Shipping Company Ltd* [2003] EWHC 1655; [2003] 2 Lloyd's Rep. 617, where the High Court enforced an arbitral award at the expense of a foreign judgment because the award was first in time and the issues between the parties were *res judicata*.

⁷⁹ [2011] EWHC 1461 (Comm), [2012] 1 All ER (Comm) 479, [2012] EWCA Civ 855, [2013] 1 All E.R. 233. The case arises from the same set of facts discussed above

⁸⁰ At para 107.

⁸¹ At para 94.

of Appeal was indivisible⁸². However, at the Court of Appeal Yukos argued that the issue in the English proceedings was exactly the same with that in the Dutch proceedings. Given that the Dutch Court of Appeal held that the Russian judgment setting aside the awards was "partial and dependent", the English Courts should also not recognise the Russian decisions. In essence, the argument was that since the Russian decisions were against Dutch public policy then it followed that it must be against English public policy. The Court of Appeal rejected this argument on the basis that public policy is not universal as public policy is inevitably different in each country⁸³ and the standard that each country will apply to determine whether decisions from the Courts of another country are "partial and dependent" may vary. Consequently, it is English public policy that is to be applied as a matter of English law and that is not the same question as whether the decision is to be regarded as partial and dependent in the view of another Court according to that Court's law⁸⁴. This overruled Hamblen J's decision on this issue and the Court of Appeal held that Rosneft was not estopped in England from arguing against Yukos's assertions that the Russian decisions setting aside the awards were partial and dependent. The issue would have to be tried⁸⁵.

Given that a party may attempt to enforce an award in different jurisdictions, the issue facing the enforcing Court may not be whether the decision of the Courts of the seat of arbitration raises issue estoppel but whether the decision of another enforcing Court precludes enforcement on the basis of issue estoppel. This is scenario (c) above. In *Diag Human Se v Czech Republic*⁸⁶, where Eder J had to consider whether Diag was estopped from enforcing the award because of an earlier decision by the Supreme Court of Austria. Diag argued that there was no issue estoppel because the issue determined by Austria's Supreme Court was different from that before the English Court. In particular, it argued that the Austrian Court did not consider whether there was in fact a valid review process as contemplated by the arbitration agreement and that was important as a matter of English law to determine whether or not the award was binding under

⁸² Ibid.

⁸³ At para 151.

⁸⁴ At para 151.

⁸⁵ At para 157.

⁸⁶ [2014] EWHC 1639 (Comm) [2014] 2 Lloyd's Rep. 283.

section 103(2) (f) of the Act. On the other hand, Czech Republic argued that the decision of the Supreme Court of Austria that the award had not yet become binding created an issue estoppel and the award was not binding. Eder J held that the issue determined by the Supreme Court of Austria was that the award was not binding and it made no difference that the decision was reached in relation to the New York Convention rather than under the Act. Where a foreign Court decides that an award is not yet binding on the parties, there is no reason in principle why that decision should not give rise to issue estoppel between the parties provided that the relevant conditions⁸⁷ for establishing issue estoppel are satisfied⁸⁸. Consequently, Diag was estopped because of the decision of the Supreme Court of Austria. This case demonstrates the need for a party to be careful at the enforcement stage as an existing decision of one enforcing Court may affect the ability to enforce that same award in another enforcing Court.

In relation to scenario (d) above, a Court may be faced with an application whether to allow the enforcement of an award that one party alleges was obtained by fraud even though the Courts of the seat of arbitration dismissed an application to amend an application before it to include an allegation of fraud. That was the position in *Anatolie Stati v The Republic of Kazakhstan*⁸⁹.

The dispute arose out of a liquefied petroleum gas plant owned by the claimants. They claimed to have spent about \$245 million on the plant and when the relationship broke down they initiated arbitral proceeding pursuant to the Energy Charter Treaty and the claimants obtained an award of about \$500million. The tribunal based its assessment of the valuation of the plant on an indicative bid of \$199 million that the claimants had received from a third party, KazMunai Gas (“KMG”).

Kazakhstan sought to set aside the award before the Svea Court of Appeal in Sweden which was the seat of the arbitration and there was a subsequent application by Kazakhstan to amend its application to include allegation of fraud and that the award should be set aside on public policy grounds. This application was dismissed in December 2016 and in March 2016 the USA Court also refused a motion by Kazakhstan to amend its application so as to add the alleged fraud as a

⁸⁷ See *The Sennar* (No2) at fn 72.

⁸⁸ See para 59.

⁸⁹ [2017] EWHC 1348 (Comm).

ground. In the meantime, Kazakhstan issued an application to set aside the permission that had been granted to enforce the award in England⁹⁰. After issuing its application in the UK, it successfully applied to the Courts in the USA for disclosure and a third party was ordered to disclose certain documents relating to the contracts. The documents obtained from the disclosure indicated that a lesser amount may have been spent by the claimants. All these developments meant that Kazakhstan applied to the English Courts to amend its English application to add a further ground that the award would contravene English public policy by reason of fraud by the claimants. Knowles J held that Swedish and USA decisions do not create estoppel and Kazakhstan was entitled to rely on the evidence obtained since the award was rendered and there was sufficient prima facie case that the award was obtained by fraud⁹¹. The USA Court's refusal to allow Kazakhstan to add the alleged fraud to its case was made on the basis that the arbitral tribunal had not relied on the claimants' evidence of the plant's costs. It did not address the question whether the tribunal was misled because KMG's bid was based on fraudulent material and the claimants' knew that when they presented the bid evidence⁹². In relation to the Swedish decision, the judge noted that the Swedish Court's refusal to set aside the award was based on its reasoning that KMG's bid was directly decisive to the tribunal's decision and the bid was not false. The decision did not address the question of whether the allegedly false evidence of the plant's cost was of "indirect decisive impact" for the outcome of the case⁹³. Even if it had been decided, as this is a public policy issue the English Courts would still have to decide whether enforcement of the award should be permitted, as English public policy is a matter for the English Courts⁹⁴. Accordingly, the fraud allegation would be examined at a trial and decided on its merits.

⁹⁰ Kazakhstan sought to set aside the permission on three grounds. First, that there was no valid arbitration agreement. Secondly, that the tribunal was invalidly constituted and lastly, that there had been a number of serious procedural errors that prevented Kazakhstan from presenting its case.

⁹¹ See paras 87 and 92.

⁹² See paras 50-55.

⁹³ See paras 62-64. The judge also noted that "... the Swedish Court also reasoned that the KMG Indicative Bid was not (itself) false evidence. That assessment holds at the time the KMG Indicative Bid was made, but I respectfully question whether it still holds when the KMG Indicative Bid later deployed by a party who knows (but continues to conceal) that it is the product of that party's fraud". At para 66.

⁹⁴ See paras 86 and 87.

In relation to scenario (f) above, where a party has unsuccessfully challenged an award at the seat of the arbitration and the seat upholds the award, should that decision raise issue estoppel if the party that unsuccessfully challenged the award wishes to resist enforcement in a foreign Court. In *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Limited*⁹⁵, Gujarat had unsuccessfully challenged a consent award made by the tribunal under section 68 of the Act. The challenge centered on whether Gujarat had been given reasonable opportunity to present its case before a consent award was issued. The Court took the view that the tribunal was entitled to make the award and that the parties had been afforded reasonable opportunity to present their case and the correct procedure was adopted.

Coeclerici subsequently sought to enforce the award in Australia but Gujarat tried to resist enforcement on the basis that it had not been given reasonable opportunity to present its case. The Federal Court of Australia⁹⁶ held that the award was enforceable because the issue of "reasonable opportunity" had been considered by the English Courts and rejected hence it could not be re-litigated. In any event, it would be inappropriate for the enforcing Court to reach a different conclusion to that of the supervisory Court. Consequently, the award was enforceable. This pragmatic approach is to be welcomed given that, not only does it take into account issue estoppel, but it also recognises the importance of the supervisory Court. It stops a party re-running the same arguments it unsuccessfully ran before the Courts of the seat of the arbitration.

However, in some jurisdictions, the matter is made more complicated by the need for a reciprocity treaty on recognition and enforcement of foreign judgments. This was the approach adopted by the Ukrainian Courts in *Pacific Inter-Link SDN BHD v EFKO Food Ingridents Ltd*⁹⁷ where the Court of Appeal of the Odessa region upheld the decision of a lower Court to grant permission to enforce awards that had been set aside by the English Courts. In the English proceedings⁹⁸, Steel J had set aside six awards under section 67 of the Act on the basis that the

⁹⁵ [2013] EWHC 1987.

⁹⁶ [2013] FCA 882.

⁹⁷ Court of Appeal of the Odessa Region No. 1511/2458/2012
See <http://www.cisarbitration.com/2012/09/17/ukrainian-court-enforces-arbitral-awards-set-aside-in-the-uk/> accessed July 19 2017.

⁹⁸ [2011] EWHC 923 (Comm), [2011] Arb. L.R. 13.

arbitrators lacked substantive jurisdiction. Despite this, the Ukrainian Courts were prepared to enforce the awards on the basis that the English judgment was not entitled to be recognised on the basis of reciprocity. The decision of the Ukrainian Courts is a curious one and demonstrates the inconsistencies that are emerging in relation to annulled awards. As argued above, arbitration is a consensual process and the jurisdiction of the tribunal is a key element of the arbitral process. Where a supervisory Court of the seat of arbitration finds that a tribunal lacks jurisdiction, it does seem peculiar that the enforcement of that award is dependent on reciprocity rather than the breach of fairness or the parties' agreement. In the author's view, there are no compelling reasons in the instant case to warrant enforcing the award set aside by the supervisory Courts.

The French Approach

As discussed above, the English Courts have taken the view that arbitral proceedings must be anchored to a legal system. The French approach is somewhat different in that arbitration is detached from local law. This has led the French Courts to come to the conclusion that awards that have been set aside at the seat of the arbitration can be enforced and have been enforced in France. They place very little or no weight at all on any decision rendered by the supervisory Courts. This was made clear by French Cour de Cassation in *Hilmarton Ltd v Omnium de Traitement et de Valorisation*⁹⁹ held that:

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

In *Hilmarton*, the French Courts on two occasions recognised an arbitral award that had been set aside by the Swiss Courts which was the seat of the arbitration. The French approach seems to be driven by the desire to develop an autonomous arbitral system where substantive rules for international arbitration are not dependent or tied any national law. This approach was re emphasised in *Societe Pt Putrabali Adyamulia v Societe Rena Holding*¹⁰⁰ where the seat of the Arbitration was England. Putrabali successfully challenged the award on a point of law pursuant

⁹⁹ (1997) XXII Year Book Commercial Arbitration 696.

¹⁰⁰ Cour de Cassation June 2007, XXXII Yearbook Commercial Arbitration 299 (2007).

to section 69 of the Act. The award was remitted back to the tribunal which then rendered a new award in favor of Putrabali. Rena was however still able to enforce the first award in France that was in its favour but had been set aside by the English Courts. The French Courts took the view that a foreign arbitral award is not anchored to any national order¹⁰¹. It was for the enforcing Court to decide which rules are applicable in relation to enforcement. A similar approach has been adopted in other French cases such as *General de L'aviation Civile de L'Emirat de Dubai v Societe International Bechtel Co*¹⁰², *Chromalloy Aeroservices v Arab Republic of Egypt*¹⁰³ and more recently by the Tribunal de grande instance in *Maximov*. Indeed, the comments of the French Courts in *Hilmarton* and *Putrabali* suggest judicial protectionism.

The American Approach

Given that some of the cases considered in this article have involved the American Courts, it is worth considering briefly the position there. Initially, the issue of whether or not an award that has been set aside at the seat of the arbitration could be enforced was considered by the US Courts in *Chromalloy v Arab Republic of Egypt*¹⁰⁴. The Egyptian Courts had set aside the award on the basis that the arbitrators had misapplied Egyptian law. Nevertheless, the American Courts enforced the award on the basis that Article V(1) (e) of the New York Convention does not state that an annulled award must not be recognised. Consequently, if the Court was to refuse to enforce the award it would militate against the US public policy in favour of final and binding arbitration of commercial disputes¹⁰⁵. However, in subsequent cases, the American Courts have been more measured in their approach. Whilst the American Courts have maintained that they have discretion as to whether or not to enforce an annulled award, nevertheless a party seeking the enforcement of an annulled award must show “adequate reasons” why the Courts should

¹⁰¹ Ibid at page 302.

¹⁰² Cour d'appel de Paris 2004/07635 (2006) Rev. Arb 695-709.

¹⁰³ (1997) XXII Yearbook Commercial Arbitration 691. The US Courts also enforced the same award but for different reason. The US decision is discussed below.

¹⁰⁴ 939 F.Supp 907, 913 (D.D.C 1996).

¹⁰⁵ At 913. The decision in *Chromalloy* has been upheld and followed in other cases such as *Karaha Boda Co. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F3d 35, 367 (5th Cir. 2007).

refuse to recognise the foreign judgment.¹⁰⁶ In *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd*¹⁰⁷ the US Courts refused to enforce an award set aside at the seat of the arbitration because the party seeking to enforce the award in the US had not shown adequate reasons as to why the foreign decision setting aside the award should not be recognised. A party seeking the enforcement of an annulled award must show “extraordinary reasons”¹⁰⁸ for doing so.

However, where there are specific concerns about the manner the award was set aside, for example where there has been a retrospective application of the law, the American Courts may still decide to enforce the award. This was the position in *Corporacion Mexicana de Mantenimiento Integral, S De RL De CV (“Commisa”) v Pemex- Exploracion y Produccion*¹⁰⁹ where the US Court of Appeals for the Second Circuit enforced an award that was annulled by the Mexican Courts. The dispute arose out of an agreement to build offshore gas platforms in the Gulf of Mexico and Commisa obtained an award in a Mexico seated arbitration in its favour and sought to enforce this award in New York. The Southern District Court of New York enforced¹¹⁰ the Mexican award but Pemex sought to set aside that decision on the basis that the Mexican award had been annulled in Mexico on the basis that the arbitrators dealt with matters that were not arbitrable. Commisa appealed to the Second Circuit Court of Appeals. Given that the award had been set aside by the Mexican Courts, the Court of Appeals remitted the decision back to the District Court for further consideration. The District Court reconsidered the award and came to the same conclusion that it reached before and decided to enforce the award. Commisa then appealed again to the Court of Appeals which affirmed the decision of the lower Court. It did so on the basis that retrospective application of new laws by the Mexican Courts was unfair because the Mexican Courts had simply applied laws that were not in force at the time the parties concluded the contract and the Court of Appeals was also concerned that if the award was not recognised in the US, that would leave Commisa without redress. The Court of Appeals decided

¹⁰⁶ See *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd* 191 F.3d at 197).

¹⁰⁷ 191 F.3d 194 (2d Cir 1999).

¹⁰⁸ *Termorio SA ESP v Electranta SP* 487 F.3 928 (D.C Cir 2007).

¹⁰⁹ Case No. 13-4022 (2d Cir, August 2, 2016).

¹¹⁰ 962 F.Supp. 2d 642 (S.D.N. Y. 2013).

to exercise its discretion under Article V of the Panama Convention to enforce the annulled award¹¹¹.

Whilst the Court of Appeals decided to enforce an annulled award, there are special reasons for doing so. The Mexican Government passed laws retrospectively which sought to deny the relief it sought in the arbitration. The conduct of the Mexican authorities would suggest that there are significant reasons why the discretion of whether or not to enforce the award should be exercised. Given the circumstance, in the *Commissa* case, it was right for the American Courts to enforce the Mexican Award even though it had been set aside by the Mexican Courts. Perhaps this is an example of where the principles of "honesty and natural justice" have been breached by the supervisory Courts. Such a scenario may warrant the enforcement of an annulled award.

The discretionary and sensible approach is further evident in *Getma International v The Republic of Guinea*¹¹². The District Court of Columbia refused to enforce a foreign arbitral award that was set aside by the Common Court of Justice and Arbitration (CCJA) because the tribunal breached the arbitration rules of the CCJA as it solicited higher fees despite being told not to do so. The District Court again noted the discretionary nature of the New York Convention in relation to annulled awards. The Court refused to accept the argument that the test for public policy can simply be whether a Court would set aside an arbitration award if that had been made and enforced in the US. In essence, different countries have different regimes in relation to setting aside an arbitral award. Consequently, the New York Convention does not endorse a regime where the enforcement Court is second guessing the judgment of a foreign Court with competent jurisdiction to annul the award. The Court further noted that an "erroneous legal reasoning or misapplication of the law is generally not a violation of public policy within the meaning of the New York Convention"¹¹³. The District Court's decision was upheld in July 2017 on the basis that the annulled award would need to be repugnant to United States' most

¹¹¹ Article V of the Panama Convention is identical to Article V of the New York Convention. The Panama Convention is an inter- American Convention on international commercial arbitration which is the regional version of the New York Convention which is incorporated in the US Federal Arbitration Act.

¹¹² No 1:14-1616 (RBW) (D.D. C., 9 June 2016).

¹¹³ *Ibid.*

fundamental notions of morality and justice for it to intervene in “this quintessentially foreign dispute”¹¹⁴.

A similar approach was adopted in *Thai – Lao Lignite (Thailand) Co Ltd & Hongsa Lignite Co Ltd v Government of Loa*¹¹⁵ where the Southern District Court of New York refused to enforce an award that had been set aside at the seat of the arbitration despite having originally granted an order to enforce. The dispute concerned a project development agreement in relation to mining operation rights. The claimant commenced a Malaysian seated arbitration and obtained an award in its favour. This award was initially confirmed by the Southern District Court of New York. However, that award was later challenged by the Government of Loa before the Malaysian Courts and it was annulled on the basis that the tribunal had exceeded its jurisdiction. Upon application by the Government of Loa, the District Court was asked to set aside its earlier decision enforcing the award. The District Court noted that it had the discretion to continue to enforce the award under the New York Convention but decided not to exercise that discretion because the circumstances in this case did not “rise to the level of violating basic notions of justice”.

The American approach is one of pragmatism. Whilst there have been cases where they have enforced annulled awards, the *Commisa* case is one where one could find justifiable reasons for the approach adopted by the American Courts. Indeed, it may well be that the same decision would have been reached by the English Courts and this scenario may satisfy the English test of “honesty and natural justice”.

Enforcing Annulled Awards: An Alternative View

As discussed above, there has been a tendency for certain commentators and jurisdiction to see arbitration as an independent and autonomous system of a dispute resolution. In the author’s view the French approach fails to take into account some of the key principles of international arbitration. The following observations are made in light of recent developments.

¹¹⁴ No.16-7087, (July 7, 2017).

¹¹⁵ 997 F Supp. 2d 214 (S.D.N.Y 2014).

In *Putrabali*, the French Court noted that justice is controlled by the enforcing Court. This nationalistic approach in the author's view is an attempt to control and influence the development of international arbitration law. This approach does little to promote finality of arbitral awards, rather it encourages forum shopping. It is important to remember that arbitration is a consensual process and the arbitration agreement is vital to any arbitral process. If the parties have chosen a particular seat, they have agreed to be bound by the arbitration laws and the judicial process of that seat. Accordingly, where the Courts of the seat of arbitration have set aside the award, surely that must carry a great deal of force. On the other hand, an enforcing Court is not chosen or agreed upon by the parties in their arbitration agreement. In fact, the parties do not necessarily know where they would be enforcing any award at the time the arbitration agreement is concluded. The role of the enforcing Court is different to that of the seat. Indeed, one must be careful not to allow the enforcing Court to alter the parties' agreement that the Courts of the seat will be the supervisory Court. We should not seek to ascribe a role to the enforcing Court that was never agreed to by the parties nor conferred upon it by the New York Convention.

In addition, where the parties are commercial entities (or wealthy individuals) who should have sought and received legal advice, there is something to be said for the argument that if the parties have chosen a seat that lacks the expertise to deal with arbitral matters or views arbitration with suspicion, then the parties must accept that they are running a risk that the arbitral process may not run smoothly. It is important to note that many of the cases that have come before the English Courts recently in relation to annulled awards originate from Russia. As noted by Burton J in *Maximov*, it may well be the case that certain decisions may have been reached by the Russian Courts because of their approach to arbitration¹¹⁶ but this is the risk the parties run by choosing a particular seat.

French Courts and commentators have seized on the permissive nature of Article V(1) (e) of the New York Convention. In *Putrabali*, the French Court cited Article VII of the New York Convention as justification for the autonomous approach of arbitral awards. In the author's view it is difficult to see how Article VII can be used as a justification to disregard the decision of the seat of arbitration. Indeed, any justification for exercising discretion is to be found in Article V which uses permissive language and not Article VII. Furthermore, it is doubtful whether the

¹¹⁶ See para 63.

permissive language of Article V can be read to mean a total disregard for the annulment decision of the seat of the arbitration. If the intention of the drafters of the New York Convention was indeed to confer such wide discretion on the enforcing Courts, then the Convention would have stated so or there would be some evidence of this in the travaux préparatoires.

A practical problem that may arise as a result of the French approach is neatly illustrated by *Dallah*. The decision of the French Court creates a situation where the award is enforceable in France but not in England. Although the English Supreme Court could not set aside the French award as it was not the supervisory Court, it creates the situation where there are two conflicting decisions on the same award. It raises the interesting question of which of the decisions will be given precedent if recognition or enforcement is sought in other countries. Perhaps the answer will depend on whether the enforcing Court has any principles similar to issue estoppel and what degree of importance that Court places on the decision of the supervisory Courts. If on the other hand, that country favours the principle of issue estoppel it may well choose to enforce the decision of the English Courts. If it places emphasis on the seat of the arbitration or has no principle similar to issue estoppel, it may well come to the conclusion that as the supervisory Court, the decision of the French Court of Appeal is to be preferred.

Another issue that is emerging is that of issue estoppel. As discussed above, issue estoppel is a potential bar to enforcing awards. We are now in a position where the decision of one enforcing Court may affect the ability of a party to enforce an award based not on an annulled decision by the Courts of the seat of arbitration but because of issue estoppel. This was the position in *Diag* where enforcement was refused by the English Courts on the basis of the decision of Austria's Supreme Court. It may well be the case that the arbitration clause in *Diag* was unusual but there is obiter to suggest that enforcement may be refused in England where a particular issue has been argued and lost in another enforcing Court. In *Chatiers De L'Atlantique S.A v Gaztransport & Technigaz S.A.S*¹¹⁷ a London seated tribunal had dismissed all the claims before it. The respondent in the arbitration sought to enforce the award that was rendered in its favour in France and the claimant in the arbitration resisted enforcement on the basis that the award was

¹¹⁷ [2011] EWHC 3383 (Comm).

obtained by fraud. The French Court rejected the fraud argument and held that the award was enforceable. In the meantime the claimant in the arbitration also sought to have the award set aside before the English Court as the supervisory Court of the arbitration. Flaux J held that the award was tainted by fraud but also noted obiter that where a party has raised the same issue of fraud before the enforcing Court and lost, it could not circumvent the application of the doctrine of issue estoppel. Consequently, that party is barred from raising those same issues before the English Court¹¹⁸.

Concluding Remarks

This article examined the issue of enforcing annulled awards and argued against delocalisation. International commercial arbitration has never been and will never be an autonomous legal order. The emerging inconsistencies in relation to annulled awards highlight the differences between the English approach and that of the French. On the face of it, the French approach may seem to be pro-enforcement. However, as demonstrated above, the French approach is self-defeating as it encourages forum shopping and seeks to ascribe a role to enforcing Courts that is not contemplated by either the New York Convention or the parties in their arbitration agreement. The role of the enforcing Court should be to facilitate the contractual agreement of the parties to honour any resulting award and not to usurp the powers of the supervisory Courts. The French approach does not sit comfortably with one of the key tenets of arbitration namely party autonomy. What is needed is a pragmatic approach which recognises the importance of the supervisory Courts but also ensures that principles of "natural justice" are upheld.

Indeed, the pragmatic approach of the English and US Courts is to be welcomed. The high threshold established in *Malicorp* and *Maximov* is a clear indication that, whilst the English Courts are prepared to review a foreign Court's decision to annul an award, it will only enforce that award in very limited circumstances with cogent evidence. There is also a clear message that a supervisory Court retains control over the arbitral process in its territory and the English Courts will not second guess that Court nor rectify any deficiencies in the decision of the same. Consequently, in the author's view, the parties must make an informed decision when choosing the seat. Given the importance of the seat of the arbitration, it is important that parties carefully

¹¹⁸ See paras 313 to 318.

consider their seat before choosing one. If they choose a seat that is hostile to arbitration and awards are set aside incorrectly, they have to accept the consequences of that choice and should not look to the enforcing Court to put right the inadequacies of the seat they have chosen.

Furthermore, a party must also consider carefully where to enforce its awards because an unfavourable decision by one enforcing Court could affect that party's ability to enforce in England even though that award has not been set aside by the supervisory Courts. A pragmatic approach that respects the choice of the parties will surely help tame the unruly horse.