THE ROLE OF THE NATIONAL COURTS OF THE SEAT IN INTERNATIONAL ARBITRATION

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I. Introduction

1. Let me first say how pleased I am to be presented with this opportunity to address you at this Conference organised by the Nani Palkhivala Arbitration Centre on the theme of strengthening arbitration in India. It is always a pleasure for me to speak to members of the legal profession in India. I am especially grateful to Mr Arvind Datar, Senior Advocate, who invited me to speak at this event some time ago and then with patience, grace and elegance, attended to a number of requests from my office in order to accommodate my schedule. I really am deeply grateful and delighted that it has all worked out.

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* Sundaresh Menon, Chief Justice of the Supreme Court of Singapore. I am grateful to my colleague, Mr Scott Tan and my law clerk, Ms Eden Li Yiling, who assisted me with the research and preparation of this paper and who discussed many of the ideas with me.

2. The subject of my address today, the Role of the National Courts of the Seat in International Arbitration, was, as mentioned by Mr Datar, something worked out in consultation with him. Given that this conference is inspired in large part by the aspirations of the Indian arbitration community for India to play its part as a key seat for international arbitrations, the choice of topic seemed entirely apt. There can be little doubt today that arbitration has emerged as the preferred mode of resolving transnational commercial disputes. For commercial parties, one of arbitration's major attractions is the benefit of finality that is assured by the general exclusion of any right of appeal. Coupled with the pro-enforcement policy that is reflected in the New York Convention[1] and the Model Law,[2] one might fairly conclude that the international arbitration system is designed to facilitate the enforcement of the award once it has been rendered. But the experience of the international community shows that in one key respect at least, finality and certainty remain tantalisingly out of reach – this concerns the effect of decisions of the seat court on subsequent enforcement proceedings.

3. Consider the following scenario. An award debtor, dissatisfied with the outcome of the arbitration proceedings, successfully sets aside the award at the seat court. Undeterred, the award creditor attempts to enforce the vacated award in a different jurisdiction. How should the enforcing court treat the seat court's prior decision to set aside the award? Or take the converse situation where the seat court dismisses the setting aside application and upholds the award: does that decision have any impact

on subsequent enforcement proceedings in which the award debtor raises the same grounds for resisting enforcement as it did in the setting aside application?

4. The answer to this question depends to some extent on whether one subscribes to territorialism or to the delocalisation school of thought. As I shall elaborate, jurisdictions remain divided on this point. It may well be that so long as this doctrinal divide remains, there will never be a consensus on the significance to be ascribed to decisions of the seat court.

5. However, this does not mean that the goals of (a) enhanced predictability in the enforceability of awards, (b) avoiding re-litigation of the identical issues in different fora, and (c) greater finality and certainty in international arbitration cannot be achieved, at least in part. In the next 45 minutes or so, I will explore how common law jurisdictions such as India and Singapore have within their legal arsenal certain doctrines that can be employed in a principled manner to answer the question of how an enforcing court should treat decisions of the seat court. I suggest that even in the absence of treaty-based reform, individual jurisdictions can play a part in promoting greater finality and certainty by adopting these doctrines in a broadly consistent manner.

II. The nature of arbitration – territorial or delocalised?

6. To set the stage, I begin by sketching the broad contours of the doctrinal debate between territorialism and delocalisation.

7. The territorialist view is also referred to as the “jurisdictional” view. It holds that every arbitration is attached to a particular jurisdiction, the seat of the arbitration, and is subject to both the law and the jurisdiction of the courts of the seat.[3] This view draws from the notions of Westphalian sovereignty, and it argues that since each state is exclusively empowered to regulate and enforce laws relating to persons, property, or events within its boundaries, the law of the seat should exclusively regulate the legitimacy and legality of arbitrations that take place within it.[4] Proponents of the territorialist view would therefore hold that an award that has been set aside by the seat court has no legal existence or effect and cannot be enforced in any other jurisdiction for the simple reason that there is nothing left to enforce. “*Ex nihilo nihil fit*”, they would say, or nothing can come out of nothing.[5]

8. In contrast, under the delocalised view, the system of arbitration is viewed as a part of a transnational legal order that is independent of any national legal system. No single state, not even the seat of the arbitration, has the final say on the validity or enforceability of an award. Consequently, the impact of the seat court’s decision to set aside an award is confined to its own jurisdiction and does not finally determine the status of the award in another jurisdiction. As Professor Jan Paulsson puts it, delocalisation raises “the possibility that an award may be accepted by the legal order of an enforcement jurisdiction whether or not the legal order of its country of origin has also embraced it”.[6]

9. The approach of the French courts perhaps best epitomises delocalisation theory. In the *Hilmarton* case,[7] arbitration proceedings took place between Hilmarton

and Omnium in Switzerland. Hilmarton successfully set aside the arbitral award before the Swiss courts. Subsequently, Omnium sought to enforce that very award in France. The *Cour de cassation* held that the award was an international award and so was not integrated into the Swiss legal order. Hence, as far as the French were concerned, the award continued to be in existence even though the Swiss courts had annulled it for non-compliance with Swiss law. The approach in *Hilmarton* was followed several years later by the Paris *Cour d'appel* in the *Chromalloy Aero Services* decision,[8] where an award rendered in Egypt was held to be enforceable in France even though it had already been set aside by the Egyptian courts.

10. The *Cour de cassation* had the occasion once again to consider a similar situation in the famous *Putrabali* case.[9] That concerned a trade arbitration between Putrabali and Rena in London. In 2001, the tribunal rendered an award in Rena's favour. Putrabali appealed on a point of law to the English High Court, as is provided for under English law. The High Court set aside the award in part and remitted it to the tribunal, which then rendered a fresh award in August 2003, substituting the original award with one in Putrabali's favour. However, in September 2003, Rena commenced proceedings to enforce the *original* award in France and it succeeded *notwithstanding* (a) the English court's decision to set aside part of the original award and (b) the existence of the second award substituting the first. In arriving at its decision, the *Cour de cassation* explained that an international arbitral award is "not anchored in any national legal order" but is instead "a decision of international justice whose validity

must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought".

A. Problems with delocalisation theory

11. The chief downside of the delocalised view is plain. It is the lack of finality and the possibility that identical issues may be re-litigated in multiple jurisdictions. If an enforcing court is not bound, so to speak, by decisions of the seat court, then the same issues might have to be litigated multiple times.[10] There is an irony here. Delocalisation theory rests on the premise that arbitration is governed not by any domestic law but by an international legal order. The ideal is that a common legal framework, freed of local idiosyncrasies, would apply to all arbitration proceedings. But that is not the *effect* of delocalisation theory. Because it accords primacy to *no* jurisdiction and to *no* legal order, the ultimate result is chaos. It leads to multiple localised adjudications of the enforceability of an award in different jurisdictions, with the same issues and arguments being revisited each time, possibly giving rise to inconsistent decisions.

12. I accept, of course, that national legal orders are different and may assign different legal outcomes to the same event.[11] But where conflicting decisions are reached on the same facts, the result is systemic uncertainty which not only undermines the objectives of the New York Convention and the Model Law, but also leads to higher transaction costs for commercial entities.[12] Parties who agree to submit their dispute to arbitration expect to, and should receive, a final adjudication of their rights and liabilities once and for all.

B. Problems with territorialism

13. It appears that in comparison to delocalisation theory, territorialism has much greater potential to achieve finality and certainty. Under a strict territorialist view, decisions of the seat court occupy primacy of place, because the international validity of the award is inextricably linked to its validity under the law of the seat.[13] If the seat court has already set aside an award, any attempt by the award creditor to enforce the award would be doomed to failure because the enforcing court will take the view that a vacated award has no legal existence or effect.

14. But one might question *why* the decision of the seat court should bind the enforcing court when the New York Convention reserves to each sovereign state a degree of control over foreign arbitral awards. Article V(1)(*e*) of the Convention provides that recognition of the award "*may*" – not "must" – "be refused at the request of the party against whom it is invoked" if the award has been "set aside by a competent authority of the country in which, or under the law of which, that award was made". Adherents of delocalisation theory have long pointed to this and argued that the use of the permissive "may" suggests that it is not mandatory for the enforcing court to refuse to enforce an award vacated by the seat court; and, conversely, that an enforcing court *may* enforce an award even if it has been set aside by the seat court.[14]

15. One example of a situation where the enforcing court might not wish to be bound by the decision of the seat court may be found in the *Yukos* case.[15] In September 2006, an arbitral tribunal seated in Russia rendered four awards in favour of Yukos

against Rosneft. Yukos commenced enforcement proceedings in the Netherlands in March 2007, but two months later, in May 2007, Rosneft succeeded in setting aside these awards before the Moscow *Arbitrazh* court. It then challenged the enforcement proceedings by relying on the Russian judgments. In response, Yukos argued that the Russian judgments were the result of a partial judicial process and hence unworthy of recognition in the Netherlands. The Amsterdam Court of Appeal agreed with Yukos and held that "it [was] so likely that the Russian civil court judgments setting aside the arbitral awards are the result of an administration of justice which is to be qualified as partial and dependent, that it is not possible to recognise those judgments in the Netherlands." Accordingly, the Amsterdam Court of Appeal chose to allow the enforcement of the arbitral awards in the Netherlands.

16. In March 2010, Yukos sought to enforce the awards in England and Rosneft again objected, relying on the Russian annulment judgments. Mr Justice Simon held, agreeing with the Dutch courts, that 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."[16] Again, the awards were successfully enforced.

17. As can be seen from the *Yukos* cases, there are instances in which an enforcing court should be allowed to enforce an award notwithstanding that it might have been vacated in its seat. In *Yukos*, neither Dutch nor English public policy would allow the recognition of a foreign *judgment* which was found to be tainted by partiality. Yet, under a *strict* territorialist approach that did not admit of any exceptions, the Dutch and

English courts would not have had any flexibility in this matter: the consequence of the Russian judgments would have been to extinguish the legal existence of the arbitral awards entirely, leaving nothing for the enforcing court to enforce.

18. In this context, I think it becomes relevant also to consider Article 34(2)(*b*) of the Model Law, which provides that a court may set aside an arbitral award (a) where the subject matter of the dispute is not capable of settlement by arbitration under the law of the seat or (b) where the award is in conflict with the public policy of the seat. Given that matters of arbitrability and public policy are inherently unique to each state, why should the decision of a state on one of these uniquely local issues determine what position the court of another state – having regard to its own unique domestic circumstances – should take? Without the power and ability to protect their own interests, states might be unwilling to commit to recognising and enforcing *any* awards within their territories.[17]

19. Further, Article VII of the New York Convention provides that the parties may avail themselves of an award in the manner and to the extent allowed by the law of the country where that award is sought to be relied upon. An approach which ties the hands of the enforcing courts by *compelling* adherence to the seat court's prior decision arguably erodes the arbitrating parties' rights to invoke more favourable national laws at the enforcement stage.[18]

20. What this discussion shows is that there is no easy answer to the issue of the proper role that the seat court should play in international arbitration. Both pure

territorialism and pure delocalisation are not without their difficulties, and the best approach possibly lies somewhere between these two extremes.[19]

III. A proposed common law approach

21. The root of the problem lies with the drafting of Article V of the New York Convention – exactly what are the circumstances under which the enforcing court "may" enforce an award that has been set aside by the seat court? When may the enforcing court choose to deviate from the seat court's decision? The lack of guidance as to how Article V of the New York Convention should be interpreted has led to the emergence of inconsistent and conflicting decisions around the world.[20] Clarity could be provided by amending the New York Convention, but severe practical obstacles stand in the way of any such endeavour.[21]

22. However, my view is that even in the absence of treaty-driven reform, the international community can and should move towards greater coordination and coherence between legal systems. In the 30th Annual Freshfields Lecture, Lord Mance proposed that in keeping with the English position, decisions of the seat court should, in the ordinary case, be treated as final save in exceptional circumstances "when justified on some recognised common law principle".[22] Elaborating on this, Lord Mance made mention of cases which applied principles governing the recognition of foreign judgments, such as the *Yukos* dispute. He also briefly touched on issue estoppel and noted that the applicability of this doctrine would depend on whether there existed an identity of issues.

23. Drawing on these helpful ideas raised by Lord Mance, I propose to delve deeper into the common law doctrines of the recognition of foreign judgments and issue estoppel, and elaborate on how they may be applied in a principled manner in the arbitral context. My proposed approach towards the treatment of decisions rendered by seat courts can briefly be summarised as follows. Where the seat court has rendered its decision on a setting aside application, the enforcing court should first decide whether it will recognise the decision of the seat court. If it decides that the decision of the seat court should not be recognised, then it would not be constrained by the decision in any way. If, however, it decides that the foreign judgment should be recognised, then the judgment should be examined further to consider the issue it has decided so as to determine whether it *may* be relied on to raise an issue estoppel in the enforcement proceedings. And if an issue estoppel is found to arise, the decision of the seat court would serve as the once-and-for-all determination of the parties' rights in relation to that issue.

24. In my view, such an approach has the potential to alleviate the problems of re-litigation and inconsistent judicial outcomes mentioned above, and will ultimately contribute to greater finality and certainty in international arbitration. The major advantage of this approach is that it can be readily accommodated within the existing legal framework of most common law jurisdictions. Common lawyers would be familiar with the principles governing the recognition of foreign judgments and issue estoppel. Since the decision of the House of Lords in *Carl Zeiss Stiftung v Rayner & Keeler Ltd*,[23] it has been accepted that issue estoppel can be applied in the context of cross-border

re-litigation. As I will explain later, there is no good reason why it cannot similarly be applied in this arbitral context.

25. In addition to the two doctrines mentioned by Lord Mance, I will also consider a third concept – the extended doctrine of *res judicata*. The approach outlined earlier is premised on the award debtor having commenced setting aside proceedings. But in the scenario where the award debtor has chosen *not* to go on the offensive, there will not be any seat court judgment. The question then is whether the award debtor should be prevented by the extended doctrine of *res judicata* from raising issues at the enforcement stage on the basis that it *could* have commenced setting aside proceedings at the seat and raised these issues then, but did not. As I will explain later, I do not think that award debtors should be constrained in this way, because this would deprive them of the choice of remedies they are entitled to under the Model Law.

A. Principles governing the recognition of foreign judgments

26. I begin by considering the subject of the recognition of foreign judgments. Every system of private international law will have a set of rules relating to the recognition and effect to be given to foreign legal decisions. To address the uncertainty over the wording of Article V of the New York Convention, several academics have proposed what is known as the "judgment route".[24] That is to say, where the seat court has rendered a final decision on the validity of an award, the enforcing court will apply its domestic rules on the recognition of foreign judgments to determine whether to recognise the seat court judgment. If the judgment is one that is entitled to recognition,

the decision should be respected. Thus, if the award has been set aside, enforcement will be refused; conversely, if the award has been upheld, the enforcing court should consider whether the decision of the seat court gives rise to an estoppel (see Part III(B) below). However, if the seat court's judgment does not meet the criteria for recognition, the question of whether the award should be enforced would be considered afresh by the enforcing court wholly unconstrained by whatever has happened before the seat court. As a matter of principle, it seems that this analysis should apply irrespective of whether the seat court decided to set aside or uphold the award.

27. The English High Court appeared to endorse the "judgment route" in its decision in the *Malicorp* case.[25] Malicorp attempted to seek enforcement of an award against Egypt even though the award had been set aside by the Egyptian court, which was the seat court. Malicorp argued that the Egyptian court had been biased in setting aside the award. Mr Justice Walker applied what he referred to as the "preferred approach" of the English courts – that is, although the court had the discretion to enforce an award that had been set aside, it would not be right to exercise that discretion if "applying general principles of English private international law, the set aside decision was one which this court would give effect to."[26] Having found that there was no positive and cogent evidence of bias, he held that there was no reason not to recognise the judgment of the Egyptian courts.

28. One seeming disadvantage of the "judgment route" approach is that each enforcing court would be required to apply its own domestic rules on the recognition

of foreign judgments. Given that the principles governing such recognition may vary from jurisdiction to jurisdiction, it has been asked whether applying the "judgment route" will truly contribute to finality and certainty in international arbitration.[27]

29. I think that any such fear may be overstated. It appears that across the board, there exist basic similarities in the criteria applied in recognition and enforcement practices.[28] For instance, it seems to be common ground that a judgment should not be recognised if the seat court's judgment is tainted by procedural unfairness, bias, or corruption, or if it violates the enforcing court's public policy or is generally contrary to fundamental notions of justice.[29] This is well-illustrated by the *Yukos* cases, which I referred to earlier, where both the Dutch and English courts refused to recognise the setting aside decisions handed down by the Russian courts on the basis that they were tainted by partiality.[30] Both courts used the language of recognition, and the similarity in their reasoning reveals that even across the civil-common divide, there is something akin to a convergence in certain core principles governing the recognition of foreign judgments. In the Asian Business Law Institute's compendium of reports on the recognition and enforcement of judgments in Asia which was published just last month, it was observed that there exists a great deal of commonality in the rules on recognition and enforcement, particularly amongst common law jurisdictions, where it was stated that save for a "handful of issues", there are "no significant differences" in the relevant rules.[31]

30. It seems to me, therefore, that an approach which calls upon enforcing states to apply their domestic principles relating to the recognition of foreign judgments will not generate undue uncertainty or inconsistency.

B. Issue estoppel

31. Applying the principles governing recognition, however, is only half the battle won. The recognition of a judgment means treating the claim which was adjudicated as having been validly determined by a foreign court.[32] However, this begs the following question: Is re-litigation thereby precluded? This is a question which belongs to the law of *res judicata*, which comprises three distinct and interrelated principles, one of which is the doctrine of issue estoppel. Issue estoppel aims to prevent parties from re-opening issues that have already been determined in a final judgment on the merits by a court of competent jurisdiction between the same parties.[33]

32. A final judgment by the seat court qualifies as a judgment capable of giving rise to an issue estoppel because it is a decision on the merits of the issues raised in the setting aside application by a court of competent jurisdiction.[34] Subject to the satisfaction of the other elements required to establish issue estoppel (namely, an identity of parties and subject matter), the seat court's decision on certain legal and/or factual issues should preclude the same parties from asserting the contrary in subsequent enforcement proceedings. Issue estoppel, if it applies, would thus prevent the unsuccessful party from re-litigating the same issues in different jurisdictions around the world. I would argue that such an outcome is fair: there is no reason why

a party should be allowed to take multiple bites at the cherry if it had raised an issue before an impartial court of competent jurisdiction and received a fair hearing and final decision on the matter.[35]

33. The use of issue estoppel in the arbitral context has received significant judicial support, most notably in the decision of the English High Court in the *Diag* case.[36] A dispute between Diag and the Czech Republic was referred to arbitration and the Czech tribunal rendered an award in favour of Diag, which then attempted to enforce the award in France, Luxembourg, the United States and Austria. The Supreme Court of Austria held that the award was not binding within the meaning of Article V(1)(*e*) of the New York Convention and therefore not enforceable. The award subsequently came up for enforcement in England and enforcement was again resisted on the ground that the award was not binding. The question before Mr Justice Eder was whether the earlier Austrian judgment gave rise to an issue estoppel such that the award should likewise be held to be not binding in the English enforcement proceedings. Mr Justice Eder held that it did, and said it made no difference that the Austrian court's conclusion had been reached in the context of the New York Convention, and not the applicable English statute,[37] because the issue being decided – whether the award was "binding" – was exactly the same.

34. In the course of his judgment, Mr Justice Eder appeared to draw a distinction between situations where the foreign court had decided on "questions of arbitrability and of public policy" and where it had decided on whether an award was "binding". He thought the former situation would not ordinarily give rise to an issue estoppel; but an

issue estoppel would normally arise in the latter situation.[38] I agree. Public policy, as well as the arbitrability of a particular dispute, which is ultimately governed by the dictates of public policy, are both quintessentially local matters on which states are entitled to take different views.[39] Thus, the question whether an award is consistent with the public policy of country A is different from whether that same award is consistent with the public policy of country B. It follows from this that one of the elements required to establish issue estoppel – identity of subject matter – would not be satisfied in that context.[40] The same point was made by the English Court of Appeal in the *Yukos* case as follows:[41]

> … The standards by which any particular country resolves the question whether courts of another country are 'partial and dependent' may vary considerably … It is our own [English] public order which defines the framework for any assessment of this difficult question; whether such decisions are truly to be regarded as dependent and partial as a matter of English law is not the same question as whether such decisions are to be regarded as dependent and partial in the view of some other court according to that court's notions of what is acceptable or otherwise according to its law.

35. However, in the context of other grounds of setting aside, there seems to be much less resistance to the idea that the enforcing court should defer to the decision of the seat court. *Diag* itself is one good example. Another is the decision of the English High Court in *Minmetals Germany GmbH v Ferco Steel Ltd*.[42] There, the seat court had rejected a challenge to the award on the ground of procedural irregularity. The award debtor subsequently sought to rely on the same ground to resist enforcement proceedings in England. Mr Justice Colman held that when the award debtor had

applied for a remedy against the award on the ground of procedural defects before the seat court, it would "normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand."[43] This approach in *Minmetals* has been endorsed in several jurisdictions, including Australia[44] and Hong Kong.[45] Although these courts did not employ the language of estoppel, it is evident that key to their decision was the fact that there had been a decision of the seat court on the issue which settled the matter.

36. It may be observed that the proposed approach differentiates between awards that are set aside on grounds that might find more "transnational" resonance (such as procedural irregularities), and grounds that have a distinctly "domestic" flavour, such as arbitrability or the violation of public policy. This finds a parallel in the approach proposed by Professor Paulsson, who has suggested that an annulment by the seat court should not be a bar to international recognition and enforcement of the award unless the award was annulled on one of what he calls the "internationally recognised grounds" set out in Article V(1)(*a*) to (*d*) of the New York Convention. When an enforcing court is faced with such a so-called "international standard annulment", he says the enforcing court should respect the seat court's decision and refuse to enforce the award. In contrast, where an award is annulled on a ground that is not "internationally recognised", it is a "local standard annulment" which has no worldwide preclusive force and the enforcing court is entitled to consider the matter afresh.[46]

37. Drawing on the approaches of Mr Justice Eder in *Diag* and Professor Paulsson, the position may be stated as follows. Issue estoppel would likely arise where the seat court has made a decision on what I shall refer to as the "international grounds" stated in Article V(1)(*a*) to (*d*) of the New York Convention, which relate mainly to procedural irregularities that affect the arbitration proceedings. On the other hand, where the seat court has decided an issue relating to one of the "domestic grounds" stated in Article V(2)(*a*) and (*b*) of the New York Convention, which concern the quintessentially domestic issues of arbitrability and public policy, the seat court's decision would *not* ordinarily be capable of founding an issue estoppel, and each enforcing state would be entitled to consider the matter afresh in accordance with its own domestic standards.

38. Before I leave this point, I would make one further observation. The analysis I have proffered draws no distinction between decisions of *seat courts* and *enforcing courts*. Indeed, the estoppel in *Diag* arose from the decision of a foreign *enforcing court*, not the seat court. In principle, I see no reason why the decision of an enforcement court should be treated any differently for the purposes of the doctrine of issue estoppel. In my view, the same principles ought to apply – that is, a decision made on an "international ground" ought to be capable of giving rise to an estoppel, but not one based on a "domestic ground".

39. There are some who have argued that uncertainty and even arbitrariness will be generated by this because if there are concurrent enforcement proceedings, it would be left to chance which enforcing court renders its decision first and assumes

preclusive effect in relation to subsequent decisions.[47] By contrast, if only seat court judgments have preclusive effects, then there would be greater certainty for the simple reason that there is only one seat court but there can be multiple enforcing courts.

40. I acknowledge that there is such a risk, but I think it can be mitigated by the use of yet another common law tool: the case management stay. It has long been established that a court has the inherent power to stay its own proceedings. This power may be exercised in a wide range of circumstances, and in pursuit of a wide variety of ends.[48] One such instance is where there are multiple parallel proceedings in different jurisdictions and the judgment in one is likely to give rise to issues of *res judicata* in the others.[49] This is a scenario which usually falls within the doctrine of *lis alibi pendens*, which governs cases where a plaintiff has commenced simultaneous actions in multiple jurisdictions against the same party in relation to the same subject matter. In such a case, the court can compel that plaintiff to elect one jurisdiction to pursue its claim. Where it does so, proceedings in all the other courts must either be discontinued or put on hold.[50]

41. This proposal to grant a stay of enforcement proceedings on the ground of case management may seem unusual, given that the New York Convention permits arbitrating parties to bring multiple enforcement proceedings concurrently, but it is, in my view, entirely consistent with principle. Courts have an interest in ensuring the efficient and fair resolution of a dispute as a whole, in a way that prevents or minimises the prospects of the duplication of resources or the risk of conflicting judgments.[51] Thus, although an award creditor is entitled to bring multiple enforcement proceedings,

if identical legal issues are raised, the award creditor may be compelled to elect which jurisdiction it wishes to proceed in first and the other proceedings should then be stayed. Once the chosen forum has rendered a decision, the proceedings in the other jurisdictions can then proceed, and the decision of the chosen forum on an international ground might be raised as the foundation of an estoppel. In considering whether to grant such a stay, the court should strive to strike a balance between the following three considerations:

(a) First, the broad aim of the New York Convention of ensuring the uniform treatment of awards and its general pro-enforcement policy should be respected, and due regard must be had to the award creditor's right to pursue multiple enforcement proceedings in different jurisdictions. Account may be taken of this, for instance, when the court is calibrating the length of the stay or the conditions to be imposed on such a stay having regard to such things as the availability of measures for the interim protection of assets.

(b) Second, the principle of comity must be respected. This may be relevant in considering which of the foreign courts the proceedings should be stayed in favour of, if at all.

(c) Third, the court should strive to prevent an abuse of process (by either party) and ensure the efficient and fair resolution of disputes. In this regard, the conduct of the parties may be relevant. The facts of the recent *Autoridad* case are illuminating insofar as the question of granting a case

management stay, albeit in a slightly different context, is concerned.[52] The claimant had commenced proceedings in the English courts seeking declarations that the defendants were liable under certain guarantees they had furnished which were governed by English law. Subsequently, the defendants commenced arbitration proceedings under a *separate* set of contractual agreements, including a separate guarantee governed by Panamanian law, and sought, among other things, negative declarations that they were not liable under the Panamanian law guarantees. The defendants then applied for a stay of the English proceedings pending the conclusion of the arbitration but this application was refused. Central to Blair J's decision was the timing of the proceedings, for it was plain to him that the claimant's decision to proceed on the English guarantees instead of the Panamanian ones represented a reasonable commercial choice, while the defendant's decision to commence an arbitration to seek negative declarations under the Panamanian guarantees was plainly strategic. While Blair J said that this did not rule out the grant of a stay, it certainly provided cause for hesitation.[53]

42. Applied judiciously, I suggest that such an approach would represent only a modest restraint on the award creditor's enforcement rights. However, the benefit is that it should result in greater consistency and orderliness in the resolution of all disputed matters, which, in turn, secures greater certainty and finality in international arbitration.[54]

43. This proposal is not without precedent. Article VI of the New York Convention provides for something similar. It states that if there is a pending setting aside application, an enforcing court may, "if it considers it proper", adjourn its decision on enforcement pending the seat court's decision on a setting aside application. In the right case, the invocation of Article VI has obvious case management benefits. Let me illustrate this point by referring to the well-known *Dallah* cases.[55] In *Dallah*, the key question was whether the Government was bound by the arbitration agreement contained in an agreement which the Awami Hajj Trust, a separate legal entity set up by the Government of Pakistan, had entered into with Dallah. The tribunal, which was seated in Paris, applied principles of French law and concluded that because the trust was the alter ego of Pakistan, the state was bound by the arbitration agreement.

44. Soon after, Dallah sought to enforce the award in both England and France. Pakistan resisted enforcement by arguing that there was no valid arbitration agreement between it and Dallah. In November 2010, the UK Supreme Court agreed and held that there was insufficient evidence of a "common intention" for Pakistan to be a party to the arbitration agreement and refused to enforce the award. Across the Channel, however, the opposite outcome was reached just three months later. In February 2011, the *Cour d'appel* held that the parties had intended for Pakistan to be party to the arbitration agreement and refused to set aside the award.

45. As Professor Gary Born argues, *Dallah* was a good example of a case where Article VI of the New York Convention could have been invoked.[56] Given that the matter involved issues of French law that were best adjudicated by the French courts,

Professor Born argues that the UKSC could have adjourned its decision on enforcement pending the French court's decision on the setting aside application. This seems to me to be a sensible suggestion from a case management perspective. I envision the case management approach outlined above as playing a similar role to Article VI of the New York Convention, albeit in the slightly different context of there being concurrent enforcement proceedings.

46. If this proposal were accepted, it would be consistent with modern trends towards greater transnational judicial cooperation. Twenty years ago, Lord Nicholls remarked that courts had to work together, otherwise "[t]he law would be left sadly lagging behind the needs of the international community."[57] I respectfully agree with this. Even in the absence of treaty intervention, there is much that national courts can do to work together to ease the process of dispute resolution and facilitate transnational business. Great strides have been taken in recent years, particularly in the field of insolvency, and I suggest that arbitration might well be the next frontier in this endeavour.[58]

C. Extended doctrine of res judicata

47. These principles governing the recognition of foreign judgments and issue estoppel only apply where setting aside proceedings have been commenced and there is a judgment of the seat court on the issue. An award debtor may, however, choose not to bring setting aside proceedings at all. It is in this context that the extended doctrine of *res judicata* needs to be considered.

48. The origin of the extended doctrine of *res judicata* can be traced to the 19th century decision of the English Court of Chancery in *Henderson v Henderson*.[59] In essence, the rule in *Henderson v Henderson* requires parties to bring their whole case before the court so that all aspects of it may be finally decided once and for all. Except in special circumstances, the parties cannot return to the court to raise arguments which they could have raised, but chose not to on the first occasion.[60] Unlike issue estoppel, the mischief that the rule seeks to address is not re-litigation of the identical subject matter; rather, it is the bringing of successive actions – even if these actions concern distinct issues – arising out of the same factual matter, which amounts to an abuse of court because it is an unreasonable imposition on the defendant to have to defend himself in such a piecemeal manner.[61]

49. In the arbitral context, an argument might be made that a party's *failure* to challenge the award before the seat court precludes it from subsequently opposing the recognition and enforcement of the award before an enforcing court. This is on the basis that arguments that may be raised at the enforcement stage could and should have been raised at the setting aside stage.[62] However, I would argue that this view is wrong for two reasons. First, where no setting aside application has been made, there are no earlier proceedings to speak of, in which the point ought to have been taken. Second, and consistent with this, in my view, it would be contrary to what the Model Law contemplates to hold that a party resisting enforcement may be penalised for not having tried to set aside the award. In the *Astro* decision, the Singapore Court of Appeal held, after a close examination of the *travaux préparatoires* of the Model Law,

that an award debtor is entitled to choose between actively challenging an arbitral award before the seat court, and passively resisting the enforcement of the award before the enforcing court.[63] This "choice of remedies" is at the heart of the Model Law's design and it cannot be said that an award debtor who only invokes its passive remedy is, in any way, guilty of abusing the court's process.[64]

50. That being said, there might arguably be room for the extended doctrine of *res judicata* to operate in the situation where an award debtor *has decided* to invoke its active remedy. In such a case, the award debtor must then consider carefully which grounds it wishes to raise at the setting aside stage. If it could have relied on a certain international ground but did not do so, the extended doctrine of *res judicata* might well operate to preclude the award debtor from raising that same ground subsequently at the enforcement stage. This is particularly so if the argument is that there was some procedural irregularity in the arbitration, which is a matter that the seat court would eminently be in an excellent position to adjudicate. This would not apply to the domestic grounds, because the questions of whether an award violates the enforcing court's public policy or whether the subject matter of the award is non-arbitrable under the law of the enforcing state are not issues which can be litigated in the seat court.

IV. A return to the pre-eminence of the seat court?

51. In summary, the approach I propose envisions the combined application of the doctrines of the recognition of foreign judgments, issue estoppel, and possibly in some circumstances, the extended doctrine of *res judicata* to the field of the enforcement of

arbitral awards. These are all tools which are ready to hand, as they are established features of the jurisprudence of common law jurisdictions. In the absence of treaty-based reform, it seems to me that they offer a sound hope of achieving greater certainty in this area. Quite apart from the practical benefits, it seems to me that they are grounded powerfully in the principles of the comity of nations and finality, and there is much to commend their adoption.

52. What, then, are the consequences for seat courts? Presently, the seat court has, at least potentially, the first word on all issues relating to the validity of the award. Under the common law approach I have proposed, it will often have the last word as well, at least insofar as it relates to the international grounds. This approach, which sees seat courts playing a special role in international arbitration, is more aligned to the territorialist than the delocalised view. Critics would say that this detracts from one of the core objectives of the New York Convention, which is to free the international arbitral process from the shackles of the law of the seat.[65] With respect, I must disagree.

53. In his Freshfields Lecture, Lord Mance forcefully argued that there has been and always will be a special link between an arbitration and its seat. In his view, decisions of the seat court are "decisions which the parties must, on the face of it, be taken to have accepted when that seat was chosen, and should in the ordinary case be treated as final and binding."[66] In other words, parties who agree to a particular seat may be taken to have intentionally submitted themselves to the law of the seat and whatever controls it exerts. This is particularly so since, as pointed out by Lord Mance, the

modern reality is that the choice of the seat is often a deliberate and conscious one.[67] Therefore, an approach that places weight on the decision of the seat court gives effect to, rather than conflicts with, the principle of party autonomy.

54. I agree with this, and would argue that the pre-eminence of the seat court is the logical outworking of orthodox common law principles which I have discussed above, each of which is itself built on sound normative foundations, namely, the principle of the comity of nations and the public interest in having finality in litigation.

55. Comity requires that no court should sit in judgment over the final decision of a competent court of another jurisdiction.[68] So where the seat court has set aside or upheld an award on certain international grounds, it is not for the enforcing court to evaluate whether the seat court's decision was correct. Save for the comparatively rare situations in which the seat court's decision will not be recognised, the decision of the seat court should prevail. Viewed in this light, respect for the decision of the seat court is nothing less than respect for the sovereignty of the courts of the seat jurisdiction itself. This foundational principle lies at the heart of every common law system's rules on the recognition and enforcement of foreign judgments.

56. Provided that the seat court's decision constitutes a final determination by a court of competent jurisdiction, the principle of finality demands that parties be precluded from re-litigating the same matter. At its heart, the doctrine of *res judicata* is grounded in the public interest of achieving finality in litigation. Judicial decisions must, if they are to mean anything at all, confer certainty and stability; and no legal system would

be able to function if all decisions were open to constant and unceasing challenge.[69] In like manner, an arbitral decision must represent a final and binding determination of the rights and liabilities of the parties concerned; and nothing can be as corrosive of confidence in the arbitral process than the prospect of endless litigation with the attendant risk of inconsistent outcomes. If the seat court has rendered a decision on a particular matter, and if the regular processes of appeal and review as provided by the law of arbitration have been exhausted, then the decision should be given due effect and the matter should end there.

57. Taken together, these three principles of (a) party autonomy, (b) the comity of nations, and (c) finality explain the primacy of the seat court. What, then, are the practical implications of this?

58. One possibility is that it would incentivise commercial parties to actively approach the seat court for a once-and-for-all solution, with the hope of using the judgment to found an issue estoppel and thereby stave off any further litigation. This is perhaps a high risk, high reward strategy for the award debtor because if it fails to set aside the award, it may find itself estopped from raising the same issues in all subsequent enforcement proceedings; but if it succeeds, subsequent enforcement proceedings should be plain sailing. It is for this reason that it seems to me that the choice of a seat will become an even more important consideration for parties who are contemplating arbitration. This then raises the question: what practical steps can a jurisdiction take to build itself up as a successful and attractive arbitral seat?

V. The road ahead for India

59. Several years ago, I had the honour of delivering the Patron's Address at the Chartered Institution of Arbitrators London Centenary Conference.[70] In my address, I identified what I considered to be the basic architecture of a successful arbitral seat. These were: (a) laws that augment the practice and conduct of arbitration, (b) an independent judiciary experienced in, and respectful of, the fundamental precepts of international arbitration, (c) freedom of choice in representation, (d) purpose-built first-in-class dispute resolution facilities, and (e) a staunch adherence to international arbitration treaties. In my view, these five factors remain key today and I am heartened to see that India has made significant progress on all of these fronts in the last decade or so.

60. I begin with the first two factors – laws that augment the practice and conduct of arbitration, and an independent judiciary that respects the fundamental precepts of international arbitration. The overall tenor of recent judicial pronouncements and legislative amendments strongly suggest that India is taking concerted steps to position itself as an arbitration-friendly jurisdiction.

61. A few years ago, the Indian Parliament passed the Arbitration and Conciliation (Amendment) Act of 2015. Among the changes made was the introduction of section 34(2A), which makes it clear that Indian courts do not have the jurisdiction to set aside awards rendered in foreign-seated arbitrations. This section is essentially a codification of the holding in *Bahrat Aluminium*,[71] in which the Indian Supreme Court

overruled its earlier decision in *Venture Global* and held that section 34 of the Arbitration and Conciliation Act of 1996 did not permit the Indian courts to set aside foreign-seated awards.[72] This has provided welcome statutory reassurance that Indian courts will not intervene to set aside such awards.

62. Another noteworthy amendment is the addition of an explanation to section 34 to clarify that "the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute." This appears to have been directed at reversing the holding in *Oil & Natural Gas Corp v Saw Pipes Ltd*, where the court had decided that awards which were contrary to substantive provisions of Indian law or against the terms of the contract could be set aside for being contrary to Indian public policy.[73] That case was criticised as having given too expansive a reading to the doctrine of public policy because it effectively granted Indian courts the mandate to conduct a merits review of an award. This is contrary to the principle of minimal curial intervention that is the bedrock of the modern international arbitration regime. As the Singapore Court of Appeal observed in its 2015 decision in *AKN v ALC*, where it declined an invitation to set aside an award on the ground of legal error:[74]

> The courts do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases. This important proscription is reflected in the policy of minimal curial intervention in arbitral proceedings, a mainstay of the Model Law …

63. It is heartening to see that the principle of minimal curial intervention has now been codified and will set the proper direction for Indian courts to take in the years to come.

64. I come to the third factor – freedom of choice in representation. In international arbitration, there can be no monopoly on the provision of legal services. The reality is that foreign parties will not readily agree to arbitrations in India if they are denied legal representation of their choice. Allow me to share Singapore's experience in this regard. In 1987, the Singapore High Court delivered its decision in the *Turner* case, where it held that only Singapore-qualified lawyers could appear in Singapore-seated arbitrations.[75] This decision, which was based on a restrictive reading of Singapore's Legal Profession Act, was greeted with widespread criticism, and cast Singapore as a parochial jurisdiction more concerned with protecting the interests of local lawyers rather than one which was pro-arbitration and outward-looking, greatly hurting Singapore's attractiveness as an arbitration seat. [76]

65. The legislature quickly took steps to reverse this decision. In 1992, it amended the Legal Profession Act to provide that foreign counsel could freely appear in Singapore-seated arbitrations, subject only to the proviso that if there were issues of Singapore law, they had to appear together with Singapore counsel.[77] In 2004, this restriction was removed and foreign counsel were at liberty to appear in all Singapore-seated arbitrations without being accompanied by local counsel, regardless of the applicable law of the arbitration.[78] This provided a great fillip to Singapore's arbitration

ambitions. Today, Singapore is ranked as one of the most preferred arbitration seats in the world, and the number one seat in Asia for ICC arbitrations.[79]

66. It should also be noted that the involvement of foreign counsel may extend beyond participation in the arbitration itself, and include – in an appropriate case – representation in the curial proceedings which follow. Late last year, the Singapore Court of Appeal allowed the application of Mr Harish Salve, Senior Advocate, for *ad hoc* admission as an advocate and solicitor of the Supreme Court of Singapore to argue issues of Indian law in connection with an application to set aside an ICC award before the Singapore court. In the grounds of its decision, the court noted that where an arbitration is governed by complex foreign law, the admission of foreign counsel might aid the seat court in the exercise of its supervisory powers by providing "the most complete possible picture of the foreign law and policy, and how they operate in the jurisdiction they spring from".[80] The other side has since successfully applied to have Mr Gopal Subramanian, a Senior Advocate of equally high renown, present its case. This decision further boosts Singapore's reputation as an arbitration-friendly seat.

67. I note that in the Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India, it was recommended that the Advocates Act of 1961 should be amended to allow foreign lawyers to participate in arbitrations in India, so long as they do not advise on matters of Indian law.[81] If this is accepted, I have no doubt that India's attractiveness as a seat jurisdiction will be enhanced.

68. The fourth factor concerns the availability of dispute resolution facilities. It is appropriate, at this juncture, to look to the organisers of today's 10th Annual International Conference. The Nani Palkhivala Arbitration Centre is located in Mylapore, the commercial hub of Chennai, and it has bold aspirations to become a centre of excellence in the field of institutional arbitration. In 2016, the Mumbai Centre for International Arbitration was opened and it was, for the first time last year, instructed by the Supreme Court of India to appoint an arbitrator in a global dispute upon the failure of one of the parties to do so, which is a new mechanism introduced by the 2015 amendments to the Arbitration and Conciliation Act of 1996.[82] A combination of supporting laws plus a nation-wide commitment to the development of first-in-class dispute resolution facilities will only make India a more compelling destination for arbitration.

69. Finally, I come to the fifth factor – a staunch adherence to international treaties designed to sustain an international system of arbitration. India is already a signatory to the New York Convention and it has adopted, in large measure, the provisions of the Model Law in the Arbitration and Conciliation Act of 1996. Yet, what remains is for full effect to be given to the spirit of these provisions. One key way in which this can be done is if the common law approach, which I believe is congruent with the key objectives of the New York Convention and Model Law to achieve consistency and regularity in the worldwide treatment of arbitral awards, is adopted.

VI. Conclusion

70. In a previous speech, I suggested that all stakeholders in international arbitration need to have conversations about important issues such as how to develop a consensus as to the effect of decisions of the seat court, how to resolve the operation of issue estoppel in enforcement decisions, and the ways in which the value of finality can be strengthened.[83] I am delighted that with this paper, I have had the opportunity to revisit precisely those themes.

71. In closing, I will say that India's arbitration regime has already undergone significant developments which have brought her several steps closer to the likes of successful seats around the world. India is, and will continue to be, an important participant in global conversations on how jurisdictions can work towards creating greater certainty and finality in international arbitration. I look forward to having more such conversations with you in the future.

72. Thank you very much for inviting me to share my thoughts with you. I wish this conference every success.

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (10 June 1958) 330 UNTS 38 ("New York Convention").

[2] United Nations Commission on International Trade Law, *Model Law of International Commercial Arbitration*, 1985, UN Doc A/40/17 ("Model Law").

[3] Simon Greenberg *et al*, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) ("Greenberg") at p 66; *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage, eds) (Kluwer Law International, 1999) ("Fouchard") at p 3.

[4] Greenberg, *supra* n 3, at 67.

[5] Albert Jan van den Berg, "Consolidated Commentary on the Court Decisions Concerning the New York Convention" (2003) XXVIII Yearbook Comm Arb 562 at 650.

[6] Jan Paulsson, "Arbitration in Three Dimensions" (2011) 60 ICLQ 291 ("Paulsson") at 298.

[7] *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation* (1995) XX Yearbook Comm Arb 663 ("*Hilmarton*").

[8] *Egypt v Chromalloy Aero Services* (1997) XXII Y Yearbook Comm Arb 691.

[9] *Société PT Putrabali Adyamulia v Société Rena Holding* (2007) XXXII Yearbook Comm Arb 299 ("*Putrabali*").

[10] The grounds for setting aside an award under Article 34 of the Model Law largely mirror the grounds for refusing to enforce an award under Article V of the New York Convention: see Article 34(2)(*a*)(i)–(iv) and (2)(*b*) of the Model Law, and Article V(1)(*a*)–(*d*) and (2)(*a*)–(*b*) of the New York Convention.

[11] Paulsson, *supra* n 9, at 298.

[12] Sundaresh Menon *SC*, "Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence" (2013) SJLS 231 at 243–244.

[13] Jonathan Mance, "Arbitration – a Law unto itself?", 30th Annual Lecture organised by The School of International Arbitration and Freshfields Bruckhaus Deringer (4 November 2015), accessible at <https://www.supremecourt.uk/docs/speech-151104.pdf> ("30th Annual Freshfields Lecture").

[14] Greenberg*, supra* n 3, at para 2.70.

[15] *Yukos Capital SARL v OAO Rosneft*, *Gerecht-shof Amsterdam* (Amsterdam Court of Appeal) (2009) XXXIV Yearbook Comm Arb 703.

[16] *Yukos Capitol SARL v OJSC Rosneft Oil Company* [2014] EWHC 218 (Comm) at [20].

17 Renato Nazzini, "Remedies at the Seat and Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel and Abuse of Process in English Law" (2014) 7 Contemporary Asia Arbitration Journal 139 ("Nazzini") at 147.

18 See, for instance, the *Putrabali* case. In endorsing the view that an arbitral award is "not linked to the legal order of a particular country", the *Cour de cassation* held that Rena could, by virtue of Article VII of the New York Convention, enforce the annulled English award in France because French arbitration laws do not provide for the setting aside of an award in its seat as a ground to refuse enforcement.

19 30th Annual Freshfields Lecture, *supra* n 13, at p 17.

20 Maxi Scherer, "Effects of International Judgments Relating to Awards" (2016) 43 Pepperdine Law Review 637 ("Scherer (2016)") at 640.

21 See, *eg*, Albert Jan Van den Berg, "Enforcement of Arbitral Awards Annulled in Russia" (2010) 27(2) Journal of International Arbitration 179 at 196–197; Thomas Kendra, "The international reach of arbitral awards set aside in their country of origin – a turning point?" (2012) 2 Yearbook on International Arbitration 151 at 161.

22 30th Annual Freshfields Lecture, *supra* n 13, at p 19.

23 *Carl Zeiss Stiftung Appellants v Rayner & Keeler Ltd* [1967] 1 AC 853.

24 See, generally, Linda Silberman, "The New York Convention After Fifty Years: Some Reflections on the Role of National Law" (2009) 28 Georgia Journal of International and Comparative Law 25; William Park, "Duty and Discretion in International Arbitration" (1993) 93 American Journal of International Law 805 ("Park").

25 *Malicorp Ltd v Government of the Arab Republic of Egypt* [2015] EWHC (Comm) 361.

26 *Id* at [21]–[22].

27 See, *eg*, Linda Silberman and Maxi Scherer, "Forum Shopping and Post-Award Judgments" (2014) 2 Peking University Transnational Law Review 115 ("Silberman & Scherer") at 135; Albert Jan Van den Berg, "Enforcement of Arbitral Awards Annulled in Russia" (2010) 27(2) Journal of International Arbitration 179 at 191.

28 Linda Silberman, "Some Judgments on Judgments: A View from America" (2008) 79 King's Law Journal 235 at 237–238.

29 See, *eg*, Silberman & Scherer, *supra* n 27, at 130; Scherer (2016), *supra* n 20, at 640; Park, *supra* n 24, at 813.

30 See [15]–[16] above.

31 *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2018) at pp 3–5.

32 Adrian Briggs, *The Conflict of Laws* (OUP, 2nd Ed, 2008) at p 119; *Clarke v Fennoscandia Limited and others* [2007] UKHL 56 at [18] *per* Lord Rodger of Earlsferry

and *Giant Light Metal (Kushnan) Co Ltd v Aksa Far East Pte Ltd* [2014] SLR 545 at [15].

33 See the decision of the Singapore Court of Appeal in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 at [98].

34 Nazzini, *supra* n 17, at 150–151.

35 *Id* at 145.

36 *Diag Human SE v The Czech Republic* [2014] EWHC 1639 (Comm) ("*Diag*").

37 The applicable statute was the Arbitration Act 1996 (c 23).

38 *Diag*, *supra* n 36, at [58]–[59].

39 Fouchard, *supra* n 3, at pp 996–997 and *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*") at [75].

40 Silberman & Scherer, *supra* n 27, at 149.

41 *Yukos Capital SARL v OJSC Rosneft Oil Company* [2012] EWCA (Civ) 855 at [151] *per* Rix LJ.

42 *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 ("*Minmetals*").

43 *Id* at 331.

44 *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109.

45 *Hebei Import and Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111.

46 See, generally, Jan Paulsson, "Enforcing Arbitral Awards Notwithstanding Local Standard Annulments (LSAs)" (1998) 6(1) Asia Pacific Law Review 28 ("Paulsson (1998)").

47 Scherer (2016), *supra* n 20, at 646.

48 See the decision of the English Court of Appeal in *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173 at 179B, citing the first instance decision of Moore-Bick J in *Reichhold Norway ASA v Goldman Sachs International* [1999] CLC 486. See, also, *Tomolugen*, *supra* n 39, at [144]–[186].

49 *Dicey, Morris & Collins on The Conflict of Laws* vol 2 (Sweet & Maxwell, 15th Ed, 2012) at para 12-076.

50 *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd and another appeal* [2013] 4 SLR 1097 ("*Virsagi*") at [26], [30], and [35]. It should be noted that *lis alibi*

pendens operates slightly differently in civil law jurisdictions. Generally speaking, once *lis alibi pendens* is established (*ie*, identity in parties, subject matter and object), priority is given to the court first-seised. This first-in-time rule can be seen, for instance, in Article 27(1) of the Brussels I Regulation. However, for present purposes, I will focus only on the common law conception of *lis alibi pendens* as explained by the Singapore Court of Appeal in *Virsagi*.

51 *Tomolugen*, *supra* n 39, at [186]; *Virsagi* at [32].

52 *Autoridad Del Canal De Panamá v Sacyr, S.A. & Ors* [2017] EWHC 2228 (Comm) ("*Autoridad*").

53 *Ibid* at [166(1)].

54 See, generally, the decision of the English High Court in *Pacific International Sports Clubs Ltd v Soccer Marketing International Ltd & Ors* [2009] EWHC 1839 (Ch) and *Autoridad Del Canal De Panamá v Sacyr, S.A. & Ors* [2017] EWHC 2228 (Comm), where the courts held that they had the inherent power to grant a temporary stay on case management grounds, even where the situation in question did not fall within the strict confines of the Brussels Convention.

55 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 76; *Gouvernement du Pakistan – Ministère des Affaires Religieuses v Société Dallah Real Estate and Tourism Holding Company* C.A. Paris, 17 February 2011 (Case No. 09/28533).

56 Gary Born, "Dallah and the New York Convention" (7 April 2011), accessible at <http://arbitrationblog.kluwerarbitration.com/2011/04/07/dallah-and-the-new-york-convention/>.

57 *Mercedes Benz AG v Leiduck* [1996] AC 284 at 313–314 *per* Lord Nicholls of Birkenhead. See also the decision of the High Court of Australia in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 195 CLR 32 at [35].

58 See, in this regard, the setting up of the Judicial Insolvency Network in late 2016: http://www.insol.org/emailer/January_2017_downloads/doc1.pdf.

59 *Henderson v Henderson* (1843) 3 Hare 100.

60 Peter Barnett, "The Prevention of Abusive Cross-Border Re-Litigation" (2002) 51 ICLQ 943 at 951.

61 *Id* at 952.

62 See, *eg*, Nazzini, *supra* n 17, at 152–157.

63 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 273 at [65]–[71].

64 The Hong Kong Court of Appeal also reached this conclusion in *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and Others* [2016] HKCA 595 at [69], which was a decision arising out of the same set of facts.

65 The New York Convention was established due to dissatisfaction with the previous international framework governing the enforcement of arbitral awards. Under the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, execution of foreign awards was permitted only if the award was "final" in its country of origin. In practice, this meant that award creditors had to obtain leave to enforce the award in the seat *before* doing so elsewhere. This "double *exequatur*" requirement was perceived as onerous and undesirable as it subjected the award to the laws of the seat even where it was perfectly valid under the laws of the enforcing state. Thus Articles III and IV of the New York Convention were introduced to do away with this obstacle by compelling enforcement of awards *without* requiring proof of finality in their country of origin. See Paulsson (1998), *supra* n 46, at 35–36.

66 30th Annual Freshfields Lecture, *supra* n 13.

67 *Ibid* at p 6, citing the Queen Mary University of London and School of International Arbitration, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration", accessible at <www.arbitration.qmul.ac.uk/docs/164761.pdf> ("QMUL Survey").

68 *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515 at [28] and [30]–[31].

69 *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 at [1] and [47].

70 Sundaresh Menon, Patron's Address, Chartered Institute of Arbitrators London Centenary Conference (2 July 2015) accessible at <https:/www.supremecourt.gov.sg/docs/default-soruce/default-document-library/media-room/ciarb-centenary-conference-patron-address.pdf> ("2015 Patron's Address").

71 *Bahrat Aluminium & Company & ors v Kaiser Aluminium Technical Service Inc & Ors* (2012) 9 SCC 552 ("*Bahrat Aluminium*").

72 *Venture Global Engineering v Satyam Computer Services Ltd & another* AIR 2010 SC 3371 ("*Venture Global*"). In this decision, the Indian Supreme Court left open the possibility that a foreign award could be challenged in India despite the clear choice of a foreign seat. However, the Indian Supreme Court clarified in *Bahrat Aluminium* that this was not the case. Legislative reform by way of section 34(2A) has now put the matter beyond doubt.

73 *Oil & Natural Gas Corp v Saw Pipes Ltd* (2003) 5 SCC 705.

74 *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN v ALC*") at [37].

[75] *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd and another* [1988] 1 SLR(R) 281.

[76] See, *eg*, Andreas F Lowenfeld, "Singapore and the Local Bar: Aberration or Ill Omen" (1988) 5(3) Journal of International Arbitration 71 at 72; see, also, David W Rivkin, "Restrictions on Foreign Counsel in International Arbitrations" in *Yearbook Commercial Arbitration 1991* (Albert Jan van den Berg ed) (Kluwer Law International, 1991) at p 411.

[77] Legal Profession (Amendment) Act 1992 (Act 7 of 1992).

[78] Legal Profession (Amendment) Act 2004 (Act 23 of 2004).

[79] See QMUL Survey, *supra* n 67, at p 2, and "Singapore confirms status as Asia's most sought-after dispute resolution hub" (14 June 2016), accessible at <https://singaporeinternationalarbitration.com/2016/06/14/singapore-confirms-status-as-asias-most-sought-after-dispute-resolution-hub/>.

[80] Re *Harish Salve and another appeal* [2018] SGCA 06 at [50].

[81] India, *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (30 July 2017) (Chairman: Justice BN Srikrishna) at pp 79–80.

[82] Khushboo Narayan, "SC tells MCIA to appoint arbitrator in global dispute", *The Indian Express* (30 July 2017), accessible at <www.indianexpress.com/article/business/companies/sc-tells-mcia-to-appoint-arbitrator-in-global-dispute-4773409/> (last accessed 3 February 2018).

[83] 2015 Patron's Address, *supra* n 70.