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The New York Convention: Enforcement of Awards and Transnational Estoppel

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1. Let me start, if I may, with a confession. It is fair to say that although I have done many construction cases over the years - while I was at the bar, on the bench and now as an arbitrator – I have never been a member of this august Society. So, I come before you as an outlander if not an interloper; and I would therefore like to express my particular thanks to your committee for inviting me to speak - and, of course, to Mrs Justice Joanna Smith for taking on the not inconsiderable burden of ensuring that I keep on topic and, perhaps more important, keep on time which I will try my very best to do – the question of transnational estoppel in the context of the recognition and enforcement of arbitral awards under the New York Convention ("NYC")[1].

2. It is trite that an arbitration award which cannot be enforced is of little, if any, value. So I welcome the opportunity this evening of scratching the surface of what has, in recent years, become something of a hot topic around the world.

3. I say "scratch the surface" because there are now probably some 100 cases or more spread over numerous jurisdictions

[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)

and many learned articles dealing with this topic; and, you will be glad to hear, because my talk this evening is not – and is not intended to be – an exhaustive study. In truth, it is no more than a gentle walk in the park with a few signposts here and there to show you the way.

4. In broad terms, I propose to cover four main points viz.

    a. The issue estoppel which arises in litigation with regard to foreign judgments.

    b. The position where the seat court affirms an arbitral award.

    c. The position where the seat court accepts a challenge and sets aside or suspends an award or otherwise makes determinations potentially relevant to the recognition and enforcement of an award in some other non-seat jurisdiction.

    d. The effect of determinations of a non-seat court with regard to the recognition or enforcement of an award.

5. In the context of international arbitration, these are "hot" topics for at least three reasons.

6. First, the circumstances in which an award may – or may not – be enforceable involves – or at least may involve - consideration not only of English domestic law but also the law in other jurisdictions around the world. That being so, there are, perhaps inevitably, different views as to what the law is – or should be.

7. Second, there are competing theories as to the fundamental nature of an arbitration award. Thus, although an arbitration will generally have a "seat" in a particular jurisdiction and although the court in that seat i.e, the "seat court" may therefore have, to some extent at least, a supervisory jurisdiction over the arbitration and the award within the territory of that jurisdiction, nevertheless, there is a strong view that on the international stage, an arbitration award operates at a higher level unaffected by the exigencies of the local jurisdiction of the seat court still less any other court. This is what is often referred to as the "delocalisation theory". The delocalisation theory is to be contrasted with what is usually described as the "territorialist" or "jurisdictional" theory of arbitration which treats every arbitration as connected to a particular jurisdiction – that is, the seat of the arbitration.

8. The great French lawyer, Emmanuel Gaillard, who sadly died a few years ago in the middle of an arbitration in which I was one of the arbitrators, was the great proponent of the delocalisation theory[2]. However, speaking for myself, the main difficulty with that theory - at least in its purest form - is that an arbitration award never stands alone because, at the end of the day, any enforcement must be effected through and with the assistance of the courts in a particular jurisdiction.

9. Thus, although a party can always seek to resist enforcement in a court other than the seat court on the basis of any of the grounds specified in the New York Convention ("NYC"), it seems to me abundantly clear that any active

[2] See: *Legal Theory of International Arbitration,* Emmanuel Gaillard

challenge to an arbitral award is a matter to be determined solely by the seat court in the exercise of its supervisory jurisdiction - as I recently held when sitting in the Singapore International Commercial Court: *Pertamina International Marketing & Distribution Pte. Ltd. v P-H-O-E-N-I-X Petroleum Philippines, Inc.*[3]. It follows that it is only the seat court that has jurisdiction to set aside an award – although, of course, other courts may refuse to give recognition or enforce an award under the NYC.

10. Third, the topic is and continues to be "hot" because over the last 20 years or so, there has been a proliferation of cases – perhaps 100 or more – in different jurisdictions around the world which deal with the issue of transnational estoppel. There is no time this evening to provide an exhaustive overview of these cases. The best summary and analysis can probably be found in the judgments of Menon CJ and Lord Mance IJ in the Singapore Court of Appeal in *The Republic of India v Deutsche Telekom*[4] *("Telekom")* - although even those judgments leave open certain questions which I hope to mention briefly.

11. In the latest edition of *Mustill & Boyd, Commercial and Investor State Arbitration (*3rd Edition, 2024*) ("Mustill & Boyd*"), the law is summarised in para 17.153 as follows:

> *"17.153 Where an award has been set aside by the courts of the seat, or the challenge has been rejected by the courts of the seat, then English law will apply principles of issue estoppel to determine what if any effect is to be given to the decision of the court of the seat."*

[3] [2024] SGHC(I) 13
[4] [2023] SGCA(1) 10.

12. The purpose of my talk this evening is, at least in part, to consider whether this brief summary of the law is correct.

13. In so doing, it is perhaps a statement of the obvious that a court will generally give significant weight to determinations of the seat court and that a party seeking to resist enforcement in a non-seat jurisdiction will face a heavy burden where the competent supervisory courts in the seat court have previously considered and either accepted or rejected challenges to the validity of an award, made on grounds which on analysis are identical - or at least bear a close resemblance - to those deployed on the application in that jurisdiction.[5] That is sometimes referred to as the "Primacy Principle". However, the question is whether such approach or tendency is to be elevated into an estoppel properly so called.

14. But, before turning to the position with regard to the recognition and enforcement of international arbitration awards, it is convenient to set the scene by considering briefly the position with regard to foreign judgments.

The position with regard to foreign judgments

15. It is well established that, as a matter of English law, a foreign judgment can give rise to an issue estoppel: see *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)*[6] and *The Sennar (No. 2)*[7]. In summary, these cases confirmed that in

[5] See, for example, *Alexander Brothers Ltd (Hong Kong SAR) v Alstom Transport SA & Anor* [2020] EWHC 1584 (Comm) (18 June 2020) per Cockerill J. at [73] citing earlier authority including *Carpatsky Petroleum Corporation v PKSC Ukrnafta* [2020] EWHC 769 (Comm) at [50] and *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315.
[6] [1967] 1 A.C. 853
[7] [1985] 1 WLR 490

order for an issue estoppel to be established four conditions must be satisfied viz. (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, which means that the issue decided by the foreign court must be the same as that arising in the English proceedings.[8]

16. However, as emphasised in *Carl Zeiss* at [967] and repeatedly emphasised in later cases, the principle of issue estoppel must be applied *"with caution"*.

17. Further, it is important to note that in *The Good Challenger*[9], Clarke LJ emphasised that the application of issue estoppel is subject to the overriding consideration that it must work justice and not injustice: at [54] and, see also *PAO Tatneft v Ukraine* [2021] 1 WLR 1123.

18. The result is that the defences to the application of an issue estoppel with regard to a prior foreign judgment extend to a determination of such judgment having been obtained by fraud or duress or it being against natural justice or to its recognition being against domestic public policy: see, for example, per Lord Mance IJ in *Telekom* at [196] citing *Phipson on Evidence* at paras 43-08 and 43-68.

19. In England, the Court of Appeal has expressly confirmed that a decision of a foreign court, whether or not a court of the country from which the judgment originates, that a foreign judgment was, or was not, obtained by fraud *can*

[8] In passing, I note that in the context of transnational estoppel, the Singapore courts have adopted the same test with some modifications: see *Telekom* at [64]
[9] [2004] 1 Lloyd's Rep 67

create an estoppel in English proceedings to enforce that judgment although, once again, the authorities make plain that the doctrine must be applied with caution because of the uncertainties arising from the differences of procedure in foreign countries: see *Spring Gardens Limited v Waite*[10]; *Owens Bank v Bracco*[11].

20. Similarly, in Singapore, the application of transnational estoppel to foreign judgments is generally well-established: see, *Sang Cheol Woo v Spackman, Charles Choi & Others*[12]; *Gomez, Kevin Bennett v Bird & Bird ATMD LLP & another*[13]; *Telekom* @ [73].

21. Thus, in the context of court litigation, it would seem that a general principle of transnational estoppel is now well recognised as a matter of English law (and also Singapore law) although it is subject to the important limitations to which I have referred.

22. It may be obvious – but it is important to emphasise that although what I have just said is, I think, correct as a matter of English law, it does not follow that the same is true of the legal position in other countries. Indeed, so far as I am aware, the concept of issue estoppel – or indeed any estoppel – is an invention of the common law and unknown in many other non-common-law jurisdictions. It follows that everything I say this evening is from the perspective of an English lawyer.

Estoppel in International Arbitration

[10] [1991] 1 QB 241
[11] [1992] 2 AC 443 at 470F.
[12] [2022] SGHC 298 at [49]
[13] [2023] 1 SLR 450 at [115]

23. Against that background, I turn then to consider – always from an English law perspective - whether transnational estoppel applies in the context of international arbitration.

24. In that context, it is convenient to consider, first of all, the simple situation when a successful claimant wishes to enforce an arbitration award in respect of an arbitration in England governed by English law - what I propose to call an "English Award".

25. Here, the position is, I think, straightforward. In principle, an English Award will be enforceable in England, with leave of the court under s.66 of the Arbitration At 1996 (the "1996 Act") subject to three possible well-known exceptions – no jurisdiction under s.67 of the 1996 Act, serious irregularity under s.68 of the 1996 Act and an appeal on a question of law under s.69 of the 1996 Act.

26. So far so good. Needless to say, an English award set aside by the English court under one of those heads will be unenforceable in England; and a decision of the English court to such effect will, as a matter of English domestic law, constitute *res judicata* or, at the very least, create an issue estoppel and *vice versa*. I am not aware of any specific authority to such effect. But, as a matter of principle, that seems obviously correct.

27. Turning then to the recognition and enforcement of a foreign award, this depends on whether it is a New York Convention award - where the seat of the arbitration is in the territory of a state which is a party to the NYC which

(given the almost universal adoption of the NYC around the world) is almost invariably the case.

28. In England, the recognition and enforcement of such an award is governed generally by Part III of the 1996 Act which, in effect, provides for the mandatory recognition and, with leave of the court, the enforcement of such award[14]. Following the regime under the NYC specifically Art. V (1) and V (2), s.103(1) of the 1996 Act provides that recognition and enforcement shall not be refused except in certain specified cases; with s.103(2) and (3) setting out those specified cases in which recognition and enforcement "may" be refused.

29. It is important to understand that Article V is concerned with circumstances in which a court may *refuse* recognition and enforcement. It is not dealing with a case where a court has to consider and then decides to *grant* recognition and enforcement. In such circumstances, I see no reason in principle why transnational estoppel might not apply.

30. Thus, if an arbitration award is issued and then, following a challenge in the seat court – for example, on the ground that the tribunal had no jurisdiction – the seat court rejects such challenge and affirms the award, I see no reason why the English court should not decide that the decision of the foreign court gives rise to an issue estoppel so as to preclude the party seeking to challenge the award re-arguing the point within this jurisdiction. – provided, of

[14] S.101(1) and (2). See generally, a most interesting and valuable article: *Cutting the Gordian Knot* (2015) 81 Arbitration 137, Tweeddale & Tweeddale in particular the analysis at pp140-143 and the cases there cited including *Dowans v Tanzania Electric Supply Co Ltd* [2011] 2 Lloyd's Rep 475; *IPCO (Nigeria) Ltd v Nigerian National Petroleum Ltd* [2005] 2 Lloyd's Rep 326; *Kanoria v Guinness* [2006] 1 Lloyd's Rep 701; *Yukos Capital SARL v IJSC Rosneft Oil Co.* [2014] EWHC 2188

course, the conditions necessary to give rise to an issue estoppel are satisfied and there are no other available defences. To my mind, there is nothing in the NYC that might suggest a different conclusion other than perhaps Art V.2(b) of the NYC which provides, in material part, that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.

31. This is exemplified by the decision of Butcher J. in *Carpatsky Petroleum Corporation v PKSC Ukrnafta*[15] concerning an arbitration in Stockholm. The facts in that case were complex involving separate court proceedings in the seat of the arbitration, Sweden, and also in other jurisdictions namely Ukraine, USA and England. For present purposes, it is sufficient to note that the arbitral tribunal rejected a submission that it had no jurisdiction and proceeded to issue an award on the merits. Subsequently, the Swedish court – which was, as I have said, the seat court – upheld and confirmed that the arbitral tribunal had jurisdiction and also rejected other challenges to the award based upon alleged procedural irregularities. On this basis, the English Court held at [130] that the decision of the Swedish Court gave rise to an issue estoppel.

32. To similar effect is the decision of the Singapore Court of Appeal in *Telekom*. The central issue in that case was

[15] [2020] EWHC 769 (Comm). See also *Mustill & Boyd* para 17.155 and the other cases there cited: *PAO Tatneft v Ukraine* [2019] EWHCE 3740 (Comm) at [21]; *Eastern European Engineering v Vijay Construction* [2018] EWHC 2713 (Comm) at [45]-[46].

whether the party seeking to challenge the award was estopped from relying on certain grounds for resisting enforcement in Singapore on the basis that these grounds had been unsuccessfully raised previously before the Swiss Federal Supreme Court which was the seat court. After a full review of the relevant case law, the Singapore Court of Appeal held that the decision of the Swiss Court gave rise to an issue estoppel. In summary, the Court of Appeal concluded at [102] that *"...the doctrine of transnational estoppel is applicable in the context of international commercial arbitration at least in relation to a prior decision of a seat court regarding the validity of an award."*. In reaching that conclusion, the Singapore Court of Appeal effectively held that the rule in domestic law viz that a party against whom a judgment has been rendered in a prior litigation in Singapore may be estopped from raising certain issues in future proceedings if certain well recognised conditions are met applied equally to a foreign judgment in respect of an arbitration award; and adopted the test set out in *Merck Sharp & Dohme Corp v Merck KGaA*[16] which was itself based (with minor modifications) on the well-known decision of the English Court of Appeal in *The Sennar (No.2)*[17]. Lord Mance IJ agreed with the conclusion that the application to set aside in that case was precluded by transnational issue estoppel and the reasons given by the majority but added a few words on the significance of prior decisions of the courts of the seat.

33. In accepting the doctrine of transnational issue estoppel in this context, it is notable that the Court of Appeal in

[16] [2021] 1 SLR] 1102
[17] [1985] 1 WLR 490

Telekom considered but rejected the approach adopted in other jurisdictions. For example, in Australia, the position appears to be that the Federal Court has stopped short of embracing transnational issue estoppel and has instead endorsed something akin to what the majority in *Telekom* described as the "Primacy Principle" whereby the enforcement court will generally accord primacy to the decision of the seat court rather than invoke transnational issue estoppel.

34. As I have said, *Telekom* was a case where the court concluded that the prior decision of the *seat court* rejecting a challenge and affirming the arbitral award in that case gave rise to an issue estoppel so as to preclude the subsequent challenge on similar grounds in Singapore. This leaves open two further important questions.

Does transnational estoppel apply where the seat court sets aside or suspends an award?

35. The first question is whether an issue estoppel can arise in the converse situation i.e. when the seat court accepts the challenge and concludes that the award should be set aside or suspended.

36. One might suppose that if an issue estoppel can arise in circumstances where the seat court rejects a challenge and affirms an award, that the converse must apply i.e. that an estoppel can similarly arise in circumstances where the seat court sets aside or suspends an award or makes certain findings (eg. that the award is, for one reason or another, not binding). To suggest otherwise would seem to

introduce the possibility of an illogical and unfair asymmetry. However, it seems to me that such possibility is at least arguable bearing in mind the structure of the NYC and, in particular, the fact that the NYC only permits a court to refuse recognition and enforcement on the limited grounds set out in Art V.

37. Where the seat court sets aside or suspends an award, the position is again relatively simple. In truth, it is unnecessary to resort to any doctrine of transnational estoppel: the mere fact that the award has been set aside or suspended by the seat court is *per se* a matter which falls within Art V.1(e) of the NYC.

38. Nevertheless, even such a case i.e., where the seat court has set aside or suspended an award, it does not follow that recognition and enforcement under the NYC *must* be refused by any other court. This is obviously so because of the wording in Art, V which provides only that recognition and enforcement "may" be refused on any of the grounds there specified. The language is permissive not mandatory. Moreover, the NYC does not identify on what basis such discretion might be exercised.

39. This is an old chestnut which has given rise to much learning. Given that the word *"may"* is unqualified, the use of that word might suggest an open-ended discretion. However, in *Dallah v Pakistan*[18] , Lord Collins stated that the discretion should be exercised in a way which gives effect to the principles behind the NYC referring back to

[18] [2011] 1 AC 76

the earlier case of *Dardana Ltd v Yukos Oil*[19], where Mance LJ emphasised that the discretion is not "arbitrary" and that the use of the word "may" was designed to enable the court to consider other circumstances, which might on some recognisable legal principle affect the *prima facie* right to have an award set aside arising in the cases listed in s.103(2). One example, adopted by Mance LJ in that case is where the party resisting enforcement is estopped from challenge.

40. The result is that an award set aside by the seat court and unenforceable in that jurisdiction may yet be enforceable in another non-seat jurisdiction. On its face, that proposition may seem surprising – in particular because it would seem to be inconsistent with the concept of transnational estoppel. However, there are numerous cases around the world which so decide. To be clear, this is not the result of some unprincipled, aberrant, perverse or maverick decision of some foreign local court but is based firmly on the wording of the NYC and, in particular, the discretion expressly granted by Art V of the NYC such that even if the party against whom recognition or enforcement is sought does furnish proof of one or more of the circumstances set out in Art V.1 or the enforcing court does find one or more of the circumstances set out in Art V.2, the court still retains a discretion whether or not to permit recognition and enforcement.

41. The possibility that a non-seat court may nevertheless enforce an award set aside by the seat court is not a mere

[19] [2002] 2 Lloyd's Rep 8; see too per Lord Collins in *Dallah v Pakistan* at [127] cited by Mance IJ in *Telekom* at [205].

theoretical possibility. There are a number of cases where this principle has been enunciated and an award set aside by the seat court has nevertheless been enforced by a court in another jurisdiction – notably in France. For example, in *Bargues Agro Industrie*[20], the Paris Court of Appeal stated (in rough translation):

> *"… [an award] is not integrated into the legal order [of the State of the seat] with the consequence that its possible setting aside by the courts of the seat does not affect its existence by precluding its recognition and enforcement in other national legal orders…"*

That was in 2004. A few years later in 2007, the principle was firmly established by the *Cours de Cassation* in the famous *Putrabali* case[21] where an award set aside by the Commercial Court in London was nevertheless enforced by the courts in France, the court stating (again in rough translation):

> *"...[a]n international award, which is not anchored in any legal order, is a decision of international justice, whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought..."*

42. Similarly, a few years later in the *Hilmartin* case[22], the *Cours de Cassation* reiterated the principle in relation to a Swiss seat award set aside in Switzerland on the basis that *"...the award handed down in Switzerland was an international award that was not incorporated into the legal system of that State, so that its existence remained established despite its setting aside and its recognition in France was not contrary to international public policy."*

[20] *Bargues Agro Industrie S.A. v Young Pecan Company* 2004 REV. ARB. 733
[21] *Putrabali Adyamulia v. Rena Holding*, Cass. 1st civ., No. 05-18.053, June 29, 2007.
[22] Cass. 1st civ., No. 92-15.137, Mar. 23, 1994. This principle has again been reiterated by the Paris Court of Appeal: pole 1, ch. 1, No. 17/19850, May 21, 2019).

43. To similar effect, there is a body of US authority (referred to in *Telekom,* by both the majority at [111]-[119] and Lord Mance IJ at [206]) which has recognised a "narrow public policy gloss" on Art V(1)(e) of the NYC to the effect that primacy will not be accorded to the decision of the seat court if it would be contrary to US public policy, the essential question being whether giving effect to the seat court decision would be *"...repugnant to fundamental notions of what is decent and just.."* in the United States[23].

44. The position is more complicated in circumstances where the seat court makes certain determinations other than an order setting aside or suspending an award – or perhaps in the course of a hearing in the seat court aimed at challenging an award.

45. For example, tracking the sub-paragraphs in Art V.1 of the NYC, the seat court might decide – for whatever reason – that the parties to the arbitration agreement were under some incapacity, or that that agreement is not valid under the relevant law (sub-paragraph (a)); or that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case (sub-paragraph (b); or that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration (sub-paragraph (c)); or that the composition of the arbitral authority or the arbitral procedure was not in

[23] Citing *Baker Marine, TermoRio, Thai-Lao Lignite (2nd Cir,2017), Pemex at 107 and Esso at 73.*

accordance with the agreement of the parties (sub-paragraph (d); or that the award has not yet become binding (sub-paragraph (e).)

46. To my mind, the important point is this: the decision of the seat court on any of these matters is not *itself* a fact or matter which would appear to fall within any of the grounds specified in Art V.1 and which, on that basis, might permit a non-seat court to refuse recognition and enforcement. To that extent and at least in that context, it might seem arguable that any suggested issue estoppel based merely on the fact of that previous decision of the seat court would be inconsistent with Art V of the NYC and thus inapplicable. Certainly, any suggestion of issue estoppel arising out of a decision of a court is inconsistent with the delocalisation theory of international arbitration. However, it seems to me that there are at least two and perhaps three counter-arguments which would support the application of a transnational issue estoppel in any of the situations referred to in the previous paragraph..

47. *First,* there is the very broad argument in favour of transnational estoppel viz. the importance of the finality of dispute resolution. Thus, where a particular issue has been properly ventilated before a court – in particular, the seat court - and that court reaches a considered decision, the desire for finality strongly supports the view that that decision should be final and binding between the parties and that further bites-of-the-cherry down the line should be avoided.

48. That broad argument is perhaps reinforced in the international context by the general principle that courts

co-exist in an international legal order within which they should each respect the decisions of other courts in the fullest sense and so far as possible avoid duplication, repetition and inconsistency in decision-making: see, for example, *Telekom* at [98]-[99]. However, it remains important to consider how the application of transnational estoppel fits the wording of Article V.1 of the NYC.

49. *Second*, there is the analysis adopted by the Court of Appeal in *Telekom* at [97] which I quote in full:

> *"97 It should be noted that when dealing with the question of the enforcement of a foreign arbitral award, the New York Convention does not operate in isolation because the domestic law of the enforcement court also comes into play (UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (United Nations, 2016) at pp 2–3). The latter includes its conflict of laws rules and how it treats judgments that are relevant and rendered by other jurisdictions. Singapore's conflict of laws rules include the principles of transnational issue estoppel that were laid down in Merck Sharp (see above at [64]–[70]). It follows that the doctrine of transnational issue estoppel will apply in the arbitral context as "part of the residual domestic law applicable in setting aside or enforcement proceedings" (see BAZ v BBA at [37]). This is especially so because the IAA is silent on this issue, and what is not governed by it must necessarily be governed by the other rules of domestic law (see Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (UN Doc A/40/17, 3–21 June 1985) at para 61)."*

50. A similar analysis has, in effect, been adopted in a recent decision in the English Court of Appeal in *Hulley Enterprises Ltd & Others v The Russian Federation* [2025] EWCA Civ 108. The issue in that case concerned not the NYC but the State Immunity Act 1978 viz when a foreign

court has decided that a state has agreed in writing to submit a dispute to arbitration, and the usual conditions for the application of issue estoppel are satisfied, can the English court treat that decision as giving rise to an issue estoppel or must it determine the issue for itself without regard to the decision of the foreign court? In summary, the Court of Appeal concluded that although the State Immunity Act 1978 sets out comprehensively the exceptions to state immunity, it does not prescribe how the court should decide whether any of the exceptions applies in any given case; and that that question must therefore be decided applying the ordinary principles of English law, both substantive and procedural, including the principle of issue estoppel. Transporting that reasoning to the NYC, it would seem to follow that, in deciding, for example, whether or not any of the grounds specified in Art V.1 of the NYC which give the enforcing court a discretion to refuse recognition and enforcement have been satisfied, the decision of the original seat court does or at least might, in appropriate circumstances, give rise to an issue estoppel binding the enforcement court.

51. I say *"in appropriate circumstances"* for two main reasons. First, because, at the risk of repetition, it is, of course, important to bear in mind that an issue estoppel will only arise if the relevant well-known conditions have been satisfied: see *Telekom* [64] citing *Merck Sharp v Merck KGaA* [2021] 1 SLR 1102 at [2] and *The Sennar* at p500. Second, it is, once again, important to bear in mind (i) the repeated warning in many of the judgments that the court must be "cautious" in deciding whether the relevant conditions have been satisfied and (ii) although issue

estoppel is regarded as a substantive right[24], it is subject to the overriding consideration that it must work justice and not injustice and that it will not apply if "special circumstances" are established: see, for example, *Telekom* citing *The Good Challenger* at [79] and *PAO Tatneft v Ukraine* [2021] 1 WLR 1123; and *Hulley* at [41].

52. *Third*, I would suggest that there is an alternative or further approach to the potential application of transnational estoppel in this context – although I cannot find any express reference to such an approach in the authorities – viz by reference to Art V.2(b) of the NYC which gives the enforcing court a discretion to refuse recognition and enforcement if such recognition and enforcement would be contrary to the public policy of that country.

53. There is much learning as to the juridical basis of issue estoppel. However, one view espoused by Diplock LJ in *Mills v Cooper* [1967] 2 QB 459 at 468-469 is that issue estoppel is simply a particular application of the general rule of public policy that there should be finality in litigation.

54. If that is right, it would seem to provide the answer to the circumstance where the seat court makes a determination which falls short of an order setting aside or suspending an award. In such circumstances and on the important assumption that the conditions necessary to give rise to an issue estoppel are satisfied, it seems to me open for the

[24] See eg. *Hulley* at [34]-[35] citing *Ass. Electric & Gas Insurance Services Ltd v European Co. of Zurich* [2003] 1 WLR 1041 and *PJSC National Bank Trust v Mints* [2022] 1 WLR 3099 at [23(i)]

enforcing court to say that although any such determination of the seat court is not, of itself, a ground for refusing recognition and enforcement under Art. V.1 of the NYC, nevertheless the enforcing court can and should give effect to such determination on the basis that it gives rise an issue estoppel by way of the application of its own public policy; and that the enforcing court therefore has a discretion to refuse recognition and enforcement by virtue of Art V.2(b) of the NYC. As I say, I cannot find any reference to this approach in the authorities and I am willing to be persuaded that I am wrong, but it seems to me an approach which, at the very least, deserves some consideration.

Does transnational estoppel apply to a decision of a non-seat Court ?

55. So far, I have focussed on the application of transnational issue estoppel as a result of a prior decision of the seat court. It remains to consider whether there is any difference between such decisions and decisions of other non-seat courts.

56. This is a topic which is the subject of much discussion in *Telekom*. In particular, the majority considered the argument that applying transnational issue estoppel to a prior decision of a non-seat court may have the unintended effect of raising the status of the first enforcement court decision to something akin to that of a seat court judgment and that this might run contrary to the structure of the NYC and the importance of according to the seat court the primary role of supervising the arbitration within that

seat[25]. The majority also considered whether the application of transnational estoppel in respect of a decision of an enforcement court could incentivise forum shopping and the emergence of possibly confusing post-award proceedings[26].

57. In the event, it is important to note that, as formulated in its conclusion in [102] which I have quoted earlier, the majority in *Telekom* limited the so-called doctrine of transnational estoppel to a prior decision of the seat court.

58. This question was also the subject of separate analysis by Lord Mance IJ in his judgment. His conclusion was that the prior decision of another enforcement court was no different as a matter of hard legal principle from a decision of the seat court: *Telekom* at [221].

59. Thus, it remains open, at least as a matter of Singapore law, whether a decision of an enforcement court creates a transnational estoppel.

60. The position in England is slightly unsatisfactory – in part, I have to confess - as a result of my own decision when sitting in the Commercial Court here in London in *Diag Human SE v The Czech Republic*[27]. The facts in that case were very complicated but for present purposes, they can be summarised as follows. The seat of the arbitration was the Czech Republic. The Tribunal made its award. An issue arose as to whether that award was binding. The reasons do not matter. The question whether or not the award was binding was then pursued in the Czech courts. Meanwhile,

[25] *Telekom* [91]
[26] *Telekom* [92]
[27] [2014] EWHC 1639 (Comm)

and before any final decision by the Czech courts, the claimant sought to enforce the award in various jurisdictions – including Austria. The highest court in Austria (i.e., the enforcement court) held that the award was not yet binding. The claimant then sought to enforce the award in England which came before me sitting in the Commercial Court in London. To be clear, there had, at the time of the hearing before me, still been no final decision by the Czech courts as to whether the award was or was not binding. Thus, the first main issue was whether the decision of the Austrian court created an issue estoppel with the effect therefore of precluding the claimant from maintaining that the award was binding and enforceable. The main difficulty with the case is that, although the claimant's counsel contended *on the facts and in the particular circumstances of that case* that there was no issue estoppel, he conceded that, as a matter of principle, the decision of the Austrian court could give rise to an estoppel. On that basis, I held that an estoppel did arise – although I went on to hold that, in any event, regardless of any estoppel, the award was not yet binding.

61. The important point is that the question as to whether a prior decision of an enforcement court could give rise to transnational issue estoppel was never argued before me and, although, the Court of Appeal in *Telekom* kindly described my judgment in *Diag* as a "landmark" judgment and it is referred to in *Mustill &* Boyd at [17.168] as support for the view that issue estoppel can arise out of a judgment of a non-seat court, I do not consider that it is authoritative on that point.

62. Be that as it may, the observations of Butcher J. in *Carpatsky* at [126] are potentially important:

> *"126. What I have said above relates to decisions by the supervisory courts. There may be different considerations as to whether to recognise an issue estoppel as a result of decisions of enforcement courts other than the supervisory courts, including in particular how those decisions might relate to what has been held (or not held) by the supervisory courts. There seems no reason why there should be a different approach to identifying, for the purpose of issue estoppel, whether the issue decided by another enforcement court in relation to a procedural objection relating to the arbitration is the same as or different from that being raised in an English court which is being asked to enforce an award. It may well be, however, that English courts would not apply a Henderson v Henderson approach to decisions of enforcement courts, or would less readily consider that there was any abuse of process involved in a point being taken here which could have been but was not taken in such a court.*

126. So, in England as in Singapore, whether a decision of a non-seat court might give rise to an issue estoppel would seem to be an open question.

127. I think you have probably heard enough of me this evening and, with your permission, I prefer to leave that particular knotty problem for another day. I would perhaps throw into the ring two points for consideration.

128. First, at the risk of repetition, it is, I think, important to bear in mind what I said earlier viz that the application of issue estoppel is subject to the overriding consideration that it must work justice and not injustice and that it will not apply if "special circumstances" are

established. Thus, it seems to me at least arguable that there is or at least may be a difference in considering whether, in the particular circumstances of a particular case, the decision of a later enforcement court gives rise to an issue estoppel.

129. Second, if I am right in suggesting that issue estoppel is really a matter of the public policy of the enforcing court under Art V.2(b), one can well understand that such policy may treat a decision of the original seat court differently from a decision of a subsequent enforcing court.

130. So, with those somewhat tentative thoughts, I will conclude by thanking you all for coming this evening and listening to me so patiently.

Bernard Eder - 2025