4-2020

# Five recurring problems in international arbitration: The relationship between courts and arbitral tribunals

Iris NG

Melissa NG

Andre SOH

Siyuan CHEN
*Singapore Management University*, siyuanchen@smu.edu.sg

# FIVE RECURRING PROBLEMS IN INTERNATIONAL ARBITRATION: THE RELATIONSHIP BETWEEN COURTS AND ARBITRAL TRIBUNALS

*Iris Ng,[*] Melissa Ng,[+] Andre Soh[±] & Chen Siyuan[⊥]*

**Abstract**

*In recent years, five recurring problems regarding the relationship between courts and tribunals have gained prominence due to case law developments. These run the gamut from preliminary issues with the arbitration agreement to disputes at the enforcement stage. This article examines these problems in detail, with a view to shed new light on the question of what it means for a jurisdiction to be "pro-arbitration". The authors argue that the oft-repeated binary categorisation of "pro-arbitration" and "anti-arbitration" jurisdictions is too broad-brush. Instead, there is no easy answer to what constitutes a truly "pro-arbitration" approach, and no one-size-fits-all approach to being a "pro-arbitration" jurisdiction.*

## I. Introduction

The relationship between national courts and arbitral tribunals is an evergreen topic that has generated much discussion.[1] In this article, we take a closer look at five recurring problems that have gained fresh currency due to case law developments from various jurisdictions. *First*, when can parties appeal from a tribunal's decision to a court (or vice versa), or to another tribunal? *Second*, how does the availability of court review of the tribunal's jurisdiction under Article 16(3)[2] of the UNCITRAL Model Law ["**Model Law**"] affect the availability of other avenues to challenge the tribunal's jurisdiction, such as setting-aside proceedings under Article 34 or enforcement proceedings under Article 36? *Third*, what can a party do when it is on the receiving end of a foreign judgment, when it would prefer to arbitrate the dispute or enforce an award? *Fourth*, when, if ever, should awards annulled at the seat be enforced by the national courts of another jurisdiction, under Article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**NYC**"]? *Fifth*, when can enforcement be refused under Article V(1)(d) of the NYC? By examining the approaches to these five specific problems, some insight can be gained into the overarching question of whether there is truly a dichotomy between jurisdictions that are "*pro-arbitration*" and "*anti-arbitration*."

* Iris Ng, Justices' Law Clerk at the Supreme Court of Singapore, LL.B. (Summa cum laude), Singapore Management University.

+ Melissa NG, Justices' Law Clerk at the Supreme Court of Singapore, LL.B. (Magna cum laude), Singapore Management University.

± Andre Soh, Justices' Law Clerk at the Supreme Court of Singapore, J.D. (Summa cum laude), Singapore Management University, B.Sc. (Economics) (Cum laude), Singapore Management University.

⊥ Chen Siyuan, Singapore Management University School of Law, L.L.B. (First class honours), National University of Singapore, LL.M., Harvard University.

1 *See*, *e.g.*, Elizabeth Gloster, *Symbiosis or Sadomasochism? The relationship between the courts and arbitration*, 34(3) ARB. INT'L 321 (2018); Emmanuel Gaillard, *Coordination or chaos: Do the principles of comity, lis pendens, and res judicata apply to international arbitration?*, 29(3) AM. REV. INT'L L. 205 (2019).

2 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration art. 16(3), G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [*hereinafter* "Model Law"].

## II. Problem 1: Exploring the Possibility of Appeals to and from Arbitral Tribunals

In arbitration, as parties have made their bed, so they must lie in it. Those who opt for arbitration "*must live with the decision of the arbitrator, good or bad. Commercial parties appoint arbitrators for their expertise and experience – technical, legal, commercial or otherwise.*"[3] This part of the article examines the ways that parties may get around the notion of "no merits review"[4] of an award, and conversely, whether arbitration may provide additional recourse when parties are unhappy with the result of litigation.

### A. Appealing against an Arbitral Award

The questions for consideration are – *first*, what are the circumstances in which a national court will entertain an appeal on the merits against an arbitral award, and *second*, whether parties can agree to an appeal mechanism from one tribunal to another.

### B. Appeals to a National Court

International arbitration awards cannot generally be judicially reviewed on the merits.[5] Parties are entitled to a fair decision, but not necessarily a correct one.[6] However, there is at least one well-established exception that parties should pay attention to: appealing an arbitration award on a point of law. While not contemplated by the Model Law, this is an option under Section 69 of the English Arbitration Act 1996 ["**UKAA**"],[7] and items 5 and 6 of Schedule 2 to the Hong Kong Arbitration Ordinance ["**HKAO**"].[8] Singapore is also considering the amendment of its international arbitration statute to allow appeals on points of law on similar grounds.[9]

Provisions allowing for appeals on points of law serve the public interest in re-introducing important questions of law to be decided by the courts, rather than behind closed doors in arbitration.[10] The approaches under the statutes mentioned are broadly similar, with parties being permitted to appeal to the court only on a question of law arising out of an award. An appeal may not be brought unless all parties agree, or with the leave of the court. If leave is sought, the test requires, amongst others, that "*the decision of the tribunal be obviously wrong or the question is one of general public importance and the tribunal's decision is at least open to serious doubt*".[11] The main difference is that the HKAO distinguishes between domestic and international arbitration, with automatic opt-in to

---

3 TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd., [2013] 4 SLR. 972, ¶ 65 (Sing.).

4 Generally, the substantive merits of the decision rendered an arbitral tribunal cannot be reviewed by a court or any other tribunal.

5 Jessica L. Gelander, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80(2) MARQ. L. REV. 625, 627 (1997).

6 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3170 (2d ed. 2014) [*hereinafter* "BORN"].

7 Arbitration Act, 1996, c. 6, § 69 (Eng.) provides that "Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section." [*hereinafter* "UKAA"].

8 Arbitration Ordinance, (2011) Cap. 609, sch. 2, items 5, 6 (H.K.) [*hereinafter* "Hong Kong Arbitration Ordinance"].

9 Sebastian Perry*, Singapore considers allowing appeals on questions of law* (Apr. 15, 2019), GLOBAL ARB. REV., *available at* https://globalarbitrationreview.com/article/1190225/singapore-considers-allowing-appeals-on-questions-of-law. This procedure is already available in domestic arbitration, where the right to appeal applies unless excluded by parties. The proposed amendment in international arbitration would apply on an opt-in basis.

10 The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales Lord, The Bailii Lecture 2016, ¶ 23 (Mar. 9, 2016), *available at* https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf.

11 Hong Kong Arbitration Ordinance, sch. 5, item 4(c); UKAA, § 69(3)(c).

items 5–6 of Schedule 2 available only for domestic arbitration.[12] The HKAO also provides for deeming provisions in subcontracting cases if the opt-in provisions apply to the head contract.[13]

Parties who wish to appeal under this route should note the following practical points:

*First,* the key determinant would be the selection of the seat, i.e., the *lex arbitri*. Only if the relevant statute contemplates appeals to a national court on a point of law will such a right of recourse be countenanced.

*Second*, the preconditions for invoking this right of appeal must be considered. For instance, a party may be required to exhaust all available arbitral processes of review and any available recourse under national law (for e.g., "*correction of award or additional award*").[14] They should also be mindful of any inadvertent waivers, such as by agreeing to dispense with the reasons for a tribunal's award (which stands to reason, as a court cannot be expected to scrutinise a non-speaking award).[15] Logically, the appeal mechanism would also not be available if parties agree that the tribunal may decide *ex aequo et bono* (from equity and conscience), because there simply would be no question of law for the court to determine.

*Third*, the parties must consider whether the appeal mechanism applies on an opt-in or opt-out basis,[16] and if the former, it ought to be clarified at which stage the agreement should be made. It may be worthwhile including an opt-in provision at the outset in drafting the arbitration agreement, or at the latest, before the award is rendered, to avoid the need to obtain leave of court. Parties seeking to appeal against an arbitral award on a point of law, without the other party's consent, face an uphill task due to the stringent requirements of the test for grant of leave. The numbers speak for themselves: In 2017, 56 applications for leave were brought under Section 69 of the UKAA, permission for leave was granted in ten cases, and only one case was successful (which was a significant improvement from the previous year!).[17]

### C. Appeals to an Appellate Arbitral Tribunal

Given the narrow circumstances in which appeals to national courts may be made on the merits, an alternative would be to include an appellate arbitration clause. Such clauses permit the parties, if dissatisfied with the decision of a first arbitral tribunal, to appeal to another tribunal.[18] Appellate arbitration clauses can take various forms, such as a two-tier arbitration clause where parties assemble their own preferred appeal mechanism. An example of this is the clause in *Centrotrade*:[19]

12 Hong Kong Arbitration Ordinance, § 100.

13 *Id.* § 101.

14 UKAA, § 70(2).

15 *See id.* § 69(1).

16 In opt-in cases, the appeal mechanism is available only if parties so provide in their arbitration agreement (as would be the case under the proposed amendments to Singapore's International Arbitration Act). In opt-out cases, the appeal mechanism is available by default, unless parties contract out. *See id.* § 69(1).

17 Commercial Court Users' Group, *Meeting Report* 1 (Mar. 13, 2018), *available at* https://www.judiciary.uk/wp-content/uploads/2018/04/commercial-court-users-group-report.pdf.

18 Prachi Aggarwal, *Multi-tier Arbitration Clauses*, RMLNLU L. REV. BLOG (Oct. 25, 2017), *available at* https://rmlnlulawreview.com/2017/10/25/multi-tier-arbitration-clauses/; Gracious Timothy Dunna*, Supreme Court in Centrotrade 2016: Too Quick to Nod at the Validity of the Two-Tier Arbitration Clause?*, 14(1) ASIAN INT'L ARB. J. 58 (2018).

19 M/s Centrotrade Minerals and Metals Inc v. Hindustan Copper Ltd., (2017) 2 SCC 228, ¶ 3 (India) [*hereinafter* "Centrotrade II"].

> *"Arbitration – All disputes or differences whatsoever arising between the parties […] shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration[…]*
>
> *If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce[.]*"[20]

Alternatively, parties may incorporate in their arbitration agreement an institutional arbitration procedure, such as those offered by the International Institute for Conflict Prevention and Resolution, 2007 ["**CPR Appeal Procedure**"], the Judicial Arbitration and Mediation Services Comprehensive Arbitration Rules and Procedure, 2014 ["**JAMS Appeal Procedure**"], or the American Arbitration Association Appellate Arbitration Rules, 2013 ["**AAA Appeal Procedure**"].

*i. Validity of Appellate Arbitration Clauses*

A preliminary issue is whether such clauses will be regarded as valid by national courts, and if so, for what purposes. The Supreme Court of India recently held in the affirmative when it had to occasion to consider the question in *Centrotrade Minerals and Metals Inc* v. *Hindustan Copper Ltd.*[21] ["**Centrotrade (II)**"]. The decision is significant because the Indian Arbitration and Conciliation Act, 1996 ["**ACA**"] is based on the provisions of the Model Law.[22]

In *Centrotrade (II)*, the appellate arbitration clause was in the form provided as an example above. The court rejected the submission that the latter part of the clause which set out the appellate mechanism, was contrary to Indian law. *First*, the court disagreed that the right to file an appeal can only be created by statute and not by an agreement between the parties. That holds true for litigation, but not non-statutory appeals that can be dealt with without resorting to court processes.[23] *Second*, the validity of appellate arbitration clauses is supported by background materials such as the Explanatory Note by the UNCITRAL Secretariat on the Model Law and the Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General ["**Analytical Commentary**"]. *Third*, the principle of party autonomy supports the acceptance of appellate arbitration clauses.[24]

The clause in *Centrotrade (II)* was upheld even though it provided for arbitration under the rules of the Indian Council of Arbitration ["**ICA**"] in the first instance, and International Chamber of Commerce ["**ICC**"] arbitration on appeal. But such "Frankenstein" clauses[25] are not always workable, especially where parties incorporate an institutional arbitration procedure. For instance, the JAMS Appeal Procedure only applies to awards that have been rendered under the JAMS

---

20 Shivansh Jolly, *Supreme Court of India Upholds Validity of Appellate Arbitration Clauses*, KLUWER ARB. BLOG (Feb. 16, 2017) *available at* http://arbitrationblog.kluwerarbitration.com/2017/02/16/supreme-court-india-upholds-validity-appellate-arbitration-clauses.

21 Centrotrade II, (2017) 2 SCC 228.

22 Arbitration and Conciliation Act, No. 26 of 1996, pmbl. (India) [*hereinafter* "Indian Arbitration Act"].

23 Centrotrade II, (2017) 2 SCC 228, ¶ 14.

24 *Id.* ¶ 40.

25 So-called because they are assembled of a mish-mash of parts and may not function as envisaged, much like the eponymous monster.

Arbitration Rules.[26] The CPR Appeal Procedure applies to "*any binding arbitration conducted in the United States*, *pursuant to the CPR Rules for Non-Administered Arbitration or the CPR Administered Arbitration Rules […] or otherwise.*"[27] What happens if the first-tier clause is valid but the appellate mechanism is not?

One would imagine that the courts, by applying the principle of effective interpretation, will adopt a very forgiving approach and uphold at least the first-tier arbitration clause once they find an intention to arbitrate – recall *Lucky-Goldstar Ltd.* v. *Ng Moo Kee Engineering*,[28] where the clause referred to non-existent rules of arbitration, and there was uncertainty as to the arbitral institution and place of arbitration. In this case, it was held that the clause was not "*inoperative or incapable of being performed*" and that the intention of the parties to arbitrate was clear. A counter argument would be that parties had intended to arbitrate *conditional upon* having the right to appeal to an appellate tribunal, and the lack of the latter makes the clause unworkable. However, such an argument is unlikely to succeed: if courts are willing to accept even "*bare*" arbitration clauses,[29] (as they have in certain pro-arbitration jurisdictions),[30] there is no reason why they would not do the same when only the appellate portion of the clause is in doubt. Hence, it is quite likely that appellate arbitration clauses will be found workable regardless of their form, even if they are contrary to specific institutional appellate arbitration procedures.

But that begs a logically prior question. Assuming that the first-instance arbitration is seated in country 'X', the appellate arbitration in country 'Y', and the substantive law of the contract is that of country 'Z', which law determines whether the arbitration agreement is valid? The threshold issue is whether the *Sulamerica* approach[31] applies, i.e., where the arbitration agreement forms part of the main contract, parties are presumed to have intended the same law to govern both the underlying contract and the arbitration agreement.[32] If so, the law governing the arbitration agreement is that of country Z. However, the *Sulamerica* approach is not universally adopted, and an alternative approach is to apply the law of the seat to assess the validity of an arbitration agreement.[33] The latter approach, however, would pose another problem: *which* seat's laws would be relevant – those of country X (where the first-instance arbitration is seated) or Y (where appellate arbitration is seated)? The better view is that it would be the law of the country where the first-instance arbitration is seated, i.e., country X. The contrary view entails some circularity because country Y would only be the seat *if* the clause were valid and encompassed the possibility of an appellate arbitration, but the very question here is whether that clause is valid. But what if

26 Theodore K. Cheng, *Merits-Based Review of Arbitration Awards: A Potentially "Appealing" Option*, 22(2) N.Y. STUDENT BAR ASS'N NY LITIGATOR 21, 22 (2017).

27 International Institute for Conflict Prevention and Resolution [CPR] Appellate Arbitration Procedure, r. 1.1, 2015.

28 Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g, [1993] 2 H.K.L.R. 73C. (H.C.) (H.K.).

29 Bare arbitration clauses do not mention the place of arbitration nor the means of appointing arbitrators. Darius Chan, *How Should "Bare" Arbitration Clauses Be Enforced by the Courts?*, KLUWER ARB. BLOG (Apr. 11, 2017), *available at* http://arbitrationblog.kluwerarbitration.com/2017/04/11/how-should-bare-arbitration-clauses-be-enforced-by-the-courts/.

30 *See*, *e.g.*, KVC Rice Intertrade Co. Ltd. v. Asian Mineral Res. Pte Ltd., [2017] 32 S.G.H.C. 43–48 (Sing.).

31 Sulamerica CIA Nacional de Seguros S.A. v. Enesa Engenharia S.A. [2012] EWCA Civ. 638 (Eng.).

32 Ashurst, *Which law governs the arbitration agreement: the law of the seat or the underlying contract*? (Feb. 7, 2017), *available at* https://www.ashurst.com/en/news-and-insights/legal-updates/which-law-governs-the-arbitration-agreement-the-law-of-the-seat-or-the-underlying-contract/.

33 *See*, *e.g.*, FirstLink Inv. Corp. Ltd. v. GT Payment Pte Ltd., [2014] SGHCR. 12 (Sing.); *Cf.* BCY v. BCZ, [2017] 3 SLR 357 (Sing.).

the arbitration agreement is valid only under the laws of country Y? This might be resolved by applying the validation principle, which is that the validity of an arbitration clause will be upheld if it is valid under *any* of the potentially applicable laws (here, any of countries X, Y, or Z), even if it is invalid under all the other potentially applicable laws.[34] All things considered, courts are likely to uphold the validity of appellate arbitration clauses.

*ii. Practical Considerations in Deciding whether to agree to Appellate Arbitration Clauses*

Deciding on whether to agree to appellate arbitration clauses involves weighing various considerations. Without such a clause there might be greater speed and finality in the arbitral process,[35] but parties would have to live with the outcome, unless the award can be challenged on due process or other grounds. On the other hand, the security of having a right of appeal against the award might be the very reason why parties accept a one-member tribunal for disputes that might have otherwise warranted a three-member tribunal, thus leading to time and cost savings.[36] Speed and finality are also not a given, if the counterparty tries to set aside the award or plays cat-and-mouse with enforcement.[37] Determining whether to include such clauses would, therefore, require careful gauging of the counterparty's track record, the state of the parties' relationship, and other relevant indicia.

We also highlight the following practical considerations:

*First*, parties should note that institutional rules chosen by them might provide for specific grounds or standards of appeal.[38]

*Second*, if an appellate arbitration clause is adopted, there is a question as to whether the seat court of the first-instance award can entertain applications for setting aside or enforcement pending the award being reviewed on appeal. We agree with the view that this should be disallowed as it would contradict the principles of judicial economy and efficiency when an appellate arbitration clause has been agreed upon by the parties.[39] There is also the concern of the appellate arbitration award being rendered nugatory or futile, if enforcement efforts have caused irremediable damage.

*Third*, parties should note when the limitation period for seeking to set aside an award commences (if they have not selected institutional appellate procedures that provide for this).[40] Would this be from the date of the first award or appellate award? This is significant because the timeline can in some cases be as short as three months. The answer to this question might well be found in Article 34(3) of the Model Law,[41] which states:

---

34 Gary Born, *The Law Governing International Arbitration Agreements: An International Perspective*, 26 SING. ACAD. L. J. 814, ¶ 51 (2014).

35 Though it should be noted that problems of speed and finality might be mitigated if parties also set a mutually acceptable time limit for invoking the arbitral appeal mechanism.

36 Theodore K. Cheng, *supra* note 26, at 21, 32.

37 *See*, *e.g.*, the long-running Astro v. Lippo saga spanning Singapore and Hong Kong.

38 *See*, *e.g.*, under AAA's Optional Appellate Arbitration Rules, r. A-10 (2013), the award must contain "*material and prejudicial*" errors of law or have "*clearly erroneous*" determinations of fact.

39 *Validity of Appellate Arbitration Clauses*, INT'L ARB. INFO. (Feb. 28, 2017), *available at* https://www.international-arbitration-attorney.com/validity-appellate-arbitration-clauses.

40 Shivansh Jolly, *supra* note 20.

41 Model Law, *supra* note 2, art. 34(3).

> *"An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received* ***the award*** *or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal."* [emphasis added]

On a plain reading of Article 34(3), the time to set aside the first-instance and appellate awards will run from their respective times of receipt. Might this pose a problem for applicants who fear they will be out of time to challenge the first award, if this is upheld on appeal? It is no answer to say that a party can challenge the appellate award, because the grounds for challenge might not apply in a transferable way – a breach of natural justice in the first proceedings would not affect the appellate proceedings. The solution, perhaps, is to first commence setting aside proceedings for the first award in the seat court and have those proceedings stayed pending determination by the appellate tribunal. It may also be argued that any grant of a stay on the first award may be more palatable if it would include the payment of the full award amount, possibly into an escrow account, to extinguish liability pending the decision by the appellate tribunal. While this solution is a little cumbersome, inelegance is preferable to a party challenging the Article 34(3) timeline and finding, to its dismay, that it is non-extendable.[42]

### D. Appealing from a National Court Decision to an Arbitral Tribunal

The final issue in this section is whether parties can appeal against the decision of a national court to an arbitral tribunal. The issue arises from a clause that featured in *ST Group Co. Ltd.* v. *Sanum Investments Ltd. appeal* ["**Sanum (SGCA)**"].[43] The clause, reproduced below, provided for the parties to refer any disputes to mediation, and then either to the "*Resolution of Economic Dispute Organisation*" or the Laotian courts:

> *"If one of the parties is unsatisfied with the results of the decision or judgment of the above procedure, the Parties shall mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration company in Macau, SAR PRC".*[44]

While the Singapore Court of Appeal acknowledged that the clause may lead to appeals against concluded national proceedings using an arbitral tribunal, it declined to adjudicate upon the validity of such a clause given that it would be a matter to be decided under the governing law of the agreement, that being Lao law.[45]

There are strong arguments against such clauses being upheld. *First*, is there even a "*dispute*" to be sent to arbitration? The tribunal might well determine, in the exercise of its competence under Article 16 of the Model Law, that the court's decision is *res judicata*. A ruling of a competent court would conclusively resolve a dispute, subject to any possible appeals to national appellate courts.

*Second*, it is questionable whether the parties could engraft, by their own fiat, a separate branch of appeals to an arbitral tribunal onto the appellate decision-tree. A "*dispute*" over a national court decision potentially falls under the non-arbitrability doctrine; national courts are meant to be the final arbiters of legal disputes within their jurisdiction. It is inherently objectionable that the decision of a national court as a manifestation of state authority should be appealable to arbitrators,

42 *See*, *e.g.*, BXS v. BXT, [2019] SGHC(I) 10, ¶¶ 37–41 (Sing.).
43 ST Group Co. Ltd. and Ors. v. Sanum Inv. Ltd. and Anr., [2019] SGCA 65 (Sing.).
44 *Id.* ¶ 8.
45 *Id.* ¶¶ 70–74.

who are appointed at the whim of parties without any assurance of legal training or quality (for ad hoc arbitrations). In a similar vein, it could be argued that allowing parties to appeal to an arbitral tribunal against a national court's decision violates public policy.

*Third*, there are difficulties arising from the mismatch over what the court, versus the arbitrator, can adjudicate and pronounce upon. Leaving aside whether *the court decision* per se is a priori non-arbitrable regardless of subject matter, what happens if the court makes a ruling that affects third parties, or there is joinder of third parties in the course of proceedings? Can that part of the dispute be hived off and the rest sent to arbitration? Even if it could, what of the risk of potentially inconsistent findings of fact? Messy situations like these can be minimised by refusing to accept such arbitration clauses as valid, albeit that these may still arise in other circumstances (such as if the court decides to grant case management stays over certain parts of the dispute). Accordingly, it is suggested that such clauses should be void.

### E. Conclusion on Problem 1

Provisions that provide either for appeal *against* an award to a court or tribunal, or for appeal from a court decision *to* an arbitral tribunal, test the limits to which courts in a broadly pro-arbitration climate will uphold party autonomy. In the authors' view, while the former should be (and is) given effect to as far as possible, the latter should not be allowed.

## III. Problem 2: The Effect of Article 16(3) of the Model Law on Subsequent Challenges to the Tribunal's Jurisdiction

Article 16(3) of the Model Law entitles a party that is dissatisfied with a tribunal's *preliminary* ruling on jurisdiction to request, within thirty days, the curial court to decide the issue of jurisdiction again.[46] How does the availability of the Article 16(3) mechanism affect the parties' right to challenge jurisdiction at the setting-aside and enforcement stages? In many jurisdictions, a party's failure to raise an Article 16(3) challenge precludes any subsequent attempt to rely on the same ground.[47] Interestingly, recent decisions by the Singapore courts have gone the other way. This section will discuss the interpretation of Article 16(3) taken by the Singapore courts, and evaluate the attractiveness of this approach against competing views taken elsewhere.

### A. Singapore's Interpretation of Article 16(3)

In *PT First Media TBK* v. *Astro Nusantara International BV* ["**Astro**"],[48] the Singapore Court of Appeal held that even where a party failed to *actively* raise jurisdictional objections under Article 16(3) of the Model Law in time, it was still open to such a party to raise those objections as a ground for *refusing enforcement* of the award (what the court referred to as a "*passive remedy*"). The court was satisfied, after analysing the *travaux préparatoires*, that the Model Law incorporates a "*choice of remedies*" system.[49] Given the differences in purpose and effect between setting aside applications

46 Model Law, *supra* note 2, art. 16(3) provides that "The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

47 *See* Nata Ghibradze, *Preclusion of Remedies under Article 16(3) of the UNCITRAL Model Law*, 27(1) PACE INT'L L. REV. 345, 385-389 (2015).

48 PT First Media TBK v. Astro Nusantara International BV, [2013] SGCA 57 (Sing.) [*hereinafter* "Astro"].

49 *Id.* ¶ 65.

and refusal of enforcement proceedings, "*parties that do not actively attack an award remain able to passively rely on defences to enforcement.*"[50] After a perusal of the *travaux*, the Court observed that nothing suggested that Article 16(3), as another form of active challenge to a tribunal's decision on jurisdiction, was intended to be carved out from this "*choice of remedies*" system.[51] But the court left open the question of whether a party who failed to utilise the Article 16(3) challenge was still able to raise the same jurisdictional objection in *setting-aside* proceedings, although it expressed the tentative opinion that it would be "*surprised*" if the answer was in the affirmative.[52]

That question was revisited by the Court of Appeal in May 2019, albeit for non-participating respondents only. In *Rakna Arakshaka Lanka Ltd.* v. *Avant Garde Maritime Services (Pte) Ltd.* ["**Rakna**"],[53] Rakna Arakshaka Lanka Ltd. ["**RALL**"] did not participate in the arbitration at all due to its protest to the tribunal's jurisdiction. The tribunal issued a preliminary ruling stating that it had jurisdiction, to which RALL did not respond. After the final award was given in favour of Avant Garde Maritime Services (Pte) Ltd. ["**AGMS**"], RALL sought to set aside the award. The question was whether RALL was now precluded from raising the jurisdictional issue in setting-aside proceedings, given its failure to raise an Article 16(3) challenge earlier.

Reversing the decision of the High Court, the Court of Appeal held that a *non-participating party* in an arbitration was *not* precluded from applying to set aside an award on jurisdictional grounds, even if he had not raised those objections in an Article 16(3) challenge. Significantly, the court stated:[54]

> *"Art 16 [of the Model Law] requires parties to an arbitration to bring out their challenges to jurisdiction at an early point of the proceedings. But this requirement pre-supposes that parties are before the arbitral tribunal and that a party to an arbitration agreement who is served with a notice of arbitration by a counterparty has no option but to participate in the ensuing proceedings."*

The court reasoned that there is no clear legal duty on a respondent to participate in an arbitration that it believes was wrongly commenced against it. Accordingly, it would be wrong to force such a party to utilise the Article 16(3) mechanism despite its objections.[55] The court also relied on the Analytical Commentary,[56] which states that a non-participating party who did not "*submit a statement or take part in hearings on the substance of the dispute*" remains able to challenge jurisdiction in both setting aside or enforcement proceedings.[57]

These decisions are unlikely to be the last word from the Singapore courts on this point, but it is clear that there are at least two exceptions to the preclusive effect of Article 16(3) under Singapore

50 *Id.* ¶ 71.
51 *Id.* ¶¶ 104–105, 111, 115, 123.
52 *Id.* ¶¶ 130, 132.
53 Rakna Arakshaka Lanka Ltd v. Avant Garde Maritime Services (Pte) Ltd., [2019] SGCA 33 (Sing.) [*hereinafter* "Rakna"].
54 *Id.* ¶ 72.
55 *Id.* ¶ 73.
56 UNCITRAL Sey. Gen., *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Rep. of the Secretary-General*, U.N. Doc. A/CN.9/264 (Mar. 25, 1985) [*hereinafter* "Analytical Commentary"].
57 *Id.* at 39.

law (subject to other doctrines like waiver and estoppel).[58] Where a respondent refuses to participate in the arbitration at all, he may still apply to set aside any award against him later on jurisdictional grounds. Moreover, even if a party chooses not to mount an active challenge to the tribunal's jurisdiction (under Article 16(3) or Article 34), it may resist enforcement on the same grounds.

### B. Other Interpretations of Article 16(3)

Against the approach taken in Singapore, the prevailing view in Germany, Canada, Hong Kong, and Australia is that Article 16(3) is the *only* avenue for challenging a preliminary award on jurisdiction.[59] Nata Ghibradze, undertaking a comprehensive survey of the case law on Article 16(3), attributes this to "*the primary purpose behind the mechanism of early determination of jurisdictional issues, legal certainty and efficiency*."[60] In *China Nanhai Oil Joint Service Corporation Shenzhen Branch* v. *Gee Tai Holdings Co. Ltd.* ["**China Nanhai Oil**"], the Hong Kong High Court stated in *obiter* that "*if you do not seek the view of the court [under Article 16(3)], then you cannot raise the matter subsequently at [the] enforcement stage*."[61] The Supreme Court of Quebec, in *Compagnie Nationale Air France* v. *Libyan Arab Airlines* ["**Compagnie**"], held that Article 943.1 of the Quebec Code of Civil Procedure (the equivalent of Article 16(3)) was the sole means of contesting the tribunal's preliminary ruling on jurisdiction – thus, excluding both setting aside and refusal of enforcement options.[62]

There is some support in the *travaux préparatoires* for this view. In particular, the Analytical Commentary and Working Group Reports show that the drafters' concerns behind Article 16 of the Model Law were in ensuring that any jurisdictional objections were raised early. It was stated by the UN Secretariat, in a comment on Article 16(3):[63]

> *"Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16(3) provides for instant court control in order to avoid unnecessary waste of money and time. […] In those less common cases where the arbitral tribunal combines its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36."*

This comment leaves the effect of not utilising Article 16(3) ambiguous, but it has been suggested that these words indicate the drafters' intention of carving out Article 16(3) from the "*choice of remedies*" system.[64]

---

58 Astro, [2013] SGCA 57, ¶¶ 199–202 (Sing.). It is stated in ¶ 200 that "the concept of waiver and estoppel are distinct. Broadly speaking, waiver of rights occurs when a party has indicated that it will be relinquishing its rights. Estoppel, however, requires something more. The party invoking the estoppel must typically show that it had relied on the representations of the other party to its detriment".

59 *See* Ghibradze, *supra* note 47, at 385–389; Remigius Oraeki Chibueze, *The Adoption and Application of the Model Law in Canada – Post-Arbitration Challenge*, 18(2) J. INT'L ARB. 191, 200–201 (2001).

60 Ghibradze, *supra* note 47, at 385–389.

61 China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd., [1994] 3 H.K.C. 375, 676–677 (H.C.) (H.K.).

62 Compagnie Nationale Air France v. Libyan Arab Airlines, [2000] R.J.Q. 717 (Can. Que.); Ghibradze, *supra* note 477, at 387.

63 *UNCITRAL Model Law on International Commercial Arbitration: Note*, U.N. Doc. A/CN.9/309, *reprinted in* [1988] 19 UNCITRAL Y.B., U.N. Doc. A/CN.9/SER.A/1988, ¶ 25.

64 Ghibradze, *supra* note 47, at 384; BORN, *supra* note 6, at 3019, where the author states, "As discussed above, the better view is that positive jurisdictional rulings are properly characterised as awards, generally subject to annulment, recognition and enforcement like other awards, but national court authority on the subject remains divided."

In our view, the divergent approaches taken by the jurisdictions outlined above (as well as eminent commentators)[65] demonstrate – and stem in part from – the ambiguity of the drafters' intention. Absent any clear direction in the Model Law or the *travaux préparatoires*, a principled interpretation of Article 16(3) must consider what this provision sets out to achieve in the entire context of the scheme and purpose of the Model Law.

### C. How Far should a Failure to Raise an Article 16(3) Challenge Preclude Setting Aside or Refusal of Enforcement on the Same Grounds?

#### *i. Failure to Raise Article 16(3) should not Preclude Resisting Enforcement on Jurisdictional Grounds*

Though much has been said about the drafters' intentions of expediting jurisdictional challenges, the structure and provisions of the Model Law do not suggest that jurisdiction is a question best reserved only to the seat court, or that any jurisdictional questions must be resolved quickly within a predefined time frame. That the ground for *refusing recognition and enforcement* of an award for lack of jurisdiction exists in Article 36 of the Model Law, in tandem with Article V(1) of the NYC, suggests that leeway is given to the enforcing court to examine the question of jurisdiction for itself regardless of deference to the seat court.[66] If so, there is no good reason why Article 16(3) must be carved out from the "*choice of remedies*" system, such that the enforcing court cannot consider the question of jurisdiction simply because it has been the subject of a *preliminary* ruling by the tribunal.

The contrary view (i.e., that failing to raise Article 16(3) precludes resisting enforcement on jurisdictional grounds) would introduce an arbitrary imbalance in the scheme of remedies in the NYC and Model Law. Everything would turn on whether the tribunal decides to issue its decision on jurisdiction as a preliminary ruling, or together with the merits in a final award.[67] If the tribunal addresses its jurisdiction only in a final award, Article 16(3) would not apply and a respondent has not one, but two chances to raise the jurisdictional objection (in setting aside, or refusing enforcement). On the other hand, if the tribunal chooses to issue a preliminary ruling, a dissatisfied party must invoke Article 16(3) or be bound by the tribunal's decision. But why should a respondent in the latter case be penalised by losing its passive remedy on the jurisdictional point, simply due to the form taken by the tribunal's jurisdictional ruling?

#### *ii. Failure to Raise Article 16(3) should Generally Preclude Setting Aside Applications on Jurisdictional Grounds except in Exceptional Circumstances*

In contrast to affirming the availability of passive remedies despite a failure to mount an Article 16(3) challenge, we suggest a more nuanced approach as far as setting aside applications are

---

65 For commentators more inclined to the view that Art. 16(3) is not preclusive, *see*, *e.g.*, HOWARD HOLTZMANN & JOSEPH NEUHAUS, A GUIDE TO THE 2006 AMENDMENTS TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 479 (2015); INT'L COUNCIL FOR COMM. ARB., INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 84 (Jan Paulsson ed., 1990); *Cf.* KLAUS BERGER, INTERNATIONAL ECONOMIC ARBITRATION 365 (1993).

66 *See* Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Govt. of Pakistan [2010] UKSC 46, ¶ 103 (Eng.). Lord Mance noted "Nor is there anything to support Dallah's theory that the New York Convention accords primacy to the courts of the arbitral seat, in the sense that the supervisory court should be the only court entitled to carry out a re-hearing of the issue of the existence of a valid arbitration agreement […] There is nothing in the Convention which imposes an obligation on a party seeking to resist an award on the ground of the non-existence of an arbitration agreement to challenge the award before the courts of the seat".

67 UNCITRAL, 2012 DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 16, ¶ 14, at 79.

concerned: A party who fails to invoke Article 16(3) should generally be precluded from relying on the same annulment ground, *except* in circumstances where the Article 16(3) mechanism was not reasonably available.[68]

There is force in the view that a respondent who could have raised an Article 16(3) challenge, but chose not to do so, should not be allowed to raise the same objection in setting aside later. Both Article 16(3) and annulment lead to a final determination by the seat court on the tribunal's jurisdiction.[69] Since Article 16(3) was drafted to discourage a party from sitting on jurisdictional objections, it ought to have preclusive effect on any attempt to raise (at setting aside) a jurisdictional objection that could reasonably have been raised earlier.[70]

But there are situations where a party cannot sensibly be expected to have recourse to Article 16(3). It is undesirable to impose a blanket rule that Article 16(3) definitively precludes any later challenge under Article 34. In *Rakna*, the Singapore Court of Appeal stated without qualification that a "*non-participating respondent*" is one exception to the preclusive effect of Article 16(3).[71] On the facts, though *Rakna* dealt only with a fully non-participating respondent, who did not engage in the arbitration at all (beyond sending letters to the Singapore International Arbitration Centre ["**SIAC**"]) and had made clear its intention to stay away from the beginning. As commentators have pointed out, it may be useful to analyse the position of different types of non-participants:[72]

1. For *fully non-participating* respondents, like in *Rakna*, these parties did not engage in the arbitral process at all, and it would be clear to the claimant in such cases that the respondent cannot be said to have waived its right to object to the tribunal's jurisdiction.[73] By not participating, these respondents also do not contribute to the wasted costs and time in the arbitration.[74] Fully non-participating respondents would not run afoul of the purpose of Article 16(3), i.e., to require parties to bring their jurisdictional objections early instead of waiting until the award was rendered.

2. For *partially non-participating* respondents, however, the position is less clear. It may very well depend on how far the respondent chose to participate in the arbitral process before

---

68 *See*, *e.g.*, Hanseatisches Oberlandesgericht Hamburg [HansOLG] [Hanseatic Higher Regional Court Hamburg] Nov. 8, 2001, CLOUT Case No. 562, 6 Sch. 04/01 (Ger.), where a party that had not raised any jurisdictional objection before the arbitral tribunal was later allowed to do so in setting-aside proceedings, because it had not been properly informed of the commencement of the arbitration.

69 Arts. 16(3) and 34(2)(a)(i) of the Model Law both subject the tribunal's power to rule on its own competence to final judicial control: *see* Analytical Commentary, *supra* note 56, at 122, ¶¶ 11–12.

70 *See*, *e.g.*, the SGCA's obiter statements in Astro, [2013] S.G.C.A. 57, ¶ 130 states that the court would be "surprised if a party retained the right to bring a setting-aside application on a ground which they could have raised via other active remedies before the supervising court at an earlier stage when the arbitration was still ongoing".

71 Rakna, [2019] SGCA 33, ¶ 74.

72 Darius Chan, *Is Article 16(3) of the Model Law a 'One-Shot Remedy' for Non-Participating Respondents in International Arbitrations?*, KLUWER ARB. BLOG (Sept. 5, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/09/05/article-163-model-law-one-shot-remedy-non-participating-respondents-international-arbitrations-2; Albert Monichino QC, *The Problem with Rakna: The Scope of the Preclusive Effect of Article 16(3) of the Model Law*, 31 SING. ACAD. L.J. 349, ¶ 38 (2019) [*hereinafter* "Monichino"].

73 Astro Nusantara International BV v. PT Ayunda Prima Mitra, [2013] 1 SLR 636, ¶ 133 (Sing.); *See also* Analytical Commentary, *supra* note 57, at 122, ¶ 9, where despite the view that the failure to raise the Art. 16(3) challenge in time precludes any arguments on jurisdiction later on, it is stated that such arguments "would remain applicable and of practical relevance to those cases where a party raised the plea in time but without success *or where a party did not participate in the arbitration*".

74 Monichino, *supra* note 72, ¶ 40.

stepping out. It has been suggested that a respondent who participates in the arbitration to contest the tribunal's jurisdiction, and who immediately steps out of the proceedings after the tribunal renders a preliminary ruling unfavourable to it, arguably did not prolong the dispute or contribute to wasted costs despite its limited participation.[75] We would, however, point out that there is nothing unfair about requiring a respondent who willingly participated in a preliminary hearing on jurisdiction to use the *full* range of measures available to challenge jurisdiction immediately, including invoking the Article 16(3) challenge.

### D. Conclusion on Problem 2

The extent to which Article 16(3) precludes subsequent attempts to set aside or resist enforcement of an award on jurisdictional grounds varies by jurisdiction. Some jurisdictions, such as the Singapore courts, adopt a somewhat more "*interventionist*" approach, and are inclined to allow parties more opportunities to challenge the tribunal's jurisdiction before the courts. On the other hand, other courts have been strict on limiting the parties' jurisdictional challenge to Article 16(3). It is difficult to say which is truly a more "*pro-arbitration*" view. Arguably, both approaches can be justified on upholding either speed and finality, or ensuring the correctness of jurisdictional decisions, in the arbitral process. Therefore, in selecting the arbitral seat and potential places for subsequent enforcement of the award, parties should consider the legal position of these courts on the effect of Article 16(3) beforehand, and take steps to safeguard their right to challenge the tribunal's jurisdiction before the court.

## IV. Problem 3: The Availability of Anti-Enforcement Injunctions from Seat Courts

Two recent English and Singapore cases affirm a very restrictive approach to the grant of anti-enforcement injunctions ["**AEI(s)**"], requiring "*exceptional circumstances*" beyond the threshold considered for the grant of anti-suit injunctions ["**ASI(s)**"]. What can a party do when it is faced with a foreign judgment, when it would prefer to arbitrate the dispute or enforce an award? There are several potential options, which this part of the article will explore after giving a brief overview of the two types of injunction and the cases on this.

### A. Definitions

ASIs restrain ongoing court proceedings. They can be issued in pre-award situations to restrain a party from commencing litigation in breach of an arbitration agreement, as well as in post-award situations to restrain a party from challenging the award outside the seat, or litigating claims that have already been determined in arbitration.[76] The focus here is on ASIs granted in breach of an arbitration clause, i.e., "*contractual*" ASIs. AEIs, on the other hand, come into the picture after a foreign court issues a judgment. They restrain a party from *relying on or enforcing* that foreign judgment.[77] The difference between ASIs and AEIs is usefully thought of as: the former concerns the *working* of a foreign court and the latter with their *output*.[78]

---

75 *Id.* ¶¶ 44–45.

76 Terna Bahrain Holding Co. WLL v. Al Shamsi and Ors. [2013] 1 Lloyd's Rep. 86 (Eng.); Michael Wilson and Partners Ltd. v. Emmott [2018] EWCA (Civ.) 51 (Eng.).

77 Ecobank Transnat'l Inc. v. Tanoh [2015] EWCA (Civ.) 1309 (Eng.) [*hereinafter* "Ecobank"].

78 *Id.* ¶ 91.

B. The Authorities – Two Recent Cases from England and Singapore

In *Ecobank Transnational Inc* v. *Tanoh* ["**Ecobank**"],[79] Ecobank and Mr. Tanoh were parties to an employment agreement containing an arbitration clause. In breach of that clause, Mr. Tanoh commenced proceedings in the courts of Togo and Cote d'Ivoire and obtained judgment in his favour. Subsequently, Ecobank obtained an *ex parte* interim injunction barring Mr. Tanoh from seeking recognition or enforcement of either foreign judgment.[80] The English Court of Appeal upheld the High Court's judgment discharging the interim injunction. Despite the fact that Mr. Tanoh's claims were brought in breach of the arbitration agreement and the bank had not submitted to the foreign courts,[81] an AEI was nonetheless refused.

The English authorities where AEIs were granted are "*few and far between*".[82] Such circumstances would include: (i) fraud on the part of the party obtaining the foreign judgment; (ii) where a judgment was obtained too quickly or secretly to enable an ASI to be obtained, and (iii) where a party could not have sought relief pre-judgment because either the exclusive jurisdiction agreement was reached post-judgment or he had no means of knowing that the judgment was being sought.[83] Further, delay in seeking injunctive relief was an important consideration, justified by a "*variety of reasons including the avoidance of prejudice, detriment and waste of judicial resources; the need for finality; and considerations of comity.*"[84] In the court's words, an applicant must act promptly and claim injunctive relief early, "*and should not adopt an attitude of waiting to see what the foreign court decides*".[85] Finally, the AEI was discharged because the bank could have sought an ASI at the outset of foreign proceedings but decided not to.

*Sun Travels and Tours Pvt. Ltd.* v. *Hilton International Manage (Maldives) Pvt. Ltd.* ["**Sun Travels**"],[86] concerned a Singapore-seated arbitration in which the tribunal rendered two awards against Sun. Hilton sought to enforce the award in the Maldives but ran into difficulties due to confusion about which Maldivian court had jurisdiction over enforcement. In the meantime, Sun commenced an action in the Maldives, essentially re-litigating the decided issues. Instead of immediately applying for anti-suit relief from the seat court, Hilton challenged the Maldivian action and failed. The Maldivian court issued judgment in favour of Sun. Hilton continued its attempt to enforce the awards, but enforcement was denied due to the Maldivian judgment.[87] Hilton appealed against the Maldivian judgment, while seeking (amongst others) a permanent ASI from the Singapore court to prevent Sun from relying on the Maldivian judgment. Instead of an ASI, an AEI was granted by the High Court,[88] but was later discharged by the Court of Appeal.

The Court of Appeal agreed with *Ecobank* that "*great caution*" should be exercised in granting AEIs because such an injunction would necessarily not have been sought promptly enough.[89] AEIs

79 *Id.*
80 *Id.* ¶ 24.
81 *Id.* ¶ 79.
82 *Id.* ¶ 118.
83 *Id.* ¶ 119.
84 *Id.* ¶¶ 126–127.
85 *Id.* ¶ 129.
86 Sun Travels and Tours Pvt. Ltd. v. Hilton Internat'l Manage (Maldives) Pvt. Ltd., [2019] SGCA 10 (Sing.) [*hereinafter* "Sun Travels"].
87 *Id.* ¶ 2.
88 *Id.* ¶ 43.
89 *Id.* ¶¶ 89-90.

would be granted only "*very sparingly*" and only where "*exceptional circumstances*" can be shown.[90] The test for when an AEI would be granted must be more stringent than that for ASIs because an AEI proscribes the enforcement of a foreign judgment on pain of contempt proceedings in the jurisdiction where the injunction is granted.[91] Granting an AEI would be "*comparable to nullifying the foreign judgment, […] when only the foreign court can set aside or vary its own judgments.*"[92]

Thus, to obtain an AEI, the applicant must show not only the breach of a legal right (i.e., breach of agreement),[93] but also "*exceptional circumstances*."[94] A non-exhaustive list of exceptional circumstances would include: (i) unconscionable conduct such as fraud, or (ii) when the applicant is not guilty of unconscionable delay, such as when it did not know of the foreign proceedings until delivery of the judgment.[95] However, the Singapore Court of Appeal did not consider the third exception in *Ecobank* (as discussed above) as a standalone ground.[96] The AEI was discharged because of Hilton's delay, which had resulted in the delivery of two Maldivian enforcement judgments and the filing of a Maldivian appeal.[97]

### C. Discussion

#### *i. Option 1: Argue against a Stricter Approach towards AEIs than ASIs*

In jurisdictions where the matter has not been conclusively decided, the question arises whether a party should argue against a stricter approach towards AEIs compared to contractual ASIs, which are granted by default unless there are strong reasons not to.[98] The stricter approach towards AEIs is premised on the view that AEIs are more injurious to comity.

Comity in *Ecobank* was unpacked as comprising two facets: (i) comity vis-à-vis the prospective *enforcing* court, which has autonomy to decide whether to enforce a particular foreign judgment in accordance with its own law; and (ii) comity vis-à-vis the court *issuing* the foreign judgment, in terms of waste of foreign judicial resources.[99]

The first facet might be disputed. In *ICC Case No. 17176*,[100] the tribunal considered that an ASI is "*inherently more invasive*" than an AEI, i.e., that an ASI would be *more* injurious to comity than an AEI.[101] The logic is that an AEI does not cast aspersions on the competence of another court (as the pre-emptive nature of an ASI may be perceived to do), but only prevents the individual

90 *Id.* ¶ 121.
91 *Id.* ¶ 98.
92 *Id.*
93 Or, where non-contractual ASIs are concerned, vexatious or oppressive conduct.
94 Sun Travels, [2019] SGCA 10, ¶¶ 99, 105 where it is stated that the requirement of "*exceptional circumstances*" is traceable to the origins of an injunction as a form of equitable relief.
95 *Id.* ¶ 113.
96 *Id.* ¶ 104.
97 *Id.* ¶ 125.
98 Donohue v. Armco Inc [2002] 1 All ER 749.
99 Ecobank, [2015] EWCA (Civ.) 1309, ¶¶ 129, 132–133, 135.
100 ICC Case No. 17176, Final Award, [2016] 41 Y.B. COMM. ARB. 86–126 (Albert Jan Van den Berg ed.) (The tribunal had in a procedural order granted an interim AEI directing the respondents to refrain from enforcing any judgment rendered in state litigation for patent infringement claims before a final award was rendered in the arbitration. In its final award, it declined the grant of a permanent AEI because the situation had changed – the tribunal had in the final award found that the claimants could argue that they were licensed, with the consequence that the respondents would either withdraw their claims or the court would find that there was no infringement).
101 Maxwell Breana Obesi & Chrispas Nyombi, *Enforcement of anti-suit injunctions*, 36 EUR. COMPETITION L. REV. 513, 524–25 (2015).

respondent from enforcing a handed-down judgment. But that explanation arguably misses the point. ASIs are not regarded as injurious to comity because they cast aspersions on the competence of a foreign court, but because they indirectly interfere with foreign proceedings even if they do not purport to direct what a foreign court should do (because they act *in personam*).[102] On this view, AEIs would be equally (if not more) injurious to comity.

Whether the second facet can be challenged depends on how exactly the waste of resources is conceptualised. *Sun Travels* appears to have endorsed an approach where there will *always* be a waste of resources if the foreign court has issued a judgment. It rejected the argument that because one Maldivian judgment spanned two and half pages, the effort expended must have been negligible.[103] This approach is likely to be accepted unless a court is prepared to pass judgment on the effort expended by its foreign counterpart based on factors such as the complexity of the case and duration of the hearing.

On balance, the stricter approach to AEIs as opposed to ASIs, appears to be here to stay. In that light, it is also worthwhile recalling that even ASIs are not well-accepted across the common-civil law divide, being considered offensive in many quarters.[104]

*ii. Option 2: Seek to Expand the Categories of "Exceptional Circumstances"*

Next, a party seeking an AEI could seek to expand the categories of "*exceptional circumstances*." The main circumstance identified in *Sun Travels* is fraud, under the umbrella of unconscionable conduct (the other category appears to be a negative stipulation – it is necessary but insufficient for an applicant to have brought its claim in a timely manner). While *Ecobank* also identified fraud, it did not go so far as to use unconscionability as a unifying rationalising doctrine. Beyond fraud, what else might suffice? On the approach in *Sun Travels*, the categories are not closed as long as the defect in the procuring of the foreign judgment is traceable to unconscionable conduct.[105]

We suggest that unconscionability is *not* an appropriate unifying theme for the circumstances in which an AEI may be granted, notwithstanding the equitable roots of an injunction, because it is both over and under-inclusive. It is over-inclusive because unconscionability is associated with numerous doctrines, some of which transfer awkwardly to the grant of AEIs. For instance, a broad view of unconscionability may sometimes include duress or undue influence,[106] but it is odd to claim that there has been undue influence in the procuring of a foreign judgment. In other contexts, unconscionability appears to have been used as a synonym for dishonest or reprehensible conduct.[107]

102 Ecobank, [2015] EWCA (Civ.) 1309, ¶ 83; Sun Travels, [2019] SGCA 10, ¶ 69.
103 Sun Travels, [2019] SGCA 10, ¶ 123.
104 Obesi & Nyombi, *Recognition of anti-suit injunctions in civil and common law jurisdictions*, 36 EUR. COMPETITION L. REV. 473, 474 (2015).
105 Sun Travels, [2019] SGCA 10, ¶ 105 states as follows: "what is required for an AEI is exceptional circumstances tied to the notion of unconscionability and not exceptional circumstances in the abstract".
106 BOM v. BOK, [2018] SGCA 83, ¶ 118 (Sing.).
107 UKAA, § 68(2)(*g*) permits the court award to set aside an award procured by fraud; Celtic Bioenergy Ltd v. Knowles Ltd. [2017] EWHC 472, ¶ 103 (Eng.).

It is under-inclusive because it would exclude doctrines such as breach of natural justice,[108] which is a fairly uncontroversial ground for denying recognition and enforcement of a foreign judgment.[109] If such a judgment would be refused recognition and enforcement in any case, there would be no additional injury to comity (if indeed comity is the justification for a narrow test for granting AEIs) if an AEI were granted. It is also unclear whether the situation where a party could not have sought relief pre-judgment because the relevant agreement was reached post-judgment (accepted in *Ecobank*) can indeed be subsumed under unconscionable delay or fraud (as rationalised by *Sun Travels*). The better approach would therefore be the one in *Ecobank*, i.e., considering this as a standalone exception – if this exception ought to be recognised at all.

If the court does indeed accept that "*exceptional circumstances*" may be assessed on a case by case basis without reference to unconscionability as a unifying principle (or indeed, *any* unifying principle because analytical clarity in the form of a grand unifying design may not always be possible or appropriate in all cases), the potential scenarios where an AEI will be available will be much broader.

### *iii. Option 3: Accept alternatives to AEIs*

Given the difficulties involved in seeking an AEI, it is also worthwhile for a party to consider whether to pursue alternative relief. It is no longer open to such a party to seek a stay of proceedings.[110] AEIs are, by definition, only necessary when foreign proceedings have concluded and judgment has been delivered. The viable alternatives are, thus, to pray: (i) that the breach of an arbitration agreement constitutes a defence to recognition and enforcement at common law, or (ii) for damages.

Dealing first with defences, breach of agreement is in some jurisdictions a statutorily recognised defence. For instance, under Section 32 of the Civil Jurisdiction and Judgments Act, 1982, a foreign judgment must be denied recognition and enforcement if the bringing of the foreign proceedings was "*contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country*."[111] A similar mechanism operates under Section 5(3)(b) of Singapore's Reciprocal Enforcement of Foreign Judgments Act,[112] which deems a foreign court not to have had jurisdiction if the action was brought in breach of agreement. These provisions would cover arbitration agreements. But it is unclear how far this defence exists at common law or how far courts will be willing to extend the rationale of this defence beyond where its application is mandated by statute.

Alternatively, a party could seek damages for breach of arbitration agreement in lieu of an AEI. The reasoning in the case of ASIs, which applies by analogy to AEIs, runs thus that the arbitration clauses have both positive and negative aspects (i.e., taking the necessary steps to arbitrate, and an

108 With its two sub-rules of the right to be heard (*audi alteram partem*), and impartiality and independence (rule against bias).

109 Adams v. Cape Industries [1991] 1 All ER 929 (Eng.); Beals v. Saldanha [2003] 3 S.C.R. 416 (Can.).

110 Michelle Lee, *Anti-suit injunctions in aid of international arbitrations: A rethink for Singapore*, 27 SING. ACAD. L. J. 438, 442 (2015); Tiong Min Yeo, *The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements*, 17 SING. ACAD. L. J. 306, 321 (2005).

111 Civil Jurisdiction and Judgments Act 1982, c. 27, § 32(1)(a) (Eng.).

112 Reciprocal Enforcement of Foreign Judgments Act 2001, § 5(3)(b) (Sing.).

undertaking not to sue other than in the agreed forum).[113] Thus, in principle, damages should be available for their breach.[114] Damages would compensate the innocent party for wasted legal costs in defending the parallel court proceedings,[115] and potentially, losses above and beyond such expenditure (e.g., the amount of loss equivalent to that expended in satisfying a foreign judgment that was successfully enforced).[116]

However, there are difficulties in claiming damages in lieu of an AEI, listed as follows:

*First*, it is not universally accepted that the breach of an arbitration agreement can found a claim for substantive damages,[117] because, in one view, arbitration agreements are procedural in nature.[118]

*Second,* who should the remedy of damages be sought from: the seat court or a tribunal?[119] The innocent party should opt for the latter because that would be consistent with his commitment to arbitrate,[120] but it is questionable whether under most institutional model clauses a tribunal can award damages for breach of the *arbitration agreement* as opposed to the main contract.[121] But this difficulty is surmountable by either rooting the tribunal's power to award damages for breach of arbitration agreement in the law applicable to the agreement in question,[122] or giving a broad approach to construction of the arbitration clause. Even so, damages in lieu of AEIs is evidently an imperfect remedy.

### D. Conclusion on Problem 3

A party faced with a foreign judgment obtained in breach of an arbitration agreement may seek to obtain an AEI, but the conditions where an AEI are available are narrowly circumscribed. This seems to be the approach taken even in "*pro-arbitration*" jurisdictions such as England and Singapore. The importance of party autonomy and upholding parties' agreement to arbitrate seems to take a backseat to concerns of international comity. The alternative remedies of breach of agreement as a defence to enforcement and damages for breach of arbitration agreement have their own limitations. Neither is a perfect substitute for an AEI. Once again, therefore, the old adage holds true: prevention, through getting a stay or an ASI, is better than cure.

## V. Problem 4: Enforcement of Arbitral Awards that have been Set Aside at the Seat

One aspect of international arbitration which invariably requires the assistance of national courts is in the recognition and enforcement of arbitral awards. An award is toothless if it cannot be enforced against the assets of the award debtor. The NYC was, therefore, enacted to provide

113 UST-Kamenogorsk Hydropower Plant JSC v. AES UST-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35 (Eng.).

114 Paul Todd, *Damages for breach of an arbitration agreement*, 5 J. BUS. L. 404, 423 (2018).

115 Rahim Moloo, *Arbitrators Granting Antisuit Orders: When Should They and on What Authority*, 26 J. INT'L ARB. 675, 697–698 (2009).

116 Albert Dinelli, *The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract meets Private International Law*, 38(3) MELB. U. L. REV. 1023, 1035 (2015).

117 *But see* Donohue v. Armco Inc [2002] 1 Lloyd's Rep. 425 (Eng.).

118 Jean Pierre-Fierens & Bart Volders, *Monetary Relief In Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements*, 9(34) REVISTA BRASILEIRA DE ARBITRAGEM 93, 96 (2012); Tiong Min Yeo, *The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements*, 17 SING. ACAD. L.J. 306, 322 (2005).

119 Julio Cesar Betancourt, *Damages for breach of an international arbitration agreement under English arbitration law*, 34 ARB. INT'L 511, 529 (2018).

120 *Id.* at 529.

121 *Id.*

122 *Id.*

common legislative standards for court recognition and enforcement of foreign and non-domestic arbitral awards.[123] However, despite the attempts at harmonisation, there is substantial divergence over whether arbitral awards annulled by a seat court can nevertheless be enforced by the enforcing courts in another jurisdiction.

### A. Different Approaches to Article V(1)(e) of the NYC

We take as our starting point Article V(1)(e) of the NYC, which states that recognition and enforcement of an award may be refused, if among other things:

> "*The award has not yet become binding on the parties, or* ***has been set aside*** *or suspended* ***by a competent authority of the country in which****, or under the law of which,* ***that award was made***." [emphasis added]

Some academics[124] and national courts[125] have interpreted Article V(1)(e) as imposing a *mandatory* obligation to refuse enforcement once an award has been set aside by the seat court. Some regard the term "*may be refused*" as an indication that the enforcement court still has the *discretion* to enforce an award notwithstanding that it may have been set aside by the seat court.[126]

These divergent approaches are well-illustrated by the case of *Nikolay Viktorovich Maximov* v. *Open Joint Stock Company "Novolipetsky Metallurgichesky Kombinat"* ["**Maximov**"].[127] The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation issued an arbitral award for almost USD 300 million in favour of Mr. Maximov.[128] The award debtor, NMLK, applied to set aside the award in the Moscow court on the basis that two of the arbitrators had failed to disclose their connections to Mr. Maximov's expert witnesses. But the judge also based her decision on two other grounds which were not argued by the parties, in relation to the public policy of Russia and the non-arbitrability of the dispute.[129] Undeterred by the annulment at the seat court, Mr. Maximov sought enforcement of the award in Paris, Amsterdam and London.[130] The French courts concluded that, the fact that the award had been set aside by the Russian courts was not sufficient to refuse recognition in France; the award had been procured in accordance with the parties' agreed contractual method and it should, therefore, be recognised and enforced.[131] In contrast, the Dutch courts held that an award set aside at the seat can only be enforced in the Netherlands under exceptional circumstances, for e.g., if giving effect to the

123 Convention on the Recognition and Enforcement of Foreign Arbitral Awards Objectives, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [*hereinafter* "NYC"].

124 Albert Jan van den Berg, *Enforcement of Annulled Awards?*, 9(2) ICC BULL. 15 (1998) [*hereinafter* "Albert Jan van den Berg – Enforcement"].

125 Astro, [2013] SGCA 57, ¶¶ 76–77 (Sing.).

126 SIMON GREENBERG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE 66 (2011).

127 Nikolay Viktorovich Maximov v. Open Joint Stock Company (Novolipetsky Metallurgichesky Kombinat) [2017] EWHC (Comm.) 1911 (Eng.) [*hereinafter* "Maximov"].

128 *Id.* ¶ 1.

129 *Id.* ¶ 5.

130 *Id.* ¶ 10.

131 Mike McClure, *Enforcement of Arbitral Awards that have been Set Aside at the Seat: The Consistently Inconsistent Approach across Europe,* KLUWER ARB. BLOG (June 26, 2012), *available at* http://arbitrationblog.kluwerarbitration.com/2012/06/26/enforcement-of-arbitral-awards-that-have-been-set-aside-at-the-seat-the-consistently-inconsistent-approach-across-europe.

*annulment judgment* would violate Dutch public policy.[132] On the evidence before it, there were no such exceptional circumstances. A similar outcome was arrived at by the English court.[133] Mr. Maximov sought enforcement in London and argued that the Russian courts' setting aside judgments should not be recognised, as they were clearly biased. Enforcement was refused because there was no "*cogent evidence of bias*."[134]

### B. Territorialism and Delocalisation

The willingness of the French courts to enforce the annulled award, and the corresponding reluctance of the English and Dutch courts to do the same, broadly correspond to the two main schools of thought on this issue. "*Territorialism*" holds that arbitration is inextricably tied to the seat, the law of the seat exclusively regulates the arbitration, and so seat-court annulment kills the award for good.[135] It ceases to have legal existence,[136] making subsequent enforcement a legal impossibility.[137] As explained by the Singapore Court of Appeal in the *Astro* case referred to in earlier sections: "*the contemplated erga omnes effect of a successful application to set aside an award would generally lead to the conclusion that there is simply no award to enforce.*"[138]

In contrast, the "*delocalisation*" theory holds that the seat of the arbitration is chosen only for convenience.[139] Arbitrators do not derive their powers solely from the seat's laws, but from the sum of all the legal orders that recognise the validity of the arbitration agreement and the award.[140] Therefore, the decisions of the seat court have no bearing on the validity of the underlying award, and an enforcing court is free to decide whether to enforce an award based on its own domestic laws. The delocalisation theory is championed most famously by the French courts. In *Arab Repub. of Egypt* v. *Chromalloy Aeroservs., Inc.* ["**Chromalloy**"], the Paris *Cour d'Appel* succinctly summarised the position thus:[141]

> *"[…] Considering finally that the award rendered in Egypt was an international award which by definition was not integrated into the legal order of that country such that its existence continues despite its nullification and that its recognition in France is not contrary to international public policy."*

### C. Evaluating the Merits of Each Approach – No Satisfactory Solution?

#### *i. Delocalisation*

It may be argued that delocalisation is more consistent with the plain words of the NYC. The phrase "*may be refused*" suggests that an enforcing state retains the discretion to enforce an award even if it has been set aside by a competent authority of the seat. The French cases also rely on the

---

132 Marike R. P. Paulsson, *Enforcement of Annulled Awards: A Restatement for the New York Convention?*, KLUWER ARB. BLOG (Dec. 21, 2017), *available at* http://arbitrationblog.kluwerarbitration.com/2017/12/21/enforcement-annulled-awards-restatement-new-york-convention.

133 Maximov, [2017] EWHC (Comm.) 1911.

134 *Id.* ¶ 63.

135 GREENBERG, *supra* note 126; FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 3 (Emmanuel Gaillard & John Savage eds., 1999) [*hereinafter* "FOUCHARD, GAILLARD & GOLDMAN"].

136 Albert Jan van den Berg, *Consolidated Commentary on the Court Decisions Concerning the New York Convention*, 28 Y.B. COMM. ARB. 562, 650 (2003); Albert Jan van den Berg – Enforcement, *supra* note 124, at 15, 16.

137 Albert Jan van den Berg – Enforcement, *supra* note 125, at 15, 16.

138 Astro, [2013] SGCA 57, ¶ 77.

139 Jan Paulsson, *Arbitration in Three Dimensions*, 60(2) INT'L & COMP. L. Q. 291, 298 (2011).

140 Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV. 16, 18 (1999).

141 Arab Republic of Egypt v. Chromalloy Aero Services, Inc., (1997) 26 Y.B. COMM. ARB. 691 [*hereinafter* "Chromalloy"]; Emmanuel Gaillard, *id.* at 25.

Article VII "*more favourable rights*" provision to refer to its own domestic laws on the recognition and enforcement of arbitral awards.[142] It should be noted that the French approach may not work in every country; for e.g., in jurisdictions that have incorporated Article V(1)(e) of the NYC into their own domestic laws there would no longer be a "*more favourable right*" in domestic law.[143] Moreover, delocalisation better accords with parties' intentions. By electing to arbitrate their dispute rather than submitting to the jurisdiction of any particular court, parties can be taken to have intended for extra-curial adjudication of their dispute. The "*territorialist*" approach contradicts parties' intentions as it over-emphasises the seat court.

However, a major drawback of the "*delocalisation*" approach is that it may severely detract from the finality and certainty of the arbitral decision, because it leaves the door open for the same issues to be re-litigated across multiple jurisdictions. One commentator has referred to these as "*floating awards*" which cannot be set aside once and for all,[144] and which encourages forum shopping as unsuccessful claimants attempt to get multiple bites at the cherry. The high potential for conflicting decisions creates "*systemic uncertainty*",[145] which undermines the harmonisation objectives of the NYC and the Model Law, in turn leading to higher transaction costs for commercial parties.[146]

In practice, however, these concerns might be somewhat overstated. Despite the fear of indefinite re-litigation, parties are realistically only concerned with the enforcement of awards in jurisdictions where the respondent has sizeable assets.[147] Once those have been exhausted, there need not be any legitimate concerns that further enforcement actions will be taken in other jurisdictions.

As for the risk of multiple conflicting decisions, this could in part be mitigated by the doctrine of issue estoppel. Issue estoppel typically arises when a foreign court of competent jurisdiction has decided on a specific issue between the same parties, which subsequently comes before another court for review.[148] Where there is an identity of parties and facts, issue estoppel may apply such that the parties are bound by the findings of the first court that hears the matter.[149] However, in the arbitration context, a distinction is sometimes drawn between decisions on distinctly domestic issues, such as public policy and arbitrability of disputes, and those which have a more international character, such as the interpretation of agreements or treaties.[150] Issue estoppel is less likely to arise

142 *See*, *e.g.*, Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation, (1995) 20 Y.B. COMM. ARB. 663; Chromalloy, (1997) 26 Y.B. COMM. ARB. 691; Art. VII of the NYC, also referred to as the "more favourable right" provision, states that the provisions of the NYC do not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon. The French court relied on this provision to reason that the party seeking enforcement of the arbitral award could rely upon its own domestic arbitration law which does not list Art. V(1)(e) of the NYC as a ground for the refusal of enforcement.

143 *See*, *e.g.*, International Arbitration Act 2002, § 31(2)(f) (Sing.) [*hereinafter* "IAA"]; Indian Arbitration Act, § 48(1)(e); Arbitration Ordinance, (2011) Cap 609, § 87(1)(f) (H.K.).

144 Emmanuel Gaillard, *supra* note 140, at 40.

145 Sundaresh Menon, Chief Justice of Singapore, The role of the national courts of the seat in international arbitration, Keynote address at the 10th Annual International Conference of the Nani Palkhivala Arbitration Centre, New Delhi, ¶ 12 (Feb. 17, 2018) [*hereinafter* "Menon CJ's Keynote Address"].

146 Sundaresh Menon SC, *Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence*, SING. J. LEGAL STUD. 231, 243–244 (2013).

147 Emmanuel Gaillard, *supra* note 140, at 40.

148 Renato Nazzini, *Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context*, 66 AM. J. COMP. L. 603, 616 (2018).

149 *See, e.g.*, Mills v. Cooper [1967] 2 All ER 100 (Eng.).

150 Diag Human SE v. The Czech Republic [2014] EWHC 1639 (Comm.) (Eng.).

in the former situation, given that the domestic courts of a particular jurisdiction would be best placed to decide such matters. Nevertheless, the application of issue estoppel would serve to reduce the instances of conflicting decisions on the same issues. It however remains to be seen whether such a typically common law doctrine will gain widespread adoption and acceptance in the civil law jurisdictions.

*ii. Territorialism*

The "*territorialist*" response is that the seat court's exclusive supervisory jurisdiction over the award would be futile if that decision need not be recognised in other enforcement jurisdictions. Further, this would efface the distinction between setting aside and refusal of enforcement.[151] Territorialism is not inconsistent with parties' intentions because the parties have willingly submitted to the supervisory jurisdiction of the seat court by agreeing on the seat of the arbitration (or, in a case where the choice of seat cannot be gleaned from the arbitration agreement, submitted to the jurisdiction of the tribunal to decide on the seat).

The main concern that arises from the territorialist approach is that it accords too much deference to the seat court in relation to matters which should be in the purview of each State's domestic courts. From an enforcing court's perspective, it is difficult to see why an award which does not offend the public policy of the enforcing court should not be given effect to – simply because the seat court finds it objectionable by local standards.

A few arguments against territorialism may be made. *First*, an enforcing court should not be hamstrung by the decision of the seat court on the status of the award, since the enforcing court has a strong interest in reviewing the award (it being the place where assets are actually seized).[152] *Second*, it would undermine confidence in international arbitration if even local standards (in the seat), that are perceived as improper or objectionable by the international community,[153] must invariably be given effect to. This problem is illustrated by the case of *Yukos Capital SARL* v. *OJSC Rosneft Oil Company* ["**Yukos**"],[154] which involved a Russian-seated arbitration. The tribunal rendered four awards in favour of Yukos against Rosneft. Rosneft successfully applied to set aside the awards before the Moscow *Arbitrazh* court.[155] Yukos nevertheless sought enforcement of the awards in Netherlands and England. Both the Amsterdam Court of Appeal and the English High Court held that the decision of the Moscow *Arbitrazh* court, setting aside the awards "*was a result of a partial and dependent judicial process.*"[156] The English High Court added that to recognise such a decision would offend "*basic principles of honesty, natural justice and domestic concepts of public policy*."[157] The *Yukos* case, therefore, demonstrates that there may be circumstances where it would be in the interests of justice to recognise an award even if it has been set aside.

151 Astro, [2013] SGCA 57, ¶ 77.
152 Emmanuel Gaillard, *supra* note 140, at 45.
153 Daniel Ang, *Enforcement of Arbitral Awards Set Aside at the Seat of Arbitration: The Way Forward for Art. V(1)(e) in Singapore*, 9 SING. L. REV. – JURIS ILLUMINAE 1, 8 (2018).
154 Yukos Capital S.A.R.L. v. OJSC Rosneft Oil Co. [2014] EWHC (Comm.) 2188 (Eng.).
155 *Id.* ¶¶ 1–2.
156 *Id.* ¶ 7.
157 *Id.* ¶ 20.

### D. The Way Forward

Neither delocalisation nor territorialism presents a perfect approach. Delocalisation entirely disregards the decision of the seat court, generates uncertainty, and leads to wasted resources and costs due to re-litigation of a similar issue. On the other hand, strict territorialism unnecessarily restricts the capacity of an enforcement court to do justice under the right circumstances, as illustrated by the *Yukos* case.

The best way forward may be a middle path between the two approaches. Chief Justice Sundaresh Menon of the Supreme Court of Singapore, speaking extra-judicially at a conference in New Delhi, proposed what is essentially a two-step approach:[158]

1. The enforcing court should first decide whether it will recognise the seat court's annulment decision, by applying its own domestic rules on the recognition of foreign judgments. If the seat court's setting aside judgment is recognised, its decision should be respected, and enforcement should be refused.

2. If the foreign judgment is recognised, the next question is whether it raises an issue estoppel in the enforcement proceedings. If so, the seat court decision is the final word on that issue. Issue estoppel would likely arise where the seat court has made a decision on grounds with more "*transnational*" resonance, such as on the basis of procedural irregularities. Conversely, if the ground for setting aside is one that has a distinctly domestic flavour, the seat court's decision would not ordinarily be capable of founding an issue estoppel, and the enforcing court would be entitled to consider the matter afresh in accordance with its own domestic standards.

The grounds of setting aside under Article 34 of the Model Law that, in the authors' view, have greater "*transnational resonance*" are Article 34(2)(a)(ii) on improper notice or inability to present its case, Article 34(2)(a)(iii) on disputes outside the scope of submission to arbitration and Article 34(2)(a)(iv) on the tribunal's composition not according with the parties' agreement or *lex arbitri*. Conversely, the grounds under Article 34(2)(b) which involve arbitrability of disputes and public policy would be grounds for setting aside with a distinctly domestic flavour.

This proposed approach accords due deference to the decision of the seat court, in line with the "*territorialist*" approach, while also ensuring that the enforcement court retains discretion on matters involving its own domestic public policy, in line with the "*delocalisation*" theory. Such an approach also ensures that there is finality *only* when the decision of the seat court should properly be regarded as the final word on the matter. This would generally be in situations where the requirements for recognition and enforcement of a foreign judgment are met. For example, if a decision of the seat court is one that has not been arrived at through proper judicial processes, it would not be in the interest of parties for that decision to be accorded any sort of finality. Indeed, a foreign judgment which has been tainted by a breach of natural justice or unfairness would not likely be recognised in a foreign jurisdiction. In relation to issues of public policy, it should be each State's domestic courts which deliver the conclusive determination. Therefore, an enforcing court is unlikely to enforce a foreign judgment which has been decided purely on the basis of the domestic public policy of that jurisdiction. Ultimately, there is no utility to be derived from finality

158 Menon CJ's Keynote Address, *supra* note 145, ¶ 23.

simply for the sake of finality, and courts should be afforded the flexibility to consider afresh whether to enforce a foreign arbitral award notwithstanding that it has been annulled in the seat court in the appropriate situations.

The effectiveness of Menon CJ's proposed approach is, in the authors' view, bolstered by the Convention of February 01, 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters ["**Hague Convention**"], which was adopted by the Hague Conference on Private International Law on July 02, 2019.[159] The Hague Convention establishes common provisions on mutual recognition and enforcement of judicial decisions and leads to greater harmonisation and convergence in the recognition rules applied by each country. The Hague Conference presently has 83 members, including both civil and common law jurisdictions.

### E. Conclusion on Problem 4

The extent to which a seat court's decision on the status of an award should be conclusive has long been uncertain. Pragmatists may contend that there is an incentive for national jurisdictions to take differing positions on this issue, precisely to market their attractiveness as an enforcement jurisdiction. Nevertheless, the authors believe that the more principled way forward is to tread the middle ground between pure territorialism and delocalisation – a unified approach which better aligns itself to the objectives of NYC.

## VI. Problem 5: When can Enforcement be Refused under Article V(1)(d) of the NYC?

In our discussion of Problem 4 above, we touched on the enforcement court's residual discretion to allow enforcement even if a ground for refusal under Article V of the NYC has been made out, pursuant to the permissive language of Article V.[160] Following from the discretionary nature of Article V, the approach varies by jurisdiction. In the final part of this article, we examine the approaches taken *vis-à-vis* Article V(1)(d) of the NYC, which states that recognition and enforcement of an award may be refused if:

> "*The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.*"[161]

Specifically, some enforcement courts have read in a requirement for the award debtor to show that there has been a *serious violation* of the parties' agreement, which in turn led to the award debtor suffering *material prejudice* (the material prejudice test) before enforcement will be refused. In contrast, other courts have held that *any* deviation from the parties' agreement, no matter how slight (the minimal deviation test), would warrant refusal of enforcement. These approaches have been discussed below.

### A. The Material Prejudice Test

One example of an enforcement court which has applied the material prejudice test is the Singapore High Court in *Sanum Investments Limited* v. *ST Group Co, Ltd* ["**Sanum Investments**

---

159 The Final Act of the Hague Convention was signed and adopted by the Hague Conference on Private International Law on July 2, 2019, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (July 8, 2019) *available at* https://www.hcch.net/en/news-archive/details/?varevent=687.

160 BORN, *supra* note 6, §§ 22.02 [A], 25.11 [A], and 26.03 [B][6].

161 NYC, *supra* note 123, art. V(1)(d).

**(HC)**"].[162] Two agreements were entered into between the parties: (1) a Master Agreement containing a multi-tiered dispute resolution clause providing for (amongst others) mediation followed by arbitration "*using an internationally recognised mediation/arbitration Company in Macau*",[163] and (2) a Participation Agreement entered into in conjunction with the Master Agreement, which provided for arbitration at the SIAC before a three-member tribunal.[164] The claimant commenced proceedings before a three-member tribunal seated in Singapore. Although the respondents objected and did not participate, the tribunal was satisfied that the dispute between the parties fell under the Participation Agreement, and eventually rendered an award in favour of the claimant.[165] The respondents sought to refuse enforcement relying on, amongst others, Article 36(1)(a)(iv) of the Model Law, which is the equivalent of Article V(1)(d) of the NYC.[166]

Disagreeing with the tribunal, the court concluded that the underlying dispute was governed solely by the Master Agreement, and the proper seat of the arbitration was Macau.[167] The appointment of a three-member tribunal was also not in accordance with the Master Agreement, because the Master Agreement was silent on this issue and the default position would be that prescribed by the chosen institutional rules (i.e., the SIAC rules which provided for a sole arbitrator).[168] Nonetheless, enforcement was not refused. Since the respondents had not produced any evidence of prejudice arising out of what the court characterised to be *procedural* irregularities, they had failed to discharge their burden of proof.[169] On appeal, the Singapore Court of Appeal accepted that *"lack of prejudice is not relevant to a jurisdictional challenge but would be relevant to a procedural challenge"*.[170] The Singapore Court of Appeal explained that such differing treatment of procedural and jurisdictional challenges is justified because of the need to avoid misusing the applicable procedural provisions as a basis for denying the award on the ground that there was a minor or incidental breach of an unimportant term in the arbitration agreement.[171] However, the Court of Appeal overturned the decision of the court below and held that it was not necessary for a party resisting enforcement of an award on the basis of a *wrongly seated arbitration* to demonstrate actual prejudice arising from the wrong seat.[172]

The material prejudice test has also been adopted in a line of cases from the United States District Courts. In *Compagnie des Bauxites de Guinee* v. *Hammermills, Inc.* ["**Hammermills**"],[173] the award debtor attempted to resist enforcement on the ground that the tribunal had breached the agreed arbitral procedure by inserting into the award the amount of legal costs to be assessed against a party after the draft award had been approved by the ICC International Court of Arbitration. The District Court rejected this contention, and held that the award should be set aside "*only if such violation worked substantial prejudice to the complaining party.*"[174] The test has also been adopted in the

162 Sanum Investments Limited v. ST Group Co., Ltd. & Ors., [2018] SGHC 141 (Sing.).
163 *Id.* ¶ 23.
164 *Id.* ¶ 24.
165 *Id.* ¶ 21.
166 *Id.* ¶ 111.
167 *Id.* ¶ 109.
168 *Id.* ¶ 110.
169 *Id.* ¶ 114.
170 *Id.* ¶ 93.
171 *Id.* ¶ 94.
172 *Id.* ¶ 103.
173 Compagnie des Bauxites de Guinee v. Hammermills, Inc., 724 F.2d 369 (1983) (U.S.).
174 *Id.* at 17.

District Court decision in *Karaha Bodas Company, LLC* v *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*.[175]

B. The Slight Deviation Test

Other enforcement courts have adhered strictly to the parties' agreement and refused enforcement without requiring the award debtor to show serious breach of material prejudice.

In *Polimaster Ltd.* v. *RAE Systems, Inc.* ["**Polimaster**"],[176] the dispute resolution clause in the parties' agreement required the settlement of disputes by negotiation, and failing that, "*by means of arbitration at the defendant's side*," which the parties agreed referred to the geographical location of the defendant's place of business. The claimant in the arbitration correctly commenced arbitration against the respondent in California (the respondent's place of business), with the reservation that no counterclaims could be filed because, pursuant to the dispute resolution clause, counterclaims against the claimant could only have been filed in Belarus (the claimant's place of business). But the respondent did end up making several counterclaims, which the arbitrator declined to dismiss because it would be contrary to "*notions of fairness, judicial economy and efficiency*" to "*[p]rosecut[e] a claim with affirmative defences in one venue while simultaneously prosecuting counterclaims almost identical to the affirmative defences in another [venue]*."[177] The arbitrator dismissed the claims and allowed the counterclaim. The United States Court of Appeals for the Ninth Circuit, adopting a strict construction of the dispute resolution clause, held that the counterclaims should have been brought against the claimant in Belarus. The court "*must enforce the parties' agreement according to its terms, even if the result is inefficient.*"[178]

The approach taken by the court in *Polimaster* clearly prioritises party autonomy. Not only was the court unconcerned about whether the appellants had suffered material prejudice, it also disregarded the efficiency gains of having the entire matter heard in the same set of proceedings. We note here that the deviation from the parties' agreement in this case was in relation to the choice of the seat.

In the Hong Kong case of *China Nanhai Oil Joint Service Corporation Shenzhen Branch* v. *Gee Tai Holdings Co Ltd* ["**China Nanhai Oil**"],[179] refusal of enforcement was sought on the basis that parties had selected arbitrators from the Shenzhen list of arbitrators when the arbitration agreement specified for selection from the *Beijing* list. The Supreme Court of Hong Kong refused enforcement on this ground because the arbitrators technically did not have jurisdiction to decide the dispute,[180] though it should be noted that enforcement was ultimately allowed because the party objecting to enforcement had taken part in the arbitration despite being aware that the arbitrators were chosen from the wrong list.[181]

175 Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 190 F. Supp. 2d 936, [2002] (U.S.), *cited in* 27 Y.B. COMM. ARB. 814.

176 Polimaster Ltd. v. RAE Systems, Inc., 623 F.3d 832 (9th Cir. 2010) (U.S.).

177 *Id.* at 832, 835.

178 *Id.* at 832, 841.

179 China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd., [1995] 2 H.K.L.R. 215. (H.C.) (H.K.)

180 *Id.* ¶ 36.

181 *Id.* ¶ 49.

Another example of a case where the court refused enforcement of an award due to the improper composition of the arbitral tribunal was *Encyclopaedia Universalis S.A.* v. *Encyclopaedia Britannica Inc.* ["**Universalis**"].[182] The clause provided that, amongst others, if the two arbitrators chosen by the parties could not reach consensus on a third arbitrator, the third arbitrator would be appointed by the Tribunal of Commerce of the Seine. The appellant prematurely requested the Tribunal of Commerce of the Seine to appoint a third arbitrator.[183] It was held that the premature appointment of the third arbitrator "*irremediably spoiled the arbitration process*."[184] The manner in which the third arbitrator was to be appointed was "*more than a trivial matter of form. Article V(1)(d) of the New York Convention itself suggests the importance of the arbitral composition, as failure to comport with an agreement's requirements for how arbitrators are selected [was] one of only seven grounds for refusing to enforce an arbitral award.*"[185] As the court noted:

> *"As to the complaint that this exalts form over substance, at the end of the day, we are left with the fact that the parties explicitly settled on a form and the NYC requires that their commitment be respected."*[186]

C. Reconciling the Authorities and a Way Forward

The material prejudice test approach is in line with the pro-enforcement aims of the NYC. By preventing relatively trivial deviations from the agreed arbitral procedure from resulting in the non-recognition of an award,[187] it, in the authors' view, prevents Article V(1)(d) from being used as a hair-trigger for non-recognition. The pro-enforcement approach in this regard reflects how procedural matters are generally subject to minimal curial intervention in arbitration.[188] On the other hand, the material prejudice test view has been criticised for detracting from party autonomy, because deviations from parties' agreed procedure may end up being disregarded more frequently. Party autonomy is yet another underlying principle of the NYC, as reflected in how the NYC does away with the previous requirement in Article 1(c) of the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards that there be a departure from procedure as set out in *both* the parties' agreement *and* the *lex arbitri*. Against this, the converse would apply to the slight deviation test.

Having regard to the pros and cons of each test, we contend that the material prejudice test should be confined to cases where the alleged non-compliance is in relation to the parties' agreement on procedure. The slight deviation test should apply to jurisdictional defects and errors pertaining to the seat, in respect of which refusal of enforcement should be more readily granted. This would strike the appropriate balance between party autonomy and ensuring that awards are not refused enforcement too readily. As George A. Bermann argues, the procedural/jurisdictional distinction is significant not only because the policy of minimal curial intervention does not apply to jurisdictional defects, but also because it would be practically very difficult to affirmatively demonstrate prejudice for jurisdictional defects.[189] It is possible to determine "*what would have been*" for procedural errors that are discrete and contained events, but not so where the deviation from

182 Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F.3d 85 (2nd Cir. 2005) (U.S.).
183 *Id.* at 88.
184 *Id.* at 91.
185 *Id.*
186 *Id.*
187 Holding Tusculum BV v. Louis Dreyfus Holding SAS [2008] Q.C.C.S. 5904 (Can. Que.).
188 Born, *supra* note 6, at 3562.
189 George A. Bermann, *Honouring the Parties' Intent*, 1 ICC BULL. 13 (2019).

the agreement relates to tribunal composition (which depends on human interactions and dynamics).[190] Moreover, where the defect pertains to the selection of the seat, the loss of the right to seek annulment of the award that would eventually be rendered in a competent court of the agreed seat is *inherently* prejudicial.[191]

This approach would reconcile the cases mentioned above: in *Hammermills*, the material prejudice test applied because the defect was procedural. In *Polimaster*, the slight deviation test applied because the problem pertained to the seat, while in both *China Nanhai Oil* and *Encyclopaedia Universalis*, the slight deviation test applied because the alleged defect was with the composition of the tribunal. Indeed, none of the cases where awards were enforced, (notwithstanding some deviation from the parties' agreement in relation to procedural issues) involved deviations from the chosen seat, except the *Sanum Investments (HC)* case, which has been overruled by the Singapore Court of Appeal.

### D. Conclusion on Problem 5

It is acknowledged that the line between a procedural and jurisdictional defect may not always be clear. For example, if the deviation from the parties' choice of seat affects little more than the procedural rules that are applied, should this still be regarded as a jurisdictional error when the effect is relatively trivial? Be that as it may, the authors think that the application of the material prejudice test in cases of procedural defects will ensure that arbitral awards are not set aside for trivial reasons, thereby maintaining the legitimacy and effectiveness of international arbitration.

## VII. Conclusion

Hence in answer to the questions posed at the beginning:

1. Appeals to a national court may be permitted under statute, though these rarely succeed in practice. Appeals to an appellate tribunal are likely to be permitted. However, appeals from a national court to a tribunal should not be allowed.

2. Failure to request the seat court to determine the tribunal's jurisdiction under Article 16(3) of the Model Law should generally preclude later attempts to set aside the award on the same jurisdictional ground, unless the Article 16(3) mechanism is not reasonably available. But the failure to invoke Article 16(3) should not preclude reliance on the same ground to resist enforcement.

3. AEIs are difficult to obtain. The alternative remedies of breach of agreement as a defence to enforcement and damages for breach of arbitration agreement have their own limitations. Therefore, a party's best bet is to obtain a stay or an ASI.

4. A middle path should be struck between delocalisation and territorialism. The enforcing court should first decide whether it will recognise the seat court's annulment decision. If recognition is denied, it would not be constrained by the decision. If the foreign judgment is recognised, the next question is whether it raises an issue estoppel in the enforcement proceedings. If so, the seat court's decision has the final say.

---

190 *Id.*

191 Bermann, *supra* note 189, at 14.

5. The material prejudice test should be confined to cases where the alleged non-compliance with the parties' agreement is a procedural one. The slight deviation test should apply to jurisdictional defects and errors pertaining to the seat, in respect of which refusal of enforcement should be more readily granted.

Extrapolating from these answers, although jurisdictions are sometimes identified as "*pro-arbitration*" or "*arbitration-friendly*," there is, in reality no jurisdiction that seeks to enforce foreign arbitral awards regardless of the circumstances of the particular case. While party autonomy can be given great weight and underpin a general stance of minimal curial intervention, there are always limits. For e.g., the Singapore courts have adopted a more sympathetic stance towards procedural breaches, by accepting the material prejudice test for refusing enforcement of an award under Article V(1)(d) of the NYC. This promotes the enforcement and recognition of awards, and bolsters the legitimacy and efficacy of international arbitration as a dispute resolution mechanism. But in the same vein, the Singapore courts have indicated that if an award has been set aside at the seat, it will accord primacy to the judgment of the seat court and refuse enforcement of the award. Other examples of approaches taken by the Singapore courts which are not, at first glance, regarded as strictly pro-arbitration include for example, adopting a narrow approach when deciding whether to grant an AEI even if there has been a breach of an agreement to arbitrate.

The authors are therefore of the view that to label a jurisdiction as being pro or anti-arbitration is a false dichotomy. Even a court which aims to be a "*promoter*" of arbitration has an equally important role as a "*regulator*" of the arbitral process. Indeed, for arbitration to flourish, it is of paramount importance for national courts to create laws which are fair and just, even if it means that party autonomy has to temporarily take a backseat.

Much like zombies, these perennial questions – and the broader controversy over the interaction between courts and tribunals – never die. And exactly like zombies, they gnaw at the brain. The debate will continue to rage. But in the meantime, we are pretty sure that the arbitration fraternity will keep calm and carry on.