NAVIGATING THE ROUGH SEAS OF ENFORCEMENT

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Introduction

1 The occasion of this annual address is an important ritual for those in the maritime community who have an interest or concern in arbitration, and indeed for the broader arbitration community. I wish to thank the AMTAC committee, and in particular its Chair, Greg Nell SC, for the invitation and for entrusting me with the responsibility of delivering the address this year.

2 Arbitration has proven to be a highly attractive means of resolving international commercial disputes. A significant component of that attraction is the relative ease with which an award creditor can enforce an award, should recourse to enforcement be necessary. The statistics that are available suggest that most award debtors pay up without any need for court involvement.[2] But awards are not self-executing, and sometimes parties can encounter, as my title today suggests, some challenges in enforcing arbitration awards.

3 It only occurred to me some time after I had submitted the title that it might be misconstrued as indicating that my message is that enforcement of arbitral awards is generally difficult or challenging; or, worse still, that there is some change afoot in the feted pro-enforcement stance of Australian law and Australian courts. Naturally, the stance that courts take comes from the governing legislation, including the pro-enforcement statements in the objects of the ***International Arbitration Act*** *1974*, the international context of that legislation and the precedential and persuasive value of previous decisions here and abroad. That stance is developed on a case by case, incremental, basis by individual judges acting independently in accordance with their oaths of office. Contrary to what seems to be the implication from some commentary, there is no discussion amongst judges where it is decided that we will be pro-enforcement, or anti-enforcement, or to take any other policy (or other) position.

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[*] Judge of the Federal Court of Australia. I gratefully acknowledge the considerable assistance of my associate, Geoffrey Zhu, in the preparation of this paper.

[2] Blackaby N, et al, *Redfern and Hunter on International Arbitration* (6th ed, OUP, 2015) 605–6 [11.02] n 3.

4 The explanation for the title is rather more prosaic; it doesn't reflect any shift in approach. It is simply a poor attempt to give a maritime flavour to the true topic, which is "some thoughts about the enforcement of arbitral awards". In particular, I propose to explore the circumstances in which a court called upon to enforce an arbitral award will disregard, or follow, a decision of the court at the arbitral seat.

5 What I am seeking to identify is when the enforcing court will follow the court at the seat, and when it will not? Is there some guiding theory about the nature of arbitration or arbitration awards which can help us better predict what courts will do, or that can guide courts, in these circumstances?

Hub Street

Introduction

6 A convenient place to start is the recent decision of the Full Court in ***Hub Street*** *Equipment Pty Ltd v Energy City Qatar Holding Company*,[3] in which I was a member of the Court with Chief Justice Allsop and Justice Middleton.

7 The parties entered into a contract pursuant to which Hub, an Australian company, was to provide Energy City, a Qatari company, with street lighting and other street furniture in Qatar. The contract was later terminated by Energy City which then sought to recover from Hub an advance payment that had been made.

8 The contract provided, in a familiar way, for the appointment of a three-member arbitral tribunal, one by each party and the two so appointed to appoint the third. It was provided that that process would commence by notice to start arbitration proceedings and that within 45 days each party was to make their appointment. If a third member could not be agreed, the parties could then refer the matter of appointment to the Qatari courts. The seat of the arbitration was Qatar.

9 Energy City failed to give Hub 45 days to appoint an arbitrator. Instead, it obtained orders from the Qatari court for the appointment of three arbitrators. Notice of the court proceeding was sent not to the Chippendale address nominated by Hub but rather to a company in Qatar with

[3] [2021] FCAFC 110; (2021) 153 ACSR 84.

which Hub had done business. That notice was brought to the attention of Hub's directors prior to the court hearing but they elected not to participate.

10 Despite numerous notices of the arbitration being sent to Hub's nominated address, it took no part in the arbitral proceeding. In due course, the tribunal issued its award requiring Hub to pay Energy City some USD 1 million.

11 Energy City then sought to enforce the award in Australia, which Hub resisted on numerous bases. These included that the composition of the tribunal, having been appointed by the Court, was not in accordance with the agreement of the parties. That ground is set out at paragraph (b) of Art V(1) of the New York Convention and is enacted domestically at paragraph (e) of s 8(5) of the *International Arbitration Act*.[4] It is the only ground that is relevant for present purposes.

12 The primary judge rejected Hub's ground for resisting enforcement and entered judgment for Energy City. Her Honour also held that had she concluded that the ground was made out, she would in any event have exercised her discretion to enforce the award because Hub had received notice of the court and tribunal hearings and had elected not to participate. On that basis it was reasoned that it was not unfair on Hub to enforce the award against it.

13 Hub appealed to the Full Court. A few days before judgment was due to be handed down, the parties settled. Nonetheless, we delivered judgment because of the wider importance of the issues it deals with.

14 We found that the composition of the tribunal was not in accordance with the agreement of the parties, and decided not to enforce the award thereby allowing the appeal. We reached that conclusion notwithstanding that the Qatari Court had itself made the orders appointing the arbitral tribunal. We held that the Qatari Court was wrongly advised or misunderstood that Energy City had notified Hub of its appointment of an arbitrator and Hub had failed to appoint one. That misunderstanding was the basis for its conclusion that the parties had failed to agree upon a tribunal, thereby enlivening its powers to appoint one.

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[4] The same ground to resist enforcement is available in the UNICTRAL Model Law (Art 36(1)(a)(iv)), although it did not apply because the award was a foreign award, i.e., made other than in Australia.

Discussion

15 On one view, the decision may be perceived as constituting a reining in of what has been described as the "pro-enforcement bias" of the New York Convention. However, that would be to misconstrue what the "pro-enforcement bias" of the Convention actually consists of.

16 As we explained in *Hub Street*,[5] the "pro-enforcement bias" of the Convention is reflected in the simplified procedure for enforcing foreign awards while also limiting the grounds upon which the enforcement of such awards may be resisted, and the placing of the onus of establishing those grounds on the party resisting enforcement. Lord Mance JSC in ***Dallah*** *v Pakistan*[6] in the Supreme Court of the United Kingdom evocatively expressed the matter as follows:

> The scheme of the New York Convention … may give limited prima facie credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in article V(1)… But that is as far as it goes in law. [The award creditor] starts with advantage of service, it does not also start 15 or 30 love up.

(The hearing in the Supreme Court took place during the second week of Wimbledon in 2010. That may explain the tennis reference.)[7]

17 Perhaps the point might be put like this: the pro-enforcement bias, such as it is, is in the law itself. The court is to interpret and apply that law, but it does not itself have any bias in favour of or against enforcement. This is explained in *Hub Street* in the discussion of the influential Victorian Court of Appeal decision in 2011, *IMC Aviation*.[8]

18 Any complaint about the commercial consequences of the decision for Energy City loses much force when it is appreciated that one of the fundamental tenets of arbitration is to give primacy to the agreement of the parties. That agreement prescribed a procedure for the nomination, in the first instance, by each party of one member of the tribunal. Contrary to the arbitration agreement, that procedure was not invoked by Energy City.

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[5] At [64].

[6] ***Dallah*** *Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2011] 1 AC 763; [2011] 1 All ER 485 at [30].

[7] The hearing took place on 28-30 June 2010. The Wimbledon Championships that year was held on 21 June to 4 July.

[8] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; (2011) 38 VR 303; (2011) 282 ALR 717, discussed in *Hub Street* at [38].

19 That primacy should be given to the parties' agreement is provided by the words of Art V(1)(d), i.e.:

> Recognition and enforcement of the 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 …

20 That primacy is also reflected in a number of curial decisions around the world. In the context of the arbitral procedures limb of Art V(1)(d), Richard Posner, sitting as Chief Judge of the US Seventh Circuit and writing for the Court, made the following colourful remarks:

> short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.[9]

21 In fact, so important is the agreement of the parties that it may override mandatory laws of the arbitral seat. As the Federal Supreme Court of Switzerland, as the enforcing court, held in a charterparty dispute, *Müller v Bergesen* in 1982:

> by virtue of the agreement of the parties, even the mandatory rules of procedure of a State also can be declared inapplicable and they can be substituted with the parties' own rules.[10]

22 The law applicable to the arbitral procedure, New York State law, required a court's confirmation of an award within one year of it being made. It was held that the parties' agreement that the award could be enforced by any competent court and would be final and binding for the parties anywhere in the world meant that it became binding upon its rendition and did not require confirmation under the law at the seat.[11]

23 Indeed, the drafting history of the Convention confirms that primacy. The United Nations Economic and Social Council's *Report of the Committee on the Enforcement of International Arbitral Awards* in 1955 observed,[12] in relation to a draft article that became Art V(1)(d), that it was the most far-reaching departure from the earlier Geneva Convention which prescribed

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[9] *Baravati v Josephthal, Lyon & Ross, Inc*, (1994) 28 F 3d 704 at 709 (7th Cir).

[10] *Müller v Bergesen* (Tribunal federal Switzerland, 26 February 1982) as reported in *Yearbook of Commercial Arbitration 1984 – Vol IX* (Kluwer Law International) 437 at 439.

[11] Ibid at 440.

[12] At [43].

that an award must have been made in accordance with the agreement of the parties *and* in conformity with the law governing the arbitration procedure.

24 In the specific context of the appointment of arbitrators, and discussed in *Hub Street*, the case of *Encyclopaedia Universalis v Encyclopaedia Britannica* is instructive.[13] In that 2005 case, the clause providing for the composition of the arbitral tribunal was relevantly the same as that in the *Hub Street* case. The parties to the dispute had each nominated one member. In due course, one of them wrote to the President of the Tribunal de Commerce of Luxembourg – that is, the Commercial Court of Luxembourg – stating that he had failed to agree with the other arbitrator as to a third arbitrator and requested the Court to appoint one pursuant to the agreement of the parties. The Presiding Judge acceded to that request and ordered that the arbitration proceed with the third member appointed by the Court. However, the assertion that the two arbitrators failed to agree was incorrect; there was no evidence that they had even attempted to agree upon a third before the request to the Court was made. In the circumstances, the US District Court refused to enforce the resulting arbitral award, which decision was affirmed by the Second Circuit. It has subsequently been cited with approval in the Ninth Circuit and the Tenth Circuit.[14]

25 In coming to its decision, the Second Circuit acknowledged that there is a strong public policy in favour of international arbitration but added that it had never held that courts must overlook agreed-upon arbitral procedures in deference to that policy.[15] It held that the appointment of the third arbitrator was premature, that the premature appointment "irremediably spoiled the arbitration process", and that the issue of appointment was "more than a trivial matter of form".[16]

26 I pause at this stage to note that, although it is not apparent in the published opinions of the Second Circuit and the District Court below,[17] a review of the pleadings filed at first instance and in the briefs filed in the appeal make it clear that the arbitration in fact took place in

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[13] *Encyclopaedia Universalis SA v Encyclopaedia Britannica Inc (US)* (2005) 403 F 3d 85 (2nd Cir) (***Encyclopaedia Universalis 2Cir***).

[14] See, respectively, *Polimaster Ltd v RAE Systems, Inc* (2010) 623 F 3d 832 at 836, 841 (9th Cir); *CEEG (Shanghai) Solar Science & Technology Co Ltd v LUMOS LLC* (2016) 829 F 3d 1201 at 1206, 1207 (10th Cir).

[15] *Encyclopaedia Universalis 2Cir* at 91 per Judge Parker.

[16] Ibid.

[17] *Encyclopaedia Universalis SA v Encyclopaedia Britannica Inc* (2003) WL 22881820 (SDNY).

Luxembourg as the seat.[18] It was, like *Hub Street*, a case where a court at the arbitral seat had made orders appointing an arbitrator and ordering that the arbitration proceed, only for an enforcing court to refuse recognition on the basis of appointment contrary to the parties' agreement.

27 It is in holding that those decisions of courts at the seat were, in effect, premature that the Full Court and the Second Circuit departed from decisions of the court at the arbitral seat. However, those departures are not in direct conflict with the decisions of courts at the arbitral seat – these are not paradigm cases of an enforcing court not following the approval or annulment of an award by the court at the seat. Rather, what they do is uphold the fundamental basis to the jurisdiction of the arbitral panel as the agreement of the parties over the supervening imposition of a panel by the court contrary to such agreement.

Discretion to enforce

28 A survey of cases around the world reveals that there are more direct cases of conflict between decisions of a court at the arbitral seat and an enforcing court. Before turning to those cases, one of the issues that the Full Court also considered in *Hub Street* was whether, notwithstanding finding that Hub had made out its ground for resisting enforcement, there was nonetheless a discretion to enforce the award.

29 The genesis of the argument for the existence of the discretion comes from the prefatory words to s 8(5) of the *International Arbitration Act*, Art V of the New York Convention and Art 36 of the Model Law, which provide that where one of the limited grounds for resisting enforcement has been made out, the court *may* refuse to enforce the award. Refusal is not expressed to be mandatory, leaving open the possibility that the Court *may* also enforce the award. The courts of virtually every jurisdiction recognise that there is such a discretion. This is to be contrasted to mandatory enforcement, consistent with what has been described as the pro-enforcement bias of the Convention, in circumstances where one of the limited grounds has not been made out.

30 In *Hub Street* we declined to exercise the discretion to enforce. That is because the composition of an arbitral tribunal is not, as the Second Circuit has held, a trivial matter of form; it is

[18] Relevantly, references can be found at: Complaint dated 13 June 2003 at [46] and [48]; Declaration of François Tripet dated 29 July 2003 at [25] and [48]; Brief for Plaintiff-Appellant and Special Appendix dated 8 April 2004 at 5.

fundamental to the structural integrity of the arbitration and it strikes at the very heart of the tribunal's jurisdiction.

Enforcement of awards set aside at the arbitral seat

31 The existence of the discretion and the circumstances in which it should be exercised are more contentious in respect of an alternative ground for resisting enforcement. I have in mind the ground that is set out under Art V(1)(e) of the Convention, which is implemented in domestic law as s 8(5)(f) of the International Arbitration Act. That ground for refusal of enforcement is that:

> the award has not yet become binding on the parties to the award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that [the] award was made.[19]

32 The part of that provision I wish to focus on is the second disjunct – that is, where the award has been set aside or suspended by a court at the arbitral seat. The interesting question is whether a discretion to enforce the award exists in such a case and, if so, when it should be exercised where a discretionary decision to enforce an award would be in direct conflict with the decision of the overseas court that had set it aside.

33 One might think that, once an award has been set aside, there will be nothing left for an enforcing court to enforce, let alone any residual discretion to enforce. That is because, ex hypothesi, the legal basis has fallen away – *ex nihilo nil fit*; that is, from nothing comes nothing. As the Hong Kong Court of Appeal remarked in *Astro Nusantara v PT Ayunda*:[20]

> it will indeed be remarkable if, despite the Singapore Court of Appeal judgment [being the court at the arbitral seat] on the invalidity of the arbitration awards, the award creditor will still be able to enforce a judgment here based on the same arbitration awards that were made without jurisdiction.[21]

34 Despite it being said to be "remarkable", in the procedural history that followed, both the Hong Kong Court of First Instance[22] and the Hong Kong Court of Appeal[23] would have denied an extension of time to challenge the enforcement of an award which had been determined by the

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[19] The underlined text shows alterations to the text of the Convention as enacted in the Act. The Model Law provision is Art 36(1)(a)(v).

[20] *Astro Nusantara Invernational BV v PT Ayunda Prima Mitra* [2014] HKCA 700.

[21] Ibid at [13] per Hon Cheung JA (for the Court).

[22] *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2015] HKCFI 274.

[23] *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2016] HKCA 595.

Singapore Court of Appeal to be made without jurisdiction on the basis that the award debtors were not parties to the arbitration agreement.[24] Those decisions were ultimately reversed by the Hong Kong Court of Final Appeal, which granted the award debtors an extension of time.[25] But the First Instance and Appeal decisions might well be characterised as instances of enforcing courts giving effect to an award that had been set aside at the arbitral seat.

Three theories

35 Whether we regard these events as remarkable or not depends upon our fundamental theoretical views on international arbitration and, in particular, the question what gives an award its validity. Professor Emmanuel Gaillard, in his *Legal Theory of International Arbitration*,[26] observed that the views practitioners hold about these questions of theory are rarely articulated,[27] but that those views, whatever they are, hold real world consequences.[28] He observed that there are, broadly, three views on this fundamental question.

36 The first, which may be termed the monolocal view, has it that arbitration is anchored to a single national legal order – the seat of arbitration – such that an award's validity stems exclusively from the law of the arbitral seat.[29] On this positivist view, consistent with the jurisprudence of Hans Kelsen and HLA Hart, the principle of *ex nihilo nil fit* makes sense. Courts at the arbitral seat have the only say on the validity of an award and once annulled, there is nothing for an enforcing court to act on – the "basic norm" or the "rule of recognition" is to be found in the law of the seat.

37 On this view, arbitration may be seen as a kind of "annex, appendix or poor relation to court proceedings". That description was given by Lord Wilberforce – a description which he personally rejected but accepted was a view that had historically been taken by English law.[30] It is perhaps the most commonly held view, especially in the common law world – even if only

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[24] *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57; [2014] 1 SLR 372.

[25] *PT First Media TBK v Astro Nusantara International BV* [2018] HKCFA 12; (2018) 21 HKCFAR 118; [2018] 3 HKC 458.

[26] Gaillard E, *Legal Theory of International Arbitration* (Martinus Nijhoff, 2010).

[27] Ibid at [1].

[28] See generally ibid Ch 2.

[29] Gaillard E, above n 26 at [11]ff.

[30] See ***Lesotho*** *Highlands Development Authority v Impregilo SpA* [2005] UKHL 43; [2006] 1 AC 221; [2005] 2 Lloyd's Rep 310; [2005] 3 All ER 789 at [18] where Lord Steyn quotes Lord Wilberforce's remarks from Hansard.

tacitly or subconsciously. The essential point is that the ability of the parties even to select a law to apply to their contract, and the authority of the arbitrator to make a legally effective decision, depends on the law, and ultimately the courts, of the seat. Dr FA Mann and Professor Roy Goode have also espoused this view.[31]

38 The second view, which Gaillard calls the multilocal or Westphalian theory, is that an award's validity is grounded in a number of different systems of law. Consistent with the Westphalian model of state sovereignty in international law, each state has exclusive sovereignty and is protected from interference by others. It is the systems of law that are willing, under certain conditions, to recognise the effectiveness of the award, or the systems of law of the countries where enforcement is sought, that are implicated.[32] On this view, recognition of the award is what retrospectively validates the entire process and the law of the seat is just one system of law among others, no longer elevated to the status of having the exclusive say on the validity of an award.[33] This is still a strict legal positivist view; it's just that the source of the norm is not necessarily located in one sovereign state – it may be in several and is in particular in the state in which enforcement is sought.

39 Anselmo Reyes has observed that arbitrators who subscribe to the multilocal view might see themselves as under a duty to make all reasonable effort to produce an award that is enforceable in a state in which the ultimate award creditor might seek enforcement.[34] From a user perspective, it is trite to observe, as Lord Mance JSC did in *Dallah*, that what matters to both parties is the enforceability of the award in the country where enforcement is likely to be sought.[35]

40 The final view, which is that preferred by Professor Gaillard, is that the validity of an award is grounded in what can be called an "arbitral legal order", which legal order is transnational and has its own norms.[36] One of the essential differences between this view and the Westphalian

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[31] Mann FA, 'Lex Facit Arbitrum', in Sanders P (ed), *International Arbitration: Liber Amicorum for Martin Domke* (Martinus Nijhoff, 1967); Goode R, "The role of the *lex loci arbitri* in International Commercial Arbitration" (2001) 17 *Arbitration International* 19.

[32] Gaillard, above n 26 at [23].

[33] Ibid at [23]ff.

[34] Reyes A, *The Practice of International Commercial Arbitration: A Handbook for Hong Kong Arbitrators* (Informa Law, 2017) 22. *Cf* ibid at [37]-[39].

[35] At [29].

[36] Gaillard, above n 26 at [40].

view is that it factors in the perspective of arbitrators who view themselves as administering justice for the benefit of the international community rather than for any single State.[37] Reyes describes this theoretical construct as being much like the *lex mercatoria* or law merchant, used to justify the notion that international commercial arbitration floats above all domestic legal systems, without being tied to any particular body of domestic law.[38] It is essentially a natural law theory.

41 Such an international arbitral order is not that far-fetched. After all, during the second reading of the Bill enacting the *Arbitration Act 1996* in the UK in the House of Lords, Lord Wilberforce said that he had always wished to see arbitration "free to settle its own procedure and free to develop its own substantive law – yes, its substantive law".[39] There is a growing consensus among states on the rules governing international arbitration and the enforcement of awards which is reflected in the widespread adoption of the New York Convention and the Model Law, although differences survive. Nevertheless, this gives some succour to the theory of a transnational arbitral legal order. The ICSID Convention system perhaps comes close to being a truly transnational system.

42 There are many ways we can test these theories in order to form a view about which of them most closely conforms to what the law is and what courts actually do. A typical case in which the arbitral process is smooth and the seas of enforcement are calm is not particularly instructive. But an examination of circumstances where enforcing courts have departed or otherwise disregarded courts at the arbitral seat – cases in some ways similar at least in that respect to *Hub Street* – is more illuminating. The phenomenon of courts enforcing annulled awards is particularly apt for consideration. What seemed remarkable to the Hong Kong Court of Appeal and perhaps to some of us is unremarkable at all to others.

United States

43 In the United States, the starting point is the decision of ***Chromalloy*** *v Egypt*,[40] a decision of the District Court for the District of Columbia in 1996. The award debtor, Egypt, had successfully sought an order nullifying an award of over USD17,000,000 in favour of

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[37] Ibid at [41].

[38] Reyes A, above n 34 at 24.

[39] *Lesotho* at [18] per Lord Steyn.

[40] *Chromalloy Aeroservices v Arab Republic of Egypt* (1996) 939 F Supp 907 (DDC).

Chromalloy in the Egyptian Court of Appeal. The award was made in Egypt, under the laws of Egypt and nullified by an Egyptian court that could review arbitral awards. In enforcement proceedings in the US District Court, Egypt argued that enforcement of the award should be denied out of deference to its court.[41]

44 In granting the award creditor's petition to enforce the award notwithstanding that it had been annulled at the seat, the Court started with the proposition that Art V provides a "permissive standard, under which this Court *may* refuse to enforce an award".[42] It then relied on Art VII(1) of the Convention,[43] which provides that the Convention does 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 or the treaties of the country where such award is sought to be relied upon.

45 Art VII(1) in effect provides that a party may rely on more permissive domestic law in seeking to enforce an arbitral award. In reliance on that, the Court considered that the Federal Arbitration Act was a manifestation of US public policy in favour of final and binding arbitration of commercial disputes[44] and that the arbitral award would be enforceable under that Act.[45] The Court further held that, under the arbitration agreement, the decision of the arbitral tribunal could not be made subject to any appeal[46] and, as such, a decision of the Court to give effect to the Egyptian Court of Appeal's annulment rather than the parties' agreement would violate clear US public policy.[47]

46 Subsequent US decisions demonstrate a paring back of the relatively pure multilocal approach in *Chromalloy*.

47 In ***Baker Marine*** *v Chevron*,[48] the Second Circuit in 1999 accepted that refusal of enforcement under Art V(1)(e) is permissive, but nonetheless held that the petitioner had shown no adequate reason for refusing to recognise the judgments of the Nigerian Federal High Court, being a

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[41] Ibid at 909.

[42] Ibid at 914 (original emphasis).

[43] Ibid at 914.

[44] Ibid at 913.

[45] Ibid at 910.

[46] Ibid at 912.

[47] Ibid at 913.

[48] *Baker Marine Ltd v Chevron Ltd* (1999) 191 F 3d 194 (2nd Cir).

court at the arbitral seat, setting aside the award.[49] *Chromalloy* was distinguished on the basis that the parties had not agreed, as the parties in *Chromalloy* had, that the arbitration could not be subject to an appeal.[50]

48 In ***TermoRio*** *v Electranta* in 2007,[51] the reasoning of the DC Circuit signalled a further shift towards the primacy of the seat. That case concerned an arbitral award of over USD 60m in favour of a Colombian company against a Colombian state-owned entity.[52] Colombia's highest administrative court annulled the award on the basis that the arbitration agreement violated Colombian law by providing that the arbitration be governed by the procedural rules of the International Chamber of Commerce.[53]

49 The DC Circuit held that a principal precept of the New York Convention, which controlled the disposition of the case, is that:

> an award does not exist to be enforced in other Contracting States if it has been lawfully "set aside" by a competent authority in the State in which the award was made.[54]

50 That was held on the basis of its expressed concern that the contrary would entail that an award creditor who lost in an annulment proceeding in a court at the arbitral seat:

> will have every reason to pursue its adversary with enforcement actions from country to country until a court is found, if any, which grants the enforcement.[55]

51 Like the Second Circuit in *Baker Marine*, the Court distinguished *Chromalloy* on the basis that an express contractual provision was violated in pursuing the appeal to vacate the award.[56] The Court referred to Colombia as the "primary State" and other Convention countries as "secondary Contracting States" and observed:

> The Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment of a court in a primary State, when the court in the primary State has lawfully acted pursuant to

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[49] Ibid at 197.

[50] Ibid at n 3.

[51] *TermoRio SA ESP v Electranta SP* (2007) 487 F 3d 928 (DC Cir).

[52] Ibid at 929.

[53] Ibid at 931.

[54] Ibid at 936.

[55] Ibid (internal quotations and references omitted).

[56] Ibid at 937.

"competent authority" to "set aside" an arbitration award made in its country.[57]

52 However, notwithstanding these categorical statements, the Court considered that there might be a narrow public policy exception to refusing enforcement under Art V(1)(e) where a foreign judgment setting an award aside is "repugnant to fundamental notions of what is decent and just in the United States".[58]

53 That "repugnancy" exception came into play in a 2013 decision of the District Court for the Southern District of New York, *COMMISA v PEP*,[59] which was confirmed by the Second Circuit on appeal.[60]

54 The proceedings concerned the enforcement of an award against PEP, a Mexican state-owned entity, and in favour of COMMISA, the Mexican subsidiary of a US company, of approximately USD 300m.[61] The District Court had previously confirmed the award but a Mexican court had in the meanwhile annulled the award on the basis that arbitrators are not competent to hear and decide cases brought against the sovereign or an instrumentality of the sovereign.[62] On PEP's motion, the Second Circuit vacated the first judgment confirming the award and remanded the case back to the District Court to address the effect that a Mexican court's annulment of the arbitral award should have on enforcement.[63]

55 The District Court held that under the *TermoRio* standard, the Mexican court's decision annulling the award was repugnant to basic notions of justice. The repugnancy was that the Mexican court relied on a law that did not exist at the time that the parties commenced arbitration, and which purported to retroactively make disputes with a state-owned entity non-

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[57] Ibid.

[58] Ibid at 939, quoting *Tahan v Hodgson* (1981) 662 F 2d 862 at 864 (DC Cir).

[59] *Corporación Mexicana de Mantenimiento Integral v PEMEX-Exploración y Producción* (2013) 962 F Supp 2d 642 (SDNY) (***Pemex SDNY***).

[60] *Corporación Mexicana de Mantenimiento Integral v PEMEX-Exploración y Producción* (2016) 832 F 3d 92 (2nd Cir) (***Pemex Appeal***).

[61] *Pemex Appeal* at 97.

[62] *Pemex SDNY* at 643.

[63] Ibid at 652.

arbitrable.[64] On this basis, the District Court refused deference and enforced the award, which was upheld on appeal to the Second Circuit.[65]

56 As an aside, one might observe that the Western Australian legislation recently upheld by the High Court which changed the law retrospectively to expunge the benefits that Clive Palmer and Mineralogy Pty Ltd had achieved in arbitration is a little like the Mexican legislation.[66] I say "a little like" because, whereas the Mexican legislation retrospectively made certain types of claims non-arbitrable,[67] the Western Australian legislation can rightly be described as ad hominem as well as going much further. It raises the question whether, if a pecuniary award had been made, and notwithstanding the change in the law in Western Australia which the High Court upheld as valid and effective, the arbitral awards which under Western Australian law had effectively been invalidated might still be recognised elsewhere in the world. That possibility was clearly adverted to by the drafters of the Western Australian legislation in legislating extensive indemnities by Mr Palmer, Mineralogy or any successor in rights.[68] As Martin J in the Supreme Court of Queensland described the legislation, it is a "juggernaut destroying everything in its path".[69]

57 The final US case I wish to mention is that of ***Thai-Lao*** *v Government of Laos*[70] in the Second Circuit in 2017. The case concerned an award of approximately USD 57m made by an arbitral panel in Malaysia against the Government of Laos. The creditor companies applied for enforcement of the award in the UK, France and in the US in the Southern District of New York. The enforcement proceedings in the US and UK succeeded (the French one having failed on appeal).[71] The award was subsequently set aside by the Malaysian High Court, which was confirmed on appeal. Thereafter, both sides of the dispute returned to the Southern District –

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[64] Ibid at 657ff.

[65] See *Pemex Appeal* at 106-111.

[66] *Mineralogy Pty Ltd v Western Australia* [2021] HCA 30; *Palmer v Western Australia* [2021] HCA 31.

[67] "The administrative rescission, early termination of the contracts and such cases as the Regulation of this Law may determine may not be subject to arbitration proceedings" quoted in *Pemex Appeal* at 99.

[68] See ss 22-24 of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA). Section 25 of the Act further provides that no amount can be paid out of the Consolidated Account or borrowed by the State in order to discharge any liability.

[69] *Mineralogy Pty Ltd v Western Australia* [2020] QSC 344 at [133].

[70] *Thai-Lao Lignite Co Ltd v Government of the Lao People's Democratic Republic* (2017) 864 F 3d 172 (2nd Cir) (***Thai-Lao 2Cir***).

[71] Ibid at 179.

the Laos Government debtor with the judgment of the Malaysian High Court seeking to overturn the Southern District's previous judgment enforcing the award, and the creditor companies with an order of the High Court of England and Wales entering judgment for the final award which they sought to enforce.[72]

58 The Government of Laos succeeded. Following *Baker Marine* and *TermoRio*, the Southern District held that it would not refuse to recognise the Malaysian judgments unless it was demonstrated that those judgments, or the process before the Malaysian courts, violated basic notions of justice.[73] This the creditor companies failed to establish, at least in part because the court in question was of a different country to the government debtor.[74] This was confirmed on appeal in the Second Circuit.

59 As for the petition to enforce the judgment of the High Court of England and Wales, it was held, unsurprisingly, that the Malaysian judgment annulling the award was to be given priority over the English judgment which itself rested heavily on that Court's deference to the now-vacated judgment of the Southern District.[75]

60 That concludes my review of the state of US authorities which would appear to rest loosely on the proposition that the annulment of the award at the seat will be given primacy unless to do so would be repugnant to fundamental notions of justice in the United States.

61 I turn now to the other side of the Atlantic.

United Kingdom

62 The first jurisdiction I wish to review is the UK. The starting point is the ***Yukos Capital** v Rosneft* litigation.[76] Yukos Capital lent substantial sums of money to a related company, YNG. The loan agreements contained a clause providing for the arbitration of disputes at the

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[72] See *Thai-Lao Lignite (Thailand) Co Ltd v Government of the Lao People's Democratic Republic* [2013] EWHC 2466 (Comm) at [5] per Popplewell J; *Thai-Lao 2Cir* at 177-180.

[73] *Thai-Lao Lignite Co Ltd v Government of the Lao People's Democratic Republic* (2014) 997 F Supp 2d 214 (SDNY) at 222-227.

[74] See the discussion at ibid at 227.

[75] *Thai-Lao 2Cir* at 190.

[76] See generally *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855; [2014] QB 458; [2012] 2 Lloyd's Rep 208; [2013] 1 All ER 233 at [12]-[18] (***Yukos EWCA***); *Yukos Capital Sarl v OJSC Rosneft Oil Co* (Gerechtshof Amsterdam, 28 April 2009) as reported in *Yearbook of Commercial Arbitration 2009 – Vol XXXIV* (Kluwer Law International) 703 at 703-4 (***Yukos AMS***).

International Commercial Arbitration Court at the Chamber of Trade and Industry of Russia. Subsequently, all ordinary shares in YNG were sold at an auction forced by the Russian state. The ultimate successor to the rights and liabilities of YNG was Rosneft, which was wholly owned and controlled by the Russian state at that time.[77]

63 Four awards in favour of Yukos Capital totaling USD 425m were made by the arbitral tribunal in Moscow. Rosneft applied for annulment of the awards. The Moscow Commercial Court granted annulment. That was confirmed on appeal to the Federal Commercial Court for the Moscow District. Permission to appeal to the Supreme Commercial Court was denied.

64 Yukos Capital turned to the Netherlands for enforcement of the award. Although denied enforcement at first instance because the award had been annulled at the arbitral seat, the Amsterdam Court of Appeal granted enforcement on the basis that the decisions of the Russian courts were "partial and dependent"[78] – in other words, dictated by bias or intimidation.[79] After setting out numerous reports on the independence of Russia's judiciary as well as the circumstances surrounding the dismantling of the Yukos Group, the Court observed that courts in several European countries had held that the criminal prosecution of officials of the Yukos Group was politically motivated.[80] The Court was of the view that the Russian state considered the interests of Rosneft, the award debtor, to be its own[81] and it held that:

> 22 … Rosneft's argument that Yukos Capital has not supplied direct evidence of the partiality and dependence of the individual judges that ruled on Rosneft's claim to annul the arbitral awards does not carry sufficient weight, in part because partiality and dependence by their very nature take place behind the scenes.

65 The award was subsequently paid[82] after the Dutch Supreme Court dismissed Rosneft's appeal.[83]

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[77] As of 2014, it appears that is only state-owned and controlled by majority: *Yukos EWCA* at [14].

[78] *Yukos AMS*.

[79] *Yukos EWCA* at [6].

[80] *Yukos AMS* at [15].

[81] Ibid at [20].

[82] *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2011] EWHCA 1461 (Comm); [2011] 2 Lloyd's Rep 443 at [3] (***Yukos QBD No 1***).

[83] *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2014] EWHC 2188 (Comm); [2014] 2 Lloyd's Rep 435 at [4] (***Yukos QBD No 2***).

66 I have thus far spoken of Russian and Dutch proceedings. How then does the UK fit in? Well, prior to the award having been satisfied, Yukos Capital commenced enforcement proceedings in England in reliance on the New York Convention as well as the common law.[84] That claim included a claim for post-award interest amounting to over USD 160m,[85] which remained after Rosneft satisfied the arbitral award in the Netherlands.[86]

67 Between the parties, there was a preliminary scuffle as to whether Rosneft was issue estopped, by virtue of the decision of the Amsterdam Court of Appeal, from denying that the Russian judgments were the result of a partial and dependent judicial process, as well as whether adjudication upon the acts of the Russian judiciary was prohibited by reason of the act of state doctrine. The Court of Appeal held that Rosneft was not issue estopped from denying the partiality and dependence of Russian courts because Dutch public policy and English public policy are not the same issue,[87] and that the act of state doctrine did not bar adjudication of the acts of the Russian judiciary or any part of Yukos Capital's case.[88] The matter was then sent back to the Commercial Court for trial.

68 Simon J held that there is no *ex nihilo nil fit* principle which precludes the enforcement of awards and that, if the allegations of judicial partiality and dependence were made out, the Court had power to enforce the awards notwithstanding their annulment at the arbitral seat.[89]

69 Simon J relied on some obiter remarks of Rix LJ in *Dallah*,[90] where, in respect of enforcement under the Convention, his Lordship said:

> Finally, I bear in mind … the problem of an award perhaps improperly set aside in the courts of the country of origin. This is a delicate matter. However, it seems to me that this is not something which can be dealt with simply as a matter of an open discretion. The improper circumstances would, I think, have to be brought home to the court asked to enforce in such a way as either, in effect, to destroy the defence based on article V(1)(e), or, which is perhaps effectively the same thing, to prevent an issue estoppel

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[84] Ibid.

[85] *Yukos QBD No 1* at [3].

[86] *Yukos EWCA* at [24].

[87] Ibid at [151]-[157].

[88] Ibid at [86]-[87], [133].

[89] Ibid at [22].

[90] *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755; [2011] 1 AC 763; [2010] 1 All ER 592.

> arising out of the judgment of the courts of the country of origin.[91]

70 Simon J concluded that whether a court can enforce an annulled award depended upon whether the decision of the foreign court annulling the award offended against basic principles of honesty, natural justice and domestic concepts of public policy.[92] That approach was later followed in *Malicorp v Egypt*,[93] a decision of Walker J in the Commercial Court in 2015.

71 That test is similar to the test that is deployed by the US courts.

France

72 I turn now to France, which approaches the question of awards annulled at the seat on an entirely different basis. In understanding the cases it is important to bear in mind that French domestic law, unlike the New York Convention, does not provide annulment at the seat as a ground for non-enforcement and Art VII(1) of the Convention preserves any rights available in domestic law. There is thus greater scope for the argument in France that an award should be enforced even if it has been annulled at the seat.

73 A convenient place to start is *Chromalloy*, an aspect of which I discussed in relation to the US.

74 It will be recalled that, in that case, the award debtor was Egypt. It had successfully sought annulment of the award in its own courts, even though the arbitration agreement provided that any award could not be subject to appeal. Prior to Chromalloy having enjoyed the rare success of enforcing an annulled award in the US, it had also succeeded in its enforcement action in the Paris Court of First Instance.[94]

75 Egypt's appeal to the Cour d'Appel was dismissed. The Court held that the appeal ground developed on the basis of the award being annulled was unfounded because:

> The award made in Egypt *is an international award* which, by definition, *is not integrated in the legal order of that State* so that its existence remains established despite its being annulled and its recognition in France is not a violation of

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[91] Ibid at [91], quoted in *Yukos QBD No 2* at [15].

[92] *Yukos QBD No 2* at [20].

[93] *Malicorp Ltd v Government of the Arab Republic of Egypt* [2015] EWHC 361 (Comm); [2015] 1 Lloyd's Rep 423 at [21]-[23].

[94] *Arab Republic of Egypt v Chromalloy Aeroservices, Inc* (Cour d'Appel Paris, 14 January 1997) as reported in *Yearbook of Commercial Arbitration 1997 – Vol XXII* (Kluwer Law International) 691 at 691-2.

international public policy.[95]

76 The reasoning of the Cour d'Appel mimics what the Cour de Cassation had said in a number of previous cases.[96] Subsequent cases have affirmed this reasoning and some have gone further.

77 One of those cases concerned the award denied enforcement in the Southern District and Second Circuit in *Thai-Lao*. It will be recalled that, in that case, the award debtor, the Government of Laos, successfully sought the annulment of the award in the Malaysian High Court. In enforcement proceedings in France, the Cour d'Appel set aside the first instance order granting enforcement of the award. Its decision was not based on the fact that the award had been annulled by the Malaysian Court because, consistently with previous French authority, the Court held that annulment at the arbitral seat was not a ground for refusing recognition.[97] Rather, the Cour d'Appel itself decided that some of the claims which the arbitral tribunal had decided were not caught by the arbitration agreement.

78 I have one final case I wish to mention which, as it happens, is another shipping case. The case is *PT Putrabali v* ***Rena Holding*** in 2007.[98] The dispute concerned a shipment of white pepper from Indonesia to Singapore. The cargo was lost when the barge on which it was being carried sank. Rena Holding, the successor to the purchaser, refused to pay the contract price. An award in London arbitration held that Rena was justified in its refusal. After a successful appeal on a point of law to the High Court in London, the award was annulled and a new award was issued in the seller's favour requiring Rena to pay the purchase price.

79 Rena successfully sought enforcement of the first award in France notwithstanding that it had been annulled and replaced with a subsequent award going the other way. The Court of First Instance, the Cour d'Appel and the Cour de Cassation all ruled in favour of enforcement of the annulled award. The Cour de Cassation reasoned:

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[95] Ibid at 693 (emphasis added).

[96] See, eg, *Pabalk Ticaret Ltd v Norsolor SA* (Cour de Cassation, 9 October 1984) as reported in *Yearbook of Commercial Arbitration 1986 – Vol XI* (Kluwer Law International) 484; *Hilmarton Ltd v Omnium de traitement et de valorization* (Cour de Cassation, 23 March 1994) as reported in *Yearbook of Commercial Arbitration 1995 – Volume XX* (Kluwer Law International) 663 at 664.

[97] *Lao People's Democratic Republic v Thai-Lao Lignite (Thailand) Co Ltd* (Cour d'Appel Paris, 19 February 2013) as reported in *Yearbook of Commercial Arbitration 2013 – Vol XXXVIII* (Kluwer Law International) 376 at 378.

[98] *PT Putrabali Adyamulia v Rena Holding* (Cour de Cassation, 29 June 2007) as reported in *Yearbook of Commercial Arbitration 2007 – Volume XXXII* (Kluwer Law International) 299 (***Rena Holding***).

> An international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose *validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought*.[99]

80 That is in stark contrast to the position expressed in the DC Circuit's decision in *TermoRio* that described the arbitral seat as the "primary State" and other Convention countries as "secondary Contracting States". It is an explicit statement in support of what Professor Gaillard calls the Westphalian theory, or even perhaps his preferred theory of the existence of an arbitral legal order.

Australia

81 Returning now to Australia, it remains to be seen how a court in this country would treat an application for enforcement of an arbitral award that has been annulled at the arbitral seat. I don't think it is contentious for me to surmise that there is a tendency amongst common law practitioners and judges to subscribe, either tacitly or subconsciously, to the monolocal theory. Indeed, such a view is to some extent apparent in the Full Court's judgment in *Gujarat*[100] which, although eschewing any resolution of the question whether an issue estoppel operated in that case, nonetheless, citing the well-known passage by Colman J in *Minmetals*,[101] held that:

> it will generally be inappropriate for … the enforcement court of a Convention country, to reach a different conclusion on the same question … as that reached by the court of the seat of arbitration.[102]

82 Against that, the result in *Hub Street* tends against a wholesale acceptance of a monolocal theory given that a Qatari Court had authorised the arbitration the resulting award of which was denied enforcement here. Also, the decision recognises that an award debtor need not challenge an award at the seat but can resist enforcement wherever it is sought. Nonetheless, the approach taken in explaining why comity did not require the award to be enforced may be taken to implicitly accept the primacy of the arbitral seat. Such acceptance would clearly not be replicated in proceedings in a French court.

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[99] *Rena Holding* at 301 (emphasis added).

[100] ***Gujarat*** *NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109; (2013) 304 ALR 468.

[101] *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 at 331.

[102] *Gujarat* at [65].

Concluding remarks

83 It can be seen that the international system of the New York Convention and Model Law represents something of a compromise between the monolocal and multilocal or Westphalian theories of international arbitration and it does not achieve a supra-national status. The system provides that recourse against an award can only be taken at the seat and a ground for not recognising or enforcing an award is that it has been set aside at the seat, yet there is a discretion to recognise or enforce the award even if it has been set aside. The system also recognises that the award debtor is under no obligation to take recourse against the award at the seat and can instead sit back and wait for enforcement proceedings to be brought and then resist that enforcement.

84 As much as the system is intended to be uniform internationally, it is also inherent in the system that the discretion to enforce an award and the public policy ground to not enforce an award inevitably retain a role for national idiosyncrasy. In *Gujarat*, the Full Court gave important guidance on how the public policy of the forum is to be approached, at least as a ground for not enforcing an award that has not been annulled. And in *Hub Street*, some guidance was given with regard to the exercise of the discretion to enforce an award in respect of which a ground of enforcement has been established. It remains to be seen how public policy will inform the exercise of the discretion to enforce an award that has been set aside or annulled at the seat of the arbitration.