The Territorial v. Transnational Approach to Enforcement of Arbitral Awards and its Impact on International Commercial Arbitration

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I. INTRODUCTION

Commercial arbitration has indubitably come a long way from its humble beginnings in the trade fairs and merchant guilds of medieval Europe to where it is today. Promising parties an expedient, cost-effective, and commercially informed avenue for the resolution of disputes, — and one centered on party autonomy — it is unsurprising that arbitration is often touted as the mainstay of cross-border commercial dispute resolution at the present time. As the Chief Justice of Singapore Sundaresh Menon observed, it is "the impressive mix of legal traditions, backgrounds, and practices characterizing the arbitration profession today that has played a vital part in its establishment as the premier mode of transnational commercial dispute resolution."[1]

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While the international arbitration community's achievements to date are indeed impressive, more still needs to be done for it to continue growing. In this regard, an issue that must be acknowledged and addressed is the growing uncertainty over the international framework governing the recognition and enforcement of arbitral awards.

Indeed, there has been increasing debate in Singapore and around the Southeast Asian region over the precedence, if any, given to a decision rendered by the Seat Court of an arbitration to set aside an arbitral award or to refuse the same. The tension lies in two competing theories. On one hand, there is the "territorial approach"[2] where an award that is set aside at the Seat of the arbitration ceases to have legal existence or effect.[3] On the other hand, there is the "transnational approach"[4] where an award does not derive its validity and legitimacy from a particular local system of law, and as a result, it is open for the Enforcement Court to enforce the award notwithstanding the decision of the Seat Court to set aside the award.[5]

This Article examines the debate surrounding both theories from the approach of several jurisdictions, including the recent conflicting decisions on *PT First Media TBK v. Astro Nusantura International BV*[6] by the Singapore Court of Appeal as the Seat Court and by the Hong Kong Court of First Instance as the Enforcement Court.[7] It concludes with suggestions for the

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Cite as 61 ATENEO L.J. 678 (2016).

1. Sundaresh Menon, Chief Justice of Singapore, Patron's Address at the Chartered Institute of Arbitrators' Centenary Conference, at London (July 2, 2015) (transcript *available at* http://www.ciarb.org/docs/default-source/ciarb documents/london/ciarb-centenary-conference-patron-39-s-address-(for-publication).pdf?sfvrsn=0) (last accessed Oct. 31, 2016) [hereinafter Menon, Patron's Address].
2. Andrew Tweeddale & Keren Tweeddale, *Cutting the Gordian Knot: Enforcing Awards where an Application Has Been Made to Set Aside the Award at the Seat of the Arbitration*, 81 INT'L J. ARB., MED. & DISP. MGMT 137, 138 (2015).
3. *Id.*
4. *Id.* at 138-39.
5. *Id.*
6. PT First Media TBK v. Astro Nusantara International BV, [2013] SGCA 57 (Sing.).
7. Astro Nusantara International BV v. PT Ayunda Prima Mitra, [2015] HCCT 45/2010 (C.F.I.) (H.K.).

way forward in favor of greater convergence in the practice of the Courts across jurisdictions.

II. ARTICLE V OF THE NEW YORK CONVENTION

Before the discussion is taken any further, it is first apposite to note Article V (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[8] which provides —

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
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> ...
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> 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.[9]

The use of the word "may" in Article V (1) of the New York Convention, being permissive rather than obligatory, suggests that Enforcement Courts are free to permit enforcement of an award in their respective jurisdictions, even if that award has been set aside by the Seat Court. However, as will be discussed in this Article, the arguments for and against either approaches transcend matters of syntax or a literal interpretation of the text of the New York Convention.

III. THE TERRITORIAL APPROACH

As noted above, the territorial approach to arbitration provides that once an arbitral award has been set aside at the Seat Court, the award will cease to exist legally and the award creditor will not be successful in any attempt to enforce the impugned award in the courts of another jurisdiction.[10] Simply put, an annulled award has no validity in the Seat Court or any other jurisdictions.

As one of the principal drafters of the New York Convention noted, "enforcing a non-existing arbitral award would be an impossibility or

8. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V (1) (e), *adopted* June 10, 1958, 330 U.N.T.S. 38 (entered into force June 7, 1959) [hereinafter New York Convention].

9. *Id.*

10. Tweeddale & Tweeddale, *supra* note 2, at 138.

[would] even go against the public policy of the country of enforcement."[11] Similarly, it is said that once an award has been annulled, the "game is clearly over."[12]

Central to the territorial approach is the idea that party autonomy and consent is the leitmotif of arbitration and due deference must be given to the parties' Seat of choice. By choosing a place for the arbitration, the parties also agree that the arbitration will be overseen by the courts of that place.[13]

Indeed, as Retired Justice of the Supreme Court of the United Kingdom (U.K.), Lord Jonathan Hugh Mance, recently highlighted, "[e]mpirical evidence suggests that the choice of Seat is usually the result of a careful consideration of the legal consequences and not merely a matter of convenience."[14] Thus, like any other instance of the exercise of party autonomy, the selection of the Seat Court will generally be a matter of contract and the parties should be expected to live with the consequences of that choice.[15] Against this backdrop, Chief Justice Menon took the view that

> [w]here there is an enforceable bargain to submit to arbitration, there is also an equally enforceable bargain to submit to the supervision of the courts at the Seat of arbitration. In other words, parties should be taken to have expressly or implicitly embraced the laws and judicial system of the Seat of arbitration, 'warts and all[.]' Allowing Enforcement Courts to appeal to vaguely defined domestic normative values in deciding whether to enforce an annulled award materially alters the bargain between the parties and also introduces a significant unstable variable into the arbitral process.[16]

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11. Pieter Sanders, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 6 NETH. INT'L L. REV. 43, 55 (1959).

12. Albert Jan van den Berg, *Enforcement of Annulled Awards?*, 9 ICC INT'L CT. ARB. BULL. 15, 15 (1998).

13. *Id.*

14. Lord Jonathan Hugh Mance, Retired Justice of the Supreme Court of the United Kingdom, *Arbitration - a Law unto Itself?*, Address at the 30th Annual Freshfields Lecture, at London (Nov. 4, 2015) (transcript *available at* https://www.supremecourt.uk/docs/speech-151104.pdf (last accessed Oct. 31, 2016)).

15. Sundaresh Menon, Chief Justice of Singapore, *Standards in need of bearers: Encouraging reform from within*, Speech at the Chartered Institute of Arbitrators' Centenary Conference, at Singapore (Sep. 23, 2015) (transcript *available at* http://www.ciarb.org.sg/wp-content/uploads/2015/09/Keynote-Speech-Standards-in-need-of-Bearers-Encouraging-Reform-from-.pdf (last accessed Oct. 31, 2016)).

16. *Id.* ¶ 33 (b).

The other oft-cited argument for a territorial approach concerns the need to discourage forum shopping. When the award is set aside at the Seat, "a party [should] not [be] entitled to shop around until it finds a venue which will enforce the award."[17] In this regard, Chief Justice Menon emphasized that, otherwise, "a judgment setting aside an award will [not] afford the award debtor any respite from having to resist further enforcement proceedings."[18] Instead, it would laden him with the need "to establish the integrity of the setting aside judgment or the award in every single Enforcement Court that the award creditor may seek to enforce the award in."[19] He further highlighted the concern that "puncturing the aura of finality accorded to decisions of the Seat Court potentially undermines the functioning of arbitration as an international system."[20]

Closely related to the argument of forum shopping is that of preventing the re-litigation of issues in different jurisdictions, which occasionally produces conflicting results between the Seat and the Enforcement Courts. As will be seen from the cases to be discussed in this Article, the inconsistency in approach taken by different jurisdictions is indeed a cause for concern insofar as the issue of enforcement of arbitral awards is involved.

IV. THE TRANSNATIONAL APPROACH

Antithetical to the territorial approach is the view that awards do not derive their validity and legitimacy from a particular local system of law. The transnational approach considers that awards are not integrated into the legal order of the Seat and therefore continue to exist notwithstanding the fact that they have been set aside by the Seat Court. It is therefore open to the Enforcement Court to enforce such award notwithstanding the decision of the Seat Court to set aside the same,[21] or as otherwise regarded as when, "an enforcing court is free to ignore the decisions of the court at the Seat of the arbitration."[22]

The *raison d'etre* of the transnational approach is that

> the legal force of transnational arbitration is founded on the parties' creation of a contractual institution; the effect of the proceedings may be left to be controlled by whatever legal system is requested to recognize the award

17. Tweeddale & Tweeddale, *supra* note 2, at 138.

18. Menon, Patron's Address, *supra* note 1, ¶ 57.

19. *Id.*

20. *Id.* ¶ 56-57.

21. Tweeddale & Tweeddale, *supra* note 2, at 138.

22. *Id.*

> once it is rendered, and that system need not necessarily be that of the place of arbitration.[23]

It is further argued that

> it is difficult in today's world to resist the conclusion that the transnational arbitral process is something apart from purely national arbitration. For it is apparent that a party who operates internationally may have greater or lesser rights, with respect to the same relationship or dispute, depending upon the national system which is brought to bear on its case, whether at the adjudicatory or execution stage of dispute litigation.[24]

Similarly, at the recent Centenary Conference of Chartered Institute of Arbitrators in Singapore held last September 2015, Professor Gary B. Born was critical of the support for a territorial approach to arbitration and argued that the international arbitration community "should reject it, and reject it emphatically."[25] He adopted a pro-enforcement stance which he said is evident from the provisions of the New York Convention.[26]

In particular, Professor Born described Article VII (1) of the New York Convention[27] to be "a critical element of the New York Convention's architecture ... because it demonstrates [that] the New York Convention does not set a ceiling on recognition of arbitral awards. It instead sets a minimum floor."[28] Such an interpretation of Article VII, he says, is crucial alongside the permissive "may" used in Article V in evidencing that it is

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23. *Id.* at 139 (citing Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT'L & COMP. L.Q. 358, 367 (1981) [hereinafter Paulsson, *Arbitration Unbound*]).

24. Paulsson, *Arbitration Unbound*, *supra* note 23, at 363.

25. Mance, *supra* note 14, at 17 (citing Alison Ross, Clash of the Singapore titans, *available at* http://globalarbitrationreview.com/article/1034834/clash-of-the-singapore-titans (last accessed Oct. 31, 2016)).

26. *See* GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 469 (2012) [hereinafter BORN, INTERNATIONAL ARBITRATION].

27. New York Convention, *supra* note 8, art. VII. It provides that —

> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor 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.

Id.

28. *See* BORN, INTERNATIONAL ARBITRATION, *supra* note 26, at 64.

"absolutely clear that States are free to recognize arbitral awards in circumstances where they would be free permissively not to recognize them. And that includes situations where an award has been annulled in the arbitral seat."[29]

V. TERRITORIAL V. TRANSNATIONAL: A LACK OF CONSENSUS

It is clear that both approaches to the enforcement of an annulled award by an Enforcement Court are not without merit. Indeed, it is for this very reason that there is a lack of international consensus as to the effect of an order by the Seat Court setting aside an award on subsequent enforcement proceedings.

The territorial approach appears to have been adopted or preferred by several jurisdictions. In the case of *PT First Media TBK*,[30] the Singapore Court of Appeal made the following observations as an *obiter* —

> While the wording of [Article V (1) (e)] of the New York Convention and [Article] 36 [(1) (a) (v)] of the Model Law arguably contemplates the possibility that an award which has been set aside *may* still be enforced, in the sense that the *refusal* to enforce remains subject to the discretion of the enforcing court, 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*.[31]

The Singapore Court of Appeal in *AKN v. ALC*,[32] however, also recognized in *obiter* the differences in opinion — and that this issue has not been finally determined in Singapore — and qualified its view slightly by stating that "[i]t is true that the effect of setting aside an award is that the award ceases to have any legal effect, at least in the jurisdiction of the Seat Court."[33]

In Italy, the territorial approach has been codified pursuant to Article 840 (5) of the Italian Code of Civil Procedure[34] which prescribes in mandatory terms that —

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29. Mance, *supra* note 14, at 17.

30. *PT First Media TBK*, [2013] SGCA 57.

31. *Id.* ¶ 77.

32. AKN v. ALC, [2015] SGCA 63 (Sing.).

33. *Id.* ¶ 49.

34. CODICE CIVIL [C.C.], art. 840 (5) (It.).

> the Court of Appeal shall refuse the recognition and enforcement of the foreign award if ... the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the State in which, or under the law of which, it was made.[35]

On the other hand, the transnational approach appears to have been endorsed by the French Courts. In the case of *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV)*,[36] the Court of Cassation affirmed the Paris Court of Appeal's decision to enforce an arbitral award despite it having been set aside in Switzerland which was the Seat Court.[37] In reaching its decision, the court in France reasoned that "the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy."[38] Similarly in *The Arab Republic of Egypt v. Chromalloy Aeroservices*,[39] the Paris Court of Appeal affirmed the Paris Court of First Instance's decision to allow enforcement of an award which had since been annulled by the Seat Court in Egypt on the same reasoning employed in *Société Hilmarton Ltd.*[40]

The French preference for the transnational approach was again emphasized in the more recent case of *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices*.[41] This case concerned an award rendered in favor of Rena that was partially vacated by the English High Court on a point of law raised by Putrabali.[42] The tribunal thereafter issued a second award which was in conformity with the Court's findings

35. *Id.*

36. Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV), 20 Y.B. Comm. Arb. 663 (1994) (Fr.).

37. *Id.*

38. Tweeddale & Tweeddale, *supra* note 2, at 139 & MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION AND LAW PRACTICE 90 (2014) (citing *Société Hilmarton Ltd*, 20 Y.B. Comm. Arb. 663).

39. Tweeddale & Tweeddale, *supra* note 2, at 139 & RUBINO-SAMMARTANO, *supra* note 35 (citing The Arab Republic of Egypt v. Chromalloy Aeroservices, 939 F. Supp. 907, 909 n.2 (D.D.C. 1996) (U.S.)).

40. *Id.*

41. Sundaresh Menon, *Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence*, 2013 SING. J. L. STUD. 231, 242 (citing Cour de cassation [Cass] [Supreme Court] June 29, 2007, 05-18053 (Fr.)) [hereinafter Menon, *Transnational Commercial Law*].

42. *Id.*

but inconsistent with the first award.[43] Despite the issuance of the second award, Rena sought successful enforcement of the first award in France.[44] In affirming the decision of the Court of First Instance of France, the Court of Cassation revisited its approach in *Société Hilmarton Ltd.,* and pronounced that the impact of a national court's decision to annul an award is confined within its own jurisdiction, and an enforcing court is to decide whether to enforce an annulled award based on its own rules.[45] The reason for such an approach is "the court's characteri[z]ation of such awards as belonging to an autonomous international legal order that is distinct from the domestic legal order."[46]

In addition, the transnational approach appears to have been adopted in some other New York Convention jurisdictions.

A case in point would be the case of *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan*[47] where the U.K. Supreme Court and the Paris Court of Appeal reached diametrically opposite results as to whether an impugned arbitral award should be enforced.

The dispute in *Dallah* is centered on a Memorandum of Understanding (MOU) entered into between Dallah Real Estate (Dallah) and the Government of Pakistan for the former to provide housing in Saudi Arabia for Pakistani pilgrims on a 55-year lease with associated financing.[48] After further negotiations between Dallah and the Government of Pakistan, an agreement was entered into and a trust set up by an ordinance issued by the

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Menon, *Transnational Commercial Law, supra* note 41, at 242 (citing Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC (HL) 46 (appeal taken from 2009 EWCA Civ 755) (U.K.)).

48. Menon, *Transnational Commercial Law, supra* note 38, at 242 (citing *Dallah Real Estate and Tourism Holding Co.*, [2010] UKSC (HL) 46, ¶ 3) & Gary B. Born, Dallah and the New York Convention, *available at* http://kluwerarbitrationblog.com/2011/04/07/dallah-and-the-new-york-convention (last accessed Oct. 31, 2016) (citing *Dallah Real Estate and Tourism Holding Co.*, [2010] UKSC (HL) 46, ¶ 3) [hereinafter Born, Dallah and the New York Convention].

President of Pakistan to implement the MOU.[49] Although the Government was not a signatory to the agreement, the Government of Pakistan's representatives were the ones who corresponded with Dallah at all material times.[50] Disputes surrounding the agreement arose, and Dallah commenced arbitration against the Government of Pakistan,[51] who resisted the arbitration on the ground of lack of jurisdiction. In deciding that the Government of Pakistan was the alter ego of the trust, the arbitral tribunal sitting in Paris held, applying principles of French law, that the Government was bound by the agreement and the arbitration clause therein.[52] The tribunal then went on to render an award of around U.S. $20 million in Dallah's favor.[53]

Several years after the award was issued, Dallah sought enforcement of the award in England and France where leave to enforce and exequatur were respectively granted.[54] The Government of Pakistan applied to set aside the order granting leave to enforce in England, and also applied to set aside the award in France.[55] Both applications were made on the basis that the arbitration agreement was not valid since the Government was never a part of it.[56] Interestingly, while the U.K. Supreme Court and the Paris Court of Appeal both applied French law, as reflected in various Court of Cassation decisions, in determining whether the parties shared a "common intention"

49. Menon, *Transnational Commercial Law*, *supra* note 41, at 242 (citing *Dallah Real Estate and Tourism Holding Co.*, [2010] UKSC (HL) 46, ¶ 4) & Born, Dallah and the New York Convention, *supra* note 48.

50. Menon, *Transnational Commercial Law*, *supra* note 41, at 242 (citing *Dallah Real Estate and Tourism Holding Co.*, [2010] UKSC (HL) 46, ¶ 9) & Born, Dallah and the New York Convention, *supra* note 48.

51. Menon, *Transnational Commercial Law*, *supra* note 41, at 242 (citing *Dallah Real Estate and Tourism Holding Co.*, [2010] UKSC (HL) 46, ¶ 14) & Born, Dallah and the New York Convention, *supra* note 48.

52. *Id.*

53. Menon, *Transnational Commercial Law*, *supra* note 41, at 242 (citing *Dallah Real Estate and Tourism Holding Co.*, [2010] UKSC (HL) 46, ¶ 1.) & Born, Dallah and the New York Convention, *supra* note 48.

54. Born, Dallah and the New York Convention, *supra* note 48 (citing *Dallah Real Estate and Tourism Holding Co.*, [2010] UKSC (HL) 46, ¶ 89).

55. Born, Dallah and the New York Convention, *supra* note 48 (citing *Dallah Real Estate and Tourism Holding Co.*, [2010] UKSC (HL) 46, ¶ 10).

56. Born, Dallah and the New York Convention, *supra* note 48 (citing *Dallah Real Estate and Tourism Holding Co.*, [2010] UKSC (HL) 46, ¶¶ 93-109).

for the Government of Pakistan to be a party to the agreement, the two courts reached diametrically opposite results.[57]

Looking into the signatories and terms of the agreement, the U.K. Supreme Court, on one hand, favored a literal and narrower approach and found that "there was no material sufficient to justify the tribunal's conclusion"[58] that the Government of Pakistan was a party to the agreement,[59] thereby denying enforcement of the award. On the other hand, the Paris Court of Appeal dismissed the Government of Pakistan's annulment request,[60] thus taking a broader view, on the basis that the Government of Pakistan had behaved as if the agreement was its own, both pre- and post-contract, and was therefore the true Pakistani party to the agreement.

One would have thought that the Paris Court of Appeal would be better placed to decide issues of French law, and it was perhaps unfortunate that the U.K. Supreme Court issued its decision before the Paris Court of Appeal. In the words of Born, these conflicting decisions are "pathological [and] contrary to both the purposes and specific terms of the New York Convention and they produce a potentially serious injustice" by serving to undermine "[t]he most fundamental objectives of the New York Convention [which] include ensuring uniform treatment of arbitral awards, and facilitating the effective enforcement of such awards, in the New York Convention's Contracting States."[61]

Closer to home, a similar experience akin to *Dallah* was seen in the case of *PT First Media TBK* involving the courts of Singapore[62] and Hong Kong.[63] The arbitration proceedings in *PT First Media TBK* are related to a

57. Born, Dallah and the New York Convention, *supra* note 48 (citing *Dallah Real Estate and Tourism Holding Co.*, [2010] UKSC (HL) 46, ¶¶ 110-22).

58. Born, Dallah and the New York Convention, *supra* note 48 (citing *Dallah Real Estate and Tourism Holding Co.*, [2010] UKSC (HL) 46, ¶ 145).

59. *Id.*

60. Born, Dallah and the New York Convention, *supra* note 48 (citing *Dallah Real Estate and Tourism Holding Co.*, [2010] UKSC (HL) 46, ¶ 107).

61. Born, Dallah and the New York Convention, *supra* note 48.

62. Ben Jolley, Astro v. Lippo: Singapore Court of Appeal Confirms Passive Remedies to Enforcement Available for Domestic International Awards, *available at* http://kluwerarbitrationblog.com/2013/11/29/astro-v-lippo-singapore-court-of-appeal-confirms-passive-remedies-to-enforcement-available-for-domestic-international-awards (last accessed Oct. 31, 2016) (citing *PT First Media TBK*, [2013] SGCA 57).

63. Jolley, *supra* note 62 (citing *Astro Nusantara International BV*, [2015] HCCT 45/2010).

dispute which arose out of a joint venture (JV) between the companies belonging to an Indonesian conglomerate — the Lippo Group — on one hand, and the companies within a Malaysian media group — the Astro Group — on the other hand.[64] The JV pertained to the provision of multimedia and television services in Indonesia where a subscription and shareholders' agreement (SSA) was entered into between companies belonging to both groups of companies.[65] In 2008, five Astro Group companies commenced arbitration against the Lippo Group in Singapore pursuant to an agreement to arbitrate contained in the SSA.[66] As the dispute was related to the provision of funding to the JV by three other Astro Group subsidiaries who were not parties to the SSA which were the Astro Joinder Parties, an application to join such Parties was made pursuant to Rule 24.1 (b) of the 2007 Singapore International Arbitration Centre (SIAC) Rules[67] at the time the Notice of Arbitration was filed.[68] The Lippo Group contested the joinder application but was unsuccessful, as the tribunal rendered a preliminary award stating it had the power, which it exercised, to include the Astro Joinder Parties as parties to the arbitration.[69]

The Lippo Group did not challenge the tribunal's preliminary award within the prescribed period allowed under Article 16 (3) of the 1985 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (Model Law).[70] Instead, the Lippo

64. Jolley, *supra* note 62 (citing *PT First Media TBK*, [2013] SGCA 57, ¶ 3).

65. *Id.*

66. Jolley, *supra* note 62 (citing *PT First Media TBK*, [2013] SGCA 57, ¶ 10).

67. Jolley, *supra* note 62 (citing Arbitration Rules of the Singapore International Arbitration Centre (SIAC), rule 24 (b) (2007) (Sing.) [hereinafter Arbitration Rules of SIAC]). Rule 24 provides that —

> 24. Additional Powers of the Tribunal
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> In addition and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have the power to:
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> ...
>
> allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes among the parties to the arbitration;

Arbitration Rules of SIAC, rule 24 (b).

68. Jolley, *supra* note 62 (citing PT *First Media TBK*, [2013] SGCA 57, ¶ 10).

69. Jolley, *supra* note 62 (citing PT *First Media TBK*, [2013] SGCA 57, ¶ 208).

70. International Arbitration Act (SS Cap 143A, 2002 Rev Ed) § 3 (Sing.). It mandates that, "the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore." *Id. See also* United Nations

Group went on to participate in the arbitration but reserved their position on the tribunal's jurisdiction over the Astro Joinder Parties.[71] The tribunal eventually went on to find in favor of the Astro Group a total sum of around U.S. $250 million and rendered further four awards against the Lippo Group.[72] Similar to its action regarding the preliminary award, the Lippo Group did not apply to set aside these awards in Singapore pursuant to Article 34 (1) of the Model Law[73] within the prescribed time limits.

The Astro Group thereafter sought to enforce all five awards in Singapore but the Lippo Group objected to the enforcement on the basis that Rule 24 (b) of the 2007 SIAC Rules[74] did not permit the tribunal to join the Astro Joinder Parties and the awards were therefore made in excess

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Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, art. 16 (3), U.N. Doc. A/40/17 (June 21, 1985) [hereinafter UNCITRAL Model Law]. It provides that —

> *Article 16. Competence of arbitral tribunal to rule on its jurisdiction*
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> ...
>
> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this [A]rticle 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 [30] days after having received notice of that ruling, the court specified in [A]rticle 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.

Jolley, *supra* note 62 (citing *Astro Nusantara International BV*, [2015] HCCT 45/2010, ¶¶ 16-17).

71. Jolley, *supra* note 62 (citing *Astro Nusantara International BV*, [2015] HCCT 45/2010, ¶ 26).

72. *Id.*

73. UNCITRAL Model Law, *supra* note 70, art. 34 (1). This provides —

> *Article 34. Application for setting aside as exclusive recourse against arbitral award*
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.

Id.

74. Jolley, *supra* note 62 (citing Arbitration Rules of SIAC, rule 24 (b)).

of jurisdiction.[75] The Singapore Court of Appeal agreed with the Lippo Group and found that the awards rendered in favor of the Astro Joinder Parties could not be enforced.[76]

In reaching its decision, the Singapore Court of Appeal held that although the Lippo Group did not actively challenge the awards during the earlier opportunities it had, it was not precluded from relying on the grounds for resisting enforcement under the Article 36 (1) of Model Law[77] as the

75. Jolley, *supra* note 62 (citing *PT First Media TBK*, [2013] SGCA 57, ¶ 159).

76. Jolley, *supra* note 62 (citing *PT First Media TBK*, [2013] SGCA 57, ¶ 16).

77. UNCITRAL Model Law, *supra* note 70, art. 36 (1). It provides the following:

> *Article 36. Grounds for refusing recognition or enforcement*
>
> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
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> (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
>
> (i) a party to the arbitration agreement referred to in [A]rticle 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (iv) the composition of the arbitral tribunal 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; or
>
> (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the

Model Law's system of "choice of remedies" accorded the award debtor both active and passive remedies under the Model Law regime.[78]

After the Singapore Court of Appeal rendered its decision, the Hong Kong High Court — which had stayed the applications before it decided to set aside the enforcement orders granted earlier pending the Singapore Court of Appeal's decision — was faced with the same question as to whether to permit enforcement of the awards in the proceedings commenced in Hong Kong by the Astro Group against the Lippo Group.[79] The Hong Kong High Court decision is interesting because it recognized that the issue of the tribunal's jurisdiction was *res judicata* as a result of the Singapore Court of Appeal's decision.[80] But it nonetheless decided that the awards could be enforced because the Lippo Group acted in breach of the principle of good faith[81] in its inordinate delay by only bringing an application in January 2012 to set aside the enforcement orders made in respect of the awards. It is to be noted that more than a year has passed from the time the judgment in terms of the awards was entered into by the Hong Kong Court in November 2010.[82]

It remains to be seen if this decision would be upheld by the Hong Kong Court of Appeal. When it dismissed a leave to appeal application brought by the Astro Joinder Parties against the decision of another High Court Judge to stay the garnishee proceedings against the Lippo Group, it opined that "it will indeed be remarkable if, despite the Singapore Court of Appeal judgment ... Astro will still be able to enforce a judgment here based on the same arbitration awards that were made without jurisdiction."[83]

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country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

Id.

78. Jolley, *supra* note 62 (citing *PT First Media TBK*, [2013] SGCA 57, ¶¶ 65-74).

79. *Astro Nusantara International BV*, [2015] HCCT 45/2010, ¶ 4.

80. *Id.* ¶ 83.

81. *Id.* ¶¶ 90-91.

82. *Id.* ¶ 91.

83. *Id.* ¶ 6 (citing Astro Nusantara International B.V. v. PT Ayunda Prima Mitra, HCMP 835/2014, ¶ 13).

Another case is *Yukos Capital S.A.R.L. v. OJSC Oil Company Rosneft*[84] which concerns the dispute between Yukos Capital S.A.R.L. (Yukos) and OAO Rosneft (Rosneft). The arbitration is related to various loan agreements entered into between Yukos as lender, and a former production subsidiary of Yukos, OJSC Yuganskkneftegaz, as borrower, and of which Rosneft was a majority shareholder.[85] The tribunal seated in Russia rendered four awards in favor of Yukos, but these awards were thereafter set aside by the Russian Arbitrazh Courts, on grounds of violations of the right to equal treatment and agreed rules of procedure and the appearance of a lack of impartiality and independence on the part of the tribunal.[86]

Notwithstanding the awards' annulment in Russia, Yukos sought enforcement of the awards in the Netherlands.[87] At first instance, the Amsterdam District Court denied Yukos' application based on Article V (1) (e) of the New York Convention but this decision[88] was subsequently reversed by the Amsterdam Court of Appeal which granted enforcement of all four previously annulled awards. [89] In reaching its decision, the Amsterdam Court of Appeal concluded that

> it is very likely that the judgments by the Russian civil judge setting aside the arbitration decisions are the result of a dispensing of justice that must be qualified as partial and dependent ... This means that ... the setting aside of that decision by the Russian court must be disregarded.[90]

Like the U.K. Supreme Court's decision in *Dallah*,[91] the Amsterdam Court of Appeal's decision has also been at the receiving end of criticisms. It

84. Yukos Capital S.A.R.L. v. OJSC Oil Company Rosneft, [2011] EWHC 1461 (Comm) (U.K.).

85. Tweeddale & Tweeddale, *supra* note 2, at 142 (citing *Yukos Capital S.A.R.L.*, [2011] EWHC 1461, ¶ 6).

86. Tweeddale & Tweeddale, *supra* note 2, at 142 (citing *Yukos Capital S.A.R.L.*, [2011] EWHC 1461, ¶ 9).

87. Tweeddale & Tweeddale, *supra* note 2, at 142 (citing *Yukos Capital S.A.R.L.*, [2011] EWHC 1461, ¶¶ 18-19).

88. Tweeddale & Tweeddale, *supra* note 2, at 142 citing *Yukos Capital S.A.R.L.*, [2011] EWHC 1461, ¶ 37).

89. Tweeddale & Tweeddale, *supra* note 2, at 142 (citing *Yukos Capital S.A.R.L.*, [2011] EWHC 1461, ¶ 35).

90. Tweeddale & Tweeddale, *supra* note 2, at 142 (citing Albert Jan van den Berg, *Enforcement of Arbitral Awards in Russia: Case Comment on Court of Appeal of Amsterdam, April 28, 2009*, 27 J. INT'L ARB. 179, 180 (2010) [hereinafter van den Berg, *Enforcement of Arbitral Awards in Russia*]).

91. Tweeddale & Tweeddale, *supra* note 2, at 142.

is argued that it was "fundamentally wrong"[92] for the Amsterdam Court of Appeal to have come to such a "conclusion without any concrete evidence of a lack of independence and impartiality on the part of the judges."[93]

VI. A BALANCED WAY FORWARD?

Needless to say, the different approaches taken towards enforcement by the various New York Convention jurisdictions have since generated a fair bit of uncertainty within the international arbitration community. This creates a legitimate cause for concern as the lack of a uniform approach across jurisdictions can lead to questionable results.

There is much to be said in favor of according weight to decisions of Seat Courts. The issue lies in whether awards set aside at the Seat cease to have legal effect or whether estoppel or *res judicata* is applicable in cases where enforcement of the awards is sought in another jurisdiction. Such an approach would indeed be useful in preventing the highly undesirable situation, as in the *Dallah* case, of an award being challenged — and even the possibility of a conflicting decision reached — in another jurisdiction 10 years after its issuance.

On one hand, it is supported by Article VI of the New York Convention,[94] which gives some recognition to the decision of the Seat Court. Indeed, it can be argued that the point of Article VI is to allow the Enforcement Court to have before it the decision of the Seat Court so that it can minimize the risk of inconsistent decisions, as had happened in *Dallah*, where the decision of the Enforcement Court was made before that of the Seat Court.

On the other hand, a balance has to be struck. The sovereignty of the Enforcement Court must also be recognized, as Articles V (1)[95] and VII[96] of

92. van den Berg, *Enforcement of Arbitral Awards in Russia*, *supra* note 90, at 180.

93. *Id.* at 181.

94. New York Convention, *supra* note 8, art. VI. This provides that —

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in [A]rticle V (1) ([e]), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Id.

95. *Id.* art. V (1). It provides that —

(1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in [A]rticle II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) 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; or

(e) 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.

Id.

96. *Id.* art VII. It provides that —

(1) The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor 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.

(2) The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Id.

the New York Convention do. A rigidly territorial approach would invariably result in the international validity of an award being linked inseparably to its domestic validity in the law of the Seat.[97] Such an approach is arguably at odds with the spirit of the New York Convention in ensuring that arbitral awards are to the maximum extent portable and that they can be recognized and enforced in all 156 Contracting States.[98]

In light of this, it is suggested that the way forward ought to lie somewhere in between both approaches.[99] There must be more effort in upholding the decisions of the Seat Court. At the same time, there must also be a development of jurisprudence on the circumstances in which an Enforcement Court departs from decision of the Seat Court. This would be helpful for guiding future arbitration cases.

In connection with this, there appears to be some developing consensus as to the exceptional circumstances under which the annulment of an award at its Seat would not preclude its enforcement in another jurisdiction.

In the 2014 English High Court case of *Yukos Capital S.A.R.L v. OJSC Oil Company Rosneft*,[100] it was opined that in deciding the question of "whether the Court in considering whether to give effect to an award can (in particular and identifiable circumstances) treat it as having legal effect notwithstanding a later order of a court annulling the award,"[101] "[i]t would be both unsatisfactory and contrary to principle if the court were bound to recognize a decision of a foreign court *which offended against basic principles of honesty, natural justice*[,] *and domestic concepts of public policy.*"[102]

Similarly, in *Dowans Holding v. Tanzania Electric Supply*,[103] it was suggested that an Enforcement Court's discretion to enforce an annulled

97. Mance, *supra* note 14, at 16.

98. *Id.*

99. *Id.* at 17 (citing M. B. Holmes, *Enforcement of annulled arbitral awards: logical fallacies and fictional systems*, 79 INT'L J. ARB., MED. & DISP. MGMT. 244 (2013)).

100. Mance, *supra* note 14, at 20 (citing Yukos Capital S.A.R.L. v. OJSC Oil Company Rosneft, [2014] EWHC 2188 (Comm) (U.K.)). *See also* Malicorp v. Egypt, [2015] EWHC 361 (Comm) (U.K.)). Justice Simon's approach in the 2014 *Yukos Capital S.A.R.L.* case was subsequently endorsed in *Malicorp.*

101. *Yukos Capital S.A.R.L.*, [2014] EWHC 2188, ¶ 20.

102. *Id.* (emphasis supplied).

103. Dowans Holding v Tanzania Electric Supply, [2011] EWHC 1957 (Comm) (U.K.).

award could be exercised when the award was set aside at the Seat Court on "grounds which a court subsequently asked to enforce ... *would deprecate.*"[104]

In the case of *Getma International v. Republic of Guinea*,[105] the United States (U.S.) District Court of Columbia (District Court) recently denied a motion to enforce an award which was previously set aside by the Common Court of Justice and Arbitration on the basis that the annulment was not repugnant to U.S. public policy. Citing the case of *Termorio v. Electranta*,[106] the District Court held that the New York Convention confers upon courts a "narrowly" confined discretion to enforce an annulled award when not doing so "would violate the [U.S.'] most basic notions of morality and justice."[107] This included cases where such decisions to annul would tend "to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property."[108]

The above approach is analogous to that adopted by common law jurisdictions in determining whether to recognize or enforce a foreign court judgment, where refusal to recognize or enforce such judgment on the grounds of fraud or breach of natural justice and public policy, is the exception rather than the norm.[109]

Apart from the above line of cases, another noteworthy suggestion as to when an Enforcement Court could exercise its discretion to enforce an award notwithstanding its annulment in the Seat Court revolves around "local standard annulments" (LSA).[110] An annulled award ought to be enforced if it was not set aside on one of the grounds set out in the first *four* paragraphs of Article V (1) of the New York Convention.[111] Everything else would be an LSA, and entitled to only local effect.[112] The rationale behind such an approach stems from the belief that the first four paragraphs of

104. *Id.* ¶ 41 (emphasis supplied).

105. Getma International v. Republic of Guinea, Civil Action No. 14-1616, (D.C. Cir. 2016) (U.S.).

106. Termorio v. Electranta, 487 F.3d 928 (D.C. Cir. 2007) (U.S.).

107. *Getma International*, Civil Action No. 14-1616, at 8.

108. *Id.* at 9.

109. *See, e.g.*, I ALBERT V. DICEY, ET. AL., THE CONFLICT OF LAWS (15th ed. 2016).

110. Christopher Koch, *The Enforcement of Awards Annulled in their Place of Origin: The French and U.S. Experience*, 26 J. INT'L ARB. 267 (2009).

111. Paulsson, *Arbitration Unbound*, *supra* note 23.

112. Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding Local Standard Annulments*, 6 ASIA PAC. L. REV. 1, 25 (1998).

Article V (1) represent "internationally accepted criteria"[113] consistent with the New York Convention having "intended to ensure that arbitral awards would be enforced around the world unless the party resisting enforcement proved a fundamental impropriety such as excess of jurisdiction, wrong constitution of the arbitral tribunal, or denial of opportunity to be heard."[114]

While jurisprudence on enforcement of arbitral awards is still developing, it is certainly indicative of steps being taken in the right direction in ensuring the continued success of international arbitration. However, as the international arbitration community continues to work towards achieving consistency in enforcement proceedings across multiple jurisdictions, it is also prudent to recognize that despite the Model Law and the New York Convention's successes in defining an effective framework for arbitration across borders, international arbitration can never truly be divorced from domestic legal systems. The international arbitration community should increase awareness of the problems caused by inconsistent decisions in the Seat and Enforcement Courts, and advocate for the Enforcement Court to avail itself of Article VI of the New York Convention as much as possible, so that it can take into consideration the decision of the Seat Court in deciding the allowance of the enforcement of an award.

113. *Id.* at 1.

114. *Id.* at 2.