Christopher Bathurst Prize 2016
Question

1. In December 2013, Singapore Oil ("**SO**"), a company incorporated in Singapore, and Cambodia Energy ("**CE**"), a company incorporated in Cambodia, entered into a contract whereby SO was to supply consignments of oil at a fixed price to CE, over a 3-year term.

2. The contract contained the following clause:

   "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the law of Ruritania. The seat of arbitration shall be Ruritania City. The governing law of the contract shall be the substantive law of Cambodia."

3. Ruritania is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

4. Following a global fall in oil prices, CE refused to pay invoices to SO from December 2014, claiming that it had entered the contract in reliance on certain false representations by SO. In January 2015, SO terminated the contract and served a notice of arbitration on CE claiming payment of sums due under the contract.

5. The arbitration took place in September 2015. In November 2015 the Panel handed down its award ("**the Award**"), which held that the contract had been lawfully terminated by SO, no misrepresentations had been made and SO was entitled to US$50,000,000 in damages.

6. In December 2015, CE challenged the Award in the High Court of Ruritania and the Court gave judgment annulling the Award. The ground for annulment was that the Award was contrary to Ruritanian public policy of encouraging the complete divestment of fossil fuels. The Award undermined

this public policy because it entitled SO to payment for the supply of oil, and was therefore declared invalid.

7. In March 2016, SO sought to enforce the Award in the Cambodian High Court and CE challenged this. In April 2016, the Cambodian High Court gave judgment that the Award was invalid as it was contrary to Cambodian law. Further, the Cambodian High Court held that the decision of the High Court of Ruritania meant that the Award had "ceased to exist".

8. SO has learnt that CE is the direct owner of shares worth US$70,000,000 in Dude Food, a company incorporated in Singapore. SO now seeks enforcement of the Award in Singapore.
   (a) Discuss.
   (b) Would it make any difference to your answer if the Ruritanian Court had annulled the decision on the basis that the composition of the Arbitral Tribunal was contrary to Ruritanian law?

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I. INTRODUCTION

1. SO obtained the Award from a Ruritanian-seated arbitration against CE. The Award was subsequently annulled by the Ruritanian High Court on the ground that it was contrary to Ruritanian public policy of encouraging the complete divestment of fossil fuels ("**Ruritanian Judgment**"). The Cambodian High Court subsequently refused enforcement of the Award on the grounds that the Award was contrary to Cambodian law and that it had, by virtue of the Ruritanian Judgment, "ceased to exist" ("**Cambodian Judgment**"). SO now seeks enforcement of the Award in Singapore. Ruritania, Cambodia and Singapore are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**NYC**").

2. The salient issues are:

   (a) Whether the Award may be enforced in Singapore notwithstanding its annulment in Ruritania (the "**Enforcement Issue**");

   (b) Whether SO is, due to the Cambodian Judgment, precluded from asserting the Award's existence (the "**Estoppel Issue**"); and

   (c) Whether the answers to the above would be any different if the Award had been annulled on the basis that the Tribunal's composition was contrary to Ruritanian law (the "**Composition Issue**").

II. EXECUTIVE SUMMARY

3. The Award may be enforced in Singapore if the Ruritanian Judgment is denied recognition under Singapore private international law.

4. The Cambodian Judgment is unlikely to preclude SO from asserting the Award's existence.

5. The answers to the above would generally be no different if the Award had been annulled on the basis of the Tribunal's composition being contrary to Ruritanian law.

III. THE ENFORCEMENT ISSUE

6. The starting point for the enforcement of foreign arbitral awards in Singapore is the International Arbitration Act ("**IAA**"),[1] which gives effect to the NYC and largely adopts the UNCITRAL Model Law on International Commercial Arbitration 1985 ("**Model Law**").[2]

7. Under the IAA, a foreign award may be enforced in Singapore,[3] subject to certain grounds for refusal of enforcement.[4] Section 31(2)(f) of the IAA, which gives effect to Article V(1)(e) of the NYC, provides that the Singapore Courts "may" refuse enforcement if the foreign award has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

8. The main controversy here is whether and when an award that has been annulled at the seat may nonetheless be enforced. Two contrasting approaches have been taken: (i) the territorial approach, where the arbitration is anchored by the seat to the legal order of the State in which it takes place, so that annulled awards are legally non-existent;[5] and (ii) the delocalised approach, where the arbitration is detached from any particular national forum and is guided

[1] Cap 143A, 2002 Rev Ed Sing.
[2] Section 3, IAA.
[3] Section 29(1), IAA.
[4] Section 31, IAA.
[5] See *eg* Lord Mance, "Arbitration – a Law unto itself?" 30th Annual Lecture Organised by the School of International Arbitration (2015) ("**Mance**"); van den Berg, "Enforcement of Arbitral Awards Annulled in Russia" (2010) 27(2) J Int'l Arb 179 ("**VDB-2010**"); Holmes, "Enforcement of annulled awards: logical fallacies and fictional systems" (2013) Arbitration 244 ("**Holmes**").

solely by the agreement, so that awards may survive annulment.[6] In between these two extremes lies the discretionary approach, where the Court is viewed as having the discretion under Article V(1)(e) of the NYC to enforce an annulled award.[7]

9. There are essentially three arguments that SO may make for the Award's enforcement notwithstanding the Ruritanian Judgment, one based on a categorical delocalised approach and two based on the discretionary approach.

A. The French Approach

10. SO may argue, consistent with French decisions,[8] that the Award should be enforced because international awards are delocalised decisions of 'international justice' which existence is unaffected by annulment at the seat, with the enforcement court being free to determine whether the award should be enforced (the "**French Approach**"). However, this argument is unlikely to succeed.

11. The first problem with the French Approach is that it is rooted in the basis that: (i) Article VII(1) of the NYC preserves the parties' rights in any enforcement regime under the enforcement jurisdiction's national laws or treaties that are more favourable than that in the NYC; and (ii) French domestic law does not include, as a ground to refuse enforcement, the annulment of the award at the seat.[9] This is not the case under Singapore domestic law.[10]

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[6] See *eg* Gaillard, *Legal Theory of International Arbitration* (The Netherlands: Martinus Nijhoff Publishers, 2010) ("**Gaillard**"); Paulsson, "Enforcing Arbitral Awards Notwithstanding Local Standard Annulments" (1998) 6(2) APLR 1 ("**Paulsson**").
[7] Menon, "Standards in need of bearers: Encouraging reform from within" (2015) CIArb: Singapore Centenary Conference ("**Menon**") at [31]-[32].
[8] See *eg Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices* [2007] Rev Arb 517 ("***Putrabali***"); *Hilmarton Ltd v Omnium de traitement et de valorisation* (1995) XX YB Comm Arb 663–665 ("***Hilmarton***").
[9] Article 1502, French New Code of Civil Procedure.
[10] Section 31(2)(f), IAA.

Additionally, the French Approach has also been criticised as being internally inconsistent, as French-seated international awards are still subject to French annulment.[11]

12. Assuming this hurdle is overcome, it is also unlikely that the Singapore Courts will view the Award as a delocalised decision of 'international justice', as the Singapore Courts are more likely to adopt the territorial approach due to the delocalised approach's incompatibility with the NYC and its theoretical and practical problems.

13. First, the NYC's legislative history shows that its drafters may have preferred the territorial approach. While delocalists argue that the territorial approach does damage to the NYC's text as Article V(1) clearly states that the Court "may" refuse to enforce an annulled award, in contrast with the word "shall" used in other Articles, the NYC's *travaux* contains no discussion on the enforcement of annulled awards[12] or on a choice between "may" and "shall" in relation to Article V(1)(e).[13] Further, one of the NYC's founding fathers, Professor Piet Sanders, had endorsed the territorial approach,[14] and the NYC's drafters may conceivably have chosen not to expressly provide for non-enforcement of annulled awards because such a provision would be meaningless until the annulment grounds were stipulated as well.[15] The use of the word "*may*" is therefore inconclusive at best.

14. Second, the NYC's structure suggests a territorial approach. Delocalists argue that Article VII(1) allows parties to rely on other more favourable law or treaties, which, together with Article V(1)(e)'s permissive language, is consistent with a delocalised approach.[16] However, such a view is inconsistent with the other Articles: Article III sets the ceiling with regard to conditions on the enforcement of awards, which expressly includes the ground of the award's

[11] VDB-2010 at 196, fn 59.
[12] Holmes at 246.
[13] VDB-2010 at 186-187.
[14] VDB-2010 at 186-187.
[15] Holmes at 246.
[16] Born, *International Commercial Arbitration*, 2nd ed (The Netherlands: Kluwer Law International, 2014) ("**Born**") at 2691-2699; Paulsson at 7-8.

annulment as per Article V(1)(e), and Article VI allows the enforcement court to adjourn the enforcement decision if an annulment application has been made to the seat court, when such adjournment would have been entirely unnecessary in a truly delocalised approach.[17]

15. Third, the delocalised approach is theoretically problematic. Delocalists argue essentially that there ought to be recognition of a separate 'arbitral legal order', given that arbitration stems from party autonomy, with the seat being chosen only by way of compromise or for the sake of convenience.[18] This is ultimately unpersuasive; it is difficult to perceive arbitration as having a separate legal order when it essentially relies on court assistance and enforcement, and the adoption of the delocalised approach ironically requires adopting the language and analysis of a particular legal system – the French.[19] Further, it may be specious to suggest that the choice of seat is generally fortuitous when considering the extent parties recognise the importance of seat selection.[20]

16. Fourth, while both approaches involve the intrusion of domestic normative values into an international dispute resolution mechanism, the delocalised approach arguably does this to a much greater extent. While complete deference to the seat results in the introduction of its domestic normative values by mandating refusal of enforcement no matter how parochial the annulment grounds are,[21] not according any deference to the seat would result in the introduction of the domestic normative values of *any* enforcing court, even if the award truly deserves to be set aside,[22] thereby heightening transaction costs and incentivising forum shopping. Non-deference to the seat may also lead to intractable situations and bizarre results,

[17] Mance at 12.
[18] See *eg* Gaillard; Paulsson.
[19] Mance at 11.
[20] See Queen Mary School of International Arbitration & White & Case, *International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015) (available online: http://www.arbitration.qmul.ac.uk/docs/164761.pdf).
[21] Paulsson at 23.
[22] Menon at [33].

eg where the annulled award is enforced notwithstanding the re-arbitration of the dispute[23] or the issuance of a subsequent award that differs from the first, as in *Hilmarton* and *Putrabali*.[24]

17. Last, perhaps the biggest obstacle to the adoption of the delocalised approach in Singapore is that its Chief Justice has more than once expressed his preference for the territorial approach.[25] While the Singapore Courts have yet to deal with this issue directly, the Court of Appeal has opined that "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".[26]

18. It is therefore submitted that SO is unlikely to succeed in enforcing the Award with the French Approach. SO may, however, find better luck with either of the two most-established discretionary approaches, discussed below.

B. The Standards Approach

19. SO may argue, consistent with Canadian decisions[27] and the preferred approach of some commentators,[28] that the Award should be enforced because: (i) Article V(1)(e) of the NYC confers a discretion on the Courts to enforce an annulled award notwithstanding its annulment at the seat; (ii) the Courts exercise such discretion only where the annulment rested on grounds equivalent to those in Article V(1)(a)-(d) of the NYC, which generally entail international (as opposed to local) standards of annulment (the "**Standards Approach**"); and (iii) the Award should be enforced as the Ruritanian Judgment had annulled the award on a

[23] VDB-2010 at 187.
[24] See Silberman & Scherer, "Forum Shopping and Post-Award Judgments" (2014) 2(1) PKU Transnat'l L Rev 115 ("**Silberman & Scherer**") at 124-125.
[25] See Menon; Ross, "Clash of the Singapore titans: Menon and Born disagree over awards annulled at the seat", Global Arbitration Review (12 Oct 2015).
[26] *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [77].
[27] See *Powerx Corp v Alcan Inc* [2004] BCSC 876; *Europcar Italia SpA v Alba Tours Int'l Inc* [1997] 23 OTC 376 at [22].
[28] See *eg* Paulsson at 25; Born at 2691-2699.

local standard (violation of local public policy). However, this argument is unlikely to succeed.

20. The Standards Approach is advocated from the perspective that there is no reason for enforcement courts to be bound by annulment decisions based on 'local peculiarities' when the arbitration is international in nature. While this view has some merit, the Standards Approach has several problems that militate against its adoption.

21. First, the Standards Approach is arguably NYC-incompatible: there is nothing in Article V(1)(e)'s wording that distinguishes between purely domestic and 'international' grounds of annulment.[29]

22. Second, the Standards Approach is in essence existing treaty law under the European Convention on International Commercial Arbitration 1961,[30] thereby giving rise to the difficulty of transposing, through interpretation, a subsequent treaty's provisions into the NYC.[31]

23. Third, the Standards Approach may be contrary to party autonomy. Under the territorial approach, parties are taken to have embraced the laws and judicial system of their chosen seat, "warts and all",[32] including any 'local peculiarities'. In the present case, the facts do not suggest that the parties were unaware, or had no means of being aware, of Ruritanian attitudes toward oil-related disputes.

[29] Mance at 17.
[30] Geneva, 21 Apr 1961, 484 UNTS 364.
[31] VDB-2010 at 188.
[32] Menon at [33(b)].

24. Fourth, the Standard Approach's lack of articulation of any valid reasons for treating foreign annulment judgments differently from any other foreign judgment goes against the principles of private international law to give effect to foreign judgments.[33]

25. Last, it may not solve the problem of parochial annulment after all, as seat courts determined to annul awards on parochial grounds will in time do so in the guise of an 'international' standard of annulment.[34]

26. It is therefore submitted that SO is unlikely to succeed in enforcing the Award with the Standards Approach.

C. The Judgment Approach

27. SO may argue, consistent with English,[35] Dutch[36] and United States[37] decisions, that the Award should be enforced because: (i) Article V(1)(e) of the NYC confers a discretion on the Courts to enforce an annulled award notwithstanding its annulment at the seat; (ii) the Court may exercise its discretion to do so if the foreign annulment judgment is, under Singapore private international law, not subject to recognition (the "**Judgment Approach**"); and (iii) the Ruritanian Judgment is not subject to recognition in Singapore. It is submitted that the Singapore Courts are likely to adopt the Judgment Approach.

28. First, the Judgment Approach is arguably NYC-compatible; the language of Article V(1)(e) provides the enforcement court with the discretion to enforce an annulled award, and where

[33] Koch, "The Enforcement of Awards Annulled in their Place of Origin: The French and US Experience" (2009) 26(2) J Int'l Arb 267 at 288.
[34] van den Berg, "Should the Setting Aside of the Arbitral Award be Abolished?" (2014) 29(2) ICSID Rev 263 ("**VDB-2014**") at 287.
[35] See *eg Malicorp Limited v Government of the Arab Republic of Egypt and others* [2015] EWHC 361 at [21]-[22]; *Yukos Capital Sarl v OJSC Oil Company Rosneft* [2014] EWHC 2188 (Comm) at [12], [20].
[36] *Yukos Capital SARL v OAO Rosneft* (2009) XXXIV YB Comm Arb 703-714.
[37] See *eg Chromalloy Gas Turbine Corp v Arab Republic of Egypt*, 939 FSupp 907 (DDC 1996); *TermoRio SA v Electranta SP*, 487 F3d 928 (DCCir 2007).

the foreign annulment judgment is denied recognition by the enforcement court, the award cannot be said to have been 'set aside', as far as the enforcement court is concerned.[38]

29. Second, the Judgment Approach has been viewed by some, including the Chief Justice of Singapore, as being consistent with the territorial approach, as it allows enforcement of annulled awards only in exceptional circumstances based on traditional principles of comity.[39].

30. Last, the Judgment Approach is likely to be viewed as an acceptable 'hybrid' approach to cut the territorial-delocalised Gordian knot, as it seeks to minimise the problems of both the territorial and delocalised approaches while being arguably the most principled of all the discretionary approaches,[40] and is also inherently compatible with the principles of private international law. While the Judgment Approach has been criticised for its potential to lead to international disharmony due to its reliance on national law,[41] such concerns may be overblown, as despite variances in local standards, a basic similarity exists.[42]

31. It is therefore submitted that SO may find some success with the Judgment Approach. In the present case, however, the facts are insufficient to state definitively whether the Ruritanian Judgment would be denied recognition by the Singapore Courts under one of the private international law grounds, *eg* fraud, breach of natural justice or violation of public policy.[43] The Ruritanian Judgment's reliance on local public policy grounds *per se*, in particular one stemming from environmental concerns, is unlikely to be sufficient.

[38] Paulsson, "Arbitration in Three Dimensions" (LSE Law, Society and Economic Working Papers 2/2010) at 33.
[39] Menon at [36]-[37]; Mance at [20].
[40] Silberman & Scherer at 135; Park, "Duty and Discretion in International Arbitration" (1999) 93 Am J Int'l L 805.
[41] VDB-2010 at 191.
[42] Silberman, "Some Judgments on Judgments: A View from America" (2008) 79 King's LJ 235 at 237-238.
[43] *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 at [14].

IV. THE ESTOPPEL ISSUE

32. CE may argue that, since the Cambodian High Court had already decided that the Ruritanian Judgment had rendered the Award non-existent, SO is estopped from re-litigating the issue of the Award's existence. It is submitted that CE is unlikely to succeed.

33. It is currently unclear whether a foreign enforcement court judgment may have preclusive effect in another enforcement court via the doctrine of issue estoppel. Some jurisdictions have answered affirmatively to that question on the basis that allowing the re-litigation of identical issues in different fora is not in line with the overarching public policy of finality.[44] Prominent judges, such as the Chief Justice of Singapore, have also endorsed the application of issue estoppel on similar grounds.[45]

34. It is submitted that the Singapore Courts ought *not* to grant preclusive effect to foreign enforcement court judgments in their own enforcement proceedings. First, the doctrine of issue estoppel may be NYC-incompatible: Article V, which provides an exhaustive list of the grounds of non-enforcement, does not include issue estoppel.

35. Second, it may be a violation of the NYC for an enforcement court to not conduct an independent evaluation on whether any of the Article V grounds have been established, as under Article III, the cause of action for enforcement is explicitly individualised to the particular forum where enforcement is sought.[46] Consequent violations of the NYC may also occur, *eg* the forum's obligation under Article II to recognise and give effect to valid

[44] See *eg Diag Human Se v The Czech Republic* [2014] EWHC 1639; *Yukos Capital SARL v OJSC Rosneft Oil Co* [2011] EWHC 1461 (Comm); *Belmont Partners LLC v Mina Mar Group Inc* 741 FSupp2d 743 (WDVa 2010); *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (2003) XXVIII YB Comm Arb 752.
[45] Menon, "Patron's Address", Chartered Institute of Arbitrators London Centenary Conference (2 Jul 2015) at [63]; Mance at 22.
[46] DeWitt, "A Judgment Without Merits: The Recognition and Enforcement of Foreign Judgments Confirming, Recognizing, or Enforcing Arbitral Awards" (2015) 50 Tex Int'l LJ 495 at 510.

arbitration agreements, where the foreign judgment's determination of the invalidity of the arbitration agreement is given preclusive effect.[47]

36. Last, granting such preclusive effect may potentially lead to increased forum shopping, multiplication of proceedings and contradictory outcomes, as parties will likely race to present the award in whichever country that has an arbitration regime in line with their interests in the hopes of relying on its preclusive effect in all other jurisdictions.[48]

37. In any event, this issue may be academic, as the Cambodian Judgment would arguably not amount to an issue estoppel. Under common law principles, the foreign court's determination must be *necessary* for its decision before it may give rise to an issue estoppel.[49] Here, the Cambodian High Court had held that the Award was invalid as it was contrary to Cambodian law, with the *further* determination that the Award had ceased to exist by virtue of the Ruritanian Judgment, thereby making its determination of the Award's existence secondary or collateral at best.

V. THE COMPOSITION ISSUE

38. In the event that the Award was annulled on the basis of the Tribunal's composition being contrary to Ruritanian law, the discussion above would not change, with one exception: should the Standards Approach be adopted, it would mean that the Award would *not* be enforced, as its annulment would have been on the basis of an 'international' standard (specifically, Article V(1)(d) of the NYC). However, depending on the facts, it may be open to SO to argue that the annulment was not on the basis of a 'local' standard, but rather a 'local' standard in 'international' clothing.[50]

[47] Scherer, "Effects of Foreign Judgments Relating to International Arbitral Awards - Is the 'Judgment Route' the Wrong Road?" (2013) 4(3) JIDS 587 at 622.
[48] *Ibid* at 622-623.
[49] *Good Challenger Navegante SA v Metalexportimport SA* [2004] 1 Lloyd's Rep 67 at [54].
[50] Paulsson at 26.

VI. CONCLUSION

39. The Singapore Courts are most likely to adopt the Judgment Approach with regard to the issue of the enforcement of annulled awards, with the Award's enforcement being thereby dependent on the non-recognition of the Ruritanian Judgment under Singapore private international law. SO may argue alternatively that the Singapore Courts should adopt the Standards Approach; though unlikely, should SO succeed, it may argue that the Award ought to be enforced in Singapore because the Ruritanian Judgment had annulled the Award on a local standard of annulment that ought to have only local effect. The French Approach is likely too problematic for adoption by the Singapore Courts.

40. The Cambodian Judgment is unlikely to amount to an issue estoppel; therefore, SO would not be precluded from asserting the legal existence of the Award. In any event, the Singapore Courts ought not to grant preclusive effect to foreign enforcement court judgments.

41. The answers above are unaffected even if the Award was annulled on the basis of the Tribunal's composition being contrary to Ruritanian law, with the exception that SO may be barred from seeking enforcement under the Standards Approach.