

**“Issue Estoppel under the New York Convention”
by Sir Bernard Eder**

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1. The New York Convention (Article V)

Article V

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) ...
 - (b) ...
 - (c) ...
 - (d) ...
 - (e) **The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority in which, or under the law of which, that award was made.**
2. **Recognition and enforcement of an arbitral award may also be refused** if the competent authority in the country where recognition and enforcement is sought finds that:
 - (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
 - (b) **The recognition or enforcement of the award would be contrary to the public policy of that country.**

- Article V is concerned with the recognition and enforcement of awards
- The way Article V is phrased is unusual
 - Expressed in the negative: does not specify when an award should be recognized and enforced, only when recognition and enforcement may be refused
- Important words: ‘MAY’ and ‘ONLY’
- **Focus on sub-paragraph (e) of paragraph 1:** recognition and enforcement of an award may be refused if the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority in which, or under the law of which, that award was made
 - Divided in to two parts:
 1. The award has not yet become binding on the parties; or
 2. Has been set aside or suspended by competent authority (court of seat of arbitration)
- **Paragraph 2(b)** provides that recognition and enforcement of awards may also be refused if the competent authority (of the enforcement state) finds that it would be contrary to the public policy of that country
- **Difficult question: Can an award that has been set aside in the country of the seat of arbitration, be enforced in a third country (e.g. where there may be assets)?**
 - This question must be considered in an international context¹
 - Wide divergence of views as to the nature of the arbitral process and its relationship with national courts
 - **Two main theories**
 - (i) **Territorial theory** – sees an award as essentially anchored in the territory of the seat of arbitration
 - (ii) **Delocalized theory** – sees an award as having an independent status, independent of the territory of the seat of arbitration
- **Radical divergence between France and USA**

(I) France

¹ See *Legal Theory of International Arbitration*, Emmanuel Gaillard (2010)

Bargues Agron Industrie (Paris Court of Appeal - 2004):

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

PT Putrabali Adyamulia v Rena Holding and Mnogitia Est Epices (Cour de Cassation - 2007):

- The English High Court set aside an English arbitration award. Claimant then went to France and got enforcement of that award in France.
- **Held:** "[a]n international award, which is not anchored in any legal order, is a decision of international justice, whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought..."
- Application of Art 5(1)(e): the fact that an award has been set aside in the seat of arbitration does not mean that under the New York Convention, the enforcement state (in this case, France) is bound to enforce it → it **may** refuse to enforce the award

(II) USA

Termo Rio (Court of Appeals for District of Columbia – 2006)

- **Held:** "[A]n arbitration 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...."
- Where an award has been set aside in the seat of arbitration, it is **generally not enforced**

2. **The English Position**²

- s 103 Arbitration Act 1996
- **Yukos Capital SARL**³: "Where an award has been set aside in the court of the seat, an arbitral award should be enforced only if recognition of the order setting aside the award would be impeachable for fraud or as being contrary to natural justice, or otherwise contrary to public policy

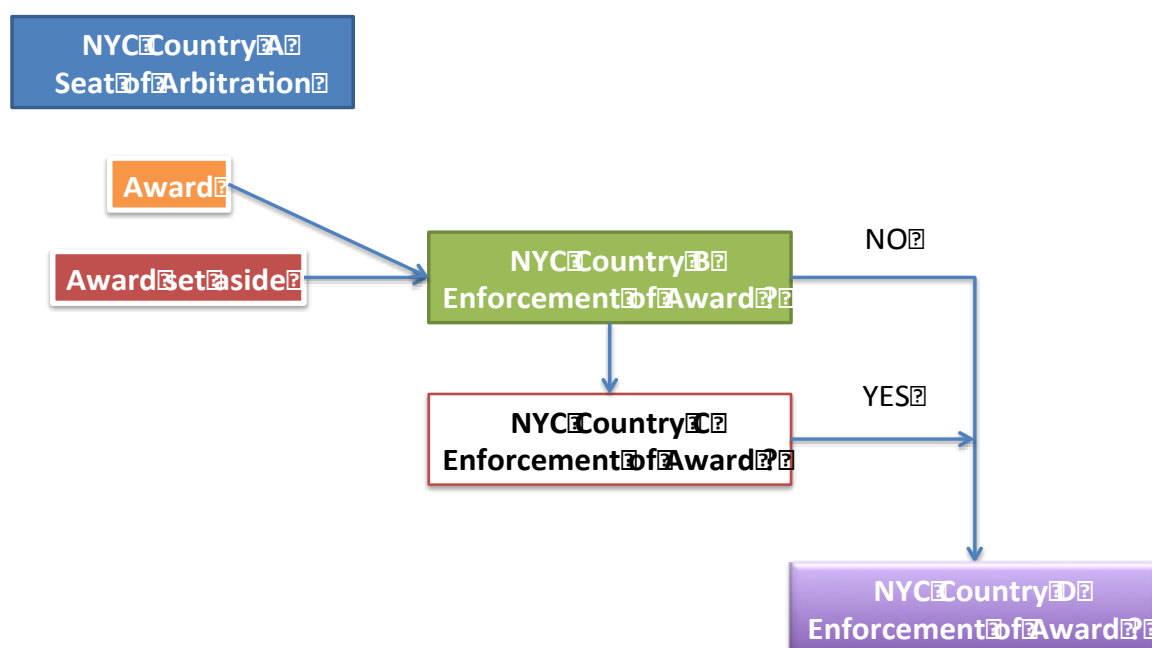
3. **Issue Estoppel under the New York Convention**

Yukos Capital SARL

- Claimant succeeded in obtaining awards in its favour in Russia (seat of arbitration). However, those awards were set aside by Moscow courts
- The claimant sought enforcement proceedings in Holland
- Initially, the Dutch District Court refused leave to enforce on the basis that the awards had been set aside in Moscow. The Amsterdam Appeal Court reversed the decision and gave leave to enforce the awards, applying local rules of private law and domestic international law in Moscow
- The claimant then sought enforce the original awards in England
- **Question that arose:** whether the decision of the Dutch courts (that the award should be enforced notwithstanding that it had been set aside in Moscow) created an issue estoppel, such that when the claimant came to England, the English court should admit enforcement?
- **Court of Appeal held** (reversing the decision of the lower court): there could be no issue estoppel in England because the Dutch decision was based on Dutch public policy. In England, the court is concerned with English public policy
- **But** inherent in the decision of the CA is that there *could* be an issue estoppel apart from the question of public policy (i.e. if the decision was not decided on public policy, there could be an issue estoppel)

² See: *Cutting the Gordian Knot* (2015) 81 Arbitration 137, Tweeddale & Tweeddale at pp140-143 and the cases there cited, in particular: *Dowans v Tanzania Electric Supply Co Ltd* [2011] 2 Lloyd's Rep 475, *IPCO (Nigeria) Ltd v Nigerian National Petroleum Ltd* [2005] 2 Lloyd's Rep 326, *Kanoria v Guinness* [2006] 1 Lloyd's Rep 701, *Dallah v Min of Religious Affairs, Govt of Pakistan* [2010] 1 Lloyd's Rep 119, (CA); [2010] 2 Lloyd's Rep 692, *Yukos Capital SARL v OJSC Rosneft Oil Co.* [2014] EWHC 2188
³[2014] EWHC 2188

Diagram Illustration



- An arbitral award has been made in country A, which is then set aside (not enforceable in country A)
- The question of whether a claimant can then seek enforcement of that award in country B turns on Article V of the New York Convention.
- Assuming that country B refuses to enforce the award, would the claimant then be allowed to ‘foreign shop’, attempt to enforce the award in Country C?
 - One argument may be that the decision in country B creates an issue estoppel, such that when the claimant goes to country C, there is an issue estoppel in country C
- In the event that country C holds that the award is enforceable, there would be two decision of two courts under the New York Convention (one in favour of enforcement, one against enforcement)
- If there are not enough assets in country C, the claimant may go to country D to enforce the award. Country D would then be faced with two conflicting decisions as to whether the award is or is not enforceable
- In this situation, what should country D do? (This question is presently unresolved)

(i) General principles of Issue Estoppel

- **In order to establish an issue estoppel, four basic conditions must be satisfied** (*Carl Zeiss Stiftung v Rayner & Keller* (No2) [1967] 1 AC 853, *The Sennar* (No2) [1985] 1 WLR 490)
 - i) The earlier judgment must be given by a foreign court of competent jurisdiction;
 - ii) That judgment must be final and conclusive on the merits;
 - iii) There must be ‘identity of parties’; and
 - iv) There must be ‘identity of subject matter’
- **Summary of principles in *Good Challenger*** [2004] 1 Lloyd’s Rep 67 at [54]
 - i) It is irrelevant that the English court may form the view that the decision of the foreign court was wrong either on the facts or as a matter of English law.
 - ii) The courts must be cautious before concluding that the foreign court made a clear decision on the relevant issue because the procedures of the court may be different and it may not be easy to determine the precise identity of the issues being determined.
 - iii) The decision of the court must be necessary for its decision.
 - iv) The application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice
- The doctrine of issue estoppel must not be applied indiscriminately in any particular case

(ii) Cases

Good Challenger

- A claimant in an English seat arbitration obtained an award in its favour and sought enforcement proceedings against the defendant in Romania
- An issue arose in Romania as to whether or not the enforcement proceedings were time-barred
- The Supreme Court in Romania refused to enforce English arbitral award on the ground that in Romanian law, a foreign award can only be enforced if it is not time-barred both under Romanian law and under the law of the seat of arbitration ('two limb requirement')
- **Held (in Romania):** enforcement proceedings were time-barred under Romanian law. However, the court went on to hold that proceedings would also be time-barred under English law → cannot enforce in Romania
- Claimant returned to England and attempted to enforce the award in England
- **Issue that arose before English courts:** Did the decision of Supreme Court in Romania create an issue estoppel for enforcement back in England?
- **Held (in England):** There was no issue estoppel in England because the conclusion reached in Romania was not fundamental to its decision as a matter of English law
 - Due to the two limb requirement, the fact that enforcement proceedings were time-barred under English law was not fundamental to as it was sufficient that the action was time-barred under Romanian law
- Inherent in the decision: an issue estoppel could have arisen by reason of a foreign court decision

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

- Claimant obtained an award in its favour in Czech Republic
 - The arbitration agreement provided for an internal appeal process (losing party had the right to appeal as part of the arbitral process)
 - The losing party gave notice to appeal
 - There was dispute as to whether notice of appeal was valid and whether the internal appeal process had been triggered (this turned on whether it was served in time and on the right party)
 - If valid → original award would not be binding as the arbitral process was still on-going
 - If not valid → original award would be binding
 - The New York Convention Art V provides that a State may refuse to enforce if the 'award has not yet become binding on the parties'
 - The claimant went to Austria and sought to enforce the original award. The Austria Supreme Court held that the award was binding
 - The claimant then went to England to enforce the award.
 - **The question before the English court was:** whether the decision of the Austria Court (that the award was not binding) create an issue estoppel in England?
 - **Held (per Mr. Justice Eder):** The award was not binding in England. However, it was conceded that an issue estoppel could arise
 - **Reasons for holding that there was an issue estoppel:**
 - (i) **Consistent with general principles:** It was a decision made by the Austrian Supreme Court on the merits, and it was conclusive in Austria (*Carl Zeiss Stiftung, The Sennar*).
 - (ii) **Consistent with the view expressed in the leading textbook:** *Dicey, Morris & Collins*, The Conflict of Laws, 15th Ed para 14-122 referring to *Owens Bank v Bracco* [1992] 2 AC 443 at pp470-F-472E and *House of Spring Gardens Ltd v Waite* [1991] QB 24
 - (iii) **Consistent with view expressed in *Yukos Capital*:** The decision was unrelated to questions of public policy, as it was a question of law.
- NB:** (a) public policy and (b) natural justice

- Case law consistent with the view in *Diag*:
 - *Karaha Bodas Co v PPM Dan Gas Bumi Negara* [2003] HKCU 1
 - *Coeclerici Asia (Pte) mLtd Gujarat NRE Coke Ltd* [2013] FCA 882
 - *Astro Nusantara v PT Ayunda Prima Mitra* [2015] HKCFI 274 in particular at paras 94-96

Astro Nusantara (currently subject to an application for leave in Hong Kong)

- Concerned Singapore seat arbitration
- At a preliminary ruling on jurisdiction, the tribunal decided that certain third parties may be included as additional parties to the arbitration
- The claimants issued enforcement proceedings in various jurisdictions, including Hong Kong and Singapore
- The time limit to resist enforcement expired in HK (in 2010) and on the basis of the decision by the tribunal in Singapore, the claimant obtained judgment for a garnishee order in Hong Kong
- When the claimant attempted to enforce the award in Singapore, the Singapore Court of Appeal set aside the original award
- The defendant, who had not resisted enforcement in HK, applied to set aside the award in Hong Kong on the basis that it had been set aside at the seat of arbitration (Singapore)
- **Held (in HK, per Justice Chow):** The fact that the original award was set aside in Singapore did not affect the judgment in HK. As the time limit to resist enforcement had already expired, it was too late to set aside the judgment in HK
- **Importantly,** Justice Chow recognized that the decision of the Singapore Court of Appeal created an issue estoppel in Hong Kong as a matter of law
- Nevertheless, the Hong Kong court was not persuaded to set aside its judgment due to discretionary factors

Academic criticisms of *Diag*

- Art V of the New York Convention provides that recognition and enforcement of an award ‘may’ be refused ‘**only** if ... the award has **not yet become binding** on the parties’ (sub-paragraph 1(e))
 - The paragraphs form a complete exhaustive code of the circumstances in which a court may refuse enforcement of awards
 - If the case does not fall within any of the sub-paragraphs, the discretion to refuse does not arise
- In *Diag*, the fact that the Austrian court may have decided that the award was binding is irrelevant to the enforcing court because the enforcing court must decide for itself whether the award is binding
 - It cannot escape this judicial function by relying on what has been decided by another court
- Issue estoppel is not one of the recognized conditions that allow a local enforcing court to refuse enforcement under the New York Convention
- **Responses to academic criticisms:**
 - (i) This point was never argued under the New York Convention
 - (ii) More importantly, in deciding whether an award has become binding, a local court must apply its own domestic rules
 - One of those rules may include the doctrine of issue estoppel
 - An award may ‘not yet become binding’ on the party seeking to enforce it he is estopped from arguing that it is binding by virtue of a previous decision – to this extent, issue estoppel may be relevant
 - In modern times, the prospect of issue estoppel affects the ability of parties to ‘foreign shop’ (going from country A to country B to enforce an arbitration award)
 - The view in England is that ‘foreign shopping’ is not an attractive prospect (argument in favour of issue estoppel)

4. Questions and comments

- Whether the New York Convention provides a regime for fast and effective enforcement of awards given the amount of legal argumentation it has generated?
 - On the face of it, the wording ‘enforcement of awards **may** be refused’ confers an open discretion
 - In England, this discretion is limited by taking a narrow view of the word ‘may’ – awards may only be set aside where it can be shown that the award was obtained out of fraud or improper practice (English law is very pro-arbitration)

- Where a local court sets aside a decision of an arbitration tribunal, it does not mean that they are being anti-arbitration. Rather, they are being pro-arbitration, as the court must maintain a supervisory jurisdiction to ensure that the arbitration process is done properly i.e. in compliance with due process, public policy etc.
- Under the English Arbitration Act, courts have discretion to take a view in respect of proceedings which have been brought in the curial court (seat of arbitration) to set aside the award but which have not yet led to a hearing
 - In particular, where there are strong reasons for comity between England and the country of the seat of arbitration, English courts may stay enforcement proceedings pending the outcome of proceedings in the curial court
 - This appears to be a recipe for ineffectiveness – proceedings take a long time and may be appealed after the first instance
 - If this discretion is exercised liberally, it potentially undermines the purpose of the New York Convention to create a regime for fast and easy enforcement of awards

Issue Estoppel under the New York Convention

CCPL/Bernard Eder/May 2015

<http://newyorkconvention1958.org/>

As of May 2015,
155 state parties have adopted the
New York Convention

WHY ?

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New York Convention: Article V

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- International context:
 - see eg *Legal Theory of International Arbitration*, Emmanuel Gaillard (2010)
- Wide divergence of views - academic, practitioner and judicial - as to the nature of the arbitral process and its relationship with national courts.
- Two main 'theories' ie. 'territorial' or 'delocalised'.

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What is fate of an award set aside at the seat ?

Cf: radical divergence between France and USA

I. FRANCE

Barques Agron Industrie (Paris Court of Appeal - 2004):

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

PT Putrabali Adyamulia v Rena Holding and Mnogitia Est Epices (Cour de Cassation - 2007):

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

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II. USA

Termo Rio (Court of Appeals for District of Columbia – 2006)

“[A]n arbitration 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....”

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England ?

S.103 Arbitration Act 1996

See: *Cutting the Gordian Knot* (2015) 81 Arbitration 137, Tweeddale & Tweeddale at pp140-143 and the cases there cited, in particular:

Dowans v Tanzania Electric Supply Co Ltd [2011] 2 Lloyd’s Rep 475

IPCO (Nigeria) Ltd v Nigerian National Petroleum Ltd [2005] 2 Lloyd’s Rep 326

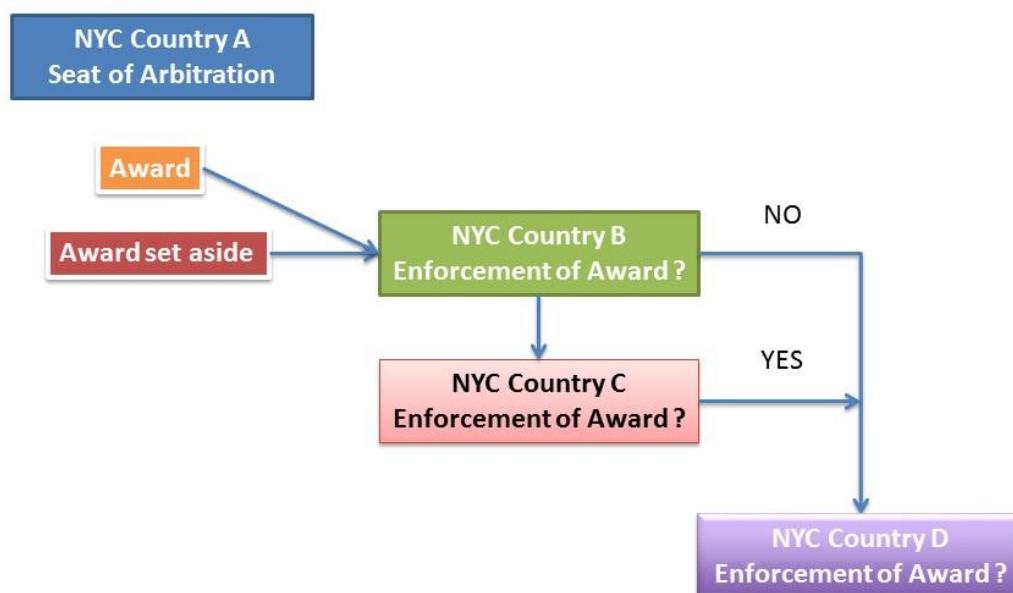
Kanoria v Guinness [2006] 1 Lloyd’s Rep 701

Dallah v Min of Religious Affairs, Govt of Pakistan [2010] 1 Lloyd’s Rep 119, (CA); [2010] 2 Lloyd’s Rep 692

Yukos Capital SARL v OJSC Rosneft Oil Co. [2014] EWHC 2188

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Issue Estoppel under the New York Convention



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General principles of issue estoppel

See:

Carl Zeiss Stiftung v Rayner & Keller (No2) [1967] 1 AC 853

The Sennar (No2) [1985] 1 WLR 490

- (1) Earlier Judgment must be given by a foreign court of competent jurisdiction;
- (2) That Judgment must be final and conclusive on the merits;
- (3) There must be 'identity of parties'
- (4) There must be 'identity of subject matter'.

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NB: per Clarke LJ in *The Good Challenger* [2004] 1 Lloyd's Rep 67 at [54]

- i) It is irrelevant that the English court may form the view that the decision of the foreign court was wrong either on the facts or as a matter of English law.
- ii) The courts must be cautious before concluding that the foreign court made a clear decision on the relevant issue because the procedures of the court may be different and it may not be easy to determine the precise identity of the issues being determined.
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- iv) The application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice.

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- *The Good Challenger* [2004] 1 Lloyd's Rep 67
- *Diag Human SE v The Czech Republic* [2014] EWHC 1639 (Comm). Three main reasons:
 - (i) General principle
 - (ii) Consistent with the view expressed in the leading textbook, *Dicey, Morris & Collins*, *The Conflict of Laws*, 15th Ed para 14-122 referring to *Owens Bank v Bracco* [1992] 2 AC 443 at pp470-F-472E and *House of Spring Gardens Ltd v Waite* [1991] QB 241.
 - (iii) *Yukos Capital SARL v OJSC Rosneft Oil Co.* [2013] 1 WLR 1329

BUT NB: (a) public policy (b) justice

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- *Karaha Bodas Co v PPM Dan Gas Bumi Negara* [2003] HKCU 1
- *Coelcerici Asia (Pte) mLtd Gujarat NRE Coke Ltd* [2013] FCA 882
- *Astro Nusantara v PT Ayunda Prima Mitra* [2015] HKCFI 274 in particular at paras 94-96

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