VOL. 7 JANUARY 2019 NO. 1

CHINA LEGAL SCIENCE

CONTENTS

ARTICLES

COMMENTARY

CASE STUDY

LEGAL INFORMATION

目　录

学术专论

法律评论

案例研究

法学信息

COMMENTARY

EXERCISE OF RESIDUAL DISCRETION UNDER ARTICLE V OF THE NEW YORK CONVENTION BY ENFORCEMENT COURT WHEN AWARD IS ALIVE, DEAD, AND UNDEAD IN SEAT

*William Leung King Wai**

I. SUPERVISORY COURT AND ENFORCEMENT COURT

In any arbitration under the auspice of the *New York Convention* (hereinafter referred to as the Convention), the court in 'the country where the award was made',[1] commonly understood to be the seat (member-state) of arbitration, has the right to, in exercising its power to supervise arbitration activities within the seat state including the setting aside of the Convention award having been made therein (hereinafter referred to as the supervisory court). The setting aside of the Convention award is a matter of domestic law of the seat and the power of doing so is the exclusive power of the supervisory court. The court of a member state of the Convention at which the application for enforcement of the arbitral award is being sought, which can either be in the seat state itself or in any non-seat state (hereinafter referred to as the enforcement court) has no power to set aside the award and has only the power to refuse to enforce the Convention award which was made in the seat state. The relationship between the supervisory court and the enforcement court is an intricate one which is neither one of deference, with the enforcement court being deferent to the supervisory court, nor one of total disregard, with the enforcement court giving no regard whatsoever to whatever decision made by the supervisory court.

As explained by Sir *Anthony Mason* in the *Hebei* case:[2] 'Under the Ordinance and the Convention, the primary supervisory function in respect of arbitrations rests with the court of supervisory jurisdiction as distinct from the enforcement court. But this does not mean that the enforcement court will necessarily defer to the court of supervisory jurisdiction. The Convention distinguishes between proceedings to set aside an award in the court of supervisory jurisdiction[3] and proceedings in the court of enforcement.'[4]

* Ph.D. Candidate at Peking University Law School. My thanks to Professor *Anselmo Reyes* for his kind comments to draft of my script.

1 Article V(1)(a) of the *New York Convention.*

2 *Hebei Import & Export Corp v. Polyteck Engineering Co Ltd* [1999] 2 HKCFAR 111-140, at 136 C-E.

3 Articles V(1)(e) and VI of the *New York Convention.*

4 *Id.*, article VI.

II. HISTORICAL DEVELOPMENT OF CONVENTION AND MODEL LAW

The trend towards the uniform treatment of foreign awards and non-domestic awards[5] or alternatively, domestic international awards[6] generally in fact began with the Convention which did away with the double exequatur rule prescribed in the *Geneva Convention of 1927*, under which left for enforcement (exequatur and the like) was required from both the court of the seat of arbitration and the court of enforcement when the place of enforcement is different from the seat of arbitration. The party relying on an arbitral award bore the burden to prove five cumulative conditions in order to obtain recognition and enforcement, including that the award was 'final'[7] in the country in which it was made. The *Geneva Convention of 1927* specified that the award would not be final if the award were still 'open to opposition, appeal or *pourvoi en cassation* or if it was 'proved that any proceedings for the purpose of contesting the validity of the award were pending'.[8] In practice, establishing the finality of the award could only be achieved by obtaining a leave of enforcement in the courts of the country of the seat of the arbitration. This required the party seeking enforcement to effectively obtain two decisions of exequatur, one at the country where the award was made and one at the place of enforcement as this was then known as the requirement of double exequatur thus generating more costs and delaying proceedings. In addition, the requirement that the award be final in the country in which the award was rendered made it particularly easy for a party to obstruct or delay the enforcement by simply instituting proceedings for contesting the award's validity in the courts of the country where the award was issued.[9]

Article V of the Convention abrogated the double exequatur by way of abandoning the requirement of finality of the award while providing that the non-binding nature of the award could still constitute a valid ground for refusing recognition and enforcement. Courts from various countries have consistently referred to the abrogation of the double exequatur as one of the major innovations of the Convention.

Numerous other courts have similarly confirmed this principle.[10] The

5 The term 'non-domestic' appears to embrace awards which, although made in the state of enforcement, are treated as 'foreign' under its law because of some foreign element in the proceedings, e.g. another State's procedural laws are applied.

6 That is, an international commercial arbitral award issued in the recognizing or enforcing state or territory, that is, in the same territory as the forum in which recognition and enforcement is sought.

7 Article 1 of the *Geneva Convention of 1927*; and EMMANUEL GAILLARD & GEORGE A. BERMANN, GUIDE ON CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS NEW YORK, at 132 (Brill Nijhoff, 2017).

8 *Id.*, 221; article 1(d) of the *Geneva Convention of 1927.*

9 ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM INTERPRETATION, at 333 (Kluwer Law International, 1981); and EMMANUEL GAILLARD & GEORGE A. BERMANN, *supra* note 7, 221.

10 EMMANUEL GAILLARD & GEORGE A. BERMANN, *supra* note 7, 222.

Convention abolished the double exequatur rule and the enforcement of a binding award by the enforcement court does not necessitate the prior applying for and the confirmation of enforcement by the court at the seat member state. The seat of arbitration which was influential because of the double exequatur rule therefore became less significant under the Convention.

After the Convention entered into force on June 7, 1959 and subsequent ratifications of the Convention by individual member-states, the *United Nations Commission on International Trade Law* (hereinafter referred to as the UNCITRAL) decided to prepare a model law to guide State legislators as soon as its text is approved by the Commission. One of the UNCITRAL's aims through the *Model Law* was to reduce the divergences which might result from each State's interpretation of its obligations under the Convention.[11] The mechanism of a model law was intended to create uniform rules to eliminate local peculiarities which stood in the way of international consistency.[12] Thus, from the outset, the enforcement regime of the *Model Law* was intended to be aligned with the Convention, saved that it would apply not just to foreign awards but also to non-domestic awards (also known as domestic international award) which is an international commercial arbitral award issued in the recognizing or enforcing state or territory, that is, in the same territory as the forum in which recognition and enforcement is sought.[13] For foreign awards, the *Model Law* followed the Convention. As for domestic international awards, the UNCITRAL secretariat recommended that the same conditions and procedures as laid down in the Convention be adopted.[14] At its 6th Session, the Working Group on International Contract Practices decided to consolidate the hitherto separate sections on the recognition and enforcement of foreign and non-domestic awards into what became the current article 35 of the *Model Law* which states: 'Article 35: Recognition and enforcement. (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and shall be enforced subject to the provisions of this article and of article 36 which sets out the grounds for refusing recognition or enforcement.'

The then prevailing view was for a combined article to cover both foreign and domestic international awards, with the main reason being:[15] 'In international commercial arbitration the place of arbitration (and of the award) should be of limited importance and that, therefore, such awards should be recognized and

11 NOTE OF SECRETARIAT ON FUTHER WORK IN RESPECT OF INTERNATIONALCOMMERCIAL ARBITRATION, at A/CN.9/169 paras 6-9 (United Nations Commission on International Trade Law, 1979).

12 John Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 Am J Comp L 201 (1979).

13 HOWARD M HOLTZMANN & JOSEPH E NEUHAUS, A GUIDE OF UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY, at 1055-1056 (Kluwer Law, 1994).

14 UNCITRAL, NOTE BY THE SECRETARIAT: MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT ARTICLES 37 TO 41 ON RECOGNITION AND ENFORCEMENT OF AWARD AND RECOURSE AGAINST AWARD, *in* YEARBOOK OF THE UNCITRAL, vol XIV, notes 3 and 12, at 92-93 (1983).

15 Paragraph 143 of the *Report of the Seventh Session.*

enforced in a uniform manner, irrespective of their place of origin."

The drafters of the *Model Law*, in aligning the *Model Law* with the Convention, were plainly desirous of continuing this trend of de-emphasizing the importance of the seat of arbitration. However, there is one significant difference between the Convention and the *Model Law*. Unlike the Convention which only dealt with enforcing Convention awards, the *Model Law* also dealt with the setting aside of Convention awards made by the supervisory court in the seat state. This other avenue to challenge non-domestic awards resulted in the possibility that the enforcement of awards originating from court within the jurisdiction of the supervisory court would be treated differently from that of foreign awards. This is where choice of remedies principle becomes significant.

III. WHETHER ONE SHOT PRINCIPLE OR CHOICE OF REMEDIES PRINCIPLE

To an award debtor of a Convention award, the crucial question is if there is a need for immediate active remedies to be taken which include the taking positive steps to invalidate an arbitral award at the supervisory court in the seat state such as by an application to challenge a preliminary ruling on jurisdiction under article 16(3) of the *Model Law* or to set aside an award on the grounds set out in article 34(1) of the *Model Law* or, rather, there is no such need but there is merely the need for future passive remedies to be taken later which include resisting the recognition or enforcement of an award at the enforcement court in the jurisdiction where and when the award is sought to be enforced under article 36 of the *Model Law*. This depends on the very nature of parties' right of remedy under the Convention regime. On the one hand, such right is of one-off nature and thus the one-shot remedy principle and, on the other hand, such right is not of one-off nature but one of choice for such rights to be exercised at any Convention's member states and thus the choice of remedies principle.

A. One-shot Principle

Under the one-shot principle, the failure by the award debtor to seek an active remedy precludes recourse to a passive remedy. Thus, the award debtor must take active means to challenge the preliminary ruling or set aside the award, that is, a preliminary ruling on jurisdiction must be challenged within the prescribed 30-day time limit, failing which the party objecting to the ruling will be deprived of any other chance to subsequently raise the same jurisdictional ground in setting aside or enforcement proceedings, and if the preliminary ruling is challenged but not set aside by the supervisory court, the party objecting to

jurisdiction cannot raise the same grounds in any subsequent application to set aside the award before the supervisory court, or to resist enforcement of the award before the enforcement court, irrespective of whether or not the latter is in the same jurisdiction as the supervisory court or elsewhere. It is important to note that the one-shot remedy principle has no application under the Convention regime.

B. Choice of Remedies Principle

Under the choice of remedies principle, there are two possible kinds of remedies: The first is the active remedy before the supervisory court in seat which in turns may be either of the followings: Firstly, challenging the preliminary ruling on lack of jurisdiction of the tribunal under article V(1)(a) of the Convention: 'arbitration agreement is not valid under the law of the country where the award was made'; or secondly, challenging the final ruling by way of setting aside the award by the supervisory court in the seat on grounds as prescribed in article V of the Convention, for example, the 'party against whom the award is invoked was unable to present his case' under article V(1)(b) of the Convention; the 'award deals with a difference deals with a difference not contemplated by or not falling within the terms of the submission to arbitration' under article V(1)(c) of the Convention; the 'composition of the arbitral authority or the arbitral procedure ... was not in accordance with the law of the country where the arbitration took place' under article V(1)(d) of the Convention. Once either of the above has been successful, articles V(1)(a) and V(1)(e) of the Convention provides that the holding of an arbitral agreement to be invalid or the setting aside of an award by the supervisory court will, subject to the exercise of the discretion by non-seat state's enforcement court, provide a ground for the non-seat state's enforcement court to refuse enforcement of the same.

The second is the passive remedies for the award debtor to resist recognition and enforcement of the award before either the court in seat or court in non-seat state both as enforcement court[16] by way of proving various grounds as provided for in article V of the Convention. The choice of remedies principle prescribes that both the active remedies and passive remedies exist as a menu of choices for the award debtor to choose from. This means that even though the award debtor had not utilized or pursued active remedies to challenge the preliminary ruling or set aside the award, it may, by passive means, resist enforcement of an award.

As the overarching scheme of the *Model Law* is to de-emphasize the importance of the seat of the arbitration and facilitate the uniform treatment of international arbitration awards, the choice of remedies principle is fundamental to the design of the *Model Law*. The system of choice of remedies applies equally

16 As prescribed by articles 35 and 36 of the *Model Law*.

to both foreign and domestic international awards under the *Model Law*. It follows that under the *Model Law*, parties that do not actively attack a domestic international award remain able to passively rely on defences to enforcement absent any issues of waiver.[17] However, it is noteworthy that this principle does not enable a party to have two bites at the cherry. Rather, this principle characterize the issue as one of alternative remedies, that is, the waiver of a right to rely on an active remedy does not prejudice recourse to a later passive remedy.

In *Paklito Investment Ltd v. Klockner East Asia Ltd*,[18] *Kaplan J* referred to the choice of remedies doctrine as follows: 'It is clear to me that a party faced with a Convention award against him has two options. Firstly, he can apply to the courts of the country where the award was made to seek the setting aside of the award. If the award is set aside then this becomes a ground in itself for opposing enforcement under the Convention. Secondly, the unsuccessful party can decide to take no steps to set aside the award but wait until enforcement is sought and attempt to establish a Convention ground of opposition.'

Those options are mirrored in article V of the Convention itself. Thus, where a party opts to set aside the award in the courts of the seat and succeeds in doing so, it acquires a defence against enforcement under article V(1) (e) of the Convention which covers cases where the award has been set aside by a competent authority of the country in which, or under the law of which, it was made. The other option is to resist enforcement on other grounds, including article V(1)(a) of the Convention, without having taken steps to set aside the awards in the supervisory court. They are options which are independently available.

The UK Supreme Court's judgment in *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan*[19] (hereinafter referred to as the Dallah UKSC Judgment) shows whether and how the pursuit of active remedies in the seat of arbitration might be relevant to enforcement proceedings. There, Lord *Mance JSC* noted that article V(1)(e) of the Convention accorded some deference and importance to the seat of arbitration, but went on to say the followings: '28. ... But article V(1)(a) ... are framed as free-standing and categoric alternative grounds to article V(1)(e) of the Convention ... for resisting recognition or enforcement. Neither article V(1)(a) ... hints at any restriction on the nature of the exercise open, either to the person resisting enforcement or to the court asked to enforce an award, when the validity (sc existence) of the supposed arbitration agreement is in issue. The onus may be on the person resisting recognition or enforcement, but the language enables such person to do so by proving (or furnishing proof) of the non-existence of any

17 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV and others and another appeal* [2013] SGCA 57, Singapore Court of Appeal's judgment by *Sundaresh Menon CJ*, para. 71.

18 *Paklito Investment Ltd v. Klockner East Asia Ltd* [1993] 2 HKLR 39, at 48-49.

19 *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763.

arbitration agreement. This language points strongly to ordinary judicial determination of that issue. Nor do article VI … contain any suggestion that a person resisting recognition or enforcement in one country has any obligation to seek to set aside the award in the other country where it was made.' [20]

As Lord *Collins* of Mapesbury also pointed out in the Dallah UKSC Judgment:[21] 'There is nothing in the Convention which imposes an obligation on a party seeking to resist an award on the ground of the non-existence of an arbitration agreement to challenge the award before the courts of the seat.' In the *Hebei* case,[22] Sir *Anthony Mason NPJ* points out that even where the supervisory court has held that the awards are valid, it would be open to the Hong Kong court in the enforcement forum to refuse enforcement, for example, on the ground of a differing Hong Kong public policy: 'The Convention distinguishes between proceedings to set aside an award in the court of supervisory jurisdiction[23] and proceedings in the court of enforcement.[24]

Thus, article V of the Convention[25] is therefore consonant with the choice of remedies principle and enables the party concerned to resist enforcement in Hong Kong without having challenged the awards in the supervisory court. The combined effect of the abolition of the double exequatur rule and the choice of remedies principle is that the enforcement court is having its own right to decide whether or not grounds of refusal to recognize and enforce Convention award has been made out. Also, despite the fact that it has decided that such grounds of refusal to recognize and enforce Convention award has already been made out, the enforcement court is also having its own right to decide whether or not the Convention award is still to be enforced. Hence, the importance of the enforcement courts' discretion under article V of the Convention.

IV. ENFORCEMENT COURT'S DISCRETION UNDER ARTICLE V OF THE CONVENTION

A Convention award is mandatory to the enforcement court in a sense that it should be held enforceable by the enforcement court unless one of the strictly limited grounds of refusal of enforcement as specified under article V of the Convention is to be established by the award debtor. As the objective of the Convention is to facilitate the recognition and enforcement of arbitral awards to the greatest extent possible and to provide a maximum level of control which

20 *Id.*, para. 28.
21 *Id.*, para. 103.
22 *Supra* note 2, 136.
23 *Supra* note 3.
24 *Supra* note 4.
25 Section 44(2) of the *Hong Kong Arbitration Ordinance (Cap. 609)* being its Hong Kong equivalent.

Contracting States may exert over arbitral awards,[26] the Convention grants courts of the member states the discretion to refuse to recognize and enforce an award on the grounds listed in article V, without obligating them to do so.[27] In some member states, courts have exercised this discretion by reference to the permissive language of the English version of the Convention or equivalent phrasing in legislation implementing the Convention in their territory, which provides that recognition and enforcement 'may be refused' if one of the grounds for refusal under article V is present.[28] Thus, article V establishes a ceiling, or maximum level of restriction in the enforcement of arbitral awards, leaving each State free to act less restrictively.[29]

Thus, there exists a residual discretion by the enforcement court in a non-seat state to recognize and enforce a Convention award despite one of the strictly limited grounds of refusal of enforcement as specified in article V of the Convention has been made out by the award debtor at either the enforcement court in the non-seat state or the supervisory court in the seat or enforcement court in the seat (hereinafter referred to as article V discretion). *Rix LJ* commented on the narrow scope of article V discretion in the Court of Appeal Judgment in *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* (hereinafter referred to as the Dallah COA Judgment):[30] 'any discretion to enforce despite the establishment of a Convention defence recognized in our English's 1996 Arbitration Act is a narrow one. Indeed, it seems to me that in the context the expression 'may be refused only if',[31] especially against the background of the French text (ne seront refuses) and the expressions of the English statute 'shall not be refused except' and 'may be refused if',[32] are really concerned to express a limitation on the power to refuse enforcement rather than to grant a discretion to enforce despite the existence of a proven defence. What one is left with therefore is a general requirement to enforce, subject to certain limited defences. There is no express provision however as to what is to happen if a defence is proven, but the strong inference is that a proven defence is a defence. It is possible to see that a defence allowed under the Convention or statute may nevertheless no longer be open because of an estoppel,[33] or that a minor and prejudicially irrelevant error, albeit within the Convention or statutory language, might not succeed as a defence'.[34]

---

26 EMMANUEL GAILLARD & GEORGE A. BERMANN, *supra* note 7, 133.

27 *Id.*

28 *Id.*, 134.

29 *Id.*

30 As held *obita dictum* by *Rix LJ* in the Court of Appeal judgment in *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2009] EWCA Civ 755, para. 89.

31 *Supra* note 3, article V.

32 Sections 103(1) and (2) of English's 1996 Arbitration Act.

33 *Supra* note 9, 265.

34 *China Agribusiness Development Corporation v. Balli Trading* [1998] 2 LLR 76.

The question is that wherever a ground for refusing to enforce an arbitral award under article V of the convention[35] has been made out by the award debtor, what the proper approach by the enforcement court in a non-seat state in its exercise of its residual article V discretion in deciding to still permit enforcement of a Convention award should be. It is submitted that the scope of article V discretion should depend on first, whether or not remedies have been sought by the award debtor; and second, if so, the whereabouts such remedies have been sought; and third, what status the award has become as a result. The whereabouts the remedies are to be sought against the award by the award debtor may be either of the followings: firstly, active remedies before the supervisory court in the seat; secondly, passive remedies before the court in the seat or court in non-seat state both as the enforcement court.

As to the status of the award is to become as a result, there are, at least, three possible scenarios as follows: First, though no active remedies have been sought by the award debtor before the supervisory court in the seat so that a Convention award remain alive in the seat, passive remedies has later been sought by the award debtor before the enforcement court in the non-seat state by way of its establishing one of the grounds under article V of the Convention in resisting recognition and enforcement of the award. Despite the establishing of one of the grounds under article V of the Convention may be a successful one, the enforcement court in the non-seat state still has a residual discretion to recognize and enforce the award concerned; Second, despite active remedies against the award have been successfully sought by the award debtor before the supervisory court in the seat and the award has been set aside by the supervisory court in the seat, the enforcement court in a non-seat state still has a residual discretion to recognize and enforce an award without obligating the enforcement court to follow the supervisory court in the seat's decision;[36]

Third, though active remedies have not been sought before the supervisory court in the seat so that the award has remained alive in the seat, passive remedies have later been sought by the award debtor before the court in the seat in its capacity as the enforcement court rather than in its capacity as supervisory court in challenging against the recognition and enforcement of the award by way of its establishing one of the grounds listed in article V of the Convention. The court in the seat may, in exercising its article V discretion, decide the challenge against the recognition and enforcement of the award be either successful or unsuccessful. If the challenge has been unsuccessful, the award will be held enforceable by the court in the seat.[37] If the challenge has been successful, the award will become an

35 *Id.*, section 44 of the *Hong Kong Arbitration Ordinance (Cap. 609).*
36 EMMANUEL GAILLARD & GEORGE A. BERMANN, *supra* note 7, 133.
37 *Sanum Investments Limited v. ST Group Co., Ltd* [2018] SGHC 141 at paras. 111 and 115 per Belinda Ang Saw Ean J.

undead[38] one because it is, on the one hand, not a dead award because it has never been set aside by the supervisory court and thus it has been a binding award and, on the other hand, not an alive one since it has been held by the court in the seat in its capacity as the enforcement court that it is unenforceable. Despite so, the enforcement court in non-seat state still has a residual discretion to recognize and enforce an award without obligating the enforcement court in a non-seat state to follow the enforcement court in the seat's decision.

V. NO ACTIVE REMEDIES SOUGHT, PASSIVE REMEDY SUCCEED IN NON-SEAT'S ENFORCEMENT STATE AND ITS EXERCISE OF RESIDUAL DISCRETION IN ENFORCING AWARD

When active remedies in seat have not been sought by the award debtor before the supervisory court in the seat so that a Convention award has neither been set aside nor been held unenforceable and remained alive in the seat, it is mandatory to be held enforceable by that enforcement court unless one of the strictly limited grounds of refusal of enforcement as specified under article V of the Convention is to be made out by the award debtor at the enforcement court in the non-seat state. It is only upon the award being sought to be enforced in a non-seat member state that passive remedies were to be sought by the award debtor by way of its establishing one of article V of the Convention's grounds only before the enforcement court in that non-seat member state. Despite the award debtor's successful establishing one of article V of the Convention's grounds before the enforcement court, if, at the same time, a breach of good faith principle is also to be held, the enforcement court can exercise its article V discretion in deciding to enforce the awards. The good faith principle in the context of the enforcement of foreign arbitral awards was established in Hong Kong by a decision of *Kaplan J* in *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co Ltd* (hereinafter referred to as the *China Nanhai* case),[39] which has the approval of the Court of Final Appeal in *Hebei Import & Export Corp v. Polytek Engineering Co Ltd* (hereinafter referred to as the *Hebei* case).[40]

In the *China Nanhai* case, the Hong Kong court as the enforcement court enforced an arbitral award notwithstanding the court's finding that the tribunal did not have jurisdiction. In that case, having participated in the arbitration and having lost on the merits, the defendant award debtor sought to oppose enforcement on article V(1)(d) of the Convention[41] or alternative ground, that

38 A phase having been used by Mr. Justice *Tang PJ* during the hearing at the Hong Kong Court of Final Appeal.
39 *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co Ltd* [1995] 2 HKLR 215.
40 *Supra* note 2.
41 Section 44(2)(e) of the *Arbitration Ordinance (Cap. 341)* being its Hong Kong equivalent.

was, that 'the composition of the arbitral authority was not in accordance with the agreement of the parties'. It complained that whereas the arbitration agreement provided for arbitration before a CIETAC[42] panel in Beijing, at the plaintiff's behest, a Shenzhen CIETAC panel had assumed jurisdiction. *Kaplan J* accepted that technically the arbitrators of CIETAC in Shenzhen did not have jurisdiction, but held that the defendant was not entitled to resist enforcement of the award under section 44(2) of the Ordinance on two grounds. Firstly, *Kaplan J* considered that upon the true construction of the Convention, there was a 'fundamental principle of good faith' which was distinct from principles of estoppel and presumably waiver under domestic or municipal laws. *Kaplan J* made extensive reference to the *New York Convention of 1958* by Dr. *Albert Jan van den Berg* including the followings: 'The principle of good faith may be deemed enshrined in the Convention's provisions. The legal basis would be that article V(1)[43] provides that a court may refuse enforcement if the respondent proves one of the grounds for refusal of enforcement listed in that article. The permissive language can be taken as basis for those cases where a party asserts a ground for refusal contrary to good faith.'[44]

Secondly, *Kaplan J* considered that, on the particular facts of the case, he ought to exercise his residual discretion under section 44(2) of the *Hong Kong Arbitration Ordinance (Cap. 609)* (hereinafter referred to as the Ordinance)[45] to permit enforcement of the award as his Lordship regarded the arbitration as one which the parties had in substance agreed to: 'The parties agreed on a CIETAC Arbitration under the CIETAC Rules. They got it. The CIETAC of Shenzhen, is a sub-commission of the CIETAC in Beijing. The defendants participated in the arbitration and have raised no other grounds whatsoever which go to the procedure of the arbitration or the substance of the award. Had they won, they would not have complained.'[46]

In the *Hebei* case, a CIETAC arbitration regarding the allegedly sub-standard performance of certain equipment supplied under a contract was involved. The complaint was that, without notice to the respondent, an inspection had been conducted by experts appointed by the arbitral tribunal accompanied by the chief arbitrator at the end user's factory, where technicians who had installed the equipment communicated with the chief arbitrator in the respondent's absence. Enforcement of the award was resisted on article V(1)(b) of the Convention[47] ground, namely, that the resisting party had been 'unable to

42 China International Economic and Trade Arbitration Commission.
43 Section 44(2) of the *Hong Kong Arbitration Ordinance (Cap. 609)*.
44 ALBERT JAN VAN DEN BERG, *supra* note 9, 185.
45 Article V of the *New York Convention*'s Hong Kong equivalent.
46 *China Nanhai* case [1995] 2 HKLR 215, at 226.
47 Section 44(2)(c) of the *Hong Kong Arbitration Ordinance (Cap. 341)* being its Hong Kong equivalent.

present his case' and on article V(2)(b) of Convention[48] ground that enforcement in such circumstances 'would be contrary to public policy'. However, when the respondent discovered that the inspection had occurred, it did not raise the matter with the tribunal but continued to participate in the arbitration. It was held that: 'The respondent's conduct amounted to a breach of the principle that a party to an arbitration who wishes to rely on a non-compliance with the rules governing an arbitration shall do so promptly and shall not proceed with the arbitration as if there had been compliance, keeping the point up his sleeve for later use.'[49]

Mason NPJ endorsed the approach adopted by *Kaplan J*, which gives effect to the objects of the Ordinance as stated in section 2AA:[50] 'I agree with his Lordship that the use of the word 'may' in section 44 of the Ordinance and article V of the Convention enables the enforcing court to enforce an award, notwithstanding that a section 44 ground might otherwise be established. Whether a court would so act in such a case would depend in very large measure on the particular circumstances. It is difficult to imagine that a court would do so, if enforcement were contrary to public policy, but there is no reason why a court could not do so where, as here, the factual foundation for the public policy ground arises from an alleged non-compliance with the rules governing the arbitration to which the party complaining failed to make a prompt objection, keeping the point up its sleeve, at least when the irregularity might be cured.

Whether one describes the respondent's conduct as giving rise to an estoppel, a breach of the *bona fide* principle or simply as a breach of the principle that a matter of non-compliance with the governing rules shall be raised promptly in the arbitration is beside the point in this case. On any one of these bases, the respondent's conduct in failing to raise in the arbitration its objection arising from the communications to the chief arbitrator was such as to justify the court of enforcement in enforcing the award.'[51]

It has not been disputed that these decisions support the proposition that the enforcing court has discretion under article V(1) of the Convention[52] to decline to refuse enforcement, even if a ground for refusal might otherwise be made out, in circumstances where there has been breach of the good faith principle by the award debtor.

It is submitted that the scope of the good faith principle is only applicable to the situation in which a party to an arbitration who wishes to rely on a procedural or jurisdiction objection has concealed the objection from the arbitral tribunal, keeping the point up its sleeve and proceeding with the arbitration as if

48 *Id.*, section 44(3).

49 *Supra* note 2, 137, citing *China Nanhai* case [1995] 2 HKLR 215, at 226.

50 Section 2AA(1) of the *Hong Kong Arbitration Ordinance* reads: 'The object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense'. The passage of the judgment was stated in paras 93-94 therein.

51 *Supra* note 2, 138D-G.

52 Its Hong Kong equivalent being section 44(2) of the Ordinance.

there were no procedural irregularity or objection to jurisdiction. This is reflected in articles 4 and 16(2) of the *Model Law* and the principle has no application to a situation in which an objection for example, on jurisdiction etc. was taken before the arbitral tribunal and the adverse ruling of the tribunal has not been challenged in the supervisory court under article 16(3) of the *Model Law* because a party is not obliged to exhaust its remedies by challenging the validity of an award in the courts of the arbitral seat, having a choice between the active remedies of making such a challenge and passive remedies of resisting enforcement in the jurisdiction where enforcement is sought. *Mason NPJ* agreed with *Kaplan J*'s view that 'a party faced with a Convention award against him has two options. He can apply to the court of supervisory jurisdiction to set aside the award or he can wait to establish a Convention ground of opposition. In my view, such a party is not bound to elect between the two remedies, at any rate when, in the court of enforcement, he seeks to reply on the public policy ground, as the respondent did here'.[53] In the *Astro* case, the SCA Astro Judgment had held that a challenge to the tribunal's preliminary ruling was not a one-shot remedy and did not affect the availability of defences at the enforcement stage.[54] It had also found that First Media had not waived its rights, but had disputed the tribunal's jurisdiction and then proceeded with the arbitration reserving its position.[55] Thus, the Hong Kong Court of Final Appeal (hereinafter referred to as the HKCFA) has held that the good faith principle had not been applicable. There is a related question of whether or not the good faith in the good faith principle is equivalent to or different from issue estoppel insofar as international commercial arbitration is concerned. In other words, is good faith at civil law way of dealing with issue estoppel at common law? It is submitted that the answer seems to be negative because the doctrine and requirement of good faith at the civil law is a broad and encompassing concept which touches on nearly all aspects of civil laws whereas issue estoppel at common law is a much narrower concept which touches only specific issue upon which it is to take effect.

VI. ACTIVE REMEDIES SUCCEED IN SEAT AND AWARDS HAVE BEEN SET ASIDE AND DEAD IN SEAT BUT NON-SEAT STATE ENFORCEMENT COURT'S EXERCISE OF RESIDUAL DISCRETION IN ENFORCING AWARD

When active remedies have been successfully sought in challenging the award by the award debtor in seat before the supervisory court so that the 'award

53 *Supra* note 2, 136 I.
54 *Supra* note 17, paras. 100-123, 125-132.
55 *Id.*, paras. 205-219, 222-224.

has been set aside by a competent authority of the country in which that award was made',[56] the setting aside of the award will not only in itself a potential defence under the Convention but likely also to raise an issue estoppel.[57] Despite so and assuming that no issue estoppel has been successfully raised, the enforcement court in a non-seat state still has a residual discretion to recognize and enforce an award without obligating the enforcement court to follow the supervisory court in the seat's decision[58] because under article V of the Convention, even if grounds under articles V(1) and (2) of the Convention has been successfully established before the supervisory court, the enforcement court, on the one hand, may refuse to enforce the award, but on the other hand, may choose to give its recognition to the award concerned:

In the absence of breach of good faith principle and when the award has been 'set aside'[59] by the supervisory court in the seat, the question is how likely the enforcement court in a non-seat state may exercise its article V discretion to turn the dead award to become alive. The answer is that the chance of turning a dead award to become alive is a very low one indeed. In particular, it would take a very strong case to permit enforcement of an arbitral award in circumstances where it was made by an arbitral tribunal without jurisdiction. The relevant authorities include the followings:

The first is *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan*;[60] the second is *Dardana Ltd v. Yukos Oil Company Petroalliance Services Co Ltd*;[61] and the third is *Kanoria v. Guinness*.[62]

It has long been established that there will be no automatic right to resist enforcement of the award, merely by virtue of the fact that the award has been set aside by the supervisory court. Even where a ground is made out within the terms of section 89 of the Ordinance including the ground under article V(1)(e) of the Convention,[63] that the award has been set aside by the supervisory court of the seat, enforcement of the award may and not shall be refused by the enforcement court. The enforcement court has a residual discretion to permit enforcement, although such discretion has to be exercised on recognized legal principles.[64] The Enforcing Court applies its own domestic law in deciding

56 *Supra* note 3, article V(1)(e).

57 *Supra* note 30, para. 89 per Rix LJ. An issue estoppel arises in the situation where 'a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him' (quoted from para 18 of *Kwan J* (as Her Ladyship then was) in *Re Chime Corp Ltd (No 2)* [2003] 2 HKLRD 945).

58 EMMANUEL GAILLARD & GEORGE A. BERMANN, *supra* note 7, 133.

59 *Supra* note 3, article V(1)(e).

60 *Supra* note 30, paras. 58 and 61 per Moore-Bick LJ and paras. 74, 87 and 89 per Rix LJ; and *supra* note 19, para. 67 to 69 per Lord Mance JSC and para. 127 and 131 per Lord Collins of Mapesbury JSC (in the Supreme Court).

61 *Dardana Ltd v. Yukos Oil Company Petroalliance Services Co Ltd* [2002] 2 Lloyds Law Rep 326, at §§8 and 18 per *Mance LJ.*

62 *Kanoria v. Guinness* [2006] 2 All ER (Comm) 413, at §25 per Lord *Phillips* of Worth Matravers CJ and §30 per May LJ.

63 Hong Kong equivalent is section 89(2)(f)(ii) of the Arbitration Ordinance (Cap. 609).

64 *Supra* note 2, 231F.

whether or not to enforce the award.

Rix LJ commented on the very narrow scope of article V discretion in the Dallah COA Judgment:[65] 'But it is difficult to think that anything as fundamental as the absence of consent or some substantial and material unfairness in the arbitral proceedings could leave it open to a court to ignore the proven defence and instead decide in favour of enforcement'.

Recent development of English jurisprudence in these areas include *Yukos Capiral Sarl v. OJSC Oil Co Rosneft*[66] which is the authority that there is no principle of *ex nihilo nil fit* under English law. In the *Yukos*, the awards made by arbitral tribunals with a Russian seat were annulled by the relevant supervisory court in Moscow. The claimant under the awards sought to enforce them in England and in Holland, where the defendant had assets. The defendant pleads that as a consequence of the set aside decisions made by the Russian supervisory court, the awards no longer existed in a legal sense under the principle 'nothing comes of nothing' or *ex nihilo nil fit* and that the claimant is precluded from asserting that the awards are valid and binding on the parties. The English court held that there is no *ex nihilo nil fit* principle which precludes the enforcement of the awards, and the court has power to enforce the awards at common law notwithstanding the decisions of the Russian courts to set aside the awards. As the English court pointed out in *Yukos*, the awards are *prima facie* enforceable at common law, and the defence is based on the fact that the awards are not enforceable as a result of the set aside decisions made by the Russian courts.

In *Yukos,* the English court pointed out that the key question was whether a foreign decision setting aside an award should be recognized in accordance with ordinary principles applying to the recognition of foreign judgments (the principles as set out in Rules 42 to 45 of Dicey). For example, a foreign judgment is impeachable on the ground that its recognition would be contrary to public policy, or if it is impeachable for fraud.

The *Yukos* approach was followed in *Malicorp Ltd v. Government of the Arab Republic of Egypt*,[67] where *Walker J* succinctly summarized: 'For present purposes I proceed on two assumptions. They are: firstly, that the word 'may' in section 103(2) of the 1996 Act confers a discretion on this court to enforce an award even though the award has been set aside by a decision (the set aside decision) of a court constituting a competent authority within section 103(2)(f); and secondly, it would not be right to exercise that discretion if, applying general principles of English private international law, the set aside decision was one which the court would give effect to.'

65 *Supra* note 30, para. 89 per *Rix LJ* (in the Court of Appeal).
66 *Yukos Capiral Sarl v. OJSC Oil Co Rosneft* [2014] EWHC 2188 (Comm).
67 *Malicorp Ltd v. Government of the Arab Republic of Egypt* [2015] EWHC 361 (Comm).

Whereas most academic authorities agree with the general proposition that awards may be recognized outside the arbitral seat even if they have been annulled there, views differ as to the circumstances in which recognition of an annulled award is appropriate. In Professor *Gary Born's International Commercial Arbitration*,[68] the analytical approaches were summarized as follows: 'First, some commentators urge that an annulled award may, and should, be recognized if it was annulled based upon the arbitral seat's local standards. Second, some commentators have reasoned that an annulled award should be recognized based simply on the criteria of first four paragraphs of article V, without regard to the award's annulment in the arbitral seat. Third, some commentators have suggested that the decisions of the courts of the arbitral seat should be treated like some other foreign judgments, given effect when they satisfy standards for recognition of foreign judgments. Under this analysis, an annulled award would be denied recognition if the annulment decision was itself entitled to recognition or, alternatively, if the court in the enforcement forum independently found one of article V grounds satisfied. Fourth, other commentators have suggested that annulled awards should be denied recognition except where the parties have agreed to waive any judicial review of the award (or, in some authorities' view, where the judicial proceedings in the arbitral seat were procedurally flawed).'

Professor *Born* considered that the better view can be identified, 'based on effectuating the parties' agreement to arbitrate and the Convention's requirement that such agreements be recognized': 'Under this approach, Contracting States should deny effect to annulment decisions in the arbitral seat: (a) which are based on local public policies or non-arbitrability rules in the annulment forum, (b) which are based on judicial review of the merits of the arbitrators' substantive decision or on other grounds not included in articles V(1)(a) to (d) of the Convention, or (c) which failed to satisfy generally-applicable standards for recognition of foreign judgments (e.g. procedurally-fair, regular procedures before an impartial decision-maker). Where an annulment decision is not given effect, the recognition court should independently apply the first four subparagraphs of article V(1), e.g. articles V(1)(a) to (d) to determine whether or not to recognize the underlying award.'

In the Dallah UKSC Judgment, Lord *Mance* made the following observation on article V(1) of the Convention:[69] 'In *Dardana Ltd v. Yukos Oil Co*[70] I suggested that the word 'may' could not have a purely discretionary force and must in this context have been designed to enable the court to consider other circumstances, which might on some recognizable legal principle affect the prima facie right to

68 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, at 3636-3638 (Wolters Kluwer Law & Business, 2014).
69 *Supra* note 19, paragraph 67.
70 *Dardana Ltd v. Yukos Oil Co* [2002] 1 All ER (Comm) 819.

have enforcement or recognition refused. I also suggested as possible examples of such circumstances another agreement or estoppel.'

In the recent Hong Kong case, *Dana Shipping and Trading SA v. Sino Channel Asia Limited*,[71] the English court as supervisory court set aside the award under section 72(1) of the *Arbitration Act of 1996*, on the ground that the arbitral tribunal was not properly constituted and the award was made without jurisdiction, as notice of arbitration had not been served on anyone who had the authority to receive the notice of arbitration on behalf of Sino, the respondent therein. This was, in essence, equivalent to the ground set out in article V(1)(d) of the Convention the composition of the arbitral authority not in accordance with the agreement of the parties or the law of the country where the arbitration took place. It has been held by *Mimmie Chan J* that as there was no evidence or suggestion that the setting aside proceedings in the English court were in any way procedurally unfair, or irregular, or that the decision maker was not impartial, or that it would in any way be contrary to the court's sense of justice or public policy to recognize the English Judgment, which should be given recognition. The fact that the Claimant therein, Dana, was seeking leave to appeal against the English judgment did not render it ineffective. Having considered the relevant authorities, *Mimmie Chan J* concluded that the English judgment was a decision to which the Hong Kong Court being the enforcement court should give effect.

In contrast to the English common law, the French arbitration law appears to have moved down the path in recognizing and enforcing an award which has been set aside in the seat by the court of a foreign jurisdiction with the French law appearing to recognize a system of transnational or supranational arbitral awards, whereby awards do not derive their validity and legitimacy from a particular local system of law. Thus, in *Hilmarton Ltd v. Omnium de traitement et de valorization* (hereinafter referred to as the Hilmarton),[72] the *Cour de Cassation* affirmed the decision of the *Cour d' Appel de Paris* which declared that the subject award was enforceable in France even though it had been set aside in Switzerland. The Swiss court had annulled the award on the basis that it had misconstrued what constituted an affront to morality in the Swiss Law.[73] The apex French court held that the Swiss award, being an international award, was not integrated into the legal order of the seat and therefore continued to exist notwithstanding that it had been set aside. The recognition of the award in accordance with the French law was not, therefore, contrary to international public policy. The same result and reasoning also features in the *Cour d' Appel de Paris'* decision of the *Arab Republic of Egypt v. Chromalloy Aeroservices, Inc.*[74] France, of course, is not a model law jurisdiction

71 *Dana Shipping and Trading SA v. Sino Channel Asia Limited* [2017] 1 HKC 281.

72 *Hilmarton Ltd v. Omnium de traitement et de valorization* (1995) XX Yearbook Comm Arb 663-665.

73 *Onmium de Traitement et de Valorisation-OTV v. Hilmarton* (1994) XIX Yearbook Comm Arb 214-222.

74 *Cour d'Appel de Paris'* decision of the *Arab Republic of Egypt v. Chromalloy Aeroservices, Inc.* (1997) XXII Yearbook Com Arb 691-695.

and as the *Cour de Cassation* stated in Hilmarton, the relevant French legislation[75] does not contain the equivalent of article V(1)(e) of the Convention.

VII. ACTIVE REMEDIES NOT SOUGHT BUT PASSIVE REMEDIES SUCCEED IN SEAT AND AWARD UNENFORCEABLE IN SEAT, NON-SEAT STATE COURT'S RESIDUAL DISCRETION ENFORCING UNDEAD AWARDS

Despite the availability of active remedies in the seat in challenging against the award, no such active remedies have been sought by the award debtor before the supervisory court in the seat (due to various reasons, for example, the time to take step to set aside the award before the supervisory court has long expired or time-barred), the award will then become final and binding.[76] Instead, passive remedies have later been sought by the award debtor before the court in the seat in challenging against the recognition and enforcement of the award. The court in the seat in its capacity as the enforcement court may decide if the challenge against the recognition and enforcement of the award is to be a successful or an unsuccessful one. If the latter happens, the award will be held enforceable by the court in the seat.[77] If the former happens, the award will become an undead[78] one because it is, on the one hand, not a dead award because it has never been set aside by the supervisory court and thus it has been a binding award and, on the other hand, not an alive one since it has been held by the court in the seat in its capacity as the enforcement court that it is unenforceable. Despite the award being an undead one, the enforcement court in a non-seat state still has a residual discretion to recognize and enforce an award without obligating the enforcement court in a non-seat state to follow the enforcement court in the seat's decision.

However, if this binding award has subsequently been ruled to be unenforceable by the court in the seat, that is, 'the country where the award was made' in its capacity as enforcement court and not as a supervisory court,[79] the award has become an undead one. As a result, there will, at least, be two consequences, firstly, it cannot be enforced in the seat and, secondly, the same grounds of refusal of enforcement having been upheld by the enforcement court of the seat may be considered by the enforcement court at the non-seat state also to be used as ground in refusing enforcement there.

---

75 Article 1502 of the *New Code of Civil Procedure*.

76 *Supra* note 3, article V(1)(e).

77 *Sanum Investments Limited v. ST Group Co., Ltd* [2018] SGHC 141 at para. 111 and 115 per Belinda Ang Saw Ean J.

78 *Supra* note 38.

79 Because of various possible reasons, for example: first, '[arbitration] agreement is not valid under ... the law of the country where the award was made' (article V(1)(a) of the Convention); second, 'The composition of the arbitral authority or the arbitral procedure ...was not in accordance with the law of the country where the arbitration took place' (article V(1)(d) of the Convention); third, 'The award ... has been set aside ... by a competent authority of the country in which ... that award was made' (article V(1)(e) of the Convention).

The situation of an undead award is a peculiar one, as it has not been 'set aside'[80] by the supervisory court, it will then become a final and binding award and the winning party can apply directly to the enforcement court without any prior need to apply for recognition and enforcement at the seat state. The question is how alive an undead award can be when it is to be applied to be enforced at the enforcement court in a non-seat state. As the award has already been refused enforcement by the court at the seat, it is obvious that the undead award should likewise also be refused enforcement by the enforcement court of any non-seat state. However, because of the word 'may' in article V of the Convention, the enforcement court in a non-seat state still has a residual article V discretion to decide whether or not it may still made alive by way of its recognizing and enforcing the undead award without obligating the enforcement court in a non-seat state to follow the enforcement court in the seat's decision.

In the past, there has been confusion as to how and to what extent article V discretion should be exercised by the enforcement court in a non-seat state in its deciding whether or not an undead award should be given its life and if so, how alive the same award should be given. In particular, what is the proper test in determining whether or not an extension of time should be granted for the purposes of an application to resist enforcement of an undead award. These were analyzed and decided by the HKCFA in its judgment in the *Astro v. First Media* (hereinafter referred to as the HKCFA Astro Judgment).[81]

In Singapore, *Astro* obtained a successful arbitral award against First Media before a Singapore-seated arbitral tribunal[82] and was initially granted leave to enforce the awards. However, First Media, by relying on the grounds in article V(1) of the Convention, that was, the ground of 'arbitration agreement is not valid under … the law of the country where the award was made' succeeded on its appeal to the Singapore Court of Appeal which held, by a judgment on October 31, 2013 (the SCA Astro Judgment),[83] that rule 24(b) did not empower the tribunal to order joinder of the 6th to 8th Claimants who had the main monetary claims as additional parties in the arbitral proceedings since they were not parties to the SSA. The tribunal therefore lacked jurisdiction to make the awards in favor of the additional parties and the Singapore enforcement orders in their favor were set aside.[84] What is peculiar to the Singapore award was that,

80 *Supra* note 3, article V(1)(e).

81 *Astro v. First Media* [2018] HKCFA 12 (the Astro case) on April 11, 2018.

82 Arbitral tribunal comprising Sir Gordon Langley, Sir Sion Tuckey and Stewart C Boyd CBE QC.

83 *Supra* note 17, *Sundaresh Menon CJ* delivered the judgment of the SCA Astro Judgment.

84 Initially, it was ruled by the arbitral tribunal comprising Sir Gordon Langley, Sir Sion Tuckey and Stewart C Boyd CBE QC that on the true construction of rule 24(b) of the 2007 Singapore International Arbitration Centre (SIAC) Rules Rule 24(b): 'In addition and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have the power to:... (b) 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'. That it had power to join persons, such as the same 6th to 8th Respondents therein as additional parties in the arbitral proceedings.

though there would have been no obligation for the winning party to have applied for recognition and enforcement of the award at the seat member-state, it was the losing party which has applied to the court at the seat member state for its refusal of enforcement of the award. The Singapore High Court and subsequently the Singapore Court of Appeal having played the role of an enforcement court under article V of the Convention[85] held that the bulk of the awards were, despite its being a binding one, unenforceable because it was held that there has never been any arbitration agreement amongst the parties concerned and hence the Tribunal has lacked its jurisdiction in rendering the awards. Thus, the Singapore arbitral awards were never set aside by the Singapore court as the supervisory court, and they remained valid and created legally binding obligations on the defendant debtor there, First Media, to satisfy the awards. Rather, the Singapore court, as the enforcement court, refused enforcement of the awards on the ground that there was no valid arbitration agreement. Thus, the Singapore awards have since become undead, one which had never been dead but, at the same time, never been alive. Subsequently, the Singapore undead award was applied to be enforced before the Hong Kong courts.

It was re-affirmed by the Hong Kong Court of Appeal that the exercise of the residual article V discretion by the enforcement court should be, apart from the aforesaid good faith principle, a matter of domestic law of the member state at which the award is sought to be enforced. More importantly, it has been held by the Hong Kong Court of Final Appeal that, whenever article V(1)(a) of the Convention was held to be the ground of refusal of enforcement by the court of the seat member-state, that is, absence of a valid arbitration agreement,[86] or the case where 'a party claims that the agreement is not binding on it because that party was never a party to the arbitration agreement',[87] the enforcement court should, in the exercise of its residual discretion under article V(1) of the Convention involves the 'looking at all relevant matters and considering the overall justice of the case, eschewing a rigid mechanistic approach, as indicated in *The Decurion*, eschewing a rigid, mechanistic methodology.'[88] with the exercise of such discretion to be overshadowed by the fact that there was a lack of jurisdiction to make the awards by the arbitral tribunal. The followings have been held to be relevant discretionary factors:

The first is the choice of remedies principle. The Singapore Court of Appeal upheld First Media's position that the availability of passive remedies remained

85 Instead of the supervisory court under articles V(1)(a), (d) and (e) of the *New York Convention*.

86 'The parties to the agreement referred to in art. II were ... is not valid ... under the law of the country where the award was made'. Its Hong Kong equivalent is section 44(2)(b) of the Ordinance: 'Enforcement of a Convention award may be refused if the person against whom it is invoked proves ... (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made'.

87 Lord *Collins* of Mapesbury JSC in the Dallah UKSC Judgment, at 828, para. 77; and para. 20 of HKCFA Astro judgment.

88 Hong Kong Court of Final Appeal Astro Judgment, paras. 62, 85 and 90.

entirely separate from the sphere of active remedies and would not be foregone so long as the affected party had reserved its rights to challenge the tribunal's jurisdiction. 'The proper and most effective course where there are genuine grounds upon which to challenge the jurisdiction of the arbitral tribunal is to raise the matter with the arbitral tribunal itself at the earliest possible stage, to insist that all objections should be fully argued before the arbitral tribunal and that the determination of the objections should be the subject of an interim award. If the arbitral tribunal upholds its own jurisdiction, as it frequently does, the respondent should continue to participate in the arbitration, having expressly reserved its position in relation to the matter of jurisdiction so that this issue may be considered again after the final award is made, either by a challenge of the award in the courts of the place of arbitration or by resisting attempts to obtain recognition or enforcement of the award.'[89]

Thus, the Singapore Court of Appeal held that First Media may apply to set aside the *Singapore Enforcement Orders* under any of the grounds which are found in article 36(1) of the *Model Law*, even though it did not pursue active remedies to challenge the award on preliminary issues under article 16(3) of the *Model Law* or set aside the awards under article 34(1) of the *Model Law* and article 16(3) of the *Model Law* is neither an exception to the principle of choice of remedies nor the one-shot remedy principle. With these in mind, the fact that award has not been set aside by the supervisory court in the seat is simply an irrelevant factor to be taken into account.

The argument that the continued existence of the Singapore awards is a relevant discretionary factor to be taken into account because they constitute documents of title creating legally binding debts which *Astro* is entitled to enforce is a fallacy because section 42(2) of the Ordinance[90] does not assist as it relevantly provides: 'Any Convention award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Hong Kong.' The binding quality of the award therefore depends on whether it would be enforceable under the Ordinance. To argue that the awards are relevant because they create enforceable debts begs the very question of their enforceability.

The second is the conclusive judgment of the supervisory court in the seat, most importantly, the absence of a valid arbitration agreement between the parties. It was held by the Hong Kong Court of Appeal that the conclusive judgment of the supervisory court in the seat is to be a very strong policy

89 NIGEL BLACKABY ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, at 127 (Oxford University Press, 2009).

90 Section 42(2) states: 'unless an award is set aside, it is treated as binding for all purposes between the parties as between whom it is made, *see* section 42(2) of the Ordinance.'

consideration for purpose of article V(1) of the Convention. The absence of a valid arbitration agreement between the parties is a fundamentally important factor militating against discretionary enforcement. Thus, referring to equivalent provisions, *Rix LJ* stated in the English Court of Appeal in the Dallah COA Judgment as follows:[91] 'There is no express provision however as to what is to happen if a defence is proven, but the strong inference is that a proven defence is a defence. It is possible to see that a defence allowed under Convention or statute may nevertheless no longer be open because of an estoppel,[92] or that a minor and prejudicially irrelevant error, albeit within the Convention or statutory language, might not succeed as a defence.[93] But it is difficult to think that anything as fundamental as the absence of consent or some substantial and material unfairness in the arbitral proceedings could leave it open to a court to ignore the proven defence and instead decide in favour of enforcement.'

In the UK Supreme Court of the same case, Lord *Collins* of Mapesbury JSC pointed out that: 'Article V[94] safeguards fundamental rights including the right of a party which has not agreed to arbitration to object to the jurisdiction of the tribunal'.[95] He acknowledged that because of the word 'may': 'The court before which recognition or enforcement is sought has a discretion to recognise or enforce even if the party resisting recognition or enforcement has proved that there was no valid arbitration agreement.'[96] However, his lordship emphasized the limits of that discretion, observing that 'it is not easy to see how that could apply to a case where a party had not acceded to an arbitration agreement.'[97]

In the *Astro* case, the SCA Astro Judgment had conclusively established that the tribunal lacked jurisdiction in respect of the additional parties, bringing First Media within section 44(2)(b) and that 'it would take a very strong case to permit enforcement of an arbitral award in circumstances where it was made by an arbitral tribunal without jurisdiction'.[98] This was shared by *Kwan JA* in the Hong Kong Court of Appeal when she considered the conclusive judgment of the Singapore Court of Appeal (which she referred to as the supervisory court) as to the invalidity of the arbitration agreement 'a very strong policy consideration' in the Hong Kong courts for section 44(2) purposes.[99]

The third is the decurion principle. It has often been emphasized that the discretion to extend time conferred by Order 3 rule 5 of the Hong Kong Rules

91 *Supra* note 30, Dallah COA Judgment [2011] 1 AC 763, para.89.
92 *Van den Berg*'s view, *see* ALBERT JAN VAN DEN BERG, *supra* note 9, 265.
93 As in the *China Agribusiness* case [1998] 2 Lloyd's Rep 76.
94 Reflected in section 44(2) of the Arbitration Ordinance.
95 *Supra* note 19, 836, para.102.
96 *Id.*, 843, para.126.
97 *Id.*, 844, para.127.
98 *Supra* note 17, para.92.
99 *Supra* note 81, Astro Judgment by Hong Kong Court of Appeal, para. 44 and 47, citing *Gao Haiyan v. Keeneye Holdings* [2012] 1 HKLRD 627 at para.65 to 69 and *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647 at 661.

of High Court (hereinafter referred to Order 3 r 5) is broad and unrestricted, designed to enable justice to be done between the parties. Thus, in *Kwan Lee Construction Co Ltd v. Elevator Parts Engineering Co Ltd*,[100] *Litton VP* in the Court of Appeal, stated: 'The court's jurisdiction to extend time, as conferred by Order 3 r 5, is as broad as it can come and, in the exercise of that discretion, the court would, generally speaking, have some regard to what might ultimately be in issue.'

In *Costellow v. Somerset County Council*,[101] dealing with the equivalent provision in England and Wales, Sir *Thomas Bingham MR* noted that the discretion involves the intersection of two principles. The first promotes the enforcement of time limits for the expeditious dispatch of litigation in the public interest and the second recognises that a plaintiff should not ordinarily be denied adjudication of his claim on the merits because of a procedural default 'unless the default causes prejudice to his opponent for which an award of costs cannot compensate'. His lordship noted that the second principle 'is reflected in the general discretion to extend time conferred by Order 3, r 5, a discretion to be exercised in accordance with the requirements of justice in the particular case.'

The Court of Appeal in *The Decurion*[102] cited *Costellow* and *Cheung JA* acknowledged the intersecting principles and stated: 'It is clear that the applicable principle in deciding whether time should be extended is to look at all relevant matters and consider the overall justice of the case. A rigid mechanistic approach is not appropriate.'[103]

In the *Astro* case, the Hong Kong CFA upheld the broad, unrestricted approach espoused in cases like *The Decurion* and rejected the elaborately structured approach to discretion in *Terna Bahrain.*[104] Thus, proper weight should have given to the established lack of a valid arbitration agreement by the court of the seat member state. At the same time, the following has been held by the HKCFA to be inapplicable and thus is an irrelevant discretionary factor and ought not to be taken into account when the discretion is to be exercised.

The fourth is arbitration being a special regime in facilitating the fair and speedy resolution of disputes and thus section 2AA(1) of the Ordinance which states that the object is 'to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense'.

The fallacy of the argument that a more disciplined approach is called for in the arbitration context, with its emphasis on speedy finality and the short statutory time limits is its failure to take into account of the fact that the policy

---

100 *Kwan Lee Construction Co Ltd v. Elevator Parts Engineering Co Ltd* [1997] HKLRD 965 at 973.
101 *Costellow v. Somerset County Council* [1993] 1 WLR 256 at 263-264.
102 *The Decurion* [2012] 1 HKLRD 1063.
103 *Id.*, para.11.
104 *Terna Bahrain Holding Company Wll v. Al Shamsi and Others* [2013] 1 Lloyd's Rep 86.

favouring speedy finality in resolving an arbitration is necessarily premised on a valid arbitration agreement between the parties which is absent in the *Astro* case. Thus, binding arbitrations must rest on a consensual basis is reflected in section 2AA of the Ordinance itself which, in subsection (2)(a) states:[105] '(2) This Ordinance is based on the principles that (a) subject to the observance of such safeguards as are necessary in the public interest, the parties to a dispute should be free to agree how the dispute should be resolved.'

VIII. CONCLUSION

Article V discretion is 'no arbitrary discretion'[106] and cannot be a 'purely discretionary' one and must 'have been designed to enable the court to consider other circumstances, which might on some recognizable legal principle affect the *prima facie* right to have enforcement or recognition refused'.[107] This means that the exercise of article V discretion requires careful consideration by way of weighting and balancing relevant factors without losing sight of the proper meaning and the spirit of the Convention and the *Model Law* before decision is to be made. The fact that the Convention has been silent on how article V discretion is to be exercised plus the fact that this year is the 60th year anniversary of the Convention, the author would like this article to bring forth a few existing recognizable legal principles which have been held to 'affect the *prima facie* right to have enforcement or recognition refused' with a wishful thinking that widely acceptable legal principles covering the whole spectrum of the issue of judicial exercise of its article V discretion[108] may precipitate in the near future.

(Revised by Robert D. Roderick)

105 *Supra* note 77, HKCFA Astro Judgment, para. 65.

106 *Supra* note 19, para. 126-128, by Lord Collins of Mapesbury JSC.

107 *Supra* note 19, para 67, by Lord Mance.

108 That was, the granting of extension of time for First Media in applying for its opposing enforcement of the undead Singapore award and, at the same time, gave an insight as to whether or not an undead award should be given its life and if so, how alive such award should be by way of its being recognized and enforced.