

The Doctrine of *Res Judicata* in International Commercial Arbitration: The Preclusionary Effects of Court Decisions

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There is an understandable tendency to conceptualise the different legal traditions around the world with reference to the civil law and common law divide. This is perhaps an oversimplification, particularly in the context of international maritime arbitration, where the divisions between the common law and civil law traditions are much less visible than in court proceedings. As a dispute resolution process, international arbitration usually presents itself as a blend of common law and civil law traditions regardless of where the arbitration is seated. Although international arbitration is a private dispute resolution method, it is not possible, at least in common law jurisdictions,¹ to speak of it as an autonomous legal order that is completely independent of national courts.

When considering the true value of international arbitration to its users, it is important to bear in mind that the enforcement of a favourable award is as crucial as obtaining the award itself. A party may pursue a case successfully and obtain a favourable award, but all this will be of no value if he or she cannot collect the award from his or her counterparty. With the adoption by more than 150 countries of the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958 (“the Convention”) arbitration awards are, in most cases, more readily enforceable than court judgments.² Undoubtedly, the so-called “pro-enforcement bias”,³ which has been duly observed by most of the

¹ *Bank Mellat v Helliniki Techniki SA* [1984] QB 291, at 301, per Kerr LJ, where he said that the common law “does not recognise the concept of arbitral procedures floating in the transnational firmament unconnected with any municipal system of law”.

² On the recognition and enforcement of judgments in civil and commercial matters within the EU, see Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast). In this paper, this regulation will be referred to as “the Brussels Regulation”.

³ *Parsons & Whittemore Overseas Co v Société Générale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2nd Cir 1972).

Convention states, has also played an instrumental role in facilitating the enforcement and recognition of awards under the Convention.⁴

The crucial question is, therefore, not *whether* awards can be recognised and enforced, but *which* awards should be recognised and enforced by national courts under the Convention. If arbitration is to be taken as a final determination of the rights of the parties, how much deference should national courts give to awards? National courts do not speak with one voice. The lack of uniformity among the Convention states on this matter has given rise to two practical issues. Firstly, where a court located at the seat of the arbitration (the “primary jurisdiction”) sets aside the award or dismisses a challenge against the award, does the decision of that court have a preclusive effect on the enforcement of the award by the courts in other jurisdictions (“secondary jurisdictions”)?⁵ Secondly, where a court in a secondary jurisdiction refuses or accepts the enforcement of the award, does that decision have a preclusive effect, preventing the parties from relitigating the issues determined by that court in the enforcement proceedings?

If the pillars of the Convention are international comity and uniformity,⁶ both questions should be answered in the affirmative. Further, and perhaps more persuasively, support for an affirmative answer can be drawn from two Latin maxims: *nemo debet bis vexari pro una et eadem causa* (“no one should be vexed twice for one and the same cause”) and *interest reipublicae ut sit finis litium* (“it is in the public interest that there should be an end to litigation”).⁷ Embedded in almost every legal system, these Latin maxims have brought about “the rules of preclusion”, which differ materially from jurisdiction to jurisdiction.

⁴ For US law, see *American Const. Mach. & Equip Corp. v Mechanised Const. of Pakistan Ltd.*, 659 F. Supp. 426, 428 (SDNY 1987).

⁵ These terms, “primary jurisdiction” and “secondary jurisdiction”, are used by the US Court of Appeals for the Fifth Circuit in *Karaha Bodas v Perusahaan Pertambangan*, 335 F.3d 357 (5th Cir 2003).

⁶ M.B. Holmes, “Enforcement of Annulled Arbitral Awards: Logical Fallacies and Fictional Systems” (2013) 79 *Arbitration* 244.

⁷ S. Sime, “*Res Judicata* and ADR” (2015) 34(1) *Civil Justice Quarterly* 35.

This paper discusses the extent to which the rules of preclusion apply to the question of the recognition and enforcement of arbitration awards by national courts. With these discussions, the paper will conclude that:

- Although there is no express provision to that effect, the Convention permits the use of the rules of preclusion, which can be treated as part of procedural public policy. Every country is justified in applying its own preclusive rules in the enforcement proceedings. Hence, a previous decision of a foreign court on the enforcement of an award under the Convention is capable of giving rise to issue estoppel in English enforcement proceedings.
- In essence, estoppel is a matter for the *lex fori*. Thus, a national court applies its own conflict of laws rules when characterising the issue previously determined in a conclusive manner by a foreign judgment. However, the question of whether the issue determined in a foreign judgment is final and conclusive should be decided with reference to the law of the foreign jurisdiction.
- The matter discussed above, which is related to the application of issue estoppel, is separate and distinct from the issue as to whether an award has become binding for the purposes of Article V(1)(e) of the Convention. The latter issue is, in essence, one for the *lex fori*. Nonetheless, a previous decision of a foreign court on the application of Article V(1)(e) can give rise to issue estoppel in enforcement proceedings.
- The admittedly tricky, but perhaps more intriguing, issue of the law governing the validity of the arbitration agreement is usually not capable of giving rise to issue estoppel.
- The use of the rules of preclusion is somewhat restricted under the Brussels Regulation, which now requires each EU member state to decide the issue of validity of arbitration agreements. However, this does not appear to have an effect on the recognition and enforcement of arbitration awards under the Convention, since the Brussels Regulation does not apply to the recognition and enforcement of arbitration awards.

A. The rules of preclusion in common law

The rules of preclusion in common law have a broader application than those under civil law. Under English law, the concept of *res judicata*⁸ in essence covers the defences⁹ of cause of action estoppel, issue estoppel and merger of judgment.¹⁰ The rule of cause of action estoppel dictates that once a court of competent jurisdiction determines a particular cause of action, no subsequent proceedings on the “same cause of action”¹¹ can be brought by the same parties or their “privies”.¹² For the doctrine to apply, the judgment must be final and conclusive on the merits.¹³

At common law, the judgment of a non-English court was capable of giving rise to a cause of action estoppel where the judgment is in the defendant’s favour. However, if the judgment is in favour of the plaintiff, it did not amount to a bar against English proceedings brought on the same cause of action.¹⁴ This was because the principle of merger of judgment did not apply in the case of a non-English judgment.¹⁵ The principle of merger prevents a claimant who has already

⁸ See *Virgin Atlantic Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2013] 4 All ER 715, where Lord Sumption said at para 17 that “res judicata is a portmanteau term which is used to describe a number of different legal principles with different judicial origins”.

⁹ The application of the cause of action or issue estoppel also allows a plaintiff to defeat the defences that are inconsistent with earlier judgments or that are rejected in earlier proceedings, see K.R. Handley, “A Closer Look at Henderson v Henderson” (2002) 118 *Law Quarterly Review* 397. See also *Man v Haryanto* [1991] 1 Lloyd’s Rep 161.

¹⁰ *The Indian Grace* [1993] AC 410, 417–418, per Lord Goff of Chieveley.

¹¹ A cause of action means the key minimum facts that a claimant is required to plead and prove in order to obtain remedy, see *Letang v Cooper* [1955] 1 QB 232, 243. When interpreting the phrase “cause of action”, English courts tend to avoid a narrow and technical interpretation of the phrase, see *The Indian Grace* [1994] 2 Lloyd’s Rep 354, per Clarke J at 354, reversed on other grounds. On competing estoppels see the decision in *Air Foyle v Centre Capital* [2003] 2 Lloyd’s Rep 753.

¹² *Thoday v Thoday* [1964] P 181 (CA), per Lord Diplock at 197. See also *Thrasylvoulou v Secretary of State for the Environment* [1989] 2 AC 273 (HL). A modern approach to the issue of who might be considered as privy is elucidated by Sir Robert Megarry in *Gleeson v J Wippel & Co Ltd* [1977] 1 WLR 510, at 515C to 515D, where he said that there would normally be sufficient privy between the trustees and their beneficiaries in the case of a trust property. Moreover, a person can also be treated as privy to proceedings if he or she has “a concrete interest in the outcome”; see *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 924, per Floyd LJ at 47.

¹³ *Jacobson v Frachon* (1927) 138 L.T. 386 (CA). For the purposes of cause of action estoppel, a default judgment is considered to be a final judgment, see *Virgin Atlantic Airways v Zodiac Seats* [2013] UKSC 46, [2013] 3 WLR 299. However, default judgments do not give rise to the defence of issue estoppel. A judgment is usually considered to be final if it is incapable of being reviewed by the same court giving the judgment. A judgment does not lose its *res judicata* effect due to a mere possibility of an appeal to a higher court, see *The Irini A* [1999] 1 Lloyd’s Rep 189.

¹⁴ *The Indian Grace*, (n 10), 391 (HL), per Lord Goff of Chieveley.

¹⁵ *Ibid.* Notably, the non-merger rule also applies in the case of *in rem* admiralty proceedings, see the decision in *The Rena K* [1979] QB 377, where Brandon J established the rule that a cause of action *in rem* does not merge in a judgment *in personam* and remains available to the extent that the judgment remains unsatisfied. He also held that the principle was also applicable in the case of arbitration awards. The Hong

obtained a favourable judgment from bringing subsequent proceedings on the same cause of action even in cases where the judgment remains unsatisfied. The rationale behind the principle is that once decided, the cause of action becomes merged in the judgment. In respect of the preclusive effect of foreign judgments, section 34 of the Civil Jurisdiction and Judgments Act 1982 now provides that:

No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales, or as the case may be, in Northern Ireland.

As interpreted by Lord Goff of Chieveley in *The Indian Grace (No. 1)*, the above provision does not expressly abolish the non-merger rule. Rather, it creates a plea against “reassertion” founded upon the same cause of action and therefore provides a “bar against proceedings by the plaintiff rather than excluding the jurisdiction of the court”.¹⁶ In essence, it prevents a claimant having a second bite at the cherry.¹⁷

Issue estoppel

The other branch of the doctrine of *res judicata* is the rule of issue estoppel. The rule prevents parties, or their privies,¹⁸ from denying or rearguing an issue of fact or law that was previously determined by a “competent”¹⁹ court.²⁰ To

Kong court in *The Alas* [2014] 6 HKC 239 followed the decision when allowing an action *in rem* that was brought by an award creditor to recover the unsatisfied part of the award.

¹⁶ *The Indian Grace*, (n 10), 395 (HL), per Lord Goff of Chieveley. See also L. Collins, “Illogical Survivals and Astonishing Results” (1992) 108 Law Quarterly Review 393.

¹⁷ On the issue of what constitutes the same cause of action, English courts tend to engage in the process of characterisation with reference to the rules of the forum. See the decision in *Black v Yates* [1991] 1 Lloyd’s Rep 181.

¹⁸ See *Littlewoods Retail Limited v The Commissioners for HMRC* [2014] EWHC 868 (Ch), where Henderson J said at para 214: “an issue estoppel binds not only the parties to the earlier determination but also their privies in blood, title or interest”.

¹⁹ The foreign court must have jurisdiction to determine the issue “both by its own law and in the eyes of English law”, see *Tracomin v Sudan Oil* [1983] 1 Lloyd’s Rep 560, per Staughton J at 566.

establish an issue estoppel, the earlier judgment given by a competent court must be final²¹ and conclusive²² on the merits.²³ When determining whether a foreign judgment is final and conclusive, the courts do not just look at English law. They also consider the nature of the judgment in the eyes of the foreign court that gave the judgment.²⁴ For this reason, once a foreign judgment is recognised by an English court, the court will give the judgment the same effects that a comparable domestic judgment would have. However, it will do so only if the foreign judgment is capable of creating that effect in the foreign country (i.e. the country of origin).²⁵ The rationale behind this approach can be found in Lord Reid's judgment in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)*, where his Lordship said:

[I]t seems to me to verge on absurdity that we should regard as conclusive something in a German judgment which the German courts themselves would not regard as conclusive. It is quite true that estoppel is a matter for *the lex fori* but *the lex fori* ought to be developed in a manner consistent with good sense.²⁶

²⁰ The operation of issue estoppel is not limited to cases where a tribunal has given a reasoned decision on the issues of fact and law in the first litigation, see *Barber v Staffordshire CC* [1996] ICR 379, per Mummery J at 388.

²¹ Thus the judgment must not be subject to subsequent review, discharge or modification by the court giving the judgment, see *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2)*, [1967] 1 AC 853; [1966] 2 All ER 536, paras 538G–539B, 541A–542B.

²² See *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2)*, (n 21).

²³ On the question of what constitutes an issue on the “merits”, see the decision in *The Sennar (No.2)*, [1985] 1 WLR 490, where a jurisdictional issue determined by a Dutch court was held to constitute an issue estoppel. Thus, the cargo interests were barred from rearguing the issue that they were bound to bring their claim in Sudan, as determined by the Dutch court. See also the decision in *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847, where the Court of Appeal accepted the principle that an interlocutory judgment of a foreign court on a procedural or jurisdictional issue can, in certain cases, be considered as a final judgment on the merits for the purpose of issue estoppel. A party is barred from rearguing a procedural issue decided in an interlocutory foreign judgment where there is an express submission of that issue to the foreign court and the specific issue of fact is raised before and decided conclusively by that court. The decision suggests that where a party appears before a court to raise its objection to the jurisdiction of the foreign court, the determination of that issue by the foreign court can give rise to issue estoppel. This does not sit comfortably with section 33 of the Civil Jurisdictions and Judgments Act 1982, which provides that mere appearance before a court to object to the jurisdiction of that court does not constitute submission. On this issue, see *Tracom v Sudan Oil*, (n 19), at 566–567; *Sovarex v Romero Alvarez* [2011] 2 Lloyd's Rep 320. This view is also adopted in Singapore; see *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] SGHC 104. See also Dicey, Morris & Collins, *Conflict of Laws*, (15th edn, Sweet & Maxwell, 2016) para 14-035, n. 147.

²⁴ *The Irini A (No.2)* [1999] 1 Lloyd's Rep 189, 193. This approach is also followed in Singapore: see *The Bunga Melati 5* [2012] 4 SLR 546 at 86; *Manharlal Trimkamdass Mody and Another v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161, at 141.

²⁵ *Charm Maritime v Kyriakou* [1987] 1 Lloyd's Rep 433, 450

²⁶ [1967] 1 AC 853, 919.

There is also another important requirement regarding the application of issue estoppel: only the particular issues that have formed “the necessary ingredients” of the judgment of the court can give rise to issue estoppel.²⁷ Thus, issues that are ancillary and collateral can be reopened in subsequent proceedings.²⁸

All these explanations clearly point out the importance of characterising the issues previously determined by a competent foreign court: for a previously determined issue to give rise to issue estoppel, it should be “identical” to the issue raised in the subsequent English proceedings. As Lord Wilberforce in the *Zeiss* case stated, caution must be exercised when establishing the identity of the issue previously decided by a foreign court. In this context, the important factors to consider are as follows:

- A party against whom the issue estoppel is invoked might not have had an opportunity to defend the particular issue in the foreign jurisdiction.
- The issue might not have been brought into full contestation.
- There may not be a clear decision by the foreign court on that issue.
- The decision-making techniques, procedural rules and the substantive law of the foreign country can make it difficult to ascertain the particular issue decided.²⁹

These factors cannot be determined without giving consideration to the laws and proceedings in the relevant foreign jurisdiction. However, the question as to the identity of the relevant issue is ultimately decided with reference to the *lex fori*. In this context, the decision in *The Good Challenger* is worthy of note.³⁰ The case was concerned with the enforcement of a 20-year-old award. In June 1983, the claimant (“the Owners”) obtained an arbitration award in their favour. The Owners sought to enforce the award against the defendant (“Charterers”) in Romania. After lengthy enforcement proceedings, the Romanian Supreme Court

²⁷ *Arnold v NatWest Bank* [1991] 2 AC 93, per Lord Keith at pp. 104–105. Hence, the discovery of a new factual matter that could not have been found out by reasonable diligence does not permit subsequent proceedings on the same cause of action. See also the decision *Virgin Atlantic Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2013] 4 All ER 715, at para 26.

²⁸ *Arnold v NatWest Bank* [1991] 2 AC 93, per Lord Keith at pp. 104–105. See also *The Good Challenger* [2004] 1 Lloyd’s Rep 67.

²⁹ [1967] 1 AC 853, 967.

³⁰ [2004] 1 Lloyd’s Rep 67 (CA)

decided in 1998 that the proceedings were time-barred both under the Romanian limitation period (three years) and under the English limitation period (six years). The English Court of Appeal held that the Romanian Supreme Court's finding on the English limitation period was not a "fundamental" and "essential" determination on which the Romanian judgment was based. Consequently, the Owners were not issue estopped from submitting before the English court that the enforcement proceedings were brought in time.

In addition to the process of characterisation, English courts have a tool to remove the harshness that may arise from the application of issue estoppel: the overarching principle on the application of issue estoppel is that it must be applied to bring about justice, not injustice.³¹ Therefore, the courts have discretion not to apply the issue estoppel if doing so would lead to injustice.³²

B) The legal position in other jurisdictions

In other common law jurisdictions, the doctrine of *res judicata* is applied in a wider sense. In *Armacel Pty Limited v Smurfit Stone Container Corporation*,³³ an issue estoppel arose from the decision of the US Federal Court that the jurisdiction clause in favour of the New South Wales courts was non-exclusive. In the eyes of the Federal Court of Australia, the US court's determination was, in fact, wrong, in that it failed to apply Australian law on the effect of the jurisdiction clause. Nonetheless, following the English decision in *The Sennar (No.2)*, the Federal Court of Australia held that the claimant be bound by the decision of the US court on the effect of the jurisdiction clause.

In the United States, the *res judicata* principles are applied in a much wider sense. While issue estoppel requires mutuality under English law,³⁴ the US law also accepts the concept of "collateral estoppel", which allows a third party to the

³¹ For this reason, issue estoppel allows an issue to be re-examined if there is new evidence that changes substantially particular aspects of the case and that could not by reasonable diligence have been determined previously. Re-examination is also possible if there is a change in the law in relation to the original decision or if fraud or collusion is alleged. *Arnold v NatWest Bank*, (n 27), per Lord Keith at p. 109.

³² *The Sennar (No. 2)*, (n 23).

³³ [2008] FCA 592.

³⁴ *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2)*, (n 21), 511. See also *Lincoln National Life Insurance Co v Sun Life Assurance Co of Canada* [2004] EWCA Civ 1660, [2006] 1 All ER 675 (CA).

previous proceeding to rely on a prior finding as a defence and/or ground for dismissal³⁵ when it is “fair” to do so.³⁶

In civil law jurisdictions, the courts also adopt the principle of finality in litigation.³⁷ However, the finality of a judgment given by a competent court does not usually extend to the conclusions of the competent court on the necessary issues of law and fact.³⁸ Only the dispositive part of the judgment has the *res judicata* effect on the parties.³⁹ The finality of the judgment has the further effect of preventing a party from arguing in subsequent proceedings legal and factual issues existing at the time of the proceedings.⁴⁰

Despite the material differences between the *res judicata* principles applied in common law and civil law jurisdictions, it is widely accepted that, just as with court judgments, arbitration awards also have *res judicata* effects.⁴¹ Based on party consent, the arbitral process results in an award that contains a definitive determination of the dispute between the parties, who promised to abide by the resulting award.⁴² Particularly in countries where the UNCITRAL Model Law⁴³ is adopted, an award can be challenged in the primary jurisdiction in only exceptional circumstances. Under English law, the grounds for challenge of the awards rendered in the jurisdiction are exhaustively set out under the English Arbitration Act 1996.⁴⁴

³⁵ *Parklane Hosiery Co v Shore*, 439 US 322 (1979).

³⁶ *Ibid.*

³⁷ C. Soderlund, “*Lis Pendens, Res Judicata* and the Issue of Parallel Judicial Proceedings” (2005)4 *Journal of International Arbitration* 301.

³⁸ *Ibid.*

³⁹ Swedish Procedural Code, c 17, Art. 11; German Civil Procedure (ZPO), Art. 322; French New Code of Civil Procedure (NCPC), Art. 480, all quoted in Soderlund, (n 37). In the context of the mutuality principle, the effect of the *res judicata* principle extends to the parties’ successors, assignors and executors, see ZPO Arts 326–327, cited in S. Brekoulakis, “The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited” (2005) 16 *The American Review of International Arbitration* 9. In Swiss law, the *res judicata* effect of a foreign judgment is decided by reference to the law of the country in which the judgment is given, see the decision of the Swiss Federal Tribunal, 140 III 278 [4A_508/2013], *The South Railways decision*, cited in N. Voser and J. Raneda, “Recent Developments on the Doctrine of Res Judicata in International Arbitration from a Swiss Perspective: A Call for a Harmonised Solution” (2015) 4 *Journal of International Arbitration* 742.

⁴⁰ Soderlund, (n 37).

⁴¹ *Indera Construction Sdn Bhd v PNS Development Bhd* [2014] Malayan Law Journal Reports; *Fidelitas Shipping Ltd v V/O Exportchleb* [1965] 1 Lloyd’s Rep 13, where the court held that an arbitration award can give rise to an issue estoppel; for German Law, see ZPO, Art. 1055.

⁴² An appellate procedure is not usually provided in the rules of arbitration agreed by the parties.

⁴³ See the UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006.

⁴⁴ See English Arbitration Act 1996, ss. 67, 68 and 69.

At the enforcement stage, where an award-debtor can usually avail itself of the passive remedy of resisting enforcement pursuant to the Convention,⁴⁵ it is generally accepted that the merits of an award are not reviewed.⁴⁶ The review envisaged by the Convention is founded on the need to ensure that there is no significant departure from the main tenets of the Convention.⁴⁷ In Convention states, an award on an arbitration agreement can be enforced by leave of the court in the same manner as a judgment, and the grounds for refusal of enforcement under the Convention are considered to be exhaustive.⁴⁸ Under the Convention, the rules of preclusion are not expressly provided as a ground for refusal of enforcement, but does this constitute a bar to application of the rules of preclusion to the question of enforcement of an award?

B. Can an enforcement judgment have any preclusive effect on the enforcement of the award in another jurisdiction?

On this matter, our attention must initially be drawn to one specific ground for refusal provided under Article V(1)(e) of the Convention. Under this provision, recognition and enforcement of an award “may” be refused, at the request of the party resisting recognition and enforcement, if that party proves that the award has not yet become binding on the parties, or has been set aside or suspended by a court of primary jurisdiction. The plain reading of the provision allows a court to recognise and enforce an award that has been set aside or suspended. Because of the use of the word “may”, enforcing courts thus have discretion to enforce such an award.⁴⁹ Under English law, it is accepted that the discretion cannot be used arbitrarily.⁵⁰ In particular, in *Dardana Limited v Yukos Oil*, Mance LJ said:

⁴⁵ *Astro Nusantara International v PT Ayunda Prima Mitra* [2013] SGCA 57 (Singapore).

⁴⁶ See *Scherk v Alberto-Culver Co* (1974) 417 US 506, 519 (US); *Westacre Investments Inc v Jugoimport SDBR Holding Co Ltd*. [2000] QB 288 (CA); *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647; *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] 2 Lloyd’s Rep 133.

⁴⁷ *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] 2 Lloyd’s Rep 691 (SC).

⁴⁸ *Rosseel NV v Oriental Commercial Shipping* [1991] 2 Lloyd’s Rep 625.

⁴⁹ *Dowan Holding SA v Tanzania Electric Supply Co Ltd* [2011] EWHC 1957 (Comm) 820.

⁵⁰ See *Dardana Limited v Yukos Oil Company* [2002] 2 Lloyd’s Rep 326, per Mance LJ at paras 8 and 18.

the Court's discretion to refuse recognition of a foreign arbitration award ... could only be exercised where "despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost, by for example, another agreement or estoppel" or where there were circumstances which might on some recognisable legal principle affect the prima facie right to have an award set aside arising in the cases listed.⁵¹

It will be observed that the common law rule of issue estoppel can have a significant impact on the question of what issues can be argued or reargued in the enforcement proceedings under the Convention. In *Yukos Capital SARL v OJSC Rosneft Oil Company*,⁵² the English Court of Appeal was concerned with the question of whether the decision of a court in the secondary jurisdiction could give rise to issue estoppel. The relevant arbitration awards were set aside by the courts in Moscow, but the Court of Appeal in Amsterdam gave leave to enforce the awards. The question before the English Court of Appeal was whether the decision of the Dutch court, which was based on Dutch public policy, created an issue estoppel. While accepting that the decision of a court in secondary jurisdiction could create an issue estoppel, the Court of Appeal held that an issue estoppel did not arise from the decision of the Dutch court since each country's public policy is different from one another.⁵³ On characterising the identity of the issues brought in both jurisdictions, the Court of Appeal took the view that English public policy cannot be equated with the public policy of another country.

In the wake of the decision in *The Sennar (No.2)*, it is now clear that a jurisdictional issue previously determined by a competent foreign court is capable of giving rise to issue estoppel.⁵⁴ For present purposes, the upshot of the decision is this: the rule of issue estoppel can apply to enforcement judgments

⁵¹ *Ibid.*

⁵² [2014] EWHC 2188.

⁵³ See also the decision in *ED & F Man v Yani Haryanto* [1991] 1 Lloyd's Rep 161. There, the English Court of Appeal accepted that illegality could amount to such special circumstances where the "nature" of illegality outweighed the countervailing public policy in support of the finality of awards.

⁵⁴ There, the Dutch court's decision on jurisdiction was held to be a judgment "on the merits" for the purposes of application of the rule of issue estoppel, see [1985] 1 Lloyd's Rep 521.

that have determined the existence, scope and validity of arbitration agreements. This principle was recognised by the English Supreme Court in *Dallah Estate v Pakistan*.⁵⁵ There, the English Supreme Court conceded that jurisdictional issues previously determined by a competent court could give rise to issue estoppel, although the arbitrators' decision on jurisdiction would be subject to review by the courts. This approach was also adopted by the Court of Appeal in *The Wadi Sudr*.⁵⁶

i) The decision in *The Wadi Sudr*

In *The Wadi Sudr* on discharge of the short-delivered cargo, the cargo interests applied to the Spanish court for the arrest of the vessel. After the Spanish court's order for the arrest of the vessel, the carrier objected to the jurisdiction of the Spanish court on the grounds that there was a valid and binding arbitration agreement between the parties under the bill of lading. Later the same day, the shipowners commenced English proceedings before the Commercial Court for a declaration of non-liability. Following these sets of litigation proceedings, the carrier also commenced (i) arbitration proceedings in London for a declaration of non-liability and (ii) a second action before the Commercial Court to obtain a declaration that the dispute was subject to an arbitration agreement.

Through the eyes of the English courts, the dispute was subject to arbitration in London, with the bill of lading effectively incorporating the charterparty arbitration clause pursuant to English law, which was the putative applicable law of the bill of lading.⁵⁷ However, the Spanish court made a preliminary decision that the cargo interest was not bound by the arbitration clause on the grounds that it was not incorporated into the bill of lading under Spanish law. In so holding, the Spanish judgment clearly stated why the court had not applied English law to the incorporation issue.⁵⁸

⁵⁵ [2010] 2 Lloyd's Rep 691 (SC).

⁵⁶ [2009] EWCA Civ 1397.

⁵⁷ M. Ozdel, *Bills of Lading Incorporating Charterparties* (Hart Publishing, 2015), Ch 1.

⁵⁸ [2009] EWCA Civ 1397, para 19.

On the question of whether the preliminary decision of the Spanish court created an issue estoppel, the English Court of Appeal held unanimously that it did. Through the application of the rule of issue estoppel, the English court was thus precluded from deciding afresh the formal validity of the arbitration agreement. Since the Spanish court had competent jurisdiction as the court first seised under the regulation, the mere fact that an English court would have come to a different decision did not constitute a bar to application of the rule of issue estoppel.⁵⁹ The English Court of Appeal also refused to hold that the public policy exception had any role to play. This was founded upon the premise that the question of validity of arbitration agreements did not fall outside the scope of the previous regulation where it was tied up with a dispute that falls within the ambit of the regulation.⁶⁰ For present purposes, the following conclusions can be drawn from the decision:

- (a) Whether a jurisdictional issue that was previously determined by a foreign court should be recognised depends mainly on the English conflict of laws rules.⁶¹
- (b) If the foreign court is a competent court under the English conflict of laws rules, the decision of the foreign court on a jurisdictional issue can give rise to issue estoppel.⁶²
- (c) At English common law, a jurisdictional issue determined by a foreign court can therefore be binding upon English courts. It can be binding even in cases where, through the eyes of English courts, the foreign proceedings are in breach of a forum selection clause.⁶³
- (d) By and large, the effect of the rule of issue estoppel, stated in (c) above, is diminished with the enactment of section 32 of the Civil Jurisdiction and Judgments Act 1982, which provides, *inter alia*, that: “a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United

⁵⁹ *Ibid.*, paras 62 and 125.

⁶⁰ This was the opinion of the Advocate General in *The Front Comor Case* C-185/07, [2009] ECR I-663.

⁶¹ [2009] EWCA Civ 1397, para 125.

⁶² *Ibid.*

⁶³ *Ibid.* In this context, the decision clearly suggests that it will not be against English public policy to recognise a foreign judgment provided that it had not been obtained by commencing or continuing foreign proceedings in defiance of an injunction; see para 125.

Kingdom if the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country”.

On the more intriguing issue of the law governing the validity of the arbitration agreement, there is not much practical guidance that can be drawn from the decision in *The Wadi Sudr*. This may be partly for the reason that a governing law issue does not usually present itself as an issue on the merits. On the application of the rule of issue estoppel, English courts are usually not concerned with the governing law chosen by the foreign court. As long as the foreign court is competent, an issue estoppel may arise from a judgment that arrives at a conclusion that is wrong according to English law.⁶⁴

A final point to note is the effect of the decision within the European Union. The decision in *The Wadi Sudr* was effectively reversed by Recital 12 of the Brussels I Regulation (Recast),⁶⁵ which provides that:

This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and

⁶⁴ See *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2)* [1966] 2 All ER 536, per Lord Wilberforce at 966. See also *Tracomin v Sudan Oil*, (n 19), per Staughton J at 569 and 674.

⁶⁵ See Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

The upshot of this is that the courts of each member state should now have complete freedom to examine whether there is a valid and binding arbitration agreement between the parties. For present purposes, the key question is: in an enforcement action under section 103 of the Arbitration Act 1996,⁶⁶ would an English court be issue estopped by the determination of a European court on the validity of an arbitration agreement? Since the Brussels I Regulation (Recast), including its recital, is not applicable to the enforcement of arbitration awards, this question should still be answered with reference to English common law.

ii) The decision in *Diag Human SA v Czech Republic*

On the application of the rule of issue estoppel in the context of enforcement of arbitration awards, the decision in *Diag Human SA v Czech Republic*⁶⁷ is also worthy of note. There, Eder J considered the issue of whether a Czech award was binding for the purposes of enforcement. The relevant arbitration agreement provided for an internal appeal process, and the losing party had the right to appeal by serving a valid notice. When the award was first brought before an Austrian court for enforcement, the court refused to enforce the award on the grounds that the award was not binding. When the award was later brought before Eder J for enforcement, the question arose as to whether the Austrian decision gave rise to an issue estoppel. Eder J refused to enforce the award for two reasons.

Firstly, he concluded that the award was not binding. In reaching this conclusion, he observed the abolition of the “double *exequatur*” under the Convention. Since under the Convention the party seeking to enforce an award is no longer required to prove that the award has become binding in the country in which the award is rendered, he decided the question by reference to the autonomous

⁶⁶ The section reflects the wording in Article V of the Convention.

⁶⁷ [2014] 2 Lloyd’s Rep 283.

interpretation of the Convention.⁶⁸ With this interpretation, he found that the award was not binding. His second ground for the decision was based on the rule of issue estoppel. He took the view that the Austrian court's decision that the award was not binding gave rise to an issue estoppel. Although the issue of whether one of the grounds under Article V of the Convention applies is one for the *lex fori*, the decision shows that a previous decision of a foreign court on this matter can give rise to issue estoppel in English enforcement proceedings.

Forum shopping can be considered as a fundamental characteristic of the Convention regime. However, applying the rule of issue estoppel in enforcement proceedings would appear to be conducive to the attainment of uniformity of approach.⁶⁹ The tension between these two conflicting policy considerations can perhaps be better understood by considering the effects of each policy. Had the determination of the issue by the Austrian court in *Diag* been erroneous in the eyes of the English court, would the English court have been bound by the Austrian court's determination? Considering the pro-enforcement bias reflected in the Convention, would the English court have exercised its discretion not to apply the rule of issue estoppel and enforce the award? In these circumstances, there appears to be two countervailing policies: the policy in support of the finality of litigation and the pro-enforcement policy towards arbitration awards.

At the other extreme is the decision in *Karaha Bodas Companu v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*. There, a Swiss award was sought to be enforced in various jurisdictions including Canada, the United States, Hong Kong and Indonesia. The award was initially enforced in the United States.⁷⁰ It was later annulled by the Central Jakarta District Court in Indonesia, although the court was not a court of primary jurisdiction. Thereafter, the Hong Kong High Court granted an order enforcing the award on the ground that the US court

⁶⁸ This interpretation was suggested by Professor A. Van den Berg in *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation, 1981), 266. See also *Dowans Holding SA v Tanzania Electric Supply Co Ltd* [2011] 2 Lloyd's Rep 475, para 24.

⁶⁹ See [2014] 2 Lloyd's Rep 283, 299.

⁷⁰ 264 F. Supp 2d 490 (SD Tex. 2003).

decision gave rise to an issue estoppel.⁷¹ In the United States, the award went up to the Supreme Court, which refused the petition of the party resisting enforcement. Shortly afterwards, the Indonesian Supreme court reversed the Jakarta District Court decision and confirmed the validity of the award.⁷² At a later stage, the award was brought before a Canadian court for enforcement in Canada. The resisting party's failed attempts ended with the Canadian court's decision to grant leave for enforcement of the award.⁷³ The Canadian court did not apply issue estoppel to the grounds for refusal that had already been decided during the earlier proceedings, but it gave some weight to the determination of the US Court of Appeals for the Fifth Circuit Court that failure to produce evidence of political risk insurance did not violate public policy.

Lengthy and complex enforcement proceedings in various jurisdictions would leave no room for sufficient recovery of wasted costs and time. For the finality and effectiveness of arbitration awards, the courts should perhaps be justified in considering the rules of preclusion in enforcement proceedings and in not permitting parties to contest the enforcement of an award on a ground that has already been rejected by a foreign court.

C. Concluding remarks

In the context of the enforcement of arbitration awards, the rules of preclusion do more than just strengthen judicial comity. They also help promote the finality of international arbitration awards under the Convention. The rules of preclusion differ from jurisdiction to jurisdiction, and the courts in every jurisdiction would be justified in applying their own rules of preclusion, as these rules should be considered as part of the procedural public policy.

On the most basic level, the aim of enforcement proceedings is to provide relief for the collection of arbitration awards. Just as a party seeking to collect a money

⁷¹ [2003] HKCU 1. See also the *dicta* in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd*, which suggest that, to prevent any abuse of process, the courts should not permit a party to reopen an issue, if that issue could have been raised in earlier proceedings in another jurisdiction.

⁷² The chronology of what actions were brought is stated in the decision of the Court of Queen's Bench of Alberta in *Karaha Bodas* [2004] ABQB 918.

⁷³ *Ibid.*

damages judgment, a party seeking to enforce an award is not expected to plead the existence of a dispute on the merits. Proceedings for the enforcement of arbitration awards can thus be likened to the proceedings for the collection of monetary judgments. There has always been wide support for having a uniform system of enforcement for arbitration awards under the Convention. The rule of issue estoppel would appear to be conducive to achieving this purpose.