CHOICE OF LAW FOR ENFORCEMENT OF ARBITRAL AWARDS

A Return to the *Lex Loci Arbitri*?

Traditionally, conflict of laws does not feature prominently in international commercial arbitration. However, as more international cross-border complex disputes are resolved by arbitration, conflict of laws is likely to be of greater importance. This article focuses on the relevance and impact of choice of law in international commercial arbitration, with particular emphasis on the importance of choice of law in enforceability of arbitral awards.

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I. Introduction

1 The burgeoning number of international commercial arbitrations worldwide[1] reflects the growing acceptance of arbitration as an effective mode of dispute resolution. Increasingly, parties from different countries and legal systems are electing to resolve their dispute by arbitration. The attractiveness of arbitration as a dispute resolution mechanism for international disputes can be attributed, to a large extent, to the enforceability of awards worldwide.[2] This international character of commercial arbitration inevitably raises questions of conflict of laws. As one commentator puts it, "it is almost impossible to avoid issues relating to conflict of laws in international commercial arbitration".[3] The treatment of conflict of laws in international arbitration rose to prominence as a result of Professor Lorenzen's seminal article in 1934[4] but not much progress has been made since

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1 Chong Yee Leong & Qin Zhiqian, "The Rise of Arbitral Institutes in Asia" in *The Asia Pacific Arbitration Review 2011* (GAR, 2011) section 2, ch 1.

2 Christian Bühring-Uhle, "A Survey on Arbitration and Settlement in International Business Disputes" in *Towards a Science of International Arbitration: Collected Empirical Research* (Christopher Drahozal & Richard Naimark eds) (Kluwer Law International, 2005) at p 31.

3 Andrew Tweeddale & Karen Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press, 2007) at para 6.48.

4 Ernst Lorenzen, "Commercial Arbitration – International and Interstate Aspects" (1934) 43 Yale LJ 716.

then.[5] Although global efforts such as the United Nations Commission on International Trade ("UNCITRAL") Model Law on International Commercial Arbitration ("Model Law") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, or more commonly known as the New York Convention, have gone a long way in reducing conflict of laws,[6] much doubt remains over issues such as the applicable law to apply for the substantive merits of the dispute,[7] the applicability of *lex mercatoria*,[8] and the law governing the validity of arbitration agreements in the absence of a choice of law rule in the context of jurisdictional challenges.[9]

2 This article focuses on a conflict of laws problem which has significant practical ramifications for arbitrators, the parties and their counsels, and national courts involved in international commercial arbitration: choice of law in enforcement of award. Generally, choice of law in international arbitration is a "forensic minefield"[10] which is avoided unless absolutely necessary. However, choice of law is actually an important aspect in the enforcement stage, especially when there is a challenge to the enforceability of the award. A detailed understanding of the operation of choice of law at the enforcement stage of arbitration will be helpful to all the actors involved in international arbitration. Arbitrators will benefit as they will be better equipped to render an award which is widely enforceable. Knowledge of choice of law issues will also benefit parties and their counsel as they would be more aware of the options available to them in enforcing or resisting enforcement of an award. Last but not least, with fuller comprehension of the operation of choice of law in enforcement applications, national courts will be able to develop their private international law rules in a more coherent manner.

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5 See Peter Smedresman, "Conflict of Laws in International Commercial Arbitration: A Survey of Recent Developments" [1977] 7 California Western International LJ 263; David Stern, "The Conflict of Laws in Commercial Arbitration" [1952] 17 Law & Contemporary Problems 567 at 567–568.

6 Article 28 of the United Nations Commission on International Trade ("UNCITRAL") Model Law on International Commercial Arbitration ("Model Law") prescribes rules which arbitral tribunals should apply in determining the applicable law that governs the substantive merits of the dispute. Similarly, Art V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention") provides default choice of law rules which apply in the absence of parties' choice of law.

7 Carlo Croff, "The Applicable Law in an International Commercial Arbitration: Is it Still a Problem" (1982) 16 *International Lawyer* 613.

8 Ole Lando, "The *Lex Mercatoria* in International Commercial Arbitration" (1985) 34 ICLQ 747.

9 Marc Blessing, "The Law Applicable to the Arbitration Clause" (1999) ICCA Congress No 9 at pp 169–179. See generally Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer, 2001) ch 4.

10 Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (Oxford University Press, 2nd Ed, 1991) at p 72.

3 The first section of the article sets out how and why there exists a choice of law problem in the enforcement of awards. This will be followed by an introduction and analysis of a proposed framework which should be applied by national courts when confronted with challenges to enforcement of awards. In sum, the article seeks to persuade that the adoption of this framework will result in more certainty for arbitrators and parties, which will, in turn, increase the attractiveness of international commercial arbitration as a private means of dispute resolution.

II. The choice of law problem in challenge of enforcement of arbitral award proceedings

4 Since the proliferation of the New York Convention, enforcement of awards has been relatively straightforward. Nevertheless, an award may be refused enforcement as long as it satisfies one of the exclusive grounds provided for in Art V of the New York Convention.[11] The grounds for refusal of enforcement under the New York Convention can be grouped into two distinct types. Grounds for refusal of enforcement of the first type generally do not involve an interpretation of the arbitration agreement but are instead premised on the application of mandatory rules which seek to promote notions of fairness and natural justice. The relevant grounds of this type under the New York Convention are violation of due process,[12] and public policy considerations of the enforcing forum.[13]

5 Grounds for refusal of enforcement of the second type are generally concerned with the interpretation of the terms of the arbitration agreement but also include questions of validity of the arbitration agreement. It is the second type of grounds for refusal of enforcement which attracts the choice of law problem. Whenever there is an issue of interpretation or validity of an agreement, there is inevitably a choice of law consideration. Under a traditional choice of law analysis, a national court will apply its own private international law rules to determine the applicable law. Only when the court has applied its private international law rules and ascertained the applicable law governing the relevant issue, can it then apply the applicable law to resolve the issue. The corollary of this choice of law methodology is that whether a particular ground for refusing enforcement can be established depends on the forum's private international law rules and the applicable law which the rules point toward. Since private international

11 Albert Jan van den Berg, *The New York Convention of 1958* (Kluwer, 1981) at p 265.
12 See Art V(1)(b) of the New York Convention.
13 See Art V(2)(b) of the New York Convention.

law rules differ from jurisdiction to jurisdiction,[14] the enforceability of an award is therefore very much dependent on the nature of the private international law rules of the enforcing jurisdiction.

6 Although the reason for the existence of a choice of law problem for each of the grounds for refusal of enforcement (of the second type) is the same, namely, that it stems from the need to interpret an agreement, the precise type of choice of law consideration differs according to each ground. It may therefore be helpful to understand the context and nature of the choice of law problem for each ground for refusal of enforcement. These grounds for refusing enforcement are (a) the incapacity of a party to enter into an agreement;[15] (b) invalidity of the arbitration agreement;[16] (c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration,[17] and contains decisions on matters beyond the scope of the submission to arbitration;[18] and (d) inconsistency between the composition of the arbitral tribunal or the arbitral procedure, and the agreement of the parties.[19]

A. Incapacity: Art V(1)(a) of the New York Convention

7 The first limb of Art V(1)(a) basically provides that an award may be refused enforcement if the parties to the agreement were "under the law applicable to them, under some incapacity". There is no mechanism which prescribes how the law applicable to the parties' capacity is to be determined. In such a case, the law applicable to capacity then depends on the private international law rules of the enforcement forum.[20] However, the law applicable to capacity is notoriously unsettled. Even within the common law, there is no clear choice of law rule.[21] Older authorities suggest the law of the domicile,[22] or the law of the place of contracting,[23] or either in the alternative.[24] More modern authorities, however, suggest the use of the objective proper law of the contract.[25] Even if there is a settled choice of law rule

14 Peter Stone, *EU Private International Law* (Edward Elgar, 2nd Ed, 2010) at p 3; Gary Born, *International Civil Litigation in the United States Courts* (Kluwer, 3rd Ed, 1996) at p 492.
15 See first limb of Art V(1)(a) of the New York Convention.
16 See second limb of Art V(1)(a) of the New York Convention.
17 See first limb of Art V(1)(c) of the New York Convention.
18 See second limb of Art V(1)(c) of the New York Convention.
19 See Art V(1)(d) of the New York Convention.
20 Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003) at para 6.51.
21 *Halsbury's Laws of Singapore* vol 6(2) (Lexisnexis, 2009) at para 75.370.
22 *Sottomayer v De Barros* (1877) LR 3 PD at 5.
23 *Baindail v Baindail* [1946] P 122 at 128.
24 *Republica de Guatemala v Nunez* [1927] 1 KB 669 at 689.
25 *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240.

at common law, it may differ from those in civil law jurisdictions. For most civil law jurisdictions, the capacity of a juridical person is governed by the law of the country where its headquarters are located (*siège social reel*).[26] Obviously, if the law applicable to capacity depends on the private international law rules of each jurisdiction, the enforceability of the award would depend very much on which forum the winning party chooses to enforce the award in.

B. Invalid arbitration agreement: Art V(1)(a) of the New York Convention

8 Under the second limb of Art V(1)(a), an invalid arbitration agreement is a sufficient ground for a national court to refuse enforcement of an arbitration award. The rationale for this ground stems from the fundamental principle that a party cannot ordinarily be compelled to arbitrate unless an agreement to do so exists.[27] Challenges to the enforcement of awards based on this ground are quite common.[28] However, courts do not seem to appreciate the choice of law process inherent in this ground of challenge. Courts seem to assume that the choice of law rule is already provided for in Art V(1)(a). Although the rule states that an award may be refused enforcement "if the arbitration agreement is not valid under the law to which the parties had subjected it, or failing any indication thereon, the law of the place where the award was made", there is actually an antecedent question of ascertaining the system of law to apply to determine if parties had chosen a law to govern the validity of the arbitration agreement. This antecedent choice of law step is typically overlooked by national courts and leading treatises alike.[29]

9 The recent Singapore case of *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd*[30] illustrates the courts' lack of awareness of the choice of law question. The respondent

26 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer, 1999) at paras 459–460.

27 Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer, 2001) at pp 155–167.

28 See *Arab National Bank v El Sharif Saoud Bin Masoud Bin Haza'a El-Abdali* [2004] EWHC 2381 and *Republic of Kazakhstan v Istil Group Inc* [2004] Eng Comm QBD 579.

29 In a widely respected leading arbitration guide, *Redfern and Hunter on International Arbitration*, the learned authors did not elaborate on the mechanism to assess if parties had chosen a particular law. They simply repeated the rule that "if the parties have *not subjected* the arbitration agreement to a particular law, expressly or by implication, its validity may be judged according to the law of the place of arbitration" [emphasis in original]: Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) at para 1038.

30 [2010] 3 SLR 661 at [6].

Ultrapolis had originally contracted the appellant DSK to provide professional design services for a 90m yacht. This first agreement was subsequently rescinded in favour of a new agreement for the provision of design services for a 100m yacht. There was a dispute over the amount and payment of work done and DSK proceeded to refer the dispute to arbitration, pursuant to an arbitration clause which was purportedly incorporated as part of a set of standard terms ("Standard Terms"). There was also a choice of law provision in the Standard Terms – cl 19 – which provided that the "contract shall be governed by Danish law". An award was ultimately rendered by the Danish Arbitration Institute in Denmark in favour of DSK. When DSK attempted to enforce the award, Ultrapolis resisted enforcement on the basis that the arbitration clause was not incorporated and hence there was no valid arbitration agreement.[31]

10 At first glance, there does not appear to be any controversy over the application of Art V(1)(a).[32] However, there was in fact a choice of law step which was bypassed or overlooked. Through its reasoning, one might reasonably infer that the court found that the parties had subjected the validity of the arbitration agreement to Danish law.[33] The court ostensibly placed a premium on the choice of law clause as well as the fact that DSK's counsel referred extensively to Danish law whereas Ultrapolis' counsel did not.[34] It is unclear why the court was so ready to assume that the choice of law clause applied, especially since the incorporation of the Standard Terms was in dispute. This is a classic illustration of a choice of law problem for formation of contracts.[35] Generally, the common law solution to this problem is to rely on either the putative proper law or the *lex fori*.[36] By assuming initially that the choice of Danish law in cl 19 applied to determine the validity of the arbitration agreement, and subsequently finding that the arbitration

31 *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661 at [4].

32 The Singapore court actually applied s 31(2)(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). This is because the New York Convention, which Singapore has ratified, is reflected in the IAA and s 31(2)(*b*) of the IAA is modelled after Art V(1)(a) of the New York Convention.

33 *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661 at [44]–[45].

34 *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661 at [44]–[45].

35 See *Dicey, Morris & Collins on the Conflict of Laws* (Sir Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) at pp 1599–1604.

36 *Dicey, Morris & Collins on the Conflict of Laws* (Sir Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) at pp 1599–1604. Decisions in favour of the putative proper law are *The Parouth* [1982] 2 Lloyd's Rep 351; *The Atlantic Emperor* [1989] 1 Lloyd's Rep 548; and *Union Transport plc v Continental Lines SA* [1992] 1 WLR 15. On the other hand, the *lex fori* was applied in *The Heidberg* [1994] 2 Lloyd's Rep 287; *Egon Oldendorff v Libera Corp* [1995] 2 Lloyd's Rep 64; and *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 65 CLR 197.

agreement was indeed valid under Danish law, the court had implicitly selected the putative proper law as the relevant connecting factor for the issue of validity of the arbitration agreement.

11 Another justification for the preference for Danish law may lie in the second autonomous choice of law rule in Art V(1)(a), *ie*, the law of the country where the award was made in the absence of parties' choice of law, which in this case, was also Danish law. Since the award was made in Denmark, it may be thought that Danish law would apply under this choice of law rule. However, even under this alternative analysis, the point remains that there is a preceding choice of law step. This is because the court can only conclude that there is no agreement as to choice of law and proceed to refer to the law of the country where the award was made if, first, the putative proper law approach is rejected and so therefore the choice of Danish law in the Standard Terms does not apply; or alternatively, the *lex fori* approach is accepted but there is no valid choice of law under the *lex fori*. The court cannot simply evade the question of whether parties had subjected the issue of validity to a particular law and refer immediately to the law of the seat of arbitration.

12 Therefore, in the paradigm case, a common law court applying Art V(1)(a) must choose between the putative proper law and the *lex fori* approach. Assuming that some national courts elect the *lex fori* approach, there would be uncertainty as different *lex fori* may have different tests for determining parties' intention and agreement as to choice of law. Additionally, apart from assets, there may not be any substantial connection to the enforcement forum. This convenient connection to the forum should not be decisive on so fundamental an issue of conflict of laws as the existence and validity of the arbitration agreement.[37] Furthermore, the discussion has proceeded on the assumption that the common law solution to choice of law problems for formation of contracts is first, homogenous across all common law jurisdictions, and second, adopted by civil law jurisdictions as well. This would be misleading. There are differences in the choice of law rules even amongst established common law jurisdictions such as the US, the UK, Canada and Australia.[38] There is likely to be even greater divergence when contrasted with civil law jurisdictions.[39] All these factors taken together render any prediction as to the effectiveness of an award against allegations of an invalid arbitration agreement speculative at best.

37 *The Heidberg* [1994] 2 Lloyd's Rep 287 at 304.

38 Gary Born, *International Civil Litigation in the United States Courts* (Kluwer, 3rd Ed, 1996).

39 Gary Born, *International Civil Litigation in the United States Courts* (Kluwer, 3rd Ed, 1996).

C. Award dealing with matters in excess of jurisdiction: Art V(1)(c) of the New York Convention

13 Another common ground which is invoked to refuse enforcement of awards is Art V(1)(c). Under this provision, an award may be refused enforcement if the "award deals with a difference not contemplated by or not falling within the terms of submission to arbitration, or [if] it contains decisions on matters beyond the scope of the submission to arbitration". Once again, this ground for refusal of enforcement requires an enforcement court to interpret the terms of the arbitration agreement to determine if the award dealt with matters which exceeded the terms of reference.

14 At first blush, this appears to be an uncomplicated task: the enforcement court only has to determine if the arbitral tribunal, in the course of rendering their award, had acted outside the scope of the terms of the arbitration agreement. However, the plain and simple language obscures a complex but necessary choice of law step. As interpretation of the terms of the arbitration agreement requires reference to a system of law, a national court has to apply a choice of law methodology and find an applicable law to interpret the arbitration agreement. It is only after the court has determined the law governing the arbitration agreement and what the arbitration agreement prescribes can it decide if the award rendered was in excess of jurisdiction.

15 Unlike Art V(1)(a), there are no autonomous choice of law rules – either the parties' choice of law or the default law of the place where the award was made – in Art V(1)(c). National courts therefore have to apply their own private international law rules to derive the applicable law. Generally, most jurisdictions' private international law rules provide that when parties have expressly chosen a law to govern the arbitration agreement, the chosen law will apply.[40] The determination of the law governing the arbitration agreement usually becomes problematic when there is an absence of parties' choice of law. Under the common law, in the absence of parties' express or implied choice of law, the law governing the arbitration agreement is the law with the closest connection to the dispute.[41] It is up to each national court to determine what law has the closest connection to the dispute. Although there is a presumption that the law of the seat of arbitration is the law with the closest connection, in the absence of parties' choice, this

40 Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer, 2001) at pp 2153–2163.

41 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50; *Bonython v Commonwealth of Australia* [1951] AC 201.

presumption is rebuttable.[42] The process of determining the law with the closest connection is by no means scientific and different courts applying the same choice of law methodology may arrive at different answers which will produce different applicable laws.[43]

16 To further compound the uncertainty, not all jurisdictions share the common law choice of law methodology. Swedish law, for instance, specifically provides that:[44]

> [W]here an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. However, *where the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place*. [emphasis added]

There is no closest connection test and the law of the place of the arbitration is *always* the default position. There is even more uncertainty if a jurisdiction recognises *lex mercatoria* as the proper law of the arbitration agreement. This is the position under French law.[45] In the absence of an express choice of law, an arbitration agreement is interpreted according to the "common intention of the parties without any reference to a national law".[46]

17 Hence, given the variance in conflict of laws rules across jurisdictions as well as the fact that different national courts can reach different outcomes even when applying the same choice of law methodology, it cannot be said that different national courts will always arrive at the same law governing the arbitration agreement. That being the case, the interpretation of the arbitration agreement is also likely to differ across jurisdictions. There is therefore no certainty as to the general likelihood of success of a challenge that the award deals with a matter beyond the scope of the arbitration agreement; the chances of success can only be ascertained in relation to a particular jurisdiction.

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42 Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer, 2001) at p 419.

43 *Halsbury's Laws of Singapore* vol 6(2) (Lexisnexis, 2009) at para 75.271.

44 Swedish Arbitration Act s 48.

45 The same approach is taken in Luxembourg: Andrew Tweeddale & Karen Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press, 2007) at para 7.07.

46 *Comité populaire de la Municipalité de Kons v Dalico Contractors* (1994) *Journal du Droit International* 432.

D. Improper constitution of the tribunal or improper arbitral procedure: Art V(1)(d) of the New York Convention

18 Last but not least, under Art V(1)(d), enforcement of an award may be refused if the "composition of the tribunal or the arbitral procedure was not in accordance with the *agreement of the parties*" [emphasis added].[47] Clearly, there is a question of law inherent in this ground, *viz*, what constitutes "agreement of the parties", which can only be answered by reference to a system of law. The New York Convention does not state which law to refer to in answering this question. Ordinarily, this limb poses minimal problems as "agreement" is understood by arbitral tribunals and courts as the arbitration agreement.[48] However, the test for agreement may differ across substantive laws. Under French law for example, "agreement" in the context of Art V(1)(d) seems to be mere common intention. Articles 1502 and 1504 of the New Code for Civil Procedure ("NCCP") allows the court to censure a failure to comply with the parties' intention without referring to the arbitration agreement.[49] On the other hand, Poudret and Besson argue that "agreement" must be a valid enforceable agreement.[50] Even within the criteria of valid enforceable agreement, there may be different requirements for such an agreement. For example, consideration is required for an enforceable contract under the common law[51] whereas there is no such requirement in civil law systems.[52]

19 It may be argued that the choice of law problem in the context of Art V(1)(d) is more apparent than real. In a private international law context, there is a powerful argument that courts generally should not rely on domestic substantive law when characterising an issue for choice of law purposes.[53] Hence, an agreement may be characterised as a legally enforceable contract even if all sides acknowledge the absence of consideration which is necessary to found a contract under the *lex fori*'s domestic contract law.[54] Applying this approach, it may be possible that "agreement" in Art V(1)(d) should be construed as the parties' common intention, which is the most basic common denominator indicative of

47 See first limb of Art V(1)(d) of the New York Convention.

48 See *Tongyuan (USA) International Trading Group v Uni Clan Ltd* [2001] Arb LR 58.

49 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer, 1999) at para 1621.

50 Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2007) at para 915.

51 See *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1.

52 See Art 3.2 of the *UNIDROIT Principles of International Commercial Contracts*; Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer, 2001) at p 723; and Konrad Zweigert & Hein Kotz, *An Introduction to Comparative Law* (Oxford University Press, 3rd Ed, 1998).

53 *Macmillan Inc v Bishopsgate Investments plc (No 3)* [1987] 1 WLR 387 at 407.

54 *Halsbury's Laws of Singapore* vol 6(2) (Lexisnexis, 2009) at para 75.003.

a meeting of the minds. The advantage of this approach lies in its simplicity. However, its simplicity belies the true nature of the concept of common intention. Although there have been some attempts to classify "common intention" as a question of fact,[55] "common intention" is invariably a question of law.[56] Whether two parties can be said to have a common intention must depend on the rules of identifying intention. Construing actions and conduct and measuring them against a set of criteria to determine intention cannot exist independently of a legal framework. Therefore, the question of whose or what legal framework is to be used inevitably surfaces. It would be unrealistic to expect most, if not all, jurisdictions to disregard their domestic substantive laws in favour of a minimum standard of "common intention" purely for the purposes of determining "agreement" in Art V(1)(d).

20 Thus, in sum, there is a real, albeit subtle, choice of law problem in proceedings to challenge the enforcement of awards under the New York Convention. It has thus far not surfaced as a significant issue for arbitral tribunals and courts but that does not detract from the fact that choice of law is a pertinent consideration. With greater awareness, it is not inconceivable that counsel will think it fit and necessary to raise such arguments before arbitral tribunals and courts. To that end, it would be prudent to propose a feasible solution to the problem.

III. Proposed solution to the choice of law problem

21 Having established that there is a conflict of laws problem inherent in challenge of enforcement of award proceedings, it is now necessary to suggest a solution that national courts can apply. It bears repeating that the problem is not the *mere* existence of a hitherto overlooked choice of law step. Rather, the problem arises because first, there is an underlying choice of law step required under the New York Convention; and second, when that underlying choice of law step is properly taken into account, it necessarily attracts the private international law rules of the enforcement jurisdiction. Since private international law rules differ across jurisdictions, the enforcement and enforceability of an award under the New York Convention thus becomes much less certain. Hence, a practicable solution must be one which enhances the predictability of the enforceability of the award irrespective of the jurisdiction. This can only be achieved if the outcome

55 D F Libling, "Formation of International Contracts" (1979) 42 MLR 169 at 175; Peter Nygh, *Autonomy in International Contracts* (Clarendon Press, 1999) at pp 93–94.

56 Adeline Chong, "Void Contracts and the Applicability of Choice of Law Clauses to Consequential Restitutionary Claims" (2009) 21 SAcLJ 545 at para 19; Peter North & James Fawcett, *Cheshire & North's Private International Law* (Butterworths, 13th Ed, 1999) at p 116.

of the challenge to an award is independent of the respective nuances of each jurisdiction's private international law rules. Uniformity of results is not only fair and just to the parties, but it can also discourage unhealthy forum shopping.[57] Many disputes in international commercial arbitration involve large multi-national corporations with assets worldwide. Enforcement of an award against a losing party may therefore take place anywhere in the world. Indeed, this must be one of the primary motivating factors for resorting to arbitration as the enforcement of an award under the New York Convention is thought to be easier[58] given the large number of countries which have ratified the New York Convention.[59] In this respect, the only way to achieve uniformity and thereby reduce uncertainty is if all enforcement courts adopt a common private international law rule.

22 Typically, if there is an issue of construction of an international convention, the immediate solution that comes to mind would be to amend the provisions of the convention. The amended convention would then specify the common private international law rule. In fact, there have been calls to update and revise the New York Convention.[60] However, amendment of such a widely used convention is impractical. The wording of the specific amendments would require the assent of all the signatories and this is unlikely to be achieved.[61] Hence, sceptics of a complete overhaul of the New York Convention suggest that judicial clarification and elucidation of the methodology and mechanism of the New York Convention is a more realistic solution.[62] In line with judicial clarification, the more viable alternative to rewriting the New York Convention would be to read into the Art V provisions an appropriate common connecting factor which all enforcement courts can resort to when addressing the choice of law problem in the respective grounds for refusal of enforcement under the New York Convention.

23 A common connecting factor may apply in two contexts. The first is a specific connecting factor for the choice of law problem implicit in each ground for refusal of enforcement under the New York Convention. For example, the putative proper law may be the relevant common connecting factor for the choice of law problem in respect of invalidity of the arbitration agreement under Art V(1)(a), whereas the

57 *Halsbury's Laws of Singapore* vol 6(2) (Lexisnexis, 2009) at para 75.271.

58 Joseph Morrisey & Jack Graves, *International Sales Law and Arbitration: Problems, Cases and Commentary* (Kluwer, 2008) at p 313.

59 There are currently 145 signatories to the New York Convention <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> (accessed 7 April 2011).

60 Albert Jan van den Berg, "A Closer Look at the New York Convention" [2008] 3(3) *Global Arbitration Review* 14.

61 See Joachim Frick, *Arbitration and Complex International Contracts* (Kluwer, 2001) at p 284.

62 See "Q&A with Albert Jan van den Berg" [2008] 3(3) *Global Arbitration Review* 21.

lex loci arbitri may be the relevant common connecting factor for the choice of law problem in respect of improper arbitral procedure pursuant to Art V(1)(d). The shortcoming of this approach is that instead of one common connecting factor, there may be as many common connecting factors as there are grounds for refusal of enforcement under the New York Convention. A more straightforward approach would be to have just one common connecting factor which the courts can look towards irrespective of the ground which is invoked to challenge the enforcement of the award. The advantage of this second approach is in its simplicity. Whenever an enforcement court is faced with a challenge to the enforcement of the award under Arts V(1)(a)–V(1)(d), it need not attempt to find the appropriate connecting factor for the respective ground invoked; all the enforcement court needs to do is apply the common connecting factor.

A. The law governing the arbitration

24 There are several potential connecting factors which may be the basis for this common connecting factor. These include the *lex fori*, proper law of the main contract, and proper law of the arbitration agreement. However, these are all inadequate. The *lex fori* is clearly an inappropriate connecting factor. Instead of mitigating uncertainty, recourse to the *lex fori* would generate as much, if not more, uncertainty since the enforceability of an award depends on the forum's choice of law rule which is applicable to the particular issue. The proper law of the main contract is also inadequate as it is difficult to see how and why it should apply to issues of validity of the arbitration agreement. Where the challenge of the award is founded on invalidity of the arbitration agreement, the choice of law question is finding the applicable law to determine if parties had subjected the arbitration agreement to a particular governing law. This is not related to the main contract and should therefore not be resolved by the proper law of the contract. The proper law of the arbitration agreement is also problematic as the court is still required to determine the proper law and this depends in turn on its choice of law methodology which may not be consistent across jurisdictions.[63]

25 The only connecting factor which is suitable is the law governing the arbitral procedure. Also known as the *lex arbitri*, curial law,[64] and "*loi de l'arbitrage*",[65] the law governing the arbitral procedure is generally defined as a body of procedural rules which governs the conduct of the arbitration, including the extent of court intervention to

63 See paras 15 and 16 of this article.

64 Rhidian Thomas, "The Curial Law of Arbitration Proceedings" [1984] LMCLQ 491.

65 Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer, 2001) at p 412.

assist in and/or supervise arbitrations.[66] The generally accepted rule[67] is that the *lex arbitri* of an international commercial arbitration is the law of the place of arbitration, or the *lex loci arbitri*.[68] The "place of arbitration", which is sometimes used interchangeably with the "seat of arbitration", is a term of art and does not refer simply to the physical location where the arbitration is conducted.[69] In modern practice, the arbitral tribunal may for reasons of convenience, meet at different places during the proceedings.[70] This does not mean that there are numerous or shifting seats of arbitration.[71] Although certain fact situations may obscure the true seat of arbitration, every arbitration has one and only one seat. It is simply a matter of interpretation of the arbitration agreement.[72]

26 Once the seat is identified, it cannot change save as in accordance with the law of the identified seat of the arbitration.[73] The seat of arbitration is an important concept, especially for Model Law jurisdictions, as only the national court of the seat of arbitration has the power to set aside an award made in the seat of arbitration.[74] It is this power of the courts in the supervisory jurisdiction to set aside an award that makes the *lex loci arbitri* the most appealing common connecting factor. Under the prevailing orthodoxy,[75] an award which has been set aside has no practical value or effect on parties[76] and cannot be enforced in a jurisdiction outside of the seat of arbitration as there is nothing left to enforce.[77] This is explicitly recognised in Art V(1)(e) of the New York

66 *Smith Ltd v H & S International* [1991] 2 Lloyd's Rep 127 at 130, *per* Lord Steyn. See also Loukas Mistelis, "Reality Test: Current State of Affairs in Theory and Practice Relating to 'Lex Arbitri'" [2006] 17 *American Review of International Arbitration* 155 at 162–166.

67 The conflicting concept of delocalised arbitration is discussed later: see paras 41–48 of this article.

68 William Park, "The *Lex Loci Arbitri* and International Commercial Arbitration" (1983) 32 ICLQ 21 at 22–24; Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer, 2001) at p 413.

69 *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116 at 119, *per* Kerr LJ.

70 Filip de Ly, "The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning" [1992] 12 *Northwestern Journal of International Law & Business* 49 at 54.

71 However, there can be a "floating" seat of arbitration which does not need to be fixed at the time the arbitration agreement is signed: *Star Shipping AS v China National Foreign Trade Transportation Corp* [1993] 2 Lloyd's Rep 445.

72 Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2007) at p 111.

73 *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 Lloyd's Rep 65.

74 Model Law Arts 1(2) and 20 read with Art 34.

75 For a view contrary to the orthodoxy, see paras 45–48 of this article.

76 Andrew Tweeddale & Karen Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press, 2007) at para 13.85.

77 Albert Jan van den Berg, "Enforcement of Annulled Awards" [1998] 9 ICC Ct Bulletin 15.

Convention which states that enforcement may be refused if the award has been set aside by a "competent authority of the country in which … the award was made".[78]

27 By channelling enforcement courts' attention to the *lex loci arbitri*, parties would have less incentive to strategise. As long as the grounds for challenging the award do not attract mandatory forum laws or forum public policy,[79] there is no tactical advantage to electing between an application to set aside at the seat of arbitration or resist enforcement in a jurisdiction outside of the seat of arbitration. The outcome for both courses of action will be identical, namely, whatever the court in the seat of arbitration decides. This degree of certainty and predictability would lower the costs of enforcement and should increase the attractiveness of arbitration as a dispute resolution mechanism. Additionally, finality of proceedings, as reflected in the maxim *interest reipublicae ut sit finis litium*, will be achieved with this reference to the *lex loci arbitri*. Ostensibly, the effectiveness of this approach is premised on the assumption that the grounds for resisting enforcement in the enforcement jurisdiction is identical to the grounds for setting aside under the *lex loci arbitri*. This assumption holds if the seat of arbitration is a Model Law jurisdiction and the enforcing jurisdiction is party to the New York Convention.[80] Notwithstanding, the invalidity of the arbitration agreement, acting in excess of the arbitration agreement, and improper constitution of the arbitral tribunal or improper arbitral procedure are ordinarily grounds for setting aside and refusing enforcement of an arbitral award,[81] irrespective of whether the

78 However, it should be noted that there is a view that as Art V(1) of the New York Convention uses the word "may", refusal of enforcement of any award even if one of the grounds is met is permissive, as opposed to mandatory. Hence, under this view, enforcement courts have the discretion to enforce the award notwithstanding a ground for refusing enforcement has been established: see Nadia Darwazeh, "Article V(1)(e)" in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola Christine Port eds) (Kluwer, 2010) at p 303; and generally Jan Paulsson, "Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)" [1998] 9 ICC Ct Bulletin 14 at 17. For the position in Germany, see Peter Schlosser, *Das Recht der Internationalen Privaten Schiedsgerichtsbarkeit* (Mohr, 2nd Ed, 1989) at p 128. For the position in China, see Wang Sheng Chang, "Enforcement of Foreign Arbitral Awards in the PRC" in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Albert Jan van den Berg ed) (Kluwer, 1999) at pp 470–472.

79 See para 6 of this article for the distinction between the types of grounds for refusal of enforcement. For a recent seminal decision on public policy grounds for setting aside and refusing enforcement of international arbitration awards, see *AJU v AJT* [2011] 4 SLR 739.

80 See Art 34 of the Model Law and Art V of the New York Convention.

81 See s 68 of the Arbitration Act 1996 (c 23) (UK).

jurisdiction is a Model Law jurisdiction or party to the New York Convention.[82]

28 The practical implementation of a reference to the *lex loci arbitri* would result in the following methodology. First, the court must identify the ground being invoked to refuse enforcement. After the specific ground has been identified, the court must distill the specific choice of law problem to be resolved. For example, the ground for refusal of enforcement may be the invalidity of the arbitration agreement pursuant to Art V(1)(a), and the choice of law question is determining whether parties have subjected the arbitration agreement to a specific law. Once the specific choice of law question is identified, the court simply has to ask itself how a court in the seat of arbitration applying the *lex loci arbitri* would resolve this question and apply that same answer to the question before it.

29 To some, this process may resemble *renvoi* as a reference to the court of the *lex loci arbitri* may point towards a third legal system if the court of the *lex loci arbitri* applies its conflict of laws rules instead of the domestic law. This was exactly what happened – albeit in an international tort context – in *Neilson v Overseas Project Corp of Victoria Ltd*[83] ("*Neilson*"). One of the key issues for the High Court of Australia in *Neilson* was the application of a provision of a Chinese statute. The plaintiff's husband was working in China for the defendant. The plaintiff, who was accompanying her husband in China, fell and injured herself. She subsequently sued the defendant in tort and contract for occupier's liability in Australia. Under Australian private international law rules, the *lex loci delicti*, not the double actionability rule, determines substantive questions in both international torts and foreign torts.[84] The Australian court therefore had to apply the General Principles of Civil Law of China ("GPCL") as the tort took place in China. Article 136 of the GPCL provides that the limitation period for the tort in question is one year. If Art 136 of the GPCL applied, the plaintiff's claim would have been time-barred and the defendant would not be liable. However, Art 146 of the GPCL states that "if both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied". Since both parties were Australian nationals, if the exception in

82 Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003) at paras 26–29. However, *cf* Gary Born's view that United States' courts will likely disregard foreign annulment decisions relying on a substantive review of the tribunal's decision or foreign annulment decisions that are procedurally tainted or based upon local public policy: Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer, 2001) at p 2687.

83 *Neilson v Overseas Project Corporation of Victoria Ltd* [2005] HCA 54.

84 *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; *Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10.

Art 146 of the GPCL applies, Australian law would apply, and under Australian law, the plaintiff's claim was not time-barred. The majority held that the proper way to construe Art 146 of the GPCL was to ask the question "how, if at all, would a Chinese court exercise the power or discretion given by that Article?"[85] This arguably is a manifestation of *renvoi*.

30 The characterisation of the *lex loci arbtri* common connecting factor approach as incorporating *renvoi* may undermine its reception in international arbitration, given the fact that there already exists a general judicial apprehension or skepticism towards *renvoi*.[86] Indeed, several opinions have surfaced in the wake of *Neilson* critiquing the High Court's decision to accept the application of *renvoi* in international torts.[87] This is further compounded by a leading view that *renvoi* has no place in the New York Convention.[88] However, there is a crucial distinction between the application of the full extent of domestic law, and the application of a jurisdiction's conflict of laws rules. Admittedly, the line may not always be clear.

31 It is fortunate that Lord Collins took the opportunity recently to clarify this distinction. In the 2010 UK Supreme Court decision of *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan*[89] ("*Dallah*"), the Supreme Court was asked by the appellant, Dallah, to overturn the Court of Appeal's decision[90] to refuse enforcement of an award against the Pakistan government. Dallah argued that the arbitration agreement was valid and Art V(1)(a) of the New York Convention therefore did not prevent the enforcement of the award against the Pakistan government. The Supreme Court disagreed with Dallah and held that there was no valid arbitration agreement and dismissed the appeal. In the process, it held that the validity of an arbitration agreement was governed by French law but that recourse should be had to "rules of transnational law" [91] on the basis that this was what a "French court would apply".[92] This seems

85 *Neilson v Overseas Project Corp of Victoria Ltd* [2005] HCA 54 at [113], *per* Justices Gummow and Hayne, and [176], *per* Justice Kirby.

86 Martin Davies, Sam Ricketson & Geoffrey Lindell, *Conflict of Laws: Commentary and Materials* (Butterworths, 1997) at p 379.

87 Reid Mortenson, "Troublesome and Obscure: The Renewal of *Renvoi* in Australia" (2006) *Journal of Private International Law* 1; Mary Keyes, "The Doctrine of *Renvoi* in International Torts: *Mercantile Mutual Insurance v Neilson*" (2005) 13 *Torts Law Journal* 1.

88 Albert Jan van den Berg, *The New York Convention of 1958* (Kluwer, 1981) at p 291.

89 [2010] UKSC 46.

90 [2009] EWCA Civ 755.

91 *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 at [110].

92 *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 at [124].

to be an affirmation of the *renvoi* approach in *Neilson*.[93] The English court was not just applying French law to determine validity; it was applying a different system of law simply because it was the law which the French court would apply. However, Lord Collins clarified that if French law as applied by a French court draws a distinction between domestic arbitrations and international arbitrations, and applied transnational principles to international arbitrations, then an English court replicating the French court in the latter situation is not applying *renvoi*.[94] This explanation coheres with the view expressed by Justice Kirby in *Neilson*. Justice Kirby pointed out that there was a nuanced difference between applying *renvoi* on one hand, and interpreting and understanding the full meaning of a provision of foreign law, even if the proper interpretation of the foreign law resulted in the application of another system of law. Therefore, even though the latter involved determining how the Chinese court would interpret Art 146 of the GPCL and whether the court may apply Australia law, that merely goes towards understanding Art 146 of the GPCL as a feature of Chinese law, and is not *renvoi* as such.[95]

32 Ultimately, whether the English and Australian courts have accepted *renvoi* in enforcement of awards and international torts respectively depends on one's understanding and definition of *renvoi*. Notwithstanding, even if these cases may be characterised as applying the doctrine of *renvoi*, the objections are largely unsustainable. After all, the main justification for applying *renvoi* is uniformity of results wherever the case is heard.[96] Very few would deny that certainty in enforcement of awards is desirable[97] and is in fact one of the defining advantages of international arbitration.[98] There is certainly much force in Lord Collins and Justice Kirby's views that the mere replicating of a foreign court's decision on its own law is not an application of *renvoi*, even if the foreign court may apply a law other than its domestic law. That said, where the foreign court would apply another system of law that is independent from its domestic law, any reference to the foreign court's decision is arguably a reference to the foreign law's choice of law rules and therefore illustrative of *renvoi*.

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93 See n 85 and accompanying text.

94 *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 at [124].

95 *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 at [175].

96 *Halsbury's Laws of Singapore* vol 6(2) (Lexisnexis, 2009) at para 75.271.

97 David Westin, "Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England" (1987) 19 *Law & Policy in International Business* 325.

98 Christian Bühring-Uhle, Lars Kirchhoff & Gabriele Scherer, *Arbitration and Mediation in International Business* (Kluwer, 1996) at pp 135–143.

33 In any event, whether the situation in *Neilson* and *Dallah* is understood as an acceptance of *renvoi* or a full application of domestic law and its accompanying facets should not be treated as particularly significant. As the jurist Kahn-Freund astutely observed, "dogmatism must yield to pragmatism" in this field of private international law.[99] The most pertinent point is that there are practical benefits to be derived from referring to the practice of the foreign court. Indeed, simplicity and certainty are desirable characteristics of a legal system.[100] A party with an enforceable award should not be encouraged – even permitted – to shop for enforcement forums which have private international law rules which would result in the application of substantive laws that are biased towards enforcement of awards. The divergent practices of enforcement courts may also encourage parties with outstanding awards enforceable against them to take defensive measures to protect their assets. They may, for instance, shift their assets to jurisdictions which have private international law rules which are more likely, when applied, to obstruct the enforcement of awards. The increased efforts spent on forum strategising would undermine two main tenets of international commercial arbitration, namely, ease of enforcement of awards[101] and efficient resolution of disputes.[102]

34 Nevertheless, even this solution is admittedly imperfect. A court applying the common connecting factor of the *lex loci arbitri* may sometimes not be able to achieve certainty in terms of the final resolution of the dispute. This was precisely the problem which the winning party in *Dallah* faced. After the UK Supreme Court refused enforcement of the award against the Government of Pakistan on the basis that there was no valid arbitration agreement,[103] the Government of Pakistan decided to set aside the award in the seat of arbitration once and for all. In direct contrast to the UK Supreme Court decision, the Paris Court of Appeal held that there was a valid arbitration agreement between the parties.[104] The interesting aspect of this factual matrix is that both the UK Supreme Court and the Paris Court of Appeal reached their respective contradictory conclusions despite relying on French law

99 Otto Kahn-Freund, *General Problems of Private International Law* (Sijthoff, 1980) at p 290.

100 *Neilson v Overseas Project Corp of Victoria Ltd* [2005] HCA 54 at [93].

101 Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003) at para 1.21.

102 Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003) at paras 1.28–1.29. See also s 33(1)(b) of the Arbitration Act 1996 (c 23) (UK), which imposes on arbitrators an obligation to ensure that there is no unnecessary delay in the conduct of arbitration.

103 *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 at [132]–[137].

104 Judgment of 17 February 2011, *Gouvernement du Pakistan – Ministère des affaires religieuses v Société Dallah Real Estate and Tourism Holding Co* (Paris Cour D'Appel) (Case No 09/28533).

as the applicable law. That certainty may not always be achieved even if a court applies the *lex loci arbitri* is not a problem with the solution *per se*; the flaw lies instead in proof of foreign law. Proof of foreign law, even in litigation, is largely based on the opinion of the expert witness on the foreign law in question.[105] A court asked to decide an issue based on foreign law can only adjudicate based on what is presented to it. If the expert witnesses' interpretation of foreign law and conclusion on the facts is superficial, lacking,[106] or simply differs from the foreign court's interpretation and conclusion, it will necessarily result in uncertainty.

35 Unfortunately, there is no straightforward, simple solution to this conundrum. As long as expert witnesses remain the focal source of reception of foreign law, there will always be a conflict of expert opinions as to the true understanding of that foreign law. Rules of law are generally "open-textured" with not only core but also penumbral meanings which are open to interpretation.[107] An expert witness, called to give testimony as one party's own witness, is therefore able and does often promote a line of argument consistent with their party's case.[108]

36 A recent development in civil procedure in Singapore may provide the answer to a decreased reliance on experts proving foreign law. Coincidentally, this development arguably mirrors the approach to refer to the *lex loci arbitri*, albeit in the context of court proceedings. Under the new O 101 of the Rules of Court, r 2(1) provides that Singapore courts have the power to order parties to seek the New South Wales court's determination of the issue if it deals with an issue of New South Wales law.[109] Notwithstanding considerations of recognition and enforceability of a foreign court's determination on a pure point of law[110] and the fact that this Order only applies to New South Wales presently, the effect of r 2(1) is that Singapore courts will arrive at the same outcome as the foreign court with regards to issues that are

105 *Di Sora v Phillipps* (1863) 10 HLC 624; *National Mutual Holdings Pty Ltd v Sentry Corp* (1989) 22 FCR 209.

106 See the comments on the expert on Chinese law in *Neilson v Overseas Project Corp of Victoria Ltd* [2005] HCA 54, for example, at [17].

107 H L A Hart, *The Concept of Law* (Clarendon, 2nd Ed, 1994) at pp 124–125.

108 T Golan, *The History of Scientific Expert Testimony in England and America* (Harvard, 2004) at p 54.

109 Order 101 r 2(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) read with r 6. Rule 2(1) states:

> [w]here in any proceedings before the Court there arises any question relating to the law of any specified foreign country or to the application of such law, the Court may, on the application of one or more of the parties, order that proceedings be commenced in a court of competent jurisdiction in that specified foreign country seeking a determination of such question.

Rule 6 designates New South Wales as a "specified foreign country".

110 Under common law rules for enforcement of foreign judgments, a foreign judgment may be enforced only if it is for a sum of money and on the merits: see *Halsbury's Laws of Singapore* vol 6(2) (Lexisnexis, 2009) at paras 75.161 and 75.165.

governed by that foreign law. Evidently, if this rule is invoked, the problems associated with proof of foreign law and divergent results in enforcement and supervisory jurisdictions would be mitigated. Thus, in a challenge to the enforcement of an award context, this civil procedure approach produces the same outcome as if the court was mirroring the decision of a supervisory court applying the *lex loci arbitri*. The Singapore court is essentially saying that since the issue involves the application of New South Wales law, the court in New South Wales is best placed to answer that issue. Transpose this to choice of law issues in enforcement proceedings, and the only difference is that the enforcing court is, hypothetically,[111] delegating the responsibility of answering the choice of law issue to the court of the seat of arbitration. In principle, this approach appears sound and fair to all the parties involved.

B. Application of lex mercatoria *and other transnational principles of law*

37 As can be seen in *Dallah*, a reference to the *lex loci arbitri* may result in the application of transnational principles of law such as the *lex mercatoria*. This may present some obstacles and thus some discussion is required. Croff notes that with the possible exception of France, there is "no rule of conflict of laws of any country [which] permits a *renvoi* to a non-national legal standard such as *lex mercatoria*".[112] Moreover, the common law[113] is generally anathema to the concept of *lex mercatoria*.[114] The learned authors of *Dicey & Morris* suggest that the Rome Convention, though it confers on parties' the right to choose their governing law, "does not sanction the choice or application of a non-national system of law, such as the *lex mercatoria* or general principles of law".[115] This was accepted in *Halpern v Halpern*[116] and *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd*.[117] In *Shamil Bank*, the English Court of Appeal expressly characterised the *lex*

111 Hypothetical because the Singapore court will not actually ask parties to refer the issue to a court in the *lex loci arbitri*.

112 Carlo Croff, "The Applicable Law in an International Commercial Arbitration: Is it Still a Problem" (1982) 16 *International Lawyer* 613 at 623.

113 Civil law jurisdictions, on the other hand, champion the use of *lex mercatoria*: see Katherine Lynch, *The Forces of Economic Globalisation: Challenges to the Regime of International Commercial Arbitration* (Kluwer, 2003) at p 325.

114 Klaus Peter Berger, "The Central Enquiry on the Use of Transnational Law in International Contract Law and Arbitration" in *Towards a Science of International Arbitration: Collected Empirical Research* (Christopher Drahozal & Richard Naimark eds) (Kluwer, 2005) at p 230; Ralph Lake, Ved Nanda & Ugo Draetta, *Breach and Adaptation of International Contracts* (Butterworths, 1992) at p 27.

115 *Dicey, Morris & Collins on the Conflict of Laws* (Sir Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) at para 32.081.

116 [2008] QB 195.

117 [2004] 1 WLR 1784.

mercatoria as a "non-national system of law".[118] The underlying rationale for the rejection of *lex mercatoria* may be traced back to Mann who pointed out that no one has ever been able to show "any provision or legal principle which could permit individuals to act outside the confines of a system of municipal law".[119] Hence, the common law may be perceived to be internally inconsistent if it admits of the applicability of *lex mercatoria* as a system of law for enforcement of award purposes, but not for any other choice of law purpose.

38 When faced with such a conflict, one of three scenarios may occur. First, the common law may reject *lex mercatoria* altogether irrespective of the nature of proceedings. Under this scenario, *Dallah* would be wrongly decided as the court could not have recognised the application of transnational rules of law. Second, the common law may accept *lex mercatoria* in its entirety for all choice of law issues. This is a radical development in the light of the traditional skepticism towards *lex mercatoria*. The third and most plausible scenario would be to carve out arbitration as a special area which permits the application of *lex mercatoria* in specific circumstances.

39 In many national arbitration statutes[120] and institutional rules[121] which govern arbitration proceedings, arbitral tribunals are permitted to apply "rules of law" to resolve the dispute. For example, Art 28(1) of the Model Law which is incorporated in Singapore's International Arbitration Act,[122] provides that "the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties". The term "rules of law" was deliberately defined broadly by the drafters of the Model Law to include a choice of law beyond that of municipal law such as the *lex mercatoria*.[123] This broad definition of "rules of law" found in the Model Law and other institutional rules have also been consistently affirmed by highly respected commentators such

118 *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] 1 WLR 1784 at [48].

119 Francis Mann, "Lex Facit Arbitrum" in *Liber Amicorum for Martin Domke* (Pieter Sanders ed) (Hague, 1967) at p 160.

120 See, *eg*, Art 187(1) of the Swiss Arbitration Act; Art 1054(2) of the Netherlands Arbitration Act; and Art 1496 of the New Code of Civil Procedure (France).

121 See, *eg*, Art 35 2010 UNCITRAL Arbitration Rules; Art 22.3 of the London Court of International Arbitration Rules; Art 3(1) of the Chamber of Arbitration of Milan Rules; and Art 59(a) of the World Intellectual Property Organization ("WIPO") Rules.

122 Section 3(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

123 See *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* UN Doc No A/CN.40/17 (Vienna, 3–21 June 1985) at paras 231–235; *Report of the Secretary-General on the Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* UN Doc No A/CN.9/264, [1985] XVI YB UNCITRAL 104 at pp 132–133.

as Born and Gaillard.[124] An arbitral tribunal which is constituted under a seat whose national arbitration law adopts the Model Law or permits the reference to such institutional rules would therefore be acting consistently with the *lex loci arbitri* in relying on *lex mercatoria* or any another transnational principles of law that do not belong to a municipal legal system in resolving the dispute.

40 Thus, it is clear that even within common law jurisdictions, legislation has provided that the *lex mercatoria* and other non-municipal systems of law may be a relevant governing law in arbitration proceedings. It would therefore not be a stretch to suggest that courts, in interpreting their national statutes incorporating enforcement provisions under the New York Convention, should likewise recognise the applicability of non-municipal laws, if only for enforcement purposes. This does not require the enforcing to apply such non-municipal laws on its own motion; it is only where the court in the seat of arbitration applying the *lex loci arbitri* would apply such non-municipal laws would the enforcing court give regard to such laws. The recognition and application of *lex mercatoria* and other non-municipal laws can then be justified on the basis that it is provided for by statute and the courts must give effect to the statute. Whilst concerns of double standards may still linger, it should be clear that it is legislation, not the common law, which permits the application of *lex mercatoria*. It is in this narrow sense that there is no internal contradiction.

C. Delocalised arbitration and arbitral awards

41 At this juncture, it is apposite to address the controversial topic of delocalised arbitration. The concept of delocalised or a-national arbitration,[125] essentially a floating, stateless arbitration,[126] is not new,[127] but remains controversial.[128] At its most basic, delocalised arbitration rejects the notion that an international commercial arbitration has a forum and is governed by the law of the forum.[129]

124 Gary Born, *International Commercial Arbitration* (Kluwer Law, 2009) at p 2143; *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer, 1999) at para 802.

125 Hans Smit, "A-national Arbitration" [1989] 63 *Tulane Law Review* 629.

126 Jan Paulsson, "Delocalisation of International Commercial Arbitration: When and Why it Matters" (1983) 32 ICLQ 53 at 53.

127 Berthold Goldman, "*La Lex Mercatoria dans les Contrats et L'arbitrage* International: *Réalité et Perspectives*" (1979) 106 *Journal du Droit International* 475.

128 For a criticism of arbitration under non-national rules, see Gillis Wetter, "The Legal Framework of International Arbitral Tribunals – Five Tentative Markings" (1981) *International Contracts* 278 at 273.

129 Julian Lew, "Achieving the Dream: Autonomous Arbitration?" in *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (Julian Lew & Loukas Mistelis eds) (Kluwer, 2007) at p 455.

In *SA Coppée Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd*,[130] Lord Mustill characterised delocalised arbitration as "a self-contained juridical system, by its very nature separate from national systems of law".[131] As the arbitral tribunal in *Sapphire International Petroleum Ltd v The National Iranian Oil Co*[132] commented, "contrary to a State judge who is bound to conform to the conflict of law rules of the State, the arbitrator is not bound by such rules. The arbitrator must instead look for the common intention of the parties and disregard national peculiarities". The urge to look beyond national legal systems is often justified on the basis that national laws are unable to accommodate the expectations of disputing parties who come from different backgrounds and cultures.[133] If delocalised arbitration gains momentum and is accepted as reflective of the nature of international commercial arbitration, any reference to the *lex loci arbitri* as the common connecting factor would be meaningless as the concept of the juridical seat or arbitration would cease to exist.

42 At present, the notion of delocalised arbitration is shunned by the common law. In *Bank Mellat v Helliniki Techniki SA*,[134] Kerr LJ emphatically stated that common law "jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law".[135] This must be right. Arbitration cannot exist outside of a legal context. Issues such as the validity of the arbitration agreement, the conformity of the arbitral procedure with the arbitration agreement as well as the enforceability of an award can only be determined and resolved by reference to a system of law.[136] The party autonomy argument by proponents of delocalised arbitration – namely, that international commercial arbitration is founded on party autonomy and hence as long as parties agree, they can choose to "delocalise" their arbitration from any national law[137] – is flawed. It fails to recognise that party autonomy is not an independent source of conflict of laws rules, but is effective only insofar as it is recognised by a pre-existing legal rule.[138] As Mann argued vehemently, "every arbitration is necessarily subject to the

130 [1995] 1 AC 38.
131 *SA Coppée Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd* [1995] 1 AC 38 at 52.
132 (1964) 13 ICLQ 1011.
133 Abdul Manirruzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration* (1999) 14 *American University International Law Review* 657 at 658.
134 [1984] QB 291.
135 *Bank Mellat v Helliniki Techniki SA* [1984] QB 291 at 301.
136 Hans Smit, "A-national Arbitration" [1989] 63 *Tulane Law Review* 629 at 631.
137 Julian Lew, *Applicable Law in International Commercial Arbitration* (Sijthoff, 1978) at p 253; Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003) at para 4.49.
138 Albert Ehrenzweig, *Private International Law* (vol 1) (Sijthoff, 1972) at p 44.

law of a given state".[139] Indeed, that party autonomy can only operate through the choice of law rule of a national legal system[140] has been described as a "truism which should never have become the object of a learned controversy".[141]

43 One conception of delocalised arbitration goes even further by suggesting that international commercial arbitration is independent of national courts and their pronouncements.[142] This view is, with utmost respect, untenable. Closely connected to the idea that arbitration cannot exist independent of a system of law, arbitration also cannot exist independently from courts. As the authors of a leading treatise remarked, "[n]ational courts may exist without arbitration, but arbitration certainly cannot exist without national courts".[143] To borrow the "scorer's discretion" example from the legal positivist Hart, when an official scorer, *ie*, official referee, is established, statements as to the score of a game by the players or other non-officials have no status within the game and are irrelevant.[144] Sometimes the players' and non-officials' scores happen to coincide with the referee's assessment in which case there will be no controversy. However, where they conflict, only the referee's score is authoritative and final.[145] The role of national courts in international commercial arbitration generally can be likened to that of the official referee in Hart's example. Only national courts have the power to produce an actionable effect; the decisions and rulings of arbitrators are irrelevant and indeed otiose if national courts refuse to acknowledge them. Specifically in the context of challenges to an award, irrespective of whether the court is an enforcement court or a supervisory court, the court's assessment of the integrity of the award is authoritative and final. The arbitral tribunal or the parties may have a different take on the issue but that is irrelevant; the decision to uphold or dismiss the challenge on the award rests solely with the national court. It is in this sense that national courts are an indispensable facet of international commercial arbitration.

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139 Francis Mann, "Lex Facit Arbitrum" in *Liber Amicorum for Martin Domke* (Pieter Sanders ed) (Hague, 1967) at pp 161–162.

140 Otto Kahn-Freund, *General Problems of Private International Law* (Sijthoff, 1980) at p 197; Peter North, "Choice in Choice of Law" in *Essays in Private International Law* (Clarendon, 1993) at pp 184–187.

141 Otto Kahn-Freund, *General Problems of Private International Law* (Sijthoff, 1980) at p 197; Peter North, "Choice in Choice of Law" in *Essays in Private International Law* (Clarendon, 1993) at pp 184–187. See also Filip De Lye, *De Lex Mercatoria* (Maklu, 1989) at pp 163–165.

142 Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003) at p vi.

143 Alan Redfern & Martin Hunter, with Nigel Blackaby & Constantine Partasides, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th Ed, 2004) at para 7.02.

144 H L A Hart, *The Concept of Law* (Clarendon, 2nd Ed, 1994) at p 143.

145 H L A Hart, *The Concept of Law* (Clarendon, 2nd Ed, 1994) at p 143.

44 Even Lew, a proponent of delocalised arbitration, disagrees with the extreme version of delocalised arbitration that dissociates itself from national courts. He states that "national court involvement in international arbitration is a fact of life as prevalent as the weather".[146] Inevitably, national courts participate in the arbitral procedure in three main stages.[147] First, in the pre-arbitration stage, national courts may be required to enforce arbitration agreements. If there is a valid arbitration agreement, courts are generally required to decline to exercise jurisdiction and instead refer the matter to arbitration.[148] Second, in the course of the arbitral process, national courts may be requested to grant certain orders to safeguard the arbitral process. These include interim injunctions,[149] and procedural orders that cannot be ordered or enforced by arbitrators such as protecting and taking of evidence.[150] Last but not least, recognition and enforcement of awards are effected through national courts. In the same vein, when the enforcement of an award is challenged, the award may be set aside[151] or refused enforcement[152] by the national court. Although parties now enjoy significantly more autonomy than before to exclude or significantly limit judicial intervention,[153] the maxim that "there must be no Alsatia in England where the King's writ does not run"[154] still resonates, albeit less forcefully.

45 In their effort to make the concept of delocalised arbitration more palatable, some commentators have even tried to make a distinction between delocalisation of the arbitral process and the

146 Julian Lew, "Does National Court Involvement Undermine the International Arbitration Process?" (2009) 24 *American University International Law Review* 489 at 490.

147 Michael Hwang & Fong Lee Cheng, "Relevant Considerations in Choosing the Place of Arbitration" (2008) 4 *Asian International Arbitration Journal* 195 at 197.

148 See, *eg*, s 6(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (Singapore); s 9(4) of the Arbitration Act 1996 (c 23) (UK); §§2 and 3 of the Federal Arbitration Act 9 USC (US); and §§91(1) and 1027a of the *Zivilprozessordnung* ("ZPO") (Germany).

149 See Art 17 of the Model Law.

150 Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003) at paras 15-42–15-44.

151 See Art 34 of the Model Law.

152 See Art 36 of the Model Law and Art V of the New York Convention.

153 For the legislative intent behind the International Arbitration Act (Cap 143A, 2002 Rev Ed) and the judicial attitude in Singapore towards court intervention in the arbitration process, see respectively the second reading speech by the Minister for Law, K Shanmugam on the International Arbitration (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (19 October 2009) vol 86 at col 1628, and generally the Singapore Court of Appeal decisions of *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28]–[29] and *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [25].

154 *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478 at 488, *per* Lord Scrutton.

delocalisation of awards.[155] In their opinion, while delocalisation of the arbitral process refers to arbitration which is independent of the purview or ambit of any national procedural law and courts,[156] the concept of delocalisation of awards is slightly more nuanced. The latter acknowledges the power of the supervisory courts but limits the extent of the authority of the supervisory jurisdiction.[157] In particular, the orthodox rule that an award which is set aside at the seat of arbitration is a nullity and should not be enforceable in other jurisdictions[158] is flatly rejected.[159] In other words, proponents of delocalisation of awards argue that an award set aside in the seat of arbitration may still be enforced elsewhere.[160]

46 France has taken the lead in adopting this radical position. Article 1502 of the French NCCP, the relevant law governing the enforcement of awards, does not contain the equivalent of Art V(1)(e) of the New York Convention which provides that an award which has been set aside by the court in the seat of arbitration may be refused enforcement. Therefore, French courts applying their own procedural law can enforce foreign awards which have been set aside at the seat of arbitration.[161] This was expressly recognised by the *Cour de cassation* in *Hilmarton Ltd v Omnium de Traitement et de Valorisation*[162]

155 Vesna Lazic, "Insolvency Proceedings and Commercial Arbitration" (Kluwer, 1998) at pp 76–84; Pippa Read, "Delocalisation of International Commercial Arbitration: Its Relevance in the New Millenium" (1999) 10 *American Review of International Arbitration* 177 at 186.

156 Vesna Lazic, "Insolvency Proceedings and Commercial Arbitration" (Kluwer, 1998) at pp 76–84; Pippa Read, "Delocalisation of International Commercial Arbitration: Its Relevance in the New Millenium" (1999) 10 *American Review of International Arbitration* 177 at 186.

157 Vesna Lazic, "Insolvency Proceedings and Commercial Arbitration" (Kluwer, 1998) at pp 76–84; Pippa Read, "Delocalisation of International Commercial Arbitration: Its Relevance in the New Millenium" (1999) 10 *American Review of International Arbitration* 177 at 186.

158 However, note the existence of a view abovementioned (see n 78 above) that a ground for refusing enforcement under the New York Convention, such as where an award has been set aside, does not necessarily preclude the enforcement of that award. In other words, the enforcing court has the discretion nevertheless to enforce an award which has been set aside. See for instance Sir Roy Goode, "The Role of the *Lex Loci Arbitri* in International Commercial Arbitration" in *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (Francis Rose ed) (LLP, 2000) at p 254.

159 Jan Paulsson, "The Extent of Independence of International Arbitration from the Law of the Situs" in *Contemporary Problems in International Arbitration* (Julian Lew ed) (Martinus Nijhoff, 1987) at p 141.

160 Jan Paulsson, "The Extent of Independence of International Arbitration from the Law of the Situs" in *Contemporary Problems in International Arbitration* (Julian Lew ed) (Martinus Nijhoff, 1987) at p 141. See also Jan Paulsson, "Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)" [1998] 9 ICC Ct Bulletin 14 at 14.

161 See *ASECNA v N'Doye* (2000) Rev Arb 648.

162 (1997) XXII Yearbook Comm Arb 696.

("*Hilmarton*") where it held that "the award rendered in Switzerland is an international award … which remains in existence *even if set aside*" [emphasis added]. Likewise, in *Chromalloy Aeroservices v Arab Republic of Egypt*[163] ("*Chromalloy*"), the Paris *Cour d'appel* held that the "award made in Egypt remained established despite its being annulled".

47 Ostensibly, this concept of delocalised awards is inconsistent with the general rule that an award which has been set aside has no practical value or effect on parties and cannot be enforced in a jurisdiction outside of the seat of arbitration as there is nothing left to enforce.[164] With respect, delocalised awards take the pro-enforcement bias of arbitration awards[165] one step too far. If a national court in the seat of arbitration exercising its supervisory jurisdiction cannot set aside an award once and for all, the very concept of setting aside of an award will be otiose since a successful setting aside of the award has no bearing on the enforcement of the award in other jurisdictions. The end result of such a practice is simply the creation of "floating"[166] awards which may crystallise and have binding effect notwithstanding it has been set aside at the seat of arbitration. This places undue power in the hands of arbitral tribunals as their award can never be denied effect *in toto*.[167] Another pragmatic repercussion of delocalisation of awards is the possibility of two conflicting awards. This was exactly what happened in *Hilmarton*. After the original award was set aside, a second conflicting award was rendered.[168] However, since the French courts had already enforced the first annulled award, there was a question of whether the enforcement of the first award barred the enforcement of the second award. Although the Versailles *Cour d'appel* enforced the second award, it was subsequently overturned by the *Cour de cassation* which unambiguously stated that "the existence of a final French decision concerning the same object and between the same parties bars the recognition in France of any judicial decision or arbitral award rendered abroad which is incompatible with it".[169] The irony of the circumstances is self-evident: the first award which had already been set aside by the supervisory court took precedence over the second award which was

163 (1997) XXII Yearbook Comm Arb 691.

164 Andrew Tweeddale & Karen Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press, 2007) at para 13.85; Albert Jan van den Berg, "Enforcement of Annulled Awards" [1998] 9 ICC Ct Bulletin 15.

165 Albert Jan van den Berg, *The New York Convention of 1958* (Kluwer, 1981) at p 155.

166 *Texaco Overseas Oil Co v Libya* (1979) 53 ILR 389; *Cases No 2977, 2978 & 3033*, ICC Arbitration Tribunal, (1981) 6 Yearbook Comm Arb 133. See also Jan Paulsson, "Delocalisation of International Commercial Arbitration: When and Why it Matters" (1983) 32 ICLQ 53 at 57.

167 For a criticism of unfettered power to arbitrators, see Joachim Frick, *Arbitration and Complex International Contracts* (Kluwer, 2001) at pp 277–278.

168 (1995) Rev Arb 639.

169 (1997) Rev Arb 376.

made pursuant to the setting aside of the first award.[170] A further irony is the fact that the invulnerable status accorded to arbitral awards by the French arbitration system was not able to protect the second, more legitimate award. Indeed, the repercussions of taking the concept of delocalisation seriously has been noted by Mayer as giving rise to "multilocalisation" instead,[171] with arbitrations and litigation taking place in numerous jurisdictions, as was the case in *Hilmarton*[172] and *Chromalloy*.[173]

48 Given the numerous flaws in the concept of delocalised awards, it is fortunate that national courts – apart from the French courts[174] – have rejected the notion of delocalised awards and adhere instead to the general rule.[175] Appositely, van den Berg, a prominent commentator on the New York Convention, describes the French legal system of enforcing annulled awards as the granting of "asylum" status to annulled awards[176] and caustically joked that "if an award is set aside in the country of origin, a party can always try his luck in France".[177] Having shown that delocalised arbitration is still far from gaining universal acceptance, a return to the *lex loci arbitri* remains a realistic proposition to the choice of law problem in enforcement of awards.

IV. Conclusion

49 Despite some teething doubts, the *lex loci arbitri* as the common connecting factor is still the most ideal solution, both conceptually and commercially. Admittedly, a return to the *lex loci arbitri* will work only if courts in most, if not all, jurisdictions adopt this standard. If some national courts persist in applying their own private international law rules or the *lex fori* to the choice of law questions in the Art V provisions of the New York Convention, there would not be the uniformity which

170 For a criticism of the *Cour de cassation's* decision not to enforce the second award, see Emmanuel Gaillard, "*L'exécution des Sentences Annulées dans leur Pays D'origine*" (1998) *Journal du Droit International* 645.

171 Pierre Mayer, "The Trend towards Delocalisation in the Last 100 Years" in *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Martin Hunter, Arthur Marriott & VV Veeder eds) (Graham & Trotman/ Martinus Nijhoff, 1995) at p 46.

172 In *Hilmarton Ltd v Omnium de Traitement et de Valorisation* (1997) XXII Yearbook Comm Arb 696, the dispute gave rise to arbitral and court proceedings in Switzerland, France and England.

173 In *Chromalloy Aeroservices v Arab Republic of Egypt* (1997) XXII Yearbook Comm Arb 691, the dispute was heard by arbitral and court proceedings in Egypt, France and the US.

174 See para 46 of this article.

175 For a view contrary to the orthodoxy, see paras 45–47 of this article.

176 Albert Jan van den Berg, "Enforcement of Annulled Awards" [1998] 9 ICC Ct Bulletin 15 at 16.

177 [1994] XIX Yearbook Comm Arb 590.

the suggested solution attempts to achieve. Article V of the New York Convention would become a dead letter and the internationality of arbitration will become an even more illusory goal.[178] In this regard, courts around the world need to strive towards a common recognition of their role in the arbitral process. The age of judicial chauvinism[179] has come and gone; it has been replaced by judicial comity.[180] Aside from international comity, there are many reasons to embrace the internationality of commercial arbitrations. Much of the success of international commercial arbitration as a dispute resolution mechanism rests on the perception that it provides a speedy and effective resolution to disputes. If the enforceability of an award rests on the idiosyncrasies of individual jurisdictions' private international laws, the utility of international arbitration may be severely undermined in the long run. Hence, choice of law for enforcement of awards is an important aspect that should not be ignored any further. Although this may take time, there is no logical reason why courts cannot agree to adopt the same approach towards enforcement proceedings much like how courts around the world from both common and civil law traditions have largely accepted the fundamentality of party autonomy in international arbitration[181] and conflict of laws.[182] As a staunch champion of international commercial arbitration as a parallel system of dispute resolution, the Singapore courts are in the prime position to take the lead in paving the way for a more commercially practical uniform approach to the enforcement of arbitral awards. To borrow Neil Armstrong's famous words, this would be a small step for the Singapore courts, but one giant leap for international commercial arbitration.

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178 Sir Roy Goode, "The Role of the *Lex Loci Arbitri* in International Commercial Arbitration" in *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (Francis Rose ed) (LLP, 2000) at p 265.

179 The term "judicial chauvinism" has been referred to several times by the Singapore courts: see, for *eg The "Asian Plutus"* [1990] 1 SLR(R) 504 at [20]; *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515 at [28].

180 The end of judicial chauvinism was decisively recognised by the House of Lords in *The Abidin Daver* [1984] 2 WLR 196 at 203 *per* Lord Diplock.

181 See generally Simon Greenberg, Christopher Kee & Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge, 2011) at Section 3.1; Norah Gallagher, "Paraellel Proceedings, Res Judicata and Lis Pendens" in *Pervasive Problems in International Arbitration* (Loukas Mistelis & Julian Lew eds) (Kluwer Law, 2006) at para 17-38.

182 *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] AC 583 at 603; *CBI NZ Ltd v Badger Chyoda* [1989] 2 NZLR 669 at 675; see also Peter Nygh, *Autonomy in International Contracts* (Oxford University Press, 1999) ch 1.