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Issue Estoppel Arising out of Foreign Interlocutory Court Proceedings in International Arbitration

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(*)

International arbitral rules commonly allow parties to seek interim assistance or relief from courts in aid of the arbitration, whether before or after the tribunal is constituted. (1) Such a request for interlocutory relief is generally not deemed incompatible with the parties' agreement to arbitrate, and does not constitute a waiver of the right to arbitrate. (2) Arbitral laws in many jurisdictions provide that the local courts may order provisional relief in connection with arbitration, (3) and in many jurisdictions such relief may be granted notwithstanding the *situs* of the arbitration is a foreign jurisdiction. (4) However, the courts will often tend to defer to the jurisdiction of the arbitral tribunal once the tribunal is constituted. (5) In general, the proper role of the courts in granting interim relief should be to enforce or supplement the function of the arbitral tribunal:

The purpose of interim measures of protection ... is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration. (6)

Under the English Arbitration Act 1996, the courts must act only if, or to the extent that, the arbitral tribunal, and any arbitral or other institution or person having power to act in relation to the subject matter, has no power or is unable to act effectively. (7) Where a party seeks an order of interim relief from the Hong Kong court following the constitution of the arbitral tribunal where the seat of the arbitration is outside Hong Kong, without having first obtained the approval of the arbitral tribunal, the court must refuse the application unless it is satisfied that the justice of the case requires the grant of such relief. (8)

The principal object of an application to the courts for interim or provisional relief will normally be to obtain an interlocutory preservative or injunctive remedy, pending a final determination of the substantive issues by the arbitral tribunal as contemplated by the arbitration agreement between the parties. However, a degree of caution is required to ensure that the conduct of the interlocutory proceedings in "aid of the arbitration" does not inadvertently preclude or exclude desired claims or arguments in the subsequent arbitration proceedings. In Commonwealth jurisdictions this may arise from the operation of elements of the doctrine of estoppel.

I. Cause of Action Estoppel and Issue Estoppel

The plea of estoppel *per rem judicatam* in English law comprises "cause of action estoppel" and "issue estoppel." "Cause of action" estoppel precludes a party from bringing an action against another where the cause of action has been the subject of a final decision in a court of competent jurisdiction. It operates to prevent a party from asserting or denying the existence of a particular cause of action which has been determined by a competent court or tribunal in previous proceedings between the same parties (or their privies). If the cause of action was determined to exist by an English court judgment it is said to be merged in the judgment. (9) If it was determined not to exist, the unsuccessful party is estopped from asserting that it does.

"Issue estoppel" has been described as an off-shoot of cause of action estoppel, arising where legal or factual issues have been necessarily established as the legal foundation or justification for a decision in prior proceedings between the same parties, but the cause(s) of action are different:

A party to civil proceedings is not entitled to make, as against the other party, an assertion whether of fact, or of the legal consequences of facts, the correctness of which is an essential element of his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties [or their privies] and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect... (10)

The distinction between cause of action estoppel and issue estoppel is that in the former the right or cause of action claimed or put in suit in the earlier proceedings has passed into judgment so that (in the case of an English court judgment) it is merged and no longer has an independent existence, while in the latter, for the purpose of some other claim or cause of action a statement or fact is alleged or denied, the existence of which is a matter necessarily decided by the prior judgment. What is estopped is restricted to what is legally indispensable to that conclusion. (11)

The doctrine of *per rem judicatam* (which includes both cause of action and issue estoppel) is founded on the principle of public policy that the public interest is served by finality in litigation, and on the rule of private justice that a defendant should not have to fight the same issue again. Issue estoppel is therefore not a mere rule of evidence. It operates as a complete bar to prevent the party estopped from calling evidence to show that the assertion which is the subject of the estoppel is incorrect. The existence of the estoppel results in there being “no issue” in the subsequent civil proceedings to which such evidence would be relevant. (12)

A. The rule in *Henderson v. Henderson*

Issue estoppel in a wider sense arises in respect of issues which should have been determined in the previous proceedings but which were not, due to “negligence, inadvertence, or even accidents,” sometimes referred to as the “rule in *Henderson v. Henderson*” (13) enunciated by Sir James Wigram V.C.:

Where a given matter becomes the subject of litigation in, and after adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which were not brought forward, only because they have from negligence, inadvertence, or even accidents, admitted part of their case. The plea of *res judicata* applies ... not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

The *res judicata* for this purpose is not confined to issues which the court is asked to decide but extends to issues or facts which are so clearly part of the subject matter of the litigation, and so clearly could and should have been raised, that it would be an abuse of process of the court to allow a new proceeding to be started in respect of them. (14) To prevent such an estoppel arising it therefore behoves a party to pursue all arguments and remedies available in the earlier proceedings. (15)

B. Exceptions to issue estoppel

In enunciating the principle of issue estoppel in the wider sense in *Henderson v. Henderson*, Sir James Wigram V.C. observed that there may be “special circumstances” in which the estoppel does not operate. A recognized exception arises in the special circumstances that further material relevant to the correct determination of the point decided becomes available which could not by reasonable diligence have been adduced in the earlier proceedings. (16) A change in the law may constitute an element in such “special circumstances,” enabling an issue to be re-opened. (17) The estoppel is largely limited to cases where reasonable diligence would have caused the matter to be raised in the earlier proceedings. (18)

C. Issue estoppel and abuse of process

A number of more recent English decisions have highlighted the extent to which the rule in *Henderson v. Henderson* rests upon the court's power to prevent the “abuse of justice” or “abuse of process” which may result from an attempt to litigate matters for a second time. Reliance on the rules governing issue estoppel may be unnecessary and superfluous where such an abuse of justice is established. (19)

In *Kirin-Amgen Inc. v. Boehringer Mannheim GmbH* (20) the English Court of Appeal considered the plaintiff's submission that it would be an abuse of process for the respondents to re-litigate matters which had been fully dealt with in U.S. court proceedings. Aldous L.J. observed, “In general where there is an estoppel, it would be an abuse of process to allow the matter to be re-litigated ... but it does not follow that abuses amount to estoppel.” (21) It was held that to found an issue estoppel the findings relied upon had to be fundamental or necessary to the extent that the earlier decision could not stand without such findings. On the facts, this requirement had not been satisfied. Nor were the parties to the English proceedings privies to the parties to the U.S. proceedings.

In *Kenneth James Wain v. F. Sherwood & Sons Transport Ltd.*, (22) Chadwick L.J. (in considering the question of whether non-actionable advisor error was capable of constituting a special or exceptional circumstance so as to justify a court in refusing to apply the principle in *Henderson v. Henderson*) observed that the rule in *Henderson v. Henderson* did not depend on the operation of the doctrine of estoppel *per rem judicatam* in its true and narrow sense (23) for the reason that, in such cases *ex hypothesi* there had been no judicial decision on the point which it was subsequently sought to raise. “[T]here is a wider sense in which the doctrine [i.e. the rule in *Henderson v. Henderson*] may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.” (24) That “abuse of process” is the true basis of the rule in *Henderson v. Henderson* was subsequently affirmed by the Privy Council in *Brisbane City Council & Myer Shopping Centers Pty. Ltd. v. Attorney General for Queensland*, (25) and by the House of Lords in *Arnold v. National Westminster Bank Plc.* (26)

II. Application of Cause of Action Estoppel and Issue Estoppel to

Arbitration

In *Fidelitas Shipping Co. Ltd. v. V/o Exportchleb* (27) Lord Denning M.R. summarized cause of action and issue estoppel (including the rule in *Henderson v. Henderson*) as follows:

But within one cause of action there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances ... And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which P 157 would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate and in any case where the self-same issue arises in the same or subsequent proceedings ...

Like principles apply to arbitration. (28)

III. Estoppel Arising From a Foreign Judgment

Issue estoppel achieved authoritative recognition in English law by the House of Lord's decision in *Carl Zeiss Stiftung v. Rayner and Keeler (No. 2)*. (29) That decision is also the leading English authority on issue estoppel arising out of a judgment of a foreign court. The House of Lords rejected the argument that no estoppel could arise from a foreign judgment where the cause of action in a foreign case does not merge in the judgment. The judgment of a foreign court may be treated as conclusive. (30)

However, Lord Reid enunciated three reasons for being "cautious": (31) (1) the English courts may not be familiar with modes of procedure in many foreign countries and need to be sure that the issue has been decided, and was not merely "collateral or obiter"; (2) there is the practical difficulty of deciding whether the defendant should have incurred the time and expense of deploying his full case in a trivial case abroad; (3) the foreign judgment should have been a "final judgment on the merits"; and the court would have to be satisfied that the issues in question could not be relitigated in the foreign country.

A decision "on the merits" in the context of a foreign judgment is one that establishes certain facts as proved or not in dispute, states the principles of law applicable to those facts, and expresses a conclusion as to the effect of applying those principles to the factual situation. With regard to "finality," "final" means a judgment that "cannot be varied, re-opened or set aside by the court that delivered it or any other court of coordinate jurisdiction, although it may be subject to appeal to a court of higher jurisdiction." (32) The issue estoppel may arise "regardless of whether or not an English court would regard the reasoning of the foreign court as open to criticism." (33)

In *DSV Silo-und Verwaltungsgesellschaft mbH v. Owners of the "Sennar"* (34) the Dutch court held P 158 that a claim in tort fell within the exclusive jurisdiction provision contained in a bill of lading which provided for the resolution of disputes in Khartoum or Port Sudan. The House of Lords unanimously held that the decision of the Dutch court on the issue of jurisdiction was final and on the merits, and the claimants were accordingly estopped from asserting in the subsequent proceedings in England that their claim did not fall within the exclusive jurisdiction clause. The decision of the Dutch court was only concerned with the issue of jurisdiction, not the merits of the substantive claim. (35)

Lord Branson observed:

The argument in relation to the first contention was that the judgment of the Dutch Court of Appeal was procedural in nature, in that it consisted only of a decision that a Dutch court had no jurisdiction to entertain and adjudicate upon the appellants' claim, and did not pronounce in any way on the question whether the claim itself, or any substantive issue in it, if it were to be entertained and adjudicated on, would succeed or fail. In my opinion, this argument is based on a misconception with regard to the meaning of the expression "on the merits" as used in the context of the doctrine of issue estoppel. Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned. If the expression "on the merits" is interpreted in this way, as I am clearly of opinion that it should be, there can be no doubt whatever that the decision of the Dutch Court of Appeal in the present case was a decision on the merits for the purposes of the application of the doctrine of issue estoppel. (36)

A. "Interlocutory" or final judgment?

For an estoppel to arise the judgment must be "final" in substance, if not in form, and not merely "interlocutory." (37) The same principle applies to foreign judgments. (38) This does not mean a judgment which is not open to appeal, but a judgment which is "final" as opposed to "interlocutory." (39) In *Mullen v. Conoco Ltd.* (40) the Court of Appeal held that a decision on an

application to set-aside a default judgment was not a “determination of issues, but merely an exercise of a discretion and the decision whether or not to grant a discretionary procedural remedy.” In contrast, a summary judgment would, if successful, require a determination of the merits of the case. (41)

In *Re Martin, ex parte Amtron Australia Pty Ltd.*, (42) Amtron had filed a notice of motion seeking to have appeals dismissed for want of prosecution or, alternatively, seeking security for costs and directions for the future conduct of the appeal. At the hearing of the notice of motion, the appellants asserted an agreement by Amtron granting a moratorium on payment of the judgment debt. The Queensland Court of Appeal rejected the existence of such an agreement and the appeal was subsequently dismissed. It was held by the Federal Court of Australia (Cooper J.) that where an issue is finally determined, albeit in what are interlocutory proceedings, an issue estoppel may arise. (43) The issue of whether a moratorium agreement existed had been argued before the Court of Appeal and finally decided.

B. Foreign interlocutory court proceedings

In *Desert Sun Loan Corp. v. Hill* (44) the English Court of Appeal considered for the first time the question of whether an estoppel may arise out of a foreign judgment in the context of “procedural” as opposed to substantive rights.

The plaintiff bank issued court proceedings in Arizona against a limited partnership for amounts due under a promissory note and against certain partners (including the defendant) as guarantors. The defendant had disposed of his interest in the partnership and moved to England. One of his partners purported to accept service on behalf of the defendant in the Arizona proceedings. The plaintiff obtained judgment in which the defendant was held liable, as guarantor, for a portion of the partnership liabilities. The defendant then instructed U.S. counsel to vacate the Arizona judgment, on the basis that he had not authorized his partner to accept service or act on his behalf, whether personally or as guarantor. The motion to vacate was rejected by the Arizona court. The defendant appealed and the Arizona Court of Appeals dismissed the appeal, holding that he had submitted to the jurisdiction of the Arizona court by virtue of his attorney entering an appearance on his behalf. The plaintiff meanwhile sought to enforce the Arizona judgment in England by summary judgment, which the defendant successfully resisted by arguing he had not voluntarily submitted to the jurisdiction of the Arizona court. On appeal in the English proceedings the plaintiff contended that the defendant was estopped by the Arizona court ruling from raising this same issue in the English proceedings.

The question therefore arose for the Court of Appeal whether an issue estoppel could arise in the context of an interlocutory judgment of a foreign court on a procedural, i.e. non-substantive, issue. Evans L.J. observed that this question was a novel one and, in the absence of any reported authority, had to be dealt with as a question of principle.

In the international context the principle of issue estoppel was considered to be based on recognition of the validity of a foreign judgment as between the same parties. (45) For such an issue estoppel to arise, the judgment of the foreign court must be by a court of competent jurisdiction; “final,” conclusive and “on the merits”; the parties to the English litigation must be the same parties (or their privies) as in the foreign litigation, and the issue raised must be identical. The decision on the issue must have been necessary for the decision of the foreign court and not merely collateral. (46) “An issue of fact or law which necessarily was concluded in favour of one party in the foreign proceedings cannot be re-opened in further proceedings between the same parties here.” (47)

The principle extends to issues which were not, but which might have been, raised in the earlier proceedings (i.e. the rule in *Henderson v. Henderson*). Evans L.J. also re-iterated the reasons for “caution” enunciated by Lord Reid in *Carl Zeiss (No. 3)*. (48)

As to the interlocutory nature of the foreign proceedings Evans L.J. observed: “The fact that procedural or interlocutory issues do not involve ‘causes of action’ in the strict sense does not mean that their independent existence cannot be recognized in appropriate circumstances.” (49) In the present case:

[T]he defendant invoked the jurisdiction of the Arizona court to decide whether he was subject to the court's jurisdiction in the proceedings in which the judgment was given. If that question of jurisdiction involved the question of fact whether he gave express authority to [his partner] to instruct [his U.S. counsel] to act on his behalf, then the defendant literally cannot deny that that issue was raised before and decided against him by the Arizona Court. (50)

Evans L.J. further observed:

On balance, and regarding the question entirely as one of principle, I would be prepared to hold that an issue estoppel could arise from an interlocutory judgment of a foreign court on a procedural, i.e. non-substantive, issue, where the following conditions were fulfilled: (1) there was expressed submission of the procedural or jurisdictional issue to the foreign court; (2) the specific issue of fact was raised before and decided by the court; (3) the need for “caution” recognized by Lord Reed in *Carl-Zeiss* is carefully borne in mind. Practical considerations such as whether the issue was or should have been fully ventilated are likely to be especially relevant in relation to procedural, as distinct from substantive, issues. (51)

On the facts of *Desert Sun Loan*, it was nevertheless held it was not sufficiently clear from the

Arizona court judgment that the specific and narrow issue of fact which arose for decision in the English enforcement proceedings (authority to act in the defendant's personal capacity) had been decided against the defendant; hence, no issue estoppel arose from the Arizona court judgment.

C. Issue estoppel arising out of foreign interlocutory court proceedings in aid of arbitration

In *[ABC] Corporation v. [China Co]* (52) the U.S. District Court for the Southern District of Texas dissolved a preliminary injunction it had previously granted prior to the constitution of the arbitral tribunal and recognized and confirmed the tribunal's final arbitral award (on issues other than costs), comprising final injunctive orders against the defendant. The claims in the arbitration had arisen out of a co-manufacturing contract for the manufacture of aircraft equipment in China. The contract was expressed to be governed by Hong Kong law and provided for disputes to be resolved by arbitration in Singapore under UNCITRAL Arbitration Rules.

The plaintiff initially commenced proceedings in the Texas court claiming damages and injunctive relief to restrain further alleged breaches of the contract as well as a trade dress infringement claim under the U.S. Lanham Act. (53) The defendants duly filed an application to compel arbitration, having regard to the arbitration agreement contained in the contract. The court ruled that the Lanham Act claim was not subject to arbitration and was not arbitrable, referring to it as a "common law trespass" claim which fell outside the arbitration agreement and arose "after but not under" the agreement. The remaining claims were duly stayed and referred to arbitration. The Lanham Act claim was also stayed, for later determination by the Texas court.

The court thereafter granted a preliminary injunction, expressed to be both "in aid of the arbitration" and in respect of the plaintiff's claim under the Lanham Act over which the court had accepted jurisdiction. In resisting the application for the preliminary injunction, the defendant argued (inter alia) that summary judgment should be given by the Texas court in favour of the defendant, dismissing the Lanham Act claim.

The plaintiff subsequently commenced arbitration proceedings in Singapore in respect of the arbitrable claims. The defendant meanwhile made a number of applications to the Texas court for reconsideration of the preliminary injunction order. The defendant asserted before the tribunal that the application to the Texas court for the preliminary injunction was inconsistent with the arbitration agreement between the parties (notwithstanding Article 26(3) of the UNCITRAL Arbitration Rules to the contrary). (54) However, no application was made to the tribunal for interim injunctive relief.

It would therefore have been arguable by the defendant that, since the parties had agreed to arbitrate all disputes arising under or relating to the agreement, such agreement contractually excluded any non-arbitrable claim by the plaintiff under the Lanham Act. (55) No such argument had been raised by the defendant in the Texas proceedings. None of the motions by the defendant before the Texas court made arguments directed to the issue of arbitrability of the Lanham Act claim, or to the issue of whether the Lanham Act claim had been effectively excluded by the arbitration agreement between the parties.

The tribunal subsequently issued rulings commenting (inter alia) on the terms of the Texas court's preliminary injunction order, based upon submissions by the defendant as to the proper scope and terms of the order. As a result, the Texas court restricted the operation of the injunction to the United States. The plaintiff subsequently applied to the Texas court to modify the preliminary injunction. The court duly modified the preliminary injunction to provide that, in conformity with the ruling of the arbitral tribunal, the Lanham Act claim no longer served as a basis for the preliminary injunction (and was dismissed, on the basis it was no longer being pursued by the plaintiff). The court also observed that the preliminary injunction continued "in aid of the arbitration," and only pending any determination by the tribunal upon issues relating to interim relief.

The defendant thereupon filed a counterclaim against the plaintiff in the arbitration, asserting that the preliminary injunction had been granted substantially on the basis of the Lanham Act claim, in breach of the arbitration agreement between the parties, and seeking very substantial damages allegedly flowing from the initial preliminary injunction granted by the Texas court.

The plaintiff argued that the Texas court was a court of competent jurisdiction; that the defendant had submitted to the jurisdiction of the Texas court on the question of whether the court had jurisdiction over the Lanham Act claim, and that the decision of the Texas court to accept jurisdiction over that claim was final and on the merits. Further, since the defendant had raised no argument in the Houston proceedings to the effect that the arbitration agreement effectively excluded any claim under the Lanham Act (such a claim being non-arbitrable in Singapore), the defendant was estopped from making any such claim in the arbitration proceedings.

In its final award, the arbitral tribunal accepted (by a majority decision) that an issue estoppel could arise out of a foreign judgment in the context of procedural, as opposed to substantive, rights. (56) The tribunal had no difficulty in applying the principles of estoppel, notwithstanding that the present case involved estoppel of a point which ought to have been

taken in interlocutory court proceedings in the United States. The tribunal found no reason not to apply the principle of estoppel simply because different fora were involved. The Texas court had stated its preliminary injunction to be given “in aid of” the Singapore arbitration. The defendant had submitted to the jurisdiction of the Texas court on the issue of whether the court had jurisdiction over the Lanham Act claim. The defendant had failed to raise the argument on which it now sought to rely, that the arbitration agreement contractually excluded any non-arbitrable claim under the Lanham Act. The decision of the Texas court on that issue of jurisdiction had been final and on the merits. Accordingly, the tribunal held that the defendant was estopped from raising that argument in the arbitration proceedings. The tribunal further found that the preliminary injunction had initially been granted in aid of the arbitration in respect of the arbitrable claims, and not wholly or mainly on the basis of the Lanham Act claim. Accordingly, the defendant's counterclaim for damages arising out of the preliminary injunction failed.

IV. Estoppel in the Context of Enforcement of New York Convention Awards

The enforcement of awards under the New York Convention, (57) where a party has unsuccessfully attempted to set aside an arbitration award in court proceedings in the place of the arbitration and, having failed, subsequently seeks to resist recognition and enforcement before the courts of another jurisdiction under Article V of the Convention, illustrates well the interplay between principles of issue estoppel, estoppel by conduct and principles of good faith, comity and finality.

In *Paklito Ltd. v. Klockner East Asia Ltd* (58) the plaintiff applied ex parte for leave to enforce a CIETAC arbitration award under section 44 of the Hong Kong Arbitration Ordinance. (59) CIETAC had appointed its own expert, but the defendant had been given no opportunity to cross-examine that expert on its report before the tribunal made its award. Kaplan J. was satisfied that a serious procedural irregularity would have been found by a Chinese court if it had been invited to consider the matter. The plaintiff relied upon the fact that the defendant had taken no steps to set aside the award in China, and asserted that this failure was a factor upon which the Hong Kong court could rely in refusing enforcement in Hong Kong.

Kaplan J. observed that a party faced with a Convention award has two options: it can apply to the court of supervisory jurisdiction to set aside the award or it can wait to establish a Convention ground of opposition in the country of enforcement. It was not suggested that these are exclusive remedies, which the losing party must elect between.

Kaplan J. observed that there is nothing in the Convention which specifies that a defendant is obliged to apply to set aside an award in the country where it was made as a condition of opposing enforcement elsewhere. An unsuccessful party is free to decide to take no steps to set aside the award in the country where the award was made, and may wait until enforcement is sought and then attempt to establish a Convention ground of opposition. The defendant's failure to apply to set aside in China was not a factor on which the court could or should rely in exercising any discretion it may have as to whether the award should be enforced by the Hong Kong court.

In *China Nanhai Oil JV Service Corp. v. Gee Tai Holdings Co. Ltd* (60) the enforcement in Hong Kong of a CIETAC arbitration award made in China was resisted by the defendant on the basis that the composition of the tribunal was not in accordance with the agreement of the parties, being a ground for refusing enforcement under section 44(2)(e) of the Hong Kong Arbitration Ordinance. (61) Kaplan J., in refusing the application, held that the doctrine of estoppel applied to the enforcement of Convention awards, referring to estoppel by conduct (rather than issue estoppel). (62) The defendant had by its inaction “waived” any irregularity in the appointment of the tribunal. The defendant, having realized the defect in the composition of the tribunal, acted unfairly in continuing with the arbitration without making any formal challenge to jurisdiction, and then seeking to challenge the proceedings on this ground when enforcement was sought in Hong Kong. Under a true construction of the New York Convention, the defendant was under a “duty of good faith,” which in the circumstances of the case it had not fulfilled. Moreover, the court had a residual discretion to order enforcement, even where a ground of opposition under Section 44 of the Arbitration Ordinance had been made out. This was not necessary in the present case but, had it been, the discretion would have been exercised in favour of enforcement, given that the defendant had raised no formal objection to the jurisdiction of the tribunal during the arbitration proceedings. It was appropriate to regard the question of estoppel in this context as a fundamental principle of good faith. (63)

In *Heibei Import & Export Corp. v. Polytek Engineering Co. Ltd* (64) the seller complained of not being invited to an inspection of disputed equipment by experts made in the presence of the chief arbitrator, who was present to ensure the propriety of conduct on the part of the experts. A copy of the experts' report had been sent to the seller, who was invited to comment. The Beijing court rejected the assertion that the tribunal had breached the CIETAC arbitration rules. No argument was raised before the Beijing court that the award was “contrary to public policy.” In the subsequent enforcement proceedings in Hong Kong it was asserted by the buyer that the seller could not rely on the public policy grounds for refusing enforcement as the argument had not been raised before the Beijing court.

Litton P.J. observed:

Estoppel ... does not lie comfortably in the context of enforcing a Convention award. It is not a legal concept of universal currency among the contracting states to the New York Convention. [However] if what is suggested by estoppel is no more than this, that a party invoking section 44(3) must act in good faith; that he must not string the claimant along by taking procedural points in contesting the award, and then, when all else has failed, attempt to resist enforcement by taking a public policy point for the first time, then this is no more than expressing another facet of public policy ... In my view estoppel as such cannot be an answer to the seller's application to refuse enforcement in this case, and it is fruitless to inquire whether the "issues" now raised are the same as, or similar to, the ones put before the Beijing court. (65)

Similarly, Mason N.P.J. stated:

I have difficulty with the notion that the questions here are to be resolved by issue estoppel. The application of this doctrine would require a precise comparison to be made of the relevant provisions of PRC law and the law of Hong Kong with a view to assessing whether the respective laws give rise to identical or similar issues ... [I]t would be inconsistent with the principles on which the Convention is based to hold that the refusal by a court of supervisory jurisdiction to set aside an award allows an unsuccessful applicant from resisting enforcement of the award in the court of enforcement ... A failure to raise the public policy ground in proceedings to set aside an award [in the jurisdiction where the award is made] cannot operate to preclude a party from resisting on that ground the enforcement of the award and the enforcement sought in another jurisdiction ... because each jurisdiction has its own public policy. (66)

Nevertheless, the court accepted that the seller's failure to object to communications with the chief arbitrator, and continued participation in the arbitration, precluded an investigation of the part this played in the tribunal's decision. The respondent's conduct amounted to a breach of the principle that a party to an arbitration who wishes to rely on a non-compliance with the rules of arbitration must do so promptly and must not proceed with the arbitration as if there has been no compliance, keeping the point for later use. The proper basis of declining to refuse enforcement of the Convention award in these circumstances was considered to be the principle of "good faith," which was to be deemed enshrined in the New York Convention's provisions:

Whether one describes the respondent's conduct as giving rise to an estoppel, a breach of the good faith principle or simply a breach of the principle that a non-compliance with the governing rules shall be raised promptly is beside the point in this case. On any one of these bases, the respondent's conduct in failing to raise in the arbitration its objection was such as to justify the court of enforcement in enforcing the Convention Award. (67)

In *Newspeed International Ltd. v. Citus Trading Pte. Ltd.* (68) the unsuccessful party in a CIETAC arbitration failed to set aside the award in an application to the Chinese courts, made on the basis that it had not had an opportunity properly to present its case in the arbitration. It then sought to resist enforcement of the award in Singapore on the basis that it had been "unable to present [its] case in the arbitration proceedings," pursuant to section 31(2)(c) of the Singapore International Arbitration Act, (69) which gives effect to Article V.1.(6) of the New York Convention, to which both Singapore and China are a party.


The Singapore court referred to the decision of the Hong Kong court in *Paklito Investment v. Klockner East Asia Ltd.*, (70) stating:

[a]lthough Kaplan J. had denied that it was not necessary for the defendants there to appeal to the Chinese court before seeking an order from the Hong Kong court to set aside the order granting leave to enforce an award, he did not say the defendants there could have two bites at the cherry, i.e. by proceeding to a Chinese court and, if unsuccessful, then by applying to the Hong Kong court. (71)

The appeal to the Singapore Court of Appeal was dismissed. It does not appear that issue estoppel formed any part of the reasoning of the court. The court appears to have been guided by the more general policy consideration of avoiding the re-litigation of the same or similar issues. The decision is difficult to reconcile with *Paklito* and presents a losing party with the potentially difficult decision as to where to seek to resist an award: in the place where the award was made or in the place(s) of enforcement. A setting-aside of the award by the courts in the place of the award is not finally dispositive of whether the award may nevertheless be enforced in the country of enforcement. (72)

V. Conclusion

Estoppel *per rem judicatam* (including cause of action and issue estoppel, in both the strict sense and under the rule in *Henderson v. Henderson*) is underpinned by the principles of finality in litigation and the undesirability of the defendant having to fight the same claim more than once. In the context of foreign interlocutory court proceedings ancillary to arbitration, this can present the applicant with an obvious dilemma. In agreeing to arbitration, the parties intend their substantive claims to be resolved by the tribunal, principally applying the agreed governing law within the arbitral law framework provided by the *lex arbitri* of the chosen place of arbitration. In the context of foreign interlocutory court proceedings, the applicant is faced with the possibility of claims and arguments being precluded or excluded in

the subsequent arbitration either by virtue of submitting to the jurisdiction of the foreign court on that issue in the interlocutory proceedings (which may give rise to an issue estoppel in the narrow sense) or by failing to raise issues and arguments which ought properly to have been raised in those interlocutory proceedings (giving rise to an issue estoppel under the rule in *Henderson v. Henderson*). The dilemma, and the resulting need for caution on the part of parties and their counsel, is expressed by Lord Reid in *Carl Zeiss*: 

The difficulty I see about issue estoppel is a practical one. Suppose the first case is one of trifling importance but it involves for one party proof of facts which would be expensive and troublesome; and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim. What is he to do? ... Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought? This does not arise in cause of action estoppel: if the cause of action is important, he will incur the expense: if it is not, he will take the chance of winning on some other point. It seems to me that there is room for a good deal more thought before we settle the limits of

issue estoppel ... (73) 

References

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- 1) International Chamber of Commerce (ICC) Rules of Arbitration 1998, art. 23(2), 36 I.L.M. 1604 (1997); United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 1976, art. 26(3), 15 I.L.M. 701 (1976); London Court of International Arbitration (LCIA) Arbitration Rules 1998, art. 25(3), 37 I.L.M. 669 (1998); American Arbitration Association (AAA) International Arbitration Rules 2001, art. 21(1), available at <www.adr.org>.
- 2) See *supra* note 1; AAA Rules, art. 21(3); UNCITRAL Model Law on International Commercial Arbitration, art. 9, U.N. Doc A/40/17, Annex I, 24 I.L.M. 1302 (1985) ("It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure"); UNCITRAL Model Law, art. 5 ("In matters governed by this Law, no court shall intervene except where so provided in this Law.").
- 3) U.S. Federal Arbitration Act, 9 U.S.C. §§ 1-14 (2001); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d. 43 (1st Cir. 1986) [U.S.]; *China National Metal Products Import/Export Co. v. Apex Digital, Inc.*, 141 F. Supp. 2d. 1013 (C.D. Cal. 2001) [U.S.]; English Arbitration Act 1996 c. 23, § 44(2); Swiss Loi fédérale sur le droit international privé, RO 1988 1776, art. 183 (1988); Singapore International Arbitration Act, cap. 143A, § 12 (2001); Hong Kong Arbitration Ordinance, cap. 341, § 2GB, § 2GC (1997); Indian Arbitration and Conciliation Act, No. 26 of 1996, § 9.
- 4) English Arbitration Act, § 2(3)(b), § 44; Indian Arbitration and Conciliation Act, § 9; *Bhatia Int'l v. Bulk Trading S.A.* (2002) 4 S.C.C. 105 [India] (*contra* *Marriott International, Inc. v. Ansal Hotels Ltd.* 2000 A.I.R. (Del.) 377) [India].
- 5) *BF Waste Systems of North America, Inc. v. Waste Mgmt. Holdings, Inc.*, No. Civ. A16577 WL 671277 (Del. Ch. 1998, unreported) [U.S.] (refusing injunctive relief to protect property pending arbitration, since the tribunal had power to grant such relief under AAA Rules).
- 6) *Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd.* [1993] A.C. 334, 365, H.L., per Lord Mustill [U.K.].
- 7) *Supra* note 4, § 44(5).
- 8) *The Lady Muriel*, [1995] 2 H.K.C. 320 [Hong Kong]. In the United States, there has been a division between the Third and Fourth Circuit Federal Courts of Appeals and the Second, Fifth and Ninth Circuits as to whether interim measures may be granted in a pending arbitration, the latter having granted interim measures in aid of the arbitration; see *McCreary Tire & Rubber Co. v. CEAT SpA*, 501 F.2d. 1032, 1038 (3d Cir. 1974) [U.S.]; *Tennessee Imports v. Pier Paulo Filippi*, 745 F. Supp. 1314 (M.D. Tenn. 1990) [U.S.]; *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044, 1051 (N.D. Cal. 1977) [U.S.]; *BF Waste Systems of North America, Inc. v. Waste Mgmt. Holdings, Inc.*, *supra* note 5.
- 9) *Isaacs & Sons v. Salbstein*, [1916] 2 K.B. 139, C.A. [U.K.].
- 10) *Mills v. Cooper*, [1967] 2 All E.R.100 [U.K.], per Lord Diplock; *The Duchess of Kingston's Case* (1776) 2 Smith L.C. (13th ed.) 644 [U.K.]; *R. v. Hartington Middle Quarter Inhabitants* (1855) 4 E&B 780 [U.K.]; *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb*, [1965] 2 All E.R. 4, C.A. [U.K.]; *Thoday v. Thoday*, [1964] 1 All E.R. 341, H.L. [U.K.], per Lord Diplock.
- 11) *Hoystead v. Commissioner of Taxation*, [1926] A.C. 155 [U.K.].
- 12) *Mills v. Cooper*, *supra* note 10, per Lord Diplock, at 104 H-I [U.K.].
- 13) *Henderson v. Henderson*, [1843] 3 Hare 114, 115 [U.K.] per Sir James Wigram V.C.; approved by the Privy Council in *Hoystead v. Commissioner of Taxation*, *supra* note 11; applied by the Court of Appeal in *Greenhalgh v. Mullard*, [1947] 2 All E.R. 255, C.A. [U.K.]; applied by the Privy Council in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank*, [1975] A.C. 581 [U.K.]. The Australian Courts have long recognized issue estoppel in this wider sense; see *Port of Melbourne v. Anshun Pty.*, 147 C.L.R. 35 (1981) [Aus.]; *Chamberlain v. Deputy Commissioner of Taxation*, 164 C.L.R. 502 (1988) [Aus.].
- 14) Per Somervell L.J., *Greenhalgh v. Mallard*, *supra* note 13, at 257, ¶ H.
- 15) Per Mortimer J., *Berthier Godown Ltd. v. E. Wah Realty*, [1986] H.K.C. 8 [Hong Kong].

- 16) *Arnold v. National Westminster Bank*, [1991] 2 A.C. 93, [1991] 3 All E.R. 41, H.L. [U.K.]. No such exception arises in a cause of action estoppel where the cause of action has merged in the judgment.
- 17) *Hunter v. Chief Constable of West Midlands*, [1982] A.C. 529, 545, H.L. [U.K.].
- 18) *Yat Tung Investment Co. Ltd. v. Dao Heng Bank*, *supra* note 14, at 590, *per* Lord Kilbrandon.
- 19) *Desert Sun Loan v. Hill*, [1996] 2 All E.R. 847, 859, C.A. [U.K.], *per* Evans L.J.
- 20) [1997] Fleet Reports 289 [U.K.]. See also *MCC Proceeds, Inc. v. Lehman Brothers Int'l*, [1998] 4 All E.R. 675, C.A. [U.K.].
- 21) *Id.* at 313, *per* Aldous L.J.
- 22) [1999] P.I.Q.R. P159, C.A. [U.K.].
- 23) Described by Diplock L.J. in *Thoday v. Thoday*, *supra* note 10, at 352, as including “cause of action estoppel” and “issue estoppel.”
- 24) *Yat Tung Investment Co. v. Dao Heng Bank*, *supra* note 13, at 590.
- 25) [1979] A.C. 411 at 425 [Aus.].
- 26) *Supra* note 17. See also *Talbot v. Berkshire CC*, [1994] Q.B. 290, C.A. [U.K.]; *Read v. Tozer*, March 12, 1998 (C.A., unreported) [U.K.].
- 27) *Supra* note 10.
- 28) *Id.* at 9; see also Russell on Arbitration 316 (21st ed.); *Arnold v. National Westminster Bank*, *supra* note 16.
- 29) [1967] 1 A.C. 853, H.L. [U.K.].
- 30) *Id.* at 917, *per* Lord Reid; see also *Godard v. Gray*, (1870) Q.B. 139 [U.K.]; *Nouvion v. Freeman* (1887) Ch.D. 244, 250, 254-55, 258, C.A. [U.K.] (foreign judicial decisions are as conclusive for *res judicata* purposes as judgments of English courts, and are non-examinable). See also the English Civil Jurisdiction and Judgments Act 1982 c. 27 (amended by SI 1993 No. 603), § 34 (“No proceedings may be brought by a person in England and Wales ... 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 of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales.”); recognition of a foreign judgment maybe denied, e.g., if tainted by fraud, breach of natural justice, contrary to public policy.
- 31) *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.*, (No. 2) *supra* note 29, at 918 *per* Lord Reid.
- 32) *DSV Silo-Und Verwaltungsgesellschaft mbH v. Owners of the “Sennar”*, [1985] 1 W.L.R. 490, H.L. [U.K.] at 494 *per* Lord Diplock.
- 33) *Id.* at 493, *per* Lord Diplock.
- 34) *Supra*, note 32.
- 35) *Id.* at 494.
- 36) *Id.* at 499.
- 37) 16 Halsbury's Laws of England para. 1010 (5th ed. 1992).
- 38) 8 Halsbury's Laws of England para. 734 (5th ed. 1992).
- 39) *Id.* para 965; see also *Marchioness of Huntly v. Gaskell* [1905] Ch. 656, 667 [U.K.].
- 40) [1995] 3 W.L.R. 1032 [U.K.].
- 41) *Pople v. Evans*, [1969] 2 Ch. 255, [1968] 2 All E.R. 743 [U.K.] (similarly, dismissal of an action for want of prosecution).
- 42) (1996) A.L.R. 117 [Aus.].
- 43) *Id.* at 121, citing *Blair v. Curran*, (1939) 62 C.L.R. 464 [Aus.]; *Carl Zeiss Stiftung* (No. 3), [1970] Ch. 506, 538-39 [U.K.].
- 44) *Supra* note 20.
- 45) See *Owens Bank Ltd. v. Bracco*, [1992] 2 All E.R. 193, 198, [1992] 2 A.C. 443, 484 [U.K.].
- 46) See also Dicey & Morris on the Conflict of Laws 479 (13th ed.), Rule 35(2).
- 47) *Desert Sun Loan*, *supra* note 19, at 854.
- 48) *Id.* at 855.
- 49) *Id.* at 856.
- 50) *Id.* at 856.
- 51) *Id.* at 858.
- 52) Civil Action (S.D. Tex. 1998, unreported) [U.S.].
- 53) 15 U.S.C. §§ 1051-1129 (2000). The plaintiff relied on the position, first, that the arbitration clause had been extinguished and, alternatively, that the court had authority to enter an injunction pending arbitration (citing *American Express v. Scott*, 955 F. Supp. 688, 694 (N.D. Tex. 1996) [U.S.]: “The Court had the right to issue preliminary injunctive relief pending arbitration even though either the plaintiff or defendant may later request arbitration.”).
- 54) “A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.” UNCITRAL Arbitration Rules, art. 26(3).
- 55) There being no claim under Singapore law equivalent to the claim by the plaintiff under the U.S. Lanham Act, under Singapore law (the *lex arbitri* of the arbitration) it was also arguable that the Lanham Act claim was not arbitrable in the Singapore arbitration under the former English common law “double actionability” rule for claims that are tortious in nature; see Dicey & Morris, *supra* note 46, Rule 201. In England the Private International Law (Miscellaneous Provisions) Act 1995 has expressly abolished the double actionability rule.
- 56) *Desert Sun Loan v. Hill*, *supra* note 20.
- 57) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 330 U.N.T.S. 3.
- 58) [1993] 2 H.K.L.R. 39 [Hong Kong].

- 59) Section 44 of the Ordinance gives effect to art. V of the New York Convention. Both Hong Kong and the People's Republic of China are Convention signatories.
- 60) [1994] 3 H.K.C. 375 [Hong Kong].
- 61) Under art. V.1(d) of the New York Convention.
- 62) *Shrager v. Basil Dighton Ltd.*, [1924] 1 K.B. 274, C.A. [U.K.].
- 63) Albert van den Berg, *The New York Convention of 1958* (Kluwer Law International 1981).
- 64) (1999) H.K.C.F.A.R. 111 [Hong Kong].
- 65) *Id.* at 120.
- 66) *Id.* at 135.
- 67) *Heibei Import & Export Corp. v. Polytech Engineering Co. Ltd.*, *supra* note 64, at 138, per Sir Anthony Mason N.P.J.
- 68) O.S. 600044/2001, June 4, 2001 (unreported) [Sing.].
- 69) International Arbitration Act, cap. 143A.
- 70) *Supra* note 58.
- 71) *Newspeed Int'l Ltd. v. Citus Trading Pte. Ltd.*, *supra* note 68.
- 72) *Westacre Investments, Inc. v. Jugoisimport-SDPR Holding Co. Ltd.*, [1999] 2 Lloyd's Rep. 65, C.A. [U.K.]; *Minmetals Germany GmbH v. Ferco Steel Ltd.*, [1999] 1 All E.R. (Comm.) 315 [U.K.]; *Baker & Marine (Nig.) Ltd. v. Chevron Corp., Inc.*, (1999) 24 Y.B. ICCA 909 (U.S. 2d Cir. 1999) [U.S.].
- 73) *Supra* note 31, at 917 C–E .

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