ASSESSING THE APPLICABILITY OF ISSUE ESTOPPEL ARISING FROM A FOREIGN ENFORCEMENT JUDGEMENT IN INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT

The recent Singapore High Court case of BAZ v BBA provided some clarity as to when and where issue estoppel can apply in seat and enforcement court proceedings. However, the court was not entirely correct. A closer inspection of the Model Law, New York Convention and the International Arbitration Act reveals that issue estoppel can actually only arise from a foreign enforcement judgement in situations where the estoppel would be in favour of enforcement or against setting aside of the award. Notwithstanding, it is better for a future court to avoid applying issue estoppel completely for a host of cogent policy reasons. The case also erred in holding that issue estoppel can never arise under the public policy and arbitrability grounds for refusing enforcement or setting aside. It would be possible (though not recommended) for issue estoppel to apply if the foreign enforcement jurisdiction considered the instant jurisdiction's public policy.

I. INTRODUCTION

Issue estoppel is a doctrine that prevents issues of fact or law that have already been raised and decided on in an earlier proceeding from being submitted again for decision in subsequent proceedings between the same parties.[1] In the international commercial arbitration context, the question is whether this doctrine can apply to bar the instant court (seat or enforcement) from re-evaluating issues raised at a prior seat or enforcement court. Although it is clear that issue estoppel can arise from a seat court judgement in enforcement court proceedings, it is less clear whether an enforcement judgement can have the same effect on another jurisdiction's enforcement court. It is also unclear whether a foreign enforcement judgement can trigger issue estoppel in the seat court.

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[1] *Good Challenger Navegante SA v Metalexportimport SA (The "Good Challenger")*, [2004] 1 Lloyd's Rep 67 [*The "Good Challenger"*].

Such ambiguity festered in Singapore until the recent Singapore High Court ("SGHC") case of *BAZ v BBA*[2] which appears to have injected some much needed clarity. Although the SGHC stopped short of unequivocally holding that issue estoppel cannot arise at all from a foreign enforcement judgement in setting aside proceedings, the court strongly indicated that the non-applicability of issue estoppel would at least be the general position going forward. In addition, the SGHC helpfully opined that issue estoppel can arise in enforcement proceedings. As a separate matter, the SGHC also held that foreign enforcement judgements decided on public policy grounds cannot give rise to issue estoppel in the seat and enforcement courts.

A number of issues however plague the court's reasoning such that *BAZ v BBA* can only be said to have been partially correct as to whether and when issue estoppel can arise. First, the court failed to realise that issue estoppel can operate either *for* or *against* enforcement, and that while the former is permitted under the New York Convention, the latter is not. Notwithstanding this, issue estoppel should not be applied in enforcement proceedings because of strong policy reasons. Second, the court's holding that issue estoppel cannot arise in setting aside proceedings was only partially right. It can in fact arise, if it operates *against* setting aside. A future court should however not apply it because of practical and doctrinal concerns with doing so. Third, the court's finding that issue estoppel cannot apply to the public policy grounds for setting aside and refusing enforcement of the award is only correct as a general proposition. It omitted to consider the situation where the foreign judgement had considered the public policy of the instant jurisdiction. Issue estoppel can potentially arise in such a situation as there would be identity of subject matter but it is advisable for a seat court to avoid doing so for practical reasons.

This article is structured as follows: section II will start off by providing the case details of *BAZ v BBA*. The subsequent sections will then proceed to analyse the various facets of the court's reasoning for the various situations that may potentially involve issue estoppel arising from a foreign enforcement judgement. Section III will first examine the applicability of issue estoppel arising in an enforcement court from a foreign enforcement court judgement. Section IV will then consider the applicability of issue estoppel arising from a foreign enforcement court judgement in setting aside

[2] [2020] 2 SLR 453 [*BAZ v BBA*].

proceedings at the seat court. Finally, section V will assess whether issue estoppel can or should arise under the public policy and arbitrability grounds for refusing enforcement or setting aside.

II. CASE DETAILS OF *BAZ V BBA*

In *BAZ v BBA*, the case revolved around a sale and purchase agreement of shares in an Indian company ("the Company"). The family members of the Company's founder and several companies controlled by them ("the Sellers") entered into a share purchase and share subscription agreement ("SPSSA") with BAZ ("the Buyer"). The Sellers were led by BBA and five of them were minors ("the Minors"). The SPSSA was governed by Indian law and had an arbitration clause providing for disputes arising out of the agreement to be resolved via arbitration held in Singapore as the seat.

A dispute subsequently broke out between the parties regarding the circumstances under which the SPSSA was entered into. The Buyer then commenced arbitration proceedings against the Sellers in Singapore. The arbitral tribunal ("the Tribunal") ruled in favour of the Buyer and granted an award of damages payable by the Sellers (including the Minors) on a joint and severally liability basis ("the Award").

Simultaneous proceedings for leave to enforce the Award were then commenced by the Buyer in the New Delhi and Singapore High Court. The New Delhi High Court ("DHC") was the first to give judgement. It allowed enforcement of the Award against the Sellers, but not the Minors on the ground of public policy ("the DHC Judgement"). In the SGHC, which was the seat court, the Sellers' contended that the Award should not be enforced because it ought to be set aside for being awarded outside the scope of the Tribunal's jurisdiction: the Tribunal was not allowed to grant an award against the Minors. The Buyer responded by arguing that the Sellers were precluded from litigating the jurisdictional challenges to the award on the basis of issue estoppel as those same issues were already canvassed before and decided by the DHC in the DHC Judgement. The SGHC ultimately dismissed the Seller's points on the merits and enforced the award against the Sellers sans the Minors.

The Buyer's claim of issue estoppel raised two issues. The first is whether a foreign enforcement court judgement can give rise to issue estoppel at the seat court and the second is whether a foreign

enforcement judgement ruling on arbitrability or public policy can give rise to issue estoppel. The SGHC answered in the negative for both. As an aside, the court also dealt with an issue unrelated to this case: whether the judgements in one enforcement jurisdiction can create issue estoppel in another enforcement jurisdiction. It was the court's opinion that issue estoppel can arise in such a situation. The rest of this article shall explore whether the SGHC was correct to make these findings.

III. ENFORCEMENT COURT & FOREIGN ENFORCEMENT COURT JUDGEMENT

The issue here is whether issue estoppel can or should arise from a foreign enforcement judgement in an enforcement proceeding. As a preliminary, it should be pointed out that there are two types of enforcement situations that the Singapore court can face: enforcing a *domestic* international award (i.e. tribunal's seat was Singapore) and enforcing a *foreign* international award (i.e. tribunal's seat was not in Singapore). The latter is governed by the *International Arbitration Act*[3] ("IAA") while the former is governed by the *UNCITRAL Model Law*[4] ("Model Law"). This is an important distinction as it would impact whether issue estoppel can apply at the enforcement court. We shall now look at each type of award in turn.

A. Foreign awards

A foreign court judgement can give rise to two different issue estoppel situations: (1) an estoppel operating *in favour* of enforcement, which is usually when the judgement enforced the award, and (2) an estoppel that operates *against* enforcement, which is usually when the judgement refused to enforce the award.[5] *BAZ v BBA* suggests that both kinds of foreign enforcement judgements can give

[3] (Cap 143A, 2002 Rev Ed) [IAA].

[4] Schedule I of the IAA, *supra* note 3.

[5] Renato Nazzini, "Enforcement of International Arbitral Awards: Res Judicata, Issues Estoppel, and Abuse of Process in a Transnational Context" (2018) 66:3 Am J Comp L 603 at 630 [Nazzini].

rise to issue estoppel but the IAA and New York Convention[6] ("NYC") actually only allows situation (1). Notwithstanding this, issue estoppel should not be applied at all for policy reasons.

B. Current case law position

BAZ v BBA opined that issue estoppel can arise in situations (1) and (2) because it is an implied ground for refusing enforcement under IAA section 31(2). When enforcing international foreign awards, the Singapore court applies IAA sections 31(1) and 31(2) which are in *pari materia* with NYC Article V.[7] Even though there is no express section for issue estoppel in the IAA and NYC, the court found that it exists as an implied ground for refusal.[8] This is as Article V(1)(e) references a foreign judgement's decision (the seat court's) as a ground for denying enforcement which must necessarily imply the use of issue estoppel in enforcement proceedings.[9]

Singapore jurisprudence is silent on *BAZ v BBA*'s position but English cases support the applicability of issue estoppel in both situations. *Chantiers De L'Atlantique S.A v Gaztransport & Technigaz SAS*[10] ("*Chantiers*") opined that issue estoppel can arise from a foreign court judgement[11] and *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)*[12] ("*Yukos*") implicitly accepted that issue estoppel can apply in both situations.[13] *Diag Human SE v Czech Republic*[14] ("*Diag*") then went further and held that issue estoppel can arise from a foreign judgement that refused enforcement.

Despite the apparent English support, *BAZ v BBA* is still wrong to allow issue estoppel for situation (2) because of two reasons. First, issue estoppel operating against enforcement cannot be

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[6] Schedule II of the IAA, *supra* note 3.

[7] David Joseph QC & David Foxton QC, *Singapore International Arbitration: Law and Practice*, 2nd ed (Singapore: LexisNexis, 2018) at para 6.10 [Joseph & Foxton].

[8] *BAZ v BBA*, *supra* note 2 at paras 35 to 36.

[9] *Ibid*.

[10] [2014] EWHC 1639 (Comm) [*Chantiers*]

[11] *Ibid* at paras 313–315.

[12] [2012] EWCA Civ 855 [*Yukos*].

[13] As observed by Nazzini, *supra* note 5 at 26 regarding the passage by Rix LJ in *Yukos*, *supra* note 12 at paras 147-149.

[14] [2014] EWHC 1639 (Comm) [*Diag*].

implied under the IAA as the grounds *against* enforcement are exhaustive but not *vice-versa*. Second, issue estoppel is unlikely to be applicable by virtue of being a procedural doctrine under NYC Article III.

Issue estoppel operating against enforcement is not an additional ground for refusal

As a preliminary, issue estoppel cannot be implied under the existing ground in IAA section 31(2)(f) as it expressly refers to only the seat court's decision as a ground for refusing enforcement by issue estoppel.[15] The question is therefore whether section 31(1) permits issue estoppel to be implied as an additional ground for refusing or permitting enforcement.

Section 31(1)'s plain reading indicates that the Article V grounds are a maximum and not a minimum rule so only additional grounds *against* enforcement are precluded under the IAA. Essentially, while enforcement of an award may be refused if the Article V grounds listed in section 31(2) are established, the court is not compelled to do so and has the discretion to allow enforcement.[16]

Although there has yet to be any local cases confirming the court's residual discretion to not refuse enforcement when a ground for refusal is met, it is likely that a future court find it so. For one, English case law has interpreted 'may' as enabling the court to enforce the award anyway despite a ground being met for reasons such as issue estoppel.[17] Second, a future court would prefer to retain discretion over whether to refuse enforcement.[18] Third, even though the SGCA in *BloomBerry Resorts and Hotels Inc v Global Gaming Philippines LLC*[19] recently interpreted 'may not' in Model Law section 34(3) as meaning 'must not',[20] the decision would likely be confined to section 34(3) and not extended to other Model Law sections. This is as the holding in that case was in relation to

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[15] Nazzini, *supra* note 5 at 632.

[16] Nazzini, *supra* note 5 at 608.

[17] *Yukos Oil Co v Dardana Ltd*, [2002] EWCA Civ 543 at para 8; *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*, [2010] UKSC 46 at para 67 [*Dallah*].

[18] Joseph & Foxton, *supra* note 7 at para 6.13.

[19] [2021] SGCA 9.

[20] *Ibid.*

the deadline for commencing setting aside proceedings and not the grounds for refusing enforcement.[21]

As there are no specified limits on the court's discretion to permit enforcement but not *vice-versa*, it follows that Article V allows enforcement courts to apply rules of national law that are more favourable to enforcement but not rules that are less favourable to enforcement.[22] Accordingly, issue estoppel that operates against enforcement cannot be implied as a new ground for refusing enforcement because it would make enforcement more difficult. Issue estoppel favouring enforcement would however be allowed as it makes enforcement easier.

Applying these principles to the trio of English cases, we find that only *Chantiers* and *Yukos* were correct while *Diag* was wrong. It is therefore submitted that a future court should not place much weight on *Diag*. We shall now look at how the estoppel operated in each case to show why the first two cases are more persuasive than the third.

Starting with *Chantiers*,[23] the award creditor first attempted to enforce an award given by an arbitral tribunal seated in London against the award debtor in France. During which, the award debtor claimed that the award was unenforceable as it was tainted by fraud, but the French court dismissed it and found the award enforceable. The award debtor then sought to set aside the award in the seat court (the English court) which the court then dismissed for lacking merit. As any issue estoppel arising from the French enforcement judgement would have prevented the award debtor from raising the same fraud allegations in subsequent proceedings to oppose enforcement, the estoppel worked in favour of enforcement and thus Flaux J's obiter that issue estoppel could have arisen in the case was correct.[24]

Turning to *Yukos*,[25] the case also involved issue estoppel operating in favour of enforcement. The award creditor first attempted to enforce an award accorded by a tribunal seated in Russia against the award debtor in the Netherlands. The award debtor however claimed that the award was

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[21] *Ibid.*

[22] Nazzini, *supra* note 5 at 608.

[23] *Chantiers*, *supra* note 10.

[24] Nazzini, *supra* note 5 at 631.

[25] *Yukos*, supra note 12.

unenforceable for having been set aside by the seat court in Russia. Notwithstanding this, the Dutch enforcement court upheld the enforceability of the award. The award creditor then sought to enforce the award in the UK but the award debtor raised the same arguments to prevent enforcement. Here, issue estoppel would have favoured enforcement because, if it was established, it would have deprived the award debtor of possibly relying on the award's setting aside as a ground for opposing enforcement under Article V.[26] As such, Rix J's implicit endorsement of issue estoppel operating would be correct – but only if it was limited to the kind of estoppel found in *Yukos*.

In *Diag*,[27] the issue estoppel operated against enforcement instead. The case involved an award creditor who was previously denied enforcement in Austria seeking enforcement in the UK. The English Commercial Court denied enforcement on the basis that the judgement by the Austrian Supreme Court gave rise to issue estoppel against the award creditor. This decision is however wrong because the estoppel here worked against enforcement[28] – it prevented the award creditor from raising the same arguments favouring enforcement in the English court. This basically meant that *Diag* was the exact situation in which a court relies on a foreign non-seat court's refusal of enforcement as a ground to refuse enforcement, which is technically not allowed under the Model Law. It would thus be advisable for a future Singapore court to follow *Chantiers* and *Yukos* instead of *Diag*.

Issue estoppel is unlikely to be a procedural doctrine under NYC Article III

Some argue that issue estoppel operating against enforcement is permitted under the NYC, not as a separate ground for refusal under Article V, but rather as a part of the procedural grounds in Article III.[29] It is said that issue estoppel is only a procedural rule because the ground for refusal remains the ones in Article V: estoppel only operates to preclude a party from denying the presence of certain

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[26] Nazzini, *supra* note 5 at 631.

[27] *Diag*, *supra* note 14.

[28] Nazzini, *supra* note 5 at 632.

[29] Tom Childs, "Enforcement of International Arbitral Awards Should A Party Be Allowed Multiple Bites at the Apple?" (2015) 26:2 The Am. Rev. of Int'l Arb 269 at 275 [Childs].

facts or legal points when they claim that an Article V ground applied.[30] Accordingly, issue estoppel is argued to be a procedural doctrine that falls under Article III which allows the Contracting state to enforce awards "in accordance with the rules of procedure of the territory where the award is relied upon".[31]

While it is admittedly possible on the plain words of Article III to treat issue estoppel as a procedural doctrine, a purposive reading of the NYC should discourage this. The fact that Article V(1)(e) *only* refers to the decision of a foreign seat court setting aside the award as a ground for refusing enforcement must mean that the decision of enforcement courts cannot have the same preclusive effect.[32] If it was otherwise then the NYC would have expressly indicated as so.[33] Also, the existence of Article V(1)(e), which is an application of issue estoppel from the decision of the seat court, as a substantive ground under Article V implies that issue estoppel is to be treated as a substantive ground for the purposes of Article V. Moreover, the NYC's primary objective is to make the enforcement of foreign awards easier[34] so the grounds for refusing enforcement should be narrowly interpreted whenever there is any ambiguity.[35] Section 31(2) should thus be interpreted as excluding issue estoppel operating against enforcement. As Singapore takes a 'pro-enforcement' stance towards foreign awards,[36] this interpretation would also have the added benefit of keeping in line with the contemporary judicial trend.

Policy arguments against allowing issue estoppel operating in favour of enforcement

Although issue estoppel operating in favour of enforcement can potentially arise under the IAA, the enforcement court should be slow to apply it because the benefit of getting greater finality in enforcement proceedings does not outweigh the much greater loss to fairness to the award debtor.

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[30] Nazzini, *supra* note 5 at 632.

[31] Childs, *supra* note 29 at 275.

[32] Nazzini, *supra* note 5 at 632.

[33] *Ibid.*

[34] Gary Born, *International Commercial Arbitration*, 3rd ed (The Hague: Kluwer, 2020) at 3721 [Born]

[35] Nazzini, *supra* note 5 at 632

[36] *Aloe Vera of Am. Inc. v Asianic Food (S) Pte Ltd*, [2006] SGHC 78 at para 40

The main argument favouring issue estoppel is that it promotes finality in arbitration proceedings. Finality is seen as highly desirable in international arbitration because it would be wasteful to allow the unsuccessful party to litigate the same points *ad nauseam* around the world.[37] It is thus argued that enforcement courts from various jurisdictions should mutually recognise and enforce each other's decisions to achieve this goal.[38]

However, the objective of achieving finality should not be prioritised over the more important objective of ensuring fair enforcement judgements. While speed is good to have, what is absolutely crucial to international arbitration is the ability to earn the trust of the parties involved. This is as the whole process is ultimately optional and consensual and so if the parties do not view arbitration as fair and reliable then chances are they will not agree to use it. Unfairness in arbitration system would thus pose a greater existential threat to international arbitration than a failure to encourage award finality.

Issue estoppel, by creating an unacceptable risk that enforcement judgements would be unfair, should thus be avoided. The doctrine undermines an enforcement judgement's fairness by precluding an unsuccessful party from raising the same points for re-evaluation, even if the prior enforcement court erroneously dismissed them on politically biased or patently erroneous grounds[39] – a risk not insignificant due to the summary nature of enforcement applications.[40] Moreover, the doctrine would perpetuate any wrongly decided foreign enforcement judgements. This problem would then be compounded by the court's lack of residual discretion to refuse enforcement where the estoppel favours enforcement, as the estoppel prevents any Article V ground from being

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[37] The Honourable Chief Justice Sundaresh Menon, "Patron's Address" (2015) 81:4 Arbitration: The Int'l J of Arb, Med and Dispute Management 413 at 424.

[38] Lord Jonathan Mance, "Arbitration – a Law unto Itself?" (4 November 2015) 30th Annual Lecture organized by The School of International Arbitration and Freshfields Bruckhaus Deringer 1 at 14.

[39] Maxi Sherer, "Effects of Foreign Judgements Relating to International Arbitral Awards: Is the 'Judgement Route' the Wrong Road?" (2013) 4:3 J. Int'l Dispute Resolution 587 at 622 to 623 [Sherer].

[40] Born, *supra* note 34 at 4164.

established.[41] This is especially problematic since issue estoppel is an equitable doctrine "subject to the overriding consideration that it must work justice and not injustice".[42]

Issue estoppel also promotes 'forum shopping' which penalises the award debtor. As the doctrine makes the first enforcement court's decision determinative on subsequent courts, the parties would be incentivised to 'forum shop' to take advantage of the first judgement's preclusive effect.[43] The award creditor will thus seek the most lenient enforcement jurisdiction for first enforcement while the award debtor will seek the strictest one.[44] This massively handicaps the award debtor because it is the award creditor who chooses where enforcement proceedings are to be initiated and even if the award debtor can pre-empt the award creditor by first getting a 'negative declaration' that the award is unenforceable from an enforcement court of his choice, very few countries allow negative declarations.[45]

Finally, issue estoppel undermines the seat court's role under NYC Article V(1)(e). To illustrate, if an enforcement court in Country A refuses enforcement, which generates an issue estoppel in other enforcement jurisdictions, then the decision in Country A would have the same practical effect as a setting aside judgement at the seat court.[46] This would amount to an inappropriate intrusion into the seat court's exclusive power to set aside awards.[47] Accordingly, in the absence of a seat court judgement, each jurisdiction should independently consider whether the award should be enforced under the NYC without giving preclusive effect to enforcement decisions of other jurisdictions.[48]

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[41] Nazzini, *supra* note 5 at 632.

[42] *The "Good Challenger"*, *supra* note 1 at para 54.

[43] Sherer, supra note 39 at 622 to 623.

[44] *Ibid.*

[45] Childs (2015), *supra* note 29 at 274 & Herbert Kronke et al., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary* (The Hague: Kluwer, 2010) at 133-35.

[46] Matthew Barry, "The Role of the Seat in International Arbitration: Theory, Practice, and Implications for Australian Courts" (2015) 32 J. Int'l Arb. 289 [Barry], citing Chief Justice Allsop at 319.

[47] Sebastian Perry & Richard Wolley, "Issue estoppel halts enforcement in London" (29 May 2014) Global Arbitration Review.

[48] Born, *supra* note 34 at 4163.

C. Domestic awards

The SGHC in *BAZ v BBA* expressed *obiter* support for issue estoppel to apply to domestic awards regardless of whether (1) it is *in favour of* or (2) *against* enforcement. As IAA section 19 is in alignment with the Model Law grounds for refusing enforcement, which is in turn in *pari materia* with NYC Article V,[49] situation (1) is possible for the reasons expressed in Part A of this section. Although situation (2) is theoretically possible under section 19's wide wording, a future court should not take advantage of this pliability to permit issue estoppel operating against enforcement as it would go against the prevailing judicial position that the court's wide discretion must be exercised in a pro-enforcement way.

Preliminary issue: Can the court refuse enforcement of a domestic award in Singapore?

While it is clear that the courts can refuse enforcement of foreign awards, it was previously unclear whether the same applied to domestic awards. The ambiguity arose from this: while foreign awards can be refused enforcement locally by virtue of IAA sections 31(2) and 31(4), the same arguably did not apply to domestic awards as Model Law Articles 35 and, in particular, 36 lack the force of law in Singapore by virtue of IAA section 3(1). It was thus argued that a domestic award cannot be refused enforcement in Singapore.[50]

It is now clear that domestic awards can be refused enforcement as the ambiguity was resolved by the Singapore Court of Appeal in *PT First Media TBK v Astro Nusantara International BV*[51] ("*PT First Media*") which held that domestic awards can be refused enforcement locally via section 19 of the IAA. Basically, refusal of enforcement is possible because section 19 gave the court the discretion to enforce a domestic award which section 3(1) did not override.[52] This is as the legislative intent behind section 3(1) was just to avoid conflict with the New York Convention's enforcement of

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[49] *Ibid* at 3762.

[50] *PT First Media TBK v Astro Nusantara International BV*, [2014] 1 SLR 372 at para 18 [*PT First Media*].

[51] *Ibid.*

[52] *Ibid* at para 85.

foreign awards and not to remove the court's right to enforce domestic awards.[53] Section 3(1)'s exclusion of Articles 35 and 36 thus only prevents the court's discretion to enforce domestic awards from being limited to the Model Law grounds and does not remove their ability to refuse them.[54]

Can issue estoppel be applied under IAA section 19?

When applying section 19, case law stipulates that the court should "align the exercise of that discretion with the grounds under Art 36".[55] Whether a court can use issue estoppel to deny enforcement of a domestic award would thus depend on whether issue estoppel is a ground for refusing enforcement under Article 36. This would in turn depend on whether the Model Law grounds are exhaustive as there is no article which provides for the application of issue estoppel.

BAZ v BBA implicitly found the Model Law grounds as non-exhaustive. The SGHC opined that Article 5's plain words gives room for residual domestic law to apply to enforcement proceedings: the Model Law only blocks the court from intervening *in matters governed by the Model Law*. This, according to the court, meant that "what was not governed by [the Model Law] must be governed by the other rules of domestic law".[56] Issue estoppel, a domestic law doctrine, can thus apply notwithstanding its absence as a ground for refusing enforcement under Article 36.[57]

The Article 36 grounds are however exhaustive as per its plain words. The court apparently ignored the phrase "may be refused only [if the Article 36 grounds are met]"[58] – it means that the Model Law omits all grounds, save those listed in Articles 36(1) and 36(2), as the basis for the court to exercise their discretion to deny enforcement of a domestic award. Article 36 therefore encompasses all possible issues arising from the proceedings which would exclude any room for domestic law, such as issue estoppel, to come in as an additional ground for refusal via Article 5.

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[53] *Ibid.*

[54] *Ibid.*

[55] *Ibid* at paras 86 to 90.

[56] *BAZ v BBA*, *supra* note 2 at para 37.

[57] *Ibid.*

[58] Section 36(1) of the IAA, *supra* note 3.

Accordingly, case law must depart from their alignment with the Model Law for issue estoppel to apply as a ground for refusal. This is possible because the basis for enforcing domestic awards is IAA section 19 and not Model Law Articles 35 and 36 by virtue of IAA section 3(1).[59] As section 19 does not stipulate how the power should be exercised, it has been interpreted to confer wide discretion on the court to decide the applicable rules for enforcement so long as it adheres to the Model Law's overarching philosophy for enforcement.[60] Therefore, if a future court interprets that 'overarching philosophy' as excluding the exhaustive nature of the Model Law grounds then issue estoppel can be introduced as an additional ground for refusing enforcement. This should however not be done as it would go against the widely accepted view that the Model Law is pro-enforcement, which is to be embodied by having specially identified exceptions to enforcement.[61]

IV. SEAT COURT & FOREIGN ENFORCEMENT COURT JUDGEMENT

The issue here is whether issue estoppel can or should arise from a judgment of another foreign enforcement court in setting aside proceedings at the seat court. Similar to the enforcement situation, issue estoppel here can either operate (1) in *favour of* or (2) *against* setting aside the award. It is likely that issue estoppel can only arise in situation (2) but not (1). Notwithstanding this, a future court should still avoid applying issue estoppel in (2).

A. Current case law position

The SGHC in *BAZ v BBA* held that courts should be slow to recognise issue estoppel arising from a prior enforcement judgement as a seat court's determination should be given primacy over an enforcement court's determination.[62] The SGCA has yet to decide on this but English law has

[59] *PT First Media*, supra note 50 at paras 86 to 90.

[60] *Ibid* at para 50.

[61] Born, *supra* note 34 at 3164 & 3718.

[62] *BAZ v BBA*, *supra* note 2 at para 51.

voiced *obiter* support for it arising in situations (1) and (2).[63] Both the Singapore and English positions are however flawed for the reasons below.

B. Issue estoppel operating in favour of setting aside cannot apply under the Model Law

The grounds for a seat court to set aside an award are enshrined in IAA section 24 read with Model Law Article 34(2). Similar to NYC Article V, the grounds in Article 34(2) are exhaustive, but only for the grounds *to set aside* and not the grounds *to refuse* setting aside. Regarding the former, Singapore case law clearly states that the IAA provides the only grounds on which an award can be set aside[64] and thus courts have rejected expanding the grounds to include doctrines such as '*Wednesbury* unreasonableness'.[65] Although there is no case authority for the latter, it should be permitted. This is as the grounds in Article 34(2) are aligned with those in NYC Article V, minus Article V(1)(e) which cannot apply in a setting aside proceeding,[66] such that the characterisation of the NYC grounds as a maximum and not a minimum rule[67] can also apply to Article 34(2). Article 34(2) thus prohibits additional grounds for setting aside but not more grounds for refusing setting aside. As such, only the application of issue estoppel operating *against* setting aside is permitted.

C. Issue estoppel operating against setting aside should not be applied under the Model Law

Although issue estoppel operating against setting aside can arise under the IAA, a court should not apply it because there are strong doctrinal and practical problems with doing so.

From a doctrinal standpoint, *BAZ v BBA* was correct to find that the seat court has primacy over the enforcement courts and should thus not defer to prior enforcement decisions.[68] There are three theories as to the role of the seat court which affects its primacy *vis-à-vis* the enforcement courts: the

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[63] *Dallah*, *supra* note 17 at para 39.

[64] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*, [2007] 1 SLR(R) 597 at paras 54-55 and 57 and *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*, [2007] 3 SLR(R) 86 at paras 60-66.

[65] *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd*, [2010] 3 SLR 1 at para 19.

[66] Born (2020), *supra* note 34 at 3438-3439.

[67] *Ibid* at 3435.

[68] *BAZ v BBA*, *supra* note 2 at para 51.

monolocal, multilocal and transnational theories.[69] Singapore likely follows the monolocal approach which means the seat court enjoys primacy.

Under the transnational theory, an arbitral award's validity "derives from a distinct arbitral legal order" and not from any national or seat legal order.[70] The seat court therefore has no primacy over the enforcement court. This theory is however unpersuasive because international arbitration cannot be a "*truly* distinct legal order" when national legal orders retain the ability to review such awards by enforcement or setting aside.[71]

Under the multilocal theory, "the validity of the arbitral award derives not only from the seat, but from all legal orders in which recognition and enforcement of the award are sought" hence a seat court does not have primacy over an enforcement court.[72] Some argue that this approach should be taken to protect parties against the 'local peculiarities' of the seat court.[73] This is however unpersuasive because it undermines the more important arbitration principle of respecting the parties' intention to settle their dispute in a neutral jurisdiction of their choice. The choice of seat is an express intention by the parties to submit their dispute to the seat's court and law[74] that is often made through careful consideration of the jurisdiction's neutrality and quality of its arbitration law and judges.[75] As the parties have made an informed choice as to the seat, the law need not protect them from unexpected bias by the seat court because they have made their bed and must lie on it. The alternative argument that the enforcement jurisdiction is more relevant to the dispute and hence

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[69] Barry, *supra* note 46 at 294.

[70] *Ibid* at 299-301.

[71] *Ibid* at 300-301.

[72] *Ibid* at 297.

[73] Jan Paulsson, "Delocalisation of International Commercial Arbitration: When and Why it Matters" (1983) 31:1 Int'l & Comparative L. Q. 53 at 54.

[74] Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd ed (London: Sweet & Maxwell, 2007) at para 146 [Poudret & Besson].

[75] Francis Mann, "The UNCITRAL Model Law: Lex Facit Arbitrum" in Martin Domke & Pieter Sanders, eds, *International Arbitration: Liber Amicorum for Martin Domke* (Leiden: Martinus Nijhoff, 1967) & Noah Rubins, "The Arbitral Seat is No Fiction: A Brief Reply to Tatsuya Nakamura's Commentary" (2001) 16 Mealey's Int'l Arb. Report 12.

should be deferred to by the seat[76] is also unpersuasive. To do so would contravene the parties' desire for neutrality because an enforcement court is chosen for its close connection to the dispute and may thus unfairly advantage one party over the other.

Under the monolocal theory, the seat court has primacy over determining an award's validity because "an arbitral award derives its legal validity exclusively from the legal order of the seat".[77] This approach should be followed for the reasons above and because Singapore case law already supports this proposition implicitly: it has been held that there would no longer be any award to enforce if the award has been set aside at the seat because the seat's act of setting aside renders the award void *ab initio*.[78]

From a practical standpoint, the promotion of finality in litigation[79] is not a compelling reason for applying issue estoppel to setting aside proceedings for three reasons. First, applying issue estoppel operating against setting aside denies the court any discretion to refuse setting aside even if the prior enforcement judgement was wrong – a risk not insignificant due to the summary nature of enforcement proceedings.[80] This is as issue estoppel will require the seat court to accept the enforcement's court finding that no ground under Article V (and thus also Article 34(2)) is established. Second, the pro-enforcement stance of enforcement courts also necessitates the seat court to make their own careful judgement instead of simply following other jurisdictions. Apart from the French courts,[81] major jurisdictions defer strongly to the seat court's decision.[82] Following a wrongly decided enforcement decision at the seat would thus spread the error down the line to the various enforcement jurisdictions. Third, a seat court would likely have great difficulty applying issue estoppel anyway. This is as it may be challenging to determine what exactly drove the foreign court

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[76] Emmanuel Gaillard, *Legal Theory of International Arbitration* (Leiden: Matrinus Nijhoff, 2010) at 32.

[77] Barry, *supra* note 46 at 294 to 295.

[78] *PT First Media*, *supra* note 50 at paras 76 to 77.

[79] *BAZ v BBA*, *supra* note 2 at para 47.

[80] Born, *supra* note 34 at 4164.

[81] CA Paris, 12 February 1993, *Unichips Finanziaraia v Gesnouin*.

[82] Barry, *supra* note 46 at 312.

to decide the way it did, especially if the court used different legal rules, procedures and techniques.[83] *BAZ v BBA* was thus correct not to apply issue estoppel at all.

V. PUBLIC POLICY & ARBITRABILITY

The SGHC's finding in *BAZ v BBA* that issue estoppel cannot arise under the public policy and arbitrability grounds for setting aside and refusing enforcement of an award is only accurate as a general proposition. Issue estoppel can arguably arise when the foreign enforcement judgement actually considered the instant jurisdiction's public policy. It should however not be done as a foreign court would not be well placed to determine the instant jurisdiction's public policy concerns.

In *BAZ v BBA*, the SGHC held that issue estoppel cannot arise from a prior enforcement judgement under the public policy and arbitrability grounds in the Model Law (and presumably also the IAA and NYC grounds) because "the public policy and the test for arbitrability are unique to each state" such that "there would be no identity of subject matter even if the ground of arbitrability or public policy has been raised before a different court".[84] The DHC Judgement therefore created no issue estoppel at the Singapore seat court because although the issue at hand in both cases pertained to the law for minors, the public policy that underpinned the law for each jurisdiction differed.

The SGHC's finding of no issue estoppel is correct, as a general principle, because the public policy considered cannot be purely 'international', which means that identity of subject matter is normally absent. The relevant sections in the Model Law, IAA and NYC[85] expressly reference the application of the *setting aside* or *enforcement* jurisdiction's public policy instead of *international* public policy so the consideration of 'purely' international public policy must be prohibited.[86] A purposive reading supports this interpretation: the public policy ground is supposed to be an escape mechanism to allow national courts to deny effect to awards when it conflicts with the instant state's

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[83] *Ibid* at 318.

[84] *BAZ v BBA*, *supra* note 2 at para 50.

[85] Section 31(4)(b) of the IAA, *supra* note 3; Article 34(2)(b) of the Model Law; Article V(2) of the NYC.

[86] Born, *supra* note 34 at 4013 to 4014.

public policy and not to enforce international principles.[87] It is therefore only national public policies which mandatorily apply to international matters under national law that can fall within the public policy ground.[88] Since the basis of such public policy is national law, the rationale for which necessarily varying from country to country, it follows that issue estoppel cannot arise from a foreign judgement considering the foreign enforcement jurisdiction's public policy in a setting aside proceeding which considers the seat's public policies.

However, if the foreign enforcement judgement considered the instant jurisdiction's public policy then issue estoppel can potentially arise because the public policies considered in both proceedings would be similar. To use *Victrix S.S. Co. v Salen Dry Cargo AB*[89] as an illustration: the US enforcement court in that case was obliged, under national law, to consider the effect of enforcing the award on Swedish public policy so arguments relating to Swedish public policy were raised and dealt with in the judgement. If enforcement was subsequently sought in Sweden and the issues pleaded were those pertaining to Swedish public policy, then issue estoppel can arguably arise from the US case as the same Swedish public policy issues would be re-litigated. A setting aside and enforcement court should however not apply issue estoppel in such a situation because a foreign jurisdiction would not be well placed to correctly apply the public policy considerations of the instant jurisdiction. This would be especially so when the jurisdictions use different legal systems or follow divergent legal traditions.

VI. CONCLUSION

Although Singapore's arbitration law has the potential to herald an era where issue estoppel plays a more potent effect in enforcement and setting aside proceedings, we should not seize this potential. Understandably, the temptation is great. Issue estoppel would promote greater certainty and finality into enforcement and setting aside proceedings. However, we must resist the temptation as these upsides do not compensate for its massive downsides. An expansive issue estoppel regime would not

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[87] *Ibid* at 4014.

[88] *Ibid.*

[89] 825 F.2d 709, 714-15 (2d Cir. 1987).

only go against internationally accepted arbitration principles in law and in spirit, but also unfairly disadvantage the award debtor and aggravate potential errors in the enforcement and setting aside process. It is thus unfortunate that the SGHC in *BAZ v BBA* succumbed to the temptation, albeit partially, by allowing issue estoppel in enforcement proceedings. As such, it is imperative for a future court to eschew the doctrine of issue estoppel completely by repudiating *BAZ v BBA*. While this article recognises that doing so may lead to increased transaction costs for the parties involved and further delay the enforcement or setting aside of the award, it submits that these costs would be a necessary evil for there to be fairness. There is after all no point in having a cheap and speedy arbitration if it would create an unjust result.