The exercise of judicial discretion in relation to applications to enforce arbitral awards under the New York Convention 1958

I Introduction

One of the achievements of the New York Convention of 1958 ('NYC') is the establishment of a harmonised and simplified international regime for the cross-border enforcement of arbitral awards. This feature of the NYC is perhaps the most important reason for the success of the Convention, which has been adopted by approximately 150 states. Article IV NYC creates a presumption that an arbitral award rendered in one NYC country is entitled to recognition and enforcement in other countries which are parties to the Convention. Notwithstanding this presumption, arbitral awards are not entitled to automatic enforcement; national courts are permitted to refuse enforcement in a narrow range of situations – set out in article V NYC and the national legislation which implements it.[1] In broad terms, article V.1 NYC provides that enforcement may be refused if: (a) the arbitration agreement was invalid; (b) the award-debtor was unable to present his case; (c) the dispute was not within the scope of the arbitration agreement; (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement or, in the absence of agreement, with the law of the seat; or (e) the award has been set aside by the courts of the seat. Under article V.2 enforcement may be refused if: (a) the substance of the dispute is not capable of settlement by arbitration;[2] or (b) enforcement would be contrary to the public policy of the enforcing country.[3]

[1] Such as arts 35-36 of the UNCITRAL Model Law on International Commercial Arbitration ('ML'); in England, Part III of the Arbitration Act 1996.

[2] Although art V.2.a NYC expressly includes a choice-of-law rule, by referring to non-arbitrability under the law of the enforcing country, the equivalent provision of the Arbitration Act 1996 (s 103(3)) contains no such qualification. This drafting difference invites the suggestion that the English court might legitimately refuse cross-border enforcement of an award in a case where, although the subject matter of the dispute is arbitrable under English law, it is not arbitrable under the law of another country (in particular, the law of the seat). Indeed, it might seem logical for the English court to refuse enforcement in such a case: see Danov, 'The law governing arbitrability under the Arbitration Act 1996' [2008] LMCLQ 536, 543). However, there is no binding authority on the point and it seems unlikely that this situation would arise in practice: if the dispute is not arbitrable under the law of the seat, a challenge to the tribunal's jurisdiction should be accepted by the tribunal (see Danov, 'The law governing arbitrability under the Arbitration Act 1996' [2008] LMCLQ 536; Arfazadeh, 'Arbitrability under the New York Convention: the *Lex Fori* Revisited' (2001) 17 Arb Int 73; see also *ICC Case No. 6162, Final Award* (1992) XVII YB Comm Arb 153; *ICC Case No. 8420, Partial Award* (2000) XXV YB Comm Arb 328) – in which case there would be no award to enforce – or, if the tribunal dismisses the jurisdictional challenge and renders an award, an application to the courts of the seat for setting aside of the award would succeed (see, for example, art 34.2.b.i ML) – in which case the award-debtor would be able to resist enforcement on the basis of art V.1.e NYC. Accordingly, notwithstanding the potential ambiguity surrounding the English legislation, the discussion which follows assumes that if cross-border enforcement is resisted on the basis that the subject-matter of the dispute is not capable of settlement by arbitration, it will be the non-arbitrability doctrine of the enforcing country which is relevant (as indicated by the text of art V.2.a NYC).

[3] A similar approach is to be found in situations where an award-debtor applies to the courts of the seat to have the award set aside. Article 34 ML, which closely follows the text of article V.1.a–d NYC, provides that the court 'may' set aside an award if certain conditions are satisfied. Under English law, the provisions for setting aside for lack of jurisdiction (s 67) or procedural irregularity (s 68) are constructed differently: under s 67, if the tribunal lacked substantive jurisdiction, the award must be set aside; under s 68, if the claimant establishes one of the 'serious irregularities' listed in s 68(2) and the court is satisfied that the irregularity has caused or will cause substantial injustice to the applicant, the award must be remitted to the tribunal or set aside.

From a brief perusal of the literature, the reader might imagine that article V NYC establishes a discretion which is general and equally applicable to each of the grounds for non-enforcement. Leading commentators state, for example, that 'even if one of the grounds listed which would justify refusal of enforcement is proven by the award-debtor, the court has a residual discretion to enforce the award.'[4]

Although, this view is supported by a literal reading of article V NYC, it is potentially misleading. The argument which is developed in the pages which follow is this: it is not helpful to understand judicial practice in this area in terms of the exercise of discretion by enforcing courts; the legal framework is better understood in terms of a general principle to which there is a small number of limited exceptions. Ultimately, the decision to order cross-border enforcement of an arbitral award under the NYC in spite of a ground for non-enforcement being established is discretionary only in a formal sense; in substance, whether an award rendered on one country is enforced in another depends on the application of an established framework of rules and principles. 'Hard cases', to the extent that they can be said to exist, are more likely to be the result of disagreements over how provisions of the NYC should be interpreted than a consequence of uncertainty surrounding the operation of judicial discretion under article V NYC.

The discussion which follows is divided into three sections. First, although one does not want the analysis to get bogged down in purely conceptual questions, there needs to be some consideration of what 'discretion' means and its potential role within the framework of article V NYC (II). Secondly, various possible hypotheses about the operation of article V NYC are tested against decided cases and academic commentary (III). In terms of its basic design and objective, this part of the discussion owes a considerable debt to a thought-provoking article written by Simon Gardner (albeit in a completely different context) towards the end of the twentieth century.[5] Thirdly, the analysis ends with a short conclusion (IV).

II What is meant by 'discretion'?

Throughout the common law, judges are described as operating within a system permeated by judicial discretion: for example, the grant of equitable remedies (such as injunctions and orders for specific performance) is said to depend on the exercise of the court's discretion;[6] in the field of private international law, where legal proceedings are brought in England as of right against a non-EU domiciled defendant, whether proceedings should be stayed on the basis of the doctrine of *forum non conveniens* involves an exercise of discretion.[7] What does the word 'discretion' signify in these propositions?

In the context of jurisprudential debates about the nature of law and legal adjudication, Ronald Dworkin drew attention to three different ways in which the word 'discretion' is

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[4] Lew, Mistelis & Kroll, *Comparative International Commercial Arbitration* (2003) para 26-68.

[5] Gardner, 'The Remedial Discretion in Proprietary Estoppel' (1999) 115 LQR 438.

[6] See, for example, the statement that, outside the area of agreements for the sale or the lease of land, the grant of specific performance 'is somewhat exceptional and discretionary': Maitland, *Equity* (1929) p 240.

[7] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 470.

conventionally used.[8] First, a judge can be said to have discretion when he must use judgment in applying legal rules which cannot be applied mechanically. Whenever a rule makes use of open-textured words or concepts (such as 'reasonable', 'fair' or 'in good faith'), the judge has to decide whether the case at hand falls within the scope of the rule. For example, article V.1.b NYC provides that cross-border enforcement of an arbitral award may be refused if, *inter alia*, the award-debtor 'was not given *proper* notice of the appointment of the arbitrator'. The NYC does not indicate what 'proper' means for the purposes of this provision; the enforcing judge's role is to exercise his or her judgment in the light of the facts of the case.

As Gardner notes, the interpretation of rules, the determination of facts and the interaction of law and fact, all involve the exercise of judgment – and might be said to involve discretion in a 'background' sense.[9] Dworkin describes this sort of background discretion, which is inherent in the activity of judging, as 'weak'. But, this sort of background discretion is not what is meant in a sentence such as: 'The effect of [Article 30 of the Brussels I Regulation Recast] …. is that any court other than the court first seised may, as a matter of discretion, stay its proceedings.'[10] Similarly, weak or background discretion is not the sort of discretion which is postulated in the statement that, in relation to article V NYC, 'even when a ground for refusing enforcement is established, the court retains a discretion to enforce the award.'[11]

Secondly, according to Dworkin, a decision-maker can be said to have discretion when his decision is final in the sense that it is not subject to being reviewed and reversed by any other official. Dworkin states that the highest court of appeal within a legal system has discretion in this sense. Again, this type of discretion is 'weak' and is not the sort of discretion which is being considered in the context of discussions concerning the operation of article V NYC.

Thirdly, within Dworkin's typology, a judge has discretion – in a 'strong' sense – when his decision is not constrained by any binding standards. That is to say, the judge exercises 'strong' discretion when the binding rules and principles run out. (In the discussion which follows, the word 'discretion' is used to signify 'strong' discretion, unless the contrary is indicated.) Although a major objective of his jurisprudential project is to show that judges do not exercise 'strong' discretion in hard cases, Dworkin does acknowledge – almost in passing – that the structure of a binding legal rule or a corpus of rules may, in fact, confer discretion. In this regard, Dworkin recognises that there are occasions when judges see themselves as exercising discretion 'when passing sentences under criminal statutes that provide a maximum and a minimum penalty, or when framing equitable relief under a general equity jurisdiction.'[12]

There is discretion in a 'foreground' or 'strong' sense when 'the law, not even appearing to assert a firm standard, overtly invites and requires the judge to make a personal choice.'[13] At

[8] *Taking Rights Seriously* (1977) pp 31-9, 68-71.

[9] Gardner, 'The Remedial Discretion in Proprietary Estoppel' (1999) 115 LQR 438, 442.

[10] Hill & Chong, *International Commercial Disputes* (4th edn, 2010) para 9.1.1.

[11] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2005] 1 CLC 613 at [11].

[12] *Taking Rights Seriously* (1977) p 71.

[13] Gardner, 'The Remedial Discretion in Proprietary Estoppel' (1999) 115 LQR 438, 442.

this point, the decision-maker's discretionary ruling may be thought to be ill-judged or inappropriate, but it cannot be categorised as legally wrong.[14] It would appear that the word 'discretion' is being used in this 'strong' or 'foreground' sense by the commentator who states that 'even if a party against whom the award is invoked proves the existence of one of the grounds for refusal of enforcement, the court still has a certain discretion to overrule the defence and to grant the enforcement of the award.'[15]

III Possible hypotheses

The structure of this section is designed to facilitate an analysis of six hypotheses which might be thought capable of encapsulating the way in which national courts decide cases within the framework of article V NYC (and how they should do so). This section starts by looking at (and rejecting) the two most extreme hypotheses (1 and 6), before turning to more plausible hypotheses that lie on the spectrum between the extreme points. In terms of the case law, reliance is placed on cases reported in English, in particular cases decided by the English courts. The analysis also makes reference to the works of leading academic commentators.

(A) Hypothesis 1: *Notwithstanding use of the word 'may' in article V NYC, in cases where the award-debtor establishes one of the grounds of non-enforcement, the enforcing court shall refuse to order cross-border enforcement of the award.*

In the past, there has been some debate over whether the English text of the NYC – which states that the court 'may' refuse enforcement in various circumstances – is to be followed in preference to the French text which could be read as implying that, if the award-debtor establishes one of the listed grounds, enforcement must be refused. However, for most courts and commentators, that debate has been resolved definitively in favour of article V NYC being interpreted in a way that allows for enforcement of an award even though the award-debtor establishes one of the grounds for non-enforcement.[16] One commentator notes:

> The discretionary nature of Art. V is now well accepted internationally. There is no longer any argument, or any sustainable argument, that would suggest that the word "may" in Art. V should mean anything other than a discretionary "may" as opposed to a mandatory "shall".[17]

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[14] This sentence somewhat over-simplifies the position: in certain situations, the exercise of discretion by a first instance judge may be reviewed by an appellate court on the basis that the judge failed to take into account a relevant consideration, took account of an irrelevant consideration or reached a decision which was plainly wrong: see Lord Brandon in *The Abidin Daver* [1984] AC 398, 420 (in the context of *forum non conveniens*).

[15] Van den Berg, *The New York Arbitration Convention of 1958* (1981) p 265.

[16] See, for example, Born, *International Arbitration: Law and Practice* (2012) p 381 (art V NYC 'establish[es] an affirmative obligation to recognize awards, subject to specified exceptions – but not to establish an affirmative obligation to deny recognition.'); Paulsson, 'May or Must under the New York Convention: an Exercise in Syntax and Linguistics' (1998) 14 *Arbitration International* 227. In terms judicial authority in England, see the Supreme Court's decision in *Dallah Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [126]-[131].

[17] See Cheng, 'Celebrating the Fiftieth Anniversary of the New York Convention' in van den Berg (ed), *50 Years of the New York Convention* (2009) 14 ICCA Congress Series 679, 680. But, see Reisman and Richardson, 'Tribunals and Courts: An Interpretation of the Architecture of International Commercial

Having said that, there are suggestions in the literature, at least as regards some of the grounds for non-enforcement, that there is, in fact, no room for manoeuvre under article V NYC and that, in certain circumstances, non-enforcement is mandatory. For example, there is a view that, whatever discretion may exist under the other paragraphs of article V NYC, there is no flexibility under article V.1.e (which deals with cases where an award has been set aside by the courts of the seat). Perhaps the foremost exponent of this view is van den Berg – one of the leading commentators on the NYC – who argues that 'the current version of the New York Convention offers no possibility to recognise and enforce an arbitral award that has been set aside in the country of origin.'[18]

This opinion is not easy to accept. Not only does it appear to contradict the earlier view expressed by the same author in his seminal commentary on the Convention,[19] but also it flies in the face of the position adopted by the majority of commentators and by the courts of leading pro-arbitration countries.[20] As will be seen in the discussion which follows, the theory that courts must refuse enforcement whenever the award-debtor establishes a ground for non-enforcement cannot be sustained.

It is worth noting, however, that the willingness of judges to consider ordering cross-border enforcement in spite one of the grounds for non-enforcement being established is partly related to how courts approach the interpretation of the provisions of the NYC. A simple example suffices to explain the point.

The first part of article V.1.d NYC provides, *inter alia*, that enforcement of an award may be refused if the arbitral procedure was not in accordance with the agreement of the parties. It has been argued that courts should construe the grounds for non-enforcement in article V NYC narrowly. According to van den Berg, 'concerning the grounds for refusal of Article V(1) to be proven by the respondent, …their existence should be accepted in serious cases only; objections by respondents on trivial grounds should not be allowed.'[21] Other commentators take the same line[22] and this idea of narrow construction is reflected in the case law in the United States[23] and other jurisdictions.[24]

Arbitration' (2012) ICCA Congress Series No. 16, p 27: 'The text may not be as permissive as some have suggested.'

[18] Van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia' (2010) 27 *Journal of International Arbitration* 179, 196.

[19] *The New York Arbitration Convention of 1958* (1981) pp 265-6.

[20] See, for example, the cases cited by Born, *International Commercial Arbitration* (2nd edn, 2014) p 3429 n 179.

[21] Van den Berg, *The New York Arbitration Convention of 1958* (1981) p 268.

[22] See, eg, Lew, Mistelis & Kroll, *Comparative International Commercial Arbitration* (2003) para 26-68: 'All grounds for refusal of enforcement must be construed *narrowly*; they are exceptions to the general rule that foreign awards must be recognised and enforced.' See also Born, *International Commercial Arbitration* (2nd edn, 2014) ch 26 (in which the same point is made several times in relation to different aspects of art V NYC).

[23] See, eg, *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier*, 508 F2d 969, 973 (2d Cir, 1974) (in relation to the defence of public policy). See also *Polimaster Ltd v RAE Systems Inc*, 623 F3d 832, 836 (9th Cir, 2010); *Steel Corporation of the Philippines v International Steel Services Inc*, 354 FAppx

Suppose that, in response to the award-debtor's argument that cross-border enforcement should be refused because the arbitral procedure was defective, the award-creditor asserts that the deviation from the procedure agreed by the parties was trivial. The enforcing court might adopt one of two modes of analysis. On the one hand, following the approach suggested by van den Berg and others, the court may interpret article V.1.d narrowly and conclude that, because the procedural error was minor, no ground for non-enforcement is established. On the other, the court may interpret article V.1.d NYC literally and accept that, because the arbitral procedure was not in accordance with the parties' agreement, the award-debtor satisfies the requirements of article V.1.d NYC. However, it may go on to decide that, because the procedural error was insignificant, the court is justified in ordering enforcement of the award; article V NYC says only that enforcement 'may' be refused in certain circumstances, not that it 'shall' be refused. Both analyses uphold the award: the first on the basis of a narrow construction of article V.1.d NYC; the second in reliance on 'may' in article V NYC. In reality, of course, both analyses are driven by the same pro-arbitration policy and reach the final decision by reference to the same criterion, namely the perceived insignificance of the procedural defect alleged by the award-debtor. By the same token, neither involves the exercise of 'strong' discretion.

Several commentators advocate not only the narrow interpretation of the grounds of non-enforcement listed in article V NYC but also the overriding of defences to enforcement in appropriate cases. The above analysis shows, however, that the two strands are more likely to be alternative routes to the same conclusion than two cumulative steps of an argument leading to cross-border enforcement. If interpretation of the article V defences is approached in a restrictive way, the award-debtor will be able to establish a ground for non-enforcement only in extreme cases. In such cases, an enforcing court would not normally contemplate upholding the award; one of the purposes of article V NYC is to protect the integrity of the arbitral process and to preclude enforcement if the arbitral process has gone seriously off the rails.

Thus, it can be seen that the extent to which courts may be inclined to enforce an award in spite of one of the grounds for non-enforcement in article V NYC being established is not unconnected to how broadly or narrowly the grounds for non-enforcement are interpreted; the more broadly the grounds are interpreted, the more likely it is that an enforcing court will be tempted to enforce an award in spite of one of those grounds being established. If, however, national courts follow van den Berg's injunction to interpret the provisions of article V NYC restrictively, it is difficult to see how, in most cases, discretion – other than in the first 'weak' sense identified by Dworkin – can come into the picture at all. In other words, whatever the theoretical position might be, the strict construction of the grounds listed in article V NYC may bring about a practical reality which is not very far removed in substance from Hypothesis 1.

689, 694 (3d Cir, 2009); *China Minmetals Materials Import & Export Co v Chi Mei Corporation*, 334 F3d 274, 283 (3d Cir, 2003).

[24] *Companie X SA v Federation Y* (2008) XXXIV YB Comm Arb 810 at [18] (Trib féd, Switzerland); *X SA v Y* (2010) XXXVI YB Comm Arb 337 at [16] (Trib féd, Switzerland); *Sojuznefteexport v JOC Oil Ltd* (1990) XV YB Comm Arb 384, 397 (CA, Bermuda); *Corporacion Transnacional de Inversiones SA de CV v STET International SpA* (1999) 45 OR (3d) 183, appeal dismissed (2000) 49 OR (3d) 414 (CA, Ontario)

(B) Hypothesis 6: *The courts have a general discretion under article V NYC to enforce an award, notwithstanding the fact that the award-debtor establishes a ground for non-enforcement, if it is just in all the circumstances to do so.*

Hypothesis 6, which is at the opposite end of the spectrum from the first one, comes closest to asserting that the use of the word 'may' in article V NYC confers 'strong' discretion on the enforcing court. Some judges seem sympathetic to this hypothesis: there are cases in which courts have repeated the mantra that 'even if a ground of opposition is proved, there is still a residual discretion left in the enforcing court to enforce nonetheless.'[25] Similarly, there is support in judicial statements for the idea that the courts have a general discretion under article V NYC to enforce or refuse enforcement.[26] However, such pronouncements tend to be *obiter* and there appear to be very few decisions (if any) which are based on such an approach. Furthermore, there is a much more significant body of opinion which contends that any flexibility under article V NYC must operate by reference to doctrine or principle, rather than depending simply on the court's perception of what would be fair in any particular circumstances. In *Dardana Ltd v Yukos Oil Company*, for instance, Mance LJ said that he was 'not impressed by' the suggestion that article V 'introduce[s] an open discretion.'[27] Moreover, in the *Dallah* case, the same judge (now Lord Mance SCJ) re-iterated the view that the purpose of 'may' is 'to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have enforcement or recognition refused.'[28]

Although the language of article V NYC places no limits or qualifications on the word 'may', it seems inherently unlikely that the drafters of a legal instrument which was intended to create a uniform international regime for the cross-border enforcement of arbitral awards would have envisaged conferring an open-ended discretion on enforcing courts. Accordingly, Hypothesis 6 is no more convincing than the first one and also must be rejected.

(C) Hypothesis 2: *If the award-debtor establishes a ground for non-enforcement, cross-border enforcement of the award shall be refused unless the award-debtor is estopped from relying on the ground in question or has waived the alleged defect.*

This hypothesis has two elements, neither of which should be particularly controversial. First, as a general rule, if the award-debtor establishes one of the defences to enforcement in article V NYC, the enforcing court should refuse enforcement. Secondly, however, enforcement should not be refused if the award-debtor has waived (or is estopped from relying on) the

[25] Kaplan J in *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd* [1995] 2 HKLR 215 at [49]. See also Gross J in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2005] 1 CLC 613 at [11]: 'even when a ground for refusing enforcement is established, the court retains a discretion to enforce the award.'

[26] See, eg, Feldman J in *Schreter v Gasmac Inc* (1992) 7 OR (3d) 608 ('both recognition and enforcement are in the discretion of the court'); Kaplan J in *China Nanhai Oil Joint Service Corp v Gee Tai Holdings Co Ltd* [1995] 2 HKLR 215 ('The residual discretion enables the enforcing court to achieve a just result in all the circumstances.').

[27] [2002] 1 All ER (Comm) at [8]; see also at [18]. See also Lord Philips CJ in *Kanoria v Guinness* [2006] 2 All ER (Comm) 413 at [25].

[28] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [67] (SC).

defence in question. If this hypothesis is correct, article V NYC, despite use of the word 'may', does not confer discretion (in Dworkin's third sense): Hypothesis 2 suggests simply that, if one of the grounds for non-enforcement is established, article V NYC lays down a general rule (of non-enforcement) to which there is an exception.

(i) THE FIRST ELEMENT: A GENERAL RULE OF NON-ENFORCEMENT

The idea that, if the award-debtor establishes one of the article V grounds, awards should normally be refused enforcement has an evident appeal. It is also the most obvious route for a court to take if it follows van den Berg's suggestion that grounds for non-enforcement should be interpreted narrowly. As Rix LJ opined in the *Dallah* case, although '[t]here is no express provision … as to what is to happen if a defence is proven, … the strong inference is that a proven defence is a defence.'[29] As noted above, Lord Mance SCJ, also in the *Dallah* case, referred to a 'prima facie right to have enforcement … refused' [30] if one of the article V grounds is established. The general rule is of particular significance in relation to those grounds for non-enforcement which might be described as 'back-and-white' grounds, particularly if they relate to the structural integrity of an arbitration.

Although any taxonomy of the grounds listed in article V NYC is potentially controversial, it seems clear that the various grounds in article V NYC are not all of the same nature. The two grounds in article V.2 NYC – non-arbitrability and public policy – are primarily designed to protect the interests of the enforcing country, rather than of the parties to the dispute; by contrast, the five grounds in article V.1 NYC aim at balancing the legitimate interests of the parties and protecting the fundamental rights of the award-debtor. Within article V.1, however, the different provisions focus on defects of different types.

The 'black-and-white' grounds in article V.1 NYC are like a switch; either the alleged defect exists (on) or does not exist (off). Consider, for example, article V.1.a NYC, according to which an award may be refused enforcement if the arbitration agreement 'is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.' Once the relevant choice-of-law analysis has been undertaken to determine the governing law, the arbitration agreement is either valid or it is not. This does not mean, of course, that article V.1.a NYC is always easy to apply. In cases where the parties have, for example, not expressly chosen the law governing the arbitration agreement, but have chosen a law to govern the matrix contract of which the arbitration agreement is a part, whether the arbitration agreement is governed by the law applicable to the matrix contract or by the law of the seat may be disputed.[31] Be that as it may, determining

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[29] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [89] (CA).

[30] [2011] 1 AC 763 at [67] (SC).

[31] See, generally, Born. *International Commercial Arbitration* (2nd edn, 2014) ch 4. In the context of English private international law, if the parties have chosen a law to govern the matrix contract, the chosen law will, by implication, normally also govern the arbitration clause; however, if the clause is ineffective or invalid under the law chosen to govern the matrix contract, it is not plausible to imply that the parties intended the chosen law to govern the clause as well as the matrix contract; in such a situation, the law of the seat is applicable on the basis that the seat is the country with which the arbitration clause is most closely connected: see *C v D* [2007] 2 Lloyd's Rep 367; *Sul America Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] 2 All ER (Comm) 796; *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 1 Lloyd's Rep 235. The decisions of arbitral tribunals determining the law governing an arbitration clause show a variety of approaches. Compare, for example, *ICC Case No. 7929, Interim Award* (2000) XXV YB Comm Arb 312 (in which the tribunal decided

the law applicable to the arbitration clause involves the application of the relevant choice-of-law rules, rather than the exercise of discretion.

The same sort of categorisation applies to article V.1.c NYC, which provides that enforcement may be refused if 'the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration'. The potential defect identified by article V.1.c is, again, of an all-or-nothing nature, rather than being on a sliding scale: either the dispute in question is within the scope of the arbitral tribunal's jurisdiction or it is not. Furthermore, the grounds listed in article V.1.a and V.1.c NYC concern the structural integrity of the arbitration. Subject to the second element of Hypothesis 2 (discussed below), in a case where the award-debtor establishes either that the arbitration agreement is invalid or that the dispute is not within the agreement's scope, it is difficult to see how a court could sensibly consider upholding the award – except in the most exceptional of circumstances.[32] As noted in the Departmental Advisory Committee's report which preceded enactment of the Arbitration Act 1996: 'An award of a tribunal purporting to decide the rights or obligations of a person who has not given that tribunal jurisdiction so to act simply cannot stand.'[33]

The grounds for enforcement in article V.2 NYC (non-arbitrability and public policy) make use of open-textured, rather than hard-edged concepts, and are very different from those considered in the preceding paragraphs. Nevertheless, the scope for flexibility is no less limited. Whether a particular dispute is capable of settlement by arbitration under the law of the place of enforcement is not always a straightforward question. A dispute which is non-arbitrable in a domestic case may be regarded as arbitrable in an international one. A legal system can sensibly take the view that, although a particular type of dispute is not capable of settlement by arbitration in a case which is closely connected with the country in question, as long as the interests of the forum would not be adversely affected, there is no such prohibition in an international case. As one commentator notes, in the context of setting aside of arbitral awards under article 34.2.b.i ML (which corresponds to article V.2.a NYC): 'if the arbitration concerned matters having no connection to the arbitral seat, governed by foreign law, there would ordinarily be no reason to apply the nonarbitrability rules of the arbitral seat to claims governed by foreign law.'[34] However, it would be wrong to regard the upholding of an award in such circumstances as an illustration of the operation of 'strong' discretion. It is no more than an example of the enforcing court interpreting its non-arbitrability doctrine in a way which limits its scope to cases which have a sufficiently close connection with the

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that Swiss law, which was the law of the seat, applied to the arbitration clause, although the law of Delaware had been chosen to govern the matrix contract) with *ICC Case No. 11869, Award* (2011) XXXVI YB Comm Arb 47 (in which, in an arbitration seated in Austria, the tribunal, adopting an analysis very similar to that later favoured by the Court of Appeal in the *Sul America* case, ruled that English law, the law chosen to govern the matrix contract, also governed the arbitration clause).

[32] In *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, Lord Collins (at [128]) refers to the theoretical possibility that 'the English court would refuse to apply a foreign law which makes the arbitration agreement invalid where the foreign law outrages its sense of justice or decency'. See, also, point (d) of Hypothesis 5 (below) which suggests that there are situations in which an award should be enforced, notwithstanding the invalidity of the arbitration agreement under the law of the seat.

[33] Departmental Advisory Committee, *Report on the Arbitration Bill* (1996) para 279.

[34] Born, *International Commercial Arbitration* (2nd edn, 2014) p 3309.

interests which the doctrine seeks to protect; this is simply an example of the 'background' discretion which is inherent in the judicial function.

The same analysis can be applied to public policy under article V.2.b NYC. The question whether enforcement of an arbitral award would be contrary to the public policy of the enforcing country cannot be answered in an abstract or mechanical way. The answer depends on how the forum interprets the scope of its public policy and whether certain types of public policy rule are to be applied in the international context (as well as a purely domestic one).[35] That is to say, whether enforcement of an arbitral award under the NYC would be contrary to the forum's public policy is a question of judgment for the enforcing court. Just as in the context of the non-arbitrability provision, no question of 'strong' discretion arises: once the enforcing court has decided whether or not the forum's public policy is engaged, either the award will be enforced (if the forum's public policy is not infringed) or enforcement will be refused (if it is). In theory, the enforcing court might conclude, first, that enforcement of the award would be contrary to the forum's public policy and, second, that the award should nevertheless be enforced. However, it is almost inconceivable that an enforcing court would reach such contradictory conclusions: because it is accepted internationally that public policy is to be narrowly construed and is limited to the forum's most basic notions of morality and justice,[36] it is 'virtually axiomatic … that a court would not choose to confirm, recognize, or enforce an award if doing so would be repugnant to fundamental public policy.'[37]

(ii) THE SECOND ELEMENT: AN EXCEPTION BASED ON WAIVER OR ESTOPPEL

As for the second element of Hypothesis 2 (the exception), the notion that estoppel may bar reliance on a ground for non-enforcement can be traced back at least to van den Berg's analysis of the NYC, published in 1981. In his commentary on the NYC, van den Berg argued that it would be appropriate to order enforcement 'where the respondent can be deemed to be estopped from invoking the ground for refusal'.[38] More recently, the notion that

[35] In *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665, 675, Bokhary PJ (sitting in the Hong Kong Court of Final Appeal) considered that, in the context of an attempt by the defendant to resist enforcement of an award on the basis of public policy, article V.2.b NYC refers to 'those elements of a State's own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are affected.' On the general international trend for national courts to interpret 'public policy' under art V.2.b NYC as signifying 'international public policy' (rather than domestic public policy), see Born, *International Commercial Arbitration* (2nd edn, 2014) who states (at p 3696): 'the overwhelming weight of national court authority has looked at least in part to what courts have called "international" public policy, as distinguished from "domestic" public policy.'

[36] The seminal authority on this point is *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier*, 508 F2d 969 (2d Cir, 1974). The cautious or restrained approach to public policy adopted by the US courts in this case has also been followed in a large number of cases around the world. Among the wide range of authorities in this area, many of which are cited by Born, *International Commercial Arbitration* (2nd edn, 2014) § 26.05[9], see, for example, *Deutsche Schachtbau- und Tiefbohrgesellschaft GmbH v Ras Al Khaimah National Oil Co* [1987] 2 All ER 769 (England); *Adviso NV v Korea Overseas Construction Corporation* (1996) XXI YB Comm Arb 612 (Korea); *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665 (Hong Kong); *Brostrom Tankers AB v Factorias Vulcano SA* [2004] IEHC 198 (Ireland); *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597 (Singapore); *IPOC International Growth Fund Ltd v LV Finance Group Ltd* (2008) XXXIII YB Comm Arb 408 (BVI).

[37] *Restatement (Third) U.S. Law of International Commercial Arbitration*§4-18, comment c (Tentative Draft No. 2 2012), cited by Born, *International Commercial Arbitration* (2nd edn, 2014) p 3694, n 1516.

estoppel and waiver operate as general principles in arbitration law has been widely acknowledged. Perhaps most significantly, article 4 of the UNCITRAL Model Law (headed 'Waiver of right to object') provides:

> A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.[39]

In formal terms, article 4 is applicable by the courts of a Model Law country in a case where an arbitration has its seat in that country.[40] Although the NYC does not expressly contain the same waiver principle, it seems clear that, in the context of an application for cross-border enforcement, the flexibility within article V justifies the rejection of defences to enforcement in situations where the defence has been waived. An arbitrant who willingly takes part in an arbitration without raising potential defects – whether in terms of the composition of the tribunal, its jurisdiction, the arbitral procedure or the award – at the earliest opportunity, should be treated as having waived the defect in question. It is not possible for an award-debtor to raise such defects at a later stage with a view to having the award set aside at the seat of arbitration;[41] nor should it be possible to resist cross-border enforcement in such circumstances.

In terms of legal principle, an award-debtor who fully participates in an arbitration without ever questioning the tribunal's jurisdiction cannot be permitted to seek to resist enforcement of the ensuing award under article V.1.a NYC on the basis that the arbitration agreement was invalid. The fact that the validity of the arbitration agreement is a fundamental aspect of the integrity of the arbitral process is neither here nor there; the award-debtor's failure to raise the issue early in the arbitral process is a good reason for not allowing the issue to be raised after the tribunal has rendered its award. The same principle should be applied in relation to each of the grounds listed in article V.1: for example, 'if a party fails to object to a particular procedure during the arbitration, it then cannot ordinarily later challenge the award on the basis of that procedure.'[42]

Application of the principle of waiver is illustrated by *Minmetals Germany GmbH v Ferco Steel Ltd.*[43] The applicant (C), having obtained two arbitral awards against a German company (D) in Chinese arbitrations, sought to have the awards enforced in England under Part III of the Arbitration Act 1996 (which implements the relevant provisions of the NYC). D resisted enforcement on several grounds, including article V.1.d, arguing that the arbitral

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[38] *The New York Arbitration Convention of 1958* (1981) p 265.

[39] The same principle is to be found in Arbitration Act 1996, s 73.

[40] See art 1.2 ML.

[41] See, for example, Gaillard and Savage (eds), *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (1999) para 1606.

[42] Born, *International Commercial Arbitration* (2nd edn, 2014) p 3537.

[43] [1999] CLC 647.

tribunal had not followed the procedure agreed by the parties. While accepting that, as regards the first award, the procedure followed by the tribunal was defective, Colman J held that enforcement should not be refused; crucially, after the defect had come to light, D 'proceeded without explicitly raising with the arbitrators their objection as to [the procedural defect]' and that, as a result, it was difficult to envisage 'a more glaringly obvious waiver of procedural irregularity.'[44]

While the principle of waiver is a vital mechanism for preventing bad faith challenges after the award has been rendered, it is important not to push the principle too far. It is well established that the award-debtor's failure to challenge the award before the courts of the seat does not prevent the award-debtor from challenging recognition and enforcement of the award in England on any of the grounds listed in article V NYC.[45] In *Paklito Investment Ltd v Klockner East Asia Ltd*, a Hong Kong case in which the same approach is adopted, Kaplan J explained the principle in the following terms:

> There is nothing in …the New York 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. It is clear to me that a party faced with a Convention award against him has two options. Firstly, he can apply to the courts of the country where the award was made to seek the setting aside of the award. If the award is set aside then this becomes a ground in itself for opposing enforcement under the Convention. Secondly, the unsuccessful party can decide to take no steps to set aside the award but wait until enforcement is sought and attempt to establish a Convention ground of opposition.[46]

Failure by the award-debtor to apply for annulment of the award should not be treated as a waiver of any defect subsequently raised by the award-debtor at the enforcement stage. As indicated by article 4 ML, waiver operates only if the award-debtor fails to take appropriate steps to challenge an alleged defect in the context of the arbitration itself. It would be wrong to seek to impose on the award-debtor a positive obligation to seek annulment as a pre-condition to being able to challenge enforcement of the award under the NYC.[48]

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[44] At 659. See also the discussion by Born, *International Commercial Arbitration* (2nd edn, 2014) pp 3537-9.

[45] See Moore-Bick LJ in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2007] QB 886 at [104] and in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [18] (CA); Lord Collins in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [98] (SC).

[46] [1993] HKLR 39 at [68]-[70]. This passage was quoted with approval by Rix LJ in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [77] (CA). See also Sir Anthony Mason NPJ in *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665, 689 (HKCFA): '[A] failure to raise the public policy ground in proceedings to set aside an award cannot operate to preclude a party from resisting on that ground the enforcement of the award in the enforcing court in another jurisdiction.'

[48] Cases which suggest the contrary are wrong in principle and cannot be supported. Born, *International Commercial Arbitration* (2nd edn, 2014) p 3604 n 1062 cites two German cases where failure to pursue setting aside proceedings on the basis of arbitrator bias was treated as a waiver in the context of enforcement proceedings in Germany.

Whereas article V.1 NYC aims to strike a suitable balance between the interests of award-creditors and award-debtors, the purpose of the grounds in article V.2 NYC, which can be raised by the enforcing court *sua sponte*, is to safeguard the essential interests of the enforcing country. Accordingly, it would not be appropriate to apply the principles of waiver and estoppel to the defences based on non-arbitrability and public policy. There is no reason to think that the award-debtor is able to waive grounds for non-enforcement which are for the protection of the enforcing country's fundamental policies, rather than of the interests of the award-debtor itself. Furthermore, as article V.2 NYC refers to non-arbitrability under the law of the enforcing country and to the public policy of that country, it is difficult to see how waiver of the article V.2 grounds could actually operate (assuming it were, in theory, possible): how, during an arbitration, could the award-debtor meaningfully raise questions of non-arbitrability or public policy under the law of the enforcing country at a time when it is not known if (or where) judicial proceedings for enforcement of the final award may take place?

Hypothesis 2 goes a long way towards explaining what the so-called 'discretion' conferred by article V NYC signifies in practice. However, as will be seen in Hypotheses 3-5 (which build on Hypothesis 2), Hypothesis 2 is incomplete; there are other exceptions to the general rule which forms the first part of the second hypothesis.

(D) Hypothesis 3: If *the award-debtor establishes a ground for non-enforcement, cross-border enforcement of the award shall be refused unless:*

(a) *the award-debtor is estopped from relying on the ground in question or has waived the alleged defect; or*

(b) *as regards procedural defects under article V.1.b and V.1.d, the alleged defect is* de minimis *or the award-debtor was not materially prejudiced by the alleged defect.*

In the context of setting aside applications, many commentators treat is as axiomatic that, unless a procedural defect is significant, annulment should not be ordered. According to Born, for example: 'It is elementary that only a material violation of a party's procedural rights can result in annulment. Minor or trivial violations of procedural rights are inevitable in any adjudicative process and do not provide grounds for annulment.'[49] Similarly, it has been suggested that '[t]he prevailing view is that a procedural irregularity or defect alone will not invalidate an award. The test is that of a significant injustice so that the tribunal would have decided otherwise had the tribunal not made a mistake.'[50] In England, the idea that setting aside on the basis of procedural irregularity requires the error to have been material is explicitly articulated in section 68 of the Arbitration Act 1996: the applicant has to establish not only a 'serious irregularity' (of one of the types listed in section 68(2)), but also that the irregularity 'has caused or will cause substantial injustice to the applicant'.[51]

[49] *International Commercial Arbitration* (2nd edn, 2014) p 3255. Born continues (at p 3254): 'A number of authorities have held that an award will not be annulled for procedural unfairness unless it can be demonstrated that the procedural violation had a material effect on the arbitral process or the arbitral tribunal's decision.'

[50] Lew, Mistelis & Kroll, *Comparative International Commercial Arbitration* (2003) para 25-37.

[51] The position in relation to Arbitration Act 1996, s 69 (appeal on point of law) is similar to s 68 in the sense that the court can give permission to appeal only if, *inter alia*, the court is satisfied that 'the determination of the question will substantially affect the rights of one or more of the parties': s 69(3)(a).

The English courts' approach under section 68 of the 1996 Act is neither to set aside an award for the simple reason that the tribunal made a serious procedural error nor to set aside an award only if the applicant can satisfy the court that, but for the alleged error, the tribunal *would* have reached a different conclusion. Instead, the English courts try to tread a path between these two extremes: the test is whether the alleged error 'caused the arbitrator to reach a conclusion unfavourable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable.'[52] In essence, this is a 'materiality' test, rather than a 'causation' test. The court only has to ask itself whether the alleged error might have made a difference, rather than having to 'decide for itself what would have happened in the arbitration had there been no irregularity.'[53] All the applicant has to show is that, if the tribunal had not gone wrong, the tribunal 'might well have reached a different view and produced a significantly different outcome.'[54]

It has been strongly argued that the same basic approach should be adopted in the context of applications to enforce awards under the NYC. According to van den Berg, because the grounds for refusal have to be proved by the respondent, 'their existence should be accepted in serious cases only; obstructions by respondents on trivial grounds should not be allowed.'[55] Following van den Berg's lead, other commentators also argue that minor defects should not justify non-enforcement.[56] The logic of this approach is that technical infringements should be ignored because such defects cannot have prejudiced the award-debtor's rights. That is to say, the outcome of the arbitration – in terms of the final award – would have been the same if the irregularity had not occurred. It is, therefore, only a small step from disregarding trivial defects (on the basis that they are immaterial) to the argument that any procedural irregularity should be ignored, unless the irregularity has caused material prejudice to the award-debtor. In relation to article V.1.b NYC, van den Berg states:

> If it is clear that the arbitral decision could not have been different had the irregularity of the procedure not occurred, it would seem to make no sense to refuse enforcement.[57]

Although there will be a tendency for minor defects to be substantively immaterial, on the one hand, and for serious violations to cause material prejudice, on the other, van den Berg considers that the important criterion is not the seriousness of the alleged defect, but its likely

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[52] Colman J in *Vee Networks Ltd v Econet Wireless International Ltd* [2005] 1 Lloyd's Rep 192 at [90].

[53] Popplewell J in *Terna Bahrain Holding Company v Ali Marzook Al Bin Kamil Al Shamsi* [2012] EWHC 3283 at [85].

[54] Idem.

[55] *The New York Arbitration Convention of 1958* (1981) p 268. This suggestion involves a *non sequitur*; it does not follow from the fact that the burden of proof is on the award-debtor that only serious defects give rise to a ground for non-enforcement. See, also, Reisman and Richardson, 'Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration' (2012) ICCA Congress Series No. 16, p 27: 'the discretionary part of Art. V ought to be understood as a policy decision by the drafters to adopt … a "material violation" rather than "technical discrepancy" approach.'

[56] See, for example, Born, *International Commercial Arbitration* (2nd edn, 2014) pp 3532, 3563.

[57] *The New York Arbitration Convention of 1958* (1981) p 302.

impact on the result reached by the arbitral tribunal. According to van den Berg, even a 'serious violation' may be disregarded 'if it is beyond any doubt that the decision could have been the same [but for the violation in question].'[58]

From what has been said already in relation to Hypothesis 2, the exception based on trivial or *de minimis* defects can have no relevance for most of the grounds listed in article V NYC. Lack of jurisdiction – whether on the basis of the invalidity of the arbitration agreement (article V.1.a) or the dispute being outside the agreement's scope (article V.1.c) – should never be seen as *de minimis*.[59] Likewise, Article V.1.e is a 'black-and white' ground: either the award has been set aside by the courts of the seat or it has not. It is difficult to see how the sliding scale implicit in the idea of a distinction between serious and minor defects could operate in this context. Moreover, if courts follow the view that the grounds of non-enforcement should be narrowly construed, a defence based on non-arbitrability (article V.2.a) or incompatibility with public policy (article V.2.b) is, by definition, not trivial. It is only in relation to article V.1.b (due process) and article V.1.d (procedural irregularity) that point (b) of Hypothesis 3 might conceivably be relevant. Having said that, it would be a very rare case in which an enforcing court would even think about enforcing an award if there had been a serious breach of due process requirements.[60] Accordingly, point (b) of Hypothesis 2 is limited mainly to cases within article V.1.d and, as will be seen, it is doubtful whether point (b) should be applied as readily to situations where the defect relates to the composition of the arbitral tribunal as opposed to the arbitral procedure.

The wide variety of potential defects covered by article V.1.b and d NYC range from the very serious to the essentially immaterial. The fact that the award-debtor can establish, for example, that the tribunal did not follow the procedure agreed by the parties does not necessarily mean that the integrity of the arbitral process was fatally compromised and that the award-debtor's rights have been undermined in a relevant way. It all depends on the circumstances of the case and the exact nature of the procedural irregularity involved. Accordingly, whereas the validity of the arbitration agreement and the scope of that agreement are obviously 'black-and-white' issues, failures in terms of procedure can be legitimately characterised as 'shades-of-grey' defects, which vary greatly from case to case in terms of seriousness and significance. It follows that, in cases where an award-debtor seeks to rely on article V.1.b or d NYC, there is potentially more scope for the flexibility which is integral to article V. As regards article V.1.d, for example, there may be circumstances in which the enforcing court reasonably considers that an award should be enforced even though the award-debtor can establish that, in terms of procedure, the tribunal failed to comply with the parties' agreement or with the law of the seat.

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[58] Idem.

[59] See, however, Born's suggestion that 'where a tribunal exceeds its authority in only minor or incidental respects, the award should not be denied recognition': *International Commercial Arbitration* (2nd edn, 2014) pp 3556-7.

[60] See Kaplan J in *Paklito Investment Ltd v Klockner East Asia* [1993] HKLR 39 at [76]: 'Having concluded that a serious breach of due process has occurred I cannot see that it would be right or proper to exercise my discretion in favour of enforcement.' See also Born, *International Commercial Arbitration* (2nd edn, 2014) p 3257: 'where there were gross violations of basic procedural guarantees that tainted the entire arbitral procedure, no specific showing of prejudice or disadvantage is required.' See May LJ in *Kanoria v Guiness* [2006] 2 All ER (Comm) 413 at [30]: 'If the structural integrity is fundamentally unsound, the court is unlikely to make a discretionary decision in favour of enforcing the award.'

As regards 'shades-of-grey' defects, there are two competing pressures. On the one hand, there is an argument for regarding the flexibility which results from the use of 'may' in article V NYC as strictly limited (to deal with cases of waiver, for example) and for enforcement of awards to be routinely refused if the applicant can establish that the arbitral procedure was defective. On the other hand, in cases where the alleged defect is minor or is unlikely to have had any impact on the substance of the arbitral award, there is something inherently unattractive in the court refusing to enforce an award which, notwithstanding the tribunal's error, arrived at the correct conclusion. There are different possible approaches to reconciling these conflicting pressures.

In terms of the decided cases, the approach advocated by van den Berg seems to have been very influential.[61] In Hong Kong, van den Berg's lead was followed, albeit *obiter*, in *Paklito Investment Ltd v Klockner East Asia*.[62] In the words of Kaplan J:

> In relation to the ground relied on this case, I could envisage circumstances where the court might exercise its discretion having found the ground established, if the court were to conclude, having seen the new material which the defendant wished to put forward that it would not affect the outcome of the dispute. This view is supported by Professor Van den Berg in his book …[63]

Shenzhen Nan Da Industrial and Trade United Co Ltd v FM International Ltd,[64] another decision of the Hong Kong courts, furnishes a further example. One of the grounds on which the defendant sought to resist enforcement of a Chinese award in Hong Kong was that the arbitral tribunal had not operated under the agreed set of arbitration rules. Kaplan J had no hesitation in rejecting this defence: in the judge's view it would have been unjust to refuse enforcement and permit the defendant to take advantage of the irregularity; no possible prejudice had been caused to the defendant.[65]

A similar issue was raised in the English case of *China Agribusiness Development Corp v Balli Trading*.[66] The defendant argued that enforcement should be refused under article V.1.d NYC on the basis that the Chinese tribunal had applied the CIETAC arbitration rules, when they should have applied FETAC's provisional rules (which had been in force when the contract had been concluded). Longmore J decided, as a matter of construction, that the parties had agreed to arbitrate in accordance with the rules currently in force when the arbitration was commenced (that is to say, the CIETAC rules). Nevertheless, if the tribunal had applied the wrong rules, the judge would still have ordered enforcement: if there has been a procedural irregularity 'it must be relevant to assess the degree of prejudice' to the award-

[61] See the cases cited by Born, *International Commercial Arbitration* (2nd edn, 2014) pp 3565 n 872.

[62] [1993] HKLR 39.

[63] At [74].

[64] [1992] HKCFI 162.

[65] At [35].

[66] [1997] CLC 1437.

debtor;[67] in the present case, the defendant had suffered no prejudice as a result of the application of the current rules, rather than the provisional rules.[68]

There are two additional points which should be made before the discussion proceeds to consideration of further hypotheses. First, there are certain dangers in following the suggestion that procedural defects, even if serious, should not bar enforcement unless they caused (or might have caused) the tribunal to reach a different result.

While there are some attractions to a causation-based approach – what is the point of refusing to enforce an award which is obviously correct in terms of its substance? – it necessarily draws the enforcing court into making an assessment of the merits of the parties' dispute and the correctness of the tribunal's award. Although some legal systems hang on to the remnants of a merits-based review,[69] most systems of arbitration law adhere to the principle that the tribunal is the final decision-maker on factual and legal issues relating to the merits. Accordingly, there is little support either from commentators or the courts for a causation-based approach.

In *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd*,[70] a decision of the Court of Appeal of the British Virgin Islands (BVI), the court decided that the flexibility within article V NYC was limited to cases 'where there has been waiver or circumstances giving rise to an estoppel on some such legally recognized principle or where …the error is minor and prejudicially irrelevant.'[71]

As regards the 'materiality' test, advanced by van den Berg and supported by cases such as *Paklito*, the court said:

> The materiality requirement would ... potentially whittle down the 'No Merits Review' principle with which all the distinguished authors … and the case law accepts as inviolable as regards an enforcement court for fear of usurping the very function and role of the arbitral tribunal or that of the supervisory court.[72]

It is legitimate to emphasise that the enforcing court's role is not to act as a court of appeal; the merits of the parties' dispute is for the arbitral tribunal, rather than the courts; it is not the role of the enforcing court to check whether or not the tribunal reached the result that the

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[67] [1997] CLC 1437, 1441.

[68] A similar approach is adopted by the US courts which will not refuse to enforce an award on the basis of a procedural violation unless the violation worked substantial prejudice to the award-debtor: see, for example, *Compagnie des Bauxites de Guinee v Hammermills Inc* (1992) XVIII YB Comm Arb 566, 571 (DDC, 1992); *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F Supp 2d 936, 945 (SD Tex, 2001).

[69] See, for example, Arbitration Act 1996, s 69. It should be stressed that: (i) s 69 is a non-mandatory provision (which the parties may choose to exclude); (ii) appeals under s 69 are limited to alleged errors of English law; and (iii) judicial permission to appeal is required.

[70] (2011) XXXVI YB Comm Arb 262.

[71] At [65].

[72] At [64].

court would have adopted. Nevertheless, there is a degree of inconsistency in the *Pacific China Holdings* judgment. The court was willing to admit an exception to non-enforcement based on a 'minor and *prejudicially irrelevant*' error; there is no logical reason why it should be unwilling to extend that exception to more serious but equally immaterial errors. In either case, the court is essentially asking itself whether the tribunal's error might have had an impact on the outcome of the dispute.

An answer to the perceived problem identified by the BVI Court of Appeal is, to a large extent, provided by the English courts' approach to setting aside applications under section 68 of the 1996 Act (noted above). The appropriate test is not based on causation (is the court satisfied that, but for the error, the tribunal *would* have reached a different result?), but on materiality (is the court satisfied that, but for the error, the tribunal *might well have* reached a different view and produced a significantly different outcome?). The application of a causation test almost inevitably requires the court to take a view on whether the tribunal reached the right result; a materiality test asks only whether the error might have had a meaningful impact on the final decision. Whereas the former may be regarded as illegitimate usurpation of the tribunal's core function, the latter cannot.

Secondly, a question arises whether defects in the composition of the tribunal should be treated in the same way as other procedural defects. It has already been seen in the context of article V.1.a and article V.1.c that jurisdictional defects are, in principle, 'black-and-white' issues. If the award-debtor can establish either that the arbitration agreement was invalid or that the dispute determined by the tribunal was not within the scope of that agreement, one would expect that, in the absence of exceptional circumstances, cross-border enforcement of the award would be refused. Is the position the same in relation to defects surrounding the composition of the tribunal? If, for example, the relevant rules impose certain consultation requirements prior to the appointment of a member of the tribunal or if the parties' agreement requires the arbitrator to have certain characteristics, must enforcement of the award necessarily be refused if the applicable requirements are not met?

As failures relating to the composition of the tribunal are included within the same provision of the NYC as procedural defects (which, as seen above, can be regarded as 'shades-of-grey' issues) an argument can be made for addressing all matters covered by article V.1.d NYC in essentially the same way. Some support for this approach can be found in *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*,[73] a decision of the Hong Kong High Court. In this case, the parties had agreed to CIETAC arbitration in Beijing, but the parties' dispute was determined under the auspices of CIETAC Shenzhen: in default of appointment by the respondent (R), an arbitrator was appointed on R's behalf by CIETAC Shenzhen and the Shenzhen Sub-Commission appointed the presiding arbitrator. An award was rendered in favour of the claimant (C) and, when C applied to have the award enforced in Hong Kong, R sought to resist enforcement on the basis that the composition of the tribunal had not been in accordance with the parties' agreement. Kaplan J decided that the award should be enforced, the *ratio* for his decision being that, in the circumstances of the case, R was estopped from challenging the tribunal's jurisdiction.[74] However, Kaplan J considered (*obiter*) what the position would have been if R had not been estopped. The judge's conclusion was that he had discretion to order enforcement of the award, notwithstanding the

[73] [1995] 2 HKLR 215.

[74] That is to say, the situation was covered by point (a) of Hypothesis 3.

fact that R could establish that the composition of the tribunal had not been in accordance with the parties' agreement. Kaplan J reasoned that, despite the irregularity, the parties had got what they bargained for – in the sense that they had agreed to arbitration before a tribunal of three Chinese arbitrators under the CIETAC arbitration rules. The technical irregularity did not result in R's rights being violated in any material way.[75]

A different analysis is offered by the decision of the English Court of Appeal in *Sumukan Ltd v Commonwealth Secretariat*,[76] a case decided in the context of an application to have an award set aside under section 67 of the Arbitration Act 1996. This decision suggests that lack of jurisdiction in all its manifestations should be treated as a fundamental defect. In the *Sumukan* case, the chairman of the Commonwealth Secretariat Arbitration Tribunal (CSAT) had been appointed without the necessary consultation requirements having been complied with. There is no suggestion in any of the Court of Appeal judgments that a distinction should be drawn between serious and less serious jurisdictional defects. Indeed, the Court of Appeal's approach indicates that, whatever the jurisdictional defect might be – whether relating to the validity of the arbitration agreement, the scope of that agreement or the composition of the tribunal – the party challenging the award is 'entitled'[77] to have the award set aside. Although the structure of the Arbitration Act 1996, which clearly distinguishes jurisdiction issues (section 67) from procedural defects (section 68) is different from article V NYC (which places some jurisdictional issues alongside procedural defects in article V.1.d), there is no reason why the Court of Appeal's analysis in the *Sumukan* case should not be seen as persuasive in the context of article V.1.d NYC. The strict approach illustrated by the *Sumukan* case is also mirrored in the jurisprudence of some other jurisdictions.[78]

Should the approach in *Sumukan* be preferred to that of Kaplan J in the *China Nanhai Oil* case or *vice versa*? One of the problems with the approach in the *China Nanhai Oil* case is that it could be used to justify overlooking *any* defect if, in the enforcing court's view, the result reached by the tribunal was the correct one. In terms of general principle, an arbitrator is entitled to make a decision binding on the parties only by virtue of the fact that he has been properly appointed. As regards jurisdictional questions, the relevant issue is not, as Kaplan J seemed to assume, whether one of the parties was prejudiced by any irregularity. This is made clear in the context of setting aside applications under the Arbitration Act 1996: unlike section 68 (procedural irregularity), section 67 (lack of jurisdiction) has no requirement that the alleged defect 'has caused or will cause substantial injustice to the applicant'. An arbitrator who has not been properly appointed is no more entitled to make a binding determination of the parties' dispute than the man in the moon or the man on the Clapham omnibus. Questions such as whether the person actually appointed had the same general characteristics as a person who should have been appointed or followed the correct procedure or reached the correct result are all irrelevant. The award-debtor's case is not that he was

[75] See also *Werner A Bock KG v The N'S Co Ltd* [1978] HKCA 222 (CA, Hong Kong) and the *obiter* statement in *X SA v Y* (2010) XXXVI YB Comm Arb 337 at [17] (Trib féd, Switzerland): 'the defect in the composition of the arbitral tribunal must have affected the outcome of the dispute'.

[76] [2007] 2 CLC 821.

[77] See Clarke MR at [56].

[78] See, for example, the US cases cited by Born, *International Commercial Arbitration* (2nd edn, 2014) p 1661, nn 131-2.

prejudiced by the irregularity, but that the person who decided the dispute had no power to do so.[79]

In the context of article V NYC, it makes little sense in policy terms for an enforcing court to enforce an award in a situation where, had the award-debtor applied to have the award set aside, it is clear that the award would have been vacated by the courts of the seat for a legitimate reason (such as lack of jurisdiction). As noted in the discussion of Hypothesis 2, the structure of the NYC allows the award-debtor to apply for annulment of the award at the seat of arbitration and/or to resist enforcement at the place of enforcement. If enforcing courts were to show themselves willing to enforce awards in cases in which, had the award-debtor made the appropriate application, one would normally expect the award to have been set aside by the courts of the seat, the award-debtor is effectively deprived of the choice which the NYC aims to confer: the losing party would be forced into applying to have the award set aside (thereby providing a ground for resisting cross-border enforcement under article V.1.e NYC), rather than risking enforcement by the enforcing court, notwithstanding the fact that the arbitral tribunal was not properly constituted.

Even a minor breach of the correct appointment procedure (whether in terms of consultation requirements or required characteristics or qualifications) deprives the person appointed of jurisdiction; consequently, unless the defect has been waived (as in the *China Nanhai Oil* case) enforcement of the ensuing award should be refused and there should be no room for the enforcing court to uphold the award on the basis that a minor transgression of the appointment procedure can be overlooked.

(E) Hypothesis 4: *If the award-debtor establishes a ground for non-enforcement, enforcement of the award should be refused unless:*

(a) *the award-debtor is estopped from relying on the ground in question or has waived the alleged defect; or*

(b) *as regards procedural defects under article V.1.b and V.1.d, the alleged defect is* de minimis *or the award-debtor was not materially prejudiced by the alleged defect; or*

(c) *as regards article V.1.e, the decision of the courts of the seat setting aside the award should not be given extra-territorial effect.*

One of the most controversial questions under the NYC concerns whether or not an award which has been set aside by the courts of the seat should be enforced in other countries. Although opinions differ markedly,[80] the majority opinion among commentators seems to accept the application of the first part of Hypothesis 4 in the context of article V.1.e NYC. That is to say, if an award has been set aside by the courts of the seat of arbitration, the courts of other countries should, as a general rule, refuse to enforce the award under the

[79] See *Bear Stearns & Co v NH Karol & Associates Ltd*, 728 F Supp 499, 501-02 (ND Ill, 1989). It is for this reason that a perfectly well-qualified tribunal will (rightly) declare that it lacks jurisdiction if it has not been appointed by the proper procedure. In *Econet Wireless Ltd v First Bank of Nigeria* (2006) XXXI YB Comm Arb 49, an arbitral tribunal (composed of Michael Kuper, Fidelis Oditah and Jan Paulsson) which had been appointed by the ICC declined jurisdiction on the basis that the appointment should have been made by the Nigerian courts.

[80] For discussion of the different strands in the literature and the case lase, see Darwazeh, 'Article V(1)(e)' in Kronke *et al* (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (2010) pp 301-44.

Convention.[81] The trend in the decided cases is to similar effect. Although there is a small number of high-profile cases in France and the United States in which an award has been enforced, notwithstanding the fact that it has been set aside by the courts of the seat,[82] most national courts accept that, in the absence of exceptional circumstances, an annulled award should be refused cross-border enforcement on the basis of article V.1.e NYC.[83] The position adopted in England is that, if an award is set aside by the courts of the seat, the setting aside judgment not only gives rise to a defence under article V.1.e of the NYC, but also will normally have *res judicata* effect. In the words of Rix LJ in the *Dallah* case: 'it is not easy to understand why a successful challenge in the courts of the country where an award was made cannot be relied on as an issue estoppel.'[84]

Although it is clear that the NYC permits the enforcement of annulled awards, it does not determine when, if ever, annulled awards should be enforced. The central question under article V.1.e NYC is not whether the award is defective in the eyes of the enforcing court, but what significance (if any) should be accorded to a decision of the courts of the seat setting aside the award. As a result, the issues surrounding article V.1.e NYC are very different from those considered in relation to the other grounds in article V NYC. In doctrinal terms, the basis for enforcing a set aside award is that, for one reason or another, the judgment setting aside the award should not be regarded as having extra-territorial effect. The precise form which the exceptional enforcement of set aside awards should take is controversial. Among the various possible approaches, two stand out as being the most plausible.

[81] See, for example, Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17 *Arbitration International* 19; Reisman, *Systems of Control in International Adjudication and Arbitration* (1992) pp 114-5.

[82] As regards the US, see, for example, the discussions by Slater, 'On Annulled Arbitral Awards and the Death of *Chromalloy*' (2009) 25 *Arbitration International* 271; Goldstein, 'Annulled awards in the US courts: how primary is "primary jurisdiction"? (2014) 25 *American Review of International Arbitration* 19. Although the decision in *Chromalloy Aeroservices v Arab Repub of Egypt*, 939 F Supp 907 (DDC, 1996) (in which the US court enforced an Egyptian award that had been vacated in Egypt) has generated a significant body of literature, it has not been followed and does not reflect the more recent trend in the US case law, which is illustrated by cases such as *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd*, 191 F 3d 194 (2nd cir, 1999); *Spier v Calzaturificio Tecnica SpA*, 71 F Supp 2d 279 (SDNY, 1999); *TermoRio SA ESP v Electrificadora del Atlantico SA ESP*, 487 F 3d 928 (DC cir, 2007); *Pioneers Baugesellschaft Anstalt (Liechtenstein) v Government of Ghana*, 578 F Supp 2d 50, 53–4 (DDC, 2008); *Thai-Lao Lignite (Thailand) Co Ltd v Government of Lao People's Democtratic Republic*, 997 F Supp 2d 214 (SDNY), 2014. As regards France, see Gaillard and Savage (eds), *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (1999) para 1595; Gharavi, 'Enforcing Set Aside Awards: France's Controversial Steps beyond the New York Convention' (1996) 6 *Journal of Transnational Law and Policy* 93.The French cases involving the enforcement of annulled awards are not examples of enforcement under the NYC; the French approach is based on art VII NYC ('the more favourable right' clause) and the fact that French law is more pro-enforcement than the NYC.

[83] See, for example, the discussion of the Singapore Court of Appeal in *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57 at [77]. See also Collins *et al*, *Dicey, Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th edn, 2014) para 16-143: 'The prevailing view is that the courts of the seat are best placed to decide on the setting aside of an award, and that the courts of other countries should in general respect the decisions of the courts of the seat.'

[84] Rix LJ in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [75] (CA). See also Moore-Bick LJ at [56] (CA) and, in the further appeal, Lord Collins at [98] (SC).

One possible solution is proposed by Paulsson,[85] who draws a distinction between, on the one hand, cases involving a 'local standard annulment' (LSA) and, on the other, situations where there has been an 'international standard annulment' (ISA). An ISA is one which is based on a provision of the *lex arbitri* which mirrors one of the grounds listed in article V.1.a–d NYC; an LSA is based on a ground for setting aside under the law of the seat which has no counterpart in the defences to enforcement under the NYC. According to Paulsson's theory, if an award is set aside through an ISA, cross-border enforcement should be refused on the basis of article V.1.e NYC; conversely, if an award is set aside by the courts of the seat on a basis which is not consistent with international standards (as reflected by the NYC), Paulsson argues that the enforcing court should ignore the annulment and enforce the award. There is, however, nothing in the text of the NYC to support this theory,[86] which does not appear to have been adopted by national courts.[87]

An alternative and more orthodox approach is to treat annulments in the same way as other foreign judgments:[88] if, according to the private international law of the enforcing country, the setting aside judgment is not entitled to recognition, the award-debtor should not be able to rely on article V.1.e NYC and the enforcing court may order enforcement of the award notwithstanding its annulment.[89] It is arguable that use of 'may' in article V.1.e NYC involves an acceptance that the effect of a judgment setting aside an award as a barrier to enforcement depends on whether the judgment is entitled to recognition according to the private international law of the place of enforcement.[90] Leading commentators in England suggest that, even if it has been set aside by the courts of the seat of arbitration, an award may be enforced in another country if the order vacating the award would be impeachable for fraud or contrary to natural justice or otherwise contrary to public policy.[91]

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[85] See Paulsson, 'The Case for Disregarding LSAs (Local Standard Annulments) under the New York Convention' (1996) 7 *American Review of International Arbitration* 99; Paulsson, 'Enforcing Arbitral Awards notwithstanding a Local Standard Annulment' (1998) 9(1) *ICC International Court Arbitration Bulletin* 14; Paulsson, 'Towards Minimum Standards of Enforcement: Feasibility of a Model Law' in van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 years of Application of the New York Convention* (1999) p 574.

[86] Paulsson's approach follows the differently drafted Art IX(2) of the European Arbitration Convention of 1961.

[87] See, however, the discussion of Burton J in *Dowans Holding SA v Tanzania Electric Supply Co Ltd* [2011] [2012] 1 All ER (Comm) 820 at [40]–[44].

[88] See Petrochilos, *Procedural Law in International Arbitration* (2004), paras 7.56–62; Park, 'Duty and Discretion in International Arbitration' (1999) 93 *American Journal of International Law* 805, 813.

[89] See Einhorn, 'The Recognition and Enforcement of Judgments on International Commercial Arbitral Awards' (2010) 12 *Yearbook of Private International Law* 43; Hill, 'The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England' (2009) 8 *Journal of Private International Law* 159; Scherer, 'Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?' (2013) 4 *Journal of International Dispute Resolution* 587.

[90] Smit, 'Annulment and Enforcement of International Arbitral Awards: A Practical Perspective' (2003) 18 *American Review of International Arbitration* 279, 303.

[91] Collins *et al*, *Dicey, Morris & Collins on The Conflict of Laws* (15th edn, 2014) para 16-144.

In *TermoRio SA ESP v Electrificadora del Atlantico SA ESP*[92] an application was made to enforce in the United States a Colombian award which had been annulled by the Colombian courts. Although the US court refused to enforce the award, it was suggested that an award that has been set aside by the courts of the seat may be enforced in the United States under the NYC if the annulment is contrary to the public policy of the forum. Following this suggestion, a US court in *Corporación Mexicana de Mantenimiento Integral v Pemex-Exploración y Producción*[93] enforced a Mexican award, notwithstanding its annulment by the Mexican courts, on the basis that the Mexican setting aside judgment had violated basic notions of justice by applying a law that had not been in existence at the time the parties' contract was formed. A similar analysis was adopted by the Amsterdam Court of Appeal in *Yukos Capital SARL v OAO Rosneft,*[94] a case involving enforcement in the Netherlands of four Russian awards which had been set aside by the Russian courts. Enforcement of the awards was granted on the basis that, because it was very likely that the Russian judgments setting aside the awards were the result of a process that had not been impartial and independent, the Russian judgments were not entitled to recognition in the Netherlands under general principles of private international law.[95] As a consequence, the award-debtor was unable to resist enforcement on the basis of article V.1.e NYC.[96]

The possibility of an annulled award being enforced in England under the NYC has also been accepted (*obiter*) by the English courts. It is implicitly acknowledged in Rix LJ's judgment in the *Dallah* case[97] that, if a setting aside judgment is not entitled to recognition under English private international law, the defendant cannot rely on article V.1.e NYC. At the end of his judgment, Rix LJ noted that the problem posed by an award which has been set aside improperly by the courts of the seat is not something which can be dealt with simply as a matter of an open discretion: 'The improper circumstances would … have to be brought home to the court asked to enforce in such a way as … to destroy the defence based on article V(1)(e), or … to prevent an issue estoppel arising out of the judgment of the courts of the country of origin.'[98] This approach was followed recently in *Malicorp Ltd v Government of*

[92] 487 F 3d 928 (DC cir, 2007).

[93] 962 F Supp 2d 642 (SDNY, 2013).

[94] (2009) XXXIV YB Comm Arb 703; discussed by Silberman, 'The New York Convention after Fifty Years: Some Reflections on the Role of National Law' (2009) 38 *Georgia Journal of International and Comparative Law* 25. The case is also considered (sub nom *Yukos v Rosneft* (28 April 2009, unreported), Amsterdam CA) in *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniya 'Naftogaz Ukrayiny'* [2011] 2 All ER (Comm) 755..

[95] Subsequently, the *Hoge Raad* declared the award-debtor's recourse in cassation to be inadmissible. For criticism of the *Hoge Raad*'s decision, see van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia' (2011) 28 *Journal of International Arbitration* 617.

[96] This result mirrors the analysis of Petrochilos, *Procedural Law in International Arbitration* (2004) para 7.57: 'One may, for example, deny effect to the foreign [setting aside] judgment when the annulment court has not been independent or impartial.'

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

[98] At [91] (CA).

the Arab Republic of Egypt.[99] Walker J accepted that the court *may* order enforcement of an award which has been set aside by the courts of the seat and that it would be wrong to refuse enforcement 'if, applying general principles of English private international law, the set aside decision was one which [the English] court would give effect to.'[100] In substance, therefore, English law mirrors the Dutch law solution as illustrated by the *Yukos* case.

(F) Hypothesis 5: *If the award-debtor establishes a ground for non-enforcement, enforcement of the award shall be refused unless:*

(a) *the award-debtor is estopped from relying on the ground in question or has waived the alleged defect; or*

(b) *as regards procedural defects under article V.1.b and V.1.d, the alleged defect is* de minimis *or the award-debtor was not materially prejudiced by the alleged defect; or*

(c) *as regards article V.1.e, the decision of the courts of the seat setting aside the award should not be given extra-territorial effect; or*

(d) *as regards article V.1.a, the arbitration agreement, although materially invalid under the law of the seat, was valid under the law chosen by the parties to govern the matrix contract; or*

(e) *as regards article V.1.d, the arbitral tribunal complied with the mandatory norms of the law of the seat and, as a result, failed to follow the procedure agreed by the parties.*

One reason for the success of the NYC is that it tackles a wide range of complex problems through a small number of relatively short, oracular provisions. The down-side, however, is that, in some hypothetical situations, the text of the NYC appears to lead to a conclusion which, in policy terms, is not easy to defend. In the context of the current discussion, there are two scenarios in which the flexibility created by the word 'may' in article V NYC provides the most obvious way of avoiding unattractive results which the text of the NYC appears to be advocating. There are two particular scenarios (addressed by points (d) and (e) of Hypothesis 5) which merit consideration.

First, consider the case where parties choose state A as the seat of arbitration and, without expressly designating a law to govern the arbitration clause, select the law of state B to govern the matrix contract. What should be the result if the arbitration clause is materially invalid under the law of state A, but valid under the law of state B? Article V.1.a NYC provides that enforcement may be refused if the arbitration agreement is not valid 'under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'.

Although the parties chose a law to govern the matrix contract, they did not 'subject' the arbitration clause to the law of any particular country; as a result the law of the seat applies and cross-border enforcement may be refused under article V.1.a NYC. Although this result is a possible interpretation of the NYC, refusing enforcement in this scenario has the effect of frustrating the parties' arbitration agreement in circumstances in which there is no reason, in policy terms, for the application of the law of the seat (under which the agreement is invalid) in preference to the law chosen by the parties to govern their contract (under which the agreement is valid). In this type of case, the better approach is for the enforcing court not to

[99] [2015] EWHC 361 (Comm).

[100] At [21].

refuse enforcement under article V.1.a NYC if the arbitration clause is valid according to the law chosen to govern the matrix contract, notwithstanding the fact that the clause is invalid under the law of the seat.[101]

The second scenario arises where there is a conflict between the procedure agreed by the parties and the mandatory procedural norms of the law of the seat; the question is whether the parties' agreement or the law of the seat should take precedence. On the face of it, the text of the NYC appears to put the tribunal in an impossible situation. On the one hand, the tribunal may follow the agreed procedure (thereby failing to comply with the mandatory norms of the *lex arbitri*) as a result of which the award-debtor may successfully apply for the award to be set aside by the courts of the seat. If the award is set aside, cross-border enforcement may be refused on the basis of article V.1.e NYC. On the other hand, the tribunal may choose to follow the mandatory norms of the *lex arbitri* (thereby failing to adhere to the procedure agreed by the parties). In this alternative, cross-border enforcement of the award may be refused on the basis of article V.1.d NYC.

Although this problem is not addressed by the NYC, the similar problem (in the context of setting aside under the Model Law) is tackled by article 34.2.a.iv ML which provides that an award may be set aside if 'the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law'. That is to say, an award cannot be set aside under the ML for the tribunal's failure to comply with the parties' agreement if that failure was motivated by the need to comply with the mandatory procedural norms of the law of the seat.

At the risk of advocating illegitimate reverse engineering, it makes sense for the same approach to be adopted in cases falling within the scope of article V NYC. If the tribunal complies with a mandatory procedural norm of the law of the seat, in preference to the procedure agreed by the parties, the enforcing court should not refuse enforcement on the basis of article V.1.d NYC.[102]

IV Conclusion

The first point to note, by way of conclusion, is that, not only in the arbitration literature but also in the decided cases, the term 'discretion' is used rather indiscriminately in relation to the operation of article V NYC. No harm is done by this usage if 'discretion' is understood to signify only that an enforcing court is not *obliged* to refuse enforcement in every case in which the award-debtor establishes one of the grounds for non-enforcement in article V NYC. However, in analytical terms, it is very doubtful whether discretion – in Dworkin's

[101] See Arzandeh & Hill, 'Ascertaining the Proper Law of an Arbitration Clause under English Law' (2009) 5 *Journal of Private International Law* 425, 441-2.

[102] Hill & Chong, *International Commercial Disputes* (4th edn, 2010) para24.2.34; van den Berg, 'Recent Enforcement Problems under the New York and ICSID Conventions' (1989) 5 *Arbitration International* 2, 9 – 10. Alternatively, it has been suggested that if an award is set aside on the basis that the tribunal followed the mandatory provisions of the law of the seat in preference to the procedure agreed by the parties, cross-border enforcement should not be refused on the basis of art V.1.e NYC: see Born, *International Arbitration: Law and Practice* (2012) p 394; Nazzini, 'The Law Applicable to the Arbitral Award' (2002) 5(6) *International Arbitration Law Review* 179, 189.

'strong' sense – is involved, in any meaningful way, in the enforcing court's decision to enforce or refuse enforcement.

There is, of course, plenty of scope for the operation of 'background' discretion as several of the provisions of article V NYC make use of open-textured concepts which require interpretation and application by enforcing courts in particular circumstances. However, once this background discretion has been exercised, there is little or no room for 'strong' discretion.

Although it might be tempting to regard use of the word 'may' as conferring an open-ended discretion on enforcing courts to enforce or refuse enforcement in light of the overall circumstances (Hypothesis 6) – and there are cases which reveal that some courts seem unable to resist this temptation – international judicial practice does not support Hypothesis 6. The reality is that, if the grounds for non-enforcement are interpreted narrowly or strictly (as advocated by most commentators and national courts), the operation of article V NYC closely resembles Hypothesis 1. That is to say, if grounds for non-enforcement are regarded as being satisfied only in serious or non-trivial cases and the award-debtor establishes one of those grounds, normally cross-border enforcement of the award will be (and should be) refused.

The most significant deviation from this general principle is provided by the doctrines of estoppel and waiver: as a result, the vast majority of decided cases are consistent with Hypothesis 2. There are, however, further deviations from the general principle of non-enforcement (as outlined in Hypotheses 3-5). The circumstances identified in points (b) and (c) of Hypothesis 5, although operating very much at the margins, are widely acknowledged by commentators and courts alike. As for points (d) and (e) of Hypothesis 5, although there seems to be no judicial authority that illustrates their operation, they are sound in principle and it is reasonable to contend that, overall, Hypothesis 5 is the most plausible articulation of how the so-called 'discretion' conferred by article V NYC is (and should be) exercised.

Finally, the analysis in the preceding pages may cause one to pause to consider how the term 'discretion' is used and abused. Attempts to explain the operation of the grounds for non-enforcement in article V NYC in terms of discretion are misleading as they suggest that the NYC's scheme for the cross-border enforcement of arbitral awards is more fluid and less principled than it actually is. In Dworkinian terms, 'strong' discretion becomes potentially relevant only if the framework of rules and principles fails to provide a solution, leaving the judge with an unrestricted choice. But, as regards judicial decisions in the context of article V NYC, even though the text of article V NYC leaves certain important questions unanswered, the normative framework is not incomplete in a way that admits the operation of discretion. As a general rule, if a defence to enforcement under article V NYC is established, enforcement will be (and should be) refused. To this general principle, there is a limited number of exceptions (identified in points (a) to (e) of Hypothesis 5), which are based on intelligible legal principles, rather than the court's perception of what would be fair in all the circumstances. Accordingly, notwithstanding repeated reference to 'discretion' in the literature and the decided cases, 'strong' discretion is not a feature of judicial decisions ordering (or refusing to order) the cross-border enforcement of arbitral awards under the NYC.