Introduction from the Editors

1.01 At the end of June 2013, Professor Anton COORAY retired from his position at the City University of Hong Kong ('CityU') School of Law after almost twenty-five years of loyal and productive service. During that time, he made a very substantial contribution to the success of the School, as well as to the study and practice of law. For younger members of staff and students, his retirement may have come as a surprise: his enthusiasm and energy belie his sixty-five years, a milestone that he reached on 10 April 2013. He joined the School in 1989, just two years after its foundation. Before joining, he had served as Head of Law and Dean of Law at the University of Colombo. He was quickly promoted from his initial role as a Senior Lecturer to Associate Professor. He later became a full Professor and served as Associate Dean of the School of Law for the last six years of his tenure.

1.02 Anton's tremendous contribution to the School of Law cannot be understated. He has taught courses on subjects ranging from private law to public law and from domestic law to international law. His teaching of such a wide variety of subjects is testament to his flexibility and his comprehensive knowledge. He participated in the development of all of the existing programmes of the School, served on almost every School committee, and represented the School on many CityU committees. In addition, Anton served on the Hong Kong Government's Standing Committee on Legal Education and helped to

provide training on administrative law and planning law to both government counsels in the Department of Justice and planning officers in the Planning Department. He was a member of the Hong Kong Town Planning Board from 1996 to 2004 and was the Deputy Chairman of the Town Planning Appeal Panel and Chairman of the Town Planning Board from 1995 to 2012, a position that is rarely awarded to a scholar. His contributions to legal education in Hong Kong, and the promotion of the School of Law and CityU are both invaluable and impossible to overstate.

1.03 Of course, Anton's contributions have not been confined to CityU. He was visiting professor at the University of Aix-Marseille, France; the School of Oriental and African Studies at the University of London; and the University of Hawaii. Since 1992, he has organised many international conferences, among them conferences in collaboration with Yale Law School; Cambridge University; Hebrew University of Jerusalem; Queen Mary, University of London; and the Commonwealth Legal Education Association. He has published widely on issues affecting many jurisdictions. As one of our contributors, Professor Neil ANDREWS, commented in his chapter, Anton's impressive scholarship and academic leadership embrace public and private law matters, substantive and procedural issues, domestic and international fields. It is not surprising that he has won a wide collection of friends and admirers around the world. His work as the Editor-In-Chief of *Asia Pacific Law Review*, first published in 1992, is particularly widely appreciated. Under his remarkable editorship, the journal is now well respected and internationally recognised, as evidenced by its inclusion in the highly regarded Social Sciences Citation Index in 2007, the first

Asian law journal to be so recognised. The journal is now also indexed/abstracted in SCOPUS, LegalTrac, the Social Sciences Citation Network, the CSA Worldwide Political Science Abstracts, the Index to Legal Periodicals and Books, Sociological Abstracts, and Sweet & Maxwell's LJI Service. It is globally available on Lexis.com, HeinOnline and ProQuest.

1.04 Anton is a very patient and caring person, with a natural calmness that may be mistaken for quietness at first meeting. When he first joined the School, his new colleagues found that his honesty and warm-heartedness shone and were reflected in his smiling face. His office door was always open to both colleagues and students. He has never turned away anyone in need of assistance and has given much of his valuable time to others, helping them to realise their academic and professional goals. This has not changed at all over his twenty-four years of service, regardless of his seniority or the administrative burdens that he carried. No wonder people — long-serving colleagues, short-term visitors, and students — recognise Anton's generosity towards others and his remarkable energy. Anton may not be the most strongly built of men in terms of physique, but he is a giant in terms of his character.

1.05 During his Associate Deanship, Anton was officially in charge of supervising half of the programmes that the School of Law offers. In fact, he performed rather more functions and was a great help to colleagues at all levels. We have all been able to rely on his good nature, his shrewd judgment and his support. We will miss him sorely at a personal and a professional level. He will also be greatly missed by the student body. Whenever there is a

student concern, the first thing in his mind is the interests of students and how they can be best served in a manner in accordance with the School of Law's principles. Such obvious kindness and passion have been widely recognised and appreciated and have enabled him to win the trust and confidence of students.

1.06 This *Festschrift* has attracted contributions from not only Anton's colleagues, but also a number of world-renowned scholars, who wished to convey through their contributions their enormous respect for his scholarship, leadership and gentlemanly bearing. We have chosen 'The Rule of Law: a Comparative Perspective' as its theme because it is one of the most important topics in the area of constitutional and administrative law, about which Anton has researched and written extensively. We have not sought to settle the debates about the definition or the exact meaning or ambit of the rule of law, but have left it in the hands of our contributors to explain how they understand the concept and how it is relevant to their respective areas of expertise. Although the study of the 'rule of law' encompasses a very long list of fundamental legal principles or precepts, the thirteen chapters contained in this *Festchrift* fall into three main spheres: the rule of law from the perspectives of (1) international law, (2) domestic law and (3) law and religion.

1.07 With regard to international law perspectives, Professor Neil ANDREWS has examined three recent English decisions in the field of the cross-border recognition of foreign judgments and foreign arbitral awards. He demonstrates how these cases expressly or implicitly turn on conceptions of 'the rule of law' and the flexibility and strength of the principle of legality. Professor Bea

VERSCHRAEGEN has written on the implementation and application of the 1980 Hague Abduction Convention in the European Union. In his chapter, Professor Shimon SHETREET discusses the legislative reversals of judicial decisions in the context of judicial independence in a number of jurisdictions. Dr. Wenwei GUAN considers the rule of law in the context of the WTO's decision-making process and Dr. Lijuan XING examines the interpretation of the Rotterdam Rules from the perspective of the international rule of law. These five chapters demonstrate that the principles and precepts of the rule of law have international or cross-border dimensions. The challenge of legislative reversals of judicial decisions to the principle of judicial independence, for example, is, unfortunately, a widespread phenomenon in Professor Shimon SHETREET's view. Observing the rule of law remains fundamental in the implementation and application of international conventions, such as the 1980 Hague Abduction Convention, as well as in the decision making process of international organisations, such as the WTO. As also shown in interpreting international conventions, such as the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules), national courts should bear in mind the international character of international conventions and the need to observe and promote international rules of law as reflected in those international conventions.

1.08 As to domestic law perspectives, Professor Walter RECHBERGER has written on the rule of law in Austria, examining the constitutional framework for Austrian civil procedure. Professor Feng LIN has written on the rule of law under the Communist Party of China, presenting a study of local People's Congress elections. Professor Xin

HE and Kwai Hang NG have discussed the use of judicial mediation in domestic disputes involving violence in China. Dr. Surya DEVA has written on the rule of law in India, analyzing the chasm between paper and practice, whilst Dr. Fozia LONE has reviewed the intersection of tort law and the concept of rule of the law in England and Wales. Although each of these five chapters has looked at different jurisdictions in the context of different areas of law, they are all concerned with the principle that separation of powers should be observed as one of the fundamental aspects of the rule of law, no matter whether in civil procedures, People's Congress elections or the judicial mediation process. Explicitly or implicitly, justice, fairness and equity are held as some of the most fundamental elements of the rule of law, which should be respected by everyone.

1.09 With regard to the relationship between law and religion, Professor Hoong Phun LEE has addressed the phenomenon of 'Islamism' or 'Islamisation' and how it interacts with western notions of constitutional rule, with emphasis on the rule of law and constitutionally entrenched guarantees of fundamental freedoms. Dr. Rajesh SHARMA has discussed the rule of law and religious faith and beliefs in the context of how Indian courts are confronted with religious issues. Rev. Dr. Noel DIAS and Roger GAMBLE have considered the relationship between the Decalogue and Sri Lankan Criminal Law and the definition of offences as a prerequisite for the rule of law. Although focusing on the relationships between the rule of law and different religions, each of these three chapters examines the increasingly intensified test of boundaries between different religions, political, social and philosophical value systems, and the legal systems that are founded on the rule of law.

1.10 We hope that Anton will take the excellent and original scholarship presented in this *Festschrift* as a sincere token of our appreciation for him. It is a great pleasure to be able to contribute to the discussion of some of the core issues in the understanding and observance of a subject that is so close to his heart: the rule of law from the perspectives of international law, domestic law, and the law and religion. We look forward to our contributors' thoughts reaching an international forum and becoming accessible to a wider audience. We hope that this book will contribute to the promotion of a better understanding of the concept of rule of law and its implications, including how the rule of law has interacted and continues to interact with international laws, domestic laws and religions over time to meet the changing needs and aspirations of human dignity worldwide.

1.11 As well as expressing our esteem for Anton, the editors wish to thank the Chief Justice of Hong Kong, Honourable Mr Geoffrey MA, who most kindly agreed to write the foreword for this volume. We are extremely grateful to all of our contributors for taking time out of their busy schedules to research and write such valuable contributions to the literature on the ever more important role that the rule of law plays in various jurisdictions and diverse areas of law. We are especially indebted to Patrick KWONG and Edmund CHAN for their generous assistance in bringing this volume to publication.

1.12 Special thanks also go to Helen SUEN, Emily CHOW and Prisca CHAN for their unfailing administrative and organisational support throughout the project, to Helen KIM for patient proofreading and excellent editorial input, and to Karen NGAI for compiling the index. Last, but not the least, our most heartfelt thanks go to the School of Law

of the City University of Hong Kong and all colleagues who supported and contributed to this project in one way or another.

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The Rule of Law Sans Frontières: Cross-Border Aspects of the Principle of Legality

Neil H. ANDREWS[1]

(1) *Introduction*

2.01 It is a pleasure to contribute to this volume. Anton COORAY's impressive scholarship and academic leadership embrace public and private law matters, substantive and procedural issues, domestic and international fields. It is not surprising that he has won a wide collection of friends and admirers in all parts of the globe.

2.02 Lord Bingham's study of the 'rule of law' concept prescribes a list of fundamental legal principles or precepts.[2] But these are not exhaustive. The tentacles of 'the rule of law' can extend to 'cross-border' matters. The purpose of this chapter is to consider three recent English decisions (decided between 2010 and 2012) in the field of cross-border recognition of foreign judgments or foreign arbitral awards. Expressly or implicitly, these cases turn on conceptions of 'the rule of law'. This triad of cases demonstrates the flexibility and strength of the principle of legality.

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[1] Professor, Faculty of Law, University of Cambridge, United Kingdom

[2] Tom Bingham, *The Rule of Law* (Allen Lane 2010).

2.03 The three topics are:

(i) Is an English court bound to set aside a default judgment, Y, granted in recognition of a final foreign judgment, X (when decision X has already survived intact following appellate scrutiny in that foreign jurisdiction) if the judgment X is subsequently reversed within that foreign legal system by decision Z, but by reference to evidence available at the time of foreign decision X? Here the connection with 'the rule of law' doctrine was explicit: the English court declared decision Z to be a violation of 'the rule of law'. This topic arose in the English Court of Appeal in *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy* (2012).[3]

(ii) In *Yukos Capital Sarl v. OJSC Rosneft Oil Co* (2012),[4] the English Court of Appeal had to decide this issue: is the English court precluded by judgment B, given in Utopia, which declared that judgment A, given in Ruritania, is open to objection for lack of judicial independence (or bribery or corruption)? Of course, 'the rule of law' doctrine justifies the refusal to give effect to the Ruritanian decision A, if there is a lack of independence, etc. But the further issue, a matter of some delicacy, is whether the courts of Utopia, which were first seised with this matter (here the Dutch court) should have the final say (in decision B) on the issue of whether the court responsible for decision A lacked judicial independence, etc. On that last point, the English answer is 'no': determination

[3] [2012] EWCA Civ 196; [2012] 1 WLR 3036; noted M Ahmed (2012) CJQ 417.

[4] [2012] EWCA Civ 855; [2013] 1 All ER 223; [2012] 2 Lloyd's Rep 208.

in judgment B of the judicial independence issue concerning judgment A is not decisive, and does not preclude the third court contemplating this issue. The reason given by the English Court of Appeal in the *Yukos* case (2012)[5] to support that non-preclusive approach is that the public policy doctrine applicable in the respective jurisdictions might differ. That is a possibility. But the better explanation is that factual determinations on such a matter should be open to each foreign jurisdiction and that the doctrine of 'issue estoppel' should not preclude re-examination of this matter.

(iii) Is an enforcing court, acting under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), required to conduct a complete review of a foreign arbitral tribunal's determination that an unnamed party, R, should be regarded as a party to an arbitration clause to which only P and Q are signatories and named parties? The Supreme Court of the United Kingdom in the Dallah case held that the New York Convention demands a full inquiry by the enforcing court of that fundamental preliminary and jurisdictional question, 'who is a party?'. Here 'the rule of law' doctrine is relevant at two levels: (a) it is surely axiomatic that an arbitral award should not enjoy authority to render a binding award if there has been no true consent to the arbitral reference, and no acquiescence in the arbitral process, by the alleged award judgment debtor; (b) nor should it be necessary for the award judgment debtor to attempt first to

5 ibid.

challenge the award in the jurisdiction where the arbitral process had its 'seat'; this is because the New York Convention requires, as a matter of international obligation, the enforcing court to conduct such a scrupulous inquiry into this matter.

(2) *A Foreign Court Improperly Invalidates a Foreign Judgment Already Recognised by the English Court*

2.04 In *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy* (2012),[6] the English Court of Appeal refused to set aside an English default judgment obtained in recognition of a foreign judgment, even though, subsequent to the English judgment, the foreign judgment had been set aside by the relevant national court (in the Ukraine). The rescission of the Ukrainian judgment in the Ukraine involved fundamental re-opening of that judgment in a manner contrary to the principles of 'the rule of law', finality, and legal certainty. This was illegitimate because evidence to support the ground of subsequent attack had been available in the first Ukrainian proceedings.

2.05 In this case, the assignee of a contractual debt owed by an energy company registered in Ukraine (in fact, a wholly owned state company) had successfully sued and obtained judgment from the Ukraine court in Kiev in April 2006. The assignee, Merchant International, is incorporated under Delaware law. In June 2006, the Supreme Court of Ukraine upheld this order; the judgment award was USD $24,719,564. But a statute was enacted

[6] [2012] EWCA Civ 196; [2012] 1 WLR 3036; noted M Ahmed (2012) CJQ 417.

that prevented enforcement of judgments against energy companies. And so the judgment creditor commenced London proceedings in April 2010 to enforce this foreign judgment. The judgment debtor failed to enter a defence, and so judgment by default was obtained in London on 28 February 2011. In April 2011, the judgment debtor persuaded the Supreme Court of the Ukraine to rescind the Ukrainian 2006 judgment on the basis that the assignee, Merchant International, had not at the date of assignment enjoyed full corporate capacity under Delaware law. The documentary evidence adduced for this purpose was a record of the companies register in Delaware. This information had been available at all stages of the long proceedings in this litigation. In November 2011, the Kiev commercial court gave a fresh judgment in the same matter between the parties, which was in favour of the judgment debtor, declaring it was not liable to Merchant International. However, the basis of this decision was not lack of corporate capacity (and so the Delaware record was in fact a spurious defence). Instead, the Kiev commercial court fastened onto the absence of a signature by the assignor in a portion of the relevant purported assignment documentation. However, this decision appears to represent Russian law on the validity of the purported assignment. This decision, therefore, surprisingly upheld a formalistic challenge. The opportunity for that challenge arose only because the Ukrainian Supreme Court had earlier rescinded the 2006 judgment by reference to material available in 2006.

2.06 The English Court of Appeal rejected the argument that the English default judgment should be set aside without further ado simply because the Ukraine judgment had been rescinded in the Ukraine. The correct decision was to maintain the default judgment, because the Ukrainian

judgment had been rescinded in a way that offended the principle of legality. It was unacceptable that the decision had been re-opened by consideration of material available to the judgment debtor in 2006. The Court of Appeal accepted the submission made by the judgment creditor's counsel that it would be contrary both to English public policy and to the Strasbourg jurisprudence concerning Article 6 of the European Convention on Human Rights for the final foreign judgment to be reopened 'on the basis of points which he advanced or could reasonably have advanced in the original litigation'; this restriction rested on 'a fundamental aspect of the rule of law'.[7] The English Court of Appeal noted (a) that the Strasbourg case law establishes that a final decision, once the ordinary system of appeals has been exhausted, cannot be re-opened on factual grounds within that foreign jurisdiction unless 'there is evidence not previously available through the exercise of due diligence that would lead to a different outcome of the proceedings';[8] and (b) that there would be a 'flagrant' breach of this principle of legal certainty for the foreign jurisdiction to permit a de novo review by reference to evidence available at the time of the earlier decision in order to protect the interests of a party associated with the foreign state itself.[9] In conclusion, the English Court of Appeal was satisfied that the process whereby the first Ukrainian judgment (already upheld on appeal with that jurisdiction) was rescinded and then reversed by successive Ukrainian decisions was irregular and incompatible with English public policy and with the Strasbourg conception

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7 ibid [58].

8 ibid [59], quoting passages from the European Court of Human Rights, in Pravednaya v Russia (Application No 69529/01) 18 November 2004, [24]-[27].

9 [2012] EWCA Civ 196; [2012] 1 WLR 3036 [60]: citing the *Agrokompleks case* (Application No 23465/03) 6 October 2011, [151].

of 'the rule of law' in this context.[10] Furthermore, TOULSON LJ in the English Court of Appeal referred to such a judgment (that is, the English default, and no doubt the earlier Ukrainian money judgment) as an 'asset' on which third parties might have relied.[11]

2.07 The decision in the *Merchant International* case establishes, therefore, that (i) the English courts should not set aside a default judgment entered in England in recognition of a foreign civil judgment, where the former is final, even though there has been a subsequent rescission of the relevant foreign judgment, provided (ii) that this rescission involved an illegitimate reference to evidence available at the time of the earlier final decision; and a fortiori the default judgment will stand if (iii) there is a clear inference that the judgment debtor who has obtained this rescission is an emanation of the relevant foreign State. This decision involved relations between two Convention States, both party to the European Convention on Human Rights, namely the United Kingdom and the Ukraine. If, for example, the foreign state were the United States of America or Brazil, Article 6 and the Strasbourg jurisprudence would not apply. But the decision in the *Merchant International* case appears to rest equally on considerations of English public policy, which apply more broadly than the European Convention. It does not appear that there had been any concrete steps already taken in England to obtain enforcement of the English default judgment. Nor does it appear to have been regarded as crucial that the Ukrainian Supreme Court's decision to rescind the original Ukrainian judgment had been based

[10] [2012] EWCA Civ 196; [2012] 1 WLR 3036 [72], [73].

[11] ibid [78].

on a reason (the allegation that the assignee company had lacked corporate capacity) that the still later Kiev Commercial Court had not accepted.

2.08 The English Court of Appeal's decision does not address the situation where the final foreign judgment has already been rescinded, although by an illegitimate foreign process, *before the English court* is asked to give judgment recognising the earlier judgment. In that situation it would be a strong application of the rule of law concept to accord finality and hence priority to the first foreign judgment even though it has already been declared invalid in the relevant foreign jurisdiction by an illegitimately broad re-opening of the original decision.

(3) *Should the English Courts Simply Follow a Foreign Court's Declaration that Another Foreign State's Court Lacked Judicial Independence?*

2.09 HAMBLEN J's decision in *Yukos Capital Sarl v. OJSC Rosneft Oil Co* (2011)[12] was reversed by the Court of Appeal in the Yukos case (2012).[13] HAMBLEN J had held that the English Commercial Court, in accordance with the principle of issue estoppel, should acknowledge that an arbitration award-debtor was bound by a Dutch court's decision. The Dutch court had held that a Russian court lacked independence when it had decided to annul four Russian arbitration awards. The Dutch court, as noted by HAMBLEN J, had found that the Russian courts in

[12] [2011] EWHC 1461 (Comm); [2012] 1 All ER (Comm) 479; [2011] 2 Lloyd's Rep 443; [2011] 2 CLC 129.

[13] [2012] EWCA Civ 855; [2013] 1 All ER 223; [2012] 2 Lloyd's Rep 208.

this respect were controlled by the Russian State and that a consistent line of non-independent decision-making had been proved.[14] The Dutch court had proceeded to enforce the Russian arbitral awards. The principal sum (approximately USD $425 million) had been paid. The present English proceedings were brought to seek recovery of interest (approximately USD $160 million), additional compensation attributable to the dilatory satisfaction by the award-debtor of the award. HAMBLEN J's decision, on a preliminary point, effectively opened the path to such supplementary enforcement.

2.10 However, the English Court of Appeal[15] held that issue estoppel did not apply here. This was because the questions of whether the Russian court's decision had been vitiated by extraneous pressure and whether that court lacked impartiality and independence had been resolved by the Amsterdam Court of Appeal applying the *Dutch test of public policy*. This meant that the issue before the English court was not the same because it required the English court to apply independently and afresh English public policy in this regard. This decision is attractive. It would be surprising and unacceptable if the English courts were in effect to abdicate responsibility for testing whether foreign courts lack impartiality and independence by deferring under the rubric of issue estoppel to a third country's prior determination of this point.

2.11 The following passage contains RIX LJ's encapsulation (giving the English Court of Appeal's judgment) of the need for a fresh and independent English assessment of

[14] [2011] EWHC 1461 (Comm); [2012] 1 All ER (Comm) 479 [35].

[15] [2012] EWCA Civ 855; [2013] 1 All ER 223; [2012] 2 Lloyd's Rep 208.

the Russian decision, rather than for the English court to rubber-stamp under the aegis of issue estoppel the Dutch court's condemnation of the Russian decision: '...it makes a great deal of difference whether the issue is being determined by reference to Dutch public order or English public order which is (or may well be) different.'[16] Of course, the reality is that English public policy is unlikely to be more or less tolerant than Dutch public policy in the matter of corruption and bribery of foreign judges. The true issue is more likely to be whether the findings of fact made when applying that branch of public policy are sound. The English decision attractively creates a fresh opportunity for the evidence relevant to this allegation to be considered by the English court. Issue estoppel does not preclude that determination. A highly sensitive and inevitably contentious factual dispute is left open for the English court to decide for itself. Its hands are not tied by a foreign court's condemnation of another foreign court's conduct.

(4) *An Enforcing Court's Responsibility to Double-Check a Foreign Arbitral Tribunal's Determination Concerning the True or Legitimate Parties to an Arbitration Agreement*

2.12 The Supreme Court of the United Kingdom in *Dallah Real Estate & Tourism Holding Co v. Pakistan* (2010)[17] held that a Paris award could not be recognised in England, under the New York Convention, because the French arbitral tribunal had incorrectly determined that

[16] ibid [156], [157].

[17] [2010] UKSC 46; [2011] 1 AC 763; Jan Kleinheisterkamp, 'Lord Mustill and the courts of tennis — *Dallah v Pakistan* in England, France and Utopia' (2012) 75 MLR 639, 640 at n 2 listing various comments on this decision.

the Pakistan Government was a party to the relevant arbitration agreement.[18]

2.13 Under the New York Convention, enacted as section 103, Arbitration Act 1996 (England and Wales), the question of whether a person was in fact party to an arbitration agreement is to be determined in accordance with either the parties' chosen law (but in the *Dallah* case the arbitration agreement did not contain any such choice of law), or the law of the jurisdiction in which the award was made (here, French law). Accordingly, French law applied here. Applying the relevant French test for this purpose, the Supreme Court of the United Kingdom was satisfied that the Paris arbitral tribunal had adopted faulty reasoning when concluding that Pakistan was a party to the agreement (even though it had not been named as a party within the arbitration agreement, nor had it signed that clause). The Pakistan Government had neither signed the arbitration agreement, nor had it been named as a party to that agreement. Instead that Government had structured the relevant substantive transaction (including, the literal terms of the arbitration agreement) by using a trust. The English court held that the Pakistan Government should not be regarded as a party to the arbitration agreement, and that the arbitration award

[18] Generally on the issue of third parties and arbitration, see Nigel Blackaby and Constantine Partasides (eds), *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009) 2.39 ff; Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (Kluwer Law International 2005); Andrea Marco Steingruber, Consent in International Arbitration (Oxford University Press 2012) (Oxford International Arbitration Series); Jan Kleinheisterkamp, 'Lord Mustill and the courts of tennis — *Dallah v Pakistan* in England, France and Utopia' (2012) 75 MLR 639, 640 n 3. On the power to add a third party under the London Court of International Arbitration (LCIA) rules, with the consent of party A, and with the consent of the third party, even if party B does not consent, see Blackaby and Partasides 2.217, noting LCIA Rules, Art 22(h).

was, therefore, flawed in deciding that this Government should be regarded as a party.

2.14 The United Kingdom Supreme Court held that the arbitral tribunal had erred because it had not applied French law (or had applied it in an impure manner) to determine whether the Pakistan Government was in fact a party to the arbitration agreement (this being the applicable law to the construction of the arbitration agreement, in default of party choice of another system).

2.15 The correct approach, founded on French law, required investigation of whether the parties' dealings disclosed a common subjective intention (express or implied), shared by Pakistan and the named arbitration parties, that Pakistan would be treated as party to the arbitration agreement. Instead the Paris arbitral tribunal, to buttress their conclusion that Pakistan was party to this arbitration agreement, had erred by invoking more general notions of 'good faith'. These nebulous notions were insufficiently tied to the question of common intention.[19]

2.16 The English Court of Appeal (this point was not pursued on further appeal to the Supreme Court) also rejected Dallah's further argument that the French arbitral tribunal's decision on the question of whether Pakistan was party to the arbitration agreement was binding as a matter of issue estoppel. It was not binding because the French arbitral tribunal had not applied French law to this question, as it should have.

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[19] The Court of Appeal summarised this curious aspect: [2009] EWCA Civ 755; [2010] 2 WLR 805; [2010] Bus LR 384; [2010] 1 All ER 592; [2010] 1 All ER (Comm) 917; [2010] 1 Lloyd's Rep 119 [24], [25].

2.17 The English court considered that it was inconsistent with the New York Convention and section 103 of the Arbitration Act 1996 (England and Wales) for the court in the country where recognition or enforcement is sought to be precluded by issue estoppel from rehearing this question concerning the arbitration agreement's validity and effect. In the Court of Appeal, MOORE-BICK LJ said that the structure of the New York Convention presupposes that the foreign enforcing court should be able to examine the present issue—whether the award is correct in declaring a person or entity to be party to the arbitration agreement—and this question is not one which is exclusively ceded by that Convention to the arbitral tribunal (subject only to the supervisory jurisdiction of the court of the seat).[20] He also held that the fact that Pakistan had chosen not to challenge the French arbitration award within the French supervisory court system did not raise an estoppel against the Government of Pakistan so that it was precluded by raising this issue during proceedings in a foreign jurisdiction concerning enforcement under the New York Convention.[21]

2.18 The *Dallah* case (2010) shows that foreign enforcement proceedings under the New York Convention can generate considerable delay and cost, and that this is far removed from the ideal of a fast route to foreign recognition and enforcement of arbitral awards. On the other hand, considering the fundamental nature of the question, it is pleasing that the English courts have shown that an arbitral tribunal's jurisdictional determination that an entity is (in its view) a party to an arbitration agreement

[20] ibid, *per* Moore-Bick LJ [18].

[21] ibid, *per* Moore-Bick LJ [56].

should not be lightly ratified by the enforcing court: there should be a 'final check' on the preliminary issue of whether a party is indeed truly a party to the relevant arbitration. The enforcing court's capacity to conduct a searching review of this matter will inject much greater rigour into this fundamental threshold issue. Given the explicit hesitation of two members of the Paris arbitral tribunal in this case on this very jurisdictional issue, it was inevitable that the enforcing court's searchlight would be trained closely at this possible weakness.

2.19 But the twist in the *Dallah* litigation was when a French court (Paris Cour d'appel: the French court nominated to review arbitral awards) later reached the opposite conclusion: that the Paris award was sound (at least according to French arbitration principles), so that the Pakistan Government should be regarded as a party to the arbitration agreement.[22] This decision was made pursuant to Article 1502(1) of the French Code of Civil Procedure, which permits the court to refuse to enforce an award 'if the arbitrator has ruled upon the matter without an arbitration agreement or [the putative arbitration agreement is] a void and lapsed agreement'. The French court's 'transnational' perspective involved posing different criteria (the *Dalico* doctrine)[23] compared with the criteria adopted by the English courts when purporting to apply French law to the relevant arbitration agreement. The French court noted that the Pakistan Government negotiated the contract, and that the Trust created by the

[22] *Gouvernement du Pakistan v. Société Dallah Real Estate & Tourism Holding Co*, Cour d'appel de Paris, Pôle 1 — 1e ch, 17 February 2011, n° 09/28533 <www.practicallaw.com/8-505-0043> accessed 11 June 2013.

[23] *Municipalité de Khoms El Mergeb v. Dalico*, Cour de Cassation, First Civil Chamber [Cass. 1e civ] 20 December 1993, JDI 1994, 432, note E Gaillard.

Government was merely a signatory; that the Government was involved in the performance of the contract; that it effectively controlled the same transactions' termination; that the Trust was 'purely formal'; and concluded that the Government was the true Pakistani party to the transaction.

2.20 The Paris Cour d'appel's decision reveals that a much more fluid test applies under French arbitral practice when the arbitration has a transnational character.[24] This suggests that in future cases greater rigour is required so that the enforcing court can ascertain with confidence the foreign test applicable at the relevant seat.

2.21 The 'lesson' from the *Dallah* case is that determination of this issue (the true parties to the arbitration agreement) in a foreign court (the enforcing court under the New York Convention) can require sophisticated expert evidence on this aspect of foreign arbitration law. This proved in the *Dallah* case to be a difficult and fraught matter. The English courts, assessing the (party-appointed) expert evidence, concluded (wrongly, as it now appears) that the test under French law for determining whether a person or entity was truly party to an arbitration agreement was a rather formal and traditional criterion of consensus.

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[24] James Clark, 'Paris Court of Appeal Upholds ICC Award in Dallah case' Practical Law Company (3 March 2011) <www.practicallaw.com/4-504-9971?q=&qp=&qo=&qe=> accessed 10 June 2013: '... the French court did not focus on French law principles... This solution is inspired by the recognised desire of French courts to develop substantive rules for international arbitration that ensure that the outcome of a dispute does not depend on the particularities of a national law. This solution is also consistent with French case law on the extension of arbitration agreements to parties that are non-signatories but have participated in its negotiation and performance.'

2.22 How does this difference of analysis and result leave the relevant award? If a third jurisdiction were to be asked to enforce the Dallah award (made by the arbitral tribunal in Paris), it seems highly likely that it would defer to the French court's decision, rather than be guided by the Supreme Court of the United Kingdom's conflicting decision. This is because (a) the French court is situated in the seat of the relevant arbitration and (b) it seems likely that the French court's flexible and transnational reasoning in this matter would be regarded as more attractive.

2.23 Finally, if there has been a determination concerning the parties to the arbitration by the court of the 'seat' where the arbitration took place, it is arguable an English court might apply the doctrine of 'issue estoppel' to preclude itself from re-opening that determination. But, of course, on the facts of the *Dallah* case, this was not the sequence of events. Instead the French Cour d'appel's decision occurred after the English courts had examined the matter.

(5) *Concluding Remarks on the Cross-Border Vitality of 'The Rule of Law'*

2.24 The three topics examined in this piece can be summarised as follows.

2.25 Transnational Finality of Judgment: As the English Court of Appeal decided in *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy* (2012),[25] where a final Ruritanian judgment A has been obtained, and it has next been recognised by

[25] [2012] EWCA Civ 196; [2012] 1 WLR 3036; noted M Ahmed (2012) CJQ 417.

an English default judgment B, and the Ruritanian court in judgment C later rescinds judgment A by receiving evidence available at the time of judgment A (and indeed there is a subsequent Ruritanian judgment D declaring the converse of the result in judgment A), the English court will not accord recognition to this *volte-face*. The reason is that it is contrary to Common Law and European Convention conceptions of 'the rule of law' for the finality of judgment A to be undercut at stage C by reference to material available at the time of judgment A. This is a strong and radical application of a transnational concept of the finality of civil judgments. The English decision was explicitly based on the notion of 'the rule of law'.

2.26 *Transnational Determinations Whether a Foreign Court Lacks Judicial Independence:* The Court of Appeal in the Yukos case (2012)[26] held that the English courts are not bound by the concept of 'issue estoppel' or 'issue preclusion' (a notion rooted in the notion of economy, finality, and consistency) from hearing afresh the allegation, already determined in judgment B by the court of Utopia, that judgment A given in Ruritania is objectionable because the latter's court lacks judicial independence (or there has been bribery or corruption). Here (i) 'the rule of law' justifies an inquiry whether judgment A is objectionable because there has been a lack of judicial independence, etc; but (ii) 'the rule of law' does not require judgment B to be the binding and final determination of that issue. Proposition (i) is uncontroversial. Proposition (ii) can be justified on the two-fold basis that first, it is possible that different jurisdictions might apply different criteria when determining lack of judicial independence, etc; and second,

[26] [2012] EWCA Civ 855; [2013] 1 All ER 223; [2012] 2 Lloyd's Rep 208.

more importantly in practice, the allegation that judgment A is open to objection on this basis is such a fundamental issue, indeed one which is so obviously fraught with diplomatic and commercial peril, that it should be open to successive jurisdictions to address this allegation, whether based on the same or new evidence.

2.27 *Transnational Determination Concerning the Legitimate Parties to Arbitration Awards:* The Supreme Court of the United Kingdom in *Dallah Real Estate & Tourism Holding Co v. Pakistan* (2010)[27] held that a foreign arbitral award cannot be recognised in England, under the New York Convention, if the enforcing court, conducting a de novo investigation of the issue, concludes that a purported arbitral judgment debtor was neither a true party to the arbitration, nor did it acquiesce in those proceedings. Even though there has been no prior challenge within the courts situated at the 'seat' of the arbitration proceedings, such a searching and deep inquiry by the enforcing court is consistent with 'the rule of law' in this respect: arbitration rests on consent; from the perspective of foreign enforcement of arbitral awards, the existence or validity of an alleged arbitral party's consent to that process cannot be precluded by the arbitral tribunal's determination of that matter; therefore, the enforcing court must be satisfied that the arbitral tribunal was correct in identifying the relevant respondent as a true or legitimate party to the arbitration award.

[27] [2010] UKSC 46; [2011] 1 AC 763; Kleinheisterkamp (n 17) 640 at n 2 listing various comments on this decision.