FRAUD AND RELATED BARS TO ENFORCEMENT OF FOREGIN JUDGMENTS

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Introduction

1. This paper will consider bars to enforcement or recognition based on:

    i. The judgment having been obtained by fraud;
    ii. Enforcement being contrary to public policy;
    iii. The proceedings being contrary to natural justice; and
    iv. The judgment being a sum of money amounting to a penalty.

2. The subject is of particular interest because it involves a tension between two competing objectives, namely a desire to give effect to a judgment of a court of competent jurisdiction and an unwillingness to give effect to something which is unjust or repugnant. The issue is where to strike the balance.

3. The English courts consider related matters on other kinds of applications, for example, bars to enforcement of arbitral awards. Further, the risk of these factors at an earlier stage of the litigation may be factors which go into the balance of factors on the issue of forum conveniens.

Bases of enforcement and recognition

4. At one time this was based upon the very uncertain doctrine of comity.
Dicey, Morris & Collins, The Conflict of Laws, 15th edition 14-007

> *"English judges believed that the law of nations required the courts of one country to assist those of any other and they feared that if foreign judgments were not enforced in England, English judgments would not be enforced abroad."*

5. This was superseded by what was called the doctrine of an obligation that the judgment of a court of competent jurisdiction over the defendant imposed a duty or obligation on the defendant to pay the sum for which judgment was given. The impact of this leads to three principles summarised by *Fentiman on International Commercial Litigation* 2nd Ed.[18.37]. First, an English court will not normally review the legal correctness of any finding of fact or law by the foreign court. Indeed,

the principles of issue estoppel mean that such findings are respected. Second, an English court will not generally review the propriety of the foreign proceedings in terms of unfairness or procedural irregularity. Third, a defendant may not raise in enforcement proceedings a defence available in the foreign country.

6. However, these three principles are subject to important exceptions. They are subject to *"anything which negatives that duty or forms a legal excuse for not performing it":* see *Schibsby v Westenholz* [1870] LR 6 QB 155, 159 per Blackburn J.

When is the foreign court a court of competent jurisdiction?

7. The starting point is the position at common law. In order for a judgment to be enforced at common law, a judgment could be recognised and enforced if it was (i) a debt or definite sum, (ii) it was not payable in respect of taxes, fines or penalties, (iii) it was not discredited on grounds of fraud or contrary to overriding considerations of public policy, and (iv) it was final and conclusive. The person against whom the judgment of the foreign court was given must, at the time the proceedings were instituted, be present in the foreign country. Alternatively, the person must have agreed before or during the proceedings to submit to the foreign jurisdiction (whether by the terms of a contract between the parties or ad hoc for the dispute or by submitting to the jurisdiction of the foreign court) or must have been a claimant or counter-claimant in the foreign proceedings.

8. In respect of enforcement under statute under the Administration of Justice Act 1920 ("AJA") and the Foreign Judgment (Reciprocal Enforcement) Act 1933 ("the 1933 Act") there are similar provisions as to when the foreign court has jurisdiction. The former is in respect of many Commonwealth countries and the latter used to be in respect of various European countries, but now is limited to Israel and Suriname.

9. Enforcement at common law is by an action in the English court usually through a summary judgment proceeding under Part 24 of the Civil Procedure Rules. If summary judgment fails due to the judgment debtor raising a real issue to be tried, then the matter has to go to a full trial. The method for enforcement in respect of the AJA and the 1933 Act is by registration where certain requirements are met. Under the AJA, the application for registration must be made within 12 months after the date of judgment or such longer period as the Court may allow. If the conditions are satisfied, a judgment will be registered in the English court *"if [in] all the circumstances of the case, they think it just and convenient that the judgment should be enforced in the United Kingdom"*. Under the 1933 Act, registration is mandatory rather than permissive, and the application for registration (subject to exceptions) must be made within 6 years after the date of judgment.

10. It follows from the fact that the foreign court is able to assert jurisdiction is not sufficient. Thus, for example, if there is a contract which is subject to the law of the British Virgin Islands ("BVI") or a contractual dispute where an English defendant is a necessary or proper party but *"the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court"* (AJA 1920 s.9(2)(b)), the English court will refuse to register the judgment. That is notwithstanding the fact that service out of the jurisdiction might be permitted under the law of the BVI subject to permission of the BVI court.

11. The European conventions from time to time contain a radically different position. If there is a basis for jurisdiction e.g. domicile or in contract, the place of performance of the obligation in question, the judgment will be enforced even where the defendant did not agree to or submit to the jurisdiction of the court or reside in the European country. Thus, where there is an allegation of breach of contract and Germany is the place of performance of the obligation in question, the German court has jurisdiction against an English defendant. The judgment of the German court has jurisdiction and can then be enforced under the conventions against the English defendant even if he did not agree to or submit to the jurisdiction of the German court.

12. It is not intended in this paper to provide anything further by way of summary of the procedure under common law or statute or under Conventions for registration. It suffices to say that particularly where there are friendly relations between the foreign court and the UK, and there is respect for the rule of law in that country, it should be very straightforward to enforce a judgment in the UK. However, this paper will highlight how these considerations may be undermined by the nature and extent of the bars to enforcement.

Fraud and other bars to enforcement

[FRAUD COMES UNDER PUBLIC POLICY IN EUROPE? COULD ALSO INCLUDE IN 18?]

13. The bars of fraud, public policy, natural justice and penalties are applied at common law. There are also similar provisions under the statutory jurisdiction. For example, the AJA at s.9(2) contains the following provisions:

> *"(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court; or*
>
> *(d) the judgment was obtained by fraud; or*

...

(f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court."

There are similar provisions under the 1933 Act for the setting aside of the registration of a judgment.

14. A useful starting point is the case of *JSC VTB Bank v Pavel Valerjevich Skurikhin* [2014] EWHC 271 (Comm). This recent case illustrates the full range of challenges to enforcement of foreign judgments in an application to enforce at common law.

15. The facts of the case were as follows. VTB is the second largest bank in Russia. Mr Skurikhin is a Russian citizen, domiciled in Russia in control of a group of English LLPs. The bank obtained a judgment in Russia for sums due under a loan agreement, guaranteed by Mr Skurikhin, for sums loaned to his English companies. The bank obtained judgments under the guarantees which were final and binding in Russia and sought to enforce them at common law by seeking summary judgment in England.

16. Mr Skurikhin argued that the judgment was unenforceable because it was obtained as part of an illegitimate corporate raid by VTB against a valuable group of companies controlled by him in the agricultural sector known as Siberian Agrarian Holding Group. He contended that:

i. VTB's Russian judgments were obtained by fraud;
ii. Enforcement of the Russian judgments was contrary to English public policy;
iii. The Russian proceedings were contrary to natural justice; and
iv. The sums obtained amounted to penalties.

17. Each of those grounds failed except for a part of the sums payable which were held to be penal in nature therefore unenforceable. There now follows a discussion of the English law relating to each of those bars to enforcement. The scope of this talk does not extend to other probably less common defences such as where the judgment of the foreign court is inconsistent with a prior judgment of the English court or another judgment of the foreign court between the same parties or their privies.

I Fraud

A The wide potential ambit of the fraud defence (in respect of a judgment outside Europe/the Convention countries)

18. The scope of the bar by reference to fraud is wide in its potential ambit.

19. The wide ambit of the bar is that the foreign judgment is impeachable for fraud where

i. fraud was alleged in the foreign proceedings and the foreign court rejected the allegation of fraud: see *Jet Holdings Inc v Patel* [1990] 1 Q.B. 335 (CA);

ii. fraud was not alleged in the foreign proceedings and the fraud only came to light thereafter;

iii. fraud was not alleged in the foreign proceedings despite the fact that the party now relying on the fraud knew at the time of the foreign proceedings and could have then alleged it but chose not to do so: see *Abouloff v Oppenheimer* (1882) 10 Q.B.D. 295 (CA) (where a claimant sued for delivery of goods and concealed from the court that he already had them), *Syal v Heyward* [1948] 2 KB 443 (CA) (where a claimant sued for a debt and concealed from the court that half the sum was a usurious interest charge upon the other half), *Jet Holdings Inc v Patel* [1990] 1 Q.B. 335 (CA) (where the claimant obtained judgment by forging documents and giving perjured testimony) and *Owens Bank Ltd v Bracco* [1992] 2 A.C. 443) (where the claimant forged documents and gave perjured evidence).

20. The cases cited in the third of the above factors show, in the context of obtaining foreign judgments, that the meaning of fraud is neither narrow nor precise. Indeed, it has been said that it extends to encompass *"every variety of mala fides and mala praxis whereby one of the parties misleads and deceives the judicial tribunal"*: see *Jet Holdings Inc v Patel* [1990] 1 Q.B. 335, 346, citing from Spencer Bower on Res Judicata.

21. As regards the first of the above factors, this would appear out of line with cases of issue estoppel where the second court is bound by the findings of the first court. Such is the breadth of the principle that the finding of fraud in the first court is not binding. This is subject to an exception where there is a second set of proceedings in the foreign court and there is an unsuccessful challenge of fraud, it has been held that that can create an estoppel in the English proceedings. The consequence is that the unsuccessful party would be precluded from relying upon the fraud (which had been rejected in the second action) as a bar to enforcement: See *House of Spring Gardens Ltd v Waite* [1991] 1 Q.B. 241 (CA).

22. As regards the third of the above factors, contrast the position in a domestic case of the proper way of challenging a decision based on a finding of fraud. The way to challenge a judgment procured by fraud is usually for a party to bring a fresh action to set aside the original judgment for fraud: see *Flower v Lloyd* [1877] 6 Ch D 297 and *Jonesco v Beard* [1930] AC 298. This would depend upon the information about the fraud being newly discovered after the trial and would not be countenanced if the unsuccessful party had not raised the issue before the court despite knowing about the fraud. However, in a case about recognition of a foreign judgment, the jurisdiction (save in respect of a enforcement of a European judgment within the EU under the

Conventions) extends even to a case where the fraud is not raised as a defence in the foreign court despite knowledge of the fraud.

23. A further aspect of the breadth of the fraud bar is that it is not restricted to a fraud on the part of the party in whose favour the judgment was given. It may be that the fraud is on the part of the court pronouncing the judgment for example, it might be that the authorities in the foreign state have a reason for wanting to cause harm to a particular litigant and rule against him due to matters unconnected with the merits of the dispute.

24. Related to that is that the fraud can be either intrinsic to the case or extrinsic thus fraud is not restricted to some false evidence designed to restrict the results but can be a bribe to a judge or some other corruption designed to procure a fraudulent result.

B Restrictions in the breadth of the ambit of the fraud defence (in respect of a judgment outside Europe/the Convention countries)

25. What then are the limitations on this apparently broad jurisdiction?

26. The fraud defence has been described as *"a carefully delimited exception, and is not to be given expansive application"*: see *Gelley v Shepherd and another* [2013] EWCA Civ 1172 per Sales J at [47]. In this case the applicant in BVI proceedings was found to have deliberately misled the court by supplying forged documents in support of its application. The court revisited the circumstances in which it would refuse to give effect to a foreign judgment for reasons of fraud.

27. It is not sufficient that the judgment is "tainted with fraud". It must be obtained by fraud, that is to say that *"in order for the exception to recognition to apply it is necessary to establish that the fraud in question has been operative in obtaining the foreign judgment and order in issue, in the sense that without such fraud having been practised the order would not have been made, or there is a real possibility that it would not have been made"*: see *Gelley* at [49]. *"If the fraud in question is not operative in the sense I have described, then there is not a sufficient basis for overriding the general policy of finality and conclusiveness of foreign judgments"* ibid at [50].

28. It is important to say that the defence of fraud is restricted to cases involving *"conscious and deliberate dishonesty"* whether in relation to the evidence given, action taken, statement made or matter concealed. It is not sufficient if the evidence relied upon was based upon an innocent error.

29. Nonetheless, these restrictions do not prevent a party from alleging fraud and seeking to re-open the parties' dispute for the purposes of obstructing an enforcement of an

otherwise enforceable judgment and to escape the principle of issue estoppel, and thereby seek to frustrate enforcement.

30. There is some protection for a judgment creditor by reference to procedural safeguards. The first is the availability of summary judgment or to strike out as an abuse of process the defence of fraud. This will be useful where for example the court will so order unless full particulars of fraud are given and plausible evidence given for at least a prima facie case of fraud.

31. Further, a court may reject such an account of fraud, despite the third category referred to above (i.e. where fraud is not alleged in the first court), on the basis that it is implausible that the fraud existed without being raised in the first court: see the case of *VTB v Skirukhin* above. Further, the Court will be strict where perjury is alleged in requiring the evidence to be *"so strong that it would be reasonably be expected to be decisive at a hearing"*: see *Westacre Investments Inc v Jugoimport-SDRP Ltd* [2008] EWHC 801 (Comm).

C Scope for changing the ambit of the defence (in respect of a judgment outside Europe/the Convention countries)

32. Despite this restriction, it might still be contended that it is a possible infringement of comity to disregard a decision of the foreign court that no fraud exists. It might be said that at least in respect of a friendly country where there is no reason to mistrust its legal system and where there is bilateral recognition of judgments that it is wrong to allow a party to relitigate a case based upon an arguable case of fraudulent evidence. This has been accepted in Canada so that it will only intervene where the Court has been misled as to jurisdiction or where the evidence of fraud has only emerged subsequently: see *Beals v Saldanha* [2003] 3 SCR 416.

33. Another approach was suggested by the Privy Council in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 a case predominantly about the issue of forum non conveniens. Lord Collins *obiter,* giving the opinion of the Privy Council, suggested a departure from the law of the scope of the fraud defence of *"a nuanced approach…depending on the reliability of the foreign legal system, the scope for challenge in the foreign court and the type of fraud alleged*

34. The Privy Council recognised that in order to overturn authorities going back to the nineteenth century (see *Abouloff v Oppenheimer* (1882) 10 Q.B.D. 295 (CA)), extremely important policy issues would have to be discussed. In subsequent decisions of the Court of Appeal, especially *Gelley* above, there has been sympathy about this dictum in *AK Investment*, but nonetheless an application of the principles going back to *Abouloff* above.

35. This nuanced approach referred to in *AK Investment* has been adopted in forum non conveniens cases. This has arisen in recent years in a number of cases where the allegation is made that in one of the CIS countries, a fair trial may not be possible. It is not possible to make the allegation without very specific evidence both as to the judicial system and as regards how the particular litigant may be disadvantaged. Depending on the circumstances as whole, *"the burden can be satisfied by showing* [by cogent evidence] *that there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption."* see *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* supra and also *Cherney* ***v*** *Deripaska* [2009] EWCA Civ 849, [2009] 2 CLC 408, at [28]-[29], per Waller LJ; *Pacific International Sports Clubs Ltd.* ***v*** *Surkis* [2010] EWCA Civ 753, [34]-[35], per Mummery LJ.

36. It is a particularly difficult task of the Courts because of the evaluative approach about other courts and systems of justice, but it is necessary in any event because of Article 6 considerations referred to below. On the basis that the Court has this nuanced approach in other cases, it does provide a possible solution to what is at the moment a serious problem about allegations of fraud opening the door to the re-litigation of cases, however well intended are the statements of the Court about the restrictive nature of the fraud defence.

37. As noted above, there is an exception where there is an unsuccessful challenge in proceedings in the foreign court of the kind referred to in *House of Spring Gardens*. *Briggs on Civil Jurisdiction and Judgments* 6th Ed. at [7.70] considers the possibility of curtailing the fraud defence where raising it would be an abuse of process. Thus, it might be that where a party would have been free to have raised the fraud defence by separate proceedings in the foreign court, it could be contended that the failure to exhaust the local remedies would be an abuse of process.

D The public policy defence under European conventions

38. There is no separate fraud defence. The EU takes a more restrictive approach to bars to enforcement. Under the Regulation, the English common law bars to enforcement of fraud and natural justice are dealt with under the public policy defence. Article 45 (1)(a) states that a judgment may be denied effect if the judgment is manifestly contrary to public policy in the State in which recognition is sought. This defence has been narrowly construed by the Court of Justice: see Case C-7/98 *Krombach v Bamberski* [2000] ECR I-1935 and *Apostilides v Orams* Case C-420/07.

39. Resort to public policy is only permitted where there has been a manifest breach of a rule of law in which enforcement is sought or of a right recognised as being fundamental within the legal order of the state where enforcement is sought. It is not

sufficient that the enforcing court considers that there has been a misapplication of national or EU law.

40. The concept of public policy is apparently wide enough to embrace fraud, but the scope of fraud is narrower than under the common law rules. For example, even if there is fresh evidence of fraud, the defendant must seek redress in the court of origin: see *Interdesco SA v Nullifire* [1991] 1 Lloyd's Rep 180. The availability of a sufficient local remedy may make it improper to rely upon a broad fraud rule, labelled as a public policy. Thus, in this context, the ability to remain knowingly quiet about a fraud point in the first court and raise it only in the enforcing court is out of the question. Further, the determination of the first court that there had not been a fraud would usually be dispositive of the issue.

41. More generally, the EU regulations (EU Regulation 1215/2012 (Brussels I bis) regulates judgments obtained in EU Member States in proceedings instituted after 10 January 2015) are intended to simplify enforcement and reduce the possibility of contested enforcement proceedings in order to further the EC's objective of free movement of judgments between States. This is not only by the restrictive approach to the public policy, but also by broadening its application to all judgments emanating from a Member State. Unlike under English common law this includes judgments which are final or provisional. Judgments need not be for a fixed sum, nor final and conclusive extending enforcement to orders for specific performance and injunctions. Further, article 39 streamlines enforceability but providing that judgments will be enforceable in other Member States without the need for a declaration of enforceability or other special procedure

II. PUBLIC POLICY

A Scope of public policy defence

42. The second bar to enforcement is on the grounds of public policy: see *Re Macartney* [1921] 1 Ch. 522 where it was considered against public policy to recognise the rights of an illegitimate child to perpetual maintenance. In applying the public policy defence (which operates also in UK domestic law as a bar to enforcing contracts which are illegal for public policy reasons), there is a frequently cited dictum of Burrough J in *Richardson v Mellish* (1824) 2 Bing 229, 252 who protested *"against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you.*

43. In *Richardson*, almost two centuries ago, Best CJ at 242-243 stated that a part of the reluctance of extending the ambit of public policy rather than keeping it within narrow tramlines is that in deciding particular cases, the judge does not have the means of bringing before it all considerations which ought to enter into a judgment about public

policy. In short, he was highlighting different functions of the judiciary and the legislature. Notwithstanding this, there is sometimes a blurring of these functions depending on the inclinations of the particular tribunal.

44. The first question which arises is whether any resort to public policy is barred because of the act of state doctrine, under which a court will not normally pass judgment on the rights and wrongs of the acts of a foreign sovereign state. In *Yukos Capital Sarl v Ojsc Rosneft Oil Company* [2012] EWCA Civ 855, the Court of Appeal held that "*judicial acts are not acts of state for the purposes of the act of state doctrine".* Rix LJ at [87] held that *"... comity only cautions that the judicial acts of a foreign state acting within its territory should not be challenged without cogent evidence."*

45. In *Yukos,* Rix LJ highlighted the international nature of a judgment in justifying the courts' interventionist approach: at [87] *"the courts are always responsible for their acts, both domestically and internationally. Domestically they are responsible up to the level of their supreme court, and internationally they are responsible in the sense that their judgments are recognisable and enforceable in other nations only to the extent that they have observed what we would call substantive or natural justice."*

46. While courts seek to respect the act of state doctrine they will not enforce a foreign law that is contrary to UK public policy. In *Al-Koronky v Time Life Entertainment Group Ltd* [2006] EWCA Civ 1123 Sedley LJ said *"while we accept that any court is always reluctant to pass judgment on the judiciary of a foreign country in the context of jurisdictional disputes, we doubt if there is any general principle that the courts of this country will never do so in any context".*

47. The challenge in relation to this bar is that public policy is difficult to define and varies from one state to another. In *JSC VTB Bank v Pavel Valerjevich Skurikhin* above, Simon J observed, *"... the ambit of the public policy exception is not capable of precise definition. Since rules which rest on the foundation of public policy are not rules of fixed customary law, they may change (either by expansion or contraction) over time".*

48. The courts have taken a restrictive approach to the public policy bar. In *Kuwait Airlines v Iraqi Airways Co and another* [2002] UKHL 19 the courts said it should be narrowly applied and gave examples of its application.

B Examples of application of public policy bar

49. Whilst an English court will normally give effect to a foreign law even though those laws are different from the law of the forum court, *"exceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court. A result of this character would not be acceptable to an English court. In the conventional*

phraseology, such a result would be contrary to public policy. Then the court will decline to enforce or recognise the foreign decree to whatever extent is required in the circumstances": see Kuwait airlines above at [16].

50. Whilst the public policy principle eludes precise definition Judge Cardozo's words are frequently cited that this will occur only when the foreign law *"would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal"*: see *Loucks v Standard oil co of New York* [1918] 120 NE 198, 202.

51. The leading example in the UK is the 1941 decree of the National Socialist government of Germany depriving Jewish émigrés of their German nationality and, consequentially, leading to the confiscation of their property. Lord Cross of Chelsea said that a racially discriminatory and confiscatory law of this sought was so grave an infringement of human rights that the English courts ought to refuse to recognise it as a law at all. See *Oppenheimer v Cattermole* [1976] AC 249, 277-278 and see also the speech of Lord Salmon at 281-283.

52. This power is only exercised exceptionally and with the great circumspection *"when to do otherwise would affront basic principles of justice and fairness"*: see *Kuwait Airways* at [18]. It is not confined to gross infringement of human rights.

53. Other instances of denying enforcement to a foreign judgment include where:

    (i) Enforcement of the judgment would give effect to a contract which purports to further an illegal act in a foreign state or where the contract requires or promotes performance of an act illegal or contrary to public policy in a foreign country. It has been held that in the context of an arbitral award, discussed in further detail below, that an English court will not enforce a contract or an arbitral award based on a contract requiring or promoting conduct illegal in a foreign state: see *Soleimany v Soleimany* (1998) 3 WLR 811.
    (ii) Enforcement of a judgment founded on a contract procured by duress or undue influence where the foreign law does not provide redress for such conduct: see *Israel Discount Bank of New York.*
    (iii) Enforcement of a judgment would contravene international law: see *Al Jedda v Secretary of State for Defence* [2009] EWHC 397 at [68-73].
    (iv) Enforcement of a foreign judgment obtained by a judgment creditor having notice of an injunction restraining proceedings in the foreign court. In such a case, the contempt of court of such a creditor disentitles him to enforcement in England: see *Philip Alexander Securities and Futures Ltd v Bamberger* [1996] CLC 1757.

54. There are cases that seek to balance the principle of finality of judgments against the principle that a court will not allow its process to be abused by enforcing judgments which condone illegal acts. This depends upon an evaluation of the nature and

seriousness of the illegality. In a case of only 15 years ago in *Westacre Investments Inc v Jugoimport-SPDR Holding Co. Ltd* [2000] 1 QB 288**;** [1999] QB 740, 773, Sir David Hurst accepted the view of Coleman J that although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug trafficking. Whether that balance between the finality of a judgment and corruption would still hold good following international cooperation against corruption and in England the Bribery Act 2010 is a moot question.

C Two analogous decisions about the defence of public policy in connection with arbitral awards

55. In *Soleimany v Soleimany* (1998) 3 WLR 811 the Court of Appeal refused to enforce a judgment where the underlying agreement involved the smuggling of carpets, which was illegal in Iran, therefore found that the contract was tainted by illegality. However, the court went further, stating that in cases where the original arbitrator has considered the illegality and concluded that it did not exist, and even in circumstances where no new evidence has arisen, then the court "should inquire further to some extent" if there is prima facie evidence from one side of illegality.

56. Waller LJ drew the line though at "a full scale trial" adding that the judge should not enter into a consideration of the facts of the dispute unless he decides that he cannot give full faith and credit to the arbitrator's award. The decision raises the question: How can the court form a view of the arbitrator's award *without* a significant investigation?

57. In *Yukos Capital SARL v OJSC Rosneft Oil Company* [2014] EWHC 2188 (Comm) a Russian company involved in oil production, obtained arbitral awards against Rosneft, another oil company owned and controlled by the Russian government. Following the arbitration (seated in Russia) the Moscow courts set them aside in judgments upheld on appeal, and in which Yukos participated. Despite the annulment of the awards, Yukos sought and obtained enforcement of the awards over Rosneft's assets within the jurisdiction of the Dutch courts. Part of the issue in the English proceedings was whether enforcement of the awards that had been set aside by the Russian courts was precluded under common law. The Court found that English courts did have the power to enforce the awards notwithstanding the set-aside decisions of the courts of the arbitral seat in Russia. They found that it would be unsatisfactory to be bound by a decision of a foreign court which offended basic principles of natural justice and domestic concepts of public policy.

III. NATURAL JUSTICE

58. The third basis for refusing enforcement of a foreign judgment is where the decision was reached in circumstances that breached natural justice. In *Pemberton v Hughes*

[1899] 1 Ch. 781 (CA) Lord Lindley stated, *"English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice".*

59. The mere fact that an irregularity leads to an unjust outcome is insufficient. There must broadly be *"a breach of an English court's views of substantial justice"*: see *Adams v Cape Industries Plc* [1990] Ch 433 at 564. The procedural unfairness can be found even where a claimant has acted in good faith. In *Adams*, there was a default judgment obtained against a defendant in a personal injury class action in Texas. The grounds on which it was found that the defendant was denied "substantial justice" included the absence of a judicial determination of the quantum of damages specific to each claimant.

60. Procedural differences between the foreign state and the UK in relation to admissibility of evidence would not by itself amount to a breach of natural justice unless the difference gave rise to a breach of the English court's view of "substantial justice". See *De Cosse Brissac v Rathbone* (1861) 6 H. & N. 301 and *Scarpetta v Lowenfeld* (1911) 27 T.L.R. 509

61. The protection against enforcement of a judgment obtained in an unfair trial is now governed by article 6 of the ECHR. The English court will not enforce a foreign judgment obtained in non-compliant proceedings: see *Al Bassam v Al Bassam* [2004] EWCA Civ 857. Strictly, the refusal to recognize a judgment forbidden by the ECHR is an additional head of defence, because once the breach of the ECHR is established, there would be a breach of the Human Rights Act 1998 (which incorporated the ECHR into UK law), and the statute would be the ground for non-recognition of the foreign judgment.

62. It should be noted that the operation of Article 6 as a defence applies whether or not the judgment comes from a state which is party to the European Convention. There is a strong but not irrebuttable presumption that the procedures in the foreign state comply with article 6. Non-enforcement is mandated only when the infringement is "flagrant": see *Aeroflot v Berezovsky* [2014] 1 CLC 53 at [51]. A case involving a non-flagrant breach of article 6 involving a foreign law which was not compliant yet non-infringing is *Government of the United States v Montgomery (No 2)* [2004] 3 WLR 2241. The Strasbourg court has held that the word "flagrant" means *"a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to nullification, or destruction of the very essence, of the right guaranteed by the Article": Soering v United Kingdom* [1989] 11 EHRR 439 at [113] cited in *Aeroflot v Berezovsky* at [49].

63. In the words of Fentiman on International Commercial Litigation 2nd Ed. at paragraph 16.46 *"it is defensible that the English courts have adopted a relativist view of the enforcement of human rights norms, which recognises that they are qualified by the principle of comity".* This acknowledges that a foreign state may have a commitment to

the right to a fair trial but express that commitment in rules or procedures different from those which might be found in signatory states to the European Convention.

64. Just as there is a balancing act in connection with the public policy considerations referred to in the preceding section, so the court has to draw a line in each case between principles of comity and concern about the nature, extent and effect of procedural irregularities. Once a breach of an English court's views of substantial justice has been established, there is no balancing act and the foreign judgment will not be enforceable by the English court.

IV. PENALTIES

65. The final bar to enforcement is where the sum awarded would amount to a penalty. This is the only defence that succeeded in the *Skurikhun* case where the judge refused summary judgment in respect of a part of the Russian judgment on the basis that it was arguable that part of the interest awarded may have been punitive rather than compensatory.

66. It is difficult to identify a consistent principle from the cases. An award of non-compensatory, punitive or exemplary damages is not necessarily contrary to public policy: see *S.A. General Textiles v Sun & Sand* [1978] 1 QB 279. In that case the Court of Appeal took a liberal approach, considering that an award for exemplary damages for 10,000 francs awarded due to the defendant's unjustifiable opposition to the claim was compensatory rather than punitive therefore would not be regarded as contrary to public policy.

67. However, where an award is arrived at by a process of multiplication (see Protection of Trading Interest Act 1980 section 5), it will be unenforceable under statute or common law.

68. Similarly *USA v Inkley* [1989] QB 255 the Court of Appeal refused to enforce a US judgment relating to the payment of an "appearance bond" following the defendant's release on bail and his return to England. The court found that despite the civil nature of proceedings, the action was properly characterised as the execution of foreign penal law and therefore ought to be struck out.

69. Courts are undecided in relation to damages of a punitive nature which are awarded against parties other than the state. In *Schnabel and others v Lui and others* [2002] NSWSC 15 it was held that punitive damages could amount to a penalty even if the sums were not payable to the State.

CONCLUSION

70. There is a trap to assume that once there is a qualifying judgment enforceable at common law or under statute or a convention that enforcement must follow as night follows day. The scope of the defences, particularly the fraud defence, can be used to make it impossible for a judgment creditor to enforce without relitigation. This is something that cannot be justified simply by over 130 years of consistent authority since *Abouloff* in 1879.

71. The world now is far more international than it once was, and there is now a greater premium to recognition and enforcement of judgments. This explains the more restricted approach in the European Conventions, the restrictive approach of the Canadian courts and the thoughtful ideas of the Privy Council in *AK Investment*.

72. It seems unlikely that the solution is simply judicial robustness in the application of the existing law. The path ahead is likely to be one of change to reflect the fact that whilst manifest injustice must not be perpetuated, there may be a great deal of injustice in having to re-litigate the same case in England after it has been decided in a court of competent jurisdiction of another country.