Jonathan Hugh Mance IJ (delivering a concurring opinion):

193 For the reasons given by Chief Justice Menon, I agree that this appeal should be dismissed on the ground that India is precluded by transnational issue estoppel and by the judgment of the Swiss Federal Supreme Court from relitigating the issues which it seeks to raise on this appeal.

194 I add a few words on the significance of decisions of courts of the seat. The subject is addressed in [103] to [130] above of Chief Justice Menon's judgment. A prior decision of a court of the seat will, undeniably and rightly, receive the closest attention from any enforcement court, whether or not it gives rise to any form of preclusive effect. A prior decision of a prior enforcement court may also be expected to merit close attention.

195 Whether any prior decision has preclusive effect depends upon whether it gives rise to an issue estoppel or, failing that, upon whether, under the principle in *Henderson v Henderson* (1843) 3 Hare 100 ("*Henderson v Henderson*"), any challenge to it is viewed as an abuse of process.

196 The application of the principle of issue estoppel to foreign decisions is now well-established, even if it is to take place "with caution" (see *Carl Zeiss* at 967) and in a more relaxed fashion than in respect of prior domestic decisions (see *Phipson on Evidence* (Hodge M Malek gen ed) (Sweet & Maxwell, 20th Ed, 2022) ("*Phipson on Evidence*") at paras 43-08 and 43-68). The conditions for a domestic issue estoppel and for a transnational issue estoppel have been set out above in, respectively, [63] and [64] of Chief Justice Menon's judgment. The defences to recognition of an issue estoppel arising from a prior foreign judgment extend to its obtaining by fraud or duress or against natural justice or

to its recognition being against domestic public policy: see *Phipson on Evidence* at paras 43-08 and 43-68.

197 The principle of abuse of process is a flexible one (see *Phipson on Evidence* at para 43-44). But it has been held that, where, for some reason, a foreign judgment does not give rise to any issue estoppel (*eg*, where the parties or issues are not the same), then it would "in general, be rare" for any challenge to it to be abusive within the principle of *Henderson v Henderson*: see *Standard Chartered Bank (Hong Kong) Ltd and another v Independent Power Tanzania Ltd and others* [2016] 2 Lloyd's Rep 25 at [41], followed in *MAD Atelier* at [81].

198 The question is whether and how the addition of a Primacy Principle to the court's armaments could fit into the picture.

199 I make several points in this connection. First, the Primacy Principle is envisaged as effectively shadowing the whole area covered by issue estoppel and *Henderson v Henderson* and going potentially still wider. It would be available either (see above, [122] of Chief Justice Menon's judgment):

> … where transnational issue estoppel does not apply for some reason, or where a party wishes or chooses to invoke the Primacy Principle for any reason, including to avoid the time and expense that may sometimes be entailed in having to establish the technical requirements for invoking the doctrine of transnational issue estoppel …

However, even if one party wished to avoid considering whether the principle of issue estoppel (or that of *Henderson v Henderson*) applied, it would surely remain relevant for the other party to point to any respects in which the conditions for issue estoppel (as set out above in [64] of Chief Justice Menon's judgment) or for the application of *Henderson v Henderson* were not met, as

reasons why there should be no presumptive following of the court seat decision. Whether or not there was an issue estoppel, or indeed abuse of process, could therefore still be very relevant.

200 Second, and linked with the first point, the suggested Primacy Principle would not be an absolute principle (see above at [123]), but rather a presumptive principle, capable of disapplication (subject to further elaboration) in situations suggested in [130]. Those situations largely mirror those in which there would be defences to recognition of an issue estoppel (see the last sentence of [196] above). The further suggested defence (that the prior decision was plainly wrong: see [130(b)(iii)]) may go further than any defence to issue estoppel. Again, it could be relevant to consider whether the basic conditions for an issue estoppel set out in [64] were satisfied. If they were, then such an estoppel should be given effect, irrespective of the position under the Primary Principle. If they were not, the case for treating the prior seat court decision as even presumptively conclusive would diminish.

201 Third, a Primacy Principle would, by definition, and whatever its qualifications, draw a sharp distinction between prior decisions of a seat court and prior decisions of another enforcement court, creating a special principle for the former alone: see [124]. This distinction would be accentuated if the principle of transnational issue estoppel were, for some reasons, held not to be available in relation to prior decisions of another enforcement court: see [92]. I am not convinced that so sharp a distinction is necessarily appropriate. The principles of issue estoppel and *Henderson v Henderson*, and, indeed, the common sense respect which any court wishes to give to any other court's reasoning and judgment in the same or an associated area, all seem to me to be as potentially relevant between successive enforcement courts as between an enforcement court and a prior seat court. They all also seem to me flexible

enough to enable courts to avoid the chimera of having to follow a prior judgment artfully obtained in another enforcement court in circumstances where it would be inappropriate to do this. The principles were and are after all fashioned to preclude re-litigation of issues in circumstances where this would be contrary to the interests of justice.

202 The seat and its courts certainly occupy a special place in international arbitration, but the question is whether this calls for recognition of a Primacy Principle, in addition to existing tools. The special place which the seat occupies is associated with the hallmark of arbitration, party autonomy, because the seat will have been chosen by, or by a process chosen by, the parties. The parties thereby submit themselves to whatever supervision over arbitration may be exercised by courts seated within the relevant jurisdiction. In some jurisdictions, such as the English and Welsh, the local arbitration legislation may (albeit rarely) permit substantive appeals. Whether an award of the seat stands or not therefore depends on the domestic law of the seat, involving considerations going well beyond the jurisdictional and procedural matters referred to in Art V of the New York Convention.

203 Articles III and V of the New York Convention provide for the recognition and enforcement of an award made in another Contracting State, save in strictly delimited circumstances. One such circumstance is under Art V(1)(*e*) that the award "has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made". Under Art VI, a court before which enforcement is sought may also adjourn its decision pending the outcome of any application to set aside or suspend which has been made to a competent authority referred to in Art V(1)(*e*).

204 Article V(1) of the New York Convention says that, where one of such circumstances applies, recognition and enforcement "may be refused". But this cannot involve an open discretion. The phrase does no more than reflect a possibility that there may, exceptionally, be good reasons for refusing to recognise or enforce an award emanating from a court referred to in Art V(1)(*e*). Both English and US authorities establish as much, although none of them examines whether Art V(1) achieves, in effect, anything different from what would flow from the principle of issue estoppel supplemented by that in *Henderson v Henderson* in circumstances where a losing party seeks to relitigate in an enforcement court a challenge which has unsuccessfully been made, or could have been made, in prior proceedings in the seat.

205 With regards to the phrase "may be refused", Lord Collins said in *Dallah v Pakistan* at [127] that:

> Since section 103(2)(b) gives effect to an international convention, the discretion should be applied in a way which gives effect to the principles behind the Convention. One example suggested by *van den Berg*, op cit, p 265, is where the party resisting enforcement is estopped from challenge, which was adopted by Mance LJ in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326, para 8. But, as Mance LJ emphasised at para 18, there is no arbitrary discretion: the use of the word "may" was designed to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have an award set aside arising in the cases listed in section 103(2). See also *Kanoria v Guinness* [2006] 1 Lloyd's Rep 701, para 25 per Lord Phillips CJ. …

206 A body of US authority has developed the point and required some clear "public policy" basis or need "to vindicate 'fundamental notions of what is decent and just' in the United States" before enforcement of an award set aside in the seat: see *Baker Marine*; *TermoRio*; *Thai-Lao Lignite (2nd Cir, 2017)*; *Pemex* at 107; and *Esso* at 73.

207 All these five US authorities were decided under Art V(1)(*e*) of the New York Convention as applicable under US Federal Law, in circumstances where the award had been set aside in the seat. In only one of these authorities (*ie*, in *Pemex*) did the US enforcement court find the requisite repugnancy to US basic notion of justice or public policy to justify enforcement despite the judgment setting aside the award in the seat. The violation in *Pemex* consisted in the retrospective application of a law not in existence at the time of the contract, the effect of which was to favor a state enterprise over a private party and to leave that party without any remedy for its claims.

208 Courts of the seat have therefore a different role from those of an enforcement court. The difference was neatly explained in terms of "primary" and "secondary" roles in *Karaha Bodas* (at 287–288), cited by Chief Justice Menon in [119]:

> The Convention 'mandates very different regimes for the review of arbitral awards (1) in the [countries] in which, or under the law of which, the award was made, and (2) in other [countries] where recognition and enforcement are sought.' Under the Convention, 'the country in which, or under the [arbitration] law of which, [an] award was made' is said to have primary jurisdiction over the arbitration award. All other signatory states are secondary jurisdictions, in which parties can only contest whether that state should enforce the arbitral award. …
>
> … *In contrast to the limited authority of secondary-jurisdiction courts to review an arbitral award, courts of primary jurisdiction, usually the courts of the country of the arbitral situs, have much broader discretion to set aside an award. While courts of a primary jurisdiction country may apply their own domestic law in evaluating a request to annul or set aside an arbitral award, courts in countries of secondary jurisdiction may refuse enforcement only on the grounds specified in Article V.*
>
> The New York Convention and the implementing legislation, Chapter 2 of the Federal Arbitration Act ("FAA"), provide that a secondary jurisdiction court must enforce an arbitration award unless it finds one of the grounds for refusal or deferral of recognition or enforcement specified in the Convention.

> [emphasis added]

209 Similarly, the US Court of Appeals said in *TermoRio* (at 937):

> … appellants are simply mistaken in suggesting that the Convention policy in favor of enforcement of arbitration awards effectively swallows the command of Article V(1)(e). A judgment whether to recognize or enforce an award that has not been set aside in the State in which it was made is quite different from a judgment whether to disregard the action of a court of competent authority in another State. '*The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief*.' *Yusuf Ahmed Alghanim & Sons*, 126 F.3d at 23; see also *Karaha Bodas II*, 364 F.3d at 287-88. This means that a primary State necessarily may set aside an award on grounds that are not consistent with the laws and policies of a secondary Contracting State. The Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment of a court in a primary State, when the court in the primary State has lawfully acted pursuant to 'competent authority' to 'set aside' an arbitration award made in its country. Appellants go much too far in suggesting that a court in a secondary State is free as it sees fit to ignore the judgment of a court of competent authority in a primary State vacating an arbitration award. It takes much more than a mere assertion that the judgment of the primary State 'offends the public policy' of the secondary State to overcome a defense raised under Article V(1)(e).
>
> [emphasis added]

210 The terminology of "primary" and "secondary" courts recognises the broader role under the New York Convention of courts of the seat compared with that of enforcement courts. But it does not address the present question, which is the approach to be taken by an enforcement court, when an award has not yet been set aside in the seat. It is well established that, in this situation, a party resisting enforcement may raise jurisdictional or procedural challenges within the limits permitted by the Convention, without having raised or explored these before the courts of the seat: see *Astro* at [63]–[64] and [75].

211 The key question, raised by the present appeal, is how enforcement courts should address situations where a challenge has been made and has failed in the courts of the seat. The New York Convention provides grounds on which enforcement may be resisted, but does not give guidance on this question. There is nothing in it even to give a prior decision of the court upholding an award a similar status to that which a decision of a seat court setting aside an award has under Art V(1)(*e*). More fundamentally, as already noted ([204] above), there is nothing in Art V(1)(*e*) to suggest that its effect differs necessarily from that which would follow from the principles of issue estoppel and of *Henderson v Henderson* in circumstances where the challenge raised in the enforcement court was or could have been raised in the seat court.

212 The common law tool of issue estoppel is, as Chief Justice Menon demonstrates, readily available when the issue in both jurisdictions is in essence the same, so that the decision by the court of the seat can be seen effectively to have decided that there are no circumstances which could or should preclude recognition and enforcement under Art V. Issue estoppel is a flexible tool, particularly in an international context, and a general pre-condition to its deployment is that it should work justice not injustice see *Arnold* at 107 and 109; *Merck Sharp* at [62]; and *PAO Tatneft* at [34]. The additional procedural power recognised in *Henderson v Henderson* to restrain abuses of process is again closely responsive to circumstances in the rare circumstances where it is appropriate for use in relation to a foreign judgment not giving rise to an issue estoppel (see [197] above).

213 In the recent case of *Union of India v Reliance Industries Ltd and another* [2022] EWHC 1407 (Comm) at [54]–[63], Sir Ross Cranston usefully summarised the nature and operation of these legal tools, holding at [61] that it was "clear that the *Henderson v Henderson* principle applies in the conduct of

both arbitral and court proceedings", being in that case a procedural power of the English law of the seat. The same applies in the case of the present Singaporean proceedings. Sir Ross Cranston went on to refer to the leading United Kingdom Supreme Court cases of *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160 and *Takhar v Gracefield Developments Ltd and others* [2020] AC 450, and to quote from Lord Sumption's judgment in the latter, where he said, at [62]:

> … Since the decisions of the House of Lords *in Arnold v National Westminster Bank plc* [1991] 2 AC 93 and *Johnson v Gore Wood & Co* [2002] 2 AC 1 it has been recognised that where a question was not raised or decided in the earlier proceedings but could have been, the jurisdiction to restrain abusive re-litigation is subject to a degree of flexibility which reflects its procedural character. This allows the court to give effect to the wider interests of justice raised by the circumstances of each case.

214 The two tools of issue estoppel and the power in *Henderson v Henderson* are, in my opinion and as this passage indicates, available and sufficient to enable justice to be done in cases where there has been a prior decision either of a court of the seat or of another enforcement court. Inherent in the suggestion of a Primacy Principle is the proposition that a decision of the former enjoys a special legal status which the latter lacks. I am not at present persuaded that, in this respect, a special legal status does exist.

215 I see in any event no sound reason why both decisions of a seat court and decisions of another enforcement court may not give rise to an issue estoppel, as would be the effect of Eder J's decision in *Diag Human*, holding that an issue estoppel could arise by virtue of a prior decision of another enforcement court. Similarly, as it seems to me, there is no obstacle in legal principle to arguments of abuse of process arising in both contexts. I note that in *Carpatsky* at [126] (not cited before us), Butcher J said in *obiter* that:

> … It may well be, however, that English courts would not apply a *Henderson v Henderson* approach to decisions of enforcement courts, or would less readily consider that there was any abuse of process involved in a point being taken here which could have been but was not taken in such a court.

As to this, I readily accept that the parties' choice lying behind the seat might play a role in a court's evaluative judgment whether to treat a challenge as abusive.

216 Short of any issue estoppel or abuse arising from the seat court's decision or from a repeat attempt to challenge it, I question however whether there is room for a further principle of law precluding full consideration in an enforcement court of whatever issues arise under Art V. Any enforcement court will of course give close attention to what is said or held by, in particular, a court of the seat, because the seat reflects the parties' choice. But, if the party challenging enforcement is not precluded from doing this by issue estoppel or *Henderson v Henderson*, it seems to me that an enforcement court should ultimately be free to arrive at its own analysis and conclusion.

217 The US authorities, cited above, do not address this question. They are all, as stated, authorities under Art V(1)(*e*) of the New York Convention, where the award sought to be enforced had been set aside in the seat. In the Australian case of *Gujarat (Full Court)*, cited by Chief Justice Menon, and followed in *Hub Street* – the Federal Court of Australia was, however, concerned with a like situation to the present, where the losing party sought in an enforcement court to re-open issues of enforceability and due process which had already been unsuccessfully raised in the court of the seat. The Federal Court expressed some doubt about the application of the principle of issue estoppel under Australian law. It went on (*Gujarat (Full Court)* at [65]):

> We do not propose to attempt a resolution of the issue, because we think that a prompt judgment is desirable in this case and, at the very least, the primary judge was correct to hold that it will generally be inappropriate for this Court, being the enforcement court of a Convention country, to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration. We endorse and apply the following observations of Colman J in *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 as to the weight to be given to the views of the supervising court of the seat of the arbitration.

218 Colman J's words in *Minmetals* have been cited by Chief Justice Menon in [107] above, and I repeat only the final part:

> … *[O]utside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be reinvestigated by the English courts on an enforcement application is to be most strongly deprecated.*
>
> [emphasis in original]

219 Those words are not at all inconsistent with a probability that the circumstances which Colman J was addressing would on analysis have involved an issue estoppel or abuse of process. They are also consistent with the practical attitude that an experienced Commercial Judge would, as a matter of case management, take to any obvious attempt to relitigate in a different court issues which had, on their face, already been litigated elsewhere – whether in a court of the seat or in another enforcement court. What I find difficult to extract from them or from the Australian authorities is any principle of law by reference to which an enforcement court should refrain from addressing matters not the subject of any issue estoppel and not precluded from investigation on the basis that it would be abusive to relitigate them.

220 A principle according to which an enforcement court must treat a prior decision of the seat court as determinative or presumptively determinative, short

of some public policy consideration, or evident procedural failing, or evident error, appears to me to bypass the first necessary enquiry, namely whether the prior court's decision is preclusive, and, if it is not, why it is not. It would also draw a sharp, and not necessarily realistic, distinction between prior decisions of courts of the seat and prior decisions of other enforcement courts. If there is no issue estoppel, and an objection raised to say jurisdiction is complex and difficult to determine, it leaves unclear at what point a party is to be precluded from raising or an enforcement court from accepting the objection. Finally, once recognised as a presumptive rule (rather than for example, a power to restrain abuse), it requires qualification by a series of further rules.

221 In these circumstances, my present inclination would be to rely on the tools which are already to hand, and not to give decisions of courts of the seat a specially elevated status in law in case of repeat challenges. Prior decisions always deserve careful consideration, even if they do not bind, and, one can add, especially so coming from a court of seat selected by the parties. But, ultimately, they *either* decide a challenge to the award in a manner which binds the parties or precludes reopening of the challenge *or* the challenge remains open for re-

litigation. In that respect, the prior decision of another enforcement court is no different as a matter of hard legal principle from a decision of the seat court.

Jonathan Hugh Mance
International Judge

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