# Court of Appeal Rules that Transnational Issue Estoppel Applies in Context of Resisting Enforcement of Arbitral Awards and Opines on Awarding Primacy to Decisions of Seat Court

A five-member *coram* of the Singapore Court of Appeal has, in the ground-breaking decision of *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10, held that the doctrine of transnational issue estoppel applies in the context of international commercial arbitration. This prevents parties to a prior decision of a seat court from re-litigating before the enforcement court points that were previously raised and determined by the seat court.

Significantly, the majority of the apex court, in *obiter*, also provisionally indicated that as a rule of Singapore arbitration law, where the enforcement court is not precluded by transnational issue estoppel from considering an issue going to the validity of an arbitral award, it may nonetheless be appropriate for the enforcement court to grant primacy to a prior decision of the seat court. This was termed as the "Primacy Principle". Pursuant to the Primacy Principle, an enforcement court will act upon a presumption that it should regard a prior decision of the seat court on matters pertaining to the validity of an arbitral award as determinative of those matters, which presumption may be displaced by certain considerations (for example, public policy considerations applicable in the jurisdiction of an enforcement court).

**Our Partners Koh Swee Yen, SC and Joel Quek and Associate Victoria Liu acted for the successful respondent before the Court of Appeal.**

## Our Comments

This decision is an important and welcome one for parties seeking to enforce their arbitral awards in Singapore. The Court of Appeal's confirmation that transnational issue estoppel applies in the context of enforcing arbitral awards promotes certainty, consistency and finality of the arbitral process. It ensures that an award debtor is not permitted to have repeated bites of the cherry and frustrate an award creditor's enforcement of the award in Singapore by re-litigating points that have already been raised and determined by the seat court.

The Court of Appeal's ruling on this issue takes on particular significance, considering that the point was discussed in *obiter* in the seminal decision of *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 a decade ago, but thereafter not conclusively determined in Singapore.[1]

Additionally, the Court of Appeal's important discussion of the Primacy Principle as a possible rule of arbitration law in Singapore further demonstrates the Singapore judiciary's thought leadership as well as capability and willingness to grapple with difficult and conceptual issues of arbitration law.

The decision demonstrates Singapore's subscription to the territorialist view of international commercial arbitration (i.e., every arbitration is attached to the seat of the arbitration, and is subject to both the law and the jurisdiction of the courts of the seat) as opposed to the delocalisation theory (i.e., the system of arbitration is viewed as part of a transnational legal order that is independent of any national legal

[1] WongPartnership acted for the respondents in this matter.

system). The inclination to grant primacy to the seat court's decision on issues concerning the validity of an award reflects the respect that the Singapore courts generally accord to the parties' choice of seat.

Once the jurisdiction of the seat court (as the primary court supervising the arbitration) has been invoked on issues concerning the validity of an award, it would be an uphill task for a party to re-litigate these issues before an enforcement court. This makes it all the more important for parties to take care when choosing the seat of arbitration. Depending on the seat of arbitration (and a party's confidence in the seat), an unsuccessful party in an arbitration should carefully consider whether to invoke the "active remedy" of challenging the award at the seat court as opposed to exercising its "passive remedy" of challenging the award before the enforcement court.

This update takes a look at the Court of Appeal's decision.

## Background

The appellant is the Republic of India (**India**). The respondent is Deutsche Telekom AG (**DT**), a multinational company incorporated under the laws of the Federal Republic of Germany (**Germany**).

Antrix Corporation Ltd (**Antrix**), the commercial arm of the Indian Space Research Organisation (**ISRO**), was an Indian state-owned entity and was controlled by India's Department of Space. Devas Multimedia Private Limited (**Devas**) was a company of which DT, through its wholly owned subsidiary Deutsche Telekom Asia Pte Ltd (**DT Asia**), was a shareholder.

Antrix and Devas were parties to an agreement under which Devas was to be leased S-Band electromagnetic spectrum on two satellites to be manufactured and launched by the ISRO (**Agreement**). The Agreement was subsequently annulled by India.

DT commenced arbitration proceedings (**Arbitration**) seated in Switzerland against India, contending that India's annulment of the Agreement violated a bilateral investment treaty between India and Germany (**BIT**).[2]

Following the arbitral tribunal's issuance of an interim award in DT's favour on 13 December 2017 (**Interim Award**), India applied to the Federal Supreme Court of Switzerland (**Swiss Federal Supreme Court**) to set aside the Interim Award but was unsuccessful (**Swiss Setting Aside Decision**). The quantum stage of the Arbitration was then heard and the final award was rendered on 27 May 2020, with the tribunal ordering that India pay DT the amount of USD 93.3 million as well as costs and interest. As India did not apply to set aside the final award, on 20 August 2020, the Civil Court of the Republic and Canton of Geneva certified that the final award was enforceable and declared that it was legally binding in its form and content.

DT then commenced enforcement proceedings in Singapore (**Enforcement Proceedings**). On 3 September 2021, the General Division of the High Court of Singapore granted DT leave on an *ex parte* basis to enforce the final award in Singapore (**Leave Order**). The Enforcement Proceedings were later transferred to the Singapore International Commercial Court (**SICC**).

[2] Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments dated 10 July 1995.

India applied to set aside the Leave Order on the basis that India, as a sovereign state, was immune from the jurisdiction of the Singapore courts pursuant to section 3(1) of the State Immunity Act 1979 (**SIA**), and the exception to state immunity under section 11(1) of the SIA that India had agreed to submit the dispute to arbitration under article 9 of the BIT did not apply because DT's investment fell outside the scope of that article for the following four reasons (collectively, **Grounds for Resisting Enforcement**):

(a) DT's investment did not fall within the definition of "investment" under the BIT because it merely amounted to pre-investment expenditure for which further steps (such as obtaining the requisite licences and approval) were required before it could be admitted as a covered investment within the terms of the BIT;

(b) DT's investment failed to satisfy the requirement under the BIT that an investment must comply with the host state's national laws because DT's investment had violated Indian law;

(c) DT's investment did not fall within the scope of the protection of the BIT because it was made indirectly through DT Asia, a non-German entity; and

(d) DT's investment was not protected by the BIT because article 12 of the BIT allowed India to act in protection of its essential security interests and where it was invoked, the other provisions of the BIT would not proscribe India's actions.

Pertinently, the Grounds for Resisting Enforcement had already been canvassed before and dismissed by the Swiss Federal Supreme Court when India applied to set aside the Interim Award.

The SICC dismissed India's application, finding, among other things, that the Swiss Setting Aside Decision had *res judicata* effect that barred India from raising jurisdictional objections which had already been heard and rejected by the Swiss Federal Supreme Court.

India appealed to the Court of Appeal against the SICC's decision (**Appeal**).

In connection with the Appeal, India sought but failed to obtain various confidentiality and sealing orders to protect the privacy of the dispute and information (including the identity of the parties) relating to the dispute. **Our Partners Koh Swee Yen, SC and Joel Quek and Associate Victoria Liu acted for DT in successfully resisting India's application.** Our 16 June 2023 update on the Court of Appeal's decision in that matter is available here.

## The Court of Appeal's Decision

The Court of Appeal dismissed the Appeal, handing down the grounds of decision of the majority comprising Sundaresh Menon CJ, Judith Prakash JCA, Steven Chong JCA and Robert French IJ (**Majority**), as well as the concurring opinion of Jonathan Hugh Mance IJ (**Concurring Judge**).

As India's Grounds for Resisting Enforcement had already been ventilated before and determined by the Swiss Federal Supreme Court, the Court of Appeal first considered the threshold issue of the preclusive effect of the Swiss Setting Aside Decision. From this, two related legal issues emerged:

(a) First, whether the doctrine of transnational issue estoppel applies in the context of international commercial arbitration so as to preclude re-litigation before the enforcement court of issues that have already been dealt with by the seat court. While the application of transnational issue

estoppel to foreign judgments is well established in Singapore law, its applicability in the context of international commercial arbitration was, until now, less certain; and

(b) Second, whether the Primacy Principle should be recognised as part of Singapore arbitration laws, and if so, its scope and outer limits.

*Transnational issue estoppel in international commercial arbitration*

The Court of Appeal held, as a matter of Singapore law, that the doctrine of transnational issue estoppel can and should be applied by a Singapore enforcement court in the context of international commercial arbitration when deciding whether preclusive effect should be accorded to a prior decision of a seat court regarding the validity of an award. The doctrine prevents the parties to a prior decision of the seat court from re-litigating points that have been previously raised and determined so long as the requirements for transnational issue estoppel (as set out in the Court of Appeal decision of *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] 1 SLR 1102) are satisfied.[3] The test for transnational issue estoppel is as follows:

(a) The foreign judgment must be capable of being recognised in this jurisdiction where issue estoppel is being invoked. Under the common law, this means that the foreign judgment must:

  (i) Be a final and conclusive decision on the merits;

  (ii) Originate from a court of competent jurisdiction that has transnational jurisdiction over the party sought to be bound; and

  (iii) Not be subject to any defences to recognition;

(b) There must be commonality of the parties to the prior proceedings and to the proceedings in which the estoppel is raised; and

(c) The subject matter of the estoppel must be the same as what has been decided in the prior judgment.

In reaching this conclusion, the Court of Appeal observed that:

(a) The doctrine of issue estoppel is grounded in the principle of finality of litigation. If an issue has been canvassed and finally dealt with by a court, then a party cannot reopen that issue in a fresh action, and it would be an abuse of process to do so. In a transnational setting, the analysis is more nuanced. When applying transnational issue estoppel, there is a balance to be struck between competing considerations of comity and the recognising court's constitutional role as the guardian of the rule of law within its own jurisdiction.

(b) The doctrine of transnational issue estoppel is compatible with Singapore's legal framework governing international commercial arbitration as set out principally in the International Arbitration Act 1994 (**IAA**), which is based on the UNCITRAL Model Law on International Commercial Arbitration and gives effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**).

[3] WongPartnership acted for the appellant in this matter. Our update on the case is available here.

(c) The trend of commentary and judicial observations suggests that transnational issue estoppel may and should be invoked by an enforcement court that is confronted with a prior decision of the seat court that has dealt with the same issues.

(d) The prevailing position under English law is that transnational issue estoppel will be invoked where the requirements are met, except where questions of public policy are raised.

(e) When dealing with the question of the enforcement of a foreign award, the domestic law of the enforcement court also comes into play, including its conflict of laws rules and how it treats judgments that are relevant and rendered by other jurisdictions. As Singapore's conflict of laws rules include the principles of transnational issue estoppel, the doctrine of transnational issue estoppel will apply in the arbitral context as "*part of the residual domestic law applicable in setting aside or enforcement proceedings*". This is especially so because the IAA is silent on this issue, and what is not governed by it must necessarily be governed by other rules of domestic law.

(f) This approach respects the parties' choice of the arbitral seat in a principled manner. It also coheres with the notion that courts co-exist as part of an international legal order where they should "*respect each other's decisions in the fullest sense, and so far as possible avoid duplication, repetition and inconsistency in decision-making*". It is also readily accommodated within the existing legal framework of most common law jurisdictions and may alleviate the problem of inconsistent judicial outcomes and limit the extent to which matters determined by a court of competent jurisdiction can be re-litigated, thus reducing wastage of time, effort and resources.

(g) No question of issue estoppel can arise where the public policy of the enforcement court's jurisdiction is in issue (or the arbitrability of a dispute, which is a question that is determined by reference to the enforcement court's public policy). This is because the question of what that public policy is or requires will not have been previously considered by the seat court. There would be no identity of subject matter in such a situation because domestic public policy is unique to each state. Hence, by differentiating between awards that are set aside on more "transnational" grounds (such as procedural irregularities) and distinctly "domestic" grounds (such as arbitrability or the violation of public policy), the doctrine can be applied in a manner that safeguards the domestic concerns of the enforcement court, while adhering to comity to the greatest extent possible.

The Court of Appeal, however, added that, in applying the doctrine of transnational issue estoppel, judgments from a foreign legal system should be interpreted with caution to determine: (a) what precisely was decided by the foreign court and whether the specific issue said to be the subject matter of an issue estoppel was a necessary, as opposed to a merely collateral, part of the foreign judgment; (b) whether the foreign court's decision on that specific issue was final and conclusive; and (c) whether the party against whom the estoppel is invoked had the opportunity to raise that specific issue.

Here, the Court of Appeal found that the Grounds for Resisting Enforcement had been previously considered and dismissed by the seat court. It also found that all the requirements for transnational issue estoppel were satisfied and that none of the exceptions to the doctrine applied. In particular, the Court of Appeal, after examining the opinions of parties' respective Swiss law experts, held that the Swiss Setting Aside Decision had *res judicata* effect under Swiss law.

The Court of Appeal therefore held that India was precluded from re-litigating the Grounds for Resisting Enforcement, and that this alone was sufficient to dispose of the Appeal.

*Primacy Principle in Singapore*

In light of its decision that India was precluded by transnational issue estoppel from raising the Grounds for Resisting Enforcement, it was strictly unnecessary for the Court of Appeal to consider the Primacy Principle. However, as the point was fully argued, the Majority offered, in *obiter*, some observations to inform the analysis on a future occasion when it might be necessary to rule on the point.

The Primacy Principle derives from the widely held view in international commercial arbitration that the seat court enjoys a position of primacy in the transnational framework that governs the conduct and supervision of international arbitration. This view is aligned with the territorialist view of international commercial arbitration to which Singapore, and many other common law jurisdictions, subscribe. The Primacy Principle also advances the interests of comity in the specific context of international arbitration, minimises or avoids inconsistency in judicial decisions, and ensures finality and overall effectiveness of international commercial arbitration.

The Majority was of the view that transnational issue estoppel and the Primacy Principle should not be approached as binary options. The Majority considered that, where transnational issue estoppel does not apply, or where a party wishes or chooses to invoke the Primacy Principle for any reason, it may rely on a prior decision of the seat court, and the Singapore enforcement court should accord that decision primacy by treating it as *presumptively determinative* of matters dealt with in the judgment pertaining to the validity of the award. The onus then shifts to the party seeking to persuade the enforcement court to come to a different view to establish a sufficient basis for doing so. Exceptional circumstances might warrant a departure from the Primacy Principle and the Majority identified possible situations where the presumption may be displaced:

(a) By public policy considerations applicable in the jurisdiction of the enforcement court;

(b) By demonstrating procedural deficiencies in the decision-making of the seat court;

(c) By demonstrating that to uphold the seat court's decision would be repugnant to fundamental notions of what the enforcement court considers to be just; or

(d) Where it appears to the enforcement court that the decision of the seat court was plainly wrong (which cannot be satisfied by mere disagreement with a decision on which reasonable minds may differ).

The Majority further stressed that the limits of the Primacy Principle and the factors that may displace the presumption are subject to further development.

The Concurring Judge, however, saw no need to recognise the Primacy Principle and give decisions of a seat court a specially elevated status in law in the event of repeated challenges to an award. He considered that a prior decision of a seat court should have preclusive effect depending (only) on whether it gives rise to an issue estoppel or whether any challenge to it is viewed as an abuse of process under the principle in *Henderson v Henderson* (1843) 3 Hare 100 (***Henderson v Henderson***) which prevents a party from raising in subsequent proceedings matters which were not but could and should have been raised in earlier proceedings.

Absent any issue estoppel or abuse of process, the Concurring Judge questioned the need for a further principle of law precluding full consideration in an enforcement court of whatever issues may arise under Article V of the New York Convention. In his view, if the party challenging enforcement is not precluded from doing so by issue estoppel or the power in *Henderson v Henderson*, an enforcement court should be free to arrive at its own analysis and conclusion. To him, prior decisions *either* decide a challenge to the award which bind the parties or preclude re-opening of the challenge *or* the challenge remains open for re-litigation. In any case, according to the Concurring Judge, prior decisions always deserve careful consideration, even if they do not bind, and especially so coming from the parties' chosen seat court. The parties' choice behind the seat may also play a role in the enforcement court's evaluation of whether a challenge is abusive. However, as a matter of "*hard legal principle*", the prior decision of another enforcement court is no different from a decision of the seat court.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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