

**ISSUE ESTOPPEL IN INTERNATIONAL COMMERCIAL ARBITRATION AND THE EFFECT OF
FOREIGN JUDGMENTS ON ENFORCEMENT COURTS: *REPUBLIC OF INDIA V DEUTSCHE
TELEKOM AG* [2023] SGCA(I) 10¹**

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I. INTRODUCTION

The Singapore Courts continue to be a rich source of international arbitration jurisprudence and its decisions continue to generate much commentary. For instance, the Singapore International Commercial Court’s judgment on the confidentiality of arbitral deliberations did not go unnoticed in the world of international commercial arbitration.² Another decision worth mentioning is that of the Court of Appeal when it declined to grant a sealing order for arbitration-related proceedings because the confidentiality of the underlying arbitration had already been lost.³

Recently added to the mix is *Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10, which addressed the applicability and effect of issue estoppel in the context of international commercial arbitration.⁴ Specifically, the Court of Appeal in this case addressed the question whether a foreign judgment on the validity of an arbitral award raised an issue estoppel. The question assumes a level of significance for both practical and conceptual reasons. The practical reason is obvious: if issue estoppel does not apply, a whole host of endless cross-border and transnational litigation may follow.

The conceptual reason remains highly debated. While Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**New York Convention**”) sets out the limited and exhaustive grounds upon which recognition and enforcement of an award may be refused, there is no guidance on the obverse issue i.e., the circumstances under which an enforcement court should allow the recognition and enforcement of an award.

Against this backdrop, there exists in international arbitration two schools of thought – the “territorialist” and the “delocalization” school. As put by Singapore’s Chief Justice Sundaresh Menon, “[o]n the “territorialist” view, the legal validity of an arbitral award derives from the

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² *CZT v CZU* [2023] SGHC(I) 11.

³ *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 4.

⁴ This article shall refer to the appellant as “**India**” and respondent as “**DT**”.

*legal order of the seat of the arbitration. Hence, if the award is set aside, it becomes a legal nullity and cannot be enforced in any jurisdiction because there is nothing left to enforce. By contrast, on the “delocalisation” theory, the legal force of an arbitral award stems from an international legal order that transcends national legal systems. This entails that the effect of a seat court’s decision to set aside an award is confined to the jurisdiction of the seat alone – the award remains enforceable in other jurisdictions”.*⁵

The Court of Appeal of the Republic of Singapore, sitting as the appellate Court hearing the appeal against the decision of the (lower) Singapore International Commercial Court,⁶ agreed with the lower Court on the point that India was estopped from raising a number of grounds for resisting DT’s enforcement of an arbitral award following India’s unsuccessful attempt at raising these same grounds before the Federal Supreme Court of Switzerland in proceedings brought by India to set aside the very same award. These grounds culminated in a single overarching submission that DT’s investment fell outside the scope of the offer to arbitrate in the bilateral investment treaty between India and Germany such that the Tribunal which made the award sought to be enforced did not in fact have jurisdiction to determine the dispute between India and DT.⁷

The Court of Appeal’s judgment is notable for several reasons.

The Court of Appeal reaffirmed that Singapore law indeed recognizes that foreign judgments are capable of giving rise to issue estoppels.⁸ It also observed a Singapore enforcement court may and perhaps should invoke such issue estoppels in the international commercial arbitration context where it is confronted by the prior decision of a foreign seat court that has dealt with the same issues.⁹ Finally, the judgment consisted of a majority opinion from 4 of the 5 sitting justices with a concurring opinion from the remaining justice, both of which addressed the existence and applicability of a separate rule of international arbitration law and practice – the Primacy Principle – requiring an enforcement court to accord primacy to a prior determination of the seat court on certain types of issues.

⁵ Sundaresh Menon CJ, *Transnational Relitigation And The Doctrine Of Transnational Issue Estoppel* (8th Judicial Seminar on Commercial Litigation, 14 March 2024).

⁶ *Deutsche Telekom AG v The Republic of India* [2023] SGHC(I) 7 (S Mohan J, Roger Giles JJ, Anselmo Reyes JJ) at [153].

⁷ [2023] SGCA(I) 10 at [38].

⁸ [2023] SGCA(I) 10 at [73].

⁹ [2023] SGCA(I) 10 at [79].

Each of these aspects of the decision raises other easily overlooked considerations of practical importance, which the rest of this article will address in turn.

II. RECOGNITION OF FOREIGN JUDGMENTS

Under Singapore law, it is well established that in order for a foreign judgment to give rise to issue estoppel, it must first be recognized under that jurisdiction's conflict of laws rules.¹⁰ However, it is still an open question under Singapore law whether reciprocity (whether the jurisdiction from which the foreign judgment in question originates similarly recognizes judgments from the court in which the foreign judgment is sought to be enforced) should be a precondition to the recognition of foreign judgments at common law.¹¹ This should not have been an issue in the instant case (indeed, the Court of Appeal did not even consider it) because both parties in the Singapore Court had submitted to the jurisdiction of the foreign court. Because they have done so, that party comes under an obligation to obey that foreign court's judgment and it is said that the foreign court has "*international jurisdiction*".¹²

Assuming for a moment that this was an issue in the present case then, it would appear on a cursory review of the Swiss Courts' approach shows that such a requirement (if applied) would likely be met.¹³ This would also be true as regards the laws of various other jurisdictions. In this connection, the Singapore Court of Appeal has observed that absence of reciprocity would, in practice, rarely be an obstacle to the recognition of a foreign judgment.¹⁴ This is because there are few jurisdictions that subscribe to a general bar against according recognition to foreign judgments.¹⁵

III. THE PRECISE CONSIDERATION OF WHEN AN ISSUE ESTOPPEL ARISES

As held by the Court of Appeal, for a foreign judgment to give rise to issue estoppel under Singapore law, the decision on the specific issue in question must be final and conclusive under the law of the jurisdiction in which that foreign judgment originated. This is because it would be illogical for a court to treat a judgment of a foreign court as final and binding if that court would not regard its own decision as final and binding.¹⁶

¹⁰ *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14 at [35].

¹¹ *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14 at [39].

¹² Yeo Tiong Min, *The Changing Global Landscape for Foreign Judgments*, Yong Pung How Professorship of Law Lecture 2021 (6 May 2021) at [7].

¹³ Swiss Code on Private International Law, Articles 25 to 27.

¹⁴ *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14 at [39].

¹⁵ *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14 at [39].

¹⁶ [2023] SGCA(I) 10 at [156].

In addition to this requirement, the foreign judgment must also originate from a court of competent jurisdiction that has transnational jurisdiction over the party sought to be bound, and not be subject to any defenses to recognition.¹⁷ Further, there must be commonality of the parties to the prior proceedings and to the proceedings in which the estoppel is raised and the subject matter of the estoppel must be the same as what has been decided in the prior judgment.¹⁸

The key feature of the decision focusses on the first limb i.e., whether the judgment was final and conclusive. The Court of Appeal's decision shows that issue preclusion does not arise simply because of the fact that the Federal Supreme Court of Switzerland rejected India's jurisdictional arguments in the setting-aside application. Rather, the question was a much more nuanced one: given the Federal Supreme Court's decision to reject these arguments, would India be prevented from re-litigating these same issues were enforcement proceedings brought in Switzerland? Put another way, since there is a distinction between enforcement proceedings being brought, on the one hand, in the jurisdiction where the seat court is located and, on the other, any other jurisdiction where assets are located, there would arguably not have been any relevant issue estoppel in Singapore if India itself was not so prevented from subsequently re-litigating these same issues before a Swiss enforcement court. After all, the Singapore Court's concern is to ensure that the Singapore enforcement court is not giving greater preclusive effect to the Federal Supreme Court's decision not to set aside the award than would be accorded under Swiss law itself.¹⁹

The majority in the Court of Appeal was at pains to emphasise this point. In doing so, it relied on two judgments of the Federal Supreme Court in another unrelated case which were highlighted by the expert appointed by DT.²⁰ It concluded that "*a subsequent Swiss court would not reconsider India's [grounds for resisting enforcement], these having already been considered and rejected...*".²¹

Another aspect of the Court of Appeal's decision is the affirmation of the trite principle that for an issue estoppel to arise from a foreign court judgment, the foreign court's determination of that issue must be a necessary part of that decision.²² Considering briefly the grounds relied

¹⁷ [2023] SGCA(I) 10 at [64].

¹⁸ [2023] SGCA(I) 10 at [64].

¹⁹ [2023] SGCA(I) 10 at [173].

²⁰ [2023] SGCA(I) 10 at [171].

²¹ [2023] SGCA(I) 10 at [174].

²² [2023] SGCA(I) 10 at [69(c)].

on by India before the Federal Supreme Court, it would appear that its decision on all of these grounds were necessary in ultimately deciding not to set aside the Tribunal's award. This is because, had India succeeded in establishing any one of them, the outcome of the setting aside application before the Federal Supreme Court may well have been different. This was not a "two ratio" type of case giving rise to an exception to issue estoppel, where a Court finds on alternative grounds in favour of a successful party. In such a case, these findings would not create issue estoppels because none of these alternative grounds could be said to be "*legally indispensable to the conclusion*".²³ It was necessary for the Federal Supreme Court to engage with and reject all of India's arguments.

IV. THE PRIMACY PRINCIPLE (OR LACK THEREOF)

While both the majority and the minority opinions agreed that issue estoppel operated so as to preclude India from re-litigating its jurisdictional arguments, and while both majority and minority held that it was unnecessary to consider the Primacy Principle as it did not arise in the present case, they were divided on the hypothetical applicability of the Primacy Principle. As mentioned above, the Primacy Principle operates so as to require an enforcement court to accord primacy to a prior determination of the seat court on certain types of issues. As observed by Singapore's Chief Justice, the Primacy Principle is largely followed by the Australian and US Courts.²⁴

The majority leaned in favour of the Primacy Principle, observing that the "*main trend appears to favour according primacy to the decision of a seat court without necessarily applying transnational issue estoppel*".²⁵ The provisional position, according to the majority, was that the principle "*may be understood as building upon the comity principle in the specific context of international arbitration by requiring an enforcement court in Singapore to treat a prior judgment of a seat court as presumptively determinative of matters dealt with in that judgment to the extent these pertain to the validity of the award*".²⁶

On the other hand, the minority disagreed with the majority. The penultimate passage is worth quoting in full:

²³ See *Eli Lilly v Genentech* [2020] EWHC 261 (Pat) at [58] to [60].

²⁴ Sundaresh Menon CJ, *Transnational Relitigation And The Doctrine Of Transnational Issue Estoppel* (8th Judicial Seminar on Commercial Litigation, 14 March 2024).

²⁵ [2023] SGCA(I) 10 at [119].

²⁶ [2023] SGCA(I) 10 at [121].

“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”.²⁷

Both the majority and minority judgments, however, appear to recognise that the Primacy Principle is not one which applies in an all-or-nothing fashion. But because of this it is difficult to predict whether, in substance, the Primacy Principle would develop into a doctrine that would be of practical importance over and above that of issue estoppel.

The development of the principle may also be counterproductive: the more uncertain the limits of the Primacy Principle, the less conducive it would be to the ideal served by issue estoppel, namely, that of finality in litigation. Things would change, for example, if parties hotly dispute the determination of the seat of the arbitration. In this author’s view, the jury is still out on whether the Primacy Principle would ensure finality (the majority appear to assert that it does)²⁸ as the principle might, depending on the development of the principle, carry with it the risk of generating even more unmeritorious applications to reopen what could potentially be concluded matters.

V. CONCLUSION

Ultimately, the result in *India v DT* is a welcome one. First, consistent with the development of the law in England, it reached a defensible conclusion and has clarified that issue estoppel may and perhaps should be invoked by a Singapore enforcement court when faced with a prior seat court decision on the validity of an arbitral award. Second, the minority judgment in *India v DT* is perhaps the first significant and eminently well-reasoned opinion from a highly respected common law judge that swims against the tide of the Australian and US decisions

²⁷ [2023] SGCA(I) 10 at [220] (per Mance JJ).

²⁸ [2023] SGCA(I) 10 at [121].

which favour the application of the Primacy Principle. Third, the decision leaves open the question whether, as a matter of Singapore law, an issue estoppel would arise from decisions of other foreign enforcement courts (as opposed to seat courts).