

SGCA's Ruling in Republic of India v. Deutsche Telekom: The Saga Continues

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Yue-Zhen Li

Authors: Kartikey Mahajan,* Satjit Singh Chhabra,** and Aayushi Singh***

Jurisdiction: **Topics:**

Singapore

- UNCITRAL Model Law
- International Litigation
- Enforcement of Arbitral Awards
- Interpretation of the Award

BRIEF OVERVIEW

The Singapore Court of Appeal (SGCA) in *The Republic of India v Deutsche Telekom*^[1] dismissed Republic of India's appeals against the rejection of its application to set aside a Swiss order granting leave to enforce a foreign tribunal award in favor of Deutsche Telekom AG. The Court underscored transnational issue estoppel to uphold the Swiss setting-aside decision as final, conclusive, and identical, preventing India from re-litigating on the same grounds against enforcement of the Swiss award.

BACKGROUND TO THE DISPUTE

The Republic of India (India) was the appellant, while Deutsche Telekom AG (DT), a multinational corporation established under the laws of the Federal Republic of Germany, was the respondent. DT acquired shares in the Indian company, Devas Multimedia Pte Ltd (Devas), through its wholly-owned subsidiary, Deutsche Telekom Asia Pte Ltd (DT Asia), a Singapore-incorporated company. Devas, in turn, entered into an agreement known as the "Devas Antrix Agreement" with Antrix Corporation Ltd, an Indian state-owned entity. The dispute that led to arbitration between India and DT originated from the termination of the Devas-Antrix Agreement.

In September 2013, DT initiated arbitration against India, alleging that India's termination of the Devas-Antrix Agreement violated the India-Germany Bilateral Investment Treaty. The proceedings, governed by UNCITRAL Rules in Geneva, resulted in an Interim Award in December 2017, holding India liable for breaching fair treatment obligations. India failed to set aside the Interim Award in the Swiss Federal Supreme Court. The quantum phase concluded in May 2019, with the Final Award on 27 May 2020. Despite India's efforts to challenge the awards in Swiss courts, the Swiss Federal Supreme Court rejected the applications in March 2023.

The Issue

Is India precluded from raising arguments rejected by the seat court in Switzerland? Furthermore, should the Singapore court accord primacy to the seat court's decision on the validity of the award?

The Parties' Submissions

India filed an appeal in the Singapore Court of Appeal against the award, arguing that the tribunal lacked jurisdiction. It contended that it was not barred from reasserting its fraud claims. It submitted that an enforcement court could only be bound by the seat court's decisions if the concept of transnational issue estoppel applied, which it argued did not exist in Swiss law.

On the other hand, DT asserted that India is estopped by transnational issue estoppel and the primacy principle from re-litigating the same points before the Singapore court. Even without transnational issue estoppel, the Singapore courts should be bound by the primacy of the seat in international arbitration unless the Swiss decision is proven to be partial or in violation of fundamental justice.

The Court of Appeal held that the transnational issue estoppel principle was not settled in international commercial arbitration. It emphasized that when the seat court sets aside an award, an enforcement court would hesitate to recognize or enforce it. The Court ruled that the primacy principle usually applies unless it conflicts with Singapore's public policy, there are serious procedural flaws in the seat court's decision-making, or the decision is fundamentally flawed. The Court rejected India's argument that the Swiss court decision would not be final and binding under Swiss law, citing expert opinions.

TRANSNATIONAL ISSUES ESTOPPEL, RES JUDICATA, AND PRIMACY PRINCIPLE

Applying transnational issue estoppel to foreign judgments is generally well-established in Singapore law. However, the applicability of transnational issue estoppel in international commercial arbitration has not been settled. As described in *Merck Sharp and Dohme Corp vs. Merck KGaA*,^[2] "transnational issue estoppel" prevents a party from re-litigating an issue that a foreign court has finally decided. The limbs for establishing transnational issue estoppel are:

- a final and conclusive decision on the merits by a court of competent jurisdiction that has transnational jurisdiction over the party sought to be bound;
- identity of parties;
- identity of subject matter, and
- identity of issues

While the question of the transnational issue estoppel remains unresolved in Singapore, the Court indicated that prevailing trends imply that an enforcement court, faced with a prior decision from the seat court addressing identical issues, might, and arguably should, apply transnational issue estoppel.

The "primacy principle" gives deference to the decision of the seat court on matters pertaining to the validity of an arbitral award, and requires an enforcement court to treat such decision as presumptively determinative, unless there are exceptional circumstances to depart from it. Such presumptive determination is based on the *territorialist view* of international arbitration, the *principle of comity, finality*, and the coherence of the international system for the supervision of arbitration. The principle is not absolute and may be displaced by exceptions like public policy considerations, procedural deficiencies, or manifest errors in the seat court's decision.

Current Position in Singapore

The Singapore courts have not yet decided on the applicability of the primacy principle, but have indicated that it may be a viable alternative to accord primacy to the seat court's decision without necessarily applying transnational issue estoppel. The doctrinal basis for the primacy principle may be found in the rule that the Singapore courts should interpret domestic legislation and develop the common law in a way that advances Singapore's international law obligations and coheres with relevant legislation, such as the New York Convention, the Model Law, and the International Arbitration Act.

Legal Position across Jurisdictions

In English law, transnational issue estoppel is inapplicable when the public policy of the enforcement court is at issue. In Australia, the enforcement court generally accords primacy to the decision of the seat court rather than invoke transnational issue estoppel, unless there are exceptional circumstances. Courts in the United States also apply a “light touch” approach when considering substantive determinations under the law of the primary jurisdiction. They generally adopt a similar approach to the primacy principle, but without applying transnational issue estoppel. The U.S. courts recognize the primary jurisdiction of the seat court under the New York Convention. They will only decline to follow the seat court’s decision if it would violate U.S. public policy or be repugnant to fundamental notions of justice.

While examining the four limbs, the Court applied the doctrine of transnational issue estoppel. This precluded India from re-litigating the same grounds for resisting enforcement of the award that it had raised and failed in the Swiss setting aside proceedings. The Court determined that the Swiss setting-aside decision was final and conclusive, and that there was an identity of parties and subject matter between the two proceedings, satisfying the four-limb test. Thus, the Court does not need to consider the primacy principle. Observing that the primacy principle is not an absolute or presumptive rule, it emphasizes the flexibility dependent upon the facts and circumstances of each case.

Diverging from a previous case, *MAD Atelier International BV v Manès* [2020] 3 WLR 631,[3] where no legal doctrine existed to give preclusive effect to the foreign judgment, the doctrine of substantive *res judicata* is recognized in Swiss law, with varying effects in different situations. The distinction between a foreign judgment’s overall finality and the decision’s finality on a specific issue was highlighted. It was noted that the former is necessary but not always sufficient, requiring further inquiry into whether the specific issue has been conclusively determined. The SGCA concluded that India is precluded from challenging the tribunal’s jurisdiction based on the Swiss Setting-Aside Decision’s *res judicata* effect. The SGCA based its decision on the expert opinion of Prof Müller, who stated that, under Swiss law, only the determination that the Interim Award should not be set aside has a *res judicata* effect. To this effect, the Court concluded that the Swiss Court would not reconsider India’s Grounds for Resisting Enforcement, these having already been considered and rejected in the Swiss Setting-Aside Decision.

Comments

While the SGAC has determined that applying transnational issue estoppel is permissible, the enforcement court is advised to approach its implementation with caution. This caution stems from the need to carefully consider the perceived advantage of achieving greater conclusiveness in enforcement proceedings against the significantly greater risk of compromising fairness to the award debtor.

Advocates supporting transnational issue estoppel may argue that it enhances conclusiveness in arbitration proceedings, a highly valued outcome in international arbitration. The rationale behind this perspective is grounded in the belief that allowing the losing party to repeatedly litigate the same issues globally would be inefficient. Proponents may further contend that enforcement courts across different jurisdictions should mutually recognize and enforce each other’s decisions to advance this overarching objective.

However, while valuable, the pursuit of conclusiveness should not take precedence over the more crucial objective of ensuring fair enforcement judgments. The doctrine of transnational issue estoppel introduces a potential threat to the fairness of enforcement judgments by preventing the unsuccessful party from re-evaluating the same points, even if the previous enforcement court dismissed them erroneously on biased or erroneous grounds.

DUTY OF FULL AND FRANK DISCLOSURE

The duty of full and frank disclosure requires an applicant in an ex parte application to disclose to the court “all matters within his knowledge which might be material even if they are prejudicial to the applicant’s claim.” The duty arises as a matter of common sense in a setting where the Court only has one party before it, and the application of the rule depends on assessing all the facts and circumstances in the case. It does not require the applicant to disclose every document that may be disclosable during discovery.

The Court rejected India’s argument that DT had not made full and frank disclosure in its ex parte application for leave to enforce the award. The Court found that DT had sufficiently disclosed the Swiss setting-aside application and decision, and that it was unnecessary for DT to detail all the arguments India had made or might make in the enforcement proceedings. The Court also finds that India’s claim to state immunity and the National Company Law Tribunal decision were not material to the determination of the ex parte application.

CONCLUSION

The SGCA’s dismissal of India’s appeals in *The Republic of India v Deutsche Telekom* reinforces the application of transnational issue estoppel, affirming the finality of the Swiss setting-aside decision. The dispute, stemming from the termination of the Devas-Antrix Agreement, led to DT’s arbitration claim against India, asserting a breach of the India-Germany Bilateral Investment Treaty.

The key question addressed was whether India could raise rejected arguments in the Singapore court or if primacy should be given to the Swiss Court’s validity decision. Notably, the SGCA emphasized that when a seat court sets aside an award, an enforcement court would be cautious in recognizing or enforcing it. The decision underscores the evolving position in Singapore, where the primacy principle is viewed as an alternative to transnational issue estoppel, depending on exceptional circumstances. Diverging from prior cases, the SGCA recognized the res judicata effect in Swiss law, concluding that India is precluded from challenging jurisdiction based on the Swiss Setting-Aside Decision. The Court also affirmed the duty of full and frank disclosure in enforcement proceedings, rejecting India’s argument against DT’s disclosure. This case sets a precedent, emphasizing the nuanced application of principles like transnational issue estoppel, primacy, and res judicata in international arbitration enforcement.

* **Kartikey Mahajan** is a Partner in the Dispute Resolution practice group in the Singapore office of Khaitan and Co. Kartikey is qualified to practice law in India, England & Wales (where he has rights of audience for all courts), and the State of New York. Prior to joining the Firm, Kartikey worked with Magic Circle and White Shoe American law firms in London and Singapore.

** **Satjit Singh Chhabra** is an Associate in the Dispute Resolution practice group in Khaitan and Co.’s New Delhi office. Satjit is a dual-qualified lawyer (India and United Kingdom) with experience in representing both domestic and foreign parties in international arbitrations and commercial litigations before Indian courts and tribunals.

*** **Aayushi Singh** is an Associate in the Dispute Resolution practice group in Khaitan and Co.’s New Delhi office. Her practice focuses on domestic and international arbitration, advising on enforcement and commercial litigation with a cross-border element, and corporate investigations. Prior to joining the firm, Aayushi was engaged as a Visiting Foreign Lawyer at the London international arbitration practice of a major US law firm.

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[1] *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10.

[2] *Merck Sharp and Dohme Corp vs. Merck KGaA* [2021] 1 SLR 1102.

[3] *MAD Atelier International BV v Manès* [2020] 3 WLR 631.