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No "Third Bite at the Cherry": Singaporean and Swiss Courts Reject State's Jurisdictional Objections in Enforcement and Set-aside Proceedings

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In 2013, Deutsche Telekom AG ("DT"), a German corporation, commenced an UNCITRAL arbitration in Switzerland under the Germany-India BIT claiming that India had (amongst other things) breached the fair and equitable treatment ("FET") standard.

In the arbitration, India raised various jurisdictional objections, which the Tribunal rejected in an Interim Award issued on 13 December 2017. The Tribunal also found that India had breached the FET obligation by annulling an agreement to lease the S-band electromagnetic spectrum on two satellites to a company owned by DT based on unsubstantiated security needs.

India then sought to set-aside the Interim Award before the Swiss courts, arguing again that the Tribunal did not have jurisdiction over the dispute. The Swiss Court issued the First Swiss Judgment on 11 December 2018 which rejected these objections and refused to set-aside the Interim Award.

Following this, the Tribunal issued the Final Award on 27 May 2020 in which it ordered India to pay USD 93.3 million to DT.

Subsequently, in enforcement proceedings in Singapore, India sought to re-agitate the jurisdiction issues rejected by both the Tribunal and the Swiss Court. While the Singapore proceedings were still on foot, India applied to the Swiss courts to set-aside both the Interim and Final Awards on the basis that new facts had been discovered. Then, India applied to stay the Singapore enforcement proceedings pending the Swiss Court's decision.

Both the Singaporean and Swiss courts rejected India's attempt to have a "third bite at the cherry" with the jurisdiction arguments, by the Singapore Judgment issued on 30 January 2023, and the Second Swiss Judgment issued on 8 March 2023.

This prolonged battle demonstrates the procedural complexities that can arise when a state resists an award both at the seat and at the place of enforcement, and the decisions of the Swiss and Singapore courts provide some helpful practical guidance on how these parallel proceedings should be managed.

India’s Jurisdictional Objections

Indirect Investment and Investors

Before the Tribunal, India argued that DT was not a relevant investor nor had it made a relevant investment, as DT’s investment in India was indirectly made through its wholly-owned Singaporean-incorporated subsidiary, Deutsche Telekom Asia Pte Ltd (“DT Asia”) which had acquired shares in an Indian company, Devas Multimedia Private Limited (“Devas”).

The BIT contained the following definitions (in relevant parts):

- “*Investment*” means “*every kind of asset invested in accordance with the national laws of the Contracting Party where the investment is made and* […] *includes* […] *shares in, and stock and debentures of, a company* […]”;
- “*Investor*” means “*nationals or companies of a Contracting Party who have effected or are effecting investment in the territory of the other Contracting Party*”.

The Tribunal rejected the jurisdictional objection finding that there was nothing in the BIT to indicate an intention that indirect investors and investments were not protected. Before both the Swiss and Singaporean courts, India recycled these objections. Both courts rejected these arguments in short order.

Admission of Investment

In the arbitration, India submitted that the BIT only protected investments that had been admitted by India, and DT’s investment in Devas had not been admitted.

The Tribunal found that Article 3(1) of the BIT, which stated “*Each Contracting Party shall* […] *admit investments in its territory in accordance with its law and policy*”, did not permit India to refuse to admit investments, but instead obliged India to admit investments subject to its laws and, in any event, India had in fact admitted DT’s investment according to India’s laws. This sound logic was echoed by the courts in Switzerland and Singapore.

Essential Security Interests

India made submissions to the Tribunal that the measures which were the subject of DT’s FET claim did not breach the BIT as those measures were necessary for the protection of India’s essential security interests. This was framed as a substantive defence, and not as a jurisdictional objection.

The Tribunal rejected this argument and determined that India had failed to establish that the contested measures were necessary to protect India’s essential security interests.

India recast this argument as an issue going to jurisdiction before the Swiss and Singaporean courts. Both courts dismissed the objection on the basis that the issue was one of substance and not jurisdiction. Further, the Swiss Court considered that India was precluded from raising this as a jurisdiction issue, given it had not previously put it that way in the arbitration.

Illegal Investment

Following the hearing and prior to the issuance of the Interim Award, India informed the Tribunal that criminal charges had been filed against Devas, and sought suspension of the arbitration on the basis that, if the charges were upheld, they "*would constitute additional grounds for dismissal* [of the claims], *as the alleged investment will not have been made in accordance with Indian law*".

The Tribunal rejected the suspension application, and ruled that it was too late for India to raise a new jurisdictional objection based on the alleged "illegality" of DT's investment. The Tribunal also found that, in any event, the objection had no merit because India had been aware of the criminal investigations for a year prior; and the criminal charges did not concern DT, nor DT's investment in Devas.

Following India's first set-aside application, the Swiss Court determined that the illegality objection had been forfeited due to India's delay in raising it and, in any event, the charges were mere accusations which did not concern DT's investment in Devas.

In the enforcement proceedings, the Singapore Court found that the evidence did not establish that DT was aware of the alleged illegal actions of Devas at the time of making its investment, and consequently DT could not be found complicit in the illegality. Further, the alleged illegality concerned the *performance or use of DT's investment* in Devas, and not the making of *DT's investment* in Devas, which did not affect the Tribunal's jurisdiction.

Following India's second set-aside application, which was based on a judgment of the Supreme Court of India finding that Devas' incorporation was illegal, the Swiss Court rejected the application. It found that: it was untimely as India had been aware of the facts underlying the judgment for some time; and to the extent that India relied on the judgment itself as a new fact, this was a fact that was discovered after the Awards which was not an admissible fact for the purposes of review.

Judicial Treatment of Earlier Decisions and Related Proceedings

First Swiss Judgment

In respect of the interaction between the Interim Award and the set-aside proceedings, the Swiss Court confirmed that its general function was to adjudicate the jurisdictional objections in an appellate sense based on the facts established in the Interim Award. However, the Court retained the ability to review facts underlying the Interim Award, and was free to examine matters of law to determine whether the Tribunal lacked jurisdiction. Consequently, the Court examined afresh India's jurisdictional objections.

Singapore Judgment

In respect of the effect of the first Swiss judgment, the Singapore Court found that:

- India's objections raised before the Swiss Court were not the subject of a cause of action estoppel, as the application to set-aside an award in one country (Switzerland) is a different cause of action to that of an application to refuse enforcement of an award in another country (Singapore).
- However, the Swiss judgment gave rise to a negative *res judicata* effect, in the issue estoppel sense, that precluded India from raising the same grounds of review in the Singaporean enforcement proceedings as the Swiss judgment was final, the parties in both proceedings were identical, and the judgment concerned identical jurisdictional objections.

The Singapore Court also rejected India's application that the Singapore enforcement proceedings be stayed pending the Swiss Court's determination on its second set-aside application, finding that:

- The "new" facts relevant to the illegality objection were known for some time, and thus the second Swiss set-aside application was likely to be rejected by the Swiss courts as untimely.
- Given the Court's view of the minimal prospects of success of the application, there was a limited risk of inconsistent decisions as between the Singaporean and Swiss courts.

Second Swiss Judgment

The Swiss Court found that:

- The Interim Award, which had already been reviewed in the first Swiss judgment, was not open to review.
- The Final Award was open for review, but India had failed to establish that it had learnt of material facts that it was unable to produce in earlier proceedings, and within the 90-day time limit of learning of those facts set by the applicable law.

Takeaways

In the context of the perceived "legitimacy crisis" of investment treaty arbitration, it is reassuring that the senior courts in two countries have reached the same conclusion on numerous jurisdictional objections raised by a State as originally reached by the Tribunal.

It is also positive to see Singapore (as the enforcement court) taking a pragmatic approach to parallel set-aside proceedings and expressing the view that it will only stay enforcement proceedings where the merits warrant a delay in enforcement. This case management approach will hopefully deter award-debtors from deploying meritless set-aside applications in an attempt to delay paying on awards.

These decisions also provide practical guidance on how decision-makers will approach belated jurisdictional objections, including by taking a robust approach to respondents who have sought to keep jurisdictional objections "up their sleeve".

Ultimately, these proceedings demonstrate the real risk that enforcement of investment treaty awards will not be a straightforward and efficient process, given the potential for the re-litigation of issues and duplicative proceedings in different courts, and consequent delay and costs.

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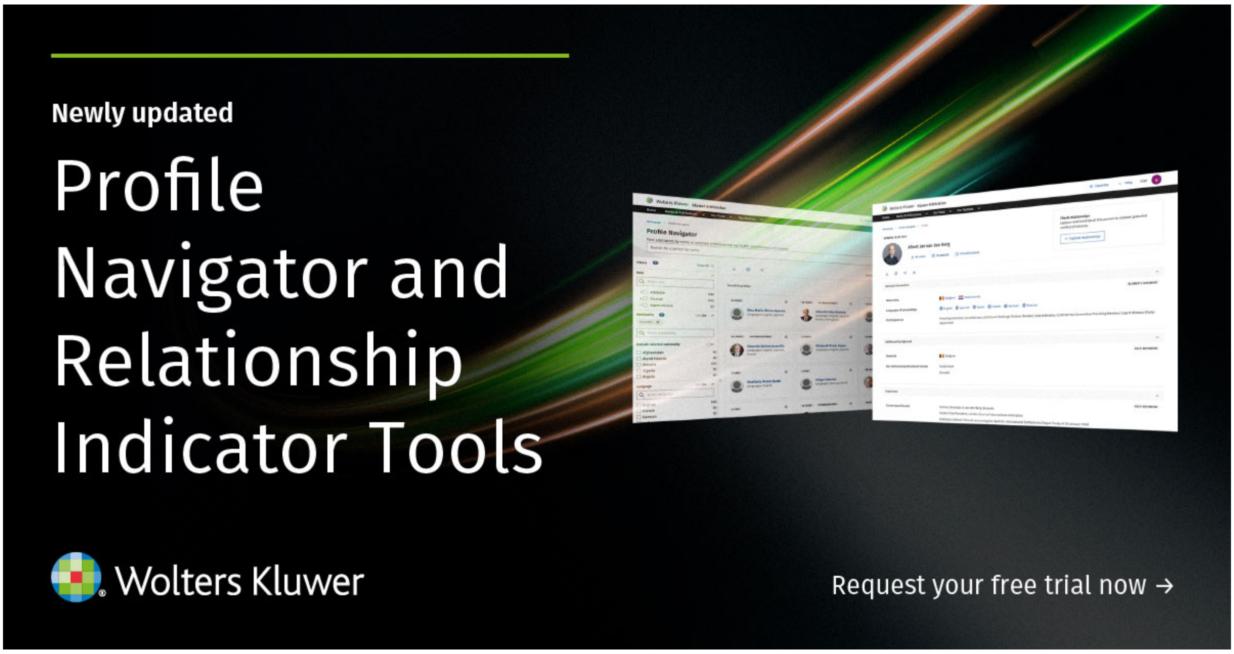

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