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The Deutsche Telekom v India Saga: Multi-Jurisdictional Proceedings, Transnational Issue Estoppel and Primacy

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Large arbitral awards have generally given rise to multi-jurisdictional post-award litigation (*see* Yukos). The *Deutsche Telekom v India* saga is a similar instance, with the Republic of India ("India") having challenged the arbitral awards before the Swiss Federal Supreme Court ("seat court") and the courts in Germany, Singapore, and the United States ("US") ("enforcement courts"). The saga, which has run for more than 10 years, has generated considerable jurisprudence on the interplay between awards that are under consideration by courts at both the arbitral seat and potential enforcement jurisdictions, as well as the preclusive effect of prior proceedings before enforcement courts.

Procedural History

In 2017, Deutsche Telekom AG ("DT") successfully obtained an interim award on jurisdiction and liability ("Interim Award") against India in a Geneva-seated UNCITRAL arbitration under the Germany-India Bilateral Investment Treaty ("BIT"). India applied to set aside the Interim Award before the seat court, but was unsuccessful ("First Swiss Proceedings").

In 2020, DT was successful in the final award on quantum ("Final Award") and the tribunal ordered India to pay USD 93.3 million to DT. In 2021, DT sought to enforce its award in Germany, Singapore, and the US (*i.e.*, the District of Columbia and New York).

In May 2022, India applied to the seat court for a revision of the Interim Award and Final Award based on its discovery of subsequent "material facts or conclusive evidence" ("Second Swiss Proceedings"). India further requested that the "two arbitral awards be set aside and that the dispute be referred back to the arbitral tribunal in Geneva for a new assessment" (Swiss decision, p. 4) (*see* prior Blog post for the substance of some of the arguments from these proceedings).

India sought to stay the proceedings before the enforcement courts, while awaiting the outcome of the Second Swiss Proceedings. This marked the start of divergent approaches as set out below.

Grant of Stay of Proceedings by US Courts

The US District Court for the District of Columbia ("DC Court") granted a stay of proceedings on the basis that (i) a stay would avoid expensive and duplicative litigation to "unwind the award"; and (ii) the Second Swiss Proceedings would conclude soon (in six to 10 months) (DC Court decision).

Before the US District Court for the Southern District of New York ("NY Court"), DT (together with other Plaintiffs who had won a separate arbitration award against India arising under the Mauritius-India BIT) sought to enforce their awards against Air India, arguing that the latter was an alter ego of India. The NY Court ordered a stay of proceedings pending the DC Court's ruling, noting that the two US proceedings were duplicative although there were different respondents in each action (*i.e.*, Air India versus India) (NY Court decision).

Enforcement of Award in Germany and Singapore

In contrast to the US proceedings, the Higher Regional Court of Berlin ("Berlin Court") and the Singapore International Commercial Court ("SICC") declined to stay proceedings and held that the award could be enforced. Both courts looked beyond the mere existence of ongoing set-aside proceedings at the seat court, and instead examined the substance of the arguments raised in the Second Swiss Proceedings. Both courts considered that India was repeating, in the Second Swiss Proceedings, the arguments raised in the First Swiss Proceedings (Berlin Court decision, p. 13 and SICC decision, para. 177).

In balancing the interests of the award creditor (DT) against those of the award debtor (India), the Berlin Court considered the low likelihood of India succeeding in the Second Swiss Proceedings (p. 13). The SICC shared a similar view, finding that (i) the arguments decided in the First Swiss Proceedings were subject to *res judicata* as a matter of Swiss law; and (ii) there was no new material evidence to support India's request to revise the award in Switzerland (SICC decision, paras. 150-52, 174-80). Accordingly, the SICC concluded that there was no real risk of inconsistent judgments rendered in Singapore (by the enforcement court) and Switzerland (by the seat court).

However, the Berlin Court and the SICC differed when considering the effect of the seat court's decision on enforcement proceedings. The Berlin Court did not accord preclusive effect to the First Swiss Proceedings, finding that the seat court's decision "does not release the court in the enforceability declaration proceedings from its own examination of the facts." Conversely, the SICC found that as a matter of Singapore law, issue estoppel would apply, leading to a form of negative *res judicata*, thereby precluding India from raising arguments that were rejected by the seat court (SICC decision, para. 153).

Unsuccessful Second Swiss Proceedings and Appeals in Germany and Singapore

On 8 March 2023, India's application in the Second Swiss Proceedings was rejected. India further appealed the decisions of the Berlin Court and the SICC to the respective apex courts.

In September 2023, the German Federal Court of Justice ("FCJ") rejected India's appeal, which was based on a new argument that the arbitration agreement in the Germany-India BIT violated the Court of Justice of the European Union's decision in *Achmea*. The FCJ declined to apply the

Achmea rule to BITs concluded between an EU Member State and a third country, and rejected India's challenge (Beschluss des Bundesgerichtshofs I ZB 12/23, and a discussion here).

In December 2023, the Singapore Court of Appeal ("SGCA") likewise rejected India's appeal and upheld the enforcement of the award (SGCA decision), as examined below.

The SGCA Further Elucidates the Preclusive Effect of Prior Proceedings

The SGCA decision sheds light on the effect of prior set-aside and enforcement proceedings on the enforcement of international arbitral awards in Singapore. Its reasoning is noteworthy in two aspects: (i) transnational issue estoppel; and (ii) the "primacy" principle.

(i) Transnational Issue Estoppel

Before the SGCA, DT's primary argument was that transnational issue estoppel precluded India from raising the same arguments that were determined by the seat court (SGCA decision, para. 50). The SGCA agreed.

As set out above, the lower court (the SICC) had recognised that issue estoppel applied to preclude India from raising, in the Singapore enforcement proceedings, arguments that had been raised before the seat court. However, the SICC did not clarify the exact doctrinal basis for its analysis. It appeared to have been relying on *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 ("*Merck*"), which was a case on the enforcement of foreign court judgments, *i.e.*, not in the international arbitration context (SICC decision, para. 138).

In its decision, the SGCA expressly confirmed that transnational issue estoppel and the *Merck* doctrine extends also to the international arbitration context. This is therefore the first instance in which a Singapore court has made this extension explicit.

The SGCA upheld the test in *Merck*, finding that transnational issue estoppel applies to prior set-aside proceedings where there is (i) a final and conclusive decision on the merits by a competent court (*i.e.*, the arbitral seat) that has jurisdiction over the award debtor; (ii) an identity of parties; and (iii) an identity of subject matter. Where all three elements are met, parties would be estopped "from re-litigating points that were previously raised and determined." As all elements were satisfied in this case, the SGCA held that India was precluded from re-litigating grounds that had been rejected by the seat court.

The SGCA's decision brings Singapore law in further alignment with English law, by recognising that issue estoppel could arise out of the seat court's decision (as required by the facts that arose in this case). However, as noted by the SGCA, English law goes further as it recognises that issue estoppel could also arise in the context of two enforcement courts (*Diag Human SE v The Czech Republic* [2014] EWHC 1639 (Comm); SGCA decision, para. 81). The SGCA then chose to leave open the question of whether issue estoppel would apply between two enforcement courts (SGCA decision, para. 92).

(ii) Primacy

DT's secondary argument was that even if issue estoppel did not apply, the SGCA should nonetheless accord "primacy" to the decision of the seat court (SGCA decision, para 50). The SGCA's discussion of the "primacy" principle was strictly *obiter* as it had already decided that transnational issue estoppel applied in this case (SGCA decision, paras. 4, 120).

The SGCA suggested that under the "primacy" principle, a seat court's decision on matters relating to the validity of an award would be "presumptively determinative" before an enforcement court. It offered four reasons for applying the "primacy" principle in Singapore: the principle (i) recognises the seat court's unique role in supervising the arbitral award and aligns with the "territorialist view" of arbitration (which Singapore subscribes to); (ii) advances judicial comity; (iii) gives weight to the parties' choice of the arbitral seat; and (iv) promotes the finality of awards (SGCA decision, para. 121). On this point, International Judge Lord Mance disagreed on the need to have a separate "primacy" principle, considering the existence and flexibility of the estoppel doctrine (SGCA decision, paras. 199-202).

The SGCA also outlined three exceptions to the application of the "primacy" principle, two of which are based on due process concerns and public policy considerations of the enforcement court, and are therefore broadly aligned with Article V(1)(b) and Article V(2)(b) of the New York Convention. The last exception allows the enforcement court to disapply the "primacy" principle if the seat court's decision appears to be "plainly wrong". This could allow an enforcement court to re-examine the legal reasoning of the seat court and undermine the finality of the arbitral award. However, as the SGCA noted, where the line should be drawn is subject to future jurisprudential development (SGCA decision, para. 130).

Concluding Remarks

The multi-jurisdictional litigation in the *DT v India* case illustrates the difficulties for courts to maintain consistent approaches in parallel set-aside and enforcement proceedings. Enforcement courts have been shown to balance the interests of award creditors against those of award debtors differently when deciding whether to stay proceedings. The SGCA's jurisprudential framework on transnational issue estoppel and the "primacy" principle helpfully offers greater certainty for award creditors looking to enforce arbitral awards in Singapore where award debtors have challenged arbitral awards at the seat. However, as the court noted, the exact contours of these doctrines would need to be refined over time.

The post only reflects the views of the author, and not of her firm or the firm's clients. The author further discloses that while her firm (Freshfields) represented Deutsche Telekom AG in the Geneva-seated arbitration, she has had no personal involvement in the arbitration nor the post-award litigation. She is not privy to any confidential information and has relied only on public sources for her analysis.

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