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Case Comment

PREVENTING FURTHER BITES OF THE CHERRY IN CHALLENGING ARBITRAL AWARDS

The Republic of India v Deutsche Telekom AG [2024] 1 SLR 56

[2024] SAL Prac 9

Although much has been said about the treatment of decisions of a seat court pertaining to the validity of an arbitral award by an enforcement court (and *vice versa*), this issue had not been definitively resolved in Singapore – that is until the recent decision of a five-member coram of the Singapore Court of Appeal in *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56. This article discusses the important conceptual questions that have been answered by the Court of Appeal including the application of the conflict of laws principle of transnational issue estoppel in the arbitration context as well as the existence of the newly-coined "Primacy Principle" as a doctrine of Singapore arbitration law, and the impact of these developments on international arbitration law and practice.

KOH Swee Yen SC[1]
LLB (National University of Singapore);
Advocate and Solicitor (Singapore);
Solicitor (non-practising) (England and Wales);
Head of International Arbitration Practice, Partner, Commercial and Corporate Disputes and Commodities and International Trade Practices, WongPartnership LLP, Singapore.

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Joel **QUEK**[1]
LLB (University College London), LLM (Cantab);
Advocate and Solicitor (Singapore);
Partner, International Arbitration and Commercial and Corporate Disputes Practices, WongPartnership LLP, Singapore.

I. Introduction

1 The emergence of a "transnational system of commercial justice" as described by Sundaresh Menon CJ extra-judicially, "provid[es] a legal framework for the resolution of international commercial disputes",[2] and is a natural consequence of our increasingly globalised economy and critical for sustaining cross-border commerce. A vital part of this framework is international arbitration. It cannot be gainsaid that for international arbitration to be an effective instrument in the transnational system of commercial justice, the promotion of enforcement of arbitral awards and prevention of re-litigation of disputes over the validity of awards is imperative.

2 The recent decision of a five-member coram of the Singapore Court of Appeal in *The Republic of India v Deutsche Telekom AG*[3] ("*India v DT*") does precisely that, and advances Singapore's position and reputation as one of the leading international arbitration jurisdictions. This is achieved through two jurisprudentially significant developments in this area of law.

3 First, the Court of Appeal confirmed the application of transnational issue estoppel in the context of international

2 See Sundaresh Menon, Chief Justice, "The Law of Commerce in the 21st Century: Transnational Commercial Justice Amidst the Wax and Wane of Globalisation", address at the lecture hosted by the University of Western Australia Law School and the Supreme Court of Western Australia (27 July 2022) at paras 17 and 45; Sundaresh Menon, Chief Justice, "The Transnational System of Commercial Justice and the Place of International Commercial Courts", lecture in Bahrain (9 May 2023) at para 2 and Sundaresh Menon, Chief Justice, "Arbitration and the Transnational System of Commercial Justice: Charting the Path Forward", keynote speech at 25th Annual International Bar Association Arbitration Day (23 February 2024) at para 2.

3 [2024] 1 SLR 56.

arbitration. This promotes certainty, consistency and finality of the arbitral process, ensuring 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.

4 Second, the Court of Appeal engaged in an important discussion of what it coined the "Primacy Principle" – that 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) – as a doctrine of Singapore arbitration law which applies in addition to transnational issue estoppel.

5 This article begins with a summary of the relevant factual background of *India v DT*, followed by a discussion of the two principles of transnational issue estoppel applied in the context of international arbitration and the Primacy Principle, and concludes with a consideration of an issue left open by the majority in *India v DT*[4] (the "Majority") – the application of transnational issue estoppel where the foreign judgment in question comes not from the seat court but another enforcement court.

II. Background to *The Republic of India v Deutsche Telekom AG*

6 *India v DT* arises out of a drawn-out dispute between Devas Multimedia Private Ltd ("Devas") and Indian state-owned entity Antrix Corp Ltd ("Antrix"), which is the commercial arm of the Indian Space Research Organisation under the control of India's Department of Space, following India's annulment of an agreement between Antrix and Devas for the leasing of

4 Comprising Sundaresh Menon CJ, Judith Prakash JCA (as she then was), Steven Chong JCA and Robert French IJ.

communication satellites ("Agreement"). Deutsche Telekom AG ("DT"), through its wholly owned subsidiary Deutsche Telekom Asia Pte Ltd ("DT Asia"), was a shareholder of Devas.

7 This led to DT commencing arbitration proceedings seated in Switzerland against India, where DT contended that India's annulment of the Agreement violated the Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments dated 10 July 1995 ("India–Germany BIT").

8 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 to set aside the Interim Award, primarily on the basis that the tribunal lacked jurisdiction over the dispute. India was ultimately unsuccessful in setting aside the Interim Award ("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 US$93.3m 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.

9 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"). 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 s 3(1) of the State Immunity Act 1979[5] ("SIA"), and the exception to state immunity under s 11(1) of the SIA did not apply because DT's investment fell outside the scope of the offer to arbitration in Art 9 of the

5 2020 Rev Ed.

India–Germany BIT for the following four reasons (collectively, the "Grounds for Resisting Enforcement"):[6]

(a) DT's investment did not fall within the definition of "investment" under the India–Germany 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 India–Germany BIT (the "Pre-investment Argument");

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

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

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

10 The SICC dismissed India's application, finding, *inter alia*, 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.

11 India appealed to the Court of Appeal against the SICC's decision, raising largely the same arguments as it did before the SICC, ultimately contending that it was immune from the jurisdiction of the Singapore courts as DT's investment fell

6 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [38].

outside the scope of the offer to arbitrate in the India–Germany BIT based on the Grounds for Resisting Enforcement.

12 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 – if India was indeed precluded from raising the same Grounds for Resisting Enforcement that had already been heard and determined against India by the seat court, there would be no need for the Court of Appeal to review these arguments afresh in the enforcement proceedings.[7] From this, two related legal issues emerged:

(a) First, whether the doctrine of transnational issue estoppel applies in the context of international 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 arbitration was, until now, less certain.

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

III. Transnational issue estoppel in the context of international arbitration

A. The doctrine of transnational issue estoppel generally

13 Transnational issue estoppel is a well-established doctrine in Singapore law, which prevents a party against whom a *foreign* judgment has been rendered in a foreign jurisdiction from raising certain issues again before the Singapore courts. In *India v DT*, the Court of Appeal provided a comprehensive and cogent summary of the requirements of transnational issue

7 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [59]–[61].

estoppel, its normative foundations in finality of litigation as well as comity,[8] and the possible outer limits of the doctrine.[9]

14 Briefly, the three-part test for transnational issue estoppel is as follows:[10]

> (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. In other words, the foreign jurisdiction itself must regard the issues as conclusive, and the issues cannot be raised again in the foreign country.[11]
> >
> > (ii) Originate from a court of competent jurisdiction that has transnational jurisdiction over the party sought to be bound. In other words, the forum court recognising the judgment must be satisfied that according to its own rules of private international law, the foreign court rendering the judgment had jurisdiction in the "international sense":[12]
> >
> > > (A) presence in the foreign jurisdiction;
> > >
> > > (B) filing a claim or counterclaim before the foreign court;
> > >
> > > (C) voluntarily submitting to the jurisdiction of the foreign court by appearing in the proceedings;

8 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [67].
9 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [71].
10 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [35]–[40]; see also *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [64].
11 *India v Deutsche Telekom AG* [2024] 1 SLR 56 at [88].
12 *India v Deutsche Telekom AG* [2024] 1 SLR 56 at [65].

(D) agreeing to submit to the jurisdiction before the commencement of proceedings; and

(iii) Not be subject to any defences to recognition which include circumstances where recognising or enforcing the foreign judgment would result in a contravention of the public policy of the forum, where the foreign judgment was obtained by fraud or in breach of natural justice, or if it would amount to the direct or indirect enforcement of foreign penal, revenue or other public laws.[13]

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

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

15 The Court of Appeal also went on to highlight important considerations that should guide the application of the above three-part test:[14]

(a) First, "[i]t is irrelevant that the court invoking transnational issue estoppel may form the view that the decision of the foreign court was wrong either on the facts or on the law".

(b) Second, "[t]he court must be cautious before concluding that the foreign court had made a final decision on the relevant issue because the procedures of the latter may be different and it may not be easy to determine the precise issues that were decided".

(c) Third, "[t]he determination of the issue must be a necessary part of the foreign court's decision".

13 *India v Deutsche Telekom AG* [2024] 1 SLR 56 at [66].

14 *India v Deutsche Telekom AG* [2024] 1 SLR 56 at [69], referencing the English Court of Appeal decision in *Good Challenger Navegante SA v Metalexportimport SA* [2004] 1 Lloyd's Rep 67 at [54].

(d) Fourth, "[t]he application of issue estoppel is subject to the overriding consideration that *it must work justice and not injustice*" [emphasis in original].[15] "Thus, the correct approach is to apply the principles identified unless there are special circumstances such that it would be unjust to do so. Whether there are such special circumstances would of course depend on the facts of the case."[16]

16 The first, third and fourth of these considerations are an important part of the inquiry at the first limb of the three-part test, whereas the second of these considerations informs the third limb of the three-part test. This second consideration took on particular significance in *India v DT*, and puts squarely in focus why there may be a need for the Primacy Principle *in addition* to the doctrine of transnational issue estoppel.[17]

B. Applying transnational issue estoppel in the context of international arbitration

17 A decade prior to *India v DT*, in its seminal decision of *PT First Media TBK v Astro Nusantara International BV*[18] ("*Astro*"), the Court of Appeal discussed in *obiter* the point on how an enforcement court should treat a prior decision of the seat court on the validity of an arbitral award, but the point was thereafter not conclusively determined in Singapore.

18 In *Astro*, the Court of Appeal held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[19] ("New York Convention") and the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") recognise the doctrine of "choice of remedies", such that a party is not precluded from exercising the passive remedy of resisting

15 *India v Deutsche Telekom AG* [2024] 1 SLR 56 at [69], referencing *PAO Tatneft v Ukraine* [2021] 1 WLR 1123 at [34].
16 *India v Deutsche Telekom AG* [2024] 1 SLR 56 at [69], referencing *Good Challenger Navegante SA v Metalexportimport SA* [2004] 1 Lloyd's Rep 67 at [79].
17 See paras 28–33 below.
18 [2014] 1 SLR 372.
19 (10 June 1958) 330 UNTS 38 (entered into force 7 June 1959).

the enforcement of an award by virtue of its failure to utilise the available active remedy of setting aside the award before the seat court.[20] As part of its analysis, the Court of Appeal opined that the underlying theme of "double-control" under the New York Convention and the Model Law is that "it is generally for each enforcing court to determine for itself what weight and significance should be ascribed to the omission, progress or success of an active challenge in the court of the seat",[21] and further observed that the authorities support the view that the New York Convention permits a party to resist enforcement even after an unsuccessful active challenge, save and except for the operation of any issue estoppel recognised by the enforcing court.[22]

19 This issue was explored again by the Singapore courts in *BAZ v BBA*[23] ("*BAZ*"),[24] which concerned proceedings before the seat court in Singapore where transnational issue estoppel arose from a judgment of a foreign *enforcement* court (*ie*, the converse of the situation in *India v DT*). The High Court after a careful and thorough examination of the relevant authorities (while noting that they almost all concerned the situation of issue estoppel arising from the judgment of a seat court (*ie*, the *India v DT* situation)), ultimately concluded that jurisdictional challenges to the tribunal attracted a *de novo* review from the seat court, and issue estoppel arising from the determination of a foreign enforcement court "should not feature" although the decision of the foreign enforcement court may have "persuasive effect".[25]

20 In the subsequent decision of *CZD v CZE*,[26] the High Court noted the presence of various authorities which supported the application by the enforcement court of issue estoppel arising

20 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [65]–[71].
21 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [75]; see *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [123].
22 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [75].
23 [2020] 5 SLR 266.
24 *BAZ v BBA* [2020] 5 SLR 266 at [33].
25 *BAZ v BBA* [2020] 5 SLR 266 at [51]–[52].
26 [2023] 5 SLR 806.

from a judgment of the seat court, and acknowledged that the question of whether transnational issue estoppel applies during enforcement proceedings was a difficult question that would be better decided in a more appropriate case.[27]

21 These decisions set the stage for the Court of Appeal's seminal decision in *India v DT*, and in particular, its determination that a Singapore enforcement court may apply the doctrine of transnational issue estoppel when determining whether preclusive effect should be accorded to a seat court's decision going towards the validity of an arbitral award.[28]

22 In so finding, the Court of Appeal undertook a comprehensive analysis of the current position in English law, the rationale and purpose of issue estoppel as well as the compatibility of the New York Convention, the Model Law and the International Arbitration Act 1994[29] ("IAA") on the application of the doctrine in the arbitration context, and its findings are summarised as follows:

> (a) The doctrine of issue estoppel is grounded in the principle of finality of litigation. If an issue has been canvassed and is 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.[30]
>
> (b) The doctrine of transnational issue estoppel is compatible with Singapore's legal framework governing international commercial arbitration as set out principally in the IAA, which is based on the Model Law and gives effect to the New York Convention.[31]

27 *CZD v CZE* [2023] 5 SLR 806 at [36].
28 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [96].
29 2020 Rev Ed.
30 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [67]–[68].
31 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [74] and [97].

(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.[32]

(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.[33]

(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.[34]

(f) This approach respects the parties' choice of the arbitral seat in a principled manner.[35] 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".[36] 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

32 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [79]–[95].
33 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [80].
34 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [97].
35 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [98].
36 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [99].

re-litigated, thus reducing wastage of time, effort and resources.[37]

(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).[38] 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.[39]

23 The Court of Appeal also affirmed the outer limits of the doctrine as recognised in its earlier decision in *Merck Sharp & Dohme Corp v Merck KGaA*:[40]

(a) First, transnational issue estoppel should not arise in relation to any issue that the court of the forum ought to determine for itself under its own law.

(b) Second, transnational issue estoppel should be applied with due consideration of whether the foreign judgment in question is territorially limited in its application.

(c) Third, additional caution may be necessary in applying the doctrine of transnational issue estoppel against a defendant in foreign proceedings, as opposed to

37 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [100].
38 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [86].
39 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [101].
40 [2021] 1 SLR 1102 at [54]–[58]; see also *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [177].

against a plaintiff, who has the prerogative to choose the forum.

(d) Fourth, transnational issue estoppel will neither arise in respect of a foreign judgment that conflicts with the public policy of this jurisdiction, nor possibly in respect of foreign judgments that may be considered to be perverse or reflect a sufficiently serious and material error.

24 However, these exceptions to the doctrine of transnational issue estoppel cannot be entirely transplanted when applied in the context of international arbitration.[41] The first two exceptions would not apply as the foreign decision concerns a prior decision of the seat court, which in and of itself would suggest that it enjoys primacy (*vis-à-vis* the enforcement court). The third exception also does not arise as the seat is often chosen by both parties either pre-dispute or at the outset of the arbitration.

25 As for the fourth exception, 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).[42] This is because the question of what that public policy is or requires (which will depend on the public policy of the enforcement jurisdiction) 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.

26 This is consistent with the Court of Appeal's earlier observations that estoppel is fundamentally rooted in the principle of finality in litigation.[43] The transnational application of the doctrine requires a nuanced approach that is informed by the principle of comity – according to which "the Singapore enforcement court should generally treat foreign court's judgment with great respect … and be slow to pass judgment

41 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [178].
42 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [86].
43 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [67].

on the reasoning in the foreign court's decision".[44] On the other hand, the Court of Appeal was keenly aware of the need to strike a delicate balance between international comity and its "constitutional role as the guardian of the rule of law within its own jurisdiction".[45] 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), transnational issue estoppel can be applied in a principled manner that safeguards the domestic concerns of the enforcement court, while adhering to comity to the fullest extent possible.

27 Ultimately, the Court of Appeal's decision to apply transnational issue estoppel in the arbitration context is a significant milestone in the development of a thriving transnational system of commercial justice. This is underscored by the keen observations of Judith Prakash SJ speaking extra-judicially at the Delhi Arbitration Weekend in March 2024 (some three months after the decision in *India v DT*) that the "application of the doctrine of transnational issue estoppel can only enhance the efficiency and repute of arbitration by bringing consistency and finality to the court's decisions on Awards and reducing protracted litigation by dissatisfied litigants".[46]

C. The doctrine of transnational issue estoppel as applied in The Republic of India v Deutsche Telekom AG

28 Having recognised that the doctrine of transnational issue estoppel applies in the context of international arbitration, the Court of Appeal proceeded to consider whether India was precluded from relying on the Grounds for Resisting Enforcement[47] in the Singapore enforcement proceedings.

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44 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [67].
45 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [68].
46 Judith Prakash, Senior Judge, "Understanding the Unsaid: Biases in Arbitration and the Role of Tribunals and Courts", speech at the Delhi Arbitration Weekend 2024 (6 March 2024) at para 44.
47 See para 9 above.

29 The Court of Appeal started by analysing the findings in the Swiss Setting-Aside Decision, before concluding that the Grounds for Resisting Enforcement were considered and dismissed by the Swiss Federal Supreme Court.[48] It then went on to consider whether the enforcement court coming to these issues subsequently would be precluded from considering the merits of these same arguments, applying the three-part test for transnational issue estoppel.

30 In this case, the first limb of the test (*ie*, whether the foreign decision was final and conclusive on the merits) presented the most controversy. Bearing in mind that "[f]or a foreign judgment to give rise to issue estoppel, 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*" [emphasis in original],[49] the Court of Appeal took care to sound the following caution:[50]

> In this regard, we note that caution should be exercised when interpreting judgments from a foreign legal system to determine: (a) what precisely was decided by the foreign court and whether the specific issue that is 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 occasion or opportunity to raise that specific issue …

31 India contended that the *only* part of the Swiss Setting-Aside Decision that has *res judicata* effect under Swiss law is the determination that the Interim Award should not be set aside as contained in the *dispositive* of the judgment, and *not* the factual findings, legal determinations, reasons or rulings that are contained in or that led to that decision. However, after examining the expert evidence on Swiss law put forward by the respective parties (as well as the various authorities on Swiss law cited by the experts), the Court of Appeal concluded that under Swiss law

48 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [154].
49 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [156]; *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [41], citing *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 at 919.
50 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [133].

if the same jurisdictional arguments raised in a prior setting-aside application were raised again in enforcement proceedings in Switzerland, they would likely be dismissed because a party is prevented from re-litigating the same issue.[51]

32 In particular, the Court of Appeal disagreed with India's contention that only the *dispositive* of the Swiss Federal Supreme Court's judgment was *res judicata*, but not its reasoning or considerations. On this point, the court observed that the doctrine of substantive *res judicata* is recognised in Swiss law and India's own expert on Swiss law had argued that *res judicata* would prevent a party from filing a second case before Swiss courts on the same grounds – which required an analysis of the court's reasons, in order to identify those grounds. Recourse to the reasons for the Swiss Federal Supreme Court's dismissal of the India's setting aside-application would demonstrate that the subject matter of the Swiss Federal Supreme Court's decision is, for all intents and purposes, the same as that which is raised in these proceedings.[52] The court also noted that the Swiss Federal Supreme Court in its 4A_244/2019 judgment had applied these principles in declining to review the tribunal's jurisdiction to render a final award, as the Swiss courts had previously upheld a partial award on jurisdiction and its prior determination on the issue of the arbitral tribunal's jurisdiction was *res judicata* and could no longer be challenged.[53] The Swiss Setting-Aside Decision was therefore "final and conclusive",[54] both *as a whole* and *on the specific issue* for the purposes of invoking the doctrine of transnational issue estoppel in respect of the Grounds for Resisting Enforcement raised by India in the Singapore Enforcement Proceedings.[55]

33 The Court of Appeal noted that the second and third limbs of the three-part test of transnational issue estoppel were satisfied as there was clearly identity of issues and parties.[56] Accordingly, the Court of Appeal held that India was precluded

51 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [157]–[174].
52 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [167].
53 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [171].
54 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [174].
55 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [156] and [165].
56 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [175].

from re-litigating the Grounds for Resisting Enforcement (comprising the Pre-investment Argument, Illegality Argument, Indirect Investment Argument and Essential Security Interests Argument), which was sufficient to dispose of the appeal.[57]

IV. The Primacy Principle

A. The scope and outer limits of the Primacy Principle

34 While the appeal was eventually dismissed, it is apparent from the Court of Appeal's involved analysis of the requirements for transnational issue estoppel (specifically, the first limb of the three-part test) that the question of whether transnational issue estoppel would preclude India from re-litigating the Grounds for Resisting Enforcement was not an open and shut one. This was particularly so given the need for the Singapore court to interpret judgments from a foreign legal system, in this case, from Switzerland.

35 However, assuming the Singapore court concluded that Swiss law had no equivalent to the doctrine of issue estoppel and that *res judicata* under Swiss law only attaches to the operative part of a decision thereby allowing India to re-litigate an issue not contained in the *dispositive* of its judgment,[58] such that the doctrine of transnational issue estoppel did not apply, would it have been satisfactory for India to be allowed to re-litigate the Grounds for Resisting Enforcement afresh in the Singapore Enforcement Proceedings? Would such an outcome promote finality of litigation and comity? Is transposing a Singaporean (and common) law concept of issue estoppel (albeit in the transnational context) to international arbitration the only way of giving effect to these desirable outcomes and promoting a robust transnational system of commercial justice?

57 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [176]. For completeness, the Court of Appeal also went on to observe that none of the possible exceptions to the application of the principle of transnational issue estoppel arose in this case (at [177]–[178]).

58 See, *eg*, the decision of the English Court of Appeal in relation to findings by the Paris Commercial Court in *MAD Atelier International BV v Manès* [2020] 3 WLR 631 at [89]–[91].

36 These questions led parties to make further submissions on, and for the Court of Appeal to grapple with the Primacy Principle[59] and its existence as a doctrine of Singapore arbitration law *alongside* transnational issue estoppel. While it was strictly unnecessary for the Court of Appeal to determine the Primacy Principle, as the point was fully argued, the Court of Appeal offered its observations in *obiter* to inform the analysis on a future occasion when it might be necessary to rule on the point.

37 The Majority considered that the Primacy Principle can apply alongside transnational issue estoppel.[60] Should it have been necessary to apply the Primacy Principle in *India v DT*, DT would presumably have been entitled to do so. This is because the Singapore courts (as the enforcement court) would act upon a presumption that it should regard the Swiss Setting-Aside Decision (being a prior decision of the seat court) on matters pertaining to the validity of the Interim Award (*ie*, the Grounds for Resisting Enforcement) as determinative of those matters. The onus would then shift to India to establish a sufficient basis for the enforcement court to come to a different view, which would require India to identify what the Court of Appeal termed "exceptional circumstances" that would warrant not giving presumptive effect to a decision of the seat court.[61]

38 While stressing that the contours of such a principle would have to be further developed in an appropriate case, the Court of Appeal identified possible limits to the Primary Principle and provided guidance on such possible situations:[62]

> (a) the decision of the seat court conflicts with Singapore's public policy;
>
> (b) there were serious procedural deficiencies in the decision-making process of the seat court;

59 See para 4 above.
60 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [121] and [130].
61 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [122].
62 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [127]–[130]. As pointed out by the Concurring Judge, these largely mirror the defences to the recognition of a foreign judgment which is one of the elements of transnational issue estoppel (see *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [200].)

(c) upholding the seat court's decision would be repugnant to fundamental notions of what the Singapore enforcement court considers to be just; or

(d) it appears to the Singapore 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).

B. The theoretical underpinnings of the Primacy Principle

39 After undertaking a comprehensive review of the positions in the major arbitration jurisdictions where the point was previously considered of Australia and the US, the Court of Appeal observed that both transnational issue estoppel and something akin to the Primacy Principle have been applied in other jurisdictions and both these doctrines need not be approached as binary options.[63]

40 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.[64] 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.[65]

41 Further, the Primacy Principle may also be rooted in the court's duty to develop the common law in line with Singapore's

63 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [105]–[121].

64 The territorialist (or jurisdictional) view is that "every arbitration is attached to a particular jurisdiction, the seat of the arbitration, and is subject to both the law and the jurisdiction of the courts of the seat": Sundaresh Menon, Chief Justice, "The Role of the National Courts of the Seat in International Arbitration", keynote address at the 10th Annual International Conference of the Nani Palkhivala Arbitration Centre (17 February 2018) at paras 6 and 8.

65 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [121].

international obligations. In the present context, the New York Convention read with the Model Law and the IAA, recognises the special role and function of the seat court.[66] As recognised and explained by the High Court in *BAZ*:[67]

> I begin with the supervisory powers of the seat court and the seat court's primacy in reviewing an award. *This primacy forms the basis for Arts V(1)(e) and VI of the New York Convention, and s 31(5) of the IAA.* Article V(1)(e) of the New York Convention … provides that recognition or enforcement of an award may be refused where it has been set aside by the seat court. Article VI complements Art V(1)(*e*), by allowing the authority, before which enforcement of an award is sought, to adjourn the decision on the enforcement if an application for the setting aside or suspension of the award has been made to the seat court. … In contrast, there is no similar provision directing a seat court to consider a judgment from a foreign enforcement court. *Thus, Arts V(1)(e) and VI of the New York Convention, along with s 31(5) of the IAA, show that a certain level of primacy is given to the judgment of the seat court.* The judicial opinions in support of the application of issue estoppel in the converse situation of an enforcement court considering a judgment of the seat court [*ie*, *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 as well as *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109] also support the primacy accorded to the seat court. [emphasis added]

42 The Majority therefore reasoned that the Primacy Principle would only be applicable where there has been a prior *seat* court decision, and not where a party chooses not to seek an active remedy before a seat court and only exercises its passive remedy of challenging the award before the enforcement court.[68]

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66 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [122]–[124].

67 *BAZ v BBA* [2020] 5 SLR 266 at [45]; see also Matthew Barry, "The Role of the Seat in International Arbitration: Theory, Practice, and Implications for Australian Courts" (2015) 32(3) *Journal of International Arbitration* 289 at 303–304, who observed that Art V(1)(*e*) of the New York Convention "establishes that the courts at the seat of arbitration have exclusive jurisdiction to set aside an award". Further:

> … while the Convention limits the grounds for refusing enforcement, the Convention does not limit the grounds upon which an award can be set aside. The fact that the setting aside of the award at the seat is, *in itself*, a ground for refusing enforcement, regardless of the grounds on which the award is set aside, suggests that the Convention attributes a special importance to the decisions of seat courts. [emphasis in original]

68 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [124].

Further, the Primacy Principle would not be an absolute principle and the court would need to resolve the further question of the weight to be placed on the seat court's decision, considering that the Model Law, IAA and New York Convention, which underpin the Primacy Principle, and the principle of "double-control" provide that it is generally for each enforcing court to determine the weight and significance to be ascribed to challenges before the seat court.[69]

43 Jonathan Hugh Mance IJ (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 where there are repeated challenges to an award.[70] 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*,[71] which prevents a party from raising in subsequent proceedings matters which were not but could and should have been raised in earlier proceedings.[72]

44 According to the Concurring Judge, the two tools of issue estoppel and the court's power to prevent abuse of process under the principle in *Henderson v Henderson* are "flexible enough to enable courts to avoid the chimera of having to follow a prior judgment artfully obtained in another enforcement court in circumstances where it would be inappropriate to do this".[73] This is especially since "[t]he principles were and are after all fashioned to preclude re-litigation of issues in circumstances where this would be contrary to the interests of justice".[74] There is therefore no need for a separate principle of law precluding consideration by an enforcement court of issues which may arise under Art V of the New York Convention, as this would go against the system of "double-control" as espoused in *Astro*.[75]

69 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [123]; *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [75].
70 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [221].
71 (1843) 3 Hare 100.
72 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [216].
73 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [201].
74 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [201].
75 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [214]–[216].

45 The Concurring Judge further opined that prior decisions which decide a challenge to an award always merit careful consideration, even if they are not binding, and especially so coming from the parties' chosen seat court. 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.[76]

46 However, taking a more pragmatic perspective on matters, there is perhaps something to be said for the Majority's view that the Primacy Principle should exist alongside transnational issue estoppel.

47 First, not all commentators share the Concurring Judge's optimism on the flexible application of issue estoppel. As opined by Jonathan Hill:[77]

> … The general application of issue estoppel to foreign judgments relating to an arbitral award encourages the courts of different countries to speak with one voice and reduces wastage of time, effort and resources. However, as has been seen, the complexity of the range of problems that may arise means that it is not appropriate to advocate the rigid application of the issue estoppel principle (and related doctrines) in all circumstances and it should be acknowledged that, in practice, the doctrine of issue estoppel may promise more than it can deliver; there seem to be more reported cases in which either the estoppel point is missed entirely or the court, while recognising the potential impact of issue estoppel, decides that the conditions for an estoppel to arise are not satisfied, than cases in which the court holds that a foreign judgment relating to an arbitral award actually establishes an estoppel. Furthermore, there may be areas in which the English approach to *res judicata* runs the risk of allowing the issue estoppel principle to lead to inappropriate results.

76 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [221].

77 Jonathan Hill, "The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England" (2011) 8(2) *Journal of Private International Law* 159 at 191. See also Matthew Barry, "The Role of the Seat in International Arbitration: Theory, Practice, and Implications for Australian Courts" (2015) 32(3) *Journal of International Arbitration* 289 at 312–313.

48 The Primacy Principle therefore addresses a potential gap in applying transnational issue estoppel in the context of international arbitration, which may arise from a rigid and technical application of the three-part test. Take for instance the stricture that "for a foreign judgment to give rise to issue estoppel, 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*" [emphasis in original].[78] This was precisely what India sought to advance in *India v DT* to resist the application of transnational issue estoppel by arguing that only the determination that the Interim Award should not be set aside contained in the *dispositive* of the Swiss-Setting Aside Decision had *res judicata* effect (and nothing else),[79] and the (legitimate) query is whether if India had succeeded in its argument, that it should therefore be allowed to re-litigate the Grounds for Resisting Enforcement afresh in Singapore (notwithstanding that these arguments were fully considered and disposed of by the Swiss Federal Supreme Court).

49 Second, it is important to recall that the Primacy Principle is underpinned by the primacy of the seat court and the territorialist view of international commercial arbitration, advancing comity, minimising or avoiding inconsistency in judicial decisions, ensuring finality, as well as the overall effectiveness of arbitration as a mode of international dispute resolution. These are reasons of principle and policy driven by the need to ensure the effective functioning of international arbitration as part of a transnational system of commercial justice. They do not cease to exist simply because the seat court's decision is not preclusive under its *own* law. Therefore, while there is much to commend about adopting common law concepts of issue estoppel and abuse of process to preclude re-litigation of issues previously raised in the seat court before the enforcement court, limiting the court to using only these common law doctrines may be overly restrictive.[80] The development of the Primacy Principle as an arbitration law

78 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [156].
79 See para 31 above.
80 See also Matthew Barry, "The Role of the Seat in International Arbitration: Theory, Practice, and Implications for Australian Courts" (2015) 32(3) *Journal of International Arbitration* 289 at 312–313.

doctrine would also serve the wider function of developing the legal framework and jurisprudence of a transnational system of commercial justice.

50 Third, there is some force to the Majority's astute observation that a party may choose to invoke the Primacy Principle to "avoid the time and expense that may sometimes be entailed in having to establish the technical requirements for invoking the doctrine of transnational issue estoppel".[81] Given the requirement that the foreign jurisdiction itself must regard the issues as conclusive, and the issues cannot be raised again in the foreign country,[82] one would expect the "need for expert evidence to be adduced on whether the findings made in a foreign court would give rise to issue estoppel under its own law … and to conduct a review of the foreign law to establish whether the preclusive effect of a foreign judgment extends to findings that form the basis or foundation for the actual dispositive decision".[83] Indeed, in *India v DT*, parties adduced expert evidence on Swiss law, and devoted a significant portion of their submissions on whether issue estoppel arose from the Swiss Setting-Aside Decision, and in particular whether the Swiss Setting-Aside Decision was a final and conclusive decision on the specific issues in question. In an appropriate case, the Primacy Principle would obviate the need for a party to incur the time and resources needed to employ the doctrine of transnational issue estoppel while still preventing the re-litigation of issues previously considered and determined in the seat court.

V. A further issue for consideration: should a prior decision of an enforcement court have preclusive effect?

51 *India v DT* is undoubtedly a welcome addition to the international arbitration jurisprudence. Apart from providing clarity and guidance on important aspects of arbitration law, it foreshadows at least one possible issue which is ripe for discussion.

81 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [122].
82 See para 14 above.
83 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [89].

52 In arriving at its decision that transnational issue estoppel applies in the context of arbitration, the Court of Appeal left open the question of the applicability of the doctrine in respect of a prior decision of an enforcement court given that the issue did not arise squarely for decision in *India v DT*. Should transnational issue estoppel apply with equal force regardless of whether the prior decision was issued by a seat court or enforcement court?

53 The Court of Appeal recognised that in *Diag Human SE v The Czech Republic*[84] ("*Diag Human*"), the English High Court applied transnational issue estoppel in respect of a prior decision of an enforcement court, holding (at [58]–[63]) that the award creditor seeking to enforce an arbitral award in England was estopped from raising the same arguments it had raised in prior enforcement proceedings before the Austrian Supreme Court.[85]

54 However, it proceeded to observe that applying transnational issue estoppel to an earlier decision of another enforcement court may have the unintended effect of raising the status of the first enforcement court's decision to something akin to that of a seat court judgment, and that this might run contrary to the structure of the New York Convention and the importance of according to the seat the primary role of supervising the arbitration.[86] Commentators have also warned that a uniform application of transnational issue estoppel to judgments from the seat and enforcement courts could incentivise forum shopping and the emergence of parallel and possibly conflicting post-award proceedings, with the award creditor first seeking enforcement in a forum with the most arbitration-friendly approach and then using a presumably favourable decision to bind subsequent

84 [2014] EWHC 1639 (Comm).
85 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [91].
86 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [91].

enforcement courts.[87] The Majority also included the following view as further food for thought:[88]

> We only observe that if the position to be taken is that transnational issue estoppel does apply in the context of international arbitration, then any departure from that position when considering a prior decision of an enforcement court would have to be grounded in principle, and that may, or may not, lie in the policy that is reflected in the scheme for the judicial supervision and support of arbitral proceedings, which does place an emphasis on the seat court, and for the recognition and enforcement of awards.

55 The Concurring Judge, on the other hand, provided a more robust opinion that he saw "no sound reason why both decisions of a seat court and decisions of another enforcement court may not give rise to an issue estoppel, as would be the effect of Eder J's decision in [*Diag Human*], holding that an issue estoppel could arise by virtue of a prior decision of another enforcement court".[89]

56 This would no doubt be driven by the importance of guarding against the "real risk that the same award might be enforced in one jurisdiction but set aside in another, leading to uncertainty and unfairness that can undermine the value proposition of arbitration as the pre-eminent mode of international commercial dispute resolution",[90] which exists regardless of whether a prior decision concerning the validity of an award comes from the seat court or an enforcement court.

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87 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [92], citing Maxi Scherer, "Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?" (2013) 4(3) *Journal of International Dispute Settlement* 587 at 622–623 and Burton S DeWitt, "A Judgment Without Merits: The Recognition and Enforcement of Foreign Judgments Confirming, Recognizing, or Enforcing Arbitral Awards" (2015) 50 *Texas International Law Journal* 495 at 514.

88 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [92].

89 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [215].

90 Sundaresh Menon, Chief Justice, "Arbitration and the Transnational System of Commercial Justice: Charting the Path Forward", keynote speech at 25th Annual International Bar Association Arbitration Day (23 February 2024) at para 10.

57 Interestingly, in the decision of *Sacofa Sdn Bhd v Super Sea Cable Networks Pte Ltd*[91] ("*Sacofa*") which was issued about two months after *India v DT*, the High Court was confronted with this precise issue. The claimant applied to set aside an arbitral award in Singapore on the grounds that, *inter alia*, the award was in conflict with Singapore public policy as it contravened Malaysian law and on the basis that the tribunal had acted in excess of his jurisdiction by deciding on a claim that fell outside the scope of the arbitration agreement. Of note, the respondent had previously applied to register and enforce the award in the Malaysian courts, and the claimant's illegality objection (which was premised on whether there was a contravention of Malaysian law, and in turn, Malaysian public policy), and the claimant's jurisdictional objections had been heard and dismissed by the Malaysian enforcement courts.

58 The court held that transnational issue estoppel applied to preclude the claimant from raising the illegality objection because the Malaysian courts had already determined that there was no contravention of Malaysian law,[92] but transnational issue estoppel did not apply in respect of the claimant's jurisdictional objections (*ie*, the tribunal acted in excess of its jurisdiction).[93] In arriving at its decision, the court found the concerns raised in *India v DT* regarding the potential "subversion of the role of the seat court and the risks of bad forum shopping" as well as the "deference to the seat court's primary and supervisory jurisdiction" persuasive.[94] The court also held that the competing interest of promoting finality in litigation between the parties applies more strongly where the seat court has decided whether to set the award aside, but does not feature as strongly for a prior decision of an enforcement court because it is only the seat court which can set aside an award. Further, the principle of comity does not entail that a party must be precluded in *all* instances from raising arguments which have been dismissed by a prior

91 [2024] SGHC 54.
92 *Sacofa Sdn Bhd v Super Sea Cable Networks Pte Ltd* [2024] SGHC 54 at [17], [22] and [68]–[69].
93 *Sacofa Sdn Bhd v Super Sea Cable Networks Pte Ltd* [2024] SGHC 54 at [74].
94 *Sacofa Sdn Bhd v Super Sea Cable Networks Pte Ltd* [2024] SGHC 54 at [71]–[72]; see also *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [91]–[92].

enforcement court, and should only be accorded greater weight where those arguments specifically implicate the enforcement jurisdiction's own statutes, public policy and other domestic interests.[95] Ultimately, however, nothing turned on this aspect of the court's decision as it had already concluded that the claimant had not made out its challenge to the award on the merits.[96]

59 One possibility that may be worth exploring in an appropriate case could be to apply the doctrine of transnational issue estoppel to a prior decision of an enforcement court, but subject to the potential limitations or control mechanisms which define the outer boundaries of the doctrine.[97] For instance, unlike in *India v DT*, where the first to third exceptions were found to be inapplicable by virtue of the prior decision in question being a decision of the seat court,[98] these outer limits have the potential to go some way to alleviate the concerns raised in *Sacofa* and by the Majority in *India v DT* of subverting the seat court and forum shopping. To echo the views of the Concurring Judge in *India v DT*, "[i]ssue estoppel is a flexible tool, particularly in an international context, and a general pre-condition to its deployment is that it should work justice, not injustice"[99] – the solution may therefore lie in how the doctrine is applied on a case-by-case basis.

VI. Conclusion

60 The issue of whether to preclude re-litigation of issues rears its head time and again both in Singapore and beyond – for instance, just one month before the Court of Appeal's decision in *India v DT*, the English High Court issued its decision in *Hulley Enterprises Ltd v Russia*[100] concerning the interaction between state immunity and transnational issue estoppel in the context of an enforcement court's treatment of the seat court's decision on the validity of an award, and *Sacofa* was issued just two months after

95 *Sacofa Sdn Bhd v Super Sea Cable Networks Pte Ltd* [2024] SGHC 54 at [73].
96 *Sacofa Sdn Bhd v Super Sea Cable Networks Pte Ltd* [2024] SGHC 54 at [48] and [52]–[53].
97 As set out in para 23 above.
98 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [178].
99 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [212].
100 [2023] EWHC 2704 (Comm).

India v DT – reflecting the importance of this issue to a robust and effective transnational system of commercial justice.

61 The rich discussion and cogent analysis in *India v DT* by the Court of Appeal showcases the Singapore court's capability and willingness to grapple with difficult and conceptual issues of arbitration law. This serves to fortify Singapore's reputation as an attractive destination for international dispute resolution and a key contributor to the transnational system of commercial justice.