IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA(I) 10

Court of Appeal / Civil Appeal No 1 of 2023

Between

The Republic of India

…Appellant

And

Deutsche Telekom AG

… Respondent

In the matter of Originating Summons No 8 of 2022 (HC/Summons No 155 of 2022)

Between

Deutsche Telekom AG

… Plaintiff

And

The Republic of India

… Defendant

JUDGMENT

[Arbitration — Enforcement — Foreign award]

Version No 1: 16 Dec 2023 (15:51 hrs)

[Arbitration — Award — Recourse against award]
[Arbitration — Conduct of arbitration — Estoppel]
[Arbitration — New York Convention]
[Res Judicata — Issue estoppel]

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The Republic of India
v
Deutsche Telekom AG

[2023] SGCA(I) 10

Court of Appeal — Civil Appeal No 1 of 2023
Sundaresh Menon CJ, Judith Prakash JCA, Steven Chong JCA, Jonathan Hugh Mance IJ, Robert French IJ
30 June, 17 August 2023

15 December 2023 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the majority consisting of Judith Prakash JCA, Steven Chong JCA, Robert French IJ and himself):

Introduction

1 In HC/SUM 155/2022 ("SUM 155"), the Republic of India ("India") applied to set aside an order obtained by the respondent, Deutsche Telekom AG, that permitted it to enforce a foreign arbitral award made against India. This application, together with various other applications, was transferred to be heard and determined by the Singapore International Commercial Court ("SICC") as SIC/OS 8/2022 ("OS 8"). The SICC disposed of OS 8, and among other things, it dismissed SUM 155. The present appeal, CA/CAS 1/2023 ("CAS 1"), is India's appeal against that decision.

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2 The appellant resists enforcement of the arbitral award in Singapore principally based on its contention that the arbitral tribunal lacked jurisdiction. This is raised before us in our capacity as a court of enforcement of the arbitral award. Among the difficulties faced by the appellant is that it had earlier applied unsuccessfully to the seat court in Switzerland to set aside the award and had canvassed before that court a number of the arguments that it raises before us on appeal. The seat court in Switzerland dismissed the setting-aside application and in effect affirmed the tribunal's jurisdiction and the validity of the award. A threshold issue in this appeal is whether the appellant is precluded from re-litigating those points that have already been raised and determined between these parties by the seat court. This raises the question of how an enforcement court should treat an earlier decision of the seat court that pertains to the validity of an arbitral award.

3 That question has yet to be resolved under Singapore law (see *CZD v CZE* [2023] SGHC 86 at [32]–[36]), although some observations were made by this court a decade ago in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("*Astro*") (at [76]–[77]) suggesting that an enforcement court should generally follow a seat court's decision to set aside an arbitral award. Those observations in *Astro* were not a dispositive part of the court's judgment and did not address some conceptual questions such as whether the enforcement court should accord primacy to a determination of the seat court as a principle specific to the context of international arbitration, and/or whether existing domestic conflict of laws rules or doctrines such as transnational issue estoppel should govern the enforcement court's treatment of a prior decision of the seat court. The point is of importance to legal practitioners and would have a significant impact on the development of international

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arbitration law and practice, and has also attracted some extra-judicial observations on the part of two members of this court: Sundaresh Menon, "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), <https://www.judiciary.gov.sg/news-and-resources/news> (the "New Delhi Address"); Jonathan Hugh Mance, "Arbitration – a Law unto itself?", 30th Annual Lecture organised by The School of International Arbitration and Freshfields Bruckhaus Deringer (4 November 2015), <https://www.supremecourt.uk/docs/speech-151104.pdf> (the "30th Annual Lecture").

4 In our judgment, as a matter of Singapore law, transnational issue estoppel does apply in the context of international commercial arbitration and its effect is to prevent the parties to a prior decision of the seat court, in certain circumstances, from re-litigating points that were previously raised and determined. In CAS 1, we are satisfied that the appellant is precluded by transnational issue estoppel from raising several of the grounds it relies on in this appeal. This suffices to dispose of the appeal as we explain below. It is therefore not necessary for us to come to a determination of whether there exists a separate rule as a matter of international arbitration law and practice that requires an enforcement court to accord primacy to a prior determination of the seat court on certain types of issues. Nonetheless, as the point was quite fully argued, we offer our view, which is that where the enforcement court is not precluded by transnational issue estoppel from considering an issue going to the validity of an arbitral award, it may nonetheless be appropriate for the enforcement court to grant primacy to a prior decision of the seat court. We explain these conclusions in this judgment and begin by setting out the key facts, in particular, in relation to the rather involved path of the various proceedings.

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Background facts

5 The appellant is the State of India. The respondent is Deutsche Telekom AG ("DT"), a multinational company incorporated under the laws of the Federal Republic of Germany. DT became a shareholder in an Indian company known as Devas Multimedia Pte Ltd ("Devas") through its wholly-owned subsidiary, Deutsche Telekom Asia Pte Ltd ("DT Asia"). DT Asia is a Singapore-incorporated company. Devas in turn entered into an agreement (the "Devas-Antrix Agreement") with an Indian state-owned entity, Antrix Corporation Ltd ("Antrix").

6 The dispute, and the arbitration it gave rise to between India and DT, stemmed from the termination of the Devas-Antrix Agreement. DT claimed that this breached the provisions of the bilateral investment treaty that was in place between India and Germany and thus commenced the arbitration seeking compensation.

Bilateral Investment Treaty between India and Germany

7 On 10 July 1995, India and Germany entered into the "Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments" (the "India-Germany BIT"). Article 2 of the India-Germany BIT provides that the agreement would apply to all investments made by the investors of either party in the territory of the other party. The term "investment" is defined in Art 1(b) as "every kind of asset invested in accordance with the national laws of the Contracting Party where the investment is made".

8 Under Art 3(1) of the India-Germany BIT, each contracting party is required to "encourage and create favourable conditions for investors of the

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other Contracting Party and also admit investments in its territory in accordance with its law and policy". Further, Art 3(2) provides that each contracting party is to accord "fair and equitable treatment and full protection and security in its territory" to investments and investors. However, Art 12 provides that nothing in the India-Germany BIT prevents a contracting party from applying prohibitions or restrictions "to the extent necessary for the protection of its essential security interests".

9 Article 9 of the India-Germany BIT provides that disputes between an investor from one contracting party and the other contracting party in connection with an investment made in the territory of the other contracting party are to be settled amicably through negotiations, failing which the dispute may be referred to arbitration.

The Devas-Antrix Agreement

10 We briefly outline some key events surrounding the Devas-Antrix Agreement.

11 Since 1983, India's Department of Space ("DOS") has been responsible for allocating India's S-band spectrum. This is a portion of the electromagnetic spectrum that can be used to send and receive signals using small units such as mobile phones and laptop computers, without requiring their antennas to be pointed directly at the satellite.

12 In mid-2003, an American consultancy firm named Forge Advisors LLC (which would later establish Devas) commenced negotiations with the Indian space authorities on the potential commercialisation of some of India's S-band spectrum. Following these negotiations, Devas was incorporated in India on 17 December 2004.

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13 On 28 January 2005, Devas and Antrix entered into the Devas-Antrix Agreement. Antrix was the marketing arm of India's DOS and the entity through which the Indian Space Research Organisation engaged in commercial activities. Pertinently, the Devas-Antrix Agreement stated that:

(a) Devas had requested from Antrix space segment capacity for the provision of certain services such as delivering multimedia and information services to mobile receivers through satellite and terrestrial systems (the "Devas Services");

(b) Antrix had agreed to lease space segment capacity to Devas; and

(c) Devas and Antrix had agreed to collaborate to build, launch and operate satellites, and provide the Devas Services.

DT's investment in Devas via DT Asia

14 DT subsequently invested in Devas through its subsidiary, DT Asia, acquiring shares in Devas. At about the same time, Devas applied to and obtained government approvals from the Indian Foreign Investment Promotion Board ("FIPB") for DT Asia's share acquisition.

Termination of the Devas-Antrix Agreement and commencement of arbitral proceedings

15 It appears that India started to revisit the arrangements reflected in the Devas-Antrix Agreement from sometime in or around 2009. On 16 February 2011, the DOS Secretary wrote a note to India's Cabinet Committee on Security in which it was suggested that there was an "imminent need to preserve the S-band spectrum for vital strategic and societal applications" and proposed the annulment of the Devas-Antrix Agreement. Shortly after, on 17 February 2011,

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the annulment of the agreement was confirmed by the Cabinet Committee on Security on the basis that the S-band spectrum should not be provided to Antrix for commercial activities. Subsequently, on 25 February 2011, Antrix notified Devas of the termination of the Devas-Antrix Agreement.

The arbitration between DT and India

16 On 2 September 2013, DT commenced arbitration (the "Arbitration") against India contending that India's annulment of the Devas-Antrix Agreement was in breach of various provisions of the India-Germany BIT. The Arbitration was conducted before a tribunal appointed by the parties (the "Tribunal") with the Permanent Court of Arbitration ("PCA") acting as the Registry. The Arbitration was governed by the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") and seated in Geneva, Switzerland.

17 On 13 December 2017, the Tribunal issued its interim award on jurisdiction and liability (the "Interim Award"). It dismissed India's objections to jurisdiction and found India liable for breaching its obligation to accord fair and equitable treatment under the India-Germany BIT to DT's investment in Devas.

18 India then applied to the Federal Supreme Court of Switzerland (the "Swiss Federal Supreme Court") to set aside the Interim Award (the "Swiss Setting-Aside Application") but was unsuccessful. We will elaborate further on the details of the Swiss Setting-Aside Application later in this judgment.

19 The hearing on the quantum phase of the Arbitration then took place between April and May 2019 and the Tribunal rendered its final award on quantum on 27 May 2020 (the "Final Award"). On 20 August 2020, the Civil

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Court of Geneva certified that the Final Award was enforceable and legally binding.

Proceedings before the Swiss seat court

20 On 29 January 2018, India brought the Swiss Setting-Aside Application before the seat court, the Swiss Federal Supreme Court, primarily on the basis that the Tribunal lacked jurisdiction over the dispute. On 11 December 2018, the Swiss Federal Supreme Court dismissed India's application (the "Swiss Setting-Aside Decision").

21 Subsequently, on 2 May 2022, India applied to the Swiss Federal Supreme Court to revise and annul the Interim Award and the Final Award and to remit the matter to another tribunal under the auspices of the PCA (the "Swiss Revision Application"). The Swiss Federal Supreme Court dismissed the Swiss Revision Application on 8 March 2023, finding that the awards were not open to revision and that the application for review was not filed in due time with regard to the new facts raised.

Related foreign proceedings

Other arbitrations

22 Separately, Devas commenced an Indian-seated arbitration against Antrix on 19 June 2011. This arbitration was conducted before a tribunal constituted under the rules of the International Chamber of Commerce. The tribunal issued its final award finding in favour of Devas on 14 September 2015, holding that the Devas-Antrix Agreement had been unlawfully repudiated and ordering Antrix to pay Devas damages (the "ICC Award").

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23 On 3 July 2012, Devas' Mauritius shareholders commenced a further arbitration against India (the "Mauritius Arbitration"). On 25 July 2016, the tribunal issued an interim award, finding that India's repudiation of the Devas-Antrix Agreement amounted to an unlawful expropriation of Devas' business. On 13 October 2020, the tribunal in that matter issued its final award on damages in favour of Devas' Mauritius shareholders.

Winding-up proceedings by Antrix against Devas in India

24 On 18 January 2021, Antrix filed a winding-up petition against Devas in India (the "Winding-Up Application"). On the next day, the Indian National Company Law Tribunal ("NCLT") heard the winding-up proceedings and appointed a provisional liquidator to take over the affairs of Devas. On 25 May 2021, the NCLT issued its final decision (the "NCLT Decision") ordering that Devas be wound up.

25 Devas and one of its shareholders, Devas Employees Mauritius Private Limited ("DEMPL") appealed against the NCLT Decision. This appeal was dismissed by the National Company Law Appellate Tribunal ("NCLAT") on 8 September 2021 (the "NCLAT Decision"). Subsequently, Devas and DEMPL further appealed against the NCLAT Decision to the Supreme Court of India ("SCI") and this too was dismissed. In its judgment dated 17 January 2022 (the "SCI Judgment"), the SCI held that because the seeds of the commercial relationship between Antrix and Devas were a product of fraud on the part of Devas, "every part of the plant that grew out of those seeds" would be "infected with the poison of fraud" and be in conflict with Indian public policy. This included the Devas-Antrix Agreement, the subsequent disputes and the arbitral awards they gave rise to.

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26 The NCLT Decision, the NCLAT Decision and the SCI Judgment are referred to collectively in this judgment as the "Indian Decisions".

Criminal investigations in India

27 Following a series of reports and investigations, on 11 August 2016, the Indian Central Bureau of Investigation ("CBI") issued a final report and filed criminal charges against a number of government officials, Devas and various officers and directors of Devas by way of a charge sheet dated 11 August 2016 (the "CBI Charge Sheet"). The CBI Charge Sheet stated that investigations had revealed that Antrix did not have any authority to lease transponder capacity to a private party and that the lease of transponder capacity under the Devas-Antrix Agreement had been done pursuant to a criminal conspiracy and entailed the abuse of the official positions of the accused persons named in the CBI Charge Sheet. On 8 January 2019, the CBI also issued a supplementary charge sheet.

28 It should be noted that India had submitted by way of a letter to the Tribunal dated 24 October 2016 (the "24 October 2016 Letter") that the filing of these charges was an important recent development which warranted the suspension of the Arbitration pending their resolution. However, in its letter dated 20 February 2017, the Tribunal denied the request to stay the arbitral proceedings. The Tribunal later explained in the Interim Award that it was unclear whether India's 24 October 2016 Letter sought to "raise a new jurisdictional or admissibility objection based on an alleged illegality in the making of the investment", but to the extent that this was the case, the Tribunal found India's objection to be "untimely and contrary to the procedural calendar established in this [Arbitration]" as it was raised well after the parties' written submissions and the hearing.

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Application to set aside the ICC Award in India

29 On 19 November 2015, Antrix filed a petition in India to set aside the ICC Award (the "ICC Setting-Aside Application"). On 4 November 2020, the SCI ordered that the ICC Award be held in abeyance pending determination of Antrix's ICC Setting-Aside Application. On 12 January 2021, Antrix sought to amend its pending ICC Setting-Aside Application to include allegations of fraud against Devas and its shareholders.

30 On 29 August 2022, a single Judge of the Delhi High Court (the "Single Judge") set aside the ICC Award (the "Single Judge Decision"). The Single Judge relied on the findings made in the Indian Decisions and set aside the ICC Award on the ground that the award "suffers from patent illegalities and fraud and is in conflict with the Public Policy of India". In summary, the Single Judge was of the view that the finding in the SCI Judgment that Devas was incorporated for a fraudulent purpose (and thus should be wound up) also infected the validity of the Devas-Antrix Agreement and the subsequent arbitral awards that had been rendered concerning its termination.

31 DEMPL appealed against the Single Judge Decision. On 17 March 2023, the appeal was dismissed by a two-judge panel of the Delhi High Court. In its decision (the "DHC Judgment"), the Delhi High Court held, amongst other things, that the findings in the SCI Judgment (concerning Antrix's Winding-Up Application) were binding on the Single Judge. The Delhi High Court duly confirmed the decision to set aside the ICC Award on public policy grounds.

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The enforcement proceedings and India's application to set aside the leave order

32 On 2 September 2021, DT successfully applied *ex parte* by way of HC/OS 900/2021 ("OS 900") for leave to enforce the Final Award in Singapore and this resulted in the issuance of HC/ORC 4992/2021 on 3 September 2021 (the "Leave Order"). On 11 January 2022, India applied to set aside the Leave Order. On 31 March 2022, OS 900 and the related proceedings were transferred from the General Division of the High Court to the SICC as OS 8. Four applications were heard in OS 8, namely:

(a) India's application under SUM 155 to set aside the Leave Order;

(b) DT's application under HC/SUM 720/2022 ("SUM 720") to strike out parts of India's affidavit evidence in SUM 155;

(c) India's application under SIC/SUM 24/2022 ("SUM 24") to stay SUM 155 and SUM 720 pending the determination of the Swiss Revision Application; and

(d) India's application under SIC/SUM 45/2022 ("SUM 45") for leave to adduce further evidence in support of SUM 24.

33 On 30 January 2023, the SICC dismissed the four summonses within OS 8, including SUM 155. India was ordered to bear DT's costs of SUM 155, SUM 24 and SUM 45, whilst no order as to costs was made for SUM 720. On 13 February 2023, India filed CAS 1 to appeal against the dismissal of SUM 155 and also against the order that it was to bear DT's costs in SUM 155.

Procedural history

34 Three applications have been filed in connection with CAS 1.

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35 First, on 2 March 2023, India filed an application under CA/SUM 4/2023 ("SUM 4") for CAS 1 and any other applications that may be filed in connection with it to be heard in private, for any information (including the identities of the parties) or documents relating to CAS 1 to be concealed, to seal the case file for CAS 1, for the parties in CAS 1 to not be identified in any hearing lists and for any published judgment or decision that may be issued in these proceedings to be redacted. We dismissed SUM 4 on 25 April 2023 on the basis that the confidentiality of the Arbitration had already been lost and that there was no compelling interest that justified the enforcement proceedings in Singapore being conducted in private and the parties' names and other details being redacted. The costs of SUM 4 were reserved to the hearing of CAS 1: see *The Republic of India v Deutsche Telekom AG* [2023] 2 SLR 77.

36 Second, on 13 April 2023, India filed an application under CA/SUM 10/2023 ("SUM 10") for permission to adduce further evidence, specifically the DHC Judgment, for the hearing of CAS 1. On 17 May 2023, we declined to make any order in respect of SUM 10 or as to costs. We considered that India was free to make reference to the DHC Judgment for any bearing that the DHC Judgment may have on the legal issues and arguments in CAS 1, and it was neither necessary nor appropriate to admit it into evidence.

37 The third and final application was CA/SUM 12/2023 ("SUM 12"). This was an application filed by DT on 12 May 2023 seeking an order that CAS 1 be dismissed unless India paid the costs and disbursements awarded in respect of SUM 155, SUM 24 and SUM 45 and all further interest payable on those sums within seven days, and an order for further security to be made against India. At the first hearing of CAS 1 on 30 June 2023, India was directed to state whether it intended to comply with the outstanding costs orders. India stated that it intended to do so, but requested that it be permitted to pay the costs into court

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pending the outcome of CAS 1. On 14 July 2023, we ordered that the costs were to be paid by India to DT by 3 August 2023 and made no further order as to security. The costs of SUM 12 were reserved to the disposal of CAS 1.

The parties' positions

Appellant's case (India)

38 The key thrust of India's case is that the Tribunal did not have jurisdiction to determine the dispute between India and DT. As a starting point, India relies on s 3(1) of the State Immunity Act 1979 (2020 Rev Ed) ("SIA") which provides that "a State is immune from the jurisdiction of the courts of Singapore except as provided in the following provisions of this Part". While s 11(1) of the SIA provides for an exception to s 3(1) where a State has agreed in writing to submit a dispute to arbitration, India contends that DT's investment fell outside the scope of the offer to arbitrate in Art 9 of the India-Germany BIT for the following reasons (collectively the "Grounds for Resisting Enforcement"):

(a) DT's investment did not fall within the definition of "investment" in Art 1(b) of the India-Germany BIT because it was really in the nature of "pre-investment expenditure". In relation to this, India contends that Art 3(1) of the India-Germany BIT is an admission clause and that investments would only be admitted if these conformed to India's laws (the "Pre-Investment Argument").

(b) DT's investment did not satisfy the requirement in Art 1(b) of the India-Germany BIT that an investment must comply with the host state's national laws because five separate violations of Indian law had occurred in connection with DT's investment in Devas (the "Illegality

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Argument"). These violations of Indian law were as follows: (i) misrepresentations were allegedly made by Devas in the Devas-Antrix Agreement concerning the ownership of the intellectual property rights for certain technologies; (ii) Devas' operations as contemplated under the Devas-Antrix Agreement were allegedly not permitted under India's policy framework for satellite communications; (iii) approvals granted to Devas allegedly pertained to different services from the Devas Services that were supposed to be provided under the Devas-Antrix Agreement; (iv) the Devas-Antrix Agreement was allegedly not entered into pursuant to a proper auction or tender process; and (v) funds approved for investment in Devas were allegedly siphoned out of India and Devas had acted contrary to its representation to the FIPB that the technologies for providing the Devas Services would be developed in India.

(c) DT's investment also did not fall within the scope of the protection of the India-Germany BIT because the investment was made by DT Asia which is not a German entity. Although DT is the parent of DT Asia, the India-Germany BIT does not cover indirect investments made through an intermediate holding company of a nationality other than those of the contracting parties to the India-Germany BIT (the "Indirect Investment Argument").

(d) DT's investment was not protected by the India-Germany BIT because Art 12 permitted 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").

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39 On any one or more of these grounds, India submits that the Leave Order should be set aside. Specifically, India contends it has state immunity under s 3(1) of the SIA and/or that enforcement of the Final Award should be refused pursuant to ss 31(2)(*b*) and 31(2)(*d*) of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA").

40 It appears that India also relies on its Illegality Argument to advance its position that the Devas-Antrix Agreement was a product of a fraudulent scheme perpetuated by Devas. According to India, these five alleged violations of Indian law were conducted as part of this fraudulent scheme, which led to DT Asia's acquisition of Devas' shares and which continued after DT Asia became a shareholder of Devas. India contends that the Indian Decisions are weighty evidence of its Illegality Argument. These decisions would show that DT bears responsibility for the consequences of the fraudulent conduct of Devas' business even though DT came into the picture after the relevant events, and that DT must be taken to have known or become aware of Devas' fraud. As DT proceeded with its investment despite its awareness that the investment was tainted with fraud and not made in accordance with India's national laws at its inception, DT must be regarded as complicit in the fraud perpetuated by Devas.

41 As we have already alluded to above, the Grounds for Resisting Enforcement had already been canvassed before the Swiss Federal Supreme Court when India brought the Swiss Setting-Aside Application. India takes the position that notwithstanding this, India is not precluded from raising these arguments before us. India contends that the SICC erred in holding that India had waived its right to raise a jurisdictional objection on illegality, pertaining to parts of its Illegality Argument, just because it had failed to raise this before the Tribunal. India also submits that the SICC erred in finding that India was

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estopped from raising arguments which the Swiss Federal Supreme Court had rejected in the Swiss Setting-Aside Decision.

42 Finally, India also submits that the Leave Order should be set aside because DT had failed to make full and frank disclosure in OS 900, in particular, concerning aspects of the Swiss Setting-Aside Decision.

Respondent's case (DT)

43 DT submits that India is estopped and/or precluded from relying on the Grounds for Resisting Enforcement because these had been unsuccessfully raised before the Swiss Federal Supreme Court which is the seat court. DT also submits that India is precluded from challenging the Tribunal's jurisdiction based on the Illegality Argument. Specifically, DT contends that India waived the Illegality Argument and the Essential Security Interests Argument: the former had been raised belatedly by way of the 24 October 2016 Letter and was rejected by the Tribunal; and the latter had not been raised as a jurisdictional objection in the Arbitration and could not now be raised as such.

44 In any event, DT also contends that the dispute in the Arbitration had arisen in connection with an investment covered under the India-Germany BIT such that the Tribunal has jurisdiction, and DT disputes the availability to India of any of the four Grounds for Resisting Enforcement. It also submits that it did not breach its duty of full and frank disclosure in OS 900 and maintains that it had made specific mention of the Swiss Setting-Aside Decision and the relevant findings in its supporting affidavit.

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The parties' further submissions

45 The appeal was first heard by us on 30 June 2023. As we could not complete the hearing, it was then adjourned to a further hearing on 17 August 2023. Prior to the further hearing, we directed the parties to address us on the following issues:

> On the assumption that the seat court decision was not preclusive under Swiss law:
>
> > i. Is an enforcement court bound by a decision of the seat court on matters that go to the validity of an award? If yes, what is the basis for this view?
> >
> > ii. If the answer to (i) is 'no', should an enforcement court nonetheless accord a high degree of deference to a decision of the seat court on matters that go to the validity of the award rather than on questions of public policy? If yes, what is the basis for this view and are there limits to this principle?
> >
> > iii. If the answer to both (i) and (ii) is 'no' what is the basis for this view?
>
> [emphasis in original omitted]

46 We mention in passing that although we used the term "deference" in these further questions, we prefer the term "primacy" and use that instead in this judgment. The question, in our view, is whether the decision of a seat court enjoys a special status within the framework for the judicial supervision and support of international arbitration, that is established by the body of law including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38 (entered into force 7 June 1959, accession by Singapore 21 August 1986) (the "New York Convention"), legislation based on the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") and case law.

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Appellant's further submissions (India)

47 In its further submissions, India submits that an enforcement court would only be bound by a decision of the seat court if the elements of transnational issue estoppel are met. An enforcement court should therefore apply the well-established doctrine of transnational issue estoppel to determine the effect of a seat court's decision on issues relating to the award's validity.

48 Where the elements of transnational issue estoppel are not met, India submits that an enforcement court should treat the seat court's decision like any other foreign judgment without according it any special status or primacy. This is because the notion of a freestanding idea that decisions of the seat court enjoy primacy, independent of an established doctrine such as transnational issue estoppel, lacks a principled or doctrinal basis and likely stems from a misunderstanding of the Model Law. India further submits that this would be incompatible with the choice of remedies that the Model Law makes available to a party aggrieved by an arbitral award.

49 On the present facts, India submits that the Swiss Setting-Aside Decision does not give rise to issue estoppel because there is no equivalent doctrine of issue estoppel under Swiss law. According to India, when the Swiss court rejects an application to set aside an award on jurisdictional grounds, Swiss law does not accord *res judicata* effect to the factual findings and legal reasons contained in the judgment of the Swiss court. Accordingly, India submits that it is not estopped by the Swiss Setting-Aside Decision from canvassing these points before the SICC, and therefore also not before us.

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Respondent's further submissions (DT)

50 DT's primary position is that the Swiss Setting-Aside Decision is indeed preclusive, such that India is estopped by the operation of transnational issue estoppel from raising in the enforcement proceedings before the Singapore court the same points that had been raised and determined before the Swiss Federal Supreme Court in the Swiss Setting-Aside Application. However, even on the assumption that the seat court decision is not preclusive under Swiss law and that an enforcement court is not in any case bound by a decision of the seat court, DT submits that a decision of the seat court on matters that go to the validity of the award would typically enjoy primacy in the scheme of modern international arbitration (the "Primacy Principle"), such that save in highly exceptional circumstances, for instance, where the seat court's decision would violate basic notions of justice or is highly likely to be partial and dependent, an enforcement court would only rarely deviate from a prior decision of the seat court.

51 DT submits that the Primacy Principle should be accepted as a part of Singapore's arbitration laws and should generally apply to a seat court's decision in respect of any challenges that have been raised as to the validity of the award, without having to inquire into whether the seat court's decision is preclusive under its own laws. As noted in the previous paragraph, DT contends that the exception to this principle would arise only in exceptional circumstances and, if at all, is more likely to arise where giving effect to the decision of the seat court would offend the public policy of the enforcing jurisdiction.

52 Applying the Primacy Principle, DT submits that India's Grounds for Resisting Enforcement in the Singapore enforcement proceedings are

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essentially the same as the grounds on which India unsuccessfully challenged the validity of the Interim Award in the Swiss Setting-Aside proceedings. It accordingly submits that the Singapore court, as the enforcement court, should accord a high degree of primacy to the Swiss Setting-Aside Decision and since there is nothing exceptional about the nature of the arguments or issues in this case, we should dismiss these allegations and not permit India to re-litigate them.

Decision below

53 The SICC found that none of India's Grounds for Resisting Enforcement were tenable. India's jurisdictional objections against the Final Award were rejected. As for state immunity, the SICC held that the exception in s 11(1) of the SIA applied.

54 As to the Indian Decisions pertaining to Antrix's Winding-Up Application against Devas, the SICC found that these could not be treated as binding findings of fraud on DT's part, because the Winding-Up Application had been decided on a summary basis based on documents without oral evidence or the cross-examination of witnesses. Further, even if the documentary evidence adduced may have been final and conclusive for the purposes of winding up Devas on the ground of a fraud as a matter of India's national law, the Indian Decisions cannot be regarded as sufficient evidence of fraud and legality for the purposes of the proceedings before the SICC. Moreover, the SICC found it difficult to accept that even if the SCI Judgment was to be regarded as containing a finding of fraud in which DT was complicit, that it would operate to bind DT because DT was not a party to the proceedings resulting in the Indian Decisions and took no part in them (*Deutsche Telekom*

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AG v The Republic of India [2023] SGHC(I) 7 ("*OS 8 Judgment*") at [123]–[135]).

55 The SICC also found that India was precluded from raising arguments that had already been rejected in the Swiss Setting-Aside Decision. The SICC found that the Swiss Setting-Aside Decision did have *res judicata* effect which precluded India from raising the Indirect Investment Argument, the Pre-Investment Argument, and the Essential Security Interests Argument, all of which it had unsuccessfully raised before the Swiss Federal Supreme Court. Likewise, India was precluded by the negative *res judicata* effect of the Swiss Setting-Aside Decision (meaning that the preclusive effect of the judgment barred the admissibility of a renewed application to set aside the Interim Award or the Final Award on the same grounds) from challenging the Tribunal's jurisdiction based on the Illegality Argument (*OS 8 Judgment* at [150]–[151]). The SICC considered that its conclusions were consistent with the evidence of India's Swiss law expert, Professor Christoph Müller ("Prof Müller"). Applying the principles of *res judicata* as a matter of Singapore law (specifically, those relating to issue estoppel), the SICC held that India was barred from raising jurisdictional objections that the Swiss Federal Supreme Court had already rejected (*OS 8 Judgment* at [153]).

56 The SICC also found that India could have but had failed to raise three of the allegations undergirding the Illegality Argument before the Tribunal. The effect of this was that India must be deemed to have waived the same points as jurisdictional objections (*OS 8 Judgment* at [162]). This was an instance of preclusion due to waiver and not by estoppel, and pertained to the question of whether a party should be treated as having waived the right to raise a jurisdictional objection by failing to raise it in an arbitration (*OS 8 Judgment* at [165]). On their plain and ordinary meaning, Art 16(2) of the Model Law and

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the analogous Art 186(2) of the Swiss Private International Law Act ("PILA") require a party to raise an objection or plea against jurisdiction *prior to* defending an arbitration on the merits. A failure to do so would preclude its being raised subsequently (*OS 8 Judgment* at [163]–[164]), because the party in question will be deemed to have waived the unargued jurisdictional point in the absence of a valid explanation (*OS 8 Judgment* at [168]).

57 Finally, the SICC found that there was no substance in India's complaint that DT failed to fulfil its duty of disclosure to disclose India's potential arguments against enforcement in Singapore. The affidavit filed with DT's *ex parte* application in OS 900 mentioned the Swiss Federal Supreme Court's finding that the Tribunal had jurisdiction and had conducted the arbitration proceedings fairly. Pertinently, it also exhibited the Swiss Setting-Aside Decision which dismissed India's submissions concerning state immunity. The SICC held that it would have been evident from a perusal of the Swiss Setting-Aside Decision that India's potential arguments against enforcement would involve similar submissions on immunity and DT's alleged complicity in Devas' fraud (see above at [40]) before the Singapore courts (*OS 8 Judgment* at [115]). Therefore, there was sufficient disclosure.

Issues raised in the appeal

58 We begin by noting that the threshold question is whether India is precluded from making arguments which have already been argued before and determined by the Swiss Federal Supreme Court. If this is answered in the affirmative, then there is no need – and in fact, it may run counter to the very object and nature of any preclusion that has been invoked – for us to undertake a separate review of India's substantive arguments (in particular as to the merits of the Grounds for Resisting Enforcement).

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59 Our determination of this appeal therefore begins with this issue of the preclusive effect of the seat court's decision. As to this, two related questions of law arise. First, we consider whether the doctrine of transnational issue estoppel applies in the context of international commercial arbitration so as to preclude the re-litigation of issues before the enforcement court that have previously been dealt with by the seat court. We then consider the Primacy Principle and whether it should be recognised as part of Singapore law, and if so, what its scope and outer limits might be.

60 If we decide that transnational issue estoppel is an applicable doctrine in this context, we will then consider its application in the present case.

61 If transnational issue estoppel and the Primacy Principle are both held to be inapplicable, we will then consider whether the SICC was correct to dismiss the Grounds for Resisting Enforcement on their merits.

62 Finally, we will consider India's contention that DT did not discharge its duty of full and frank disclosure in OS 900.

Does transnational issue estoppel and/or the Primacy Principle apply in the context of international commercial arbitration when an issue decided by a seat court is subsequently raised again before an enforcement court?

The applicability of transnational issue estoppel in the context of international commercial arbitration

Transnational issue estoppel in Singapore law

63 As a matter of domestic law, a party against whom a judgment has been rendered in a prior litigation in Singapore may be estopped from raising certain issues in future proceedings if the following conditions are satisfied (*Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301*

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[2005] 3 SLR(R) 157 at [14] and [15]; *The Sennar (No 2)* [1985] 1 WLR 490 ("*The Sennar*") at 499):

(a) the prior judgment must be final and conclusive on the merits;

(b) the prior judgment must be given by a court of competent jurisdiction;

(c) there must be commonality of the parties to the prior proceedings and to the proceedings in which estoppel is raised; and

(d) the subject matter of the proposed estoppel must be the same as what has been finally decided in the prior judgment.

64 The same test has been applied with some modifications in the context of *transnational* issue estoppel where the prior judgment is rendered in a foreign jurisdiction (*Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] 1 SLR 1102 ("*Merck Sharp*") (at [2]); *The Sennar* at 500). The test for transnational issue estoppel has been formulated as follows (*Merck Sharp* at [35]–[40]):

(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;

(ii) originate from a court of competent jurisdiction that has transnational jurisdiction over the party sought to be bound; and

(iii) not be subject to any defences to recognition;

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

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

65 With respect to the requirement at [64(a)(ii)] above that the court giving the foreign judgment must have transnational jurisdiction over the party sought to be bound, this requirement has been defined in terms that 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" to render that judgment (*Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK and another* [2016] 5 SLR 1322 ("*Humpuss Sea Transport*") at [71]; *The Republic of the Philippines v Maler Foundation and others and other appeals* [2014] 1 SLR 1389 ("*Maler Foundation*") at [66]). There are four possible grounds of jurisdiction: (a) presence in the foreign country; (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; and (d) agreeing to submit to the jurisdiction before the commencement of proceedings *(Humpuss Sea Transport* at [71]; *Sang Cheol Woo v Spackman, Charles Choi and others* [2022] SGHC 298 ("*Sang Cheol Woo*") at [57]).

66 Regarding the requirement at [64(a)(iii)] above, a foreign judgment satisfying the other requirements will not be recognised or enforced if a defence can be established. Defences to recognition, under the common law, concern a variety of circumstances, the most common of which concern 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

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enforcement of foreign penal, revenue or other public laws (*Humpuss Sea Transport* at [73]; *Maler Foundation* at [68]; *WKR v WKQ and another appeal* [2023] SGHC(A) 35 at [68], citing *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515 at [12]). Further, where the defences to the recognition of foreign judgments are concerned, the court in *Merck Sharp* considered that it would in principle be desirable for there to be broad convergence in the development of the defences available under the common law and those under statutes such as the Choice of Court Agreements Act (Cap 39A, 2017 Rev Ed) (now the Choice of Court Agreements Act 2016 (2020 Rev Ed)) and the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) (now the Reciprocal Enforcement of Foreign Judgments Act 1959 (2020 Rev Ed)) (at [37]).

67 The doctrine of issue estoppel is grounded in the principle of finality of litigation. If an issue has been canvassed and finally dealt with by a court, then a party cannot reopen that issue in a fresh action. Indeed, it would be an abuse of process to do so. In a transnational setting, the analysis is more nuanced. As a general rule, the approach taken by a common law court towards the judgments or decisions of a foreign court is informed by the principle of comity, which is defined in *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 (at 1096) as the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws" (see also *The "Reecon Wolf"* [2012] 2 SLR 289 at [23]; *Best Soar Ltd v Praxis Energy Agents Pte Ltd* [2018] 3 SLR 423 at [28]). In other words, international comity requires that the Singapore enforcement court should generally treat the foreign court's judgment with great respect (*Halsbury's Laws of Singapore – Conflict of Laws*

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vol 6(2) (LexisNexis, 2023 Reissue) at para 75.273) and be slow to pass judgment on the reasoning in the foreign court's decision (*Ramesh Vangal v Indian Overseas Bank and another matter* [2023] 2 SLR 261 at [43]). But international comity functions only as an underlying consideration without normative force. More recently, the courts have invoked the doctrine of transnational issue estoppel as a principled basis for giving effect to a foreign judgment between the same parties.

68 However, 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. This balance is a delicate one that calls for: (a) affirming that the elements of transnational issue estoppel are in broad terms the same as those of domestic issue estoppel, whilst taking special care in applying these elements in a transnational context; (b) exercising particular caution in delineating the outer limits of transnational issue estoppel; and (c) potentially adopting a different approach from that taken in the context of domestic issue estoppel to what is commonly referred to as "the *Arnold* exception", that is to say, the exception to issue estoppel derived from the House of Lords' decision in *Arnold and Others v National Westminster Bank plc* [1991] 2 AC 93 ("*Arnold*") (*Merck Sharp* at [33]–[34]).

69 We also acknowledge the helpful identification by the Court of Appeal of England and Wales in *Good Challenger Navegante SA v Metalexportimport SA* [2004] 1 Lloyd's Rep 67 ("*The Good Challenger*") (at [54]), of four important considerations that should guide the court in this context:

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(a) It 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) The 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) The determination of the issue must be a necessary part of the foreign court's decision.

(d) The application of issue estoppel is subject to the overriding consideration that *it must work justice and not injustice* (see also, *PAO Tatneft v Ukraine* [2021] 1 WLR 1123 ("*PAO Tatneft*") at [34]). 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 (*The Good Challenger* at [79]).

70 In our judgment, these are helpful signposts that guide the court's analysis in the context of transnational issue estoppel. The first, third and fourth of these considerations are an important part of the inquiry at the first step of the three-step framework set out at [64] above; while the second of these considerations informs the third step of that framework.

71 We left open in *Merck Sharp* (at [52]–[54]) the issue of the outer limits of transnational issue estoppel because that issue did not squarely arise on the facts of that case. However, we did express our provisional view that one appropriate control or gatekeeping mechanism to define the outer boundaries of

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transnational issue estoppel would be where a foreign judgment was found to conflict with the *public policy* of the jurisdiction in which issue estoppel is invoked (*Merck Sharp* at [54] and [58]).

72 We next consider whether these principles ought to apply in the context of *international commercial arbitration*.

The current position in Singapore with respect to transnational issue estoppel in the context of international commercial arbitration

73 Although the application of transnational issue estoppel to foreign judgments is generally well-established in Singapore law (see, for example, *Gomez, Kevin Bennett v Bird & Bird ATMD LLP and another* [2023] 1 SLR 450 at [49]; *Sang Cheol Woo* at [115]), the applicability of transnational issue estoppel in the context of international commercial arbitration has not been settled.

74 In Singapore, the legal framework governing international commercial arbitration is set out principally in the IAA, which is based on the Model Law (see the Long Title and First Schedule of the IAA) and also gives effect to the New York Convention (see the Long Title and Second Schedule of the IAA). As the New York Convention governs judicial control over the recognition and enforcement of foreign arbitral awards, we begin by considering whether the doctrine of transnational issue estoppel is compatible with the provisions of the New York Convention and in particular, Art V, which provides an exhaustive list of the grounds for refusing enforcement.

75 Article V(1)(*e*) of the New York Convention provides that:

> 1. Recognition and enforcement of the award *may* be refused, at the request of the party against whom it is invoked, only if

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> that party furnishes to the competent authority where the recognition and enforcement is sought, proof that —
>
> …
>
> (*e*) the award has not yet become binding on the parties, or *has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*
>
> [emphasis added]

76 On a plain reading, Art V(1)(*e*) of the New York Convention is worded permissively with the use of the word "may". It permits but does not require an enforcement court to abide by a seat court's decision to set aside an arbitral award, when deciding whether to refuse recognition and enforcement of the award (*BAZ v BBA and others and other matters* [2020] 5 SLR 266 ("*BAZ v BBA*") at [36]; Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2020) ("*Gary Born*") at §26.05[C][8][a][i]). This discretion that is accorded to the enforcement court reflects the concept of "double-control" that was explained in *Astro* (at [75], citing *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 ("*Dallah v Pakistan*")), in terms that it is generally for each enforcement court to determine the weight and significance that should be ascribed to the outcome of an active challenge in the seat court. Further, Art VI of the New York Convention complements Art V(1)(*e*) by allowing the enforcement court or authority to adjourn the decision on enforcement of the arbitral award if an application for setting aside or suspension of the award has been made to the seat court and is pending.

77 In Singapore, the courts have generally considered that where an award has been set aside by the seat court, the enforcement court may be reluctant to recognise or enforce that award. In *Astro*, this court observed (at [77]) that whilst the permissive wording of Art V contemplates the possibility that an

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award which has been set aside *may* still be enforced, the contemplated *erga omnes* effect of a successful application to set aside would generally lead to the conclusion that there is simply no award to enforce (see also, *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 at [46]).

78 While Art V(1)(*e*) does not expressly mention issue estoppel as a ground for refusing recognition/enforcement, it has been noted that the seat court's decision to set aside an award could be given effect to by invoking transnational issue estoppel (*BAZ v BBA* at [36]), and that the option afforded to a party to seek to resist enforcement even after an unsuccessful active challenge under the New York Convention might exist "save and except for the operation of any issue estoppel recognised by the enforcing court" (*Astro* at [75]). Some academic commentary also suggests that when resisting enforcement proceedings, an award debtor who raises the same ground of challenge which previously failed at the seat court "will be estopped (assuming all the requirements of estoppel are met) from contending anything that is contrary to the decision of the seat court" (see Darius Chan, Paul Tan and Nicholas Poon, *The Law and Theory of International Commercial Arbitration in Singapore* (Academy Publishing, 2022) at para 9.68(a)).

79 While the question has not been settled judicially in Singapore, the trend of commentary and judicial observations suggests that transnational issue estoppel may and perhaps *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.

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The current position in English law

80 We first examine the position under English law, where the prevailing position is that transnational issue estoppel will be invoked where the requirements are met, except where questions of English public policy are raised. This exception is warranted by the fact that the public policy concerns of the enforcement court will not necessarily be the same as those of the seat court and further, the seat court will, in any case, not have addressed the public policy concerns of any given enforcement court.

81 Our review begins with Eder J's landmark decision in *Diag Human SE v The Czech Republic* [2014] EWHC 1639 (Comm) ("*Diag Human*"), where transnational issue estoppel was applied in English law in the context of international commercial arbitration, though that concerned a prior decision of another enforcement court (at [59]) rather than of the seat court. There, the Austrian Supreme Court declined to enforce an award made in the Czech Republic on the basis that the award was not yet binding on the parties as it was subject to an additional arbitral review process. In subsequent enforcement proceedings that came before the High Court of England and Wales, Eder J held that the Austrian decision gave rise to an issue estoppel which prevented the award-creditor from raising the same issue of whether the award was binding on the parties, in its effort to resist enforcement in the English proceedings (*Diag Human* at [62]–[63]). However, Eder J also noted that "questions of arbitrability and of public policy may be different in different states and that a decision in a foreign court refusing to enforce an award under the New York Convention on public policy grounds of that state will not ordinarily give rise to an issue estoppel in England" (*Diag Human* at [58], referencing *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2013] 3 WLR 1329 ("*Yukos Capital (CA)*").

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82 Subsequent cases by the English courts have gone on to deal with the question of the effect that a prior *seat* court decision would have on a subsequent enforcement court. In general, these have taken the approach that ordinary and well-recognised principles that may apply to the recognition of foreign judgments, including transnational issue estoppel, could and should apply in this context.

83 In *Malicorp Ltd v Government of the Arab Republic of Egypt and others* [2015] EWHC 361 (Comm) ("*Malicorp*"), the court was faced with an application to enforce an award against Egypt which had been set aside at the seat in Egypt. Walker J held that while English courts have a discretion to enforce an award vacated at the seat, "it would not be right to exercise that discretion if, applying general principles of English private international law, the set aside decision was one which this court would give effect to" (*Malicorp* at [21]). Similarly, in *Carpatsky Petroleum Corp v PJSC Ukrnafta* [2020] EWHC 769 (Comm) ("*Carpatsky*"), Butcher J held that transnational issue estoppel could arise in respect of a decision at the seat of arbitration on the validity of the award if the same issue was raised at the enforcement stage (at [130] and [146]).

84 The *limits* of transnational issue estoppel in the context of international arbitration have also been considered by the English courts. Following the approach previously taken in *Yukos Capital (CA)*, a string of cases has held that transnational issue estoppel will not apply when the English court is required to consider and apply its own considerations of public policy.

85 Thus, in *Stati and others v Republic of Kazakhstan* [2017] EWHC 1348 (Comm), it was held (at [83]–[87]) that a Swedish court's decision that it would not set aside an award where the arbitrators had been

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intentionally misled by the claimants, did not bind the English court in determining whether enforcement of the award in such circumstances would be contrary to English public policy. A similar approach was taken in *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd* [2018] EWHC 2713 (Comm) which concerned an allegation, amongst others, that a witness had been interfered with and prevented from giving evidence in the arbitration, and a submission that enforcement of the award in such circumstances would be contrary to public policy. It was held (at [61]) that there was "not an exact identity of issue [and] … that it would be wrong to short circuit the argument here, and that the better course is to consider the merits of the challenges".

86 In our judgment, no question of issue estoppel can arise where the public policy of the enforcement court's jurisdiction is in issue (or for that matter, the arbitrability of a dispute, which is a question that is determined by reference to the enforcement court's public policy: *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [48]; *Diag Human* at [58]; New Delhi Address at para 34) 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 (*BAZ v BBA* at [50]).

87 In considering the jurisprudence of the English courts in this area, a few points arise.

88 First, a common requirement for transnational issue estoppel to apply is that the earlier decision must be a final and binding decision (see [64(a)] above). The earlier decision will *not* be recognised as being of this nature in relation to a given issue unless that determination is regarded as conclusive by the foreign

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court itself (see *PAO Tatneft* at [31]; *MAD Atelier International BV v Manès* [2020] 3 WLR 631 ("*MAD Atelier*") at [51]; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 ("*Carl Zeiss*") at 919). In other words, the doctrine of transnational issue estoppel only applies where the issues meant to create estoppel "cannot be raised again in the foreign country" and the enforcing court will refuse to "regard as conclusive" something that the foreign jurisdiction itself would not regard as conclusive (*Carl Zeiss* at 918–919). While this has been held to be the case in the context of transnational issue estoppel generally (see *Merck Sharp* at [41]–[43], citing *Carl Zeiss* at 919; *Helmville Ltd v Astilleros Espanoles SA (The "Jocelyne")* [1984] 2 Lloyd's Rep 569 at 572; *Joint Stock Company "Aeroflot-Russian Airlines" v Berezovsky & Anr* [2014] EWCA Civ 20 at [28]–[34]; *Abdel Hadi Abdallah Al Qahtani & Sons Beverage Industry Co v Antliff (Andrew)* [2010] EWHC 1735 (Comm) at [52]–[55]; *MAD Atelier* at [48]–[61]; *Zheng Zhenxin v Chan Chun Keung* [2018] HKCFI 2284 at [44]–[47] and the US Restatement (Fourth) of Foreign Relations Law (US) § 487 (2018)), we consider it must equally apply in the context of transnational issue estoppel that is raised in the particular setting of courts dealing with matters concerning international arbitration.

89 Flowing from this, the courts have recognised the potential 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 (*Chantiers De L'Atlantique S.A. v Gaztransport & Technigaz S.A.S* [2011] EWHC 3383 (Comm) at [315]) 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. Such foundational matters would include, for instance, findings of fact (*Yukos Capital v OJSC Rosneft Oil Company* [2011] EWHC 1461 (Comm) at [76]–[78]).

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90 The point is worth noting because the substantive rules and principles are not identical across jurisdictions and the more so, across different legal systems and traditions. Thus, in some civil law jurisdictions, a party may only be precluded from re-litigating the conclusions pronounced in the *operative part* of a judgment (such as whether an award is ultimately enforceable or not) but not the *reasons or findings leading up* to the decision as these may be deemed to be incidental questions (such as whether the arbitration agreement is valid) (see Philippe Hovaguimian, "The Res Judicata Effects of Foreign Judgments in Post-Award Proceedings: To Bind or Not to Bind?" (2017) 34 J. Int'l Arb. 79 at 81–82).

91 Second, English case law has considered the question of how transnational issue estoppel applies both as between the decision of a seat court and an enforcement court, as well as between two enforcement courts. We have noted that *Diag Human* concerned the application of issue estoppel in relation to an earlier decision of another *enforcement* court. It has been suggested 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 (see Art V(1)(*e*) and Art VI; see also Matthew Barry, "The Role of the Seat in International Arbitration: Theory, Practice, and Implications for Australian Courts" (2015) 32 J. Int'l Arb. 289 at 319).

92 It has also been suggested that such a rule 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

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decision to bind subsequent enforcement courts (see Maxi Scherer, "Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?" (2013) 4 J. Int'l Disp. Settlement 587 at 622–623; Burton S. DeWitt, "A Judgment Without Merits: The Recognition and Enforcement of Foreign Judgments Confirming, Recognizing, or Enforcing Arbitral Awards" (2015) 50 Texas Int'l L.J. 495 at 514). This concern was not explicitly considered in *Diag Human* and it does not squarely arise before us. We therefore do not express a concluded view on this point. 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.

93 Finally, it may be noted that in England, transnational issue estoppel will not arise in relation to a foreign judgment that is regarded by the English court as perverse in the sense that the law of the foreign country that was applied in and formed the basis for the foreign judgment is at variance with generally accepted doctrines of private international law (see *Air Foyle Ltd and another v Centre Capital Ltd* [2002] EWHC 2535 (Comm) at [36(5)]; *Simpson v Fogo* (1863) 1 H & M 195 ("*Simpson v Fogo*") at 243 and 247). This may be the case, for instance, where a foreign court has disregarded the relevant applicable law or refused to recognise the laws of other civilised countries which ought to have regulated the rights of the parties, thus resulting in a judgment which was wrong.

94 For instance, in *Simpson v Fogo*, an English ship, that was subject to a valid mortgage in England, sailed to Louisiana and was thereafter attached by

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Louisiana creditors of the mortgagor to satisfy debts owed. The English mortgagee-bank intervened in the Louisiana action and claimed possession of the ship (at 195–197). The Supreme Court of Louisiana refused to recognise its title on the basis that the mortgage instrument, while good in English law, could not be enforced under the law of Louisiana (at 203–204). The ship was eventually sold to the defendant. When the ship subsequently sailed to England, the English mortgagee-bank filed an action to establish its security rights over the ship before the English courts (at 207–208).

95 The English Court of Chancery held that the law of England should have governed the rights pertaining to the vessel as the connecting factors in the dispute pointed to England, contrary to the Louisiana court's findings, and it refused to treat the Louisiana judgment as binding, describing it as involving "a perverse and deliberate refusal to recognise the law of the country by which title has been validly conferred" (at 247) and made contrary to the laws of England and contrary to "what is required by the comity of nations" (at 247). That said, perversity in this context does not encompass a mere error because an "honest error is a very different thing from perversity" (*Carl Zeiss* at 922). For instance, in *Carl Zeiss*, the House of Lords, in considering the effect to be given to a judgment issued by a court in West Germany distinguished its case from *Simpson v Fogo* in that the West German court in their judgment did not refuse to apply the law of East Germany; rather, they had applied what they *thought* (even if mistakenly) was the law of East Germany.

The doctrine of transnational issue estoppel should be applied when contemplating the effect to be given to a seat court's decision

96 In our judgment, the doctrine of transnational issue estoppel can and should be applied by a Singapore enforcement court when determining whether

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preclusive effect should be accorded to a seat court's decision going towards the validity of an arbitral award.

97 It should be noted that when dealing with the question of the enforcement of a foreign arbitral award, the New York Convention does not operate in isolation because the domestic law of the enforcement court also comes into play (*UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (United Nations, 2016) at pp 2–3). The latter includes its conflict of laws rules and how it treats judgments that are relevant and rendered by other jurisdictions. Singapore's conflict of laws rules include the principles of transnational issue estoppel that were laid down in *Merck Sharp* (see above at [64]–[70]). It follows that 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" (see *BAZ v BBA* at [37]). This is especially so because the IAA is silent on this issue, and what is not governed by it must necessarily be governed by the other rules of domestic law (see *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* (UN Doc A/40/17, 3–21 June 1985) at para 61).

98 This also appropriately respects the parties' choice of the arbitral seat in a principled manner. By making that choice, the parties have chosen the jurisdiction and the system of law that will have primacy in relation to many matters concerning the arbitration and in line with that, an enforcement court should ordinarily give effect to the prior decision of the seat court.

99 It further coheres with the notion that courts co-exist as part of an international legal order, within which they should "respect each other's decisions in the fullest sense, and so far as possible avoid duplication, repetition

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and inconsistency in decision-making" (30th Annual Lecture at p 22). Counsel for both parties accept that the enforcement court should have due regard to the decision of the seat court; they diverge only on how and the extent to which this should be done. In our judgment, that can be considered and in this case resolved by recourse to transnational issue estoppel which is a somewhat flexible tool "sensitive to over-riding considerations of justice" and able to be applied appropriately to the context of a seat court's decision (as was noted in the 30th Annual Lecture at p 22).

100 Further, such an approach has the major advantage of being readily accommodated within the existing legal framework of most common law jurisdictions (New Delhi Address at para 24). By applying established doctrines of private international law, we avoid the risk of having enforcement courts approach a seat court's decision in a manner that is at odds with general trends in private international law towards the recognition of foreign court judgments (see *Gary Born* at §26.05[C][8][b][iv]). The sensible invocation of the doctrine of transnational issue estoppel can also help alleviate the problem of inconsistent judicial outcomes and limits the extent to which matters determined by a court of competent jurisdiction can be re-litigated, thus reducing the wastage of time, effort and resources (Jonathan Hill, "The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England" (2012) 8 J. Priv. Int. Law 159 at 191).

101 By differentiating between awards that are set aside on grounds that might find more "transnational" resonance (such as procedural irregularities) and grounds that have a distinctly "domestic" flavour (such as arbitrability or the violation of public policy) (New Delhi Address at para 36), the doctrine can

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be applied in a manner that safeguards the domestic concerns of the enforcing court, while adhering to comity to the greatest extent possible.

102 In our judgment, therefore, as a matter of Singapore law, the doctrine of transnational issue estoppel is applicable in the context of international commercial arbitration at least in relation to a prior decision of a seat court regarding the validity of an award.

The applicability of the Primacy Principle

103 We go on to consider the Primacy Principle because it was argued before us. DT contends in its further submissions that if India is not precluded by the doctrine of transnational issue estoppel from raising the Grounds for Resisting Enforcement in CAS 1, this court should nonetheless, by virtue of the Primacy Principle, follow the decision of the seat court because there are no exceptional circumstances to warrant not doing so. At the further hearing of CAS 1, we explored the limits of the Primacy Principle, but counsel's suggestion that it would apply save in very exceptional circumstances left us with the impression that as framed by DT, its effect and operation was not in any material way different from the application of transnational issue estoppel save that the stringent criteria required to invoke the latter doctrine might not even have to be met. We also think the submission by counsel for India, that the Primacy Principle, if left vague and undefined, may pave the way for unprincipled or arbitrary decisions by enforcement courts, raises a legitimate concern.

104 Indeed, the key difficulties with the adoption of the Primacy Principle seem to us to lie in identifying its doctrinal basis and in formulating its substantive content and outer limits. To assist in this inquiry, we first consider

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how the Primacy Principle has been formulated and applied in other jurisdictions.

The position in Australia

105 The position in Australia appears to be that the enforcement court will generally accord primacy to the decision of the seat court rather than invoke transnational issue estoppel.

106 The development of this area of the law can be traced to the decision of a single judge of the Federal Court of Australia in *Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd* [2013] FCA 882 ("*Gujarat (Single Judge)*") where the court had to consider whether the parties were estopped from re-litigating issues that had been earlier decided by the English seat court. Foster J observed that the Australian courts had previously applied issue estoppel to preclude the re-litigation of an issue that had been determined in a prior foreign judgment (citing *Armacel Pty Ltd v Smurfit Stone Container Corp* (2008) 248 ALR 573 at [56]–[82]) and that the parties were therefore estopped from raising issues already determined by the English court (*Gujarat (Single Judge)* at [102]). In any event, even if issue estoppel did not arise, Foster J advanced the broader proposition, based on what we have termed the "Primacy Principle", that "it would generally be inappropriate for this court, being the enforcement court of a Convention country, to reach a different conclusion on the same question as that reached by the court of the seat of the arbitration" and that it "would be a rare case where such an outcome would be considered appropriate" (*Gujarat (Single Judge)* at [103]).

107 On appeal, the full Federal Court of Australia declined to rule on whether the earlier decision of the English seat court gave rise to transnational

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issue estoppel, and opted instead to endorse Foster J's view on the Primacy Principle that it would generally be inappropriate for the enforcement court to reach a different conclusion on the same question of asserted procedural defects as that which had been reached by the seat court (*Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 468 ("*Gujarat (Full Court)*") at [65]). Significantly, the full Federal Court also endorsed and applied the observations of Colman J in the earlier decision of the High Court of England and Wales in *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 ("*Minmetals*") (at 331) as to the weight to be given to the views of the supervising court of the seat of the arbitration:

> In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand. Just as great weight must be attached to the policy of sustaining the finality of international awards, so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction. I use the word 'normally' because there may be exceptional cases where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so. However, *outside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be reinvestigated by the English courts on an enforcement application is to be most strongly deprecated.*
>
> [emphasis in original]

On the facts, the full Federal Court found that there was nothing to suggest that the case fell within one of the exceptional circumstances identified by Colman J in *Minmetals*, and therefore affirmed Foster J's decision to abide by the

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conclusion that had been reached by the English seat court (*Gujarat (Full Court)* at [66]–[67]). The appeal was therefore dismissed.

108 The decision of the full Federal Court in *Gujarat (Full Court)* to accord primacy to a seat court decision rather than applying transnational issue estoppel in this context was followed in *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* (2021) 396 ALR 1 ("*Hub Street*") (at [77]). The court reiterated that it would generally be inappropriate for the enforcement court to reach a different conclusion on the same question of asserted defects in the award as that reached by the seat court.

109 Some extra-judicial comments of Allsop CJ (who was on the full court in *Gujarat (Full Court)* and *Hub Street*) suggest that possible reasons for de-emphasising the doctrine of issue estoppel may include the attractiveness of "a broad and flexible approach" as to "the weight to be given to the views of other courts". As against this, if issue estoppel was the basis on which an enforcement court would apply a prior decision of a seat court, it would raise the question of why the same rule ought not to apply to the prior decision of any other enforcement court. This in turn may give rise to the concern that the international nature of arbitration (which enables the parties to avoid national court systems that may be perceived as unreliable) may be undermined if a doctrine was embedded that accords primacy to whichever was the first court to produce a decision about an international award (Chief Justice Allsop, "International Commercial Arbitration – The Courts and the Rule of Law in the Asia Pacific Region", speech delivered at the 2nd Annual Global Arbitration Review (11 November 2014) <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/journals/FedJSchol/2014/22.html>; Chief Justice Allsop, "The Authority of the Arbitrator", 2013 Clayton Utz Sydney of University International Arbitration Lecture (29 October 2013)

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<https://www.claytonutz.com/ialecture/previous-lectures/2013/speech_2013>; see also our observations at [91]–[92] above).

110 It seems to us that the Federal Court has stopped short of embracing transnational issue estoppel in this context and has instead endorsed something akin to what we have described as the Primacy Principle. However, there remains limited guidance as to how the Primacy Principle should apply, other than the broad statement from *Minmetals* that was cited in *Gujarat (Full Court)* and that we have reproduced at [107] above.

The position in the United States

111 We turn to the position in the United States ("US"). Similar to the approach in Australia, it appears that primacy is accorded to the findings of the seat court without specific recourse to transnational issue estoppel, save perhaps in a handful of outlier cases. On the basis of judicial comity or reciprocity, the US courts will only decline to honour the decision of a seat court if there is sufficient reason to do so (see, for example, *Baker Marine (Nig.), Ltd. v Chevron (Nig.), Ltd.* 191 F 3d 194 (2nd Cir, 1999) ("*Baker Marine*") at 197), such as where following the seat court's decision would violate US public policy.

112 In *TermoRio S.A. E.S.P. and LeaseCo Group LLC v Elecranta S.P.* 487 F 3d 928 (DC Cir, 2007) ("*TermoRio*"), the court held that it would generally defer to decisions of the seat court, reasoning that seat courts have "primary" jurisdiction under the New York Convention whereas enforcement courts only have "secondary" jurisdiction, and the latter should not ordinarily second-guess the primary State's decision (*TermoRio* at 937). This approach is not rooted in the strict application of transnational issue estoppel but instead seems to draw reference from the framework established by the New York

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Convention. It is also based on considerations of comity and the desire to avoid unnecessary re-litigation.

113 A similar approach can be seen in *Thai-Lao Lignite Co Ltd v Government of the Lao People's Democratic Republic* 864 F 3d 172 (2nd Cir, 2017) ("*Thai-Lao Lignite (2nd Cir, 2017)*"). This concerned an award made by an arbitral panel in Malaysia against the Government of the Lao People's Democratic Republic (the "Government of Laos"). The award creditors successfully applied for enforcement of the award in the District Court of the Southern District of New York (as well as other jurisdictions including the UK). Subsequently, the Malaysian seat court annulled the award and ordered that the matter be tried again before a new tribunal (at [180]).

114 Armed with the Malaysian court's setting-aside decision, the Government of Laos returned to the US District Court seeking to vacate its previous judgment ordering the enforcement of the award. The US District Court vacated its previous enforcement decision holding that it would not disregard considerations of comity and instead would act in accordance with the decision of the Malaysian court, unless it was shown that the process before the Malaysian courts "violated basic notions of justice" (*Thai-Lao Lignite (Thailand) Co., Ltd. v Government of Lao People's Democratic Republic* 997 F Supp 2d 214 (SDNY, 2014) at 227). On appeal, the Second Circuit largely followed this analysis and affirmed the decision of the District Court (*Thai-Lao Lignite (2nd Cir, 2017)* at 189). Pertinently, the Second Circuit emphasised the primacy of the seat court (over other enforcement courts, such as the UK, which had enforced the award) (at 191):

> We agree with the District Court that equity favors giving heavier weight to the Malaysian judgment—the decision of the primary jurisdiction—over the English, particularly when the English ruling was so closely related to the District Court's own

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> judgment, which had meantime been vacated. We thus conclude that the District Court did not abuse its discretion in its decision denying enforcement.

115 The courts have thus emphasised that the role of the secondary jurisdiction is not to second-guess the primary court's substantive determinations (*Getma International v Republic of Guinea* 862 F 3d 45 (DC Cir, 2017) at 48) and that a "light touch" approach is used when considering substantive determinations under the law of the primary jurisdiction (*Esso Exploration and Production Nigeria Limited v Nigerian National Petroleum Corporation* 40 F 4th 56 (2nd Cir, 2022) ("*Esso*") at 75; *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v Pemex-Exploración Y Producción*, 832 F 3d 92 (2nd Cir, 2016) ("*Pemex*") at 111). However, a "light touch" approach when considering substantive determinations under the law of the primary jurisdiction does not appear to preclude a US court from considering whether there is an error of law or clearly erroneous finding by the seat court.

116 In *Esso*, the US court deferred to the decisions of the seat court in Nigeria partially setting aside an award, but in doing so had first considered whether the seat court decisions were "*so facially deficient* in their substantive analysis" that they would "merit no respect" and concluded that the seat court's decisions appeared at least on their face "to analyze the relevant issues *rationally* under [its own laws]" and that "the issues appear[ed] *susceptible to reasonable disagreement*" [emphasis added] (at 75).

117 The US courts have, however, recognised a "narrow public policy gloss" on Art V(1)(*e*) of the New York Convention such that primacy will not be accorded to the decision of the seat court if it would be contrary to US public policy (see *TermoRio* at 939). The test to be applied in this context is whether giving effect to the seat court decision would be "repugnant to fundamental

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notions of what is decent and just in the [US]". The public policy exception "accommodates uneasily two competing (and equally important) principles: [i] 'the goals of comity and *res judicata* that underlie the doctrine of recognition and enforcement of foreign judgments' and [ii] 'fairness to litigants'" (*Pemex* at 106). We observe parenthetically that although reference is made in *Pemex* to *res judicata* as a basis for the rule, it seems to us that this is likely to be a reference to a broader interest in finality rather than the technical application of *res judicata* as a preclusive doctrine.

118 In any case, the bar for invoking the public policy exception is a high one that is met only infrequently and only in clear cases. The courts have carefully limited the situations in which a foreign judgment of the seat court may be ignored on grounds of public policy (*TermoRio* at 938; see also, *Compañía De Inversiones Mercantiles S.A. v. Grupo Cementos DeChihuahua S.A.B. De C.V.* 58 F 4th 429 (10th Cir, 2023)). A non-exhaustive list of factors considered in the analysis includes (a) the vindication of contractual undertakings and the waiver of sovereign immunity; (b) the repugnancy of retroactive legislation that disrupts contractual expectations; (c) the need to ensure legal claims find a forum; and (d) the prohibition against government expropriation without compensation (*Pemex* at 107; *Esso* at 73).

119 While there have been some outlier cases where the US courts appear to have applied transnational issue estoppel, referred to as "judicial estoppel" or "issue/claim preclusion" (*Belmont Partners, LLC v Mina Mar Group, Inc.* 741 F Supp 2d 743 (WD Va, 2010) at 750; see also *Karaha Bodas Co., L.L.C. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 364 F 3d 274 (5th Cir, 2004) ("*Karaha Bodas*") at 294, with respect to whether parties may assert a position inconsistent with that taken in the same or earlier proceedings),

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the main trend appears to favour according primacy to the decision of a seat court without necessarily applying transnational issue estoppel.

The provisional position in Singapore

120 In that light, we consider the position in Singapore. As it transpires, for reasons that we will explain shortly, it is not necessary for us in this case to resort to the Primacy Principle.

121 Nonetheless, we make some brief observations so that it might inform the analysis on a future occasion when it may be necessary to rule on the point. At the outset we observe, based on the foregoing review of the case-law that the two doctrines, transnational issue estoppel and something akin to the Primacy Principle have been applied in other jurisdictions. It is not clear to us however, that they should be approached as binary options. 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 and the enforcement of the awards that emanate from this critically important dispute resolution process. This view is aligned with the territorialist view of international commercial arbitration to which we in Singapore, and many other common law jurisdictions, subscribe. The Primacy Principle is also in line with and somewhat advances the principle of comity, which as we have said at [67] above, requires a Singapore court to treat a relevant decision of a foreign court with great respect, though that is a principle without normative force. The Primacy Principle may be understood as building upon the comity principle in the specific context of international arbitration by requiring an enforcement court in Singapore to treat a prior judgment of a seat court as *presumptively determinative* of matters dealt with in that judgment to the extent these pertain

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to the validity of the award. We consider that such a principle would advance the interests of comity, minimise or even avoid inconsistency in judicial decisions and most importantly, it would ensure the finality and overall effectiveness of international commercial arbitration. Further, it would accomplish these ends in a way that accords due weight to party autonomy because the seat court will typically have been chosen by the parties themselves.

122 It seems to us that the doctrinal basis for the Primacy Principle may be found in the rule that the Singapore courts are duty-bound to interpret *our* domestic legislation and hence, develop our common law, as far as permissible, in a way that advances Singapore's international law obligations (see *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489 at [59]), and in line with the observations we have made at [66] above citing *Merck Sharp* at [37], that the common law should as far as possible be developed in a way that coheres with relevant legislation. In the present context, the New York Convention read with the Model Law and the IAA, which recognise the special role and function of the seat court, provide the basis for the Primacy Principle. It seems to us then that the starting position in Singapore should be that where transnational issue estoppel does not apply for some reason, or where a party wishes or chooses to invoke the Primacy Principle for any reason, including 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, it may instead rely on a prior decision of the seat court, and an enforcement court in Singapore should accord primacy to that prior decision of the seat court by treating it as presumptively determinative of the matters dealt with in the judgment pertaining to the validity of the award. Being presumptively determinative, the onus then shifts to the party seeking to

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persuade the enforcement court to come to a different view to establish a sufficient basis for doing so.

123 This would not be an absolute principle and the court would need to resolve the further question of what weight should be placed on the seat court's decision and what the limits of the principle are. It would not be absolute or completely preclusive doctrine precisely because of the instruments that underpin the Primacy Principle, namely the Model Law, the IAA and the New York Convention. The effect of those instruments is that unlike the position with respect to special categories of awards, such as those issued under the auspices of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) 575 UNTS 159 (entered into force 14 October 1966), and which exist within a self-contained system that is not subject to review by national courts, most arbitration awards are subject to the rules for enforcement and challenge in the courts of the country in which enforcement is sought (James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th Ed, 2019) at pp 714–715). And in line with the principle of double-control, it is generally for each enforcing court to determine what weight and significance should be ascribed to challenges before the seat court (*Astro* at [75]).

124 It seems to us that the Primacy Principle would only be applicable where there has been a prior *seat* court decision. A party is not obliged to seek an "active remedy" before a seat court and it retains its "choice of remedies" which includes the option of only exercising its passive remedy of challenging the award before the enforcement court (see *Astro* at [65]–[71]). In the latter situation, it seems to us the Primacy Principle would not arise. This is because the international scheme governing the recognition and enforcement of international arbitration awards accords a special status to the seat court which

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supervises the conduct of proceedings, and which alone has the power to grant the active remedies. Enforcement courts on the other hand do not enjoy any such status, though doubtless what a prior enforcement court has to say about the award will be carefully considered just because it is the pronouncement of another court dealing with the same issues.

125 While the Primacy Principle is not one that we need to invoke in this case, had it been necessary to do so, our likely view would have been to treat the decision of the seat court as presumptively determinative of the matters it dealt with, to the extent these went to the validity of the award. This is so, as we have explained, because those are matters placed within the jurisdiction of the seat court and where that jurisdiction of the seat court, as the primary court supervising the arbitration has been invoked, it would promote the coherence of the international system for the supervision of arbitration to accord such presumptive validity to its determination. The burden, as we have said, then shifts to the party seeking to displace that judgment to say why it ought not to be treated as determinative. This leads to the question of the limits of the principle and in our view, the principal concern is to prevent an issue from being re-argued save in *exceptional circumstances* where this might be warranted (see *Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727 at [9]).

126 The next question pertains to identifying the exceptional circumstances which might warrant a departure from the Primacy Principle. As was pointed out by counsel for India, this is a necessary step because it may otherwise lead to arbitrary outcomes and a lack of predictability as to when a decision of the seat court will or will not be departed from. It would be unwise to attempt to lay down the contours of a principle that is not necessary to decide for the purposes of disposing of the matter that is before us. However, from the submissions that

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were directed to us on this issue, it seems at least three possible limits may be identified, though these are not necessarily exhaustive, and others may be identified as the law develops.

127 The first is where the decision conflicts with the public policy of our jurisdiction. This is well-understood and well-recognised in practice and we need say no more on this.

128 The second is where it can be shown that there were serious procedural flaws in the decision-making process of the seat court itself. This would be akin to failures of natural justice. It would also extend to those situations where to uphold the seat court's decision would be repugnant to fundamental notions of what is just.

129 The third is where the seat court's decision may be shown to be so wrong as to be perverse. This court previously considered the possibility in *Merck Sharp* (at [58]) that transnational issue estoppel might conceivably not apply to foreign judgments that are perverse or that reflect a sufficiently serious and material error. The justification for this may be found in the point we referred to earlier as to the need to balance considerations of comity against the "constitutional role of the recognising court in overseeing the administration of justice and safeguarding the rule of law within its jurisdiction" (*Merck Sharp* at [33]). As to whether an error falling short of being treated as perverse would suffice to displace the principle, we think this should be reserved to a future occasion where it is necessary to dispose of the matter before the court. On the one hand, it may be noted that *Merck Sharp* was concerned with the doctrine of transnational issue estoppel which is a preclusive doctrine once it applies; whereas, the Primacy Principle is a presumptive one. At the same time, a decision of the seat court on a point that was evenly balanced and required

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careful and nuanced arguments or where reasonable judges could readily come to different views might not be readily displaced even under the Primacy Principle. Thus, where the "the issues appear susceptible to reasonable disagreement" and the decision of the seat court is not "so facially deficient in their substantive analysis that [it] merit[s] no respect", the seat court's decision should generally be followed (*Esso* at 75; see above at [116]).

130 By way of summary the Primacy Principle may be understood as follows, subject to further elaboration as the law develops:

(a) 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.

(b) The presumption may be displaced (subject to further development):

(i) by public policy considerations applicable in the jurisdiction of the enforcement court;

(ii) by demonstration:

(A) of procedural deficiencies in the decision making of the seat court; or

(B) that to uphold the seat court's decision would be repugnant to fundamental notions of what the enforcement court considers to be just;

(iii) where it appears to the enforcement court that the decision of the seat court was plainly wrong. The latter criterion is not satisfied by mere disagreement with a decision on which reasonable minds may differ. (As to where in the range between

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those two extremes, an enforcement court may land on, is something we leave open for development.)

Does transnational issue estoppel prevent India from raising the Grounds for Resisting Enforcement?

131 We next consider whether India is indeed estopped from raising the Grounds for Resisting Enforcement that were already canvassed before and determined by the Swiss Federal Supreme Court.

132 We have set out the elements of transnational issue estoppel at [64]–[70] above.

133 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 (*Merck Sharp* at [40]; see above at [69(b)] and [90]).

The Tribunal and seat court's findings on the Grounds for Resisting Enforcement

134 Several of the Grounds for Resisting Enforcement relied on by India were first raised during the Arbitration, and subsequently before the Swiss Federal Supreme Court when it considered the Swiss Setting-Aside Application.

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The Tribunal's findings on the Grounds for Resisting Enforcement in the Interim Award

135 Three of the four Grounds for Resisting Enforcement (namely, the Pre-Investment Argument, the Indirect Investment Argument and the Essential Security Interests Argument) had been considered and dismissed by the Tribunal during the Arbitration. As for the Illegality Argument, India argued by way of the 24 October 2016 Letter to the Tribunal that the charges reflected in the CBI Charge Sheet warranted the suspension of the Arbitration pending their resolution, but the Tribunal declined to accede to this (see above at [28]).

136 The Tribunal did engage with the first three Grounds for Resisting Enforcement, in its Interim Award where it noted (at [120]) as follows:

> [India] has raised three preliminary objections or 'threshold issues', which in its view preclude [DT] from bringing this arbitration. First, it argues that the BIT does not cover indirect investment and indirect investors (A). Second, it asserts that the Treaty does not protect pre-investments (B). Third, India puts forward that the Treaty does not apply as a consequence of the invocation of the 'essential security interest' clause contained in Article 12 (C).

137 With respect to the Indirect Investment Argument, the Tribunal considered two questions (Interim Award at [137]). First, it considered whether the India-Germany BIT requires a national of the home State to hold the relevant assets directly. The Tribunal concluded (Interim Award at [148]–[153]) that the treaty definition of "investment" did not require that assets be held directly by a national of the home State in order for them to qualify as protected investments. Hence, it could instead be held through a subsidiary that was of a different nationality, as was the case here.

138 Next, the Tribunal recognised (Interim Award at [154]) that under Art 5(3) of the India-Germany BIT, the fact that certain assets may qualify as an

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investment and that a national holding those assets indirectly may qualify as an investor did not mean that such national could assert the direct owner's rights over the investment. The Tribunal hence also considered whether a home State national that does not directly own the assets affected by the contested measures could bring a claim under the treaty alleging breaches as a result of those measures. The Tribunal found that as DT was not presenting itself as the beneficiary of the protections owed to its subsidiary but was claiming in respect of the reflective loss it suffered due to India's alleged breach of the treaty obligations protecting DT's investment, Art 5(3) of the India-Germany BIT would not restrict its right to claim for such reflective loss in its own right (Interim Award at [156]).

139 With respect to the Pre-Investment Argument, the Tribunal did not accept India's view that Art 3(1) of the India-Germany BIT required that the host State admit an investment before it could attract protection under the treaty because (Interim Award at [175]):

> Article 3(1) is not a permissive clause authorizing the Contracting States not to admit investments; it stipulates an obligation of admission subject to the law and policy of the host state.

140 The Tribunal also found that even if it were to accept that Art 3(1) of the India-Germany BIT is a permissive clause authorising the host State not to admit investments, India's FIPB and Department of Telecommunications had in fact approved DT's indirect equity participation in Devas and this amounted to the requisite admission (Interim Award at [178]).

141 With respect to the Essential Security Interests Argument, the Tribunal found that Art 12 did not empower India to make this determination on its own without being subject to review and scrutiny by the Tribunal and on the facts, it

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considered that India's decision to annul the Devas-Antrix Agreement and take back the S-band spectrum was not necessary for the protection of the State's essential security interests (Interim Award at [225]–[291]).

The seat court's findings on the Grounds for Resisting Enforcement in the Swiss Setting-Aside Decision

142 These grounds were then canvassed again before the Swiss Federal Supreme Court.

143 In brief summary, the Swiss Federal Supreme Court rejected the Pre-Investment Argument on the basis that Art 3(1) of the India-Germany BIT was not an "admissions clause". It also rejected the Indirect Investment Argument on the basis that the definition of "investment" under Art 1(b) of the India-Germany BIT was wide enough to cover indirect investments held through a subsidiary. The Swiss Federal Supreme Court declined to consider the Illegality Argument because it found that India had forfeited its right to raise this jurisdictional objection, as it had not informed the Tribunal of this objection until its belated 24 October 2016 Letter after the hearing had already concluded and post-hearing briefs were submitted. The Swiss Federal Supreme Court noted that according to the Tribunal's findings, there were circumstances "which were revealing, at least, of suspicions of criminal offences" from as early as 2009 when an anonymous complaint had been received that the S-band spectrum had been leased to Devas as a result of corruption, as well as from media interest in the Devas-Antrix Agreement and the ensuing investigations, reports and memoranda within the Indian administration, and from the arrest of senior officials in the Indian administration in early 2011 before the Devas-Antrix Agreement was terminated in the same month. The Swiss Federal Supreme Court hence found it "difficult to understand" why India did not raise

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such circumstances earlier in the arbitral proceedings. The Swiss Federal Supreme Court finally declined to consider the Essential Security Interests Argument because it considered that this had been advanced as a substantive argument in the Arbitration and did not give rise to a jurisdictional issue. It therefore dismissed India's application. We elaborate further on these points below.

144 In explaining the reasons for its decision, the Swiss Federal Supreme Court began by noting that the Tribunal had dealt with three of the Grounds for Resisting Enforcement and had found that it had jurisdiction to hear the dispute. It then went on to consider all the four Grounds for Resisting Enforcement.

145 First, in relation to the Pre-Investment Argument, the Swiss Federal Supreme Court noted (Swiss Setting-Aside Decision at para 3.2.2.1) that India's criticism was:

> …based on the distinction it allegedly made between two categories of investment treaties: on the one hand, the treaties of the 'right-of-establishment' type, which grant protection to the persons concerned with respect to the establishment of an enterprise in the territory of the host State; on the other hand, treaties of the 'admission-clause' type, which grant their protection only after the establishment of an enterprise has become effective, thereby enabling that State to subject that institution to all the conditions it finds useful and therefore do not include pre-investment activities within their scope.

146 It noted that India's position was that the India-Germany BIT, on the basis of Art 3(1), reserved to the host State the power to determine the conditions for the admission of the investment in question. Since there had been no admission as such, according to India, the activities carried out by Devas and its shareholder were only in the nature of "pre-investment" activities.

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147 The Swiss Federal Supreme Court rejected this argument and noted that the distinction made between investment treaties of the "right-of-establishment" type and the "admission-clause" type was "a categorization that [India] uses on its own initiative". The court did not accept that Art 3(1) empowered the host State to "refuse *ad libitum* the protection of the BIT to an investor" or even "to agree to the proposed investment on a condition unilaterally determined by it and to exclude any protection with respect to activities that have not gone beyond the pre-investment stage". It accordingly rejected the notion that investments had to be specifically admitted in a particular way in order to attract protection under the India-Germany BIT (Swiss Setting-Aside Decision at para 3.2.2.2.1).

148 The Swiss Federal Supreme Court found in the alternative, that even if Art 3(1) had the character of an admission clause and would have authorised India not to admit the investments proposed by DT, the court was bound by the Tribunal's finding of fact that India, by approving DT's indirect investment in Devas, had authorised DT's investment (see above at [140]). Further, India's attempt to characterise DT as "an investor having made only preparatory acts not going beyond 'pre-investment'" was "doomed to failure", as DT was "fully invested in an undertaking within its sphere of competence, whose success was not immediately ensured". In this regard, the Swiss Federal Supreme Court noted that at the point when DT entered the picture through acquiring Devas' shares, Devas and Antrix had concluded the Devas-Antrix Agreement and Antrix had received necessary government approvals "for the construction and launch of the first satellite as well as for the rental of the S-band transponder capacity". As such, DT had incurred expenses while Devas was already benefitting from the Devas-Antrix Agreement, and DT had also provided know-

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how and expertise to Devas as well (Swiss Setting-Aside Decision at para 3.2.2.2.2).

149 Turning to the Indirect Investment Argument, India's position was that since DT's sole investment was the acquisition of shares of DT Asia, which was the actual entity that subscribed for the shares in Devas, the investment "would not enter into the BIT's forecasts, given its indirect nature" (Swiss Setting-Aside Decision at para 3.2.1.1). The Swiss Federal Supreme Court rejected this and held that (Swiss Setting-Aside Decision at para 3.2.1.2.5):

> … nothing in the text of the BIT gives the impression that the contracting parties sought to restrict in any way the scope of the notion of investment, except from the incorrect assumption, suggested by [India], that this notion does not embrace indirect investments in the absence of a clause that would expressly include them…

150 Next, the Swiss Federal Supreme Court considered the Illegality Argument, essentially finding that India had forfeited its right to raise this jurisdictional challenge as it was not brought timeously before the Tribunal. There were two dimensions to this. First, there was the alleged wrongfulness of the Devas-Antrix Agreement itself; next, India also alleged that it had not been permitted to adduce the evidence it wanted to adduce in this respect before the Tribunal, in light of the Tribunal's rejection of India's requests in its 24 October 2016 Letter to suspend the arbitral proceedings, to advance a new jurisdictional objection of alleged illegality based on the CBI Charge Sheet and to file new factual evidence including the CBI Charge Sheet (Swiss Setting-Aside Decision at para 4; see also Interim Award at [115]–[119]). The Swiss Federal Supreme Court found that India had forfeited its right to argue that the Tribunal lacked jurisdiction on this basis. The court considered that India should have taken these points promptly before the Tribunal but did not do so "in its submissions in the arbitration, or during the hearing of April 2016, or in its post-hearing brief

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of June 10, 2016, preferring instead to wait until October 24, 2016, to inform the Arbitral Tribunal" (Swiss Setting-Aside Decision at para 4.4.2). The Swiss Federal Supreme Court therefore concluded that the jurisdictional defence based on Arts 1(b) and 3(1) of the India-Germany BIT had been forfeited (Swiss Setting-Aside Decision at paras 4.4.2–4.4.3).

151 The Swiss Federal Supreme Court also relied on, among other things, the Tribunal's confirmation that the CBI Charge Sheet contained "only allegations and charges that were not yet decided" (Swiss Setting-Aside Decision at para 4.4.2).

152 Finally, the Swiss Federal Supreme Court considered India's Essential Security Interests Argument. This was to the effect that (Swiss Setting-Aside Decision at para 3.2.3.1):

> …first, that Art. 12 of the BIT imposes a condition relating to the jurisdiction of the arbitral tribunal; second, that the Arbitral Tribunal improperly applied that treaty provision; third, that the measures taken by it were intended to protect its 'essential security interests'; fourth, that the Arbitral Tribunal erred in considering that the disputed measure was not 'necessary' within the meaning of the same provision.
>
> [emphasis in original omitted]

153 The Swiss Federal Supreme Court rejected India's argument, noting that India had never argued before the Tribunal that Art 12 of the India-Germany BIT concerned the *jurisdiction* of the Tribunal (Swiss Setting-Aside Decision at paras 3.2.3.3.1–3.2.3.4):

> It must first be noted with [DT] that [India] never argued once before the Arbitral Tribunal that Art. 12 of the BIT concerned the jurisdiction of the Tribunal.
>
> …
>
> It follows from these considerations that [India] is precluded from raising, before the [Swiss Federal Supreme Court], the

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> arguments of lack of jurisdiction of the Arbitral Tribunal in connection with Art. 12 of the BIT.
>
> …
>
> As the issue of essential security interests did not fall within the question of the jurisdiction of the Arbitral Tribunal in this case, the argument of a breach of Art. 190(2)(b) PILA, even if [India] had not been barred from raising it … would nonetheless have been declared inadmissible on that basis. Moreover, the interested party does not rely on other grounds in relation to Art. 12 of the BIT.

154 The Grounds for Resisting Enforcement which are raised before us have therefore been considered and dismissed previously by the seat court, which affirmed the decision made by the Tribunal to the extent that these issues had also been raised at the Arbitration. The question then is whether we, as an enforcement court coming to these issues subsequently, are precluded from considering the merits of these same arguments where the seat court has already considered and ruled on them.

Whether the requirements for transnational issue estoppel to arise are met

155 We first examine whether the requirements for transnational issue estoppel laid down in *Merck Sharp* have been satisfied.

First limb: Whether there was 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

156 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*. This is because it would be illogical for a court to treat a judgment of a foreign court as final and binding if that court would not regard its own decision as final and binding (*Merck Sharp* at [41], citing *Carl Zeiss* at 919). Further, it will be necessary to draw a

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distinction between (a) whether the foreign judgment *as a whole* is final and conclusive; and (b) whether the decision on a *specific issue* is final and conclusive (*Merck Sharp* at [41]). The former is a necessary but commonly insufficient condition, in that it will usually also be necessary to take the inquiry further and establish that the actual issue that is now being raised has already been considered and conclusively determined (*Merck Sharp* at [43]). This is especially significant in relation to certain jurisdictions and systems of law under which it may in certain circumstances only be the result that the court has arrived at in a judgment that is considered final and binding but not the "reasons, intermediate steps or other elements" that led to that result even if they are stated in the judgment. In such a setting, even essential parts of the reasoning may not be final and binding under the system of law that gave rise to the foreign judgment in question (see for instance, *MAD Atelier*). It is therefore necessary to be alive to inter-jurisdictional differences and to consider expert evidence, where available, on the position under the law of the foreign jurisdiction in question (*Merck Sharp* at [43]).

157 In CAS 1, India's main contention is 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, and that the same is not true in relation to the factual findings, legal determinations, reasons or rulings that are contained in or that led to that decision. Both parties adduced expert evidence on this and the respective legal experts offered somewhat seemingly different opinions on this.

158 The SICC concluded as follows (*OS 8 Judgment* at [152]):

> Accordingly, apart from an application for revision under Swiss law based on material evidence that could not previously have been adduced, India is precluded from challenging the Tribunal's jurisdiction on the grounds that the Swiss Federal

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> Supreme Court rejected. This is by operation of the doctrine of *res judicata*, rather than because it is estopped by the Swiss Federal Supreme Court's findings on discrete issues. As Prof Müller stated: 'Consequently, the effect of the Federal Supreme Court's rejection of India's Application against the Interim Award is simply that India cannot file another application in Switzerland to set aside the Interim Award or the Final Award on the same grounds as traversed in India's Application against the Interim Award.'

159 Prof Müller was India's expert. The SICC's decision rested on its conclusion that the decision of the Swiss Federal Supreme Court could not be revisited by any Swiss court on the same grounds that India had already put forward and the sole exception to this was by way of an application for revision based on new and previously unavailable evidence. The SICC considered this to be the effect of Prof Müller's evidence. Before us, India submits that the SICC failed to consider another part of Prof Müller's opinion which was to the effect that the factual and legal determinations in the Swiss Setting-Aside Decision do not have *res judicata* effect and are not final, conclusive and/or binding under Swiss law. We disagree. To explain this, it would be helpful to set out the experts' analysis as to which parts of the Swiss Setting-Aside Decision would have *res judicata* effect under Swiss law.

160 In his expert report, Prof Müller stated that:

> 18. The only part of the [Swiss] Federal Supreme Court's Decision that has *res judicata* effect under Swiss law is the determination that the Interim Award should not be set aside.
>
> 19. The fact that the [Swiss] Federal Supreme Court rejected India's [Swiss Setting-Aside Application] does not mean that it confirmed the Interim Award (in particular, the operative part of the same).
>
> 20. All factual and legal considerations, *obiter dicta*, preliminary issues and implied decisions in the Decision of the [Swiss] Federal Supreme Court do not have *res judicata* effect.

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161 He then went on to explain that although Art 61 of the Federal Law on the Federal Supreme Court of 17 June 2005 provides that decisions of the Swiss Federal Supreme Court become *res judicata* on the day they are delivered, this only applies to decisions that dispose of and conclude the proceedings and not to determinations made in the course of the proceedings, such as orders for advance payments of costs, decisions on evidentiary measures or other incidental rulings. Further, the term "*res judicata*" in Art 61 covers firstly the concept of formal *res judicata* (where only *extraordinary* means of recourse like a request for revision or interpretation may be brought against the decision) and secondly the concept of substantive *res judicata* (where the matters decided in a decision cannot become the subject of later proceedings between the same parties concerning the same subject matter). According to Prof Müller, substantive *res judicata* may be understood as having two effects – a negative effect in that a subsequent court cannot proceed with a new action when the subject matter of the dispute has already been the subject matter of a decision that has *res judicata* effect, and a positive effect in that any court seized by another case and called upon to give a preliminary ruling on the question decided by the decision having *res judicata e*ffect is bound by the operative part of that decision.

162 Prof Müller also explained that with respect to the *res judicata* effect of decisions of the Swiss Federal Supreme Court, a new appeal on the same grounds is not admissible. In line with this, where the Swiss Federal Supreme Court has remanded or referred the case to a court within a cantonment for further consideration, that court cannot entertain and the parties cannot put forward pleas that were rejected in the Swiss Federal Supreme Court's referral decision and this extends to the reasoning of the Swiss Federal Supreme Court. However, if the appeal had been rejected by the Swiss Federal Supreme Court

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without being remitted for further consideration, then it would only be the operative part of the decision, and not its reasoning, that would have substantive *res judicata* effect. It is only if the operative part expressly refers to a particular finding, that that finding would become an integral part of the operative part of the decision and have *res judicata* effect. Save to this extent, factual findings, legal reasons, preliminary determinations and the like would not have *res judicata* effect.

163 Prof Müller further opined that in the specific context of an application to set aside an arbitral award, the *res judicata* effect of the Swiss Federal Supreme Court's rejection of such a setting-aside application is limited:

> In the event that the [Swiss] Federal Supreme Court rejects an application to set aside an arbitral award, this does not mean that the arbitral award is either confirmed or even replaced by the decision of the [Swiss] Federal Supreme Court. Hence, *in the present case, the fact that the [Swiss] Federal Supreme Court rejected India's Application pursuant to Article 77 [Federal Law on the Federal Supreme Court of 17 June 2005] against the Interim Award does not mean that it confirmed the Interim Award (in particular, the operative part of the same), or that the Decision of the [Swiss] Federal Supreme Court replaced the Interim Award.*
>
> [emphasis added]

164 On this basis, he concluded that the only part of the Swiss Federal Supreme Court's decision that has positive *res judicata* effect under Swiss law is the determination that the Interim Award should not be set aside, and that the negative *res judicata* effect of the Swiss Setting-Aside Decision is only that India cannot file another application in Switzerland to set aside the Interim Award or the Final Award on the same grounds as it had raised in its Swiss Setting-Aside Application.

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165 Even taking Prof Müller's opinion at its highest, we are unable to accept India's argument that the Swiss Setting-Aside Decision is not a final and conclusive decision for the purpose of invoking the doctrine of transnational issue estoppel. At the outset, we note that unlike the position in *MAD Atelier* where it was found that no legal doctrine existed that would clothe the foreign judgment in question with any preclusive effect, the doctrine of substantive *res judicata* is recognised in Swiss law and its effect varies in different situations.

166 Prof Müller's acceptance that a renewed application for setting aside based on the same grounds would be inadmissible in light of the Swiss Setting-Aside Decision, suggests that the Swiss Setting-Aside Decision *as a whole* as well as those grounds that had been unsuccessfully raised were final and conclusive before the Swiss courts and could not be raised or ventilated afresh (see above at [156] and [163]–[164]). Prof Müller's view that the rejection of the Swiss Setting-Aside Application does not amount to a confirmation of the validity of the Interim Award does not change the analysis because the SICC's finding was not that India was estopped from arguing that the Interim Award was invalid *at all*, but only that India was estopped from raising the same *grounds* for invalidity as those it had raised before the Swiss Federal Supreme Court.

167 Further, we note that Prof Müller maintained that substantive *res judicata* only attaches to the *operative part* of the reasoning, and that this entails a determination of "the subject-matter of the application (that is, the factual situation that gave rise to it) and what the court actually decided". Prof Müller then cited several cases and articles which were exhibited in the annexes to his expert report. These seem to us to suggest that the reasons in a decision *may* be relevant where (a) they are necessary to make sense of the decision; and (b) they establish that the subject matter of the decision and a new dispute are the same.

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In our judgment, this cuts against India's case. First, without reference to the reasons set out in the Swiss Setting-Aside Decision, it is simply not possible to make sense of the Swiss Federal Supreme Court's dismissal of the Swiss Setting-Aside Application. More pertinently, recourse to those reasons is precisely what demonstrates 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. It seems to us that this is precisely in line with Prof Müller's view that we have summarised at [163]–[164] above, to the effect that India is precluded under Swiss law from setting aside the Award *on the same grounds* as it had raised in its Swiss Setting-Aside Application.

168 We also note that this was the effect of the evidence of DT's expert, Mr Pierre-Yves Tschanz ("Mr Tschanz"), who contended that the Swiss Federal Supreme Court's decision is final and conclusive in that the issue of the tribunal's jurisdiction cannot be re-litigated before the Swiss courts.

169 Mr Tschanz first contended that the Swiss Federal Supreme Court as the seat court has exclusive jurisdiction to decide whether the arbitral tribunal had jurisdiction to make the award. Mr Tschanz opined that an enforcement court would only depart from the decision of the seat court to set aside an award or to dismiss a setting-aside application in "exceptional" situations, and usually only when the seat court and the enforcement court are applying different laws to the existence and scope of the arbitration agreement. In treaty-based arbitration, where the consent to arbitrate in the relevant treaty would be governed by international law, there would be no question of a different system of law applying and so the decision of the seat court would effectively be conclusive.

170 In support of this, Mr Tschanz highlighted two judgments rendered by the Swiss Federal Supreme Court ("4A_244/2019" and "4A_246/2019") which

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involved an award issued in an investment treaty arbitration between Russia and a number of Ukrainian companies. It is relevant to set out the relevant chronology of the facts:

(a) The arbitral tribunal seated in Switzerland rendered an award on *jurisdiction* on 26 June 2017, finding that it had jurisdiction to adjudicate the claim under the relevant bilateral investment treaty.

(b) The defendant challenged the tribunal's jurisdiction over the dispute in a setting-aside application made to the Swiss court. In its judgment of 16 October 2018, the Swiss Federal Supreme Court dismissed the setting-aside application raised by the defendant, finding that the tribunal had jurisdiction.

(c) The final award on liability and damages was then rendered by the arbitral tribunal on 12 April 2019.

(d) Thereafter, the defendant filed an application to set aside the final award, and again contended that the tribunal had no jurisdiction over the dispute. The Swiss Federal Supreme Court dismissed this setting-aside application on 12 December 2019 as the issue of the arbitral tribunal's jurisdiction was considered to be *res judicata*.

171 In particular, the Swiss Federal Supreme Court held in 4A_244/2019 (at para 4.2) that the prior determination on the issue of the arbitral tribunal's jurisdiction was *res judicata* and could no longer be challenged:

> The correct view is that the *Appellant is once again disputing the Arbitral Tribunal's jurisdiction. … However, the [Swiss Federal Supreme Court] has already ruled on the jurisdiction of the Arbitral Tribunal* in its Judgment 4A_396/2017 of October 16, 2018 (BGE 144 III 559), in which it dismissed the appeal filed by the Appellant against the interim award to the extent the

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> matter was capable of appeal. In making this finding, the [Swiss Federal Supreme Court] found that the grievance that consideration of subsequent border shifts would have required a further agreement between the Parties to the Contract under Art. 13 of the 1998 BIT was not well-founded; in addition, it also expressly held that the Arbitral Tribunal had rightly found that the territory of the Crimean Peninsula was to be regarded as part of the 'territory' of the Appellant within the meaning of Art. 1(4) 1998 BIT and was covered by the territorial scope of that Agreement (BGE 144 III 559 at 4.3.2). ***Because the [Swiss Federal Supreme Court] has already issued a* res judicata *ruling on this point, the jurisdiction of the Arbitral Tribunal can no longer be challenged by appeal against the final Award.***
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

172 While we do not express a view on Mr Tschanz's view that a seat court has *exclusive* jurisdiction over the arbitral tribunal's jurisdiction in the context of treaty-based arbitration, the decision of the Swiss Federal Supreme Court that we have referred to in the previous paragraph does support the conclusion that 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.

173 Prof Müller responded to this by reference to *Dallah v Pakistan* where an English enforcement court and the French seat court came to different conclusions on whether the defendant ("Pakistan") was bound by the arbitration clause. However, in *Dallah v Pakistan*, Pakistan had not yet sought to challenge the award before the supervisory court in France at the time when it applied to set aside the English court's order granting leave to enforce the relevant arbitration award (see *Dallah v Pakistan* at 763). In fact, the Paris Court of Appeal had disposed of the matter only *after* the English enforcement court (in particular, the United Kingdom Supreme Court) had given its decision. This case hence does not shed light on whether an enforcement court is barred from

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reconsidering jurisdictional arguments already raised in a prior setting-aside application. Moreover, *Dallah v Pakistan* tells us nothing about how the *Swiss courts* would decide the issue. Our concern is to ensure that the Singapore enforcement court is not giving greater preclusive effect to the Swiss Setting-Aside Decision than would be accorded under Swiss law (*Merck Sharp* at [43]). Mr Tschanz's analysis, in our judgment, establishes that the Swiss Federal Supreme Court is unlikely to conduct a subsequent review of the arbitral tribunal's jurisdiction at the enforcement stage under *Swiss law*.

174 For these reasons and having considered the expert opinions that were placed before us, we are satisfied that a subsequent Swiss court would not reconsider India's Grounds for Resisting Enforcement, these having already been considered and rejected in the Swiss Setting-Aside Decision. We therefore conclude that the Swiss Setting-Aside Decision is final and conclusive for the purposes of transnational issue estoppel.

Second and third limbs: Identity of parties and identity of subject matter

175 We briefly note that the remaining two limbs of the *Merck Sharp* test are clearly made out in the present appeal. There is patent identity of the parties and the Grounds for Resisting Enforcement in CAS 1 are the same as those relied on before the seat court (see above at [142]–[154]).

176 We are therefore satisfied that India is precluded from re-litigating the Illegality Argument, the Pre-Investment Argument, the Indirect Investment Argument and the Essential Security Interests Argument in the present appeal. That is sufficient to dispose of the appeal.

177 For completeness, we note that while there may be exceptions to the doctrine of transnational issue estoppel as was recognised in *Merck Sharp*, none

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of those exceptions arise in this case. *Merck Sharp* suggests potential limitations or control or gatekeeping mechanisms which may define the outer boundaries of transnational issue estoppel (at [54]–[58]):

> (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 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.

178 None of these exceptions apply here. Exceptions (a) and (b) do not apply given that this issue arises in the context of international commercial arbitration and concerns a prior decision of the seat court, which in and of itself would suggest it enjoys primacy. Exception (c) does not arise since the seat was chosen by both parties. With respect to exception (d), we see no reason for thinking that the Swiss Federal Supreme Court's decision is either contrary to our public policy or obviously wrong to the extent of being perverse.

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The Primacy Principle does not arise in this case

179 It is therefore unnecessary to consider the Primacy Principle.

Was the SICC correct in dismissing the Grounds for Refusing Enforcement?

180 It follows from this that the SICC was correct to dismiss India's application, and we need say nothing more on this. The SICC did go on to consider the merits of India's arguments, but it is not necessary for us to do so.

Did DT discharge its duty of full and frank disclosure?

181 Finally, we briefly consider India's argument that DT had not made full and frank disclosure in OS 900. There is no merit in this argument and the SICC was correct to dismiss it.

182 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 "Vasiliy Golovnin" [2008] 4 SLR(R) 994 at [83]). What this entails is the disclosure of all material facts, with the test of materiality being an objective inquiry into whether the fact that has not been disclosed would have been relevant to the question of whether or not to grant the application. 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 an assessment of all the facts and circumstances in the case and does not, for instance, require the applicant to disclose every document that may be disclosable in the course of discovery (at [86]–[88]).

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183 In our judgment, it sufficed for DT to have made reference to the Swiss Setting-Aside Application and the Swiss Setting-Aside Decision (see *OS 8 Judgment* at [115]). The affidavit filed in support of OS 900 stated as follows:

> On 29 January 2018, India applied to the Swiss Federal Supreme Court to set aside the Interim Award. On 11 December 2018, the Swiss Federal Supreme Court – the highest court in Switzerland – rejected India's application to set aside the Interim Award, finding that the Tribunal had correctly concluded that it had jurisdiction under the BIT, and that it had conducted the Arbitration proceedings fairly. A copy of the Swiss Court's Decision in Case No. 4A_65/2018, Swiss Federal Supreme Court, Judgment of 11 December 2018 is exhibited at Tab 5 of IR-1.
>
> [emphasis in original omitted]

184 In the context of this application, it was not necessary for DT to detail all the arguments that had been made by India or to speculate on whether India might rely on the same grounds in enforcement proceedings in Singapore. In any case, the decision of the Swiss Federal Supreme Court was annexed to the affidavit.

185 India separately submits that DT should have disclosed India's claim to state immunity and its other jurisdictional defences because DT had been made aware of India's Grounds for Resisting Enforcement by way of parallel enforcement proceedings in the US (the "US Proceedings"). In support of this submission, India exhibited a joint motion dated 23 July 2021 that was filed in the US Proceedings, in which India stated that it "objects to the jurisdiction of this Court". However, beyond mentioning that India will object to the court's jurisdiction, the joint motion does not furnish further details of or reasons for India's objection. We therefore do not think that this would have been material to the determination of OS 900.

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186 India also submits that the NCLT Decision was relevant to India's Illegality Argument. However, we agree with DT's submission that since DT was not party to the proceedings before the NCLT and since those were winding-up proceedings we do not see any failure to disclose the NCLT decision as being material.

187 Therefore, we affirm the SICC's decision that DT had *not* failed to meet its duty of full and frank disclosure.

Conclusion

188 We therefore dismiss the appeal.

189 With respect to costs, the SICC Rules 2021 apply. Order 22 r 3 of the SICC Rules 2021 provides that the quantum of costs sought by a successful party is subject to the principles of proportionality and reasonableness, having regard to factors such as the complexity of the case and the difficulty or novelty of the questions involved. Given the commercial consideration underlying the costs regime in the SICC, an award of costs is generally intended to restore or compensate the other party for the expense it had incurred in the legal proceedings as long as this had been incurred in sensibly mounting his claim or defence (*Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [52]).

190 In relation to CAS 1, both India and DT sought costs of $130,000 plus disbursements. Given the voluminous documents referred to, the number of issues canvassed and the need to consider some complex and/or novel points of law, we order that DT is to have costs fixed at $130,000, plus disbursements that are to be agreed, and failing agreement within 21 days, the parties may write in seeking that we fix the disbursements.

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191 The costs of SUM 4 were reserved to the hearing of CAS 1, and as SUM 4 did not involve many documents and was determined without oral arguments, we fix the costs and disbursements of SUM 4 in the aggregate sum of $6,000, in favour of DT.

192 We make no order as to the costs of SUM 12.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Robert French
International Judge

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Jonathan Hugh Mance IJ (delivering a concurring opinion):

193 For the reasons given by Chief Justice Menon, I agree that this appeal should be dismissed on the ground that India is precluded by transnational issue estoppel and by the judgment of the Swiss Federal Supreme Court from relitigating the issues which it seeks to raise on this appeal.

194 I add a few words on the significance of decisions of courts of the seat. The subject is addressed in [103] to [130] above of Chief Justice Menon's judgment. A prior decision of a court of the seat will, undeniably and rightly, receive the closest attention from any enforcement court, whether or not it gives rise to any form of preclusive effect. A prior decision of a prior enforcement court may also be expected to merit close attention.

195 Whether any prior decision has preclusive effect depends upon whether it gives rise to an issue estoppel or, failing that, upon whether, under the principle in *Henderson v Henderson* (1843) 3 Hare 100 ("*Henderson v Henderson*"), any challenge to it is viewed as an abuse of process.

196 The application of the principle of issue estoppel to foreign decisions is now well-established, even if it is to take place "with caution" (see *Carl Zeiss* at 967) and in a more relaxed fashion than in respect of prior domestic decisions (see *Phipson on Evidence* (Hodge M Malek gen ed) (Sweet & Maxwell, 20th Ed, 2022) ("*Phipson on Evidence*") at paras 43-08 and 43-68). The conditions for a domestic issue estoppel and for a transnational issue estoppel have been set out above in, respectively, [63] and [64] of Chief Justice Menon's judgment. The defences to recognition of an issue estoppel arising from a prior foreign judgment extend to its obtaining by fraud or duress or against natural justice or

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to its recognition being against domestic public policy: see *Phipson on Evidence* at paras 43-08 and 43-68.

197 The principle of abuse of process is a flexible one (see *Phipson on Evidence* at para 43-44). But it has been held that, where, for some reason, a foreign judgment does not give rise to any issue estoppel (*eg*, where the parties or issues are not the same), then it would "in general, be rare" for any challenge to it to be abusive within the principle of *Henderson v Henderson*: see *Standard Chartered Bank (Hong Kong) Ltd and another v Independent Power Tanzania Ltd and others* [2016] 2 Lloyd's Rep 25 at [41], followed in *MAD Atelier* at [81].

198 The question is whether and how the addition of a Primacy Principle to the court's armaments could fit into the picture.

199 I make several points in this connection. First, the Primacy Principle is envisaged as effectively shadowing the whole area covered by issue estoppel and *Henderson v Henderson* and going potentially still wider. It would be available either (see above, [122] of Chief Justice Menon's judgment):

> … where transnational issue estoppel does not apply for some reason, or where a party wishes or chooses to invoke the Primacy Principle for any reason, including 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 …

However, even if one party wished to avoid considering whether the principle of issue estoppel (or that of *Henderson v Henderson*) applied, it would surely remain relevant for the other party to point to any respects in which the conditions for issue estoppel (as set out above in [64] of Chief Justice Menon's judgment) or for the application of *Henderson v Henderson* were not met, as

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reasons why there should be no presumptive following of the court seat decision. Whether or not there was an issue estoppel, or indeed abuse of process, could therefore still be very relevant.

200 Second, and linked with the first point, the suggested Primacy Principle would not be an absolute principle (see above at [123]), but rather a presumptive principle, capable of disapplication (subject to further elaboration) in situations suggested in [130]. Those situations largely mirror those in which there would be defences to recognition of an issue estoppel (see the last sentence of [196] above). The further suggested defence (that the prior decision was plainly wrong: see [130(b)(iii)]) may go further than any defence to issue estoppel. Again, it could be relevant to consider whether the basic conditions for an issue estoppel set out in [64] were satisfied. If they were, then such an estoppel should be given effect, irrespective of the position under the Primary Principle. If they were not, the case for treating the prior seat court decision as even presumptively conclusive would diminish.

201 Third, a Primacy Principle would, by definition, and whatever its qualifications, draw a sharp distinction between prior decisions of a seat court and prior decisions of another enforcement court, creating a special principle for the former alone: see [124]. This distinction would be accentuated if the principle of transnational issue estoppel were, for some reasons, held not to be available in relation to prior decisions of another enforcement court: see [92]. I am not convinced that so sharp a distinction is necessarily appropriate. The principles of issue estoppel and *Henderson v Henderson*, and, indeed, the common sense respect which any court wishes to give to any other court's reasoning and judgment in the same or an associated area, all seem to me to be as potentially relevant between successive enforcement courts as between an enforcement court and a prior seat court. They all also seem to me flexible

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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. The 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.

202 The seat and its courts certainly occupy a special place in international arbitration, but the question is whether this calls for recognition of a Primacy Principle, in addition to existing tools. The special place which the seat occupies is associated with the hallmark of arbitration, party autonomy, because the seat will have been chosen by, or by a process chosen by, the parties. The parties thereby submit themselves to whatever supervision over arbitration may be exercised by courts seated within the relevant jurisdiction. In some jurisdictions, such as the English and Welsh, the local arbitration legislation may (albeit rarely) permit substantive appeals. Whether an award of the seat stands or not therefore depends on the domestic law of the seat, involving considerations going well beyond the jurisdictional and procedural matters referred to in Art V of the New York Convention.

203 Articles III and V of the New York Convention provide for the recognition and enforcement of an award made in another Contracting State, save in strictly delimited circumstances. One such circumstance is under Art V(1)(*e*) that the award "has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made". Under Art VI, a court before which enforcement is sought may also adjourn its decision pending the outcome of any application to set aside or suspend which has been made to a competent authority referred to in Art V(1)(*e*).

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204 Article V(1) of the New York Convention says that, where one of such circumstances applies, recognition and enforcement "may be refused". But this cannot involve an open discretion. The phrase does no more than reflect a possibility that there may, exceptionally, be good reasons for refusing to recognise or enforce an award emanating from a court referred to in Art V(1)(*e*). Both English and US authorities establish as much, although none of them examines whether Art V(1) achieves, in effect, anything different from what would flow from the principle of issue estoppel supplemented by that in *Henderson v Henderson* in circumstances where a losing party seeks to relitigate in an enforcement court a challenge which has unsuccessfully been made, or could have been made, in prior proceedings in the seat.

205 With regards to the phrase "may be refused", Lord Collins said in *Dallah v Pakistan* at [127] that:

> Since section 103(2)(b) gives effect to an international convention, the discretion should be applied in a way which gives effect to the principles behind the Convention. One example suggested by *van den Berg*, op cit, p 265, is where the party resisting enforcement is estopped from challenge, which was adopted by Mance LJ in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326, para 8. But, as Mance LJ emphasised at para 18, there is no arbitrary discretion: the use of the word "may" was designed to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have an award set aside arising in the cases listed in section 103(2). See also *Kanoria v Guinness* [2006] 1 Lloyd's Rep 701, para 25 per Lord Phillips CJ. …

206 A body of US authority has developed the point and required some clear "public policy" basis or need "to vindicate 'fundamental notions of what is decent and just' in the United States" before enforcement of an award set aside in the seat: see *Baker Marine*; *TermoRio*; *Thai-Lao Lignite (2nd Cir, 2017)*; *Pemex* at 107; and *Esso* at 73.

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207 All these five US authorities were decided under Art V(1)(*e*) of the New York Convention as applicable under US Federal Law, in circumstances where the award had been set aside in the seat. In only one of these authorities (*ie*, in *Pemex*) did the US enforcement court find the requisite repugnancy to US basic notion of justice or public policy to justify enforcement despite the judgment setting aside the award in the seat. The violation in *Pemex* consisted in the retrospective application of a law not in existence at the time of the contract, the effect of which was to favor a state enterprise over a private party and to leave that party without any remedy for its claims.

208 Courts of the seat have therefore a different role from those of an enforcement court. The difference was neatly explained in terms of "primary" and "secondary" roles in *Karaha Bodas* (at 287–288), cited by Chief Justice Menon in [119]:

> The Convention 'mandates very different regimes for the review of arbitral awards (1) in the [countries] in which, or under the law of which, the award was made, and (2) in other [countries] where recognition and enforcement are sought.' Under the Convention, 'the country in which, or under the [arbitration] law of which, [an] award was made' is said to have primary jurisdiction over the arbitration award. All other signatory states are secondary jurisdictions, in which parties can only contest whether that state should enforce the arbitral award. …
>
> … *In contrast to the limited authority of secondary-jurisdiction courts to review an arbitral award, courts of primary jurisdiction, usually the courts of the country of the arbitral situs, have much broader discretion to set aside an award. While courts of a primary jurisdiction country may apply their own domestic law in evaluating a request to annul or set aside an arbitral award, courts in countries of secondary jurisdiction may refuse enforcement only on the grounds specified in Article V.*
>
> The New York Convention and the implementing legislation, Chapter 2 of the Federal Arbitration Act ("FAA"), provide that a secondary jurisdiction court must enforce an arbitration award unless it finds one of the grounds for refusal or deferral of recognition or enforcement specified in the Convention.

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> [emphasis added]

209 Similarly, the US Court of Appeals said in *TermoRio* (at 937):

> … appellants are simply mistaken in suggesting that the Convention policy in favor of enforcement of arbitration awards effectively swallows the command of Article V(1)(e). A judgment whether to recognize or enforce an award that has not been set aside in the State in which it was made is quite different from a judgment whether to disregard the action of a court of competent authority in another State. '*The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief*.' *Yusuf Ahmed Alghanim & Sons*, 126 F.3d at 23; see also *Karaha Bodas II*, 364 F.3d at 287-88. This means that a primary State necessarily may set aside an award on grounds that are not consistent with the laws and policies of a secondary Contracting State. The Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment of a court in a primary State, when the court in the primary State has lawfully acted pursuant to 'competent authority' to 'set aside' an arbitration award made in its country. Appellants go much too far in suggesting that a court in a secondary State is free as it sees fit to ignore the judgment of a court of competent authority in a primary State vacating an arbitration award. It takes much more than a mere assertion that the judgment of the primary State 'offends the public policy' of the secondary State to overcome a defense raised under Article V(1)(e).
>
> [emphasis added]

210 The terminology of "primary" and "secondary" courts recognises the broader role under the New York Convention of courts of the seat compared with that of enforcement courts. But it does not address the present question, which is the approach to be taken by an enforcement court, when an award has not yet been set aside in the seat. It is well established that, in this situation, a party resisting enforcement may raise jurisdictional or procedural challenges within the limits permitted by the Convention, without having raised or explored these before the courts of the seat: see *Astro* at [63]–[64] and [75].

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211 The key question, raised by the present appeal, is how enforcement courts should address situations where a challenge has been made and has failed in the courts of the seat. The New York Convention provides grounds on which enforcement may be resisted, but does not give guidance on this question. There is nothing in it even to give a prior decision of the court upholding an award a similar status to that which a decision of a seat court setting aside an award has under Art V(1)(*e*). More fundamentally, as already noted ([204] above), there is nothing in Art V(1)(*e*) to suggest that its effect differs necessarily from that which would follow from the principles of issue estoppel and of *Henderson v Henderson* in circumstances where the challenge raised in the enforcement court was or could have been raised in the seat court.

212 The common law tool of issue estoppel is, as Chief Justice Menon demonstrates, readily available when the issue in both jurisdictions is in essence the same, so that the decision by the court of the seat can be seen effectively to have decided that there are no circumstances which could or should preclude recognition and enforcement under Art V. Issue 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 see *Arnold* at 107 and 109; *Merck Sharp* at [62]; and *PAO Tatneft* at [34]. The additional procedural power recognised in *Henderson v Henderson* to restrain abuses of process is again closely responsive to circumstances in the rare circumstances where it is appropriate for use in relation to a foreign judgment not giving rise to an issue estoppel (see [197] above).

213 In the recent case of *Union of India v Reliance Industries Ltd and another* [2022] EWHC 1407 (Comm) at [54]–[63], Sir Ross Cranston usefully summarised the nature and operation of these legal tools, holding at [61] that it was "clear that the *Henderson v Henderson* principle applies in the conduct of

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both arbitral and court proceedings", being in that case a procedural power of the English law of the seat. The same applies in the case of the present Singaporean proceedings. Sir Ross Cranston went on to refer to the leading United Kingdom Supreme Court cases of *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160 and *Takhar v Gracefield Developments Ltd and others* [2020] AC 450, and to quote from Lord Sumption's judgment in the latter, where he said, at [62]:

> … Since the decisions of the House of Lords *in Arnold v National Westminster Bank plc* [1991] 2 AC 93 and *Johnson v Gore Wood & Co* [2002] 2 AC 1 it has been recognised that where a question was not raised or decided in the earlier proceedings but could have been, the jurisdiction to restrain abusive re-litigation is subject to a degree of flexibility which reflects its procedural character. This allows the court to give effect to the wider interests of justice raised by the circumstances of each case.

214 The two tools of issue estoppel and the power in *Henderson v Henderson* are, in my opinion and as this passage indicates, available and sufficient to enable justice to be done in cases where there has been a prior decision either of a court of the seat or of another enforcement court. Inherent in the suggestion of a Primacy Principle is the proposition that a decision of the former enjoys a special legal status which the latter lacks. I am not at present persuaded that, in this respect, a special legal status does exist.

215 I see in any event 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. Similarly, as it seems to me, there is no obstacle in legal principle to arguments of abuse of process arising in both contexts. I note that in *Carpatsky* at [126] (not cited before us), Butcher J said in *obiter* that:

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> … It may well be, however, that English courts would not apply a *Henderson v Henderson* approach to decisions of enforcement courts, or would less readily consider that there was any abuse of process involved in a point being taken here which could have been but was not taken in such a court.

As to this, I readily accept that the parties' choice lying behind the seat might play a role in a court's evaluative judgment whether to treat a challenge as abusive.

216 Short of any issue estoppel or abuse arising from the seat court's decision or from a repeat attempt to challenge it, I question however whether there is room for a further principle of law precluding full consideration in an enforcement court of whatever issues arise under Art V. Any enforcement court will of course give close attention to what is said or held by, in particular, a court of the seat, because the seat reflects the parties' choice. But, if the party challenging enforcement is not precluded from doing this by issue estoppel or *Henderson v Henderson*, it seems to me that an enforcement court should ultimately be free to arrive at its own analysis and conclusion.

217 The US authorities, cited above, do not address this question. They are all, as stated, authorities under Art V(1)(*e*) of the New York Convention, where the award sought to be enforced had been set aside in the seat. In the Australian case of *Gujarat (Full Court)*, cited by Chief Justice Menon, and followed in *Hub Street* – the Federal Court of Australia was, however, concerned with a like situation to the present, where the losing party sought in an enforcement court to re-open issues of enforceability and due process which had already been unsuccessfully raised in the court of the seat. The Federal Court expressed some doubt about the application of the principle of issue estoppel under Australian law. It went on (*Gujarat (Full Court)* at [65]):

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> We do not propose to attempt a resolution of the issue, because we think that a prompt judgment is desirable in this case and, at the very least, the primary judge was correct to hold that it will generally be inappropriate for this Court, being the enforcement court of a Convention country, to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration. We endorse and apply the following observations of Colman J in *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 as to the weight to be given to the views of the supervising court of the seat of the arbitration.

218 Colman J's words in *Minmetals* have been cited by Chief Justice Menon in [107] above, and I repeat only the final part:

> … *[O]utside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be reinvestigated by the English courts on an enforcement application is to be most strongly deprecated.*
>
> [emphasis in original]

219 Those words are not at all inconsistent with a probability that the circumstances which Colman J was addressing would on analysis have involved an issue estoppel or abuse of process. They are also consistent with the practical attitude that an experienced Commercial Judge would, as a matter of case management, take to any obvious attempt to relitigate in a different court issues which had, on their face, already been litigated elsewhere – whether in a court of the seat or in another enforcement court. What I find difficult to extract from them or from the Australian authorities is any principle of law by reference to which an enforcement court should refrain from addressing matters not the subject of any issue estoppel and not precluded from investigation on the basis that it would be abusive to relitigate them.

220 A principle according to which an enforcement court must treat a prior decision of the seat court as determinative or presumptively determinative, short

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of some public policy consideration, or evident procedural failing, or evident error, appears to me to bypass the first necessary enquiry, namely whether the prior court's decision is preclusive, and, if it is not, why it is not. It would also draw a sharp, and not necessarily realistic, distinction between prior decisions of courts of the seat and prior decisions of other enforcement courts. If there is no issue estoppel, and an objection raised to say jurisdiction is complex and difficult to determine, it leaves unclear at what point a party is to be precluded from raising or an enforcement court from accepting the objection. Finally, once recognised as a presumptive rule (rather than for example, a power to restrain abuse), it requires qualification by a series of further rules.

221 In these circumstances, my present inclination would be to rely on the tools which are already to hand, and not to give decisions of courts of the seat a specially elevated status in law in case of repeat challenges. Prior decisions always deserve careful consideration, even if they do not bind, and, one can add, especially so coming from a court of seat selected by the parties. But, ultimately, they *either* decide a challenge to the award in a manner which binds the parties or precludes reopening of the challenge *or* the challenge remains open for re-

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litigation. In that respect, the prior decision of another enforcement court is no different as a matter of hard legal principle from a decision of the seat court.

Jonathan Hugh Mance
International Judge

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