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WHEN FINALITY MEETS SOVEREIGNTY: ISSUE ESTOPPEL AND THE ENFORCEMENT OF ARBITRAL AWARDS AGAINST STATES

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Introduction

Estoppel as defined by the Black's Law Dictionary refers to: "*A bar or impediment raised by the law, which precludes a man from alleging or from denying a certain fact or state of facts, in consequence of his previous allegation or denial or conduct or admission, or in consequence of a final adjudication of the matter in a court of law.*"[1] The doctrine rests upon the maxim *Interest reipublicae ut sit finis litium* which means that it is in the interest of the state that the litigation comes to an end. Most nations governed by common law adhere to the principles of estoppel.[2] Estoppel, therefore, in essence is a species of the doctrine of res judicata. Among this species lies a sub-species called issue estoppel. Issue estoppel, a rule of preclusion, precludes parties from re-arguing the same issues that have already been decided by another competent court.

This rule is of great relevance in international arbitration in facilitating and aiding enforcement of an award once its validity is confirmed by the seat court. However, when the award-debtor is a state, particularly in investor-state disputes, the application of the rule of preclusion is itself precluded by a plea of sovereign immunity. This effectively renders an award infructuous leaving the award-creditor remedy-less. This paper explores the jurisprudence of issue estoppel, its recent application in international commercial and investor-state arbitrations and advances the view that plea of state immunity must not be allowed to stymie enforcement, frustrating the award itself.

[1] *"Estoppel"*, Black's Law Dictionary (2nd ed, 1910).
[2] Gary Born, *International Commercial Arbitration* (2nd ed.), Kluwer Law International, p. 3734-3735 (2014).

Issue Estoppel *per rem judicatam*

The doctrine of issue estoppel, coined in *Hoysted v Federal Commissioner of Taxation*[3] was enunciated by J. Diplock in *Thoday v Thoday*[4]: "*The second species, 'issue estoppel', is an extension of the rule of public policy. If in litigation on one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.*"

This doctrine was differentiated from res judicata by the Supreme Court in *Bhanu Kumar Jain v Archana Kumar*[5] holding that res judicata prevents a court from exercising its jurisdiction to adjudicate a dispute once it has already attained finality between the parties. In contrast, issue estoppel operates against a party: where a particular issue has been conclusively decided against that party in earlier proceedings, he is barred from re-agitating the same issue in subsequent proceedings.[6]

Transnational Issue Estoppel

The application of issue estoppel becomes peculiar when the previous judgement that is sought to invoke issue estoppel is rendered by a foreign court. In order to establish issue estoppel, the English court in *Carl Zeiss Stiftung v Rayner C Keeler Ltd.*[7] laid down four conditions namely, (i) the judgment given by foreign court has proper jurisdiction; (ii) the judgement is final and conclusive; (iii) there must be identity of parties and; (iv) there must be identity of subject matter. These conditions have been widely accepted to constitute a basis for the application of issue estoppel.

In *Carpatsky Petroleum Corporation v PJSC Ukrnafta*,[8] the English Commercial Court has ruled that substantial over exact similarity of issues is sufficient for the doctrine to be applied. These principles were reiterated in the celebrated judgement of *Good Challenger Navegante v Metal Export Import* ["**Good Challenger**"][9] which today serves as a yardstick for application of issue estoppel in most jurisdictions.

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[3] *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561.
[4] *Thoday v Thoday* [(1964) 1 All ER 341 : (1964) 2 WLR 371 : 1964 P 181 (CA)].
[5] *Bhanu Kumar Jain v Archana Kumar*, (2005) 1 SCC 787.
[6] Ibid ¶ 30.
[7] *Carl Zeiss Stiftung v Rayner C Keeler Ltd* (No 2) [1967] 1 AC 853.
[8] *Carpatsky Petroleum Corporation v PJSC Ukrnafta* [2020] EWHC 769 (Comm). ¶ 122.
[9] *Good Challenger Navegante v Metal Export Import* [2003] EWCA Civ 1668.

Relevance of Issue Estoppel in International Arbitration

The genesis of issue estoppel in international arbitration stems from the primacy of the court of the seat of arbitration. The enforcement court proceeds on the premise that the decision of the seat court was conclusive of those matters estopping the enforcement court from reopening issues already decided.[10]

Tenets of the principle conferring primacy to seat court can be found in Article V(1)(e) of the New York Convention 1958 which reads as: "*Article V(1)(e) Recognition and enforcement of the award may be refused…if the award 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.*"[11]

The application of issue estoppel in the context of international commercial arbitration arose as early as 1902 from the U.S Supreme Court judgement in *Southern Pacific Railroad Co v United States*[12] which ruled that a right, question or a fact put in issue and determined by a competent court as a ground of recovery cannot be disputed.[13] This position was succinctly followed and affirmed by the France-Venezuela Mixed Commission in *Company General of the Orinoco Case.*[14]

Issue estoppel in investor-state disputes

This rule of preclusion has been equally applied in arbitrations arising out of investment disputes. In *RSM v Grenada*,[15] RSM, the sole claimant brought a claim against Grenada for a contractual breach. In *Grynberg v Grenada*,[16] the additional claimants brought claim under bilateral investment treaty but arising out of the same contract. The claimants contended that the earlier dispute arose out of a contract while the current arises out of breach of treaty. Rejecting the argument, the tribunal acknowledged that issue estoppel is an established principle of international law.[17]

The rule is not merely a feature of common law but also has its foundation in principle of comity which is the acknowledgment by one State of the validity of another state's legislative, executive,

[10] Kshama A. Loya and Oindrila Mukherjee, 'The Issue of Issue Estoppel in International Arbitration', *Asian Dispute Review*, Volume 26, Issue 4 (2024), pp. 178 - 184, <https://www.kluwerarbitration.com/document/kli-ka-adr-2024-04-003> accessed 4 December 2025.
[11] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958) art V(1)(e).
[12] *Southern Pacific Railroad Co v United States* 168 US 1, (1897).
[13] *Southern Pacific Railroad Co v United States* 168 US 1, (1897) ¶ 48-49.
[14] Company General of the Orinoco Case, Reports of International Arbitral Awards, 31 July 1905, Volume X, p. 276.
[15] *RSM Production Corporation v Grenada*, ICSID Case No. ARB/05/14.
[16] *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010.
[17] *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 4.6.5.

or judicial acts within its own territory, exercised out of respect for international community and practical necessity, without prejudice to the rights of its own persons.[18]

However, an impediment to the application of issue estoppel is created when the former, a predominantly common law principle comes into direct conflict with another foundational principle of international law i.e. state immunity.

Issue Estoppel vs State Immunity

For the uninitiated, state immunity forms one of the foundational principles of international law drawing its authority from the presupposition that all sovereigns are equals. The law of immunity is procedural in nature, being concerned with the exercise of jurisdiction and not as such the substantive question as to whether the particular conduct in question was or was not lawful.[19] The United Nations Convention on Jurisdictional Immunities of States and Their Property[20] is a manifestation of this principle of customary international law. Although not in force, this convention has been instrumental in guiding jurisprudence on state immunity.

When a party obtains an arbitral award in its favour, it holds a significant leverage knowing that its claim can be enforced in any jurisdiction that is a signatory to the New York Convention[21] or the International Centre for the Settlement of Investment Disputes ["**ICSID**"][22]. But when a sovereign is an award-debtor, state immunity acts as a bulwark against the enforcement of such award. [23]

This conflict of principles arose in one of the most prominent international disputes, the *Devas-Antrix* saga where the Singapore Court of Appeal in *The Republic of India v Deutsche Telekom AG*[24] ["**Deutsche Telekom**"] rejected India's application to set aside a Swiss ruling by applying issue estoppel, ruling that 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.[25]

The question of application of transnational issue estoppel resurfaced again in *Hulley Enterprises v Russian Federation*[26] ["**Hulley case**"]. Russia commenced proceedings in the Netherlands to set

[18] *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 (at 1096).
[19] Malcolm N Shaw, *International Law* (9th edn, Cambridge University Press 2021).
[20] United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004).
[21] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958).
[22] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966).
[23] Ylli Dautaj, 'Sovereign Immunity from Execution of Foreign Arbitral Awards in India: The "New" Kid on the (Super) Pro-Arbitration Block' (2012) 4 *Arbitration Law Review*.
[24] *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10.
[25] ibid ¶ 102.
[26] *Hulley Enterprises Ltd & Ors v The Russian Federation* [2025] EWCA Civ 108.

aside the awards, arguing that there was no arbitration agreement and the Dutch court set aside the award. The award was later restored by the Dutch Court of Appeal, and this judgement was further upheld by the Dutch Supreme Court. In proceedings initiated by claimants in UK for the enforcement of the award, Russia claimed sovereign immunity by virtue of UK's State Immunity Act, 1978[27].

Section 1 of the State Immunity Act, 1978 confers immunity however subject to exceptions. While Russia argued that the EWHC's duty under the Civil Jurisdiction and Judgements Act, 1982[28] requires it to be satisfied on its own analysis of the existence of a valid arbitration agreement, the claimants' argument as accepted by the EWHC, was that the court is positively invited to rule on the state immunity, by deciding if Section 9 would apply. However, there is nothing mentioned on how the court shall determine the issue, and therefore, the EWHC could very well apply the rules of English common law, i.e. issue estoppel in this case, and conclude that Russia cannot claim state immunity.[29]

In another proceeding before the Singapore Court[30], the Russian Federation sought to set aside the award on grounds of state immunity in terms of the State Immunity Act, 1979 (Singapore) contending that the exception of arbitration under Section 11 does not apply because it had never submitted to arbitration in writing. The Claimants relied on the decisions of The Hague Court of Appeal and the Supreme Court of Netherlands, stating that they give rise to issue estoppel precluding the Russian Federation from raising the same legal and factual issues. The Court based its decision on the *Deutsche Telekom* case, and said that the application of transnational issue estoppel applies even to questions of state immunity. This established Russia's written consent to submit the dispute to arbitration, and the exception set out in Section 11 of the State Immunity Act, 1979 applies, thereby dismissing its application to set aside its award.

Exceptions to issue estoppel

While issue estoppel has facilitated proper enforcement of arbitral awards, it is well established that it "*should not arise in relation to any issue that the court of the forum ought to determine for itself under its*

[27] Simon Bushell, Lian-Ying Tan and Deekshitha Swarna, 'Should Issue Estoppel Apply to Questions of State Immunity?' (*Kluwer Arbitration Blog*, 30 April 2025) <https://legalblogs.wolterskluwer.com/arbitration-blog/should-issue-estoppel-apply-to-questions-of-state-immunity/> accessed 4 December 2025.
[28] Civil Jurisdiction and Judgments Act 1982 (UK).
[29] Esha Rathi, 'The Hulley Case: Decoding the Unprecedented Role of Issue Estoppel in Jurisdictional Issues' (*Kluwer Arbitration Blog*, 9 March 2024) <https://legalblogs.wolterskluwer.com/arbitration-blog/the-hulley-case-decoding-the-unprecedented-role-of-issue-estoppel-in-jurisdictional-disputes/> accessed 4 December 2025.
[30] *Hulley Enterprises Ltd. & Ors. v The Russian Federation* [2025] SGHC(I) 19.

own law"[31] meaning thereby issue estoppel cannot arise where the enforcement court is bound to make a determination upon its own public policy, a facet not under consideration before the seat court.

India's Stance

Indian courts have taken inconsistent stands specifically upon the application of issue estoppel in context of international arbitrations. In *International Investor KCSC v Sanghi Polyesters Ltd.*[32] the Andhra Pradesh High Court took a favourable view that an argument submission refused by the seat court cannot be re-argued before an enforcement court. However, the Delhi High Court in *Cruze City 1 Mauritius Holdings v Unitech Limited*.[33] The court had to decide whether Unitech was precluded from opposing enforcement on a particular ground which was not raised during the proceedings before the seat court. Answering in negative, the court stated that the cause of action for the enforcement proceedings is distinct from the one before the seat court and therefore, objections not raised before the seat court can still be urged during enforcement proceedings. The court went on to rule that res judicata and issue estoppel are merely indicative for courts when deciding upon the enforceability of an award.

But it is pertinent to note India's judicial approach to foreign states invoking immunity as a ground to obstruct the enforcement of awards. Unlike the UK, India does not have any specific statute governing state immunity. India is a signatory to the United Nations Convention on Jurisdictional Immunities of States and their Properties but has not ratified it yet. The only provision that reflects the intention to confer state immunity is Section 86 of the Code of Civil Procedure.[34] The Bombay High Court in *German Democratic Republic v The Dynamic Industrial Undertaking Ltd.*[35] has ruled that Section 86 does not confer sovereign immunity as recognised under international law but rather acts as an exception to the plea of immunity. In *Ethiopian Airlines v Ganesh Narain Saboo*,[36] the Supreme Court rejected the plea of state immunity on the following grounds: (i) that a specific statute, later in time, will have a non-obstante effect on the general statute; (ii) that a state expressly waives its immunity by virtue of being signatory to a convention; and lastly that sovereign immunity cannot be claimed when it enters into transactions of commercial nature. The Ministry of External Affairs has also submitted that prior consent under Section 86(3) is not a sine qua non

[31] *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14 ¶ 55.
[32] *International Investor KCSC v Sanghi Polyesters Ltd.* [2003] 43 SCL 271(AP).
[33] *Cruze City 1 Mauritius Holdings v Unitech Limited* 2017:DHC:1911.
[34] The Civil Procedure Code s. 86.
[35] *German Democratic Republic v The Dynamic Industrial Undertaking Ltd.,* AIR 1972 Bombay 27.
[36] *Ethiopian Airlines v Ganesh Narain Saboo*, Civil Appeal No. 7037 of 2004.

for the enforcement of an arbitral award against an award-debtor state.[37] Therefore, the executive as well as judicial approach appears to be progressive upholding the principles of arbitration.

Conclusion

Party autonomy is one of the cornerstones of international arbitration. Issue estoppel operates as a common law principle in post-award litigation, preventing the courts from re-deciding settled issues, in the nature of those elaborated in *Good Challenger*.[38] Therefore, this operates as a barrier to parties challenging the award in set-aside proceedings, and rightfully so. One well-known barrier to enforcement of arbitral awards rendered by Tribunals against a sovereign entity is sovereign immunity, which many state parties are bound to argue at some point during the proceedings. The development of issue estoppel, and the application/non-application of the same, has been discussed in various proceedings. Against this doctrinal backdrop, a contemporary question regarding its applicability in deciding questions of public policy (violation of which in itself forms an exception under the New York Convention), such as sovereign immunity, has been subject to much controversy. While some judgements interpret it as being non-applicable to sovereign immunity,[39] the developing jurisprudence overwhelmingly shows that issue estoppel can be applied to decide against sovereign immunity, even in the context of changing state immunity legislations. The *Hulley Case* (EWHC), relying upon *Deutsche Telekom*, seems to be the most recent decisions in this series, and the court's decision provides a more concrete approach to the evaluation of the application of issue estoppel in the context of sovereign immunity. If the application of issue estoppel were to be outside the lines of sovereign immunity, then the enforcement of awards against state, especially in investor-state disputes, would prove to be difficult. In a pro-arbitration regime, especially such as India, the upholding of the award, and execution thereof, dictate that state immunity must not stymie the arbitral award.[40]

[37] *KLA Const Technologies Pvt. Ltd. v The Embassy of Islamic Republic of Afghanistan* OMP(ENF)(COMM) 82/2019 & I.A. No. 7023/2019 & *Matrix Global Pvt. Ltd. v Ministry of Education, Federal Democratic Republic of Ethiopia* O.M.P.(EFA)(COMM) 11/2016 & E.A. 666/2019.
[38] *Good Challenger Navegante v Metal Export Import* [2003] EWCA Civ 1668.
[39] *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14.
[40] Ylli Dautaj, 'Sovereign Immunity from Execution of Foreign Arbitral Awards in India: The "New" Kid on the (Super) Pro-Arbitration Block' (2012) 4 *Arbitration Law Review*.