*Plaintiff: Matthias Scherer: 1st : 25.05.2022*

**IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE**

SIC/OS 8/2022
SIC/SUM 24/2022

In the matter of Section 29 of the International Arbitration Act (Cap. 143A, 2002 Rev. Ed.)

And

In the matter of Order 69A Rule 6 of the Rules of Court (Cap. 322, R 5, 2014 Rev. Ed.)

And

In the matter of an arbitration between Deutsche Telekom AG as Claimant and The Republic of India as Respondent

Between

**DEUTSCHE TELEKOM AG**
(Germany Registration No. T08UF0327J)

…Plaintiff

And

**THE REPUBLIC OF INDIA**
(ID Unknown)

…Defendant

**AFFIDAVIT**

I, **Matthias Scherer** (Swiss Passport No X3167637) care of rue de la Mairie 35, PO Box 6569, 1211 Geneva 6, do affirm and say as follows:

1. I am a Swiss attorney-at-law, and partner with LALIVE SA in Geneva. I have been practicing international arbitration for over 25 years, both commercial and investment treaty disputes. I am co-chair of the Arbitration Practice Group and a member of the firm's Management Board.

2. I am the editor-in-chief of the quarterly journal of the Swiss Arbitration Association, the ASA Bulletin, and have authored (with Michael E. Schneider) the chapters on evidence and on due process in arbitration in a major Swiss commentary on Private International Law (Basler Kommentar, articles 182 and 184 Swiss Private International Law Act ("**PIL Act**")).

3. I am a member of the governing body (Council) of the ICC Institute of World Business Law and a past vice-chair of the International Bar Association's arbitration committee.

4. In 2021, I was designated by Switzerland to the ICSID Panel of Arbitrators.

5. I frequently represent parties in arbitration matters before the Swiss Federal Supreme Court.

6. LALIVE is assisting Deutsche Telekom ("**DT**") in its efforts in Switzerland to enforce the Final Award dated 27 May 2020 ("**Final Award**") rendered by the arbitral tribunal ("**Tribunal**") comprising Professor Gabrielle Kaufmann-Kohler, Mr Daniel M Price and Professor Brigitte Stern in PCA Case No. 2014-10 between DT and India ("**Arbitration**"). LALIVE has successfully assisted DT in freezing an account held for India's ultimate benefit with the International Air Transport Association.

7. I understand that in the Arbitration, the Tribunal issued an Interim Award on Jurisdiction and Liability dated 13 December 2017 ("**Interim Award**"). On 28 January 2018, India had applied to the Swiss Federal Supreme Court (being the

federal seat court of the Arbitration) to set aside the Interim Award, and India's setting aside application was dismissed by the Swiss Federal Supreme Court on 11 December 2018.

8. India did not apply to set aside the Final Award. On 20 August 2020, the competent authority at the seat of the arbitration (the Civil Court of the Republic and Canton of Geneva) certified that the Final Award was enforceable and declared that the Final Award was legally binding in its form and content.

9. I understand that – in addition to the pending enforcement proceedings in Switzerland – DT is also seeking to enforce the Final Award in Singapore and in Washington DC and that India has moved to stay the enforcement proceedings based on its application filed on 2 May 2022 for revision of the Interim and Final Awards with the Swiss Federal Supreme Court (the "**Revision Application**"). As explained below, India has not sought to stay the enforcement proceedings in Switzerland.

10. I am filing this affidavit on behalf of DT to respond to India's application to stay the enforcement proceedings in Singapore, and in particular, to the affidavit of Mr Christopher Boog dated 17 May 2022 ("**Mr Boog's Affidavit**"). I understand that Mr Boog is one of the lawyers having conduct of India's Revision Application.[1] Mr Boog has also submitted a sworn declaration in support of India's stay application in Washington DC. I have also reviewed Mr Boog's declaration which is substantially similar to Mr Boog's Affidavit. India's motion to stay the

[1] Mr Boog's Affidavit at paragraph 2

enforcement proceedings in Washington DC as well as the sworn declaration of Mr Boog is exhibited hereto at "**MS-1**").

11. For the purpose of the present affidavit, I shall rely on the copy of the Revision Application exhibited to Mr Boog's affidavit as the authoritative and true version of the Revision Application filed by India with the Swiss Federal Supreme Court. It should be noted, however, that the only authoritative version of the Revision Application is the one filed with the Swiss Federal Supreme Court. The Swiss Federal Supreme Court has yet to serve the Revision Application on DT. In the Swiss system, it is the Swiss Federal Supreme Court that serves a party the application that has been filed against it as opposed to the applicant serving the application on the opposing party. The Swiss Federal Supreme Court will serve the Revision Application on DT only after India has paid the advance of the Court fees. DT will only be in a position to verify whether the Revision Application in Mr Boog's Affidavit is identical with the Revision Application actually filed only after it has received the document from the Swiss Federal Supreme Court.[2]

## I. UNCERTAIN STATUS OF INDIA'S REVISION APPLICATION

12. Based on the documents filed by India, it is uncertain whether the Swiss Federal Supreme Court will even accept to hear the case.

[2] See also Mr Boog's Affidavit at paragraph 37 and 38

13. In fact, as stated by Mr Boog in his affidavit at paragraph 36, a request for revision needs to overcome several preliminary hurdles before the Swiss Federal Supreme Court will admit the application and assign it to its docket.

14. First, India must promptly pay an advance of the Court fees. This is confirmed by Mr Boog in his Affidavit at paragraph 38. India has been ordered to pay CHF 195,000 by 20 May 2022. A copy of the order dated 5 May 2022 (with an English translation) is exhibited at "**MS-2**". If it is not made, the Swiss Federal Supreme Court will strike the Revision Application from the docket and not hear the case and never serve the Revision Application on DT.

15. The second hurdle (which Mr Boog's Affidavit omits to mention) is India's duty to pay security for DT's costs (which, I understand, DT will request to be posted once DT is served the Revision Application). India would be well aware of this given that DT previously made such a request to the Swiss Federal Supreme Court in the earlier proceedings brought by India challenging the Interim Award ("**Setting Aside Proceedings**"). In the Setting Aside Proceedings, the court ordered India to pay CHF 250,000 as security for DT's costs. A copy of the Swiss Setting Aside Decision (with an English translation) is exhibited at "**MS-3**".

16. Both hurdles are dispositive of the Revision Application.

17. The Swiss Federal Supreme Court will only begin to process the Revision Application if India makes these payments within the time limits set by the Swiss Federal Supreme Court. India has thus not established that the Revision Application will even be heard by the Swiss Federal Supreme Court.

18. Yet, India seeks to obtain a stay of enforcement of the award in Singapore and Washington DC on the basis of the Revision Application. Indeed, there are a number of elements that lead me to conclude that the Revision Application was filed by India for the sole purpose of derailing the pending enforcement proceedings in Washington DC and Singapore (as opposed to a genuine attempt to obtain the revision of the Interim and Final Awards). In the next section, I describe the facts that have led me to reach that conclusion.

## II. INDIA'S SWISS REVISION APPLICATION IS INTENDED TO HALT ONGOING ENFORCEMENT PROCEEDINGS IN SINGAPORE AND IN WASHINGTON DC, NOT IN SWITZERLAND

19. Even if the Swiss Federal Supreme Court admits India's Revision Application, it is fair to say that India's prospects of obtaining the extraordinary relief it is seeking are close to zero.

20. India's goal appears to be to obtain a stay from the courts in Singapore and Washington DC, rather than the relief requested from the Swiss Federal Supreme Court.

### A. India did not ask for a stay in the Revision Application

21. Revision applications have no suspensive effect under Swiss law. As such, they do not automatically entail the stay of the enforceability of the award (Marco STACHER, *Einführung in die Internationale Schiedsgerichtbarkeit der Schweiz*, Zurich 2021,

N 470).[3] However, Swiss procedure would have allowed India to request in its Revision Application a stay of enforcement of the Final Award (Decision of the Swiss Federal Supreme Court of 16 October 2003, 4P.117/2003;[4] Decision of the Swiss Federal Supreme Court of 31 January 2021, 4A_464/2021;[5] Decision of the Swiss Federal Supreme Court of 14 October 2021, 4A_422/2021).[6] There are currently enforcement proceedings pending in Singapore and Washington DC, but also in Switzerland in which DT has successfully attached funds held by the International Air Transport Association for India's ultimate benefit. Indeed, as has widely been reported, DT's successful attachment prompted India to withdraw from IATA so as to prevent the freezing of additional funds going into its account with IATA.[7] The fact that India did not make an application to suspend enforcement of the Final Award is all the more curious, especially when the Revision Application specifically refers to the pending enforcement proceedings in Singapore and Washington DC.[8] By contrast, India previously applied for a stay of enforcement of the Interim Award in 2018 in the Setting Aside Proceedings.

22. A request to stay enforcement of an arbitral award will be granted if the party seeking to annul or revise an award can show irreparable harm and that the prospects of success are not fanciful (Bernard CORBOZ, *Commentaire de la LTF*,

[3] Exhibited to Tab 1 of "**MS-7**"

[4] Exhibited to Mr Boog's Affidavit at "**CB-5**".

[5] Exhibited to Mr Boog's Affidavit at "**CB-8**".

[6] Exhibited to Mr Boog's Affidavit at **CB-9**".

[7] The relevant news reports are exhibited to "**MS-6**"

[8] See Mr Boog's Affidavit Exhibit "**CB-2**" at paragraph 133

Bern 2014, Art. 103 N 28 and 29).[9] Inversely, if the Supreme Court is not satisfied that the application stands a *prima facie* chance of success, an application to stay enforcement will be denied.

23. India has not applied in Switzerland (in its Revision Application) for a stay of enforcement of the Final Award. It seems to have shied away from doing so because of this litmus test applied by the Swiss Federal Supreme Court when considering an application for a stay of enforcement as to whether or not the revision application has a *prima facie* chance of success. India's failure to seek a stay of enforcement in connection with its Revision Application is thus telling about how it views the likelihood of success of a stay application before the Swiss Federal Supreme Court. It seems to me that India was unwilling to risk the Swiss Federal Supreme Court denying its application for a stay of enforcement and finding that the application lacked a *prima facie* chance of success.

24. Rather than attempting to satisfy the legal standard for a stay of enforcement before the Swiss Federal Supreme Court, India instead seeks a stay of enforcement proceedings currently pending in Singapore and in Washington DC. In other words, India uses the Swiss Revision Application to obtain from courts in Singapore and in Washington DC what it did not dare ask from the Swiss court.

25. It would be unfortunate if India's Swiss Revision Application were given more weight in Singapore and in Washington DC than India believed it should be given in Switzerland. It should also be recalled that at this stage, the Swiss Federal

[9] Exhibited to Tab 2 of "**MS-7**"

Supreme Court has not yet decided whether it will hear the case at all. India has not yet overcome all the preliminary hurdles (see above).

## B. India's Revision Application to the Swiss Federal Supreme Court is drafted in English

26. Swiss official languages are German, French, and Italian; "Romansch", which is a dialect, is a fourth national language in addition to the others. Proceedings before the Swiss Federal Supreme Court must be conducted in one of the official languages (Art. 42(1) and 54(1) Swiss Federal Supreme Court Act ("**FSCA**")).[10] Swiss courts will as a rule not accept submissions in English language.

27. As an exception, in international arbitration matters, parties can file requests/submissions drafted in English. This provision is a controversial one and was added to Art. 119*a*(2) and 77(2bis) FSCA on 1 January 2021.[11] Many practitioners and especially judges found it an unwelcome amendment to the FSCA. The purpose behind the amendment was primarily to market Switzerland as a seat for international arbitrations. It was never expected that large numbers of Swiss practitioners would file applications in English.

28. The Swiss Federal Supreme Court has not published statistics on the number of requests/submissions filed in English, but to my knowledge, there are very few.

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[10] Exhibited to Tab 3 of "**MS-7**"

[11] Article 119a(2) of the FSCA is exhibited at "**CB-3**" of Mr Boog's Affidavit; Article 77(2bis) is exhibited to Tab 4 of "**MS-7**"

29. The reason that English language requests/submissions are so rare is simple. It comes down to advocacy. No seasoned Swiss litigator would unnecessarily forego the possibility of communicating with the decision makers (the Swiss Federal Supreme Court judges) in their native language(s). Indeed, the Swiss Federal Supreme Court was actually opposed to the amendment to the FSCA that allowed English language requests/submissions. In its message on the modification of chapter 12 of the PIL Act to the Parliament, the Swiss Federal Council indicated:[12]

> "*English is the most widely used language in (international) arbitration proceedings. In setting aside or revision proceedings, the Swiss Federal Supreme Court already accepts, with the agreement of the parties, exhibits to pleadings in English.*
>
> ***Despite the criticism expressed by the Swiss Federal Supreme Court**, the draft proposes to go further and allow the parties to submit any document in English to the Swiss Federal Supreme Court when it is seized by a setting aside or revision request in arbitration proceedings*".

A copy of the relevant excerpt of the message (with an English translation) is exhibited at "**MS-4**".

30. The Revision Application states that English is used to ensure consistency with the wording used in the Interim and Final Awards and the Indian judgments.[13] However, the law that the judges of the Swiss Federal Supreme Court apply is not drafted in English, and they will not render their decision in English. They will render it in either German or French.

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[12] Message PIL Act, FF 2018 7153, p. 7164. (Emphasis added).

[13] See Mr Boog's Affidavit Exhibit "**CB-2**" at paragraph 149

31. In comparison, in 2018, India filed a 69-page request to set aside the Interim Award in French within 47 days of the issuance of the Interim Award. The Setting Aside Application (with an English translation) is exhibited hereto at "**MS-5**".[14]

32. The fact that India chose not to prepare the Revision Application in one of Switzerland's official languages leads me to conclude that India is more concerned about the Revision Application being understood by the English-speaking courts in Washington DC and Singapore than by the court which will decide the Revision Application (i.e., the Swiss Federal Supreme Court).

33. This conclusion is supported by the fact that in its Revision Application, India did not seek a stay of enforcement of the Final Award, which if granted, would have resulted in an order staying enforcement proceedings in Switzerland that India could then have presented to the courts in Washington DC and Singapore as I explained in the previous section.

## III. THE PROSPECTS OF SUCCESS OF INDIA'S REVISION APPLICATION ARE "FANCIFUL"

34. I disagree with Mr Boog's statement that the Swiss Revision Application "*has real and not fanciful prospects of success*" (Mr Boog's Affidavit at page 9). In light of the stringent requirements for revision requests under Swiss law, and the

[14] Swiss law imposes a 30-day deadline for challenging an award, but that deadline was extended by court rule to account for the Christmas break

shortcomings of India's Revision Application, I come to the contrary conclusion. The Revision Application is indeed "*fanciful*".

35. I will set out (A) the regime governing revision applications, (B) statistical data showing India's chance of success is extremely low (C), India's application is very unlikely to be sustained in light of arguments DT could raise.

## A. The legal framework of revision applications under Swiss law

36. Swiss law provides for two remedies against arbitral awards in international matters rendered in Switzerland: setting aside (or annulment) request (Art. 190 PIL Act) on the one hand, and revision applications on the other (Art. 190*a* PIL Act).

37. Importantly, there is no appeal or appellate remedy against an arbitral award. Neither a setting aside request nor a revision application will entail a review of the merits or appeal by the Swiss Federal Supreme Court.

38. Both review and setting aside requests can be brought directly before the Swiss Federal Supreme Court.

39. I broadly agree with the description of Mr Boog in his Affidavit at paragraph 8 to 15 (and in particular, paragraph 12) where he explains that revision and setting aside proceedings are two distinct remedies. This is indeed the case. Mr Boog also confirms the difference between the two remedies – the grounds for revision are even narrower than those available for setting aside an award.

40. Revision is in fact so extraordinary that it was not even included in the Swiss arbitration law (chapter 12 of the 1987 PIL Act). It was introduced by the Supreme Court in 1992 (SCD 118 II 199)[15] when it accepted to hear a revision application (and rejected it). This exceptional application was only codified in the recent amendment to the PIL Act in 2021 by way of a new article 190*a*, which is set out below.

41. As to the format and duration of revision proceedings, I agree with Mr Boog. The proceedings typically last less than a year from the time the application is filed, always assuming that India is not dragging out the proceedings, and pays any cost advance and security promptly, that no hearing is convened, and written submissions limited to two rounds. However, it can be longer (see for example Swiss Federal Supreme Court decision 4A_386/2015, where the revision proceedings lasted 400 days).[16]

42. I also confirm that there is no appeal against the Swiss Federal Supreme Court's decision (see Mr Boog's Affidavit at paragraph 36).

## B. <u>India's statistical chance of success is extremely low</u>

43. A study published in 2020 found that there were only 39 applications for revision of international arbitral awards between 1992 (the year the Swiss Federal Supreme Court recognised the possibility to request the revision of an award) and 2019. Only

[15] Exhibited to Mr Boog's Affidavit at "**CB-4**

[16] Exhibited to Tab 5 of "**MS-7**"

three applications were successful (C.A. Kunz, Revision of Arbitral Awards in Switzerland: An Extraordinary Tool or Simply a Popular Chimera? ASA Bull. 1/2020, p. 6 ff.).[17] To the best of my knowledge, since 2019, the Swiss Federal Supreme Court examined only 6 other revision applications. Only one was successful.

44. Accordingly, there have been *only 45* applications for revision of international arbitration awards considered by the Swiss Federal Supreme Court between 1992 and 2022 (i.e. 30 years). To contrast: between 1989 and 2019, there were *660* annulment requests (*Dasser / Woytowicz, Swiss International Arbitral Awards Before the Federal Supreme Court, Statistical Data 1989-2019, ASA Bull 1.2021, p. 7-41, page 10*).[18] That is fewer than two revision applications per year. Only four have ever succeeded. This is one successful application every 7.5 years. Or 0.13 per year.

45. In addition, **only two were admitted based on the only ground invoked by India** (alleged new evidence under Art. 190*a*(1)(a) PIL Act).

46. Besides, these two cases can be distinguished from India's case (see below, paragraphs 54 ff).

47. Based on this statistical evidence alone, one is bound to conclude that the chance of success of <u>any</u> revision application is extremely low.

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[17] Exhibited to Tab 6 of "**MS-7**"

[18] Exhibited to Tab 7 of "**MS-7**"

48. While statistics provide useful context, they are not a complete answer. Even a broken clock is right twice a day. In the next section, I will explain why, in my view, India's Revision Application is unlikely to succeed on the merits (as mentioned above, India must be aware of these dim prospects, as it has not even sought a stay, for which it would precisely have had to prove that it has a *prima facie* chance of success and that its Revision Application is not "*fanciful*").

## C. The prerequisites for the only ground for revision on which India relies are not met

### *(1) Available grounds under Swiss law*

49. I agree with Mr Boog (see Mr Boog's Affidavit at paragraph 12) that the only grounds for revision are listed in Art. 190*a* PIL Act, which provides as follows:

> *[1] A party may request a review of an arbitral award if:*
>
> *a. it has subsequently become aware of significant facts or uncovered decisive evidence which it could not have produced in the earlier proceedings despite exercising due diligence; the foregoing does not apply to facts or evidence that came into existence after the award was issued;*
>
> *b. criminal proceedings have established that the arbitral award was influenced to the detriment of the party concerned by a felony or misdemeanour, even if no one is convicted by a criminal court; if criminal proceedings are not possible, proof may be provided in some other manner;*
>
> *c. a ground for a challenge under Article 180 par. letter c only came to light after the conclusion of the arbitration proceedings despite exercising due diligence and no other legal remedy is available. 2*
>
> *[2] The request for a review must be filed within 90 days of the grounds for review coming to light. A review may not be requested*

> *more than ten years after the award becomes legally binding, except in the case of par. 1 letter b.*[19]

50. India relies on Art. 190*a*(1)(a) PIL Act.[20]

51. No new grounds for revision can be added once the Revision Application is filed. If this ground fails, the Revision Application fails (Decision of the Swiss Federal Supreme Court of 31 January 2022, 4A_464/2021 para. 4.1).[21]

***(2) India has not demonstrated that the prerequisites of Art. 190a(1)(a) PIL Act applies – are met - No material new evidence or facts***

52. It would not be appropriate or possible for me to address India's arguments and pleadings in detail now. This will be for DT's counsel if and when the Swiss Federal Supreme Court invites DT to comment on India's Revision Application (which as we have explained might never happen, see above).

53. Ultimately, it will be for the Swiss Federal Supreme Court to decide whether India's Revision Application has any merit. I would, however, point to a few elements that establish in my view that the chances of success of the Revision Application are zero, or close to zero, given the Supreme Court's past practice.

(i) *The only two previous cases where the Court granted the relief are not applicable here*

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[19] Exhibited to Mr Boog's Affidavit at "**CB-2**"

[20] See Mr Boog's Affidavit at "**CB-1**", pages 37 ff

[21] Exhibited to Mr Boog's Affidavit at "**CB-8**"

54. First of all, it should be recalled that the ground for revision invoked by India has only successfully been asserted twice since 1992. This does not necessarily exclude the theoretical possibility that India's Revision Application, could become the third case. However, a closer look at the two prior cases in which a revision application on the ground invoked by India have succeeded were based on quite different sets of facts and demonstrate that the applicant in a revision application must overcome a very high threshold in order to succeed in its application.

55. It is probably for this reason that neither the Revision Application nor Mr Boog's affidavit refer to either of these two decisions in which the revision applications were successful.

56. First, the Decision of the Swiss Federal Supreme Court 4A_412/2016 dated 21 November 2016[22] concerns a dispute between a German manufacturer of diesel engines for power plants ("**Manufacturer**"), and a Panamanian company ("**Consultant**"), which undertook to provide consultancy services to the Manufacturer in relation to the supply of powerplants to a state-owned operating company ("**State-Owned Operating Company**"). The consultancy agreement contained an anti-corruption clause, pursuant to which the parties agreed that the Consultant, would lose its right to the agreed fee in case of non-compliance with the applicable anti-corruption laws. In the years following the conclusion of the consultancy agreement, the Manufacturer entered into a dozen contracts for the supply of diesel engines to another state-owned company, which was closely related

[22] Exhibited to Tab 8 of "**MS-7**"

to the State-Owned Operating Company. The Consultant subsequently commenced an ICC arbitration in which it requested the payment by the Manufacturer of the consultancy fee due in relation to those contracts. In the arbitration, the Manufacturer opposed the consultant's right to any fees on the basis that it had not in fact provided any consultancy services and had bribed public officials in violation of the anti-corruption clause. The arbitral tribunal found that the Manufacturer had failed to prove its allegations of corruption and granted the Consultant's claims.

57. In the subsequent revision proceedings, the Manufacturer's legal successor ("**Manufacturer's Successor**") relied on new facts and evidence obtained in subsequent criminal proceedings directed against one of the Manufacturer's former employees who had been responsible for major projects. Specifically, the Manufacturer's Successor relied on the "Form A" (i.e., one of the bank account opening documents used to verify the identity of the beneficial owner) pertaining to one of the consultant's bank accounts which had come to light in the criminal proceedings. According to the Form A, the consultant's beneficial owner was none other than the Manufacturer's former employee. The Manufacturer's successor argued that this new evidence, which existed at the time the arbitral award was rendered, demonstrated that the Consultant was not an independent third party providing real services under the consultancy agreement but merely a vehicle for paying bribes to obtain contracts with state-owned companies, as it had already alleged in the arbitration. The Consultant did not respond to the Manufacturer's Successor's revision request.

58. The Supreme Court granted the Manufacturer's Successor's revision request as it found that the new evidence (the Form A) established the Consultant's beneficial owner, a fact which could have changed the outcome of the arbitration. Indeed, the arbitral tribunal had considered the Consultant's beneficial ownership to be decisive for its determination on the corruption allegations and had, accordingly, ordered the Consultant to produce the relevant bank documents, *albeit* unsuccessfully. Whether the fact that the Manufacturer's former employee had concealed his beneficial ownership of the Consultant and lied about his interest in the outcome of the dispute in the witness testimony he provided in the arbitration could also give rise to a revision of the award pursuant to Article 123(1) FSCA, was left open (Catherine KUNZ, *Revision of Arbitral Awards in Switzerland: An Extraordinary Tool or Simply a Popular Chimera? A review of decisions rendered by the Swiss Federal Supreme Court on revision requests over the period 2009-2019*, *in*: ASA Bulletin 2020, pp. 6-31, p. 26).[23]

59. Second, the dispute in the Decision of the Swiss Federal Supreme Court, 4P.102/2006 dated 29 August 2006[24] relates to the sale of a stake in a Russian telecommunications company. The seller refused to execute the sale on the grounds that the trade intended by the parties would be illegal, *i.e.,* constitute money laundering. In support of its contentions, the seller stated in particular that the economic beneficiary of the buyer was in fact a senior Russian bureaucrat. In the arbitration that ensued, the tribunal found that the seller could not prove his

[23] Exhibited to Tab 6 of "**MS-7**"

[24] Exhibited to Tab 9 of "**MS-7**"

allegations and held that the economic beneficiary of the buyer would be a Danish lawyer, which rebutted the accusation of money laundering. In January 2006 — after an application to set aside the award had been rejected by the Swiss Federal Supreme Court — the seller discovered the existence of an affidavit (produced in connection with another set of proceedings) by one of the directors of the buyer, who stated under oath that he could no longer maintain his earlier assertions that the Danish lawyer was the only economic beneficiary of the purchaser. The Supreme Court accepted the revision based on the ground of the new evidence contained in the affidavit (Antonio RIGOZZI, *Challenging Awards of the Court of Arbitration of Sport*, *in*: Journal of International Dispute Settlement, 2010, pp. 217-265, p. 263).[25]

60. In the case at hand, however, India's Revision Application is based on supposed factual issues raised by the issuance of a judgment of the Indian Supreme Court dated 17 January 2022 ("**Indian Judgment**"). However, the Indian Judgment is not new for the purpose of the Swiss revision proceedings, it is not material, and the Revision Application is ultimately not timely, as I will explain below.

*(ii) The Indian Judgment is not new*

61. India relies on Art. 190*a*(1)(a) PIL Act only. It does not invoke 190*a*(1)(b) PIL Act, which would have dealt specifically with new judgments.

62. Mr Boog explains the applicable threshold as follows "*a party may request the revision of an arbitral award if it has subsequently become aware of significant*

[25] Exhibited to Tab 10 of "**MS-7**"

*facts or uncovered conclusive evidence which it could not have submitted in the earlier arbitral proceedings despite exercising due diligence*" (see Mr Boog's Affidavit at paragraph 25).

63. I agree. As mentioned by Mr Boog in his Affidavit at paragraph 26, the facts must already have existed when the award was rendered.

64. The Indian Judgment is dated 17 January 2022. It post-dates the Awards and, on its face, cannot serve as a basis for a revision application under Art. 190*a*(1)(a) PIL Act.

65. Mr Boog mentions that evidence post-dating the arbitral award "*but shedding light on facts pre-dating*" the award could still be admissible (see Mr Boog's Affidavit at paragraph 27 and 28). He refers to certain legal writers (see Exhibit "**CB-12**") and two decisions of the Swiss Federal Supreme Court (see Exhibits "**CB-10**" and "**CB-11**", which deal with revision request of court decisions and are therefore not directly applicable). There are no decisions in Switzerland yet to that effect and I would not expect India's Revision Application to provide an opportunity to the Swiss Federal Supreme Court to declare that the scope of Art. 190*a*(1)(a) includes judgments as new evidence. Indeed, the Swiss Federal Supreme Court would, in my view, not reach the stage of assessing whether the Indian Judgment is new evidence, because India's Revision Application would fail on other grounds anyway. As Mr Boog confirms in his Affidavit at paragraph 31, India must also show the materiality of any alleged new facts or newly discovered evidence. India's

Revision Application meets neither of these requirements. As explained in the next section, the Indian Judgment is not material.

*(iii) The Indian Judgment is not material*

66. India would have to show that, if these facts had been known to the Tribunal, then it would have decided differently. As Mr Boog rightly points out in his Affidavit at paragraph 31, relevance is a prerequisite "*Regarding the first requirement of relevance, the applicant merely needs to show that the newly asserted fact or evidence likely would have led to a different outcome, had it been known to the arbitrators before the awards were rendered: Federal Supreme Court, Decision 4P.265/1996, 2 July 1997 (published in ASA Bulletin, Vol. 15(3) 1997, pp. 494-595) at [2(a)] (annexed hereto at "CB-13"). The Swiss Court thus limits its analysis to a hypothetical examination of whether the newly discovered facts or evidence "might actually have been relevant to the outcome of the case"*".

67. The Interim Award and the Swiss Setting Aside Decision would show that the circumstances were not material.

68. India's case in the Revision Application is "*that the Respondent's purported investment in Devas was tainted by the illegality and fraud behind the incorporation of Devas and the unlawful procurement of the Devas Agreement, as conclusively established by the Indian Supreme Court.*".[26]

[26] See Revision Application at paragraph 169 exhibited at "**CB-2**"."

69. I understand from the Interim Award that the Tribunal refused to entertain the allegations of illegality because they were put forward late: not because there was no evidence, but because the very allegation was made late. It was procedurally inadmissible, and revisions or annulments are no cure for this. This is clear from the Interim Award:[27]

> "*118 The Tribunal first notes that it is not clear whether, in its letter of 24 October 2016, the Respondent sought to raise a new jurisdictional or admissibility objection based on an alleged illegality in the making of the investment. To the extent that this was the case, the Tribunal finds that such objection is untimely and contrary to the procedural calendar established in this arbitration. Indeed, such purported objection was raised well after the Parties' written submissions and the Hearing. The Tribunal likewise denies the introduction of new evidence into the record, as untimely and not in accordance with the procedural rules, which require prior leave.*
>
> *119 In any event, even if the illegality objection were deemed timely, the Tribunal would deny it on its merits. Indeed, the Respondent has not sufficiently substantiated its objection, if it was one. It only devoted a few sentences in its letter of 24 October 2016 arguing that, if upheld, the criminal charges in question would be grounds for dismissal of the claims, as the investment would not have been made in conformity with Indian law. Second, and more importantly, the CBI Charge Sheet on which the Respondent relies was issued in the context of an investigation commenced by the CBI in March 2015 and contains mere allegations that have not yet been tried, let alone upheld, in court. Third, none of the allegations contained in the CBI Charge Sheet relate to actions or conduct of DT. The Respondent has not explained how, as a result of the CBI Charge Sheet,* ***DT's*** *investment (made through the acquisition of shares in Devas) would have been contrary to Indian law. For all of these reasons, the Tribunal cannot follow the Respondent's argument that the claims should be dismissed for reasons of illegality.*".

[27] Exhibited to Mr Boog's Affidavit at pages 89 to 232.

70. The Swiss Federal Supreme Court specifically acknowledged and endorsed this finding when it dismissed India's request to set aside the Interim Award:

> "*It has been stated above that, when the jurisdictional defense is reasoned, it must be fully justified under pain of forfeiture (see 3.2.3.3.1, 2nd para.). The Appellant has therefore forfeited the right to argue the lack of jurisdiction of the Arbitral Tribunal in connection with the compliance clause, unless it could reasonably have raised such an objection before the time when it did so, as it asserts before the Federal Tribunal. This Court is not persuaded by this assertion. It should be noted that, according to the findings of the Arbitral Tribunal, on November 8, 2009, U._____, one of the secretaries of the DOS, apparently received an anonymous report that the spectrum of the S-band had been leased to A._____ on the basis of corruption, a complaint which was followed by discussions among the representatives of the Indian space authorities, then the constitution of the so-called Committee V._____, named after its sole member, the director of the Indian Institute of Space and Technology, which published its report on June 6, 2010. The Indian media had also been interested in Contract A._____, claiming that the lease was too advantageous for this company, and they called on the government to cancel the contract. This was followed by a series of reports and memoranda in the Indian administration. Some senior officials of this administration had been arrested in early February 2011, before A._____ saw its contract with B._____ terminated, on the 25th of the same month, for an alleged case of force majeure. Therefore, it is difficult to understand why the Appellant did not mention these circumstances – which were revealing, at least, of suspicions of commission of criminal offenses – in its submissions in the arbitration, or during the hearing of April 2016, or in its post-hearing brief of June 10, 2016, preferring instead to wait until October 24, 2016, to inform the Arbitral Tribunal. This is all the less understandable that the CBI had already sent its Charge Sheet to whom it may have concerned on August 11, 2016. As the aforesaid reservation is no longer subject to the conclusion of this examination, it follows that the jurisdictional defense based on Arts.1(b) and 3(1) of the BIT is forfeited*"

71. In other words, with this Revision Application, India is trying a third time to introduce circumstances that it had not timely raised in the Arbitration and was found to be estopped from raising by the Tribunal and the Swiss Federal Supreme

Court. The evidence it tenders now – the Indian Judgment – does not concern a material fact.

72. Even if these circumstances were now established by the Indian Judgment as India argues, this would not remedy the fact that India is estopped from relying on it in the Revision Application.

73. The Swiss Federal Supreme Court will also note that India chose not to challenge the Final Award.

74. India's decision not to challenge the Final Award further compromises the Revision Application's chances of success. The Swiss Federal Supreme Court is likely to find that India is estopped to rely on illegality allegations. This was the finding of the arbitral tribunal, and the Swiss Federal Supreme Court itself in the setting aside proceedings against the Interim Award.

75. Ultimately, it does not matter whether the Indian Judgment itself or the circumstances it allegedly establishes are new. Neither is material.

*(iv) The Revision Application is not timely*

76. It is critical for India to establish that its Revision Application was filed within the 90 days in Art. 190*a*(2) PIL Act.

77. The calculation of court holidays in Mr Boog's Affidavit is noted (Mr Boog's Affidavit at paragraph 23). However, regardless of the parties' positions on the matter, this is a prerequisite that the Swiss Federal Supreme Court will consider and decide whether India has satisfied or not.

78. In any event, I consider that the Indian Judgment is not a triggering event and cannot be relied upon for a revision under Art. 190*a*(1)(a) (see above). In that sense, the Revision Application was made out of time.

## IV. CONCLUSION

79. Based on statistical data on the extremely low chance of success of revision applications and certain flaws in India's Revision Application, I come to the conclusion that the Application is "*fanciful*" (to use the term in Mr Boog's Affidavit at paragraph at page 9, paragraph 24).

80. There are also strong indications that the principal goal of India's Revision Application is to delay and stay the enforcement proceedings in Singapore and Washington DC, rather than being a genuine attempt to revise the Interim and Final Awards in Switzerland.

81. Indeed, India's Revision Application does not contain a stay request. India could have applied for a stay, which would have led the Swiss Federal Supreme Court to decide whether the Revision Application has a *prima facie* chance of success. Rather than taking the risk of failing this threshold, India misuses the Revision Application in the courts of Singapore and Washington DC, alleging that it has a real chance of success, when that is not the case.

82. I also note that the Revision Application is drafted in English (which is not a Swiss national language and not the language that the Swiss Federal Supreme Court will use). This also supports the conclusion that the enforcement courts in Singapore

and Washington DC are the intended audience and not the Swiss Federal Supreme Court.

AFFIRMED by the abovenamed )
**Matthias Scherer** )
In Geneva )
On this 24th day of May 2022 )


Before me

**A NOTARY PUBLIC**

This affidavit is filed on behalf of the Plaintiff.