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Case Comment

THE CONTOURS AND LIMITS OF TRANSNATIONAL ISSUE ESTOPPEL

Merck Sharp & Dohme Corp v Merck KGaA
[2021] 1 SLR 1102

[2021] SAL Prac 22

The application of issue estoppel, regularly invoked in the Singapore courts, had hitherto not been distinguished based on whether the judgment giving rise to the estoppel emanated from a local or foreign court. In a recent decision, a five-man coram of the Court of Appeal comprehensively considered the contours and limits of transnational issue estoppel, and set out principles to guide the future application of such estoppel. The authors consider the significance and implications of this decision, which provides welcomed clarity but also gives rise to unresolved issues for determination in future cases.

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I. Introduction

1 Cross-border litigation invariably engages considerations of the appropriate forum in which such disputes and/or issues should be brought, and litigants occasionally attempt to have their disputes determined in multiple fora. This has given rise

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to the question of how the Singapore courts should treat cases of repeated litigation before them, particularly where said prior litigation had taken place in a foreign jurisdiction.

2 Such a question arose before a five-man coram of the Court of Appeal in *Merck Sharp & Dohme Corp v Merck KGaA*[1] ("*Merck Sharp*"). In that case, the Court of Appeal had occasion to consider the question of whether and how transnational issue estoppel (*ie*, issue estoppel which arises from a prior foreign decision) should apply, and whether different considerations would arise as compared to a case of domestic issue estoppel (*ie*, issue estoppel which arises from a prior local decision). Recognising the novelty and importance of this question, the Court of Appeal appointed Prof Yeo Tiong Min SC ("Prof Yeo") as *amicus curiae* to assist it in setting out the contours of transnational issue estoppel.

3 The Court of Appeal rendered its decision on 26 February 2021, which set out its recalibrated approach on transnational issue estoppel. While the Court of Appeal established comprehensive legal principles to guide the application of transnational issue estoppel, it also left certain controversial issues to be conclusively determined on a future occasion.

II. Summary of the Court of Appeal's decision

4 The facts of *Merck Sharp* may be briefly summarised. In the 1970s, the predecessors of the appellants and the respondents had entered into a co-existence agreement (the "Agreement") to govern the use of the name "Merck" in various jurisdictions around the world. Disputes subsequently ensued between the appellants and respondents in several jurisdictions around the world concerning the use of the "Merck" name. For the purposes of the appeal, the question which arose was whether three English decisions handed down before the commencement of the Singapore proceedings gave rise to issue estoppel in respect of the interpretation of the Agreement.

1 [2021] 1 SLR 1102.

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5 As the application of transnational issue estoppel arose squarely for consideration, the Court of Appeal took the opportunity to revisit the legal principles in respect of the same.

6 As a starting point, the Court of Appeal accepted that the doctrine of issue estoppel applies to a prior foreign judgment as it does to a prior domestic judgment. However, the Court of Appeal noted that the scope and principles applicable to domestic judgments had to be modified when foreign judgments were involved as other considerations, including transnational comity, had to be taken on board.[2]

7 Two contrasting considerations were: first, the need to give effect to transnational comity and to accord reciprocal respect to courts of independent jurisdictions, and second, the need to preserve the constitutional role of the recognising court (*ie*, Singapore) in overseeing the administration of justice and safeguarding the rule of law within its jurisdiction.[3] These considerations, as the Court of Appeal recognised, pulled in opposite directions. While the Court of Appeal accepted that due regard and respect had to be accorded to a foreign court's judgment, this could not be at the expense of the recognising court's role in ensuring that the foreign court's determination was consistent with the recognising court's conception of the rule of law.[4]

8 Faced with these competing considerations, the Court of Appeal set out the following legal principles to strike the appropriate balance:[5]

> (a) the elements of transnational issue estoppel are the same as those of domestic issue estoppel, although special care has to be taken in applying these elements in the former context;
>
> (b) particular caution should be exercised in delineating the outer limits of transnational issue estoppel; and

2 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [25].
3 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [33].
4 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [33].
5 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [34].

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(c) a potentially different approach to the *Arnold* exception (see below), which arises in domestic issue estoppel, may have to be applied in respect of transnational issue estoppel.

A. Elements of transnational issue estoppel

9 The Court of Appeal clarified that the elements of domestic issue estoppel would similarly apply to transnational issue estoppel. The four established elements are: (a) a final and conclusive judgment on the merits; (b) issued by a court of competent jurisdiction that has transnational jurisdiction over the party to be bound; (c) identity of parties; and (d) identify of subject matter.[6]

10 The Court of Appeal also affirmed that the defences to the recognition of a foreign judgment under common law should broadly converge with the defences available under the statutory regimes[7] (*ie*, the defences recognised under the Choice of Court Agreements Act[8] ("CCAA") and the Reciprocal Enforcement of Foreign Judgments Act[9] ("REFJA")). This would include situations where the foreign judgment was procured by fraud or where enforcement of the foreign judgment would be contrary to the public policy of Singapore.

11 The Court of Appeal, however, emphasised the care which would need to be exercised in applying these elements to transnational issue estoppel and raised specific examples.

12 First, special attention must be paid where there are competing judgments.

(a) In the case of competing foreign judgments, the judgment which is first in time should be recognised for the purposes of creating an estoppel.[10]

6 *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 at [34]–[39].
7 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [37].
8 Cap 39A, 2017 Rev Ed.
9 Cap 265, 2001 Rev Ed.
10 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [36(a)].

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(b) However, where the foreign judgment is inconsistent with a ***prior or subsequent domestic judgment***, the domestic judgment would have to be given priority.[11]

13 The Court of Appeal, however, left open the approach to be taken where a foreign judgment is rendered while local proceedings on the same or substantially the same subject matter have been commenced and are pending. During the appeal, Prof Yeo expressed the view that the foreign judgment should still be recognised for the purposes of creating an estoppel as it brings finality to litigation and avoids a situation where litigants might be incentivised to initiate pre-emptive litigation proceedings strategically to prevent the recognition of an impending foreign judgment. While the Court of Appeal did not endorse or reject Prof Yeo's proposed approach, it noted tentatively that it might be possible to address concerns of pre-emptive litigation by having due regard to all the circumstances, "including how the foreign judgment came to be issued within the particular time frame in question and whether there was undue haste or any action by a party that is suggestive of a deliberate attempt to pre-empt the recognition of the foreign judgment in Singapore".[12]

14 Second, the Court of Appeal considered the question of whether reciprocity should be a precondition to the recognition of a foreign judgment under common law. Such reciprocity is required for the statutory regimes under the CCAA, REFJA and the Maintenance Orders (Reciprocal Enforcement) Act[13] to apply. But such a requirement of reciprocity has not hitherto been adopted as a precondition under common law recognition in Singapore. While choosing to defer this issue for future consideration, the Court of Appeal observed that the requirement for strict reciprocity appears to have fallen out of favour in foreign jurisdictions and that the absence of reciprocity is rarely an obstacle to the recognition of a foreign judgment.[14]

11 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [36(b)].
12 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [38].
13 Cap 169, 1985 Rev Ed.
14 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [39].

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15 Third, the Court of Appeal cautioned that care should be exercised when determining whether the elements of identity of parties and identity of subject matter are met for the purposes of transnational issue estoppel, as much would turn on the interpretation of judgments from a foreign legal system. Due care must be taken in ascertaining what had actually been decided by the foreign court; whether the foreign court's determination on the specific issue was final and conclusive; and whether the party against whom estoppel is invoked had the occasion or opportunity to address that specific issue or whether it was foreclosed from doing so.[15]

B. Outer limits of transnational issue estoppel

16 Having cautioned that extra care is required when determining whether transnational issue estoppel arises, the Court of Appeal then considered *potential* outer limits of such estoppel which would strike the appropriate balance between transnational comity and the recognising court's role as custodian of the rule of law within the domestic legal regime.[16]

(a) 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". Such issues would include situations where there is a mandatory law of the forum which should apply, "where the issue in question engages the public policy of the forum", or where the issue is classified as being a procedural one for the purpose of the conflict of laws.[17]

(b) Transnational issue estoppel should be applied with due consideration of whether the foreign judgment is territorially limited in its application.[18]

(c) Additional caution should be exercised when applying transnational issue estoppel against a defendant

15 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [40]–[43].
16 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [52]–[54].
17 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [55].
18 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [56].

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in the foreign proceedings as compared to a plaintiff in the foreign proceedings.[19]

(d) Where a foreign judgment is in conflict with the public policy of the recognising jurisdiction, issue estoppel *may* be denied to the foreign judgment. In this regard, while the Court of Appeal noted that it is uncontroversial for substantive public policy to apply as a defence to recognition of a foreign judgment, difficulties may arise in determining whether the public policy defence can be availed of in circumstances where the foreign judgment had made a manifest, patent, or egregious error in *applying the law of the recognising jurisdiction*.[20] The Court of Appeal further opined that such an argument against transnational issue estoppel may not necessarily be characterised as a public policy defence but as a standalone limitation on transnational issue estoppel.[21]

17 The Court of Appeal ultimately did not express any concluded views on the outer limits of transnational issue estoppel as they were not determinative of the appeal before it. That said, the court made observations about the above *potential* limits so that future courts (and litigants) would be guided if and when the issue arises for consideration.

C. The Arnold *exception*

18 Finally, the Court of Appeal considered the applicability of the *Arnold*[22] exception to transnational issue estoppel. The *Arnold* exception provides an exception to issue estoppel in circumstances where further material becomes available to a party relevant to the correct determination of a point involved in the earlier proceedings, provided that the further material could not by reasonable diligence have been adduced in the earlier proceedings.[23]

19 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [57].
20 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [58]–[59].
21 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [61].
22 *Arnold v National Westminster Bank plc* [1991] 2 AC 93.
23 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [62].

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19 While the Court of Appeal again declined to express a conclusive view on the matter, it discussed four potential approaches (as set out by Prof Yeo) to be adopted in respect of the applicability of the *Arnold* exception to transnational issue estoppel:

> (a) The court could accept that the *Arnold* exception does not strictly apply to transnational issue estoppel. This is on the basis that a requirement for the *Arnold* exception to apply (*ie*, that the prior judgment must be clearly wrong) would be inconsistent with the well-established principle that the recognising court should not question the merits of a foreign judgment (the "conclusiveness principle").[24]
>
> (b) The court could regard the conclusiveness principle as only applying to the cause of action and not to the other issues dealt with in a foreign judgment.[25]
>
> (c) The court could apply the *Arnold* exception as a broad discretionary exception in transnational issue estoppel on the basis that issue estoppel is subject to the overriding considerations of working justice and not injustice.[26]
>
> (d) The court could peg the question of the conclusiveness of a foreign judgment and the applicability of the *Arnold* exception to issue estoppel arising from the foreign judgment to the law of the judgment's originating jurisdiction. This was the approach preferred by Prof Yeo.[27]

20 While the Court of Appeal concluded that it was unnecessary to form a view on which proposed approach should be adopted, it nonetheless expressed its concerns in respect of each of the approaches to be examined on a future occasion where necessary.[28] In essence, the Court of Appeal remarked that any approach to be adopted should not result in the principles being

24 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [63(a)].
25 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [63(b)].
26 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [63(c)].
27 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [63(d)].
28 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [65].

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too broad-based, discretionary and/or difficult to apply, such that it would encourage litigation on the question of whether issue estoppel is applicable. This would be inimical to the court's underlying policy objective of conserving resources.

III. Observations

21 A few key takeaways may be derived from the Court of Appeal's judgment in *Merck Sharp*.

22 First, the Court of Appeal's suggestion that transnational issue estoppel may potentially apply with less rigour to a defendant as contrasted to a plaintiff could potentially have spillover effects to other well-established principles in respect of issue estoppel.

23 For instance, it has been accepted that foreign default judgments may give rise to issue estoppel so long as the judgment was intended to be final and conclusive by the court issuing the judgment.[29] This position may now have to be reconsidered given the Court of Appeal's remarks that there may be circumstances where a defendant's non-participation in foreign proceedings, perhaps due to the relatively low value of the claim, should not give rise to issue estoppel in subsequent proceedings where the claim value is significantly higher. It will be interesting to see if litigants may be emboldened to ignore foreign proceedings if the claim value is small, given the attenuation of the issue estoppel doctrine to such cases.

24 Another question which arises is whether there is any basis to, on the one hand, accept that the foreign default judgment may be recognised in Singapore as a final and conclusive judgment for the purposes of enforcement, but at the same time refuse the foreign judgment's recognition for the purposes of establishing issue estoppel. How such incongruity will be resolved may be a question that needs to be more closely considered in a future case.

29 See, *eg*, *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [77].

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25 Second, the Court of Appeal's emphasis on properly interpreting the foreign judgment, and identifying precisely what had been ventilated and decided before the foreign court, is an important clarification of the approach to be taken in raising, or responding to, an issue estoppel argument. Practically speaking, practitioners will have to consider if evidence of the surrounding *context*, including foreign court procedure, should be adduced to explain the full circumstances of the foreign court's decision-making. This is especially key if the context and underlying procedural considerations are *not* apparent on the face of the record or foreign judgment.

26 Finally, the Court of Appeal's tentative observation that the public policy defence may potentially be broadened in the context of transnational issue estoppel is significant. It has been noted that public policy in private international law has a narrower meaning than in domestic law, and that the defence of public policy has seldom succeeded in the context of the enforcement of *in personam* foreign judgments.[30] Instances where such a defence have succeeded include: (a) where a party, who had notice of an anti-suit injunction from the court of the forum, nevertheless proceeded to obtain judgment from a foreign court; and (b) where the foreign court had applied the *conflict of laws rules* of the forum court in such an erroneous manner that it might be characterised as "perverse".

27 The Court of Appeal's observation, however, opens the door to new arguments. For example, is there scope to now argue that a manifest error in applying the *substantive* law of the forum may also give rise to a public policy defence or may even apply as a standalone defence to issue estoppel? Such an argument, if accepted, would come close to the forum court effectively questioning the merits of a foreign judgment and may sit uncomfortably with the conclusiveness principle, which has been established since the 1870 decision of *Godard v Gray*.[31]

30 *Halsbury's Laws of Singapore* vol 6(2) *Conflict of Laws* (Lexis Nexis, 2009) at para 75.210.
31 (1870) LR 6 QB 139.

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28 Recognising that the discussion as to the outer limits of transnational issue estoppel may have significant implications (both practically and doctrinally), and were in any event beyond the scope of issues raised in *Merck Sharp*, the Court of Appeal did not go further and left such issues to be ventilated in future cases.

IV. Conclusion

29 The Court of Appeal's decision in *Merck Sharp* serves as a timely clarification of the principles of transnational issue estoppel, particularly given the recent enactments and modifications of the statutory regime for the recognition and enforcement of foreign judgments (*ie*, the CCAA and the REFJA). It establishes clear principles to guide practitioners who seek to rely on transnational issue estoppel in future cases.

30 While many controversial issues (some of which have been touched upon in this article) have been left by the Court of Appeal to be determined in future cases, *Merck Sharp* at the very least sets out the Court of Appeal's thinking and serves as a comprehensive platform upon which these issues may be subsequently explored.

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