

“Importing” Foreign Judgments into Singapore through Transnational Issue Estoppel: An Important Piece in Singapore’s Recognition Regime

Under the doctrine of transnational issue estoppel, a party in a domestic court is prevented from re-litigating the same issue that had been previously decided by a foreign court involving the same parties. This effectively means that the foreign judgment is recognised in Singapore, and has the effect of binding the parties before the domestic court. In a significant decision by a five-Judge Court of Appeal, with the assistance of *amicus curiae* Prof Yeo Tiong Min S.C., the Court of Appeal outlined the applicability and perimeters of transnational issue estoppel: *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] SGCA 14.

Our Comments

Today’s global economy involves international supply chains, cross-border provision of goods and services, and the dispersion of assets across state lines. An inevitable outcome of international commercial life is that parties may not always agree – resulting in disputes that take place across jurisdictions and before multiple domestic courts or forums.

Legal mechanisms in different courts and forums move at different rates, and it could well be that a decision in one forum is rendered before the other forums, or even before proceedings are instituted in the other forums.

Transnational issue estoppel is an important legal doctrine that allows a litigant in a domestic court to rely on a prior foreign decision, where the issues involved are the same or sufficiently similar. The foreign decision on these issues is effectively “imported” into the domestic forum. This binds the parties in the domestic court, and prevents the same litigants from being vexed twice over the same or similar issues.

The Court of Appeal’s exposition on transnational issue estoppel provides greater clarity in international disputes and increased certainty in cross-border dealings. It is also a timely reminder of the suite of options available to a party in the larger recognition and enforcement regime, which includes the Choice of Court Agreements Act, the amendment of the Reciprocal Enforcement of Foreign Judgments Act, and the slated repeal of the Reciprocal Enforcement of Commonwealth Judgments Act.

Our Melanie Ho, Lam Chung Nian, Chang Man Phing, Alvin Lim and Lin Si Hui acted for the appellant.

This update explores the relevant aspects of the Court of Appeal’s decision concerning, and the intricacies of, transnational issue estoppel.

Background

In the 1970s, the predecessors of the appellant, Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc), and the respondent, Merck KGaA (formerly known as E Merck), entered into a co-existence agreement to govern the use of the name “Merck” in various jurisdictions (“**Agreement**”).

Fast forward to the present day, and the appellant and the respondent are embroiled in a multi-jurisdictional dispute over the use of the name “Merck” in jurisdictions such as the United States, England, Germany, Switzerland, Mexico, India, Australia, China and Hong Kong.

In Singapore, the respondent sued the appellant and three other defendants for trade mark infringement, passing off and breach of contract. Before the High Court, the respondent applied for summary judgment for alleged breach of the Agreement, and a preliminary determination on the question whether the parties were bound by a decision of the English Court of Appeal (“**ECA Decision**”) on the interpretation of the Agreement. The ECA Decision was issued on 24 November 2017, before the Singapore proceedings were commenced.

The High Court Judge dismissed the respondent’s summary judgment application. On the preliminary determination, the High Court Judge found that issue estoppel applied such that the parties were bound by the ECA Decision on interpretation. The appellant appealed.

The five-Judge Court of Appeal’s Discussion on Transnational Issue Estoppel

The Court of Appeal, with the assistance of *amicus curiae* Prof Yeo Tiong Min S.C., carefully examined the doctrine of transnational issue estoppel, recalibrated the underlying rationales and principles, and discussed its outer limits.

Issue estoppel arising from foreign judgments

Taking the doctrine back to its roots, the Court of Appeal found that the conceptual justifications undergirding transnational issue estoppel were found in considerations of transnational comity and reciprocal respect among courts of independent jurisdictions. At the same time, the domestic court retains its constitutional role to oversee the administration of justice and to safeguard the rule of law within its jurisdiction.

Against this backdrop, the Court of Appeal highlighted the following substantive and procedural aspects of transnational issue estoppel. A litigant should carefully consider whether it is able to satisfy these aspects before it seeks to invoke the doctrine of transnational issue estoppel in respect of a foreign judgment.

- (a) The foreign judgment concerned must be a final and conclusive decision on the merits, issued by a court of competent jurisdiction that has transnational jurisdiction over the party sought to be bound.

- (b) Where there are multiple competing *foreign* judgments, the foreign judgment that is first in time should be recognised for the purpose of creating an estoppel. This may not apply where there is a cross-estoppel (arising from estoppel by representation). However, where there is an inconsistent prior or subsequent *local* judgment, the foreign judgment should not be recognised.
- (c) There must be no defences to the recognition of the judgment. In this regard, there should be broad convergence of the defences available under transnational issue estoppel with the defences available under the Choice of Court Agreements Act and the Reciprocal Enforcement of Foreign Judgments Act.
- (d) The recognition of foreign judgments does not require any special procedure beyond normal pleading rules.
- (e) There must be an identity of issues. However, caution should be exercised when interpreting judgments from foreign legal systems, in particular, identifying the specific issue that was decided by the foreign court, and ascertaining whether the foreign court's decision on that specific issue was final and conclusive, and whether the party against whom the estoppel is invoked had the occasion or opportunity to raise that specific issue.
- (f) Issue estoppel does not apply to a foreign (or local) judgment on a "pure" question of law that does not affect the parties' rights, liabilities or legal relationship.
- (g) Finally, there must be an identity of parties between the foreign proceedings and the domestic proceedings.

The Court of Appeal left open for future consideration the approach to be taken where a foreign judgment was handed down when local proceedings on the same or substantially the same subject matter had been commenced and were pending, as well as the question whether reciprocity should be a precondition to the recognition of foreign judgments at common law.

Further considerations relevant to transnational issue estoppel

The Court of Appeal also provided valuable guidance on the control or gatekeeping mechanisms that may be appropriate to define the outer boundaries of transnational issue estoppel:

- (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, namely, where:
 - (i) there is a mandatory law of the forum that applies irrespective of the foreign elements of the case and irrespective of any choice of law rule;
 - (ii) the issue in question engages the public policy of the forum; and
 - (iii) the issue in question is a procedural issue for the purpose of the conflict of laws.

- (b) Transnational issue estoppel should be applied with due consideration as to whether the foreign judgment in question is territorially limited in its application, such as findings on the validity of a patent in a jurisdiction or findings concerning the public policy of a jurisdiction.
- (c) Additional caution may be necessary in applying transnational issue estoppel against a *defendant* in foreign proceedings, as opposed to against a *plaintiff*, as the latter has the prerogative to choose the forum. Where a defendant can demonstrate *bona fide* reasons for its decision not to contest or fully contest an issue in proceedings in another jurisdiction, it may be sensible that it not be estopped on that issue in proceedings in Singapore.
- (d) It was left open for future determination whether there should be a limitation on transnational issue estoppel in respect of foreign judgments that are considered to be perverse or that reflect a sufficiently serious and material error.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally deal with or any of the following Partners:

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