Foreign Judgments: The Limits of Transnational Issue Estoppel, Reciprocity, and Transnational Comity

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In *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14, a full bench of the Singapore Court of Appeal addressed the limits of transnational issue estoppel in Singapore law, and flagged possible fundamental changes to the common law on the recognition and enforcement of foreign judgments in Singapore. The litigation involves multiple parties spread over different jurisdictions. The specific facts involved in the appeal are fairly straightforward, centring on what has been decided in a judgment from the English court, and whether it could be used to raise issue estoppel on the interpretation of a particular term of the contract between the parties. The Court of Appeal affirmed the decision of the High Court that it could. What makes the case interesting are the wide-ranging observations on the operation of issue estoppel from foreign judgments, and more fundamentally on the basis of the recognition and enforcement of foreign judgments in the common law of Singapore.

The Court of Appeal affirmed the case law in Singapore that so far have ruled that a foreign judgment is capable of raising issue estoppel in Singapore proceedings. It upheld the uncontroversial requirements that the judgment must first be recognised under the private international law of Singapore, and that there must be identity of issues and parties. It is the first Singapore case, however, to discuss and affirm the need for the foreign judgment to be final and conclusive (under the law of the originating state) not just on the merits, but also on the issue forming the basis of the issue estoppel. The Court also highlighted the caution that needs to be exercised when determining what has actually been conclusively decided under a foreign legal system, especially where the foreign courts operate under different procedural rules.

The Court discussed the outer limits of transnational issue estoppel without reaching a conclusion because they were not in issue on the facts of the case. It accepted that issue estoppel raises a question of *lex fori* procedure, and that as a starting point, the same principles of issue estoppel apply whether the previous judgment is a local or foreign one. It made a number of important observations on the limitations of transnational issue estoppel. First, it affirmed that issue estoppel from a foreign judgment would not be applicable if: (a) there is a mandatory law of the forum that applies irrespective of the foreign elements of the case and irrespective of any applicable choice of law rules; (b) the issue in question engages the public policy of the forum; or (c) where the issue that is the subject of the estoppel is procedural for the purpose of the conflict of laws. Second, it noted that that transnational issue estoppel should be applied with due consideration of whether the foreign decision is territorially limited in its application. Third, the Court highlighted the possibility that it may not apply issue estoppel to a defendant in circumstances where the defendant did not, and was not reasonably expected to, argue the point, or argue the point fully, in answer to the claim brought against it in the foreign jurisdiction.

Fourth, issue estoppel effect may be denied to a foreign judgment if it conflicts with the public policy of the forum. This last point is generally uncontroversial. However, what is notable in the judgment is that the Court left open the question whether an error made by the foreign court regarding the content or application of Singapore law would provide a defence based on public policy, or as a standalone limitation. As a standalone limitation, it would be inconsistent with the conclusiveness principle in *Godard v Gray* (1870) LR 6 QB 139, as well as the Hague Convention on Choice of Court Agreements. Thus, it may be that foreign judgments could be reviewed on the merits at least in respect of some types of errors of Singapore law, at least under the common law. Further clarification will be needed on this issue from the Court of Appeal in the future.

Fifth, the Court discussed the exception to issue estoppel. A distinctive feature of Singapore law on issue estoppel is the rejection of the broadly worded "special circumstances" exception to issue in English common law (*Arnold v National Westminster Bank plc* [1991] 2 AC 93). Singapore law (*The Royal Bank of Scotland NV v TT International Ltd* [2015] 5 SLR 1104) has instead a narrow exception based on the satisfaction following cumulative requirements:

(a) the decision said to give rise to issue estoppel must directly affect the future

determination of the rights of the litigants;

(b) the decision must be shown to be clearly wrong;

(c) the error in the decision must be shown to have stemmed from the fact that some point of fact or law relevant to the decision was not taken or argued before the court which made that decision and could not reasonably have been taken or argued on that occasion;

(d) there can be no attempt to claw back rights that have accrued pursuant to the erroneous decision or to otherwise undo the effects of that decision; and

(e) it must be shown that great injustice would result if the litigant in question were estopped from putting forward the particular point which is said to be the subject of issue estoppel – in this regard, if the litigant failed to take advantage of an avenue of appeal that was available to him, it will usually not be possible for him to show that the requisite injustice nevertheless exists.

The Court noted the difficulty in applying requirement (b) to a foreign judgment because the principle of conclusiveness (*Godard v Gray* (1870) LR 6 QB 139) prohibits re-opening the merits of the foreign decision (note that this is potentially challenged above but only in respect of Singapore law matters). It considered four possible approaches to this issue: (1) leave things as they are, with the consequence that foreign judgments may have stronger issue estoppel effect than local judgments; (2) do not apply the conclusiveness principle to issue estoppel; (3) apply the broader "special circumstances" exception to foreign judgments rather than the narrow approach in domestic law; or (4) apply the law of the originating state to the issue whether an exception can be made to issue estoppel. The Court was troubled by all four suggested solutions, and it left the question, to be considered further in a future case which raises the issue squarely.

The Court also endorsed the principle that issue estoppel from a foreign judgment will be defeated by an inconsistent prior foreign judgment or by an inconsistent prior or subsequent local judgment. However, it left open the question whether a foreign judgment obtained after the commencement of local proceedings can be used to raise issue estoppel in the local proceedings. In response to a submission that the foreign judgment should nevertheless be recognised unless there was an abuse of process in the way it was obtained, the Court thought that it was equally plausible to take the view that the commencement of local proceedings could be a

defence unless the commencement of local proceedings amounted to an abuse of process.

The most interesting aspects of the decision, with possible far-reaching implications, are two-fold. First, the Court of Appeal cast serious doubt on the obligation theory of the common law and preferred to rest the basis of the recognition and enforcement of foreign judgments on "considerations of transnational comity and reciprocal respect among courts of independent jurisdictions". Second, it left open the question whether reciprocity should be a precondition to the recognition of foreign judgments at common law. A precondition of reciprocity was said to be entirely consistent with the rationale of transnational comity, and with the position under the statutory registration regimes as well as the Hague Convention on Choice of Court Agreements. These two aspects of the decision are discussed in the public lecture, "The Changing Global Landscape for Foreign Judgments", Yong Pung How Professorship of Law Lecture, Yong Pung How School of Law, Singapore Management University, 6 May 2021 (available here).