Postmodernism in Singapore private international law: foreign judgments in the common law

Guest post by Professor Yeo Tiong Min, SC (honoris causa), Yong Pung How Chair Professor of Law, Yong Pung How School of Law, Singapore Management University

Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck) [2021] 1 SLR 1102, [2021] SGCA 14 ("*Merck*"), noted previously, is a landmark case in Singapore private international law, being a decision of a full bench of the Court of Appeal setting out for the first time in Singapore law the limits of transnational issue estoppel. It was also the beginning of the deconstruction of the common law on the legal effect to be given to foreign judgments. Without ruling on the issue, the court was not convinced by the obligation theory as the rationale for the recognition of foreign *in personam* judgments under the common law, preferring instead to rest the law on the rationales of transnational comity and reciprocal respect among courts of independent jurisdictions. There was no occasion to depart from the traditional rules of recognition of *in personam* judgments in that case, and the court did not do so. However, the shift in the rationale suggested that changes could be forthcoming. While this sort of underlying movements have generally led to more expansive recognition of foreign judgments (eg, in Canada's recognition of foreign judgments from courts with real and substantial connection to the underlying dispute), the indications in the case appeared to signal a restrictive direction, with the contemplation of a possible reciprocity requirement as a necessary condition for recognition of a foreign judgment, and a possible defence where the foreign court had made an error of Singapore domestic law.

The Republic of India v Deutsche Telekom AG [2023] SGCA(I) 10, another decision of a full bench of the Court of Appeal, provides strong hints of possible future reconstruction of the common law in this important area. While in some respects it signals a possibly slightly more restrictive common law approach towards the recognition of foreign judgments, in another respect, it portends a

potentially radical expansion to the common law on foreign judgments.

Shorn of the details, the key issue in the case was a simple one. The appellant had lost the challenge in a Swiss court to the validity of an award against it made by an arbitral tribunal seated in Switzerland. The respondent then sought to enforce the award in Singapore. The question before the Singapore Court of Appeal was whether the appellant could raise substantially the same arguments that had been made before, and dismissed by, the Swiss court. The Court of Appeal formulated the key issue in two parts: (1) whether the appellant was precluded by transnational issue estoppel from raising the arguments; and (2) if not, then whether, apart from law of transnational issue estoppel, legal effect should be given to the judgment from the court of the seat of the arbitration. The second question, in the words of the majority, was:

> *"whether the decision of a seat court enjoys a special status within the framework for the judicial supervision and support of international arbitration, that is established by the body of law including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards …, legislation based on the UNCITRAL Model Law on International Commercial Arbitration …, and case law."*

On the first issue, the court considered that the principles of transnational issue estoppel were applicable in the case. The majority (Sundaresh Menon CJ, Judith Prakash JCA, Steven Chong JCA, and Robert French IJ) summarised the principles in *Merck* as follow:

> *"(a) the foreign judgment must be capable of being recognised in this jurisdiction, where issue estoppel is being invoked. Under the common law, this means that the foreign judgment must:*
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> *(i) be a final and conclusive decision on the merits;*
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> *(ii) originate from a court of competent jurisdiction that has transnational jurisdiction over the party sought to be bound; and*
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> *(iii) not be subject to any defences to recognition;*
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> *(b) there must be commonality of the parties to the prior proceedings and to the proceedings in which the estoppel is raised; and*

(c) the subject matter of the estoppel must be the same as what has been decided in the prior judgment."

The court found on the facts that all the elements were satisfied in the case, and thus the appellant was precluded by the Swiss judgment from raising the challenges to the validity of the award in the enforcement proceedings in Singapore.

Mance IJ in a concurring judgment agreed that transnational issue estoppel applied to preclude the appellant from raising the challenges in this case. The application of issue estoppel principles to the international arbitration context is relatively uncontroversial from the perspective of private international law. There was one important distinction, however, between the majority and the concurring judgment on this point. The majority confined its ruling on transnational issue estoppel to a foreign judgment from the seat court, whereas Mance IJ considered transnational issue estoppel to be generally applicable to all foreign judgments in the international commercial arbitration context. Thus, in the view of the majority, the seat court may also enjoy special status for the purpose of transnational issue estoppel. It is not clear what this special status is in this context. At the highest level, it may be that transnational issue estoppel does NOT apply to foreign judgments that are not from the seat court, so that the only foreign judicial opinions that matter are those from the seat court. This will be a serious limitation to the existing common law. At another level, it may be that the rule that the prior foreign judgment prevails in the case of conflicting foreign judgments must give way when the later decision is from the seat court. This would modify the rule dealing with conflicting foreign judgments by giving a special status to judgments from the seat court.

Another notable observation of the majority judgment on the first issue lies in its formulation of the grounds of transnational jurisdiction, or international jurisdiction, ie, the connection between the party sought to be bound and the foreign court that justifies the recognition of the foreign judgment under Singapore private international law. Traditionally, it has been assumed that the common law of Singapore recognises four bases of international jurisdiction: the presence, or residence of the party in the foreign territory at the commencement of the foreign proceedings; or where the party had voluntarily submitted, or had agreed, to the jurisdiction of the foreign court. The majority in this case

recognised four possible grounds: (a) presence in the foreign territory; (b) filing of a claim or counterclaim; (c) voluntary submission; and (d) agreement to submit to the foreign jurisdiction. Filing of claims and counterclaims amount to voluntary submission anyway. The restatement of the grounds omit residence as a ground of international jurisdiction. This is reminiscent of a similar omission in the restatement by the UK Supreme Court in *Rubin v Eurofinance SA* [2013] 1 AC 236, [2012] UKSC 46, which has since been taken as authoritative for the proposition that residence is not a basis of international jurisdiction under English common law. Notwithstanding that the Court of Appeal did not consider the Singapore case law supporting residence as a common law ground, it may be a sign that common law grounds for recognising foreign judgments may be shrinking. This may not be a retrogression, as international instruments and legislation may provide more finely tuned tools to deal with the effect of foreign judgments.

The key point being resolved on the first issue, there was technically no need to rule on the second issue. Nevertheless, the court, having heard submissions on the second issue from counsel (as directed by the court), decided to state its views on the matter. The most controversial aspect of the judgment lies in the opinion of the majority that, beyond the law of recognition of foreign judgments and transnational issue estoppel, there should be a "Primacy Principle" under which judgments from the seat of the arbitration have a special status in the law, as a result of the common law of Singapore developing in a direction that advances Singapore's international obligations under the transnational arbitration framework. The majority summarised its provisional view of the proposed Primacy Principle in this way:

> *"By way of summary the Primacy Principle may be understood as follows, subject to further elaboration as the law develops:*
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> *(a) An enforcement court will act upon a presumption that it should regard a prior decision of the seat court on matters pertaining to the validity of an arbitral award as determinative of those matters.*
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> *(b) The presumption may be displaced (subject to further development):*
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> *(i) by public policy considerations applicable in the jurisdiction of the enforcement court;*

(ii) by demonstration:

(A) of procedural deficiencies in the decision making of the seat court; or

(B) that to uphold the seat court's decision would be repugnant to fundamental notions of what the enforcement court considers to be just;

(iii) where it appears to the enforcement court that the decision of the seat court was plainly wrong. The latter criterion is not satisfied by mere disagreement with a decision on which reasonable minds may differ. (As to where in the range between those two extremes, an enforcement court may land on, is something we leave open for development.) "

The Primacy Principle may be invoked if the case falls outside transnational estoppel principles. It may also be invoked even if the case falls within the transnational estoppel principles, if the party relying on it prefers to avoid the technical arguments relating to the application of transnational issue estoppel. However, the principle is only applicable if there is a prior judgment from the court of the seat; parties are not expected proactively to seek declarations from that court.

The Primacy Principle is said to build on the international comity in the specific context of international arbitration, by requiring an enforcement court to treat a prior judgment of a seat court as presumptively determinative of matters decided therein relating to the validity of the award, thus ensuring finality and avoiding inconsistency in judicial decisions, and promoting the effectiveness of international commercial arbitration. The majority also pointed out that the principle is aligned with the principle of party autonomy because the seat is generally expressly or impliedly selected by the parties themselves.

Mance IJ pointed out that the exceptions to the proposed Primacy Principle are very similar to the defences to issue estoppel, except that the exception based on the foreign decision being plainly wrong appears to go beyond the law on issue estoppel. In the elaboration of the majority, this refers to perversity (in the sense of the foreign court disregarding a clearly applicable law, and not merely applying a different choice of law) or a sufficiently serious and material error. In *Merck*, the Court of Appeal had suggested that a material error of Singapore law may be a ground for refusing to apply issue estoppel, but in principle it is difficult to

differentiate between errors of Singapore law and errors generally, insofar as the principle is based on the constitutional role of the Singapore court to administer justice and the rule of law. So, this limitation in the Singapore law of transnational issue estoppel may well be in a state of flux.

Mance IJ disagreed with the majority on the need for, or desirability of, the proposed Primacy Principle. In his view, the case law supporting the principle are at best ambiguous, and there was no need to give any special status to the court of the seat of the arbitration under the law. In Mance IJ's view, transnational issue estoppel, in the broader sense to include abuse of process (sometimes called *Henderson* estoppel (*Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313), under which generally a party should not be allowed to raise a point that in all the circumstances it should have raised in prior litigation), is an adequate tool to deal with foreign judgments, even in the context of international arbitration. The rules of transnational issue estoppel are already designed to deal with the problem of injustice caused by repeated arguments and allegations in the context of international litigation. There is force in this view. Barring defences, the transnational jurisdiction requirement for the recognition of judgments from the seat court under the common law does not usually raise practical issues because generally the seat would have been expressly or impliedly chosen by the parties and they are generally taken to have impliedly submitted to the jurisdiction of the court of the seat for matters relating to the supervision of the arbitration. Mance IJ also expressed concern about the uncertainty of a presumptive rule subject to defences where the contents of both the rule and defences are still unclear.

The contrasting views in the majority and the concurring judgments on the proposed Primacy Principle are likely to generate much debate and controversy. The Primacy Principle is said to be aligned with the territorialist view of international arbitration found in many common law countries and derived from the primary role that the court in the seat of the arbitration plays in the transnational arbitration framework. Thus, this view is highly unlikely to find sympathy with proponents of the delocalised theory. It will probably be controversial even in common law countries, where reactions similar to that of Mance IJ may not be unexpected.

Under the obligation theory, *in personam* judgments from a foreign court are recognised because the party sought to be bound has conducted himself in a certain manner in relation to the foreign proceedings leading to the judgment. On

this basis, it is difficult to justify the special status of a judgment from the seat court within the principles of recognition or outside it. However, it would appear that, after *Merck*, while the obligation theory may not have been rejected *in toto*, it has not been accepted as the exclusive explanation for the recognition of *in personam* judgments under the common law. On the basis of transnational comity and reciprocal judicial respect, there is much that exists in the current common law that may be questioned, and much more unexplored terrain as far as the legal effect of foreign judgments not falling within the traditional common law rules of recognition is concerned. For example, the UK Supreme Court in *Rubin v Eurofinance SA* [2013] 1 AC 236, [2012] UKSC 46 had rejected that there were any special rules that apply to *in personam* judgments arising out of the insolvency context. This line of thinking has already been rejected in Singapore in the light of its adoption of the UNCITRAL Model Law on Cross-Border Insolvency (*Re Tantleff, Alan* [2022] SGHC 147; [2023] 3 SLR 250), but it remains to be seen what new rules or principles of recognition will be developed.

The idea that the judgment of the court of the seat (expressly or impliedly) chosen by the parties should have some special status in the law on foreign judgments has some intuitive allure. There is a superficial analogy with the position of the chosen court under the Hague Convention on Choice of Court Agreements. As a general rule (though not exclusively), the existence and validity of an exclusive choice of court agreement would be determined by the law applied by the chosen court, and a decision of the chosen court on the validity of the choice of court agreement cannot be questioned by the courts of other Contracting States. The Convention has no application to the arbitration context. However, at least under the common law, the seat of arbitration is invariably expressly or impliedly chosen by the parties, and it will usually carry the implication that the parties have submitted to the jurisdiction of the supervisory court for matters relating to the regulation of the arbitration process. It is also not far-fetched to infer that reasonable contracting parties would intend that court to have exclusive jurisdiction over such matters (*C v D* [2007] EWCA Civ 1282; [2008] 1 Lloyd's Rep 239), *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56). But this agreement cannot extend to issues being litigated at the enforcement stage, because naturally, contracting parties would want the freedom to enforce putative awards wherever assets may be found, and the enforcement stage issues frequently involve issues relating to the validity of the arbitration agreement and the award. This duality is the system contemplated

under the New York Convention. Whatever other justification there may be for the special status of judgments of the court of the seat, it is hard to find it within the principle of party autonomy.