‘Salami-slicing’ and Issue Estoppel: Foreign Decisions on the Governing Law

One of the requirements for issue estoppel is identity of issue. However, the process of ‘refining down’ or ‘salami-slicing’[1] is not always clear. The argument that the issue is different because the two courts would arrive at different conclusions on the governing law is increasingly being utilised as a litigation strategy. If the first court applied its choice of law rules to determine that the governing law of the claim is Utopian law, would an issue estoppel arise over this decision in the second court if under the second court’s choice of law rules, Ruritanian law is the governing law? The answer depends on whether the ‘slice’ is thick or thin. Is the relevant issue ‘What law governs the dispute or issue?’ or ‘What law is identified by our (forum) choice of law rules to govern the dispute or issue?’

For example, there is considerable difference in tort choice of law rules. Some jurisdictions apply the double actionability rule.[2] Most jurisdictions adopt the *lex loci deliciti* or *lex loci damni* rule,[3] with differences on how the relevant *locus* is identified and whether a flexible exception in favour of the law of closer connection is present. Party autonomy is also permitted in certain jurisdictions.[4] Thus, in tort claims, the issue could be framed in different ways: eg, ‘what is/are the law(s) governing the tort?’, ‘what is the lex loci delicti?’, ‘where in substance did the tort arise?’, or ‘where was direct damage suffered’? It will be obvious that only the first, broad, framing of the issue, or, in other words, a ‘thick’ slice, will result in there being identity of issue. In essence, the question is: does a difference in choice of law rules matter for issue estoppel purposes?

The Hong Kong Court of Final Appeal in *First Laser v Fujian Enterprises (Holdings) Co Ltd*[5] took the view that an issue estoppel can arise over a foreign decision on the governing law of the dispute. However, there is a suggestion in the Singaporean Court of Appeal decision of *Gonzola Gil White v Oro Negro Drilling Pte Ltd* that a difference in the two laws is relevant.[6] Arguably, the Court’s views were limited to the specific situation where the Singaporean court as the second court would have arrived at Singaporean law after application of

Singaporean choice of law rules. This is because the Singaporean court views it as part of its constitutional responsibilities to safeguard the application of Singaporean law.[7] If this is correct, it is doubtful that the same approach would be adopted by at least the English courts, as English courts are prepared accord preclusive effect to a judgment of a foreign court even where that foreign court had made an error on English law in its judgment.[8]

The English Court of Appeal in *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)*[9] held that no issue estoppel will arise over a question involving forum international public policy. This is entirely explicable as each country's public policy differs. It has also been suggested that no estoppel arises over an issue which is subject to a forum overriding mandatory rule.[10] Decisions on sensitive matters which give rise to comity considerations should also be excluded.[11]

The question is whether decisions on the governing law merit the same treatment. It is argued that for most private law claims, a foreign decision on the governing law of the dispute or on a specific issue in the claim is generally capable to giving rise to an issue estoppel. A contrary conclusion would disregard the policies underlying estoppel and allow forum shopping. However, some choice of law categories – eg, choice of law for consumer contracts or employment contracts, or for environmental torts – are underpinned by public policy considerations. For these special choice of law categories, it is suggested that the forum court retains the prerogative to decide on the issue of the governing law for itself, despite a prior foreign decision on the same point. In other words, a narrow 'slice' is appropriate.

The same broad-narrow question arises in other contexts. It could arise in the jurisdictional context: would the first court's decision on the applicability of the personal equities exception for the *Mocambique* rule give rise to an estoppel in subsequent proceedings in a different court? What about a decision on which court is *forum (non) conveniens*? How about arbitration, where the balance of competing considerations may lie differently compared to international litigation? For example, should an issue estoppel arise over a foreign decision on subject-matter arbitrability?[12] Is it relevant if the first court decided this issue at the pre-award stage or at the post-award stage pursuant to proceedings to enforce an arbitral award? Does it matter if the first court is the court of the seat?[13]

These, and other questions, are considered in the open access article Adeline

Chong, ‘Salami-Slicing’ and Issue Estoppel: Foreign Decisions on the Governing Law’, International and Comparative Law Quarterly (FirstView).

[1] *Desert Sun Loan v Hill* [1996] 2 All ER 847, 859 (Evans LJ).

[2] Eg, Singapore: *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 (Singapore

CA); Hong Kong: *Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd* [2020] 6 HKC 451; Japan: Act on General Rules for Application of Laws (Act No 78 of 2006), art 22.

[3] Eg, Rome II Reg, art 4(1).

[4] Eg Rome II Reg, art 14; Swiss Federal Code on Private International Law, art 132.

[5] [2013] 2 HKC 459 (HKCFA).

[6] [2024] 1 SLR 307 [87] (Singapore CA).

[7] Ibid [78]-[79].

[8] *Good Challenger Navegante SA v MetalExportImport SA, (The “Good Challenger”)* [2003] EWCA Civ 1668, [54]–[55]. See also *Godard v Grey* (1870) LR 6 QB 139.

[9] [2012] EWCA Civ 855.

[10] *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 [55] (Singapore CA).

[11] See the reference to ‘matters of high policy’ in *Yukos* [2012] EWCA Civ 855 [151].

[12] *Diag Human SE v Czech Republic* [2014] EWHC 1639 (Comm) [58].

[13] See *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 (Singapore CA).