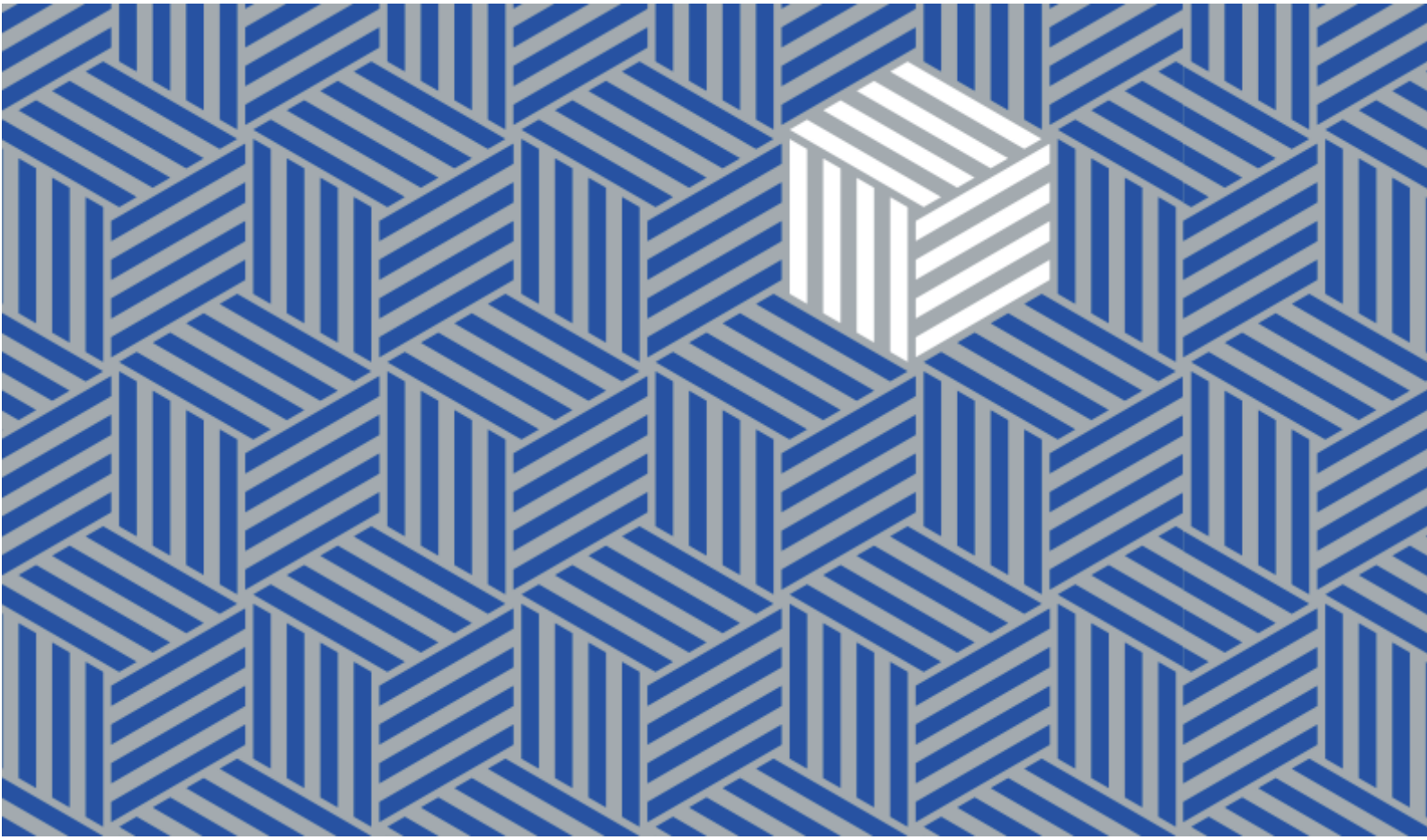
Singapore Academy of Law
Law Reform Committee

Report on the Framework and Margins of Transnational Issue Estoppel

May 2023



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THE FRAMEWORK AND MARGINS OF TRANSNATIONAL ISSUE ESTOPPEL

The primary purpose of the doctrine of issue estoppel is to give final and binding effect to court determinations on issues arising from disputes between the same parties. Not uncommonly invoked in the context of purely domestic court proceedings, the doctrine serves in effect to avoid re-litigation of issues that would otherwise be wasteful of parties' and court resources. *Transnational* issue estoppel takes the doctrine a step further by training the inquiry on the finality of *foreign* court determinations in local proceedings between the same parties, bringing with it a host of other considerations many may be less familiar with. The boundaries of the doctrine have also yet to be fully explored and delineated in case law. This report, in reference to a recent decision by the Singapore Court of Appeal, seeks to outline the framework and margins of transnational issue estoppel by highlighting seven key potential outer limits that one should consider when seeking to invoke the doctrine in an appropriate case.

Introduction

1 Courts around the world from time to time confront issues concerning potential preclusive effects of foreign judgments in pending local proceedings. Singapore, as an established international disputes resolution hub, is no stranger to such encounters where its court proceedings are concerned.

2 The Court of Appeal's 26 February 2021 decision in *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)*[1] ("*Merck*") re-affirming the position under Singapore law that foreign judgments are capable of giving rise to issue estoppel in local proceedings ("transnational issue estoppel") is one recent significant example in this regard. In *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd and others*[2] ("*EFG Bank v Surewin*"), the General Division of the High Court (citing *Merck*) further had another occasion to apply transnational issue estoppel principles in respect of a foreign arbitral award.[3]

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1 *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 (26 February 2021, Court of Appeal of Singapore).

2 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd and others* [2022] 5 SLR 915; [2021] SGHC 227 (12 November 2021, High Court of Singapore) ("*EFG Bank v Surewin*").

3 See also, for example, International Arbitration Act 1994 (2020 Rev Ed) (Singapore) section 19B(1).

3 This report explores the framework and margins of the concept of transnational issue estoppel in Singapore, with legal and court practitioners as its primary intended beneficiaries. It is hoped, in particular, that this report will form a useful basis of reference from which transnational issue estoppel principles under the common law in Singapore can further be evolved and developed by the courts in the future.

The basic framework underpinning transnational issue estoppel

4 Court judgments and academic scholarship propound with general consistency that the test determining whether a domestic issue estoppel arises from a local judgment forms the starting premise for the test determining whether transnational issue estoppel arises from a foreign judgment, subject to appropriate and necessary modifications taking into account considerations of transnational significance.

5 Under the common law, whereas the creation of domestic issue estoppel is conventionally understood to be underpinned by four key conditions, namely:

(a) the (domestic) judgment was entered by a court of competent jurisdiction;

(b) the judgment said to give rise to estoppel is a final and conclusive judgment on the merits;

(c) there is identity of parties; and

(d) there is identity of subject matter,

the doctrine of transnational issue estoppel—ie, where the judgment contended to have binding effect on a party is a judgment rendered by a national court in a jurisdiction outside that of another national court in which that judgment is being relied upon—introduces additional layers of considerations that must be taken into account, such as:

(e) whether the court rendering the foreign judgment had "international jurisdiction" (sometimes also referred to as "transnational jurisdiction") over the party said to be bound by the estoppel, in the sense that either:

(i) the party was present or resident in the state or territory of the foreign court at the time of commencement of the foreign proceedings; or

(ii) the party had submitted or agreed to submit to the jurisdiction of the foreign court in respect of the dispute; and

(f) whether there is otherwise any defence preventing the recognition of the foreign judgment in the local court proceedings.

6 The more sophisticated analysis involved when applying transnational issue estoppel stems principally from the interplay between the concepts of state sovereignty and international comity. On the one hand, it is a well-established principle under the precepts of state sovereignty in the international legal order as we know that national court judgments enjoy no automatic transnational or extra-territorial effect. Yet on the other hand, international comity encourages national courts around the world to give transnational effect to each other's competent determination on matters involving the same parties and the same subject matter, as a gesture of international respect at the same time as this could help minimise the economic cost of litigation transnationally.

7 Before transnational issue estoppel can be said to arise from a foreign judgment, the judgment must first and foremost be capable of being recognised by the court addressed under its own conflict of laws rules, or pursuant to an applicable treaty or statute relating to the recognition of foreign judgments. In the case where the court addressed is a Singapore court, these include the common law conflict of laws rules, the Reciprocal Enforcement of Foreign Judgments Act 1959, or the Choice of Court Agreements Act 2016 (as the case may require).[4]

[4] The Reciprocal Enforcement of Commonwealth Judgments Act 1921 (2020 Rev Ed) (Singapore) was separately repealed with effect from 1 March 2023.

Recognition of the foreign judgment – unpacking the 'extrinsic' element of transnational issue estoppel

8 As mentioned, the recognition of a foreign judgment is an essential threshold that must first be crossed for the analysis to cross to the next step of considering whether the foreign judgment may in substance give rise to transnational issue estoppel. To an extent, the recognition of the foreign judgment may be rationalised as an 'extrinsic' (but important) element of transnational issue estoppel, because principles on the recognition of foreign judgments are of general application and not within the exclusive province of the doctrine of transnational issue estoppel. The application of transnational issue estoppel necessarily depends on the recognition of a foreign judgment, but not vice versa.

9 Under Singapore common law, a foreign judgment is capable of being recognised in the Singapore courts if the judgment is a final and conclusive decision on the merits by a court of competent jurisdiction that has "international" (or "transnational") jurisdiction over the party sought to be bound by the judgment, and there are no defences against the recognition of the judgment (see paragraphs 5(a), 5(a), 5(e) and 5(f) above).[5]

Finality and conclusiveness of the foreign judgment

10 An analysis of whether a foreign judgment is "final and conclusive" in this regard comprises two aspects:

(a) First, what constitutes finality and conclusiveness in a foreign judgment is defined by the *lex fori*, which in this context means the 'recognition' court's own private international law rules. Under this aspect, a judgment is considered by the common law to be final and conclusive if it "cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate Jurisdiction although it may be subject to appeal to a court of higher Jurisdiction".[6]

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5 The principles under the Reciprocal Enforcement of Foreign Judgments Act 1959 (2020 Rev Ed) (Singapore) are largely the same, save for the Act's reciprocity requirements (discussed further below).

6 See *DSV Silo-Und Verwaltungsgesellschaft mbH v Owners of The Sennar* [1985] 1 WLR 490; [1985] UKHL J0321-4 (21 March 1985, House of Lords of the United Kingdom) ("*The Sennar (No 2)*") at 494, followed in *The "Bunga Melati 5"* [2012] 4 SLR 546; [2012] SGCA 46 (21 August 2012, Court of Appeal of Singapore) ("*The Bunga Melati 5*") at [81]. In the context of ASEAN, Australia, China, India, Japan and South Korea: see Bích Ngọc Du, "Principle 3: Finality of Foreign Judgments" in Adeline

(b) Second, in determining whether a foreign judgment actually fulfils the *lex fori*'s perspective on finality and conclusiveness, the realm of the 'recognition' court's considerations must include what the court finds the law of the 'originating' court itself says about the nature of the foreign judgment.[7] The 'recognition' court's determination under this aspect must turn ultimately on the facts of the matter and be "extra-sensitive" to the 'originating' court's intention regarding the effect of the foreign judgment under the law of that 'originating' jurisdiction.

Foreign judgment must be "on the merits"

11 Apart from being final and conclusive, the foreign judgment must be found to be so "on the merits".[8] A judgment that is final and conclusive on the merits has been held to mean "a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned".[9] It has also been said that a decision relating to procedure alone does not amount to a decision on the merits.[10] At the same time, case authorities highlight that transnational issue estoppel can in principle arise in respect of foreign decisions on interlocutory matters, such as a positive finding of court jurisdiction.[11] This suggests—consistently with Singapore's jurisprudence relating to *domestic* issue estoppel—that there is no relevant distinction that can be drawn between "final" and "interlocutory" decisions in this context.[12] What instead matters is whether there has been "a declaration or determination of a party's liability and/or his rights or obligations leaving nothing else to be judicially determined".[13]

Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (Asian Business Law Institute, 2020), pp. 42-45 at paras [c]-[f].

7 See *The Bunga Melati 5* at [86].

8 *Cf. Sang Cheol Woo v Spackman, Charles Choi and others* [2022] SGHC 298 (30 November 2022, High Court of Singapore) at [49]-[56].

9 See *The Sennar (No 2)* at 499.

10 *Ibid*.

11 See *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372; [2019] SGCA 42 (26 July 2019, Court of Appeal of Singapore) ("*Lakshmi Anil Salgaocar*") at [101], citing *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847 (15 February 1996, Court of Appeal of England and Wales).

12 See *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453; [2006] SGHC 211 (22 November 2006, High Court of Singapore) ("*Goh Nellie*") at [28].

13 *Ibid.*

'Originating' court must have had competent and international (transnational) jurisdiction

12 The requirement that the 'originating' court must not only have had "competent" but also "international" (or "transnational") jurisdiction can be rationalised as follows. Competent jurisdiction should not be conflated with international (or transnational) jurisdiction, as both are conceptually distinguishable. The 'originating' court's international (or transnational) jurisdiction over a party will be found to have existed if the court addressed is satisfied that the party was either (a) present or resident in the state or territory of the foreign court at the time of commencement of the foreign proceedings, or (b) the party had submitted or agreed to submit to the jurisdiction of the foreign court in respect of the dispute (see paragraph 5(e) above).[14] The requirement of competent jurisdiction is, by contrast, to a large measure a matter to be ascertained by reference to the internal laws of the 'originating' court pertaining to the establishment of its own jurisdiction *ratione materiae* (ie, subject matter jurisdiction) and jurisdiction *ratione personae* (ie, personal jurisdiction), including (depending on the jurisdictional construct of the 'originating' court in question) jurisdiction *ratione temporis* (ie, temporal jurisdiction).

No defences against recognition of foreign judgment must exist

13 Finally, the requirement that there be no defences against the recognition of the foreign judgment demands that the foreign judgment must not be procured by fraud, the recognition of the foreign judgment would not contravene Singapore's public policy, and the proceedings in which the foreign judgment was obtained were not contrary to the principles of natural justice. These general defences mirror those available in the sister situation of the common law enforcement of foreign judgments.[15]

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14 The principles of international (or transnational) jurisdiction are largely the same under the Reciprocal Enforcement of Foreign Judgments Act 1959, save that residence of the defendant in the country of the court of origin is required, rather than presence.

15 See, for example, *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129; [2009] SGCA 60 (8 November 2009, Court of Appeal of Singapore) at [14].

The 'intrinsic' elements of transnational issue estoppel

14 The further essential elements of transnational issue estoppel are twofold: there must be identity of parties and identity of subject matter (ie, issue) in both the proceedings before the 'originating' court and the court addressed. In comparison with the first element (ie, recognition of the foreign judgment), these two other elements are for reasons set out below of more specific peculiarity—and hence 'intrinsic'—to the substantive doctrine of transnational issue estoppel.

Identity of parties

15 Identity of parties is a concept entrenched in the common law doctrine of *res judicata*—of which issue estoppel is a species.[16] As a starting point, the test for identity of parties is determined by reference to the *lex fori*,[17] and the Singapore courts generally adopt a broad view towards what constitutes identity of parties, looking past form to consider whether, in substance, the parties involved in the two sets of proceedings are effectively the same.[18]

16 An approach towards the requirement of identity of parties that is too technical is not representative of the Singapore courts' stance in this regard, as what is needed is only the "principal players" in both the 'originating' and 'recognition' proceedings to be effectively identical.[19]

17 Identity of parties can also be established where privies are involved.[20] This means that any party in the proceedings before the court addressed who is a privy to one of the parties in the 'originating' court proceedings may still be bound by issue estoppel, even though the parties in both sets of proceedings are not strictly speaking identical.

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16 See *Goh Nellie* at [17]-[24].

17 See, for example, *EFG Bank v Surewin* at [53].

18 See *Koh Sin Chong Freddie v Singapore Swimming Club* [2015] 1 SLR 1240; [2014] SGHC 276 (31 December 2014, High Court of Singapore) at [110].

19 See *EFG Bank v Surewin* at [58]; *Goh Nellie* at [33].

20 See *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529; [1981] UKHL 13 (19 November 1981, House of Lords of the United Kingdom) at 541, cited approvingly in *Goh Nellie* at [32].

Identity of subject matter

18 In the context of issue estoppel, identity of subject matter requires the *specific issue* in respect of which estoppel is said to be founded to be identical in the 'originating' and the 'recognition' proceedings. This position was settled by the Court of Appeal in *Merck*.[21]

19 Importantly, the Court of Appeal also held that "in order for a foreign judgment to give rise to issue estoppel, not only the foreign judgment as a whole, but also the decision on the specific issue that is said to be the subject matter of the estoppel must be final and conclusive under the law of the foreign judgment's originating jurisdiction".[22]

20 Accordingly, identity of subject matter, although essential, may not be considered sufficient for the purpose of transnational issue estoppel. The court addressed must additionally be satisfied that the foreign legal system in question have "either a doctrine of issue estoppel covering the issues dealt with in the foreign judgment, or a doctrine with the same underlying basis and operation", failing which a claim of transnational issue estoppel will be defeated on account of "inter-jurisdictional differences" between the law of the 'originating' court and the *lex fori*. This echoes most notably Lord Reid's caution in *obiter* in *Carl Zeiss* at 919, where he stated that:

> […] we should have to be satisfied that the issues in question cannot be relitigated in the foreign country. In other words, it would have to be proved in this case that the [foreign courts] would not allow the re-opening in any new case between the same parties of the issues decided […] which are now said to found an estoppel here. There would seem to be no authority of any kind on this matter, but it seems to me to verge on absurdity that we should regard as conclusive something in a [foreign] judgment which the [foreign] courts themselves would not regard as conclusive. It is quite true that estoppel is a matter for the *lex fori* but the *lex fori* ought to be developed in a manner consistent with good sense.

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21 See *Merck* at [43], following the *obiter* remarks of Lord Reid and Lord Wilberforce in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853; [1966] UKHL J0518-1 (18 May 1966, House of Lords of the United Kingdom) ("*Carl Zeiss*").

22 See *Merck* at [43].

The outer limits of transnational issue estoppel

21 The Court of Appeal in *Merck* opined that there remains a need for more clarity as well as caution on the potential "outer limits" of the doctrine of transnational issue estoppel at common law, "[d]ue to the tension between transnational comity and a local court's role as custodian of the rule of law within the domestic legal regime".[23] In articulating this view, the Court of Appeal considered that the three elements described in the previous section (ie, the requirements of a foreign judgment that is capable of being recognised, identity of parties and identity of subject matter) "are necessary but ultimately insufficient conditions for transnational issue estoppel to arise".[24]

22 In this section, a number of potential outer limits of transnational issue estoppel will be considered and discussed.

Potential limits

Territoriality of the foreign judgment

23 The Court of Appeal in *Merck* held that transnational issue estoppel "should be applied with due consideration of whether the foreign judgment in question is territorially limited in its application".[25] The thinking behind this remark was that if a foreign judgment lacked transnational impact, that would prevent the giving rise of transnational issue estoppel effect in proceedings before another national court.

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23 See *Merck* at [52].

24 *Ibid.*

25 See *Merck* at [56].

24 Two examples in this regard which the Court of Appeal highlighted in *Merck* are "findings on the validity of a patent in a jurisdiction" and "findings concerning or implicating the public policy of a jurisdiction", where it was considered that "inherent territorial limitations may arise from the nature of the subject matter".[26] The example of patent validity is uncontroversial as it is widely accepted that intellectual property rights are primarily territorial in nature. Hence legal protection of intellectual property in an invention must be assessed by reference to the specific intellectual property laws of each individual jurisdiction in which the invention finds itself being applied or used. In this respect, it may even be considered that the element of identity of subject matter is inherently lacking, since a judicial determination on issues regarding the validity of a patent according to the intellectual property laws of country X is different from a judicial determination of the same issues in Country Y.

25 Similarly in the example of foreign judgments implicating the public policy of the judgment's state of origin, it runs consistent with the view that the sustainability of an alleged right or liability within country X as a matter of country X's public policy says nothing about the prospects of the sustainability of the same right or liability within country Y according to the latter's public policy. The courts of country X and country Y each retain their prerogative to determine public policy sustainability of the same right or liability within their own respective jurisdictions *de novo*.

Forum mandatory rules

26 Another limit that the Court of Appeal in *Merck* considered to be possible is "where 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".[27] Forum mandatory rules, commonly also referred to as international mandatory rules, generally tend to be statutory in nature in common law systems such as Singapore. To a large extent, it is usually a question of statutory interpretation whether a particular legislative Act or provision bears an overriding mandatory effect irrespective of any choice of law rule.

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26 *Ibid.*

27 See *Merck* at [55].

27 It is not possible to exhaustively list down all conceivable forum mandatory rules in Singapore. Suffice it to say that the Singapore courts have considered "penal, revenue and other public laws" (including certain laws of a "regulatory nature" such as the Securities and Futures Act 2001) as laws that can possibly operate as forum mandatory laws or rules in Singapore.[28] It has also been held that section 5(2) of the Civil Law Act 1909 (which in simple terms provides that no action premised on a wager shall be brought or maintained in the Singapore courts for monetary remedies or otherwise) is in the nature of a forum mandatory provision.[29] Likewise, in the family law context, section 3 of the Guardianship of Infants Act 1934 has been held to impose an "overriding duty" on the Singapore courts such that "the doctrine of issue estoppel does not apply strictly in relation to proceedings involving the custody and upbringing of a child".[30]

28 Because forum mandatory rules are of overriding effect and application in the forum they necessarily limit the scope of transnational issue estoppel, since any issue governed by a forum mandatory rule must, from the 'recognition' court's perspective, be determined exclusively by reference to the forum mandatory rule. This is regardless of whether the same issue had in fact already been finally and conclusively determined in a prior foreign judgment applying foreign law.

Issues that are procedural for the purpose of the conflict of laws

29 The Court of Appeal in *Merck* accepted that transnational issue estoppel may also fail to arise in respect of an issue that is considered to be "procedural for the purpose of the conflict of laws".[31]

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28 See *Goldilocks Investment Co Ltd v Noble Group Ltd* [2018] 5 SLR 425; [2018] SGHC 108 (7 May 2018, High Court of Singapore) at [10] and [13].

29 See *Star City Pty Ltd (formerly known as Sydney Harbour Casino Pty Ltd) v Tan Hong Woon* [2002] 1 SLR(R) 306; [2002] SGCA 10 (25 February 2002, Court of Appeal of Singapore) ("*Star City*") at [29].

30 See *TSH and another v TSE and another and another appeal and another matter* [2017] SGHCF 21 (29 August 2017, High Court of Singapore) at [50].

31 See *Merck* at [55].

30 Two important aspects must be considered when ascertaining whether an issue is procedural for the purpose of the conflict of laws:

(a) First, a fundamental distinction needs to be appreciated between issues that are substantive and issues that are procedural in nature. In this regard, one (traditional) view rationalising this distinction can be distilled from jurisprudence concerning whether a legislative provision is substantive or procedural in nature—ie, whether the matter involves "the essential validity of a right" or "its enforceability".[32] Alternatively, another possible view is to focus the inquiry on whether the matter in question cuts so closely to the root of the 'recognition' court's machinery of administration of justice such that it would be inappropriate to disregard the *lex fori*.[33]

(b) Second, the issue must not merely be procedural, but procedural *for the purpose of the conflict of laws*.

31 An illustration of an issue that is considered procedural for the purpose of the conflict of laws is the question whether a foreign judgment from country X gives rise to issue estoppel in a Singapore court, when the court from another country Y had previously found that the foreign judgment from country X created an issue estoppel under the laws of country Y.[34] The foreign judgment from country X does not, simply by virtue of the decision of the court in country Y, give rise to issue estoppel in Singapore, because questions relating to the domestic binding effect of a foreign judgment are quintessentially matters reserved to be determined in accordance with the private international law rules applied by the court addressed.

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32 See *Star City* at [12].

33 See *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367; [2009] SGCA 52 (6 November 2009, Court of Appeal of Singapore) at [20]-[21], and see also *Lew, Solomon v Khaikhushru Shiavax Nargolwala and others and another appeal* [2021] 2 SLR 1; [2021] SGCA(I) 1 (10 February 2021, Court of Appeal of Singapore) at [73]. This is the prevailing modern view in major Commonwealth jurisdictions, for example in Australia (*John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [2000] HCA 36 (21 June 2000, High Court of Australia)), Cananda (*Tolofson v Jensen* [1994] 3 SCR 1022 (15 December 1994, Supreme Court of Canada)) and Hong Kong SAR (*First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd* [2012] HKCFA 52 (13 November 2012, Court of Final Appeal, Hong Kong SAR)).

34 See *Merck* at [55].

32 An example of an issue that is *not* considered to be procedural for the purpose of the conflict of laws is that of limitation of actions. Although previously questions of foreign limitations could or could not, depending on circumstances, be considered to be procedural for the purpose of the conflict of laws, that position was superseded by legislation. Under the Foreign Limitation Periods Act 2012, which came into effect on 1 June 2012,[35] section 5 expressly provides that where a foreign court has determined any matter relating to limitation "then, for the purposes of the law relating to the effect to be given in Singapore to that determination, that court is, to the extent that it has so determined the matter deemed to have determined it on its merits". The explanatory note to the Act further states that the Act was enacted "to provide for any law relating to the limitation of actions to be treated, for the purposes of cases in which effect is given to foreign law or to determinations by foreign courts, as a matter of substance rather than as matter of procedure".

33 In *Lakshmi Anil Salgaocar*, the Court of Appeal rejected an argument contending that where a foreign court had declined to stay its proceedings on *forum non conveniens* grounds, issue estoppel operated in subsequent Singapore court proceedings involving an anti-suit injunction application between the same parties. The Court of Appeal reasoned that the element of identity of subject matter would not be satisfied in such a circumstance given that "the test for anti-suit injunctions differs from that for stay applications on *forum non conveniens* grounds".[36] The Court of Appeal further expressed its concern with "arbitrary outcomes" if the position were to be otherwise, stating that:[37]

> More importantly, we are of the view that the doctrine of issue estoppel cannot apply in the manner suggested by the respondent because it would lead to arbitrary outcomes. If issue estoppel applies in the manner advanced by the respondent, the court that is second in time would effectively always be precluded from considering the application before it, though the application is strictly speaking different from that which was considered by the foreign court. This cannot be legally correct and is not supported by the case law. To suggest otherwise would effectively mean that the outcome of any such applications would be dependent on the scheduling of the hearings by the courts over which the parties would have no control whatsoever.

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35 The Foreign Limitation Periods Act 2012 (2020 Rev Ed) (Singapore) implemented the recommendations made by SAL's Law Reform Committee in January 2011 in Yeo Tiong Min, *Limitation Periods in Private International Law* (Law Reform Committee of the Singapore Academy of Law, January 2011).

36 See *Lakshmi Anil Salgaocar* at [99].

37 *Ibid* at [103].

34 To date, the decision in *Lakshmi Anil Salgaocar* remains good law in Singapore's jurisprudence. Nevertheless, a possible slightly different way to rationalise the decision in that case might be to consider whether the decision is better explained by regarding the question of *forum non conveniens* as generally an issue that is procedural in nature in the conflict of laws sense, and therefore incapable of giving rise to transnational issue estoppel (although technically speaking this should not prevent issue estoppel from arising from other factual findings in the foreign judgment, such as for example the place of habitual residence of a party or the place of performance of a contract). One benefit of this approach is it puts to rest the question whether an approach akin to *Lakshmi Anil Salgaocar* suggests that identity of subject matter must invariably fail the moment there exists *any* kind of difference that can be adverted to between the legal tests applied by the 'originating' court and the 'recognition' court—and if so, whether such a view is too narrow and technical.[38]

Public policy

35 If an issue before the court addressed engages the fundamental public policy of the forum, transnational issue estoppel likewise may not arise from the foreign judgment in question. The Court of Appeal considered this potential limitation as falling within the umbrella of issues in respect of which "the court of the forum ought to determine for itself under its own law"[39] (much like issues attracting the application of forum mandatory rules and issues which are procedural for the purpose of the conflict of laws, as discussed above).

36 This report suggests that the circumstances in which the fundamental public policy of the forum is "engaged" can be regarded from two angles: first (ie, the basic angle), public policy engaged by virtue of it being embedded as an essential test or analysis that the court addressed must undertake in the domestic proceedings; and second (ie, an *extended* angle), public policy that is otherwise engaged in order that the court addressed fulfils its "constitutional role […] in overseeing the administration of justice and safeguarding the rule of law within its jurisdiction".[40]

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38 See, for example, Richard Garnett, "Recognition of jurisdictional determinations by foreign courts" (2019) 15(3) *Journal of Private International Law* 490 (DOI: 10.1080/17441048.2019.1679435) at 508-513.

39 See *Merck* at [55].

40 See *Merck* at [33].

37 One obvious example falling under the basic angle is where forum public policy considerations are or appear to be reflected in a forum mandatory rule (see, eg, section 5(2) of the Civil Law Act 1909). It is a matter of statutory interpretation by the court addressed whether an issue of public policy of the forum is engaged under this conception.

38 On the other hand, the *extended* angle regarding public policy engagement presents a unique set of considerations that should call for greater caution. This is because of the broad and varied range of situations in which considerations of forum public policy can be sought to be invoked in practice. Some possible examples include the following:

(a) **Where the 'originating' court is considered to have acted with "perversity in the ordinary sense of obstinately or dishonestly shutting one's eyes to what one knows to be right"**.[41] Perhaps a more extreme characterisation of such conduct is corruption or partiality in the decision-making of the 'originating' court, such that it offends the basic notions of justice for the court addressed to recognise the foreign judgment. Given, however, the relatively extreme charge levelled against a foreign court, it is envisaged that challenges on such ground will be rare and exceptional in practice. In this regard, in England and Wales the courts have in particular cautioned that although there is "no rule that the English court […] will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence[,] [t]he rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence".[42] Furthermore, it has been held that the "public order" of the state addressed "defines the framework of any assessment of this difficult question; whether [a foreign judgment is] truly to be regarded as dependent and partial as a matter of [local] law is not the same question as whether [the foreign judgment is] to be regarded as dependent and partial in the view of some other court according to that court's notions of what is acceptable or otherwise according to its law".[43]

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41 See *Carl Zeiss* at 917-918.

42 See *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804; [2011] UKPC 7 (10 March 2011, Judicial Committee of the Privy Council of the United Kingdom) at [101].

43 See *Yukos Capital Sarl v OJSC Rosneft Oil So (No 2)* [2014] QB 458; [2012] EWCA Civ 855 (27 June 2012, Court of Appeal of England and Wales) ("*Yukos Capital Sarl*") at [151]. The general decision of *Yukos Capital Sarl* has been referred to by the Singapore Court of Appeal on two separate occasions: *The Royal Bank of Scotland NV (former known as ABN Amro Bank NV) and others v TT International*

(b) **Where the foreign judgment is found to have been "obtained by fraud"—borrowing the language from Singapore's existing statutory frameworks pertaining to the recognition of foreign judgments (see, eg, section 5(1)(a)(iv) of the Reciprocal Enforcement of Foreign Judgments Act 1959 and section 14(b) of the Choice of Court Agreements Act 2016)**. The Court of Appeal expressly highlighted the pertinence of having regard to the promulgation of the Choice of Court Agreements Act 2016 and amendments related to the Reciprocal Enforcement of Foreign Judgments Act 1959 when a Singapore court is considering transnational issue estoppel, "because the application of the relevant principles might impact Singapore's international relations".[44]

(c) **Where a more benignant understanding of what constitutes "perversity" applies, i.e., "where the law of the foreign country applied in the foreign judgment is at variance with generally accepted doctrines of private international law"**.[45] Nevertheless, what is not quite clear and which courts may not always find easy in practice to define is what "accepted doctrines of private international law" entail. In England and Wales, courts have expressed the need to be sensitive to the fact that different civilised countries may take different views on international law.[46] There is no reason why the Singapore courts should not adopt a similarly cautious mindset in this regard—perhaps even to the extent of taking a presumptively generous legal relativistic view in this aspect, taking into account considerations of international comity.

Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal [2015] 5 SLR 1104; [2015] SGCA 50 (30 September 2015, Court of Appeal of Singapore) ("*Royal Bank of Scotland v TT International Ltd*") at [165]-[166] and *The Republic of the Philippines v Maler Foundation and others and other appeals* [2014] 1 SLR 1389; [2013] SGCA 66 (30 December 2013, Court of Appeal of Singapore) at [55]-[56].

44 See *Merck* at [2].

45 See *Carl Zeiss* at 922.

46 See *In re Queensland Mercantile and Agency Company. Ex parte Australasian Investment Company. Ex parte Union Bank of Australia* [1892] 1 Ch 219 (17 December 1891, Court of Appeal of England and Wales) at 226; *Carl Zeiss* at 922.

39 A particularly challenging aspect of public policy which has not been settled under Singapore law is where the foreign judgment is found by the court addressed to "reflect a sufficiently serious and material error".[47] In this regard, two general scenarios are considered:

(a) Where the foreign judgment contains sufficiently serious and material errors in the application of non-Singapore law.

(b) Where the foreign judgment contains sufficiently serious and material errors in the application of Singapore law.

Where foreign judgment contains errors in application of non-Singapore law

40 In relation to the first scenario, the Court of Appeal, while leaving the question open for determination in a future case, indicated that it appears "at least provisionally, incompatible with our role as custodian of the rule of law within this jurisdiction to readily yield to a foreign judgment that appears to have been wrongly decided".[48] This provisional inclination is understandable when viewed through the lens of a judicial system that aspires towards the pursuit of justice and the upholding of the rule of law within its jurisdiction as categorical imperatives. It may likely also engender the application of the English *Arnold* exception[49] in full force and effect in respect of foreign judgments just as it would apply to Singapore domestic judgments.[50]

47 See *Merck* at [58].

48 See *Merck* at [63(a)].

49 As derived from *Arnold v National Westminster Bank plc* [1991] 2 AC 93 (25 April 1991, House of Lords of the United Kingdom), and as interpreted and adopted in *Royal Bank of Scotland v TT International Ltd* relating to domestic judgments.

50 Thereby overriding the conclusiveness principle in *Godard v Gray* (1870) LR 6 QB 139 (10 December 1870, High Court of Justice of England and Wales) at least for issue estoppel. See *Merck* at [63].

41 However, such inclination would appear to threaten a reversal of a century-old affirmation of the rule in *Godard v Gray*[51] that a foreign judgment "is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error, whether of fact or of law".[52] It could further generate a perception of a ground shift in the Singapore courts' general attitude on a fundamental point of judicial policy as articulated by the Court of Appeal more than two decades ago:[53]

> It is also vitally important that no court of one jurisdiction should pass judgment on an issue already decided upon by a competent court of another jurisdiction. This is the doctrine of comity. After all, two tribunals, both acting conscientiously and diligently, could very well come to a different conclusion on the same facts. There is no question of which is being more correct. To seek to make such an evaluation would be an invidious exercise and could lead to the undesirable consequence which we have mentioned before of encouraging judicial chauvinism. It must be borne in mind that the enforcement forum is not an appellate tribunal *vis-à-vis* the foreign judgment.

42 In cases where the foreign judgment was rendered by a court whose jurisdiction was undergirded by parties' consent, such as for example by way of a contractual choice of forum clause, an added layer of difficulty may have to be contended with. In particular, a question would be asked why foreign court judgments should, if at all, be any more susceptible to review on the substantive merits than private arbitral awards in respect of which the principle of minimal curial intervention is axiomatic.[54] Finally, doubts may also arise as to how a policy of common law curial intervention against foreign judgments would sit consistently with other leading common law jurisdictions' jurisprudence as well as modern trends and developments in private international treaty law (such as the Convention of 30 June 2005 on Choice of Court Agreements and the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters).

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51 *Godard v Gray* (1870) LR 6 QB 139 (10 December 1870, High Court of Justice of England and Wales).

52 See *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515; [2002] SGCA 17 (21 March 2002, Court of Appeal of Singapore) ("*Hong Pian Tee*") at [12] and [14], citing *Ralli v Angullia* (1917) 15 SSLR 33 (Court of Appeal of the Straits Settlements).

53 See *Hong Pian Tee* at [28].

54 See, for example, *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86; [2007] SGCA 28 (9 May 2007, Court of Appeal of Singapore) at [59] and [65(c)]; *BLC and others v BLB and another* [2014] 4 SLR 79; [2014] SGCA 40 (30 July 2014, Court of Appeal of Singapore) at [51]-[53]; *Republic of India v Vedanta Resources plc* [2021] 2 SLR 354; [2021] SGCA 50 (12 May 2021, Court of Appeal of Singapore) at [47]-[48].

Where foreign judgment contains errors in application of Singapore law

43 Special consideration may nevertheless be warranted under the second scenario (ie, where the foreign judgment contains sufficiently serious and material errors in the application of substantive *Singapore* law), to which the Court of Appeal in *Merck* indicated (in *obiter*) that it is a "sensible course" that the Singapore courts "should avoid taking an extreme position (either that a foreign judgment on any question of Singapore law would *necessarily be incapable* of giving rise to an issue estoppel on the basis that the Singapore courts are the ultimate authority on Singapore law, or that a foreign judgment on any question of Singapore law would *always be capable* of giving rise to an issue estoppel so long as all the elements of transnational issue estoppel are present)".[55]

44 In this regard, the Court of Appeal suggested that different treatment may possibly be given depending on whether the error is an "existent" or a "retrospective" one:[56]

> […] there is a delicate balance to be struck between, on the one hand, giving effect to what foreign courts have decided (so that we do not in effect find ourselves sitting as a *de facto* appellate court, given the significance of considerations of comity), and, on the other, ensuring the correct application of Singapore law (both from the standpoint of our role as guardian or custodian of Singapore law, and from that of the administration of justice in any given case by not allowing patent errors to go uncorrected). There may also be a need to distinguish between cases where Singapore law is applied in a manner that is obviously wrong, and cases where a point under Singapore law is uncertain with no clear Singapore decision and the foreign court adopts a considered position after taking into account expert evidence, which position is eventually proved incorrect by a subsequent Singapore decision. In our view, such situations could potentially be dealt with by distinguishing between existent errors, where the foreign court clearly erred in its application of Singapore law, and retrospective errors, where the foreign court adopted a view that cannot be said to be wrong under Singapore law *as it then stood* but happened to anticipate wrongly how Singapore law would develop. […]

55 See *Merck* at [61].

56 *Ibid.*

45 However, it may be doubtful whether such a distinction between an "existent error" and a "retrospective error" can truly be material in the context in which transnational issue estoppel is argued to arise, as opposed to 'last mile' scenarios such as where a foreign judgment is sought to be enforced. In the latter type of situations, it may be arguable that the distinction proposed between these two types of errors of Singapore law is *ex hypothesi* maintainable, such that a foreign judgment with an existent error is liable to be unenforceable whereas a foreign judgment with a retrospective error is enforceable. In this regard, it may even be said that a "retrospective error" in itself is not so much truly an error of substantive Singapore law as it is a finding of Singapore law that could not have been faulted as at the time when the parties' rights and liabilities were crystallised into a judgment debt by the foreign court.

46 In the context of transnational issue estoppel, on the other hand, questions relating to the binding or preclusive effect of a foreign judgment (or any part thereof) typically arise in the course of live local proceedings where some underlying substantive dispute has been properly engaged to be determined on the merits by the Singapore court. As a matter of generality, it is difficult to appreciate why it should matter whether an error of substantive Singapore law contained in the foreign judgment said to be giving rise to issue estoppel is an existent or a retrospective one, since the parties' rights and liabilities as staked in the substantive live local dispute addressed to the Singapore court are rightfully within the Singapore court's competent jurisdiction to decide interpreting the relevant substantive Singapore law as at the time of the local proceedings.

47 In any case, caution must be taken in assessing whether an operative error in either of the two senses proposed by the Court of Appeal in *Merck* in fact existed in the first place. For one, the Singapore law said to be applied erroneously in the foreign judgment must not be simply a *pure* question of law having no impact on the actual outcome of the dispute in the foreign proceedings. As the Court of Appeal observed, since "issue estoppel is about precluding parties from re-litigating what a prior competent court of law has already decided about their dispute, it has no role to play in "determinations of pure questions of law that do not affect the actual dispute"".[57] Another possible consideration is whether there should be a further distinction drawn between errors occasioned by a misinterpretation of Singapore law and errors in the sense of applying Singapore law (as correctly interpreted) to the facts in a way that the court addressed would otherwise not have done, with the result that only errors of the former type should attract an exception to transnational issue estoppel.

Timing of foreign judgment

48 The timing of the foreign judgment as a further potential limitation can be manifested in at least two ways, as endorsed by the Court of Appeal in *Merck*:

> (a) **Where there are multiple competing foreign judgments, the foreign judgment that is the first in time should be recognised for the purposes of creating an estoppel**. The rationale for this has been explained by the Court of Appeal as "not only promot[ing] finality and reduc[ing] the risk of dissatisfied parties seeking to undermine the last-rendered judgment by engaging in satellite litigation to obtain a further judgment in their favour, but is also in line with the legislative policy reflected in s 15(1)(*e*) of the [Choice of Court Agreements Act 2016] and s 5(1)(*b*) of the [Reciprocal Enforcement of Foreign Judgments Act 1959]".[58]

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57 See *Merck* at [51], and *Fidelitas Shipping Co Ltd v V/O Exportcleb* [1966] 1 QB 630 (25 February 1965, Court of Appeal of England and Wales) at 644-645.

58 See *Merck* at [36(a)].

(b) **Where, for whatever reason, there is an inconsistent prior or subsequent Singapore judgment between the same parties, the foreign judgment should not be recognised**. The Court of Appeal explained that "[t]his gives priority to the *res judicata* effect of local judgments, and is consistent with the legislative policy reflected in s 15(1)(*d*) of the [Choice of Court Agreements Act 2016], which confers upon the General Division of the High Court the discretion to refuse recognition (or, as the case may be, enforcement) of a foreign judgment if it is inconsistent with a Singapore judgment given in a dispute between the same parties".[59]

49 The Court of Appeal, however, left open the question of what should be the approach where a foreign judgment is handed down when Singapore proceedings on the same or substantially the same subject matter have been commenced and are pending.[60] On this point, concerns that a rule of non-recognition may create an incentive in the strategic initiation of pre-emptive Singapore proceedings in order to prevent the recognition of an impending foreign judgment can be of particular relevance; and the Court of Appeal observed in *obiter* that the Singapore courts could consider "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".[61]

50 It should be noted that this issue has previously been comparatively surveyed and studied to some extent by the Permanent Bureau of the Hague Conference on Private International Law ("HCCH"), culminating in an October 2015 report titled "Comparative Note on *Lis Pendens* in the Recognition and Enforcement of Foreign Judgments" ("HCCH Report").[62] The "*lis pendens* issue" as identified in the HCCH Report was expressed as "the situation where a domestic proceeding is pending in a State when recognition and enforcement of a foreign judgment is sought in this State". From its survey of, among others, 28 national jurisdictions and 13 regional and international instruments, the HCCH Report found that:

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59 See *Merck* at [36(b)]. See also Colin Ong, "Principle 11: Inconsistent Judgments" in Adeline Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments in Asia* (2020, Asian Business Law Institute) pp 171-172 at paragraphs [zl]-[zm].

60 See *Merck* at [38].

61 *Ibid*.

62 See "Jurisdiction Project", *Hague Conference on Private International Law*, undated.

> Legal regimes which address the *lis pendens* issue fall broadly into two categories. While some legal regimes give a preference towards pending domestic proceedings over the recognition and enforcement of a foreign judgment, others provide a preference towards recognising the foreign judgment over the pending domestic proceedings.
>
> […]
>
> Several national legal regimes that follow common law traditions, such as Australia, Canada (other common law provinces), China (Hong Kong), India, New Zealand, Singapore, the United Kingdom (England and Wales) and the United States of America tend to give preference to foreign judgments when addressing the *lis pendens* issue. Under the laws of these regimes, a foreign judgment will be recognised as *res judicata*, provided certain conditions are met. A foreign judgment that is recognised as *res judicata* has preclusive effects on domestic proceedings, and the court of the State addressed may either stay or dismiss the pending domestic proceedings.
>
> […]

51 The HCCH Report further outlined certain advantages and disadvantages under each of the two approaches (ie, the approach preferring pending domestic proceedings and the approach preferring the recognition of the foreign judgment) to be considered by a Working Group. Subsequent reports published by the HCCH suggest that further (albeit limited) discussions were held on "matters relating to direct jurisdiction (including exorbitant grounds and *lis pendens* / declining jurisdiction)", "with a view to preparing an additional instrument". As at the time of writing, this report understands that the HCCH's work on that front had since been broadly subsumed under the umbrella of its "Jurisdiction Project" (which progress is still fairly nascent), even as the text of the 2019-promulgated Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (to which Singapore is yet to be a signatory) attempted to address the *lis pendens* issue to some extent. Article 7(2) of the Convention provides that:

> Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –
>
> (a) the court of the requested State was seised before the court of origin; and
>
> (b) there is a close connection between the dispute and the requested State.
>
> A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

52 It is recommended that future developments in this area of the HCCH's work be followed so that it may serve as a potential reference point for the Singapore courts to weigh how a *lis pendens* issue should best be approached. Some guidance may also be drawn from the judicial treatment of similar issues when transnational issue estoppel arises from an arbitral award.[63]

Party asymmetry

53 The Court of Appeal in *Merck* highlighted that additional caution may also be necessary in applying the doctrine of transnational issue estoppel against a party who was a *defendant* in the foreign proceedings, as opposed to against a claimant. This was "[i]n view of the practical difficulties faced by a defendant in deciding whether to deploy full resources to defend a point in a relatively trivial case".[64] The difficulty which the Court of Appeal alluded to had been explained by Lord Reid previously in *Carl Zeiss*, as follows:[65]

> The difficulty which I see about issue estoppel is a practical one. Suppose the first case is one of trifling importance but it involves for one party proof of facts which would be expensive and troublesome; and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim. What is he to do? The second case may never be brought. Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought? This does not arise in cause of action estoppel: if the cause of action is important, he will incur the expense: if it is not, he will take the chance of winning on some other point. It seems to me that there is room for a good deal more thought before we settle the limits of issue estoppel. […]

54 Without setting out to express a conclusive view on the matter, the Court of Appeal indicated its "provisional view" that "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 eminently sensible that it not be estopped on that issue in proceedings in Singapore".[66]

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63 See, for example, *EFG Bank v Surewin* at [50], where the General Division of the High Court held that the commencement of an arbitration a month after a court action was begun did not per se constitute a ground for rejecting the corresponding arbitral award (which was rendered whilst the court action was still pending) as being capable of giving rise to an issue estoppel. The General Division held that "That would be the result only if the second defendant's conduct in securing the [arbitral] award could be characterised as an abuse of process (*Jixin Xu v Wei Wang* (2019) 58 VR at [107(d)])".

64 See *Merck* at [57].

65 See *Carl Zeiss* at 917.

66 See *Merck* at [57].

55 Whilst the practical difficulties of being a defendant in legal proceedings are something that one can be sympathetic towards, one might nevertheless advocate that courts should generally approach concerns with such 'party asymmetry' for the purpose of transnational issue estoppel with great care. It may, for instance, prove to be an invidious challenge for the courts to formulate a sufficiently stable and objective test to decide whether a claimant by way of the prior foreign proceeding indeed raised a case that was "trivial" or of "trifling importance", such that the defendant's subjective choice to defend the foreign proceedings parsimoniously (if at all) is sufficient to create an obstacle to the foreign judgment giving rise to an issue estoppel effect subsequently. It may, on the other hand, perhaps be in only very exceptional cases that the Singapore courts should find that the defendant had *bona fide* reasons to not contest or fully contest an issue in the foreign proceedings, and not be estopped on that issue in subsequent proceedings in Singapore. In any event, it would seem sensible that the defendant should bear the burden of satisfying the court of the existence of such *bona fide* reasons, and that the reasons were rational (for example, by proving the triviality or trifling nature of the claimant's case raised in the prior foreign proceedings).

Reciprocity from the jurisdiction of origin on the recognition of judgments

56 One final question which has been left open by the Court of Appeal for future consideration is whether reciprocity from the jurisdiction from which the foreign judgment originates should be a precondition to Singapore's recognition of foreign judgments at common law.[67] The Court of Appeal observed the following in *obiter*:

> (a) On the one hand, imposing a requirement of reciprocity is "entirely consonant" with the rationale of comity, as well as with the legislative stance taken in the Choice of Court Agreements Act 2016, the Reciprocal Enforcement of Foreign Judgments Act 1959 and the Maintenance Order (Reciprocal Enforcement) Act 1975.[68]

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67 See *Merck* at [39].

68 The Court of Appeal did not elaborate on what form such a reciprocity test would take. That is, whether it would be *de facto*, *presumed* or *de jure*. For further information on these forms of reciprocity, see generally Yujun Guo, "Principle 5: Reciprocity" in Adeline Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments in Asia* (2020, Asian Business Law Institute) pp 57-76.

(b) On the other hand, the philosophy underlying the approach of the common law differs from that of the legislature in giving effect to foreign judgments, with the former focusing on personal obligations and the conduct of the party sought to be bound by the foreign judgment, and the latter engaging broader considerations including international relations. On the basis of such differences, the common law does not typically require reciprocity.

(c) Academic scholarship in this field suggests that the requirement for strict reciprocity is "increasingly falling out of favour".[69]

57 The Court of Appeal concluded with the provisional view that "the absence of reciprocity would, in practice, rarely be an obstacle to the recognition of a foreign judgment", noting that in practice it appears *overall* relatively uncommon for jurisdictions in the world to bar according recognition to foreign judgments substantially, notwithstanding a few examples to the contrary.[70]

58 Having regard to these preliminary observations made by the Court of Appeal in *Merck*, it would appear that there is little reason in support of instituting a requirement of reciprocity in Singapore *at common law*. As the Court of Appeal noted, the common law typically does not impose such a requirement given its philosophical underpinnings. It is not apparent why a marked departure from this seemingly entrenched paradigm should be warranted in current times. If considerations relevant to international relations should ever become an impetus for change, it is recommended that the necessary reforms are better implemented through legislation than at common law.

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69 Citing Béligh Elbalti, "Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark But Not Much Bite" (2017) 13 *Journal of Private International Law* 184 (DOI: 10.1080/17441048.2017.1304546) at 185. See also Yujun Guo, "Principle 5: Reciprocity" in Adeline Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments in Asia* (2020, Asian Business Law Institute) pp 58-59 at paras [d]-[e].

70 See *Merck* at [39].

Conclusion

59 The common law conflict of laws is, by its very nature, complex and challenging. That the doctrine of transnational issue estoppel is no exception should come as no surprise. By setting out the basic framework and outlining some likely margins of transnational issue estoppel, this report hopefully serves as a starting resource for any development of the common law doctrine of transnational issue estoppel in appropriates case in the future.

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