

## REVIEW OF THE LAW REFORM COMMITTEE'S REPORT ON TRANSNATIONAL ISSUE ESTOPPEL

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### I. INTRODUCTION

The Law Reform Committee of the Singapore Academy of Law has published a new report on transnational issue estoppel, which explores the framework and margins of the concept of transnational issue estoppel in Singapore.<sup>1</sup> The Committee hopes that the report will aid in the development of transnational issue estoppel by the Singapore courts in the future.

Globally, courts have had to grapple with the preclusive effects of foreign judgements in pending legal proceedings. This is especially true for Singapore, a leading international dispute resolution hub.

### II. FRAMEWORK UNDERPINNING TRANSNATIONAL ISSUE ESTOPPEL

While the starting premise for the test for whether transnational issue estoppel arises from a foreign judgement is the test for whether domestic issue estoppel arises from a local judgement, this is subject to modifications due to considerations of transnational significance. “The more sophisticated analysis involved when applying transnational issue estoppel stems principally from the interplay between the concepts of state sovereignty and international comity.”<sup>2</sup>

The report divides the concept of transnational issue estoppel into its ‘extrinsic’ and ‘intrinsic’ elements. Before transnational issue estoppel can arise from a foreign judgement, a threshold requirement is that the judgement must be capable of being recognised by the Singapore courts. The report rationalises this requirement as the ‘extrinsic’ element of transnational issue estoppel because the “principles on the recognition of foreign judgments are of general application and not within the exclusive province of the doctrine of transnational issue estoppel”.<sup>3</sup>

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<sup>1</sup> Singapore, Law Reform Committee of the Singapore Academy of Law, *Report on the Framework and Margins of Transnational Issue Estoppel* (Singapore: Singapore Academy of Law, 2023) [Report]. The Report can be found online at <https://store.lawnet.com/report-on-the-framework-and-margins-of-transnational-issue-estoppel.html>.

<sup>2</sup> *Ibid* at para 6.

<sup>3</sup> *Ibid* at para 8.

After the foreign judgement has been recognised, two additional elements must be met out: “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”.<sup>4</sup> The report labels these two elements as the ‘intrinsic’ elements of transnational issue estoppel because they are “of more specific peculiarity [...] to the substantive doctrine of transnational issue estoppel”.<sup>5</sup>

### III. OUTER LIMITS OF TRANSNATIONAL ISSUE ESTOPPEL

The Singapore Court of Appeal in *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* (“*Merck*”) expressed a need for caution on the potential “outer limits” on the doctrine of transnational issue estoppel, citing the “tension between transnational comity and a local court’s role as custodian of the rule of law within the domestic legal regime”.<sup>6</sup> The report considers and discusses several potential outer limits of transnational issue estoppel such as the territoriality of the foreign judgement<sup>7</sup> and forum mandatory rules.<sup>8</sup>

One of the potential limits on transnational issue estoppel discussed by the report and raised by the Court of Appeal in *Merck* is public policy. “If an issue before the court addressed engages the fundamental public policy of the forum, transnational issue estoppel [...] may not arise from the foreign judgement in question.”<sup>9</sup> Similar to other potential limitations discussed in the report, the Court of Appeal in *Merck* considered this as an issue that “the court of the forum ought to determine for itself under its own law”.<sup>10</sup>

The report suggests that the issue of public policy can be regarded from two angles: first, “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”<sup>11</sup>; and second, citing the Court of Appeal in *Merck*, the court addressed fulfilling its “constitutional role [...] in overseeing the administration of justice and safeguarding the rule of law within its jurisdiction”.<sup>12</sup>

### IV. CONCLUSION

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<sup>4</sup> *Ibid* at para 14.

<sup>5</sup> *Ibid*.

<sup>6</sup> [2021] 1 SLR 1102, [2021] SGCA 14 at para 52 [*Merck*].

<sup>7</sup> *Report, supra* note 1 at para 23.

<sup>8</sup> *Ibid* at paras 26-28.

<sup>9</sup> *Ibid* at para 35.

<sup>10</sup> *Merck, supra* note 6.

<sup>11</sup> *Report, supra* note 1 at para 36.

<sup>12</sup> *Ibid*.

The report does an admirable job of comprehensively canvassing the framework of transnational issue estoppel and provides insightful suggestions on its potential outer limits. It is a most useful addition to the literature on transnational issue estoppel.

The report is published online at <https://store.lawnet.com/report-on-the-framework-and-margins-of-transnational-issue-estoppel.html>.