

## **Anti-Suit Injunctions in Private International Law**

In general terms this lecture is concerned with the power of a court to restrain, by way of injunction, a party from instituting or from continuing proceedings in a foreign court. It is a power that is virtually unknown outside Common Law jurisdictions. I should first explain the meaning to be attached to the word “foreign” in this context. By foreign proceedings I include, not only proceedings in a foreign nation, but also proceedings in another State or Province which forms a constituent part of the same (usually federal) nation. For my present purpose a State Court sitting in New York would, for example, regard a State Court sitting across the Hudson River in the State of New Jersey as foreign; so, too, a Court sitting in the Canadian Province of Ontario would regard a Court sitting in the Province of British Columbia as foreign.

The power to restrain the party (or potential party) to the foreign proceedings is a power to grant what is called an anti-suit injunction. Such injunctions are, as anyone acquainted with Common Law systems will know, in a strict sense the creation of equity rather than common law. However, they are a feature of the Common Law in the wider and more important sense that, as I have said, they are virtually unknown outside Common Law countries. I mention the fact that in a Common Law country an injunction is a form of equitable rather than (in the narrow sense) common law relief, not in order to create terminological confusion, but in order to emphasise that, in accord with the fundamental distinction between common law and equitable remedies, the availability of the latter is in large measure discretionary.

In any country a defendant (actual or potential) when faced, perhaps unexpectedly, with foreign proceedings (current or anticipated) will often have several options open to him. He may decide to defend the action; he may decide simply to ignore it; he may in some circumstances launch counter-proceedings elsewhere. Sometimes there may also be various other procedural possibilities which fall short of recourse to anything so apparently draconian as the anti-suit injunction.

Why then have anti-suit injunctions been seen as necessary in an increasing (albeit in fact still relatively small) number of cases in Common Law countries?

The answer must largely lie in the various disadvantages which will attach in some circumstances to each of these various options.

To defend the foreign action, which may well be prudent if the defendant has substantial assets in the foreign country, is almost certain to be expensive and time-consuming even if the defendant is successful. This will be particularly unfair if his success had, in the event of his participation in the foreign proceedings, been clearly predictable.

To ignore the foreign proceedings could be dangerous unless the defendant has no assets in the foreign country and does not anticipate having any assets there in the future, and moreover it is not likely that any judgment given against him would be enforced elsewhere in a court having jurisdiction over him and sitting in a country where he does have assets.

The launching of counter-proceedings elsewhere might be helpful if they could be begun at a time when the foreign proceedings were still merely anticipated so as to justify a stay of those proceedings on the grounds of *lis alibi pendens*. However, even in such a situation a party who elects this option, even if he is successful in the counter-proceedings, may find that his costs are in fact irrecoverable.

Another option might be to seek a declaration of non-liability from a friendly court. But, even if such an application were to be successful, its effectiveness might well often be limited in practice, costs again being irrecoverable. And so it has been that in Common Law jurisdictions another, and in a sense a more direct, option has been developed, and in certain circumstances has been made available to an unfairly beleaguered defendant (or potential defendant) in foreign proceedings. English courts have for a long time exercised jurisdiction to restrain a party from instituting or continuing proceedings in a foreign court by way of anti-suit injunction. In 1834 in *Lord Portarlington v. Soulby*<sup>1</sup> the Lord Chancellor, Lord *Brougham*, had pointed out that this jurisdiction is grounded “not upon any pretension to the exercise of ... judicial rights abroad”<sup>2</sup> but upon the fact that the party, to whom the order is directed, is subject to the *in personam* jurisdiction of the English court. However, it must be admitted that, although the injunction only operates *in personam* against a party to the foreign

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<sup>1</sup> (1834) 3 My. and K. 104.

<sup>2</sup> *Ibid.* 108.

proceedings, it can, if effective, sometimes operate as an interference, albeit indirect, with the process of the foreign court.

In these circumstances it is not surprising that the unwillingness of non-Common Law courts themselves to grant anti-suit injunctions is accompanied by a marked reluctance on their part to recognise, or give effect to, the grant of such injunctions by Common Law courts. In 1989 the Brussels Civil Court held that an American anti-suit injunction could not be recognised in Belgium because it was repugnant to Belgian public policy in combination with Article 6 of the European Convention on Human Rights.<sup>3</sup> In 1988 the Luxembourg Court of Appeal held that, as a matter of principle there can be no such thing as an anti-suit injunction (let alone an extra-territorial anti-suit injunction) under Luxembourg law.<sup>4</sup> In 1996 in *Re the Enforcement of an English Anti-Suit Injunction*<sup>5</sup> the Dusseldorf Regional Court of Appeal held that the service of an anti-suit injunction in Germany had to be refused under Article 13 of the 1965 Hague Service Convention. There the petitioner had obtained an injunction from the High Court in England ordering a German resident not to proceed against the petitioner, in relation to a contractual dispute that had arisen between them, in any court other than the London Court of International Arbitration which was the contractually agreed *forum*. The Court held that anti-suit injunctions constitute an infringement of the jurisdiction of Germany and thus of its sovereignty. The Court emphasised that the fact, that the anti-suit injunction was not directly addressed to the German state or to German courts but to a party (actual or potential) to German proceedings, was immaterial. A party's compliance with such an injunction is likely to constitute a direct interference with the work of the German court. Moreover, the principle of free access to the German courts is an expression of state sovereignty and must be safeguarded.

In the very recent case of *Phillip Alexander Securities and Futures Limited v. Bamberger and others*<sup>6</sup> German courts have again regarded English anti-suit injunctions as an infringement of their sovereignty and have refused to enforce them. Moreover, it is to be noted that in the subsequent English proceedings the Court of Appeal, although not called upon to decide whether the German judgments resulting from that refusal should be recognised or be enforced, did approve the opinion of the English trial judge in the case when he had said: "It

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<sup>3</sup> Civ. Bruzelles, 18 déc. 1989, R.W. 1990-1991, p.676.

<sup>4</sup> 24 February 1998; Numéro 10047.

<sup>5</sup> Case 3 VA 11/95; [1997] I.L.Pr. 73.

<sup>6</sup> [1997] I.L.Pr. 73.

would seem to me *prima facie* that if someone proceeds in breach of, and with notice, an injunction granted by the English court to obtain judgments abroad, those judgments should not, as a matter of public policy, be recognised in the United Kingdom”.<sup>7</sup> In other words the party against whom an injunction has been granted by an English court and who nevertheless institutes, or proceeds with, the relevant action abroad, puts himself in contempt of the English court and therefore cannot as a matter of public policy be allowed to take advantage in England of the result of his contemptuous behaviour.

I will return later to this and another matter raised in the *Phillip Alexander Securities and Futures* case. But first I would like to say something about the circumstances in which resort to anti-suit injunctions is in fact had in some important Common Law countries. The countries which I have chosen are England, Canada and the United States of America.

First, England. It is, of course, a pre-condition for the granting of an anti-suit injunction that the English court has *in personam* jurisdiction over the party against whom it is to be directed. In England this pre-condition will be most easily satisfied if, in compliance with the historic Common Law rule, that party is present and can be personally served with the writ in England. In addition personal service abroad is permissible in a range of situations listed under Order 11, rule 1(1), of the Rules of the Supreme Court. It is, however, to be remembered that jurisdiction under Ord. 11, rule 1(1), can only be taken with leave of the court, and “No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order”.<sup>8</sup> Moreover, if the case falls within the scope of the Brussels or the Lugano Convention, jurisdiction to entertain that action will depend upon compliance with the provisions of the relevant Convention.

On the assumption that an English court has jurisdiction to grant an anti-suit injunction, when will that jurisdiction be exercised? It would be unrealistic to suppose that a precise answer to this question emerges from the case law. This is not surprising. We are concerned here with the flexibility of equitable relief; with the influence and impact of notions of international comity; with to some extent the principles underlying *forum non conveniens*; as we shall see

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<sup>7</sup> Ibid. 115.

<sup>8</sup> R.S.C. Order 11, rule 4(2).

with the concept of “vexations or oppressive” conduct; and, of course, with achieving “justice”.

*Dicey and Morris*<sup>9</sup>, citing the House of Lords case of *Castanho v. Brown and Root*<sup>10</sup> states: “The underlying principle is that jurisdiction is exercised ‘when it is appropriate to avoid injustice’, or, as it was once put, when the foreign proceedings are ‘contrary to equity and good conscience’”.<sup>11</sup> The authors continue: “Although it is possible to identify certain categories of cases in which the jurisdiction has been exercised ‘the width and flexibility of equity are not to be undermined by categorisation’”.<sup>12</sup> Some examples of English courts granting anti-suit injunctions have related to foreign proceedings in breach of a contract not to sue;<sup>13</sup> or in breach of a contract to be bound by the result of English proceedings;<sup>14</sup> or in breach of a contract to sue only in England.<sup>15</sup> A court will sometimes restrain foreign proceedings in order to protect its own “due process”.<sup>16</sup> Again, English courts have more than once granted injunctive relief restraining foreign proceedings which it has regarded as “oppressive or vexatious”.<sup>17</sup> An English court will even, although very rarely, enjoin a party from carrying on matrimonial proceedings in a foreign court. An illustration of this is provided by the case of *Hermain v. Hermain*<sup>18</sup> in which in 1988 an injunction was granted by the English Court of Appeal in respect of French divorce proceedings.

An important matter is the relationship between the test governing the availability of anti-suit injunctions and that governing the operation of the doctrine of *forum non conveniens*. In 1981 in *Castanho v. Brown and Root* Lord Scarman, with whom all the other members of the House of Lords agreed, had said “The principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings”.<sup>19</sup> It was therefore held that an injunction could be granted to restrain foreign proceedings in the same circumstances as those in which a stay of English proceedings would be ordered on the ground of *forum non*

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<sup>9</sup> *Dicey and Morris: The Conflict of Laws* (12th ed.) pp.408-9.

<sup>10</sup> [1981] A.C. 557, 573.

<sup>11</sup> *Carron Iron Co. v. Maclaren* (1885) 5 H.L.C.416, 439.

<sup>12</sup> *op.cit.* 409, again citing *Castanho v. Brown and Root* [1981] A.C.557, 573.

<sup>13</sup> *Ellerman Lines Ltd. v. Read* [1928] 2 K.B. 144.

<sup>14</sup> *The Tropaioforos* (No.2) [1962] 1 Lloyd’s Rep. 410.

<sup>15</sup> *The Lisboa* [1980] 2 Lloyd’s Rep. 546.

<sup>16</sup> *South Carolina Insurance Co. v. Assurantie N.V.* [1987] A.C.24.

<sup>17</sup> See, e.g., *South Carolina Insurance Co.* case [1987] A.C.24. and *Société Nationale Industrielle Aerospatiale v. Lee Kui Jak* [1987] A.C.871.

<sup>18</sup> [1988] 2 F.L.R. 388.

<sup>19</sup> [1981] A.C.557, 574.

*conveniens*. However, six years later in *Société Nationale Industrielle Aerospatiale v. Lee Kui Jak*<sup>20</sup> the Privy Council held that it was no longer right to treat the principles applicable in injunction cases as equivalent to those applicable in *forum non conveniens* cases as developed by the House of Lords six months earlier in *Spiliada Maritime Corp. v. Consulex Ltd.*<sup>21</sup> A party should not be enjoined from proceeding in a foreign court simply because England was the natural *forum*. The Privy Council (hearing an appeal from the Court of Appeal of Brunei Darussalam) held that, where a remedy was available in England and in the foreign court, an injunction to restrain the plaintiff from proceeding in the foreign court would generally only be granted if pursuit of the foreign proceedings would be “vexatious or oppressive”. Lord Goff, delivering the advice of the Privy Council, said: “In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, in the Brunei) court and in a foreign court, the English or Brunei court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action; and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him”.<sup>22</sup> In the *Société Aerospatiale* case the action had arisen out of a helicopter accident in Brunei in which a wealthy citizen of Brunei had been killed. The helicopter, owned by an English company and serviced by a Malaysian company, had been manufactured by a French company, *Société Aerospatiale*. The widow of the deceased, *Lee Kui Jak*, commenced proceedings against *Société Aerospatiale* in Brunei and in Texas. The jurisdiction of the Texas court was based upon the fact that the defendant did business there by selling its products to a subsidiary. The plaintiff wanted to sue in Texas because of its more favourable product liability laws and damage quantification laws. The defendant sought a stay of the Texas action, but this was refused by the Texas court. The defendant then brought an anti-suit action in Brunei seeking to restrain the plaintiff from proceeding in Texas. The Privy Council had no difficulty in holding that Brunei was the natural *forum* because the action arose out of the death in Brunei of a citizen of Brunei and

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<sup>20</sup> [1987] A.C.871.

<sup>21</sup> [1987] A.C.460.

<sup>22</sup> [1987] A.C.871, 896.

the law of Brunei fell to be applied. Moreover, the situation was totally unconnected with Texas. It was perhaps less obvious that to allow the Texas action to continue would be vexatious or oppressive. In an earlier case, *The Atlantic Star*,<sup>23</sup> the House of Lords had stated that oppressive means morally delinquent and that vexatious in this context connotes irresponsibility. It would seem, however, that the Privy Council in the *Société Aerospatiale* case perhaps adopted a rather more flexible interpretation. There *Société Aerospatiale* had contended that it was seeking a contribution from the company responsible for the maintenance of the helicopter, and that it was uncertain whether it could base such a claim upon a Texas judgment. It might, therefore, have to bring a fresh action against the maintenance company in Brunei in order to establish liability. The Privy Council found that this would be vexatious and oppressive.

Although technically a Brunei, rather than an English, case the advice given by the Privy Council in the *Société Aerospatiale* case is now accepted as representing current English law. However, looking at the actual decision one is perhaps tempted to suspect that, although the need for demonstration of vexatiousness or oppression will prove to be a salutary restriction upon the availability of anti-suit relief in the great majority of cases, it may have to be flexibly applied in a case in which the foreign *forum* is (as in the instant case) totally unconnected with the fact situation.

It is not necessary for a plaintiff, who seeks an injunction, to seek relief in an English court on the substance of the dispute. Applicants for anti-suit injunctions are seeking not to assert any independent cause of action, but simply protection from suit in a foreign court. Sometimes, but only very exceptionally, an injunction may be granted even if, notwithstanding the jurisdictional competence of the English court, the would-be plaintiff in the foreign proceedings would fail on the merits in English proceedings. This possibility was considered by the House of Lords in *British Airways Board v. Laker Airways Ltd.*<sup>24</sup> and by the Court of Appeal in *Midland Bank PLC v. Laker Airways Ltd.*<sup>25</sup>. Both of these cases arose out of anti-trust proceedings brought, or threatened to be brought, in the United States by the English liquidator of Laker Airways Ltd., in connection with an alleged conspiracy to drive Laker Airways Ltd. out of business, against several defendants including certain British airlines and

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<sup>23</sup> [1974] A.C.436.

<sup>24</sup> [1985] A.C.58.

<sup>25</sup> [1986] Q.B.689.

banks. In the former case the House of Lords intimated that an anti-suit injunction could be granted to restrain foreign proceedings even if the plaintiff in those proceedings would have no remedy in England, but then only if the bringing of the foreign action would in the circumstances be so unconscionable that it could be regarded as the infringement of an equitable right. An injunction was refused in the instant case because the British airlines by carrying on business in the United States had in effect accepted that they were subject to United States law, including United States anti-trust law. Subsequently this result was distinguished by the Court of Appeal in *Midland Bank PLC v. Laker Airways Ltd.* There it was held that two British banks were entitled to an injunction restraining the liquidator from joining them in the United States proceedings. It was alleged that they had joined a conspiracy to deprive Laker Airways Ltd., to whom they were bankers, of the benefits of a financial rescue package. The Court of Appeal held that for an English plaintiff to sue them in the United States, on the basis of the extra-territorial application of United States anti-trust law to activities in England and intended to be governed by British law, would be unconscionable and unjust.

It is always to be remembered that, an injunction being a form of equitable relief, the exercise of judicial discretion may limit its availability. In *Toepfer v. Molino Boschi*<sup>26</sup> one of the reasons why an injunction was refused was the undue delay on the part of the plaintiff in seeking it. In the course of his judgment *Mance J.*, sitting in the Commercial Court, said: "... delay is an extremely relevant factor in the exercise of any discretion ..." to grant an injunction.<sup>27</sup> His Lordship concluded: "Viewing the matter overall, I have no hesitation in concluding that this is not a case where this Court should at this very late stage contemplate issuing any injunction to prevent Molino Boschi [the defendant] pursuing and seeking the ruling of the Italian Court either on the issues of procedure which have been ventilated before it exhaustively with oral evidence or on any substantive issues which do arise thereafter".<sup>28</sup>

The very recent decision of the Court of Appeal in *Airbus Industrie GIE v. Patel*<sup>29</sup> would appear to extend in one respect the availability of anti-suit injunctions. In 1994 an India Airlines aircraft crashed on landing in Bangalore in India. Some actions were begun in Texas against *Airbus Industrie GIE*, the manufacturers of the aircraft. The plaintiffs in one of these

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<sup>26</sup> [1996] 1 Lloyd's Rep.510.

<sup>27</sup> Ibid.515.

<sup>28</sup> Ibid.518.

<sup>29</sup> [1997] I.L.Pr.230; The Times 12 August 1996. Leave has been given to appeal to the House of Lords.

actions were English residents who had been involved in the crash. The Texas court held that the defendants were immune from suit in the United States. Thereafter a Bangalore court held that the English residents could not sue in any *forum* other than Bangalore. They then sought to appeal in Texas. It was this Texas appeal that in English proceedings *Airbus Industrie GIE* sought to prevent by way of an anti-suit injunction. The defendants in these proceedings were English residents subject to English jurisdiction *in personam*. Bangalore, not Texas, was the natural *forum*. The Court of Appeal held that to proceed in Texas would be oppressive because *Airbus* would fail in any contribution proceedings in Bangalore if it lost in Texas and, additionally, because Texas law would have been applied although Texas was totally unconnected with the alleged wrongdoing. What is particularly noteworthy is that here an English court granted an injunction to restrain the claimants from continuing with their foreign proceedings notwithstanding that the grant was being made, not for the purpose of protecting any proceedings instituted in England, but for the purpose of protecting proceedings in India. The availability of the English courts for the conduct of the substantive proceedings was held not to be an essential pre-condition for the exercise of the court's jurisdiction to grant an anti-suit injunction. In the instant case it was held to be enough for the grant of an injunction that to permit the claimants to proceed with their action in Texas - in any event an inappropriate *forum* for the case - would be unconscionable and oppressive and would be unfair to the manufacturers.

I now turn to the position in Canada. There, as in England, a pre-condition for the granting of an anti-suit injunction is that the court has *in personam* jurisdiction over the party against whom it is to be directed.

The Supreme Court in the case of *Amchem Products Inc. v. British Columbia Compensation Board*<sup>30</sup> has, however, recently reviewed the position relating to the availability of anti-suit injunctions in jurisdictionally competent courts. In the *Amchem* case the Workers' Compensation Board of British Columbia brought a subrogated claim in Texas against manufacturers and distributors of asbestos. The claim was to recover payments which the Board had made to British Columbian employees for asbestos related disabilities which had arisen from their employment in British Columbia. The Board also sought, on behalf of the employees, general damages on a scale normally operative in Texas courts. The defendants, having failed to have the action stayed in Texas largely because Texas courts do not apply the

doctrine of *forum non conveniens*, then sought an anti-suit injunction in Canada to restrain the Board from proceeding in Texas. They succeeded at first instance and in the British Columbia Court of Appeal but failed in the Supreme Court of Canada.

The Supreme Court seems to have laid down that generally the availability of an anti-suit injunction should not even be considered unless a suit has actually been commenced in the foreign jurisdiction and the defendant has applied unsuccessfully for a stay in that foreign court. *Sopinka J.*, delivering the judgment of the Supreme Court, said of anti-suit injunctions: “In order to resort to this special remedy consonant with the principles of comity, it is preferable that the decision of the foreign court not be pre-empted until a proceeding has been launched in that court and the applicant for an injunction in the domestic court has sought from the foreign court a stay or other termination of the foreign proceedings and failed”.<sup>31</sup> Then, but “preferably” only then, may the defendant even apply to a Canadian court for an anti-suit injunction. The Supreme Court further held that a Canadian court should only grant such an injunction if (1) the foreign court was exercising jurisdiction on a basis inconsistent with Canadian principles of *forum non conveniens* and (2) injustice<sup>32</sup> would result if the foreign proceedings were allowed to continue.

If strictly applied, the *Amchem* doctrine is clearly likely to limit the availability of anti-suit injunctions in Canada in several ways.

First, any preliminary requirement, that an application for an injunction will not even be considered unless a suit is already pending in the foreign court and unless that foreign court has already refused to stay its proceedings, could give rise to unnecessary delay and expense. Of course, if an injunction would restrain a foreigner from bringing an action in his place of residence, the case for granting an injunction may well be very weak; but this can hardly justify a general rule under which, for example, a Canadian court would be prevented from even considering entertaining an application for an anti-suit injunction aimed at a Canadian resident simply because, even though an inappropriate foreign court would be very likely to assume jurisdiction and decline to stay proceedings, it has not yet had an opportunity to do so.

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<sup>30</sup> [1993] 1 S.C.R. 897

<sup>31</sup> *Ibid.* 931.

<sup>32</sup> *Sopinka J.* preferred this test to be in terms of “injustice” rather than in terms of it being “vexatious or oppressive” (*ibid.* 932-3).

Would it offend comity if in such circumstances a Canadian court were to order the Canadian resident not to commence vexatious or oppressive proceedings in the foreign court?

Again, the requirement that no injunction can be granted unless the foreign court assumed jurisdiction on a basis inconsistent with Canadian principles of *forum non conveniens* could be unduly restrictive. A Canadian court, even if it concludes that it would itself clearly be a natural *forum*, will not be allowed to grant an injunction unless it is also satisfied that the basis of the foreign court's refusal to stay was inconsistent with Canadian principles of *forum non conveniens*. In the *Amchem* case itself the Texas court did not rely upon *forum non conveniens*. The Supreme Court of Canada nevertheless did conclude that its exercise of jurisdiction was not inconsistent with the principles of that doctrine as applied in Canada.

In short it is disturbing to note that the second arm of the *Amchem* test, namely that injustice would result if the foreign proceedings were allowed to continue, although basically laudable in itself, will not be operative unless there has been compliance, both with the precondition for even consideration of the grant of an injunction, and with the first arm of the test.

The *Amchem* case itself involved injuries to Canadian residents which had arisen in Canada. The motive for bringing the action in Texas would appear, at least in part, to have been the avoidance of Canadian limitations on damages. Was justice to the defendants sacrificed on the tawdry altar of pseudo-comity?

Let us now consider the position in the United States of America. In assessing United States authorities concerned with the availability of anti-suit injunctions one must, of course, always remember that many of them arose in an inter-State rather than an international context. In such cases considerations of international comity are, as such, of little, if any, direct relevance. However, the preservation of the cohesion and structure of the Union is important. At the same time it is generally accepted that the constitutional mandate that "full faith and credit"<sup>33</sup> be accorded to sister-State judgments is usually not operative so far as anti-suit injunctions are concerned. On the other hand United States Federal Courts have sometimes had to limit the grant of anti-suit injunctions directed at parallel State Court proceedings.

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<sup>33</sup> Constitution of the United States, Article IV, Section 1.

As has recently been pointed out by *Julian Wilson*<sup>34</sup> United States Circuit Courts would appear to be divided on the approach to the problem of the proper standard to apply when deciding (assuming, of course, that the court has jurisdiction) whether to grant an anti-suit injunction. The District of Columbia, the 2nd Circuit and 6th Circuit adopt, in his words a “restrictive approach which accords primacy to non-interference with the sovereignty of the foreign court over the inequities of simultaneous parallel proceedings”.<sup>35</sup> The 5th, 7th and 9th Circuits are, on the other hand, again in his words, “more liberal and incline towards an approach which grants the remedy to avoid the hardship which allowing simultaneous prosecution of the same action in a distant foreign forum may otherwise entail”.<sup>36</sup>

The former, i.e. the “stricter”, standard seems to require that the court should only grant an anti-suit injunction when this is necessary in order to protect its own jurisdiction and to prevent the evasion of its own public policies. The “laxer” standard seems to be closer to the English doctrine under which an injunction may be available if the foreign proceedings are “vexatious or oppressive” and would cause inequitable hardship.

An “old” (1958) case demonstrating the length to which anti-suit injunction availability has sometimes gone in the United States is to be found in the decision of the Supreme Court of Illinois in *James v. Grand Trunk Western Railroad Co.*<sup>37</sup> That case involved a Michigan injunction and an Illinois counter-injunction. The proceedings arose out of a fatal accident in Michigan. The widow of the deceased brought an action in Illinois under a Michigan wrongful death statute. The defendant railway company obtained an injunction in Michigan restraining the widow from proceeding with the Illinois action. The widow then sought an injunction in Illinois to restrain the enforcement of the Michigan injunction. The Supreme Court of Illinois, granting this counter-injunction, held: “We are not only free to disregard such out-of-State injunctions, and to adjudicate the merits of the pending action, but we can protect our jurisdiction from such usurpation by the issuance of a counter-injunction restraining the enforcement of the out-of-State injunction...”. However, in the course of a dissenting judgment Justice Schaefer observed: “The place to stop this unseemly kind of

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<sup>34</sup> See the Editorial in the International Legislation News for January 1997.

<sup>35</sup> Ibid. p.2. See *Laker Airways v. Sabena* 731 F. 2d. 909 (D.C. Circ.1984); *China Trade v. M.V. Choon Young* 837 F. 2d. 33 (2d. Cir.1987) and *Gau Shan v. Bankers Trust* 956 F. 2d. 1349 (6th Circ.1992).

<sup>36</sup> Ibid. p.2. See *Re Unterwasser* 427 F. 2d. 888 (5th Circ.1970); *Allendale Mutual Insurance Co. v. Bull Data* 10 F. 3d. 425 (7th Circ.1993); and *Seattle Totems Hockey Club Inc. v. National Hockey League* 652 F. 2d.852 (9th Circ.1981).

<sup>37</sup> 4 Ill. 2d. 356; 152 N.E. 2d. 858; Cert. den. 358 U.S. 915 (1958).

judicial disorder is where it begins”. He went on to point out that Illinois had “no connection whatever with the occurrences out of which the administrator’s [the widow’s] claim arose”. The “judicial disorder” began, of course, in the failure of the Illinois court in the initial proceedings to decline to exercise jurisdiction on the ground of *forum non conveniens*. This failure occurred 40 years ago, i.e., although about a decade after first acceptance of the doctrine of *forum non conveniens* by the Supreme Court of the United States in *Gulf Oil Corp. v. Gilbert*<sup>38</sup>, at a time when its nature and scope had still not been fully developed. So perhaps today the sequence of “judicial disorder” would have been avoided.

In the recent case of *Kaepa v. Achilles*<sup>39</sup> the Court of Appeal for the 5th Circuit has held that the trial judge had correctly exercised his discretion in granting an anti-suit injunction restraining proceedings in Japan which were the same as, or were very similar to, proceedings in Texas. The Japanese litigants had consented to the jurisdiction of the Texas court and had actually appeared in the Texas action giving discovery there before bringing the suit in Japan. The majority of the Court observed: “We decline to require a District Court to genuflect before a vague and omnipotent notion of comity every time it must decide whether to enjoin a foreign action”. The minority took a much more restrictive approach. It took the view that: “amicable relations among sovereign nations and their judicial systems depend upon our recognition as federal courts, that we share the international arena with co-equal judicial bodies, and that we therefore act to deprive a foreign court of jurisdiction only in the most extreme circumstances”.

The difference between the reasoning and conclusion of the majority and the reasoning and conclusion of the minority in the *Kaepa* case reflects a divergence of view as to the primary purpose of transnational (and trans-State and trans-Province) litigation. Is the primary purpose to do justice between the parties, or is it to further good relations between nations and between the constituent elements of a federation?

Before offering any conclusions and suggestions about anti-suit injunctions generally, I would like now to say a brief word about the intra-European Union position. Should there be special controls upon their use by a court in a member State in relation to proceedings in another Member State? Should any such controls similarly apply to courts sitting in a country which

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<sup>38</sup> (1947) 330 U.S. 501.

<sup>39</sup> 76 F. 3rd. 624 (5th Circ. 1996).

is party to the Lugano Convention? Control at the existence of jurisdiction stage is, of course, already operative. However, does the special relationship existing between Member States additionally require that the actual exercise of jurisdiction to grant an anti-suit injunction be limited if the suit involved is a suit in a court of another Member State? If one were to follow the example of the United States of America practice in inter-State cases the answer to this question would appear to be in the negative. Moreover, the English Court of Appeal in the case of *Continental Bank N.A. v. Aeakus Cia Naviera S.A.*<sup>40</sup> appears to have held that a court may in some circumstances grant an anti-suit injunction relating to proceedings in another Member State although those proceedings fall within the scope of the Convention. I have already referred to the very recent English case of *Phillip Alexander Securities and Futures Ltd. v. Bamberger and others*<sup>41</sup> in another context. But I would now like to draw attention to the concluding paragraph in the judgment of the English Court of Appeal delivered by *Leggatt L.J.* In the opening words of that paragraph his Lordship said: “The practice of the courts in England to grant injunctions to restrain a defendant from prosecuting proceedings in another country may require reconsideration in the light of the facts of this case”.<sup>42</sup> He then drew attention to the problems of enforceability. He went on to conclude the judgment as follows: “In cases concerning the European Union what would best meet the predicament is a Directive defining the extent of the recognition which orders of the courts of each Member State are entitled to receive from the courts of other Member State”.<sup>43</sup> In other words his Lordship is not advocating special limitation on the granting of anti-suit injunctions in the European Union context, but rather regulation of the recognition of such injunctions in that context. However, of course, the knowledge that an injunction would not be entitled to recognition or enforcement could in practice often inhibit a court in deciding whether to grant it.

I will now turn to more general matters. Why have anti-suit injunctions found favour in Common Law countries? Indeed why could they find favour in any country? There is no simple, clear-cut, all-embracing answer to this question. However, one thing is obvious. Resort to anti-suit injunctions has been, and still is, a response to the practice of courts in some countries of claiming, and exercising, unreasonably wide jurisdiction. It cannot be a coincidence that in many Common Law countries there has been, over now several decades, a

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<sup>40</sup> [1994] 1 W.L.R. 588.

<sup>41</sup> [1997] I.L.Pr. 73.

<sup>42</sup> *Ibid.* 117.

<sup>43</sup> *Ibid.* 117.

marked tendency to widen, and to render more flexible, the ground upon which jurisdiction can be taken. To some extent the effect of this has been negated by a willingness to decline to exercise exorbitant jurisdiction on the ground of *forum non conveniens*. But this latter doctrine is still not accepted in some countries, and resort to it is still pretty limited in many other countries. In these circumstances it seems to be clear that, as a first step towards reducing the number of situations in which the granting of an anti-suit injunction could be appropriate, the rules governing both the assumption of, and the exercise of, jurisdiction should be reviewed, rationalised, and co-ordinated.

However, even if this were to be achieved, i.e., even if a set of rational and co-ordinated rules limiting the assumption and the exercise of jurisdiction *in personam* generally were to be agreed and applied internationally, a further question might arise, namely as to the appropriateness of their application to the specific, and some would say idiosyncratic, case of an application for an anti-suit injunction. For example, should the fact, that a *forum* has general *in personam* jurisdiction over the party against whom the injunction would be directed, always be a sufficient basis for jurisdiction to grant such an injunction? Or given the nature of anti-suit relief, should there be special restrictions upon the existence of jurisdiction to grant such relief? I incline to think not. The circumstances in which anti-suit relief is sought may vary a great deal. Although basic jurisdictional competence must be an essential requirement, accommodation of the intrinsic peculiarities of anti-suit relief, and the diversity of the circumstances in which it may be sought, can best be achieved by a flexible technique. There is clearly room for the operation of *forum non conveniens* in this area. There may well be cases in which, although jurisdictionally competent, the court in which anti-suit injunction is being sought is not the most appropriate *forum* for the grant of such relief.

I turn now to consider the criteria which ought to be applied by a jurisdictionally competent and appropriate *forum* when deciding whether or not to grant an application for an anti-suit injunction for the purpose of preventing the institution or continuance of foreign proceedings.

I start by repeating the words of Lord *Goff*, delivering the opinion of the Privy Council in the *Soci t  Aerospatiale* case, to the effect that the *forum* will “generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This pre-supposes that, as a general rule, the .... court must conclude that it provides the natural *forum* for the trial of the action; and further, since the court is concerned

with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign *forum* of which it would be unjust to deprive him”.<sup>44</sup>

It is to be noted that no reference is made here to “comity” which has sometimes been invoked by those who regard the grant of an anti-suit injunction as being unwarranted. The primary purpose of litigation is seen by Lord *Goff* as being the doing of justice between the parties. In any event if comity is to operate it should be mutually operative. The assumption and exercise of jurisdiction by the foreign court has itself been inconsistent with considerations of comity in those cases in which anti-suit relief is warranted.

Secondly, it is to be noted that no mention is made of a need to protect the “due process” of proceedings in the *forum* being, as such, a factor to be taken into account. This contrasts with earlier *dicta* to the contrary; but it is, of course, obviously consistent with the holding in *Airbus Industrie GIE v. Patel* where there were no separate proceedings in the *forum* to be protected. It is the interests of the parties (to the foreign proceedings), not the interests of the *forum* in which relief is being sought, that is important.

A crucial phrase in Lord *Goff*'s formulation is, of course, “vexatious or oppressive”. Note that it is not “vexatious and oppressive”. A vexatious action is defined in the Oxford Dictionary as being one “instituted without sufficient grounds for winning purely to cause trouble or annoyance to the defendant”. The definition of “oppressive” is more varied but includes the “unjust” exercise of power. Few would argue that litigation having either (still less both) of these characteristics should not be discouraged. In the view of Common Lawyers in an appropriate case it is seemly that an attempt be made to achieve this by way of anti-suit injunction. But should the grant of such relief ever be permissible in the absence of vexatiousness or oppression? Lord *Goff* was cautious: but he laid down that “generally speaking” it should not. Even if this means that in practice the availability of anti-suit injunctions will be confined to cases of vexatiousness or oppression it is possible that advantage may nevertheless sometimes be taken of the flexibility inherent in the concept of oppression.

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<sup>44</sup> [1987] A.C.871, 896.

Should there be any additional limitations upon the power of a jurisdictionally competent and appropriate *forum* when it has been shown that institution or continuance of foreign proceedings would clearly be vexatious and/or oppressive? The Supreme Court of Canada answered this question in the affirmative in the *Amchem* case, when it indicated that the availability of an anti-suit injunction should not be even considered unless a suit has actually been commenced in the foreign court and the defendant has already applied unsuccessfully for a stay in that foreign court. Moreover, the Supreme Court held that even then anti-suit relief could only be available if it is shown that the foreign court was exercising jurisdiction on a basis inconsistent with Canadian principles of *forum non conveniens*. These additional requirements are obviously likely to benefit the plaintiff in the foreign process, but it is difficult to see how they promote justice which, as Lord *Goff* emphasised, involves both parties. Indeed, as in the simple hypothetical example that I tried to give earlier, they could sometimes operate unfairly against the defendant in foreign proceedings.

I now turn to address what is often potentially, and sometimes actually, a major flaw in the anti-suit injunction procedure. This, of course, concerns its effectiveness. At the time when an injunction is being sought there may be serious doubts as to whether, if granted, it would be effective. Moreover, whether or not such doubts existed at that time, it may in fact turn out to be ineffective, both the party against whom it was granted, and the foreign court, being able simply to disregard it. As I mentioned when introducing the concept, an injunction is classified in Common Law countries as a form of what is designated equitable relief. There is an historic dogma in these countries that “Equity does nothing in vain”. Compliance with that dogma would mean that in many cases, in which an anti-suit injunction would otherwise be available, relief would be denied. It is true that in this area courts have not in fact always paid scrupulous regard to the dogma; but the underlying problem has not gone away. Indeed, it has been specifically considered very recently by *Leggatt L.J.* when delivering the judgment of the English Court of Appeal in the *Phillip Alexander Securities Ltd.*<sup>45</sup> case which I have already mentioned. There his Lordship said: “The conventional view is that such an injunction only operates *in personam* with the consequence that the English courts do not, and never have, regarded themselves as interfering with the exercise by the foreign court of its jurisdiction. In the cases where the defendant lives or has assets of substance in England that view may have some reality, for there is reason to think that the injunction may be enforced so as to prevent proceedings taken in breach of it from reaching the foreign court. But in cases

in which the defendant does not live in England and does not have assets here the injunction is unlikely to be enforceable except by the foreign court recognising and giving effect to the injunction or, where it refuses to do so, by this court refusing to recognise the order of the foreign court made without such recognition. In the present case the German courts regarded the injunctions as an infringement of their sovereignty and refused to permit them to be served in Germany. In addition they proceeded to give judgments on the merits”.<sup>46</sup>

The response to all this can, in the present circumstances, only be that the fact that a form of relief will not be effective in even a significant number of cases is not a reason for rejecting its use in those cases in which it is likely to be effective. Moreover, the fact that in the circumstances of a particular case an injunction would be unlikely to be effective, may itself well be a circumstance to be taken into account by the court when deciding whether to grant that injunction. The point may be reached at which, even in this area, equity would do nothing that would be palpably “in vain”.

So much for the possible response to *Leggatt L.J.* in present circumstances: but how should these circumstances themselves be changed? Let us remember those words of Justice *Schaefer*, uttered in the Supreme Court of Illinois now some 40 years ago, when dissenting from the majority decision to grant a counter-injunction: “The place to stop this unseemly kind of judicial disorder is where it begins”. Where it “began” was in the failure of the Illinois court in the initial proceedings to decline to exercise jurisdiction to entertain a claim which was almost totally unconnected with Illinois. Focus should be upon the cause of a malfunction not upon its symptoms or effects. I can only repeat that what is called for is the creation or evolution of a rational and universally operative set of rules governing the assumption of *in personam* jurisdiction, supplemented by universal acceptance of the doctrine of *forum non conveniens*. The number of occasions, upon which the need or temptation to resort to granting an anti-suit injunction would arise, would then be greatly reduced. In the exceptional situation in which the need for such relief did nevertheless arise a court should only grant the injunction if (1) the court is clearly jurisdictionally competent; (2) exercise of that jurisdiction would accord with the doctrine of *forum non conveniens*; (3) as a general rule (that is to say apart from very exceptional cases such as *Airbus Industrie GIE v. Patel*) the court would itself be a natural *forum* for the trial of the substantive issues; (4) the court in granting the

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<sup>45</sup> [1997] I.L.Pr. 73.

<sup>46</sup> *Ibid.* 117.

injunction adheres strictly to the criteria set out by Lord *Goff* in the *Société Aerospatiale* case, and never allows itself to forget that the ultimate purpose of litigation is to do justice between the parties.

To further embellish this laudable pattern there should be international agreement, perhaps by way of a convention, defining the extent of the recognition to which an anti-suit injunction (by then, of course, a rare phenomenon) would be entitled.