ANTI-SUIT INJUNCTIONS:
GETTING RESULTS IN MULTI-JURISDICTION DISPUTES

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Anti-suit Injunctions: Getting Results in Multi-jurisdiction Disputes

by Frank Walwyn[1] and Georgina Bryan[2]

"[T]he business of litigation, like commerce itself, has become increasingly international." So said Justice Sopinka in Canada's seminal case on conflicts of laws, *Amchem Products Inc. v. British Columbia (Workers' Compensation Board).*[3] In the twenty years since *Amchem* was decided, it has become clear that trade and commerce really have gone global. As businesses increasingly push across boundaries and borders, business clients have come to expect their lawyers to do the same. As a result international commercial litigation, once a bastion of a token few jet-setting lawyers in major business centres, has become a dynamic field populated by lawyers whose practices were, until recently, based only in the domestic sphere.

Lawyers practising in the international milieu know that their clients are no longer satisfied with top-notch advice at home; they expect an equal level of proficiency when their case takes an international turn. International commerce increasingly frequently gives rise to disputes which could be brought in more than one jurisdiction, and the same case in two different jurisdictions will often reach two very different outcomes. As such, a strong understanding of the mechanisms by which courts claim and reject jurisdiction over such disputes can often prove vital in obtaining the best outcome for the client.

The Anti-suit Injunction

When courts in two different jurisdictions are presented with the same dispute, there is no prohibition on each following its own legal process through to judgment. However,

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[1] Frank Walwyn is a litigation partner at WeirFoulds LLP in Toronto, Canada with a focus on complex multi-jurisdictional matters. He also is appointed as a Distinguished Visiting Scholar in the G. Raymond Chang School of Continuing Education at Ryerson University.

[2] Georgina Bryan is a visiting British Fox Scholar (2013-2014).

[3] [1993] 1 S.C.R. 897 at 911 (*'Amchem')*

there are clear disadvantages to the case being heard in this way: not only will time and money potentially be spent twice over, but such litigation may well lead to contradictory results. In practice, this very rarely occurs; far more common is the situation in which parties vigorously litigate over the question of where to litigate, as different jurisdictions provide different prospects of obtaining and enforcing judgment. In such a scenario, there are generally speaking two options which a litigant can pursue: a stay of the proceedings the party wishes to halt on the grounds of *forum non conveniens*, or an anti-suit injunction granted by the court in which the party wishes to proceed. In the case of a stay, the court restrains its own proceedings; where an anti-suit injunction is granted, the party seeking to pursue proceedings in a foreign court is compelled not to do so.

In one sense, then, a stay on *forum non conveniens* grounds and the anti-suit injunction can be seen as two sides of the same coin. However, in reality the anti-suit injunction is a far more complex and controversial remedy. Though courts have taken pains to stress that an anti-suit injunction binds the litigant *in personam,* rather than taking effect over the foreign legal system, its practical effect is nonetheless to restrain a foreign judicial system from exercising jurisdiction over the dispute in question.[4] This, clearly, is an extraordinary step, with implications far beyond any single case. As such, the boundaries of and justifications for the anti-suit injunction have proved difficult to navigate. However, with multi-jurisdictional disputes showing no signs of disappearing and applications for a stay not always meeting clients' needs, it is worth taking the time to understand these complexities, for the anti-suit injunction is becoming an increasingly crucial weapon in a litigator's arsenal.

The Conceptual Background

In order to understand the courts' approaches to the anti-suit injunction, it is necessary to understand its roots in the concepts of *forum non conveniens* and comity.

[4] See *Societe Nationale Industrielle Aerospace v Lee Kui Jak* [1987] A.C. 871 (P.C.) at 892 per Lord Goff: 'where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed.'

Forum non conveniens

The doctrine of *forum non conveniens* governs situations where the defendant moves for a stay of judicial proceedings in a given jurisdiction on the ground that there exists elsewhere a more appropriate forum for the airing of the dispute. Originally a Scottish doctrine, *forum non conveniens* was exported to the Commonwealth through the English case of *Spiliada Maritime Corp. v Cansulex.*[5] In that case, a test was developed whereby the defendant seeking a stay is required to show that the domestic court is not the appropriate forum in which to resolve a dispute, and that a more appropriate forum exists.[6] To determine whether to issue the stay, the court applies the "real and substantial connection" test. The factors to be considered under this test include:

- in a contractual dispute, the location in which the contract was signed and the applicable law of the contract (and by parity of reasoning, in a tort dispute, the location in which the tort was committed and the law governing the tort);
- where the majority of the witnesses reside;
- the location of the key witnesses;
- where the bulk of the evidence will come from;
- the jurisdiction in which the factual matters arose;
- the residence or place of business of the parties;
- any loss of juridical advantage (such as an issue regarding limitation periods).[7]

[5] [1986] 3 All ER 843

[6] *Ibid.* Note: in some cases the burden of proof is reversed. For example, where the plaintiff has to seek leave to serve the defendant outside the jurisdiction in order to commence the litigation, it has been held that the plaintiff bears the burden of convincing the court to maintain jurisdiction if the defendant subsequently raises a challenge to the venue.

[7] For Canadian development of the test in *Spiliada,* see *Muscutt v. Coucelles* (2002), 60 O.R. (3d) 20 (C.A.) and *Incorporated Broadcasters Ltd. v Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 (C.A.)

Where such factors lean towards the domestic court not being the appropriate forum for the dispute in question, the domestic court will grant a stay of proceedings and the case can proceed in the foreign jurisdiction.

In many common law jurisdictions, acceptance of the doctrine of *forum non conveniens* has meant that the question of jurisdiction is considered with reference to the concept of the "natural forum". That having been said, not all common law jurisdictions insist that a plaintiff sue only in the natural forum. For example, the High Court of Australia has set out a new approach, whereby a stay of proceedings in transnational cases will only issue where the Court considers Australia to be a "clearly inappropriate forum".[8] As such, Australia has parted ways from the principles set out in England in *Spiliada,* and has opened the possibility of not staying proceedings even where there exists a more appropriate forum elsewhere. As the Honourable Justice Hariprashad-Charles of the Eastern Caribbean Supreme Court[9] remarked in a paper on *forum non conveniens:*

> Although the High Court claimed in *Voth* that the difference between the "clearly inappropriate" and the "more appropriate" test was slight, critics warned that the effect of the High Court decision may be to encourage Australian courts to exercise jurisdiction over matters which have very little connection with Australia.[10]

Comity[11]

A second crucial concept behind the anti-suit injunction is that of comity. The most commonly accepted definition of comity was first set down by the US Supreme Court in *Hilton v Guyot*: [12]

[8] *Voth v Maildra Flour Mills Pty Ltd* (1991), 171 C.L.R. 538

[9] Now a judge on The Bahamas Superior Court

[10] Hariprashad-Charles J., "*Forum Non Conveniens*" (paper presented 28 March 2008 at "Managing International Commercial Litigation in the 21st Century for ECSC Judges", Tortola, BVI)

[11] The writers would like to thank Greg Richards, David R. Wingfield, Frank Walwyn and Nikiforos Iatrou for their comments and contributions on this topic in their paper, "Avoiding False Starts and Hollow Victories: Equipping Yourself for Cross-Border Litigation", *Lexpert Magazine*, 11 February 2009

> 'Comity', in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

In *Hilton* the court explored the idea that comity is an aspect of state sovereignty, whereby states give their voluntary consent to foreign law out of courtesy, rather than obligation. Ultimately, however, the court drew the conclusion that comity is a binding, albeit imperfect, obligation on domestic courts, whereby deference is required in certain situations where the foreign court has properly exercised its jurisdiction over its litigants.

Though this definition has been widely adopted it is not unproblematic, and even those courts which cite it differ in interpretation of its implications. It is not for nothing that the idea has been referred to as 'the little understood concept of comity upon which so much depends, and which is often more a matter of legal fiction than of reality or principle.'[13] Different jurisdictions have disagreed on the implications of comity; the extent to which comity is a principle of deference; and, how its importance should be taken account of in the process of determining applications for anti-suit injunctions. Some jurisdictions do not even recognise the concept of comity in law,[14] and some critics argue that anti-suit injunction applications should be governed not by comity at all but by choice of law rules.[15] Broadly, however, it is true to say that comity as a principle of regard for the jurisdiction of other courts underpins most courts' reluctance to grant

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[12] 159 US 113 (1895), adopted by the Supreme Court of Canada in *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 and referred to in the English case of *In re Johnson* [1903] 1 Ch 821 (Ch) 829

[13] *Amchem Products Inc. v. British Columbia Workers' Compensation Board,* (1990), 75 DLR (4th) 1, McEachern C.J.B.C. at 9

[14] E.g. Texas, in the *Amchem* case

[15] Cameron Sim, 'Choice of Law and Anti-Suit Injunctions: Relocating Comity', ICLQ vol 62, July 2013 pp. 703-726 at 716

anti-suit injunctions and gives rise to the often-articulated caution with which such applications are considered.[16]

Anti-suit Injunctions in Three Jurisdictions

England and Wales

Though the case law of England and Wales provides the foundation of the law on anti-suit injunctions in Commonwealth jurisdictions[17], the availability of anti-suit injunctions in England and Wales itself has been drastically diminished by the European Court of Justice in recent years. As such, before moving on to consider the case law developed by England and Wales and its application in Commonwealth countries, it will first be helpful to understand the limitations on the availability of the anti-suit injunction in England and Wales today.

In the case of *Turner v Grovit*, a Mr Turner had worked as a solicitor for Chequepoint Group in the UK before transferring to work in Spain. Within a year he resigned, claiming he had been the victim of attempts to implicate him in illegal conduct which he felt to be tantamount to a dismissal. He began proceedings in the London Employment Tribunal, and Changepoint brought an action for damages allegedly arising from illegal conduct before a court of first instance in Madrid. Mr Turner then applied to the High Court of Justice of England and Wales for an anti-suit injunction restraining Changepoint from pursuing proceedings in Madrid, which he believed to be an attempt to frustrate his efforts in the London Employment Tribunal.

The case reached the Court of Appeal, which granted the injunction, and was appealed to the House of Lords. The House of Lords stayed its proceedings and sought a preliminary ruling from the European Court of Justice on the following question:

[16] That great caution must be exercised before an anti-suit injunction is granted has been deemed a 'ritual incantation: *The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA) 96

[17] See for example, the Privy Council decision in footnote 3 above

> 'Is it inconsistent with the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968 (subsequently acceded to by the United Kingdom) to grant restraining orders [aka anti-suit injunctions] against defendants who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts?'[18]

The European Court of Justice's answer was, in essence, yes: it is not open to a party in one Brussels Convention state to obtain an anti-suit injunction against a defendant who threatens to commence or continue with proceedings in another, even if the defendant acts in bad faith or with the intention of frustrating proceedings in the English courts. Similarly, it is incompatible with EC Council Regulation No. 44/2001 for a court of an EU Member State to make an order restraining a person from commencing or continuing proceedings before the court of another Member State on the grounds that such litigation would be in breach of an arbitration agreement.[19]

The court rejected counsel's submission that the anti-suit injunction was a procedural measure and not a review of the jurisdiction of another member state, and held that to allow one Member State to make such an order against a party proceeding in another would violate the principle of mutual trust central to the Convention:

> [S]uch interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum State. In so far as the conduct for which the defendant is criticised consists in recourse to the jurisdiction of the court of another Member State, the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member State. Such an

[18] (Case C-159/02) [2005] 1 A.C. 101, ECJ

[19] *West Tankers Inc v Allianz SpA (*Case C-185/07) [2009] 1 A.C. 1138, ECJ

> assessment runs counter to the principle of mutual trust which, as pointed out in paragraphs 24 to 26 of this judgment, underpins the Convention and prohibits a court, except in special circumstances which are not applicable in this case, from reviewing the jurisdiction of the court of another Member State.[20]

This decision is a controversial one, and has been interpreted as both 'a clear restatement of the basic philosophy underlying both the Convention and the Regulation'[21] and giving rise to 'a state of affairs which makes one rub one's eyes in disbelief.'[22] It is, however, an unambiguous authority on the point; Brussels Convention Member States are not able to grant anti-suit injunctions against pursuing proceedings in other Brussels Convention Member States.

Within these boundaries, then, the courts of England and Wales are able to grant anti-suit injunctions pursuant to s. 37 of the Senior Courts Act 1981. The principles governing applications for anti-suit injunctions were set out by Lord Goff in *SNI Aérospatiale v Lee Kui Jak,*[23] a case on appeal from Brunei to the Privy Council. In that case, a helicopter that was manufactured by a French company, owned by an English company, and operated by a Malaysian company, crashed in Brunei, killing its occupant, a citizen of Brunei. The estate of the deceased launched actions in Texas, France, and Brunei against several defendants, including the helicopter manufacturer. The Texas courts found that they had personal jurisdiction over the helicopter manufacturer because it carried on business in Texas. The defendant helicopter manufacturer then sought an anti-suit injunction from the court in Brunei to restrain the Texas proceedings.

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[20] *Turner v Grovit* at 28

[21] Christopher Hare, 'A Lack of Restraint in Europe', C.L.J. 2004, 63(3), 570-574 at 574

[22] Adrian Briggs, 'Anti-suit Injunctions and Utopian Ideals' L.Q.R. 2004, 120(Oct), 529-533

[23] [1987] A.C. 871 (P.C.)

The court refused to grant the order, and the case was ultimately appealed to the Privy Council. The Privy Council set out the basic principles of the anti-suit injunction as follows:

1. The jurisdiction is to be exercised when the "ends of justice" require it;

2. The order is directed against the party proceeding or threatening to proceed with the action and not against the foreign court;

3. An injunction will only be issued restraining a party amendable to the jurisdiction of the court, against whom an injunction will be an effective remedy; and

4. The jurisdiction to make the order must be exercised with caution.[24]

The court applied the test in the following passage:

> 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, 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 proceedings 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. Fortunately, however, as the present case shows, that problem can often be overcome by appropriate undertakings given by the defendant, or by granting an injunction upon appropriate terms; just as, in the cases of stay of

[24] *Ibid* at 892

> proceedings, the parallel problem of advantages to the plaintiff in the domestic forum which is, prima facie, inappropriate, can likewise often be solved by granting a stay upon terms.[25]

Where there exists a contractual right not to be sued, in the form of an exclusive jurisdiction clause, the position is altered. In *Turner v Grovit* in the House of Lords, Lord Hobhouse set out the usual effect of a contractual right not to be sued:

> The applicant for a restraining order must have a legitimate interest in making his application and the protection of that interest must make it necessary to make the order. Where the applicant is relying upon a contractual right not to be sued in the foreign country (say because of an exclusive jurisdiction clause or an arbitration clause), then, absent some special circumstance, he has by reason of his contract a legitimate interest in enforcing that right against the other party to the contract.[26]

As such, where an exclusive jurisdiction clause exists and a claim within its scope is brought in a jurisdiction contrary to that provided for, the English court will usually exercise its discretion to secure compliance with the contract unless the party suing in the non-contractual forum can show strong reasons for so doing. The exercise of the court's discretion may take the form of granting a stay in English proceedings, restraining the prosecution of proceedings abroad by means of an anti-suit injunction, or the making of another appropriate procedural order. As Lord Justice Toulson stated in *Deutsche Bank AG v Highland Crusader Offshore Partners LLP*, an anti-suit injunction granted on this basis will not be regarded as a breach of comity:

> An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court. An injunction to enforce an exclusive jurisdiction clause governed

[25] *Ibid* at 896

[26] [2002] 1 W.L.R. 107, HL at 27

> by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract.[27]

The English courts may, however, decline to grant an injunction even where such a contractual agreement exists where there is 'some special circumstance' as envisaged by Lord Hobhouse. Such circumstances may arise, for example, where the interests of parties not bound by the exclusive jurisdiction clause are involved or where the relevant dispute involves grounds of claim which are not the subject of the clause.[28]

Canada

The leading Canadian case of *Amchem* has confirmed that in proper circumstances Canadian courts are willing to grant anti-suit injunctions against parties over whom they have *in personam* jurisdiction in order to restrain them from pursuing legal proceedings in other jurisdictions.[29] However, the Supreme Court made clear that the anti-suit injunction was a remedy that ideally would not be applied for until other means of halting foreign proceedings had been exhausted:

> 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.

In a situation where an application for a stay on the grounds of *forum non conveniens* has been unsuccessful (or, as in *Anchem,* where the foreign court in question does not recognise the doctrine of *forum non conveniens*), a Canadian court will apply the two-part test set out in *Anchem.*

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[27] [2010] 1 W.L.R. 1023, CA at 50

[28] *Donohue v Arco Inc* [2002] Lloyd's Rep. 425, HL at 27

[29] *Amchem Products v. Workers' Compensation Board* [1993] 1 S.C.R. 897

First, the court must consider whether the domestic forum is the natural forum through use of the real and substantial connection test. If a foreign court has already made this determination while respecting the principles of *forum non conveniens,* then the domestic court should refuse to order an anti-suit injunction. If, however, the domestic court concludes that the foreign court could not reasonably have come to the conclusion that it is the appropriate forum, then the domestic court must proceed to the second part of the test. The second part of the test, in a similar balancing act to that carried out by the English courts, weighs the relative prejudice to the plaintiff in restricting its access to a foreign court to the relative prejudice to the defendant by allowing the action to proceed in the foreign jurisdiction.

The terms of the test set out in *Amchem* clearly draw heavily on those set out in the case law of England and Wales. The Canadian approach, however, differs notably in its conception of the role of comity. Sopinka J. notes:

> The result of the above test will be that when a foreign court assumes jurisdiction on a basis that generally conforms to the Canadian rule of private international law for determining whether Canadian courts are the *forum conveniens*, that decision will be respected and a Canadian court will not purport to make the decision for the foreign court. The policy of Canadian courts with respect to comity demands no less. If, however, a foreign court assumes jurisdiction on a basis that is inconsistent with Canadian rules of private international law and an injustice results to a litigant or "would-be" litigant in Canadian courts, then the assumption of jurisdiction is inequitable and the party invoking the foreign jurisdiction can be restrained. The foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the basis of comity.

As such, the Canadian approach explains the granting of an injunction which may initially appear contrary to comity through recourse to comity itself; if a foreign court has not respected the rules of comity, the judicial system of Canada need not respect the foreign court's assumption of jurisdiction.

The Caribbean

The Eastern Caribbean Supreme Court was faced with an application for an anti-suit injunction in the case of *Finecroft Limited v. Lamane Trading Corporation.*[30] This case concerned the interpretation of a trust deed, which contained a clause whereby the parties agreed to submit any disagreements to the International Court of Arbitration in London (LCIA). When disputes did emerge, Lamane Trading not only submitted its grievances to the LCIA but also brought proceedings concerning substantially the same issues in Russia, Cyprus and New York. Finecroft sought an anti-suit injunction against Lamane Trading to restrain it from continuing these court actions and to prevent it from commencing further actions based on the issues before the LCIA. As Lamane Trading was incorporated under the laws of the British Virgin Islands (BVI), Finecroft sought the relief in the BVI. Finecroft claimed, and the court agreed, that the BVI had personal jurisdiction over Lamane Trading.

In *Finecroft* (one of the first instances of an anti-suit injunction being issued in the Eastern Caribbean), the Honourable Justice Hariprashad-Charles concluded that "[I]t is plain from the judicial authorities that the appropriate relief where proceedings have been brought in breach of an arbitration agreement is an anti-suit injunction."[31] She went on to explain her reasoning in adopting the approach of the English courts:

> Mr Husbands warned that this Court must refrain itself from following what he seems to regard as an extravagant approach of the English Court. He submits that the exorbitant jurisdiction that the English courts are getting into is extreme and unnecessary and that this Court ought to take a completely different look at the extent of extraterritorial orders. Mr Howard QC emphasizes that the English courts are not exercising an extravagant jurisdiction. It is not a long arm jurisdiction says

[30] Claim Nos. BVIHCV2005 / 0264 & BVIHCV2005 / 0265 (consolidated) (6 January 2005)

[31] *Ibid* at 46

> Mr Howard QC. It is a jurisdiction *in personam*. I agree entirely with Learned Queen's Counsel.[32]

The court held that Lamane Trading was in breach of its obligation under the trust deed to settle disputes in the LCIA, and did not hesitate to order an injunction to restrain it from continuing its actions, with the exception of the proceedings before the LCIA.

In the recent case of *Kenneth M. Krys and another v Stichting Shell Pensioenfonds,*[33] the Eastern Caribbean Court of Appeal on an appeal from the BVI considered the application of the anti-suit injunction in an insolvency context. This case concerned Fairfield Sentry Limited ("Fairfield"), a BVI incorporated investment fund which prior to winding-up had invested approximately 95% of its assets in Bernard L Madoff Investment Securities LLC. Upon news of the Madoff fraud breaking, Stichting Shell Pensioenfonds ("Shell"), a significant shareholder, obtained a pre-judgment conservatory "garnishment order" over funds held in a bank account of Fairfield's in Dublin. An additional "garnishment order" was obtained at a later date, additional funds having been deposited into the Dublin bank account.

Shell then proceeded to bring an action in the Dutch court to recover monies invested. Fairfield, having failed to have the garnishment order set aside in the Dutch court, applied to the BVI for an anti-suit injunction to restrain Shell from proceeding in the Dutch court. At first instance, the application was refused on the basis that in the absence of "sharp practice" there was no reason to prevent Shell proceeding in the Dutch court. The matter was then appealed.

In the Court of Appeal, it was held that the lower court erred in holding that an element of 'sharp practice' was necessary to justify the granting of an injunction in circumstances such as these, and the injunction was granted. Rather, the Court of Appeal reached the view that the correct reading of the English case law was that vexatious or oppressive conduct was not necessary for the making of an anti-suit injunction. Instead, such an

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[32] *Ibid* at 47

[33] [HCVAP 2011 / 036] ('*Fairfield')*

order could be made where pursuit of the foreign proceedings would interfere with the court's due process, or where the injunction is required to protect the policies of the local forum. The court's reading of the English case law on the point was set out as follows:

> The guidance which we derive from these cases is that the most obvious example in which the jurisdiction will be exercised is where the conduct of the claimant pursuing foreign proceedings is said to be vexatious or oppressive or otherwise unconscionable. However, we do not understand the authorities to be suggesting that without a finding of oppressive or unconscionable conduct the jurisdiction is not available. We do not read the statements by Lord Goff as requiring such a finding. Indeed we also prefer Sopinka J.'s formulation of the principle as being based simply on the 'ends of justice' as in our view the emphasis on the expressions 'vexatious' or 'oppressive' conduct runs the risk of imposing a rigid formulation in respect of a jurisdiction which must remain fluid in its development and adaption to new challenges precisely for the purpose of meeting the 'ends of justice'.
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> It should be pointed out also that these cases, relied on by Ms Newman, QC, were ordinary civil actions either of single forum or alternate forum cases, where a major feature, as Mr Girolami, QC pointed out, would be some element of unconscionable or oppressive conduct. Here, what is in process is a liquidation of Sentry which is proceeding on the basis of a statutory scheme the objective of which is to treat all its creditors fairly and equally, without any creditor gaining an advantage over the other in the distribution of the assets. It seems to us that both Lord Rix (in the *Glencore* case) and Lord Goff (in the *Airbus* case) tacitly recognised that the jurisdiction is available where the conduct of the claimant by pursuing the foreign proceedings would interfere with the 'due process of the court' or where it is required to protect the polices of the local forum, as a separate and distinct consideration although when looked at from the

> other end of the spectrum, it may very well be viewed as an abuse of process.[34]

In this case, then, the Eastern Caribbean Supreme Court considered the approach of the English and Canadian courts and preferred Sopinka J.'s broader rendering of the principle to the original "vexatious or oppressive" formulation.

The Expansion of the Application of Anti-Suit Injunctions

Though judges continue to emphasise that the power to grant anti-suit injunctions is to be exercised with caution, the courts have proved willing to grant applications in an increasingly wide range of circumstances. In the case of *Castanho v Brown,* a defendant sought to restrain proceedings that had been brought in America after an action had been commenced in the English courts.[35] Here, Lord Scarman explained the significance of the anti-suit injunction's roots in equity:

> [T]he width and flexibility of equity are not to be undermined by categorisation. Caution in the exercise of the jurisdiction is certainly needed; but the way in which the judges have expressed themselves from 1821 onwards amply supports the view for which the defendants contend that the injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice.[36]

This view is generally shared in other common law jurisdictions. As such, despite its unusual nature, the anti-suit injunction has been used increasingly widely in order to deliver justice in the broad range of circumstances placed before the courts.

In England, anti-suit injunctions have been made where the domestic court proceedings have already drawn to a close. In the case of *Masri v Consolidated Contractors International Company*, Masri had brought an action against the defendants in the

[34] *Ibid* at 32

[35] [1981] 1 All E.R. 143 (H.L.)

[36] *Ibid* at 149

English courts and, after eventually winning disputes about jurisdiction, obtained judgment.[37] The defendants then brought an action in the courts of Yemen, seeking a declaration that they were not liable to Masri. The case was then brought back before the English courts, as Masri sought an anti-suit injunction in England to restrain the defendants from pursuing the action in Yemen or re-litigating other actions that had already been heard in England. The case reached the Court of Appeal, which upheld the lower court's decision to grant the injunction sought. Concluding its judgment, the court stated:

> The discretion was properly exercised in this case, consistently with the dictates of comity. It is consistent with principle for an English court to restrain re-litigation abroad of a claim which has already been subject of an English judgment. There is long-established authority that protection of the jurisdiction of the English court, its process and its judgments by injunction is a legitimate ground for the grant of an anti-suit injunction.[38]

As such, the court was prepared to make the injunction to protect proceedings that were no longer ongoing in the English courts.

The Canadian courts have been particularly receptive to recognizing that there are times when equity demands that the Court adopt a flexible approach in relation to anti-suit remedies. Though the Canadian courts prefer a party seeking an injunction to have first sought a stay in the foreign proceedings, this step will not be required where this would be contrary to the interests of justice. In the case of *Bell'O International LLC v. Flooring and Lumber Co.*, the defendant sought an injunction to prevent the plaintiff continuing with an action brought in New Jersey.[39] The plaintiff had sought an injunction in Ontario to prevent the defendant selling disputed merchandise after a business relationship had soured, and the injunction had been denied. The plaintiff then sought essentially the same relief in the courts of New Jersey. The court found Ontario

[37] [2008] EWCA Civ 625

[38] *Ibid* at 100

[39] (2001) 11 C.P.C. (5th) 327 (Ont. Sup. Ct.)

to be the natural forum in this case, as the relevant businesses were carried out in Ontario and the relevant goods made there. The court was also persuaded by the fact that the plaintiff itself had originally chosen to bring the action in Ontario, and turned to New Jersey only when this first action was unsuccessful.

Before granting the injunction, the court required the defendant to explain why it had immediately proceeded to seeking an anti-suit injunction rather than first seeking a stay in the foreign court. The defendant explained that it did not have the financial resources to have taken this course of action, as expending further resources on an action in New Jersey when it was already embroiled in proceedings in Ontario would have put the defendant out of business. In this case, the court was satisfied by the explanation and granted the relief sought.

The Canadian courts have also, in the right circumstances, been prepared to grant equitable relief even when the foreign jurisdiction is in fact an appropriate jurisdiction. In the case of *Hudon v. Geos Language Corp.*, the plaintiff had travelled to Japan to teach English pursuant to an employment contract with the defendant.[40] A condition of this contract was that the defendant would arrange all insurance coverage for the plaintiff. While on vacation from her teaching job, the plaintiff was involved in a serious accident in China and suffered permanent injuries. The plaintiff claimed that the insurance coverage obtained by the defendant, a sum of just over CDN$110,000, was negligently insufficient.

The plaintiff brought an action in Ontario, and the defendant moved for a stay. At the same time, the defendant commenced proceedings in Japan and sought a declaration that the Japanese courts had jurisdiction over the matter. The plaintiff brought an anti-suit injunction in Ontario to restrain the proceedings in Japan. The court found that as the employment contract was signed in Ontario, the plaintiff lived in Ontario, and many potential witnesses lived in Ontario, this would be an appropriate forum for the case. The court acknowledged that Japan was also likely to be an appropriate forum; however, the plaintiff had not applied for a stay in Japan before seeking an anti-suit

[40] (1997), 34 O.R. (3d) 14 (Div. Ct.)

injunction in Ontario. Here, as in *Bell'O,* this did not prevent the plaintiff from obtaining equitable relief, as in this case the plaintiff was not well enough to travel to Japan. The court balanced the potential prejudice to the plaintiff were she to be required to travel with the lack of adverse effect on the defendants were they to be required to defend in Ontario, and granted the anti-suit injunction accordingly.

In a particularly striking example of the Canadian courts issuing an extreme order to address the equities of the situation, the Superior Court in Ontario recently issued an anti-suit injunction in circumstances where the applicant was not even a party to foreign proceedings. In *Shaw v Shaw,*[41] the parties were husband and wife but had been separated for several years. A dispute had arisen between their respective companies as to who held the patent for a particular type of lights for children's shoes. The products were distributed by the wife's company throughout North America. While the parties were litigating the issue in Ontario, the husband commenced proceedings in New Jersey against the wife's customers, claiming patent infringement.

In an unusual step, the wife sought an anti-suit injunction to halt the New Jersey proceedings despite not being a party to them. Her motion was based on the fact that her customers were concerned about being potential targets of litigation if they continued to do business with her company, to the effect that her company was at risk of going out of business. Though the court acknowledged that this was not a 'true' anti-suit injunction case, as the parties were not the same in both jurisdictions, it nonetheless chose to follow the principles set out in *Amchem.* The court stated:

> In my opinion, an anti-suit injunction as requested should issue. Must that relief be denied because the moving parties are not parties to the New Jersey action? I think not. It would surely offend one's sense of justice to permit the plaintiffs to proceed with New Jersey actions which

[41] [2007] *CanLII* 27337 (Ont. Sup. Ct.)

> depend for their success on the answer to the question the plaintiffs have asked the Ontario court to determine.[42]

As such, it should not be forgotten that the anti-suit injunction is an equitable remedy, and that as such the courts have been prepared to grant relief in unconventional circumstances in order to serve the interests of justice.

Conclusion

As businesses are less and less bound by their home country's perimeters, and even small companies have multi-national dealings, the law governing and facilitating such interactions is required to adapt and develop. This can often lead to surprising developments, such as in the recent English High Court case of *Conductive Inkjet Technology Ltd v Uni-Pixel Displays Inc*.[43] Here, one party was based in England and the other in Texas. The parties had exchanged draft agreements (neither containing an exclusive jurisdiction clause) over e-mail. In determining where the contract had been made, the court declined to follow the usual "posting" rule, deeming this an artificial approach, and instead confirmed authority that a contract can be made in two places at once[44]. It was held that there was a good arguable case that the relevant contract could have been made in both England and Texas.

The anti-suit injunction remains an extraordinary remedy approached by the courts with caution, but is increasingly being used with greater flexibility in order to deal with a broad range of multi-jurisdictional circumstances. In the case of *Fairfield,* the court noted 'the authorities make it clear that the principles are not etched in stone, nor can a circle be drawn around them outside of which no one must go.'[45] As such, the flexibility afforded by the court's equitable jurisdiction presents great opportunity for litigators; in

[42] *Ibid* at 23

[43] [2013] EWHC 2968 (Ch)

[44] *Apple Corps v Apple Computer* [2004] EWCH 768 (Ch)

[45] *Fairfield, supra* note 31 at 22

this complex and developing area of law, the outer limits of the courts' powers may be bound only by the skill and creativity of the lawyers who appear before them.