ANTI-SUIT INJUNCTIONS TO RESTRAIN FOREIGN PROCEEDINGS IN BREACH OF AN ARBITRATION AGREEMENT

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Introduction

The anti-suit injunction is the remedial device available in common law systems to restrain a party from instituting or continuing with proceedings in a foreign court.[1] The remedy is a discretionary one, exercisable when the ends of justice require it. Though an anti-suit injunction is directed against a plaintiff in personam, not against the foreign court, it can be regarded as an indirect interference with the processes of the foreign court. That being so, the interests of comity have traditionally required that the power to grant the anti-suit injunction should be exercised with caution.

While the categories where an anti-suit injunction may issue are not closed, and there are different ways of defining them, the common law of Anglo-Commonwealth countries generally recognises two broad jurisdictions: an inherent jurisdiction in a court to protect its own processes, and an equitable jurisdiction to restrain unconscionable conduct.[2] Within the equitable jurisdiction a recognised category for the issue of an anti-suit injunction is where a plaintiff has commenced proceedings in a foreign court in breach of a contractual promise, for example, in breach of an exclusive jurisdiction clause or an arbitration agreement. In this type of case there is a

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1 For overviews of the anti-suit injunction in Anglo-Commonwealth countries, refer to Lawrence Collins et al (eds), *Dicey, Morris and Collins on the Conflict of Laws* (14th ed, 2006) 500-511, 746-749; Peter Nygh and Martin Davies, *Conflict of Laws in Australia* (7th ed, 2002) 136-137. More extensive discussion is found in Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (2003) 170-246.

2 The modern principles regarding anti-suit injunctions in English law are set forth in *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 and *Airbus Industrie GIE v Patel* [1999] 1 AC 19. The main modern authority for Australia is *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; see also *National Mutual Holdings Pty Ltd v Sentry Corp* (1989) 87 ALR 539.

tension between the interests of comity on the one hand and the policy of upholding contractual undertakings on the other.

The English Court of Appeal in *Aggeliki Charis Compania Maritima SpA v Pagnan SpA ('The Angelic Grace')*[3] can be regarded as having inaugurated a more liberal approach to the jurisdiction to grant an anti-suit injunction restraining breach of an arbitration agreement.[4] The tension between comity and contractual bargain was largely resolved in favour of the latter. This paper examines the nature and extent of the liberalisation worked by *The Angelic Grace* and subsequent English decisions.

The approach in the *Angelic Grace*

The facts of *The Angelic Grace* were as follows. Panamanian owners of an ocean-going vessel let the vessel to Italian charterers for carriage of grain from Rio Grande to ports on the Italian Adriatic. During unloading operations at an Italian port, a collision occurred between that vessel and a floating elevator owned by the charterers. Both vessels were damaged, each blaming the other. The owners commenced arbitration proceedings in London, relying on an arbitration clause in the charterparty. Soon after, the charterers commenced proceedings before an Italian court in Venice. The owners then applied to the English court for a declaration that the various claims and counterclaims were within the scope of the arbitration clause and for an injunction to restrain the charterers from continuing the proceedings in Italy.

At first instance, Rix J found for the owners and issued the declaration and injunction.[5] A unanimous Court of Appeal upheld the decision.

The circumstances in *The Angelic Grace* made the grant of the injunction particularly appropriate. The charterers had submitted to the jurisdiction of the English court for the purpose of determining whether their claim in Italy was arbitrable. But it was clear they intended to proceed with their claim in Italy even if the English court were to find that that claim was arbitrable. And no evidence had been adduced to show

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3 [1995] 1 Lloyd's Rep 87, Court of Appeal, Neill, Leggatt and Millett LJJ.

4 This jurisdiction appears to have been first exercised in *Pena Copper Mines Ltd v Rio Tinto Co Ltd* (1911) 105 LT 846. Arbitration agreements are of two basic types: arbitration clauses and submission agreements. Arbitration clauses are inserted into contracts to provide for arbitration as the means of resolving disputes which may arise in the future, whereas submission agreements are entered into when a dispute has arisen and the parties wish to refer it to arbitration. In the resolution of international commercial disputes, arbitration clauses are far more common than submission agreements. On the types of arbitration agreements, see for example Julian Lew et al, *Comparative International Commercial Arbitration* (2003) 99-101.

5 [1994] 1 Lloyd's Rep 168, Queen's Bench Division, Commercial Court.

that the Italian court would do other than stay its proceedings to uphold the arbitration agreement. The determination of the charterers to press on in Italy regardless was described by Rix J as vexatious.[6]

The core of the approach in *The Angelic Grace* to enjoining foreign proceedings in breach of an arbitration agreement is found in a passage from the judgment of Millett LJ. It is worth setting out this passage in full as it has been repeatedly quoted or acknowledged in later relevant decisions:

> In my judgement, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. In the former case, great care may be needed to avoid casting doubt on the fairness or adequacy of the procedures of the foreign Court. In the latter case, the question whether proceedings are vexatious or oppressive is primarily a matter for the Court before which they are pending.
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> But in my judgement there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them.[7]

Millett LJ recognised that the jurisdiction to issue the injunction was discretionary and not to be exercised as a matter of course. But he maintained that 'good reason' needed to be shown why it should not be exercised in any given case.[8]

The approach of Millett LJ to the grant of the anti-suit injunction was expressly endorsed by Neill LJ in a brief concurrence. And Leggatt LJ in some places in his judgment seemed well disposed to this robust approach to comity.[9]

In the course of his judgment Millett LJ observed that there was no difference in principle between an injunction to restrain breach of an arbitration clause and one to restrain breach of an exclusive jurisdiction clause.[10] This is unexceptional in so far as

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6 Ibid 182.

7 [1995] 1 Lloyd's Rep 87, 96.

8 Ibid.

9 See, for example, his remarks about the exercise of caution in the grant of the injunction at Ibid 92.

10 Ibid 96.

in both instances the injunction is to hold parties to their contractual bargain. And the liberalism of *The Angelic Grace* has influenced decisions on jurisdiction clauses.[11] But some developments have suggested that considerations specific to arbitration agreements entail that comity will have less of a role for arbitration agreements than for jurisdiction clauses.

Prerequisites for grant of injunction

For the grant of an anti-suit injunction in Anglo-Commonwealth countries, there are basic minimum prerequisites going to jurisdiction and contract.

As a preliminary requirement, the person against whom the injunction is sought must be amenable to the jurisdiction of the court. This means that in personam jurisdiction must exist either under the common law on the basis of presence or submission or under the statutory rules allowing for service ex juris. Normally the jurisdictional rules will be satisfied by the mere fact of an arbitration agreement requiring arbitration in the forum, because either the agreement itself constitutes a submission to the courts of the forum or a sufficiently close connection to the forum is made by the agreement.[12]

Since early 2009, the English courts cannot exercise the jurisdiction to issue an anti-suit injunction to restrain commencement of proceedings in a court of another Member State of the European Union, even where those proceedings are clearly in breach of an arbitration agreement. The European Court of Justice, on a reference from the House of Lords, determined in *Allianz SpA, Generali Assicurazioni Generali SpA v West Tankers Inc*[13] that the grant of the anti-suit injunction is incompatible with the EU jurisdiction regime embodied in the Brussels I Regulation.[14] Nonetheless,

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11 See *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425, House of Lords, where the decisions are reviewed, especially by Lord Bingham of Cornhill at 432-435 and by Lord Scott of Foscote at 440.

12 *Tracomin SA v Sudan Oil Seeds Ltd* [1983] 1 WLR 1026, 1035.

13 Case C–185/07. The reference was made by the House of Lords in *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA ('The Front Comor')* [2007] 1 Lloyd's Rep 391.

14 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, 16.1.2001, 1. Its predecessor was the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed on 27 September 1968. The rules of the Brussels Convention were extended to the European Free Trade Association (EFTA) countries by the parallel Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed on 16 September 1988.

English courts remain free to continue to employ the anti-suit injunction to restrain commencement of proceedings in courts outside the EU.

Choice of the forum as the place or 'seat' of the arbitration appears crucial in any request for a court of the forum to issue an anti-suit injunction to restrain breach of an arbitration agreement. It is doubtful that a court would grant the injunction where the arbitration has no connection with the forum.[15] But where the arbitration is to be held in the forum, the supervisory jurisdiction of the courts of the forum is engaged in regard to that arbitration. To date, *The Angelic Grace* and succeeding cases have concerned disputes arising out of contracts governed by English law, with the contracts containing London arbitration clauses.

A claim must of course fall within the scope of the arbitration agreement between the parties before the court will grant an injunction to restrain a party from proceeding otherwise than under the agreement. But a widely drawn arbitration agreement will be apt to embrace most, if not all, claims between the parties. The modern attitude of the courts is to give full effect, so far as the language of the agreement permits, to the commercial expectations of the parties who, as rational business people, are presumed not to have intended the inconvenience of having possible disputes arising out of their transaction heard in different places.[16]

Occasionally a judge may stigmatise a blatant breach of an arbitration agreement as vexatious or oppressive.[17] But it is accepted that the breach does not have to meet any such standard for the anti-suit injunction to issue.[18] The breach of the contractual bargain per se is sufficient. The test of vexation or oppression constitutes an independent and distinct category for the grant of an anti-suit injunction in the equitable jurisdiction.

The equity in regard to enforcing an arbitration agreement will arise only where a party has a sufficient connection with that agreement. Third parties outside the contractual bargain will receive neither the benefit nor the burden of the agreement.

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15 See Adrian Briggs, *The Conflict of Laws* (2002) 110. For a contrary view, see Paul Mitchard, 'Anti-Suit Relief – An Imperfect World' (2007) 2 *Global Arbitration Review* 33, 34.

16 See *Fiona Trust and Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254, House of Lords, especially Lord Hoffmann at 256-257 and Lord Hope of Craighead at 259-260; *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, Federal Court of Australia, especially at 87-88 in the judgment of Allsop J, with whom Finn and Finkelstein JJ agreed.

17 For example, Rix J at first instance in *The Angelic Grace*.

18 *The Jay Bola* [1997] 2 Lloyd's Rep 279, 286 in the judgment of Hobhouse LJ, with whom Morritt LJ and Sir Richard Scott V-C agreed.

Where an anti-suit injunction is sought by or against a third party, another ground for the grant of the injunction has to be relied on. This would usually be the category of vexation or oppression. It is not easy to satisfy this category, because the traditional attitude of caution here remains undiminished. As Millett LJ acknowledges in *The Angelic Grace*, the question whether proceedings are vexatious or oppressive is primarily a matter for the court before which they are pending.[19]

What is a sufficient contractual nexus? The Court in *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH ('The Jay Bola')*[20] allowed that an anti-suit injunction can be granted against a subrogated insurer who pursues a claim in a foreign court inconsistently with an arbitration agreement binding on its assured. The idea is that the subrogated insurer is bound by the arbitration agreement not because of privity of contract but because the contractual rights of the assured, to the benefit of which the insurer has become entitled, are subject to the arbitration agreement.[21] This reasoning was applied by Colman J in *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA ('The Front Comor')*[22] and by Cooke J in *Starlight Shipping Co v Tai Ping Insurance Co Ltd Hubei Branch* (*'The Alexandros T')*.[23]

A sufficient connection to the contract bargain was found wanting in *Through Transport Mutual v New India Assurance Co Ltd ('Through Transport').* [24] There proceedings were brought in Finland under a Finnish statute which conferred rights on third parties against insurers in circumstances where the insured was insolvent. The subrogated insurer of a shipper relied on the statute to sue the liability insurers of an insolvent carrier. The insurance policy of the liability insurers provided that any disputes had to be referred to arbitration in London. The Court of Appeal refused to grant an anti-suit injunction to the liability insurers even though the statutory claim was characterised as in substance one to enforce the contract of insurance and the insurers had a right to London arbitration. It was held that *The Angelic Grace* did not directly apply because the subrogated insurer of the shipper was not itself in breach of contract in bringing the proceedings in Finland.

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19 [1995] 1 Lloyd's Rep 87, 96.

20 [1997] 2 Lloyd's Rep 279, Court of Appeal, Sir Richard Scott V-C, Hobhouse and Morritt LJJ.

21 Ibid 285-286, 291.

22 [2005] 2 Lloyd's Rep 257, Queen's Bench Division, Commercial Court, Colman J.

23 [2008] 1 Lloyd's Rep 230, Queen's Bench Division, Commercial Court, Cooke J.

24 [2005] 1 Lloyd's Rep 67, Court of Appeal, Woolfe LCJ, Clarke and Rix LJJ. Judgment of the Court delivered by Clarke LJ.

Challenge to the jurisdiction

After *The Angelic Grace* a serious challenge was made to the scope and even the very existence of the jurisdiction to restrain foreign proceedings brought in breach of an arbitration agreement. This challenge derived from the international legal regime embodied in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('the New York Convention').[25]

The New York Convention provides a widely accepted international regime for enforcement not only of arbitral awards but also of arbitration agreements. The enforcement mechanism for arbitration agreements is set out in Article II.3 which basically requires that a court of a Contracting State is to refer to arbitration any party who comes before it in breach of an arbitration agreement recognised under the Convention. It was argued in some decisions that the New York Convention mechanism left no justification for using the anti-suit injunction to enforce arbitration agreements.

In *Toepfer International GmbH v Societe Cargill France ('Societe Cargill')*[26] the Court of Appeal seemed less than enthusiastic about the approach of *The Angelic Grace*. Delivering the judgment of the court, Phillips LJ referred to Article II.3 of the New York Convention and observed:

> It might be thought that there would be much to be said, both as a matter of comity and in the interests of procedural simplicity, if a defendant who was improperly sued in disregard of an arbitration agreement in the Court of a country subject to the New York Convention were left to seek a stay of the proceedings in the Court in question. It seems, however, that litigants in cases governed by English arbitration clauses are not prepared to trust foreign Courts to stay proceedings in accordance with the New York Convention, for it has become the habit to seek anti-suit injunctions such as that sought in the present case.[27]

Phillips LJ then cited the passage from the judgment of Millett LJ in *The Angelic Grace* and remarked:

> While we would not wish it to be thought that we have independently endorsed these sentiments, in view of this decision we feel obliged to hold that Mr. Justice Colman did not err in principle in the exercise of his discretion

[25] 330 UNTS 38.

[26] [1998] 1 Lloyd's Rep 379, Court of Appeal, Staughton, Phillips and Robert Walker LJJ.

[27] Ibid 386.

> when granting an injunction in this case. The point will be open to argument in a higher tribunal.[28]

The observations of Phillips LJ appeared to go to the exercise of the discretion rather than to its very existence. And the Court of Appeal did not disturb the exercise of the discretion by the trial judge in granting the injunction. But the observations naturally gave rise to the prospect that the approach in *The Angelic Grace* might be in some way wound back.

Doubtless emboldened by this prospect, counsel for the defendants in *The Front Comor* argued that Article II.3 of the New York Convention should be regarded as the exclusive enforcement mechanism for arbitration agreements under the Convention. If generally accepted, this argument would abolish the anti-suit injunction as a means of enforcing arbitration agreements because all major common law countries are parties to the New York Convention. The argument was inconsistent not only with *The Angelic Grace* but also with all the English decisions enjoining breach of arbitration agreements since UK accession to the New York Convention in 1975. The argument was rejected. Colman J in *The Front Comor* noted that the argument was inconsistent with the decision in *Societe Cargill* where the Court of Appeal reluctantly held that *The Angelic Grace* precluded such a submission.[29] As to the substance of the matter, Colman J observed succinctly that whereas Article II.3 identified the duty which rested on the court seised of proceedings to stay them and to refer the parties to arbitration, it contained nothing which vested in that court exclusive jurisdiction to enforce that arbitration agreement.[30] On appeal, the House of Lords affirmed that the grant of the anti-suit injunction was not inconsistent with the New York Convention.[31]

In so far as the Court of Appeal in *Societe Cargill* can be taken to have suggested more caution in the exercise of the discretion to grant or withhold the injunction, that suggestion has not been adopted. It will be shown in the course of this discussion that subsequent decisions have embraced *The Angelic Grace* with almost religious zeal.

Comity and sensitivities of foreign court

What account should be made of the possibility that the foreign court might take offence at the attempt to restrain proceedings before it?

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28 Ibid.

29 [2005] 2 Lloyd's Rep 257, 268.

30 Ibid 269.

31 [2007] 1 Lloyd's Rep 391, 393.

A *Angelic Grace* robustness

There was no evidence in *The Angelic Grace* as to how an Italian court might react to the grant of an anti-suit injunction. This did not seem to concern either Leggatt LJ or Millett LJ. For his part, Leggatt LJ did not contemplate that an Italian judge would regard it as an interference with comity if English courts, having ruled on the scope of an English arbitration clause, then sought to enforce it by restraining a party from trying its luck in duplicated proceedings in the Italian court.[32] More strongly, Millett LJ maintained that courts in countries which were party to the Brussels Convention or the New York Convention were accustomed to the idea that they may be under a duty to decline jurisdiction in a case because of the existence of an exclusive jurisdiction or arbitration clause. He accordingly rejected the proposition that any court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which that party had promised not to invoke and which it was the duty of the court to decline.[33] This robust conclusion was soon belied by the reaction of German courts.

B Reaction of German courts

How the anti-suit injunction can be viewed in civil law systems is illustrated by the decision of the Dusseldorf Regional Court of Appeal in *Re the Enforcement of an English Anti-suit Injunction*.[34] There the Court refused to allow service in Germany of an English anti-suit injunction which was aimed at preventing a German resident from commencing or continuing proceedings in German courts in disregard of an arbitration agreement referring the parties to arbitration in London. The injunction was held to constitute an infringement of the jurisdiction of the German courts and of the sovereignty of the German state.

C Caution in *Phillip Alexander*

The attitude of the German courts caused the robust approach of Millett LJ in The Angelic Grace to be questioned in *Phillip Alexander Securities and Futures Ltd v Bamberger ('Phillip Alexander')*.[35] That case involved contracts between German customers and English futures and options brokers. The customers brought actions against the brokers in various German courts as a result of trading losses incurred. In

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32 [1995] 1 Lloyd's Rep 87, 95.

33 Ibid 96.

34 [1997] I L Pr 320. For a note on this case, see Jonathan Harris, 'Restraint of foreign proceedings - the view from the other side of the fence' (1997) 16 *Civil Justice Quarterly* 283.

35 [1997] I L Pr 73, Queen's Bench Division, Commercial Court, Waller J; Court of Appeal, Leggatt, Morritt and Brooke LJJ.

each instance, the brokers contested the proceedings on the basis that there was a binding arbitration agreement requiring arbitration in London. In some of the actions, the German courts had already gone on to give judgments on the merits. The brokers obtained interim anti-suit injunctions from the English Commercial Court against some of their other customers. But the German courts refused to permit service of the interim injunctions. It was apparent that the German courts would ignore any attempt to issue an anti-suit injunction and would block any attempt to enforce the same.

Waller J declined to grant the injunctions and distinguished *The Angelic Grace* in two main respects.[36] Firstly, neither Leggatt LJ nor Millett LJ in that case contemplated that the Italian judge would be offended by the grant of the injunction, whereas in the instant case it was clear that the German court was offended by what it regarded as an interference with its activities. Secondly, the German court clearly took the view that there was no obligation to stay the German proceedings pursuant to the New York Convention because of German consumer laws.

On appeal, the Court of Appeal in *Phillip Alexander* decided that none of the arbitration clauses in the contracts between the English brokers and their German customers was enforceable. There was no basis for issuing anti-suit injunctions. But at the end of the judgment of the Court, delivered by Leggatt LJ (who had presided in *The Angelic Grace*), doubts were raised about the use of anti-suit injunctions:

> 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. 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 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

[36] Ibid 93-94.

> to permit them to be served in Germany. In addition they proceeded to give judgements on the merits.[37]

It might have been thought that *Phillip Alexander* qualified the approach in *The Angelic Grace* and required that more regard would now have to be paid to comity. Subsequent decisions demonstrate, however, that *The Angelic Grace* has been undiminished. This is revealed by examining how possible understandings of *Phillip Alexander* have been received.

D Evidence of foreign court being affronted

In *Phillip Alexander*, Waller J declined to issue the anti-suit injunction in part because there was clear evidence that the German Court was offended by such interference; however, the Court of Appeal was concerned not so much with the feelings of the German Court but with whether the injunction would be enforceable in the light of what the German Court might actually do or not do in response to it. Subsequent decisions confirm that the English courts will pay scant regard to whether the foreign court feels affronted. An English court will grant an anti-suit injunction to restrain breach of an arbitration agreement even if the foreign court will not recognise or give effect to it.

In *XL Insurance v Owens Corning*,[38] Toulson J acknowledged that an anti-suit injunction involved by definition a degree of interference with foreign court procedures. But he forthrightly declared that if the English court was satisfied that litigation in another country (in this case the United States) would be a breach of contract to arbitrate a dispute in London, the issue of the injunction would involve no disrespect or unfriendliness to the foreign court.[39] Toulson J did not attempt to discern how a court in the United States might actually feel about the matter.

Aikens J in *Navigation Maritime Bulgare v Rustal Trading Ltd* (*'The Ivan Zagubanski')*[40] had before him the opinion of two French law professors that the imposition of an anti-suit injunction was 'a grossly offensive intrusion' into the functioning of a French court. But he observed that the opinion neither recorded the actual opinion of French Judges nor referred to any case where those views had been expressed by French Judges.[41] On that basis he distinguished the instant case from the position faced by Waller J in *Phillip Alexander*. Aikens J opined that he would expect the

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37 Ibid 117.

38 [2000] 2 Lloyd's Rep 500, Queen's Bench Division, Commercial Court, Toulson J.

39 Ibid 509.

40 [2002] 1 Lloyd's Rep 106.

41 Ibid 126.

French court to take the view of Millett LJ in *The Angelic Grace* and not be offended by the grant of an injunction.[42] At the least, there is here shown a marked reluctance to concede that the anti-suit injunction would offend a foreign court.

There was evidence in *Through Transport* that the Finnish courts would not recognise or give effect to an anti-suit injunction. At first instance, Moore-Bick J noted that the injunction was not directed at the Finnish courts and that in any event the assistance of those courts was not required to render the injunction effective against the insurer.[43] The Court of Appeal was content to agree with the remarks of Millett LJ in *The Angelic Grace* and to declare that there was no reason why any court should be offended by an injunction to restrain a party from invoking a jurisdiction in breach of a contractual promise that the dispute be referred to arbitration in England.[44] After all, an English court would not be offended if a party were enjoined from commencing or continuing proceedings in England in breach of an arbitration agreement.[45] For other reasons noted above, however, the injunction was in this case not granted to restrain a party from continuing proceedings in Finland.

In *The Front Comor*, Colman J had evidence before him that Italian courts would simply ignore an anti-suit injunction and would go on to decide the issue whether to stay proceedings on the grounds of the arbitration clause. But Colman J averred that it was an inescapable conclusion from the decision in *Through Transport* that in the case of an anti-suit injunction to uphold an arbitration agreement, evidence that a foreign court would not recognise or enforce the order was insufficient to sustain a submission that the foreign court would be so offended or affronted that an order should not be made.[46]

All the decisions referred to above emphatically endorse what is in reality a disregard of the attitude of the foreign courts. It will be seen that only where that attitude may result in the anti-suit injunction being ineffective in practice might the English courts be dissuaded from granting the injunction.

E Consumer protection and mandatory laws

It is possible to read the judgment of Waller J in *Phillip Alexander* as deferring to the existence of mandatory consumer laws in Germany. But the remarks of Leggatt LJ in the Court of Appeal do not go to the mandatory nature of the law. And Anglo-

42 Ibid.

43 [2004] 1 Lloyd's Rep 206, 215.

44 [2005] 1 Lloyd's Rep 67, 88.

45 Ibid.

46 [2005] 2 Lloyd's Rep 257, 268.

Commonwealth countries do not take into account the mandatory contract laws of a foreign country unless the law of that country is the proper or governing law of the contract.[47] Indeed in *Akai Pty Ltd v People's Insurance Ltd*[48] it was held that considerations of comity did not require the English courts to give effect to the decisions of a foreign court applying mandatory laws that would override a choice of jurisdiction and law by the parties. Rather what Leggatt LJ in *Phillip Alexander* regarded as relevant were the actions which the German court would take to ensure those laws applied in the instant case, and the difficulty in enforcing an anti-suit injunction against individual German consumers.

F Ineffectiveness of remedy

In accordance with the maxim that equity does nothing in vain, an anti-suit injunction will not be granted where it is obvious that the grant of the remedy would be futile or ineffective. This seems to be the ultimate consideration relied on by Leggatt LJ in *Phillip Alexander*. The German courts had not merely registered their affront at the issue of anti-suit injunction. Rather they had taken active steps to thwart the injunction by refusing to allow service in Germany and had gone ahead and in some cases delivered judgment in disregard of the injunction. But crucially, the parties resisting the injunction could be out of the reach of enforcement of the injunction by the English courts. As individual German consumers, they would probably have no assets in England that the English courts could move against. *Phillip Alexander* is best understood as concerned with the enforceability of the injunction. So understood the decision is unexceptional and does not really qualify the thrust of the approach in *The Angelic Grace*.

Comity and equitable considerations

The Angelic Grace rejects the idea that comity requires that the jurisdiction to enjoin foreign proceedings in breach of an arbitration agreement is to be exercised with 'great caution'. But this does not mean that comity is altogether ignored. It has been recently remarked that to some extent considerations of comity are built into the basic requirements for the principled exercise of the jurisdiction to grant an injunction.[49] The discretionary nature of the injunction as an equitable remedy means that regard can be paid to factors which, directly or indirectly, relate to or promote considerations of comity. So an injunction can be refused if equitable defences such

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47 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277.

48 [1998] 1 Lloyd's Rep 90, Queen's Bench Division, Commercial Court, Thomas J.

49 Rix LJ in an exclusive jurisdiction agreement case, *OT Africa line Ltd v Magic Sportswear* [2005] 2 Lloyd's Rep 170, 183.

as laches or waiver are made out, or where grant of the remedy would be ineffective.[50]

A Delay

Millett LJ towards the end of his judgment in *The Angelic Grace* qualified his statement that the court should feel no diffidence in granting the injunction with the proviso that the injunction should be sought promptly and before the foreign proceedings are too far advanced. And while adhering to *The Angelic Grace*, Mance J in *Toepfer International GmbH v Molino Boschi SRL ('Molino Boschi')*[51] observed that it had never been the law that a foreign defendant could with complete impunity allow foreign proceedings to continue practically to judgment.[52]

Mere delay will not of itself engage the exercise of discretion or amount to laches in a strict sense. The length of the delay is obviously relevant, but it is the consequences of the delay which will be determinative of whether an injunction is issued.

The effect of the delay on the other party is to be considered. That party may have been caused inconvenience and expense in pursuing an action in the foreign court while the applicant for the anti-suit injunction stood by. If real prejudice to the other party would now be occasioned by issue of the injunction, the court will refrain from issuing it.[53] But the courts are prepared to grant the anti-suit injunction to an applicant if any detriment to the other party can be made good by reimbursement of expenses incurred or by other appropriate undertakings.[54]

Delay in seeking the injunction can impact upon the processes of the foreign court, exacerbating the degree of interference, whether direct or indirect, which the injunction will cause. Of significance is the stage at which proceedings in the foreign court have reached.

If proceedings have only been formally commenced or are at a very early stage, it may be felt that an anti-suit injunction will not amount to much of an interference. In *Societe Cargill*, the French proceedings had gone no further than the service of a pleading by the party contesting the jurisdiction of the court. No hearing date had been fixed and no evidence had been filed. And in *Shell International Petroleum Co Ltd*

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50 On these equitable defences generally, see R P Meagher et al, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, 2002) 574-576, 1031-1045.

51 [1996] 1 Lloyd's Rep 510, Queen's Bench Division, Commercial Court, Mance J.

52 Ibid 516.

53 *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyd's Rep 588, Court of Appeal, Staughton LJ and Sir Denys Buckley (an exclusive jurisdiction agreement case).

54 See, for example, *The Jay Bola* [1997] 2 Lloyd's Rep 279, 288.

v Coral Oil Co Ltd ('*Coral Oil*')[55] the injunction was granted where proceedings had only recently been commenced in the Lebanese court and had not advanced to any significant extent.

Where, however, the foreign court has invested much time or effort in the matter or is close to issuing judgment, then intervention may not be justified. Thus in *Molino Boschi*[56] the judge refrained from granting the injunction where proceedings before the Italian court had reached a very late stage, after having been in progress for between six and seven years. The parties had already exchanged exhaustive memoranda under Italian law and procedure on issues regarding jurisdiction, arbitration and the merits. In *Verity Shipping SA v NV Norexa ('The Skier Star')*,[57] about three years had elapsed since the start of proceedings in the Antwerp court and, by virtue of a court ordered surveyors report, substantial progress had been made in the investigation of relevant facts.[58] The applicant for the injunction had failed to act promptly by not applying within a year of becoming aware of the Antwerp proceedings. Even though it was still possible to challenge the jurisdiction of the Antwerp court under its own procedural rules, the injunction was refused.

B Waiver

In some circumstances the applicant for the anti-suit injunction may be held to have waived its legal rights under the arbitration agreement. Lengthy delay or inaction may amount to evidence of waiver. But usually waiver will result from some overt conduct by the applicant.

If the applicant for the injunction has acted in such a way as to be regarded as having submitted to the jurisdiction of the foreign court, injunctive relief may be refused. In particular, a party seeking to rely on the arbitration agreement will generally be held to have submitted if its appearance before the foreign court is not confined to challenging the jurisdiction of the court but moves into arguing the substantive merits of the dispute. The need for care in appearing before a foreign court to ask it to uphold the arbitration agreement is evident.

But in the exercise of discretion some leeway may be accorded the applicant in regard to submission. In *Molino Boschi* the applicant had clearly made submissions on

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55 [1999] 1 Lloyd's Rep 72, Queen's Bench Division, Commercial Court, Moore-Bick J.

56 [1996] 1 Lloyd's Rep 510, Queen's Bench Division, Commercial Court, Mance J.

57 [2008] 1 Lloyd's Rep 652, Queen's Bench Division, Commercial Court, Teare J.

58 Teare J accepted that while the Antwerp court was not strictly obliged to follow the findings of the surveyor, it was extremely rare for such findings to be challenged or to be set aside: Ibid 657.

the merits before the Italian court but was excused because it had done so at each stage as a subsidiary and precautionary matter.[59] Exceptionally, even a clear submission may not preclude the grant of the anti-suit injunction where circumstances are such that it would be inequitable to insist on the jurisdiction of the foreign court.[60]

An abandonment of the right to arbitration under an arbitration agreement may take place otherwise than by submission to the foreign court. In *Coral Oil*, it was argued that by bringing proceedings in England for an injunction to restrain Coral from commencing proceedings in Lebanon in breach of arbitration agreements, Shell had somehow abandoned its right to arbitration under those agreements. Not surprisingly, Moore-Bick J had no hesitation in rejecting that argument. In order to make out an abandonment of right, Coral would have had to point to some clear and unequivocal statement on the part of Shell which indicated that it was intending to abandon its rights and indeed to evidence showing that Coral had relied on that statement in some way to its detriment.[61]

C Ineffectiveness of remedy

As noted above, the court in its discretion may refuse to issue an injunction where the grant of the remedy would be futile or ineffective. *Phillip Alexander* instanced the concern about being unable to enforce the injunction against individual German consumers. But almost invariably the injunction will be readily enforceable against the large commercial enterprises which have assets and do business in England. Any thoughts by such parties about refusing to comply with the injunction are usually dispelled by gentle reminders by the courts about the powers of enforcement they possess.[62] The popularity of the remedy in England attests to its effectiveness in upholding the arbitration agreement in international commercial transactions.

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[59] [1996] 1 Lloyd's Rep 510, 515.

[60] See *AS Svendborg v Wansa* [1997] 2 Lloyd's Rep 183, an exclusive jurisdiction agreement case, where despite having submitted to proceedings in Sierra Leone, the plaintiff was granted an anti-suit injunction in the light of evidence both that a death threat had been made against a key witness of the plaintiff should he return to Sierra Leone and that the defendant had regularly boasted that he could manipulate the legal system in Sierra Leone.

[61] [1999] 1 Lloyd's Rep 72, 76.

[62] See the remarks of Cooke J in *The Alexandros T* [2008] 1 Lloyd's Rep 230, 238: disobedience to the order of the court gives rise to potential consequences for contempt.

Any other relevant considerations?

Apart from the equitable considerations discussed above, it is difficult to discern from the judgments in *The Angelic Grace* any other considerations relevant to the exercise of the discretion to grant or refuse the injunction. But Millett LJ did state that he saw no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause. Picking up on this, Clarke J in *Ultisol Transport Contractors Ltd v Bouygues Offshore SA*[63] maintained that Millett LJ's test of 'good reason' is in essence the same test as that applied where a stay of English proceedings is sought on the grounds of a foreign exclusive jurisdiction clause.[64] Accordingly it was further suggested, obiter,[65] that the criteria identified by Brandon LJ in *Aratra Potato Co Ltd v Egyptian Navigation Co* (*'The El Amria')*[66] as relevant to the exercise of the discretion to uphold a foreign jurisdiction clause were also relevant to the exercise of the discretion to restrain foreign proceedings in breach of an arbitration clause.

In *The El Amria*, Brandon LJ thought that the risk of inconsistent decisions from different tribunals was a significant consideration where a foreign jurisdiction clause was sought to be enforced.[67] As well he referred to various factors of convenience[68] which nowadays may be considered under the doctrine of forum non conveniens.[69]

In *Societe Cargill* counsel for the plaintiffs argued that, apart from such matters as unconscionable delay or submission to the jurisdiction, the New York Convention left no room for discretionary flexibility as to the enforcement of an arbitration clause generally.[70] This argument had not been raised in *The Angelic Grace* but could be said to be in the spirit of the liberal approach to grant of the anti-suit injunction. The

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63 [1996] 2 Lloyd's Rep 140, Queen's Bench Division, Admiralty Court, Clarke J.

64 Ibid 148.

65 Ibid 149.

66 [1981] 2 Lloyd's Rep 119.

67 Ibid 128.

68 Ibid 127-128. These factors he had previously recounted as Brandon J in *The Eleftheria* [1969] 1 Lloyd's Rep 237, 242.

69 The doctrine of forum non conveniens, strictly so called, requires a court of the forum to decline to exercise its jurisdiction where , on one view, a foreign court is the natural forum for an action (the current English approach: *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460) or, on another view, where the forum is a clearly inappropriate forum for an action (the current Australian approach: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538).

70 See [1997] 2 Lloyd's Rep 98, 110.

argument maintained that considerations regarded as material in determining whether or not to enforce an exclusive jurisdiction clause, such as the risk of inconsistent decisions from different tribunals and the issue of forum non conveniens, were irrelevant. The mandatory stay requirement of Article II.3 of the New York Convention did not admit of such considerations. It was inconsistent nonetheless to refer to those considerations when enforcing an arbitration agreement by way of anti-suit injunction. Colman J accepted this argument:

> [W]hy should the English Courts in exercising their jurisdiction to restrain foreign proceedings by injunction give weight to matters such as forum non conveniens criteria or the risk of inconsistent decisions, when those matters are entirely extraneous to the regime created by the Convention? I can see no good reason why they should. To do so would simply derogate from adherence o the Convention. Criteria which are irrelevant for the purposes of the Courts granting a domestic stay should equally be accorded little or no weight in the discretionary balance involved in deciding whether to grant an injunction. If it was the purpose of the Convention, as enacted in the 1975 Act for domestic proceedings, to exclude such considerations, it would be perversely insular of the English Courts to inject those considerations into the exercise of their jurisdiction to protect arbitration agreements by injunctions restraining foreign proceedings.[71]

Colman J disavowed any intention to detract from the approach of *The Angelic Grace* to the exercise of discretion. However, in identifying criteria relevant to whether there was good reason or strong cause why an arbitration agreement should not be enforced, he treated considerations of forum non conveniens and the risk of inconsistent decisions as of little or no weight.[72] On appeal from Colman J, the Court of Appeal it will be recalled refrained from independently endorsing the sentiments of Millett LJ in *The Angelic Grace*, but in view of that decision felt obliged to hold that the trial judge did not err in principle in the exercise of his jurisdiction when granting an injunction in the instant case. How has the approach of Colman J fared ?

A Forum non conveniens

Nowadays considerations of convenience have been largely discounted where a party in breach of an exclusive jurisdiction agreement relies on them to resist an anti-

[71] Ibid. Colman J was referring to the New York Convention as enacted by the *Arbitration Act 1975* (UK). The current legislation is the *Arbitration Act 1996* (UK).

[72] Ibid.

suit injunction.[73] The decisions concerning enforcement of arbitration agreements have in practice adopted an even less accommodating stand. Since *The Angelic Grace*, no argument as to convenience has been accepted by an English court as sufficient reason to decline to enforce an arbitration agreement. It does seem that the decisions justify Colman J's view in *Societe Cargill* that 'little or no weight' should be accorded to the issue of forum non conveniens.

The Court of Appeal in *The Jay Bola* was quite dismissive of the relevance of factors of convenience. Hobhouse LJ, with whom Morritt LJ agreed, succinctly observed that the jurisdiction to restrain foreign proceedings in breach of an arbitration agreement did not depend upon the concept of forum non conveniens.[74]

In *Welex AG v Rosa Maritime Ltd ('The Epsilon Rosa') (No 2)*,[75] David Steel J described the observations of Colman J in *Societe Cargill* as persuasive and in granting the anti-suit injunction treated forum non conveniens criteria as of little weight.[76] The Court of Appeal[77] agreed that David Steel J was right to grant the injunction and gave further argument for downplaying factors of convenience in the context of an arbitration agreement. It was stated that English law and London arbitration clauses are often chosen to provide a neutral forum for dispute resolution and that by making such a choice the parties accept that their dispute will have nothing to do with England.[78] It is undoubtedly true that parties to international commercial transactions will choose arbitration in London or elsewhere to avoid the uncertainties associated with litigating in foreign courts. And it may also be submitted that parties often choose arbitration because they perceive it as a more flexible and commercially convenient method of dispute resolution than litigation in any court.

Not surprisingly, Colman J in *The Front Comor* referred to *The Angelic Grace* and *The Jay Bola* to support the proposition that the strong cause required for the anti-suit

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73 In *Bouygues Offshore SA v Caspian Shipping Co* [1998] 2 Lloyd's Rep 461, Evans LJ, with whom Mummery LJ agreed, asserted (at 466) that the issue of the natural and appropriate forum was 'of subsidiary even negligible importance when one party claims to enforce an exclusive jurisdiction clause'.

74 [1997] 2 Lloyd's Rep 279,286.

75 [2002] 2 Lloyd's Rep 701, Queen's Bench Division, Commercial Court, David Steel J.

76 Ibid 706.

77 [2003] 2 Lloyd's Rep 509, Court of Appeal, Brooke, May and Tuckey LJJ. Judgment of the Court delivered by Tuckey LJ.

78 Ibid 519.

injunction to be refused was not normally to be provided by forum non conveniens considerations alone.[79]

B Risk of inconsistent decisions

The House of Lords in *Donohue v Armco Inc*[80] affirmed the relevance of taking into account the risk of inconsistent decisions in considering whether to grant an anti-suit injunction to restrain breach of either an exclusive jurisdiction agreement or an arbitration agreement. Lord Bingham put the position as follows:

> The authorities show that the English Court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so there is a risk of parallel proceedings and inconsistent decisions.[81]

This formulation identifies two situations where the risk of inconsistent decisions will be material: the interests of third parties and claims outside the scope of the arbitration agreement.

When the interests of parties other than the parties bound by an arbitration agreement are involved, considerations beyond those of *The Angelic Grace* come into play. Third parties not having agreed to arbitration cannot be compelled to submit their claims to it. A possibility of inconsistent decisions affecting their interests is opened up. But the risk of inconsistent decisions is not material where their interests are unaffected.

The party suing in a foreign court in breach of an arbitration agreement cannot really complain about the risk of inconsistent decisions or multiplicity of proceedings affecting its own interests. If, for instance, the argument is that the party needs to institute proceedings against various parties under different contracts and that suing in the foreign court will allow all the parties to be sued in the same proceedings, the response will be that this does not amount to a good reason for depriving the party relying on the arbitration agreement of its contractual rights.[82]

Nor can the party suing in breach of the arbitration agreement credibly argue that the interests of the other party to the arbitration agreement could be detrimentally affected by inconsistent decisions if the arbitration is to proceed. It is for that other

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79 [2005] 2 Lloyd's Rep 257, 273.

80 [2002] 1 Lloyd's Rep 425.

81 Ibid 433.

82 *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500, 509.

party to determine whether it is in its own interests to insist on its contractual right to arbitrate. That party may well be prepared to run any risk of inconsistent decisions as the price of enforcing the agreement for arbitration in the forum.[83]

The risk of inconsistent decisions may not in any event be avoided even if no injunction is granted to restrain foreign proceedings. The party seeking the injunction may continue to exercise its legal right to arbitration in the forum.[84] If so, there is no reason to refrain from granting the injunction.

Where grounds of claim not the subject of the arbitration agreement are part of the relevant dispute, the contractual agreement rationale animating the approach of *The Angelic Grace* cannot be invoked in regard to them. This is an inevitable consequence of the nature and limits of the agreement between the parties. Nonetheless, the parties can minimise problems by taking the precaution at the outset of their relationship of agreeing to a widely drawn arbitration agreement apt to cover all or most claims arising out of a future dispute between them. Moreover, the courts would not countenance any attempt by a party to construct artificial or unrealistic grounds of claim in order to evade the agreement to arbitrate.

In summary, argument as to the risk of inconsistent decisions will only prevail in restricted circumstances such as do not really detract from the approach of *The Angelic Grace*.

C Security for a claim

What of the relevance of another factor mentioned in *The El Amria*, namely, prejudice as a result of being deprived of security for a claim? This question can typically arise in maritime disputes where vessels or bunkers are attached in foreign jurisdictions as security for claims of cargo damage made against the owners. Such was the situation in *The Epsilon Rosa*, where it was held that loss of security could amount to a reason for not granting an anti-suit injunction to restrain proceedings in breach of an arbitration clause. But the Court of Appeal in *The Epsilon Rosa* regarded possible loss of security in that case as not determinative because the party resisting the injunction had brought the problem upon itself by not having commenced arbitration in a timely fashion. And decisions on exclusive jurisdiction clauses show that concerns about loss of security can be overcome by granting the anti-suit injunction subject to

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83 There is nothing the matter with that: see, eg, *The Skier Star* [2008] 1 Lloyd's Rep 652.

84 Indeed an English court will give effect to the arbitration agreement by appointing an arbitrator in England, despite there being foreign proceedings: *Atlanska Plovidba v Consignaciones Asturianas SA (The Lapad)* [2004] 2 Lloyd's Rep 109.

appropriate undertakings by the other party as to availability of security.[85] Furthermore, as Gloster J emphasises in *Kallang Shipping SA v AXA Assurances Senegal (The Kallang)*,[86] English courts will grant an anti-suit injunction to restrain a party from using security proceedings in a foreign court as a means of avoiding or frustrating an arbitration agreement.[87] It can be concluded that taking loss of security into account does not make any real inroads into the liberal approach of *The Angelic Grace*.

Rationale for the jurisdiction

Even though the jurisdiction to enjoin proceedings brought in breach of an arbitration agreement is long established, the question may be raised as to whether the jurisdiction is really needed. While accepting that Article II.3 of the New York Convention does not necessarily rule out other means of enforcement, it does provide a clear mechanism which has wide coverage internationally. Why should not the parties to an arbitration agreement rely on this mechanism when they are before courts of countries that adhere to the New York Convention? At most, goes this argument, an injunction should only be contemplated where proceedings are brought in one of the very few countries outside the New York Convention regime.

It does seem, as Phillips LJ remarked in *Societe Cargill*, that litigants in cases governed by English arbitration clauses were not prepared to trust foreign courts to stay proceedings in accordance with the New York Convention. A generalised mistrust of foreign courts hardly provides a secure and principled basis for the grant of the anti-suit injunction. But concerns about enforceability of arbitration agreements in particular jurisdictions may have justification. Some countries, while adhering to the New York Convention, may take a restrictive approach to its scope in a way out of keeping with the generally held assumptions. In *Molino Boschi* it was submitted that Italian law by treating the validity of arbitration agreements as a matter of procedure and by taking a rigid attitude to the nature of the written agreement contemplated by Article II of the New York Convention adopted approaches on their face unexpected and out of line with general trends.[88] The trial judge did not in the circumstances need to explore this submission. Where there is a real likelihood of a foreign court

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85 See, for example, *Ultisol Transport Contractors Ltd v Bouygues Offshore SA* [1996] 2 Lloyd's Rep 140, 152.

86 [2007] 1 Lloyd's Rep 160, Queen's Bench Division, Commercial Court, Gloster J.

87 Ibid 167-168. In this case there was an attempt to use security proceedings in Senegal to obtain a bank guarantee which required resolution of the substantive cargo claim in, and subject to, Senegalese jurisdiction.

88 [1996] 1 Lloyd's Rep 510, 514.

departing from broadly accepted understandings of the New York Convention, it could be argued that the grant of an anti-suit injunction would promote the international efficacy of that instrument and its policy in favour of upholding arbitration agreements. But the anti-suit injunction would clearly be based on the assumption that the courts of the forum were correcting an erroneous view of the law held by the foreign court. It could not then be said with any conviction that the injunction was not directed against the foreign court. And Millett LJ in *The Angelic Grace* stated that an injunction was not to be granted for fear that the foreign court may wrongly assume jurisdiction despite the plaintiffs; rather it was granted on the surer ground that the defendant promised not to put the plaintiff to the expense and trouble of applying to that court at all.

This breach of contractual rights will inevitably cause expense and trouble to the party relying on the arbitration agreement. If that party were to decide to ignore the proceedings in the foreign court, the court could assume jurisdiction and grant a judgment in default of appearance. To protect its interests the party relying on the arbitration agreement would generally want to appear before the foreign court to challenge its jurisdiction. This would be particularly so where the party concerned has assets or carries on business within the territorial reach of the foreign court.

Even if the challenge succeeds and the foreign court declines jurisdiction, the party relying on the arbitration agreement has nonetheless been put to the unwarranted costs and complexities of having to litigate abroad. The merits of the dispute between the parties remain to be determined in the contractually agreed manner. But if the foreign court does not decline jurisdiction and proceeds to deal with the merits of the dispute the whole purpose of the arbitration agreement is undercut. The party relying on the arbitration agreement is at risk of an adverse outcome from a tribunal other than the one agreed between the parties.

In challenging the jurisdiction of a foreign court, a party walks what has been described as a 'legal tightrope'.[89] It has to protest the jurisdiction of the court without doing anything else which might amount to a submission to the jurisdiction of that court. Some countries, especially those of the civil law tradition, require that a party making a challenge to the jurisdiction of the court must at the same time file a defence to the merits of the dispute.[90] If a jurisdictional challenge fails in these circumstances, the risk of being held to have submitted is a real one. The foreign

[89] Rix J in *The Angelic Grace* [1994] 1 Lloyd's Rep 168, 180.

[90] Instances appear in the findings in the cases: for example, Greece (*Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 Lloyd's Rep 505, 512) and Brazil (*The Jay Bola* [1997] 2 Lloyd's Rep 279, 284).

court may hold that a party relying on an agreement for arbitration in England has submitted to its jurisdiction in circumstances where English law would also regard the party as having submitted. In this case the right to arbitrate in England under the arbitration agreement may be rendered nugatory. On the other hand, the actions of the party may not be regarded as a submission under English law though regarded as such under the foreign law. In this case any judgment of the foreign court in disregard of the arbitration agreement would not be recognised in English law. The foreign court would lack jurisdiction in the international sense for purposes of the recognition of a foreign judgment under English rules of private international law.[91] But the foreign judgment could conceivably be recognised by the courts of some third country. And, of course, the judgment could be effective against a party who had assets or carried on business within the territory of the foreign court.

Despite an adverse judgment from the foreign court, the party relying on the arbitration agreement would have a claim against the other party in arbitration alleging that the judgment had been obtained in breach of the agreement. Were the former party to persist with arbitration, there is the 'rather unseemly spectacle' of arbitrators considering whether the judgment of the foreign court was right or wrong.[92] If the arbitrators would have reached the same conclusion on the merits as the foreign court only nominal damages would be available for breach of the arbitration agreement.[93] But if the arbitrators would have reached a conclusion less adverse to the party relying on the agreement then they would have to make an award in favour of that party representing the difference between the two.[94]

Conclusion

The liberal approach of *The Angelic Grace* to the grant of anti-suit injunctions to restrain breach of an arbitration agreement has survived doubts and criticism and has been confirmed in a stream of subsequent decisions. As a matter of practical reality, the grant of the anti-suit injunction is now hard to resist. Upholding the contractual

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91 This conclusion is underpinned by s 32 of the *Civil Jurisdiction and Judgments Act 1982* (UK), denying recognition to a foreign judgment where the proceedings in the foreign country were brought contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country. To similar effect in Australian law, see s 7(4) (b) *Foreign Judgments Act 1991* (Cth). The United Kingdom provision does not affect the recognition or enforcement in the United Kingdom of a judgment required to be recognised or enforced under the Brussels or Lugano Conventions or the Brussels I Regulation.

92 *Tracomin SA v Sudan Oil Seeds Ltd* [1983] 1 WLR 11026, 1037.

93 Ibid 1036.

94 Ibid 1036-1037.

bargain to arbitrate in the forum generally trumps considerations of comity. The only limits appear to be those intrinsic to the reach of an arbitration agreement and the nature of the injunction as an equitable remedy.

It is to be anticipated that the Australian courts will adhere to the liberal attitude to granting the anti-suit injunction consistently shown in the English authorities. Admittedly, *The Angelic Grace* has not yet been the subject of analysis by the High Court of Australia. But in *CSR Ltd v Cigna Insurance Australia Ltd*,[95] the Court in its survey of the principles governing the grant of anti-suit injunctions cited *The Angelic Grace* as an authority for the instance where proceedings in a foreign jurisdiction are restrained by reason of agreement to submit to arbitration in the forum.

There is another policy interest which complements the contractual agreement rationale of *The Angelic Grace*. All countries with modern arbitration laws seek to promote themselves as venues for international commercial arbitration. Upholding arbitration agreements requiring arbitration in the forum enhances the attractiveness of a forum as a venue for arbitration.[96] At a time of world-wide competition in international legal services and international arbitrations, a jurisdiction perceived to facilitate and support arbitration will have a competitive advantage.

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95 (1997) 189 CLR 345.

96 The policy interest which the United Kingdom has in promoting arbitrations with a London seat was acknowledged by the House of Lords in *The Front Comor* [2007] 1 Lloyd's Rep 391,395 in the judgment of Lord Hoffmann, with whom other members of the House agreed. That an anti-suit injunction issued by the High Court of Singapore would advance the interest Singapore has in promoting itself as a venue for arbitration had been noted by Lee Seiu Kin JC in *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603,637.