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How can an anti-suit injunction in relation to proceedings before a competent court of another jurisdiction ever be justified?

1 Even though anti-suit injunctions are in-personam, they indirectly interfere with a foreign sovereign state's court process. Thus, international comity requires that anti-suit injunctions be issued only "with caution".[1] The common law world recognises three categories of justifications for anti-suit injunctions outside of the European Union. However, these categories ultimately either ignore or disrespect comity as it is currently understood. After discussing the three categories, this essay concludes by suggesting a more practical understanding of comity and ways to respect it.

Category One: Prior agreement by the parties

2 First, anti-suit injunctions may be justified by the parties' prior agreement *via* an exclusive jurisdiction or arbitration clause.[2] In *Deutsche Bank AG v Highland Crusader Partners LP* [2010] 1 WLR 1023 ("*Highland Crusader*"), Toulson LJ explained (at [50]) that an injunction to enforce an

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1 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871("*SNI*") at 892.

2 See *Turner v Grovit* [2002] 1 WLR 107 at [27].

exclusive jurisdiction clause does not breach comity because "it merely requires a party to honour his contract."

3 This explanation assumes the comity issue away. First, what English courts might not regard as breaches of comity, other courts might.[3] Second, even assuming that all courts allow the exclusion of their jurisdiction *via* contract, they might disagree on the interpretation of the relevant contractual clause. As Toulson LJ himself said, "different judges operating under different legal systems … may legitimately arrive at different answers".[4]

Category Two: Protecting the court's jurisdiction and national policies

4 In *Airbus Industrie G.I.E. Respondents v Patel and Others Appellants* [1999] 1 AC 119 ("*Airbus*"), Lord Goff cited with enthusiasm Judge Wilkey's holdings in *Laker Airways Ltd v Sabena, Belgian World Airlines* (1984) 731 F.2d 909 that anti-suit injunctions are most often necessary to:[5]

(a) protect the jurisdiction of the enjoining court; or

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3 See *eg* the ECJ Case C-185/07 *Allianz SpA and Generali Assicurazioni Generali SpA -v- West Tankers Inc* ("*West Tankers ECJ*"), barring anti-suit injunctions despite prior agreement between parties *via* arbitration clauses.

4 *Highland Crusader* at [50].

5 Judge Wilkey's views represent the "conservative" camp (1st, 2nd, 3rd, 6th 8th and DC Circuits) within the United States "Circuit split" on when anti-suit injunctions should be granted. The "liberal" camp's views correspond to the third category of justifications below.

(b) prevent the litigant's evasion of the important public policies of the forum.

5 With respect to the former - in *Beckkett Pte Ltd v Deutsche Bank AG* [2011] 2 SLR 96 ("*Beckkett*"), the claimant audaciously launched duplicative proceedings in Indonesia less than two weeks after the Singapore Court of Appeal had reserved judgment on the matter. *Beckkett* is an interesting example because the Indonesian proceedings did not seem particularly vexatious given that the defendant only applied for an anti-suit injunction in Singapore 15 months after the Indonesian proceedings commenced. Nevertheless, the Court of Appeal upheld the grant of an anti-suit injunction, stating with some indignation (at [19]) that irrelevant of the parties' interests, a court is perfectly justified to intervene to protect its own process against abuse.

6 Second, as for national public policies - Singapore Judge of Appeal Andrew Phang has made clear (then sitting as Judicial Commissioner) that "international comity ought *not* to be accorded if to do so would offend the public policy of the domestic legal system (here, of Singapore)."[6]

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[6] *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494 at [25].

7 As the foregoing quotation makes clear, this category of justifications overpowers the concerns of comity. The requirements of comity are rejected in protection of the jurisdiction's own interests.

Category Three: Preventing vexation and oppression

8 This category probably accounts for the majority of litigation regarding anti-suit injunctions. The rule here is that where the domestic court is the natural forum (a necessary but insufficient condition), anti-suit injunctions to protect a party against oppressive or vexatious conduct by its opponent are justifiable. As an equitable remedy, the injunction is available when required by the "ends of justice". Accordingly, it will also not be granted if it would unjustly deprive the plaintiff of advantages in the foreign forum.[7]

9 While we always knew that comity required caution, it had not been entirely clear where exactly comity factored into judicial analysis. In *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14 at [2], Rix LJ explained that comity is considered in the "second, discretionary, stage in the context of an anti-suit injunction".

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[7] *SNI* at 892-893, 896.

10 It is more clear than ever that this category allows comity to be trumped by the ends of justice as understood by the enjoining court (query though, *inter alia*, its ability to appreciate legitimate advantages in foreign forums), entirely in its discretion.

"Absolute" comity imposed

11 Pursuing what might be called an "absolute" conception of comity, the European Court of Justice ("ECJ") has rejected the aforesaid first and third categories of justifications in *West Tankers ECJ* and Case C-159/02 *Turner v Grovit* ("*Turner ECJ*") respectively. The ECJ reasoned that based on the Brussels Convention / Brussels I Regulation, the contracting states' mutual trust precluded anti-suit injunctions as these interfered with the other states' jurisdictions (*Turner ECJ* at [24]-[27]). However, the mutual trust spoken of by the ECJ smacks of artificiality given the House of Lords' views in the *West Tankers ECJ* reference (see [14] to [17]). One gets the sense that the Lords were hoping for a way out of the "mutual trust" imposed on them (see *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35).

Practical comity

12 I suggest a more practical conception of comity that resides in mutual respect. The false dichotomy posed by the current understanding of comity is that a judge cannot do right by his jurisdiction (and grant an anti-suit injunction) without disrespecting foreign ones. However, just as lawyers may respectfully disagree, so may judges from different nations. Mutual respect is shown through listening to each other's views and taking them seriously when making decisions. This is how friends respect each other, and comity is friendship between jurisdictions.

13 Practical comity is undermined when a judge claims a monopoly on judicial wisdom and is uninterested in the considerations of his foreign brethren. Practical comity is not undermined when a judge, having appreciated the considerations of his foreign brethren (*eg*, through their reasons for not granting a stay), ultimately decides to grant an anti-suit injunction[8] based on any of the three categories of justification discussed. Judges understand that each has their own job to do (or they would not be able to tolerate each other at international conferences).

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[8] Cf *The Angelic Grace* [1995] 1 Lloyd's Rep 87 at 95.

14 Practical comity would require some changes. For a start, it should be required that applications for anti-suit injunctions be accompanied by the foreign court's reasons for refusing a stay. I note there has been quite a range of views on this[9] but none have quite considered my suggested conception of comity.

15 Next, courts should refer questions to each other more. In that regard, *Beckkett*, in stating what the claimant should have done instead, cited (at [20]) an instance in which the Singapore Court of Appeal directed a party to refer a point of English law to an English court. Tomlinson J helpfully obliged the reference which he understood to be a request for assistance from the Singapore court (notwithstanding the hypothetical nature of the question) in *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2008] EWHC 801 (Comm).

16 The suggestion in *Beckkett* shows willingness to take pragmatic steps to consider a foreign court's perspective before deciding. It is a laudable example of practical comity. I look forward to more.

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[9] See *Dicey Morris & Collins* on the Conflict of Laws at 12-078.