ANTI-SUIT INJUNCTIONS

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1. Introduction

An anti-suit injunction is an injunction against a person restraining him from commencing or continuing with proceedings in a foreign court. The court’s power to grant such an injunction is founded on section 37(1) of the Supreme Court Act 1981, which provides that injunctions to stay proceedings can be granted where it is “just and convenient to do so”. In theory, such an injunction does not call into question the jurisdiction of the foreign court and is directed only at the conduct of the defendant. But in reality, this often requires investigation as to whether or not the foreign court is a forum non conveniens and if granted, such an injunction obvious does effect the jurisdiction of the foreign court.

The justification for anti-suit injunctions generally falls into two categories, according to the limits on the exercise of the power under section 37 which have been imposed by judicial decisions. On the whole, a valid need for an anti-suit injunction will arise only when (1) the parties have agreed to resolve their disputes in a certain jurisdiction or by arbitration or (2) it is “in the interests of justice” – a catch-all test for a variety of situations where there is no contractual dispute resolution clause.

In this paper I shall endeavour to deal briefly with both types of case, and conclude with particular emphasis on recent developments in relation to the European jurisdiction regimes, which have significantly affected the future for “forum shopping” and, as a result, for an anti-suit injunctions.

2. Evolution

First, I ought to say some introductory words as to how the anti-suit injunction has evolved in England. I stress “in England” because the law on anti-suit injunctions has proceeded in very different directions in Australia, Canada, United States of America, and elsewhere.

The resolution on anti-suit injunctions adopted in 2003 by the Institut de Droit International recognised that they have a limited place and considered that there should be “restraints” because of the need for comity and that injunctions ought not to be granted outside of (1) enforcing contractual jurisdiction or arbitration clauses or (2) where a plaintiff has acted oppressively or unreasonably in a foreign jurisdiction or (3) in the protection of a court’s own jurisdiction in matters such as insolvency and administration of estates.

The intrusion onto the sovereignity of other nations and the rights of their citizens which is involved in granting an anti-suit injunction means that comity takes on a sense in this context which goes well beyond mere courtesy or even the desirability of co-operation between different states.

In England, the case law has passed through a number of different stages. First, there was a period prior to the incorporation into English law of the doctrine of forum non conveniens, when the test for obtaining an anti-suit injunction, outside the enforcement of a contractual right, was whether the foreign proceedings were vexatious – a high test, seldom satisfied, in which the applicant had to show that “the Plaintiff in the foreign court could not obtain an advantage from foreign procedure which he could not obtain in the English court.”

There was then a second phase after the incorporation of forum non conveniens, when the House of Lords thought that the question of whether an anti-suit injunction was to be granted, was governed by the same legal principles as whether a stay was to be granted: this meant that the question was viewed as one turning on whether England was the more appropriate forum. Categorisation was not fashionable and Lord Scarman held sway when he stated in Castanho v Brown & Root  in 1981 that “caution in the exercise of the jurisdiction is certainly needed but the way in which the judges have expressed themselves…amply supports the view…that the injunction can be granted against a party properly before the court where it is appropriate to avoid injustice”.

That second period ended with the SNIA case, Societe National Industrielle Aerospatiale v Lee Kui Jak in 1987 in which the Privy Council held that there was no jurisdiction to grant an anti-suit injunction based solely on the court’s view about forum non conveniens. The exercise of the injunction jurisdiction is different from the stay jurisdiction: the stay is a self denying restraint by an English court in exercising its jurisdiction, whereas the injunction has the effect of preventing foreign proceedings from going ahead.

For the purposes of the post-SNIA third period, on the face of it, it is the foreign court which should decide whether it is going to proceed, and we assume that the justice will be available and we would be done there. An argument which is only that there could be differences in view between an English court and an foreign court about what is the natural forum and where the case should most appropriately be tried, cannot justify the granting of an anti-suit injunction.

Whilst the SNIA case remains the leading statement as to the nature of the anti-suit jurisdiction, we have now entered a fourth period, because of the impact of the European jurisdiction regimes and two ECJ decisions in 2004, namely Gasser v Misat and Turner v Grovit, which suggest that the tide has thoroughly turned against anti-suit injunctions against foreign proceedings, at least in the European sphere; but also against stays of English proceedings, in conjunction with the latest word from the ECJ as regards stays on the basis of forum non conveniens – the Owusu v Jackson case decided earlier this year

3. A few comparisons

I mentioned a little earlier that the law has proceeded in different directions in Australia, Canada and the United States. Australia has limited the anti-suit jurisdictions to cases where the injunction protects the jurisdiction of the Australian court and where it is needed to protect a contractual right or to prevent oppressive or vexatious conduct; whereas in Canada, on the other hand, there is a presumption in favour of anti-suit injunctions if the foreign court is not the forum conveniens.

In the United States of America, different courts of appeals have followed different approaches. The second, third and sixth circuits Court of Appeals have followed a restrictive approach in which the general rule is to permit parallel proceedings to go on abroad without interference, at least until final judgment is achieved and can be pleaded as res judicata. They have recognised that anti-suit injunctions may be granted if the parties before the US and foreign courts are the same and the issues are substantially identical, either (1) for the protection of the jurisdiction of the United States court or (2) the protection or advancement of important national policies.

The first circuit Court of Appeals has declined to view these two thresholds as essential. The fifth, seventh and ninth circuits have adopted a more liberal approach, placing greater emphasis on the desirability of avoiding the same actions going on in both the United States and abroad and the need to avoid the risk of conflicting decisions.

4. Breach of contract (exclusive jurisdiction and arbitration clauses)

Whilst the judicial decisions stress that anti-suit injunctions are equitable in origin and thus not susceptible to rigid categorisation, it is nonetheless convenient to divide those cases in which anti-suit injunctions are available in English courts, as between those cases where the forum proceedings have been brought or continued in breach of contract, because of a jurisdiction or arbitration clause, and other cases where it is “in the interests of justice” to restrain the foreign proceedings, whether to give effect to an anticipatory defence or to prevent a threatened abuse of the process of the English court or where the foreign proceedings would be in some other way “unconscionable” (a word often used in the context of anti-suit injunctions).

Whilst an opinion formed by an English court about forum non conveniens is not enough to justify the injunction, if the question is which court should hear and determine the underlying substantive dispute – that is, an “alternative forum” case - then whether the English court is the more appropriate forum is a starting point or threshold question. If the foreign court applies the principle of forum non conveniens, then normally the English court should respect its decision but where the appropriate forum is overwhelmingly the English court, the English proceedings were started first and an anti-suit injunction was being sought in the foreign proceedings against English jurisdiction, then the English court might grant its own injunction without waiting for a decision of the foreign court.

If the threshold question, as to whether the English court is the more appropriate forum, is tackled and is answered in favour of England, then the court next considers whether “the ends of justice” require the granting of the injunction, also taking into account whether the respondent to the application would be deprived “of advantages in the foreign forum of which it would be unjust to deprive him”.

There is also a role for the injunction in protecting the integrity of the judicial process in England, the due administration of justice, and a vehicle by which English public policy of sufficient importance is advanced. Anti-suit injunctions are also available against the bringing of foreign proceedings in breach of an arbitration clause, unless there are strong reasons not to grant it – see The Angelic Grace in 1995. But in all cases there are two vital practical questions

First, an injunction will only be granted against a person who is “amenable to the jurisdiction of the court” which means that the court must have territorial jurisdiction over him either because of his presence here or through service out of the jurisdiction. In Donohue v Armco in 2002, the persons who were not parties to the contract containing the exclusive jurisdiction clause had no basis for serving the Respondents to their injunction application with a claim form out of the jurisdiction and could not use the proceedings in England brought by Mr Donohue as “Trojan horse” in order to sue the Respondents.

Furthermore and secondly, the injunction must be a “effective remedy”. Thus in The Tropaioforos No. 2 in 1962 the English proceedings against one insurer were a justification for an anti-suit injunction against another insurer who was acting in breach of a contract to be bound by the English proceedings, notwithstanding that the defendant was not present within the jurisdiction and there was a risk that the injunction would have no enforceable effect in the immediate future: the injunction might nonetheless be obeyed or be taken into account by a foreign court or enforced by an English court at some time in the future.

Generally, the first issue before the court on an application for an anti-suit injunction will be to consider what if anything the parties agreed with respect to jurisdiction over the dispute. If the contract contains a choice of jurisdiction clause, then that clause must be construed in order to decide whether or not it confers exclusive or non-exclusive jurisdiction. An exclusive jurisdiction clause in favour of the English court alone, contains within it a negative promise that a party will not sue abroad. The same applies in the case of an arbitration clause and both can be enforced by an injunction to restrain foreign proceedings unless “strong reason” is shown for not doing so.

The cases on the granting of injunction of anti-suit injunctions, as with the cases on granting stays to enforce exclusive jurisdiction clauses, place great weight on the importance of holding parties to their contract and should be examined in order to see what factors may serve to override this consideration. Just as in England exclusive jurisdiction clauses may be invalidated by the legislature for reasons of domestic policy (see for example the entrenched provisions in the Judgments Regulation enabling insureds to have access to the courts of member states notwithstanding agreements to the contrary) so too may legislation in foreign states sometimes invalidate clauses which if upheld would result in the evasion of important domestic policies, such as consumer protection.

Akai v People's Insurance Company was a 1998 case in which the High Court of Australia struck down a choice of English law and jurisdiction on the basis of a statutory anti-evasion provision, but English courts subsequently restrained further proceedings in New South Wales because the public policy in Australia did not correspond to English public policy and did not stand in the way of enforcing the contractual bargain. So where there is a clause conferring exclusive jurisdiction, the prospects of obtaining an anti-suit injunction are good.

If the clause only confers non-exclusive jurisdiction, the 2002 case of Sabah Shipyard v Republic of Pakistan demonstrates that an anti-suit injunction can still be granted if the respondent's conduct, whilst not obviously breaching contract, is nonetheless unconscionable. The relevant clause in Sabah was construed as a non-exclusive choice of jurisdiction. It read "each party hereby consents to the jurisdiction of the courts of England for any action filed by the other party under this Agreement to resolve any disputes between the parties". This was interpreted as meaning that the parties agreed to submit themselves to the jurisdiction of the English courts as opposed to agreeing to submit "any dispute" – which would amount to an exclusive jurisdiction clause.

But even though the clause was interpreted as non-exclusive in favour of England, the fact that the Government of Pakistan commenced proceedings against Sabah Shipyard in the courts of Pakistan and moreover obtained from the Pakistani courts an injunction against Sabah Shipyard to restrain it from commencing proceedings in England, was regarded as sufficiently unconscionable to justify the grant of an anti-suit injunction by the English court to restrain the Government of Pakistan from continuing with the Pakistani proceedings. The first instance judge and the Court of Appeal found that the Government of Pakistan was in breach of contract in seeking to prevent Sabah from bringing proceedings in England and had behaved vexatiously and oppressively in beginning the Pakistani proceedings as a pre-emptive strike in the hope of preventing Sabah starting proceedings in the agreed country, namely England.

Thus although the clause was not an exclusive jurisdiction clause "in the sense of making it a breach of contract for either party to commence proceedings in a jurisdiction other than England", the particular facts of that case amounted to unconscionable conduct on the Government of Pakistan's part, by bringing the Pakistani proceedings in order to prevent proceedings in a jurisdiction to which they had consented. The outcome might have been very different if the clause had given the parties the clear right to prosecute proceedings elsewhere (as well as in England) and if England had not been clearly the chosen and proper forum for the dispute in question.

5. Interests of Justice (alternative forum)

Moving away from cases concerned with breaches of contract, and in particular breaches of exclusive jurisdiction or arbitration clauses, I have already mentioned the "alternative forum" cases. Those are cases where, without being able to assert that the respondent is breaching the contract by pursuing a claim abroad, nonetheless it is said that the merit ought to be decided in England. The fact that the English court may consider England to be a more appropriate forum or even the natural forum is not sufficient to justify an injunction but is, as I have said, the first, threshold question. It is important both to the characterisation of the respondent's conduct, as unconscionable or otherwise, and also as to whether or not as a matter of discretion an injunction should be granted.

But there must be more to make the conduct of the respondent in continuing with foreign proceedings, unconscionable and to make it unjust for the foreign proceedings to continue. Thus in the SNIA case itself, it was unjust for Texan proceedings to be brought against the manufacturers because of their position in obtaining an indemnity or contribution from those who were responsible for maintaining the helicopter and who was subject to jurisdiction in Brunei but were contesting it in Texas. That was a crucial factor justifying the granting of the injunction.

The injustice in a multiplicity of proceedings and inconsistent results was determinative in SNIA, as it was in Donohue v Armco when an exclusive jurisdiction clause was refused enforcement on that ground. However, this line of reasoning is only available to protect the determination of the merits of the underlying case in England.

In Airbus v Patel in 1999, the applicants were unsuccessful in seeking to restrain proceedings in Texas on the grounds that they should be sued in Bangalore, where the aeroplane had crashed. Whilst the Bangalore court granted an anti-suit injunction restraining the respondents from bringing proceedings except in India, that injunction was not enforceable in England and the English court would not grant an anti-suit injunction to restrain proceedings in Texas on the basis that the alternative forum protected not the proceedings on the merits in England, but proceedings on the merits in another foreign court.

That does not mean that an English anti-suit injunction is not available where proceedings in England have not yet been brought, so long as the purpose of the injunction is to prevent proceedings in a forum alternative to England.

6. Single forum cases

To be distinguished from the alternative forum cases are "single forum" cases where the foreign court is the only forum in which the applicant can be sued – for example, where the action in the United States is under American anti-trust legislation. The question in these cases is whether through the mechanism of an anti-suit injunction, the proposed defendant can gain immunity from suit in the foreign jurisdiction and thus immunity from any liability.

In the Laker Airways litigation, British Airways were unable to complain in England about the bringing of the anti-trust proceedings against them in the United States, because they were parties to the applicable agreement between the United Kingdom and the United States which regulated transatlantic air traffic and were therefore bound by the domestic law of both countries. But Midland Bank were able to obtain an anti-suit injunction because Laker Airways were seeking to complain in the United States of dealings by that English company in the course of carrying on its business in England which was subject to English law; and it would be an exorbitant exercise of jurisdiction by the United States to entertain a civil suit in respect of conduct by a foreigner abroad. It was unconscionable for Laker Airways to subject the Bank to such proceedings and contrary to the entitlement of the Bank in England to conduct its business according to the norms of English law without being answerable to the courts of a foreign state.

7. Other conflicts with foreign courts

Under this heading I group six types of case in which anti-suit injunctive relief may be sought from the English courts.

The first of these is to restrain reliance on or enforcement of a foreign judgment obtained by fraud. The classic case under this head is Ellerman Lines v Read in 1928, in which the defendant had obtained a judgment in Turkey in breach of contract and through fraud committed on the Turkish court and it was held that the applicant had a substantive right to impeach the foreign judgment thus giving the English court jurisdiction to restrain the defendant from enforcing the same. The same grounds could have been relied upon in advance of any judgment being obtained in Turkey since the conduct of the defendant in bringing proceedings there in breach of an English arbitration agreement and then seeking to obtain an advantage through fraud, would have been itself actionable.

The second type of case seeks to enforce the issue estoppel effect of an English judgment. A party bound by issue estoppel or res judicata as a result of an English judgment can be enjoined from re-litigating the underlying dispute abroad, including re-litigating matters which could and should have been part of the original English action. This is part of an important English public policy which precludes collateral attacks on final judgments by disappointed litigants. But that public policy is not so strong as to enable an injunction to be granted against a party relying in any court worldwide upon a foreign judgment inconsistent with an English one: that has been regarded as an illegitimate intrusion on the processes of courts throughout the world, and to give an illegitimate effect to the grant of a declaration establishing the position in English law only.

This is rather different from an alternative forum case where the English court has not yet rendered a judgment on the merits; because the purpose of the anti-suit injunction is to uphold and enforce the judgment given in the English action, the application can be included within the original English proceedings.

A third type of case is one in which protection is sought for assets abroad which are covered by an English bankruptcy, administration or winding-up proceeding. The purpose of this injunction is to safeguard the integrity and effectiveness of the English proceedings since in the context of bankruptcy and winding up, there is an English public policy of treating creditors and distributing proceeds equally, and foreign proceedings seeking to cease assets are inconsistent with that policy. This harks back to the Australian justification for anti-suit injunctions to which I earlier referred.

In Barclays Bank v Homan in 1993 an English bank had lent money in London to an English customer under English law. Repayment to it out of the proceeds of an asset located in America was alleged to be a preference. There were administration proceedings in London and Chapter 11 proceedings in the Southern District of New York. The issue of preference was raised in New York, and not in London, and the English court decided against the bank that there was no right, or sole jurisdiction, to have the English court decide it on a negative declaration.

However, as a fourth type of case, there have been instances where the plaintiff in the foreign court has no cause of action, or there is a clear defence to the claim, and the English court intervenes to restrain pursuit of the foreign proceedings on the grounds that their continuance is vexatious, oppressive or unconscionable, thereby giving anticipatory effect to the defence. British Airways v Laker Airways in 1985 was such a case.

The fifth type of case is one in which the English court is asked to restrain proceedings abroad relating to the obtaining of documents or depositions of witnesses. In the South Carolina Insurance case in 1987, South Carolina sought to obtain documents from in the United States under 28 USC section 1782, from persons who were non-parties to the English proceedings: this was not regarded as unconscionable, because it did not interfere with the conduct of the English proceedings and there was no legitimate interest to be protected by injunction. The position in relation to oral depositions or materials after an English trial may well be different in interfering with English proceedings and in an unfair effect.

Examples of this range from an old matrimonial case, Armstrong v Armstrong in 1892, where the oral examination of potential witnesses abroad amounted to an interrogation which would interfere with the proper course of administration of justice in England; to another recent 28 USC section 1782 case, Omega Group v Kozeny in 2002, where witnesses would be subjected to double cross examination and the trial would suffer from unnecessary duplication and witness discouragement.

The sixth category, which I have saved to the end because it has some minor amusement value, is the use of anti-anti-suit injunctions which are rather like anti-anti-missiles in that the English court responds to a threat that an application will be made in a foreign court for an anti-suit injunction to restrain a party from continuing with proceedings in England. Lord Goff gives an account of the anti-anti-suit injunction in Airbus Industrie v Patel. The application is essentially for a provisional measure enabling the English court to go on hearing and determining the underlying claim, thus protecting the integrity of the administration of justice here.

8. Some procedural aspects

Before moving on to my penultimate topic, the hot question of the effect of the European jurisdiction regimes, I ought briefly to mention four procedural matters of general application as regards anti-suit injunctions.

The first is that much of what I have said about injunctions to restrain foreign proceedings in breach of an exclusive jurisdiction agreement or contrary to the administration of justice in England, apply in respect of arbitration proceedings. On the other side of the coin, it can be noted that an injunction may be granted to restrain the pursuit of arbitration proceedings based on a supposed arbitration agreement the validity of which is impeached. But arbitrations have a special feature, in that they are outside the European jurisdiction regimes with which I will be dealing shortly.

The second point is to stress that personal jurisdiction over the defendant is required for an anti-suit injunction application to be launched. Where proceedings on the merits are before the English court, then in an alternative forum case the injunction supports the jurisdiction over the merits and that jurisdiction in itself grounds the injunction. If the defendant has submitted to the English jurisdiction for the action on the merits, then there is no need for any further submission to the jurisdiction on which to base the granting of an injunction in order to prevent abuse of the English proceedings. The same reasoning can apply, as in the Eras EIL actions in 1995, where the respondent is not yet a party to the English litigation but was amenable to it on the merits.

In other cases, where permission to serve the anti-suit injunction application out of the jurisdiction is required under CPR Part 6.20, it should be borne in mind that there is now no separate head devoted to enabling service out of the jurisdiction of an application seeking only anti-suit relief and that whilst sub-rule (1) would apply to enable service out of the jurisdiction against a person domiciled in England, sub-rule (2) is restricted to restraining acts within the jurisdiction and so would normally not apply.

The third point is to stress that anti-suit relief invariably begins and sometimes ends, by way of interim applications which are subject to questions as to the adequacy of damages as a remedy. Damages are seldom an adequate remedy as an alternative to either a stay of court proceedings, or an injunction to prevent foreign or outside proceedings. But the right to claim damages might be a factor in the exercise of discretion: thus in Donohue v Armco in 2002, the respondent's undertaking not to enforce any multiple or punitive damages award resulting from his RICO claims in New York supported the refusal of the anti-suit injunction.

Finally, the fourth aspect to be noted is the relevance of other discretionary factors including delay. Interlocutory applications for injunctions to prevent successful foreign claimants from relying upon their judgments, when the applicant subsequently disputes the jurisdiction of the foreign courts, are regarded as particularly intrusive on the sovereignty of foreign states.

9. The European Jurisdiction Regimes

I move on to the effect of the European jurisdiction regimes, by which I mean primarily EU Council Regulation No. 44/2001 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (now referred to generally as the Judgments Regulation) which supersedes the 1968 Brussels Convention for all EU countries, including the 10 new countries which joined on 1 May 2004, with the exception of Denmark; and the Brussels and Lugano Conventions (the Lugano Convention regulating issues of jurisdiction between EU and EFTA states and not yet formally updated to come into line with the Judgments Regulation) which now apply to Denmark only, and to Switzerland, Iceland and Norway from EFTA.

In this regard the key provisions are:

(1) Article 23 of the Judgments Regulation (being equivalent to Article 17 of the Brussels and Lugano conventions) which provides that where the parties enter into an exclusive jurisdiction agreement which confers jurisdiction on a member state, then that court must take jurisdiction and conversely all other courts must decline jurisdiction in that chosen court's favour; and

(2) Article 27 of the Judgments Regulation (equivalent to Article 21 of the Brussels and Lugano Conventions) which provides that where parallel proceedings are brought in the courts of different member states, then all courts, except the court "first seized" of the proceedings in question, must stay the proceedings before them, until jurisdiction is established by the court first seized.

Until recently, the English courts upheld exclusive jurisdiction clauses by means of anti-suit injunctions to restrain a party from breaching proceedings in a different jurisdiction in breach of a jurisdiction clause. That has now completely changed in cases governed by the Judgments Regulation or the Brussels or Lugano Conventions. In Eric Gasser v Misat, Misat commenced proceedings in the Italian court which became the court "first seized", notwithstanding that the contract between the parties conferred exclusive jurisdiction on the Austrian courts, and Gasser subsequently commenced proceedings there.

The ECJ held that the Austrian proceedings should be stayed while the Italian court determined jurisdiction so regulation 27 prevailed over regulation 23, contrary to an earlier decision of the English Court of Appeal in Continental Bank in 1994; and it follows that even where a contract has an exclusive jurisdiction clause an anti-suit injunction should not be granted if the court first seized is a member state that the matter is within the judgment regulation.

The ECJ reached a similar decision in relation to applications for anti-suit injunctions against foreign proceedings within the EU or EFTA, where there is no jurisdiction clause, and the applicant relied on the "interests of justice" grounds. In Turner v Grovit, also in 2004, Grovit commenced proceedings in Spain to try and pressurise Turner in respect of English proceedings, and the Court of Appeal granted an anti-suit injunction to restrain Grovit from continuing in Spain.

The House of Lords referred the matter to the ECJ which held that the purpose of the then Brussels Convention was to promote mutual trust between member states and it would be against that spirit of the Convention for one member state indirectly by means of an anti-suit injunction or otherwise, to impact on another member state's court's hearing of the case. Even where the foreign proceedings are brought in bad faith with a view to frustrating existing English proceedings, there can be no basis for interfering with the jurisdiction of a foreign court under the Convention system. If the foreign proceedings to be restrained are not within the EU or EFTA then it is still possible to obtain an anti-suit injunction.

The other most important exception relates to arbitration proceedings. The Court of Appeal have held, in Through Transport Mutual Insurance Association v New India Assurance Co in 2004 (relying on an earlier ECJ preliminary ruling in the Marc Rich case) that it is for the court in which proceedings are brought to determine whether the dispute falls within the arbitration exception to the Judgments Regulation and it need not stay jurisdiction in favour of the court first seized. This is important because it means that the Gasser and Turner decisions are not applicable where an arbitration clause is concerned, as this falls wholly outside the Judgments Regulation. The Court of Appeal expressly stated there is nothing in the Judgments Regulation or the Conventions to prevent the courts from the contracting state from granting an injunction to restrain a claimant from beginning proceedings in a contracting state which would be in breach of an arbitration clause.

10. The future for forum shopping

That brings me to my final topic, the future for forum shopping. I have previously mentioned the distinction between the English court's power to stay proceedings before it, and its power to grant anti-suit injunctions restraining proceedings in foreign courts or by way of arbitration. But the doctrine of forum non conveniens plays an important part in relation to both types of power.

Earlier this year, the European Court of Justice decided an important question which has troubled the English courts for the last two decades: whether an English court can stay proceedings on the basis of forum non conveniens when the defendant is domiciled within the English jurisdiction. In the 1992 case of Re Harrods (Buenos Aires), the Court of Appeal held that an English court could stay proceedings fought against an English domiciled defendant when the court was convinced that a non-contracting state was clearly the more appropriate forum – in that case Argentina, where the business of an English company the subject of a section 459 unfair prejudice petition was conducted.

That case was doubted but generally followed. The English courts have accepted, however, that a stay could not be granted where the allegedly more appropriate forum was a contracting party to the Brussels or Lugano Conventions, since the Conventions (and now the Judgments Regulation) provided for their own rules for internal allocation of jurisdiction and for competing jurisdictions. In UGIC v Group Jossi, the ECJ in 2001 confirmed that the Brussels Convention applied when the defendant was domiciled in a contracting state and the claimant was domiciled in a non-contracting state.

Now, in Owusu v Jackson (C-281/02) the ECJ has held that the doctrine of forum non conveniens could not be applied when the defendant is domiciled within the jurisdiction. The court confirmed that the European jurisdiction regimes applied to disputes involving parties from non-contracting states and parties from contracting states because of (1) the need for consistency of jurisdictional rules; (2) the need for legal certainty in relation to questions of jurisdiction; and (3) the fundamental nature of article 2 jurisdiction based on the domicile of the defendant. The English judge said that he would have found that Jamaica was a more appropriate jurisdiction, since all the defendants other than Mr Jackson were Jamaican, but that since the action had to proceed against Mr Jackson in England then, in order to avoid the multiplicity of proceedings he refused the Jamaican defendants forum application for a stay.

Where does this leave forum arguments and anti-suit injunctions? Cases decided already on the grounds of forum non conveniens, which involve a defendant domiciled in the UK, should be reconsidered. Stays and possibly anti-suit injunctions if any should be lifted. Multi-party litigation involving persons from many different jurisdictions might now be more likely to proceed in England if one of the defendants is domiciled here as in Owusu at first instance, although a similar argument was rejected by the Court of Appeal in 2003 in American Motorists Insurance v Cellstar

Maybe this will mean that England becomes more attractive for forum shopping particularly in the light of the increased domestic acceptance of claims based on negative declarations. And if that is right, maybe there will be renewed life for anti-suit injunctions notwithstanding the apparent set-back in Turner v Grovit. Isn’t life complicated ?