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THE REQUIREMENTS FOR ANTI-SUIT INJUNCTIONS IN TERMS OF ENGLISH AND INDIAN LAW
Table of Contents

CHAPTER 1 ................................................................................................................................................ 2
INTRODUCTION ........................................................................................................................................... 2
1 Introduction ........................................................................................................................................... 2
2 Conceptual Definitions ..................................................................................................................... 2
3 Historical background of anti-suit injunctions ................................................................................ 2
4 The history of the requirements of anti-suit injunctions in terms of case law ................................... 3
5 Conclusion ........................................................................................................................................... 10

CHAPTER 2 .................................................................................................................................................. 11
ENGLISH LAW ......................................................................................................................................... 11
1 Introduction ........................................................................................................................................... 11
2 The ends of justice ............................................................................................................................. 11
3 Unconscionable conduct ................................................................................................................... 12
4 A legal or equitable right ...................................................................................................................... 12
5 Vexatious and oppressive conduct .................................................................................................... 13
6 Forum non conveniens ....................................................................................................................... 14
7 The principle of Comity ..................................................................................................................... 14
8 Conclusion ........................................................................................................................................... 15

CHAPTER 3 ................................................................................................................................................ 16
INDIAN LAW ............................................................................................................................................. 16
1 Introduction ........................................................................................................................................... 16
2 Facts ..................................................................................................................................................... 16
3 Legal question ...................................................................................................................................... 17
4 The requirements set out in the Modi Entertainment case .............................................................. 17
5 The principle of comity ....................................................................................................................... 18
6 The other requirements that were set out in the judgment are as follows .................................... 21
7 Conclusion ........................................................................................................................................... 21

CHAPTER 4 ............................................................................................................................................... 22
CONCLUSION .......................................................................................................................................... 22
BIBLIOGRAPHY ..................................................................................................................................... 23
CHAPTER 1

INTRODUCTION

1 Introduction
This chapter outlines the theoretical constituents of anti-suit injunctions as portrayed in case law. More specifically, the definition, nature and function of anti-suit injunctions are discussed. In addition, this chapter highlights the historical context of the requirements for an anti-suit injunction, with specific focus on case law and legislation.

2 Conceptual Definitions
2.1 Anti-suit injunctions
An anti-suit injunction is a court order which requires the injunction defendant not to commence or cease to pursue or advance particular claims or to take steps to terminate or stop court or arbitration proceedings in a foreign country. The order is addressed to and binds the actual litigant in the other proceedings, and is not addressed to and has no effect on the other court. Injunctions will be granted in two situations. In the case of contractual injunctions, an injunction may be granted if court proceedings have commenced in a particular foreign court in breach of a choice of forum clause which specifically provides for the exclusive jurisdiction of the English Courts or an arbitrator. Alternatively, an injunction may be granted in instances whereby alternate forum cases, in which the foreign proceedings overlap matters as per court proceedings within England which are additionally vexatious and oppressive in nature as well. The anti-suit injunction is a remedial device available in English law systems to restrain a party from instituting or continuing with proceedings in a foreign court. 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, and not against the foreign court, it can be regarded as an indirect interference with the processes of the foreign court.

3 Historical background of anti-suit injunctions
It is essential to explore the historical context and its influence of the history of anti-suit injunctions as it is marked with misperception and disagreement over the central tests which need to be satisfied in order for an anti-suit injunction to be granted. The history of anti-suit injunctions in terms of case law is very

2 Raphael (n 1) 6.
important as the conflicts have not been resolute in establishing a fixed set of rules to grant an anti-suit injunction, which has left case law in a very unsatisfactory state. The case law which dates to the 17th century is a two-fold guide to the modern establishment of rules governing anti-suit injunctions.

4 The history of the requirements of anti-suit injunctions in terms of case law

4.1 Case law before the Judicature Act

The anti-suit injunction derived from the “common injunction” in terms of which the English Court of Chancery had restrained litigants before the English common law courts from obtaining Judgements which were contrary to the principles of equity. Common injunctions were granted on two grounds: first, where the common law would fail to protect an equitable right; and second, where the ends of justice required interference to put an end to vexatious and oppressive litigation. However equity did not accept any principle of early deference to the English law courts as both the courts of Chancery and the English common law courts had no consideration if the comity of nations were involved. The English Court of Chancery was then faced with a situation as foreign courts would also grant verdicts which would contravene the English principles of equity. Thus the decision was left in the hands of the court as to whether a common injunction may have been granted in order to restrain litigants from following further foreign proceedings. The situation was addressed for the first time in the case of Love v Baker dating back to the 17th century (which involved a claim for an injunction to restrain proceedings in the courts of Leghorn). Lord Claredon feared that such a remedy would be “a dangerous case” and, on the advice of the other judges, he dissolved the injunction.

Thus in the late 18th century the issue was addressed again in the Lord Portland’s case which involved a “motion for an injunction of the stay of the younger children’s proceedings in Holland for a claim amounting to part of their father’s personal estate”. This was claimed in accordance with the marriage settlement followed by the laws of Holland under which the marriage settlement in terms of the law of Holland which gave one thousand pounds which was intended to satisfy the claim itself. Sir Joseph Jekill

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3 Raphael (n 1) 42.
4 Pennell v Roy (1853) 3 De GM & G126.
5 n 3 above.
6 Love v baker (1665) 1 Chan Cas 67.
7 Lord Portland’s Case, 114 Harg MSS 166.
filed the case of where it was ruled that this court may take cognizance of contracts made in Holland and of the laws there. Lord keeper, stated in the case of Sir John Grey that the House of Lords where held to the same purpose of which the point seemed to be agreed. Sir Jos. Jekille said the stated that ‘It was proper to bind their conscience by an injunction. It was not rejected in this case by the defendant as not being in contempt nor was having prayed time to answer, and therefore the motion too early though the whole matter had arisen within the jurisdiction of the court.” This makes it clear that the Lord Keeper agreed that the court did have jurisdiction to confine the pursuit of proceedings in Holland on the basis that it was proper to bind parties living in Holland and their consciences by way of injunction although the injunction sought was refused on procedural grounds.

During the early 19th century, the granting of anti-suit injunctions to restrain proceedings in other countries became well established. In the early cases, injunctions were granted if both categories of the common injunction could legitimately be applied in an international situation, and the pursuit of foreign litigation could be restraint because there was an equitable defense on the merits. More specifically, one of the categories of the common injunction is discussed in the case of Lord Portarlington v Soulby. In this case, Lord Brougham justified an injunction to restrain the proceedings before the courts of Ireland, where there was a potential equitable defense, on the ground that “it was sufficient to assume that the Court in which the action is brought is a court of common law, and has no ground to stop the proceeding on the ground now set forth”. The “anti-suit injunction” was first applied in England in Bushby v Munday. This was the first time the courts began to approach injunctions to restrain foreign proceedings primarily with the focus on the second category of the common injunction. The plaintiff was suing to set aside a bond for a debt, and requested the English court to stop the defendant from enforcing the bond in the court of Scotland. The court held that the injunction plaintiff had to prove that “the ends of justice” required that the injunction be granted. If the applicant could successfully prove that the ends of justice would be defeated which illustrated that he/she had clear equity to be protected, which would now have effect on the defendant’s conscience.

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8 n 7 above.
9 Raphael (n 1) 43.
10 Lord Portarlington v Soulby 1834 My & K 104.
11 n 10 above.
12 Bushby v Munday 1821 Madd 297.
13 n 12 above.
14 Beckford v Kemble 1822 1 Sim & St 7.
If the injunction plaintiff successfully proved the abovementioned “ends of justice” requirement, the proceedings in terms of which the defendant instituted were labeled as “contrary to equity and good conscience”. However, on either approach, the rationality was not that substantive equity determined the court’s decision as to whether proceedings should continue, as an alternative, the courts assessed that the pursuit of the targeted proceedings should be restrained on the basis of the foundation of equity.

The courts were faced again with the same issue in case of *Peruvian Guano Co. v Bockwoldt*,¹⁵ where the defendant had two actions, under French and English law, both concerning the same subject matter.¹⁶ The plaintiff’s counsel referred to the case of *Pieter's v Thompson*,¹⁷ suggesting that the case was the authority for the requirement of election. Bacon V.C., in his finding stated that there was no law which required that the defendant be given election, and went on further to state that the precedent value of the Pieters case was in relation to an application to constrain the plaintiffs to do that which they had promised to do. The remainder of the court agreed that there was no specific law requiring the defendant to put it to this election.¹⁸

However, they disagreed that the court had any powers in this area whatsoever. Jessel M.R. said categorically: “We cannot compel the plaintiffs to abandon the foreign action”. Bowen L.J. qualified Jessel’s position, stating:

“*It seems to me that we have no sort of right, morally or legally, to take away from a plaintiff any real chance he/she may have of an advantage. If there is a fair possibility that he/she may have an advantage by prosecuting a suit in two countries why should this Court interfere and deprive him/her of it?*”¹⁹

The development of the injunction was limited as the growing realization of the interference with the pursuit of litigation abroad gave rise to the development of precursors of the modern development of the concept of the comity of nations. In the *Penell v Roy* case,²⁰ which had no parallel English proceedings, the Court of Chancery refused to grant an injunction which was sought on the ground that the Scottish proceedings would be frivolous and vexatious and without merit as this was a question for the Scottish

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¹⁵ *Peruvian Guano Co v Bockwoldt* 1883 23 Ch.


¹⁷ *Pieters v Thompson Coop G* 294.

¹⁸ n 16 above.

¹⁹ *Peruvian Guano Co v Bockwoldt* 1883 23 Ch. D at 234 per Bowen.

²⁰ *Pennell v Roy* 1853 3 De GM & G 126.
court to decide. The House of Lords in the *Carron Iron v Maclaren* case\textsuperscript{21} stated that it would impose a stricter check to justify the granting of an injunction to restrain a foreigner from claiming before his/her own courts.\textsuperscript{22}

4.2 Case law after the Judicature Act

As a result of the fusion of the courts of law and equity, and accordance with the Judicature Act of 1873 and 1875, the Court of Chancery was revised into a single division of the High Court in terms of which equity could be administered in any division of the High court.\textsuperscript{23} The effect of this in terms of injunctions to restrain existing proceedings before the High Court or the Court of Appeal were prohibited, existing proceedings before other courts of higher or concurrent jurisdictions were to be restrained.\textsuperscript{24} However, it was no longer required to exercise these powers to ensure that the principles of equity were enforced in the common-law courts. This lead to the reforming of the principles required to grant an anti-suit injunction. The courts now faced an impetus change of the jurisprudence of when the courts would have the power grant a stay of English proceedings.\textsuperscript{25}

In the case of *McHenry v Lewis*\textsuperscript{26} the court found that it would stay proceedings if it were “vexatious or oppressive” or “an abuse of its process,” though such power had to be exercised with caution. The test could be satisfied if the proceedings were frivolous and vexatious meaning that it was without merit and bound to fail, or if an action was brought in *mala fide* with the intention of harassing the defendant. This made it clear that the existence of duplicated proceedings or the inconvenience of the chosen forum was sufficient to bring about vexation or oppression; however duplicated proceedings could also be vexatious if it did not give the double claimant some substantial advantage. This in essence meant that duplicated proceedings were seen as vexatious only if there was a beneficial advantage to the claimant, but not in a case where there was a substantial reason of benefit to him/her.\textsuperscript{27}

\textsuperscript{21} *Carron Iron Co v Maclaren* 1855 10 ER 961.

\textsuperscript{22} Raphael (n 1) 46.

\textsuperscript{23} Judicature Act 1873 ss,3,4.

\textsuperscript{24} Raphael (n 1 ) 47.

\textsuperscript{25} Raphael (n 1) 48.

\textsuperscript{26} *McHenry v Lewis* 1881 21 CH D 202.

\textsuperscript{27} Raphael (n 1 )49.
However, the first decisive statement in English law on the availability of an anti-suit injunction was in the case of Cohen v Rothfield, 28 which involved an English court that was requested to grant an anti-suit injunction to stop the defendant continuing with a Scottish action. Lord Justice Scrutton said:

“Where it is proposed to stay an action on the ground that another is pending, and the action to be stayed is not in the Court asked to make the order, the same result is obtained by restraining the person who is bringing the second action from proceeding with it. But, as the effect is to interfere with proceedings in another jurisdiction, this power should be exercised with great caution to avoid even the appearance of undue interference with another Court.” 29

Justice Eve stated that this would amount to a very serious action, but he did not doubt that the court had the necessary jurisdiction to grant such an order and made it clear that an injunction was issued in personam and he went on to further state that a court would exercise this discretion where the continuation of both actions would be oppressive and vexatious.30

At this point, the English courts decided that they had jurisdiction to effect proceedings in a foreign country by imposing an injunction on individuals who brought the action and whereby English law had jurisdiction. The test to be satisfied by the applicant was difficult as the inter-relationship or comity between local and foreign courts were paramount. However, over a period of time, the test became more lenient as the definition of “vexatious and oppressive” was broadened. Consequently, the forum non conveniens principle developed in this regard which led to the abandonment of the “vexatious and oppressive” principle altogether.31

As a result, the House of Lords in Spiliada Maritime Corporation v Cansulex32 decided to dilute the stay of proceedings in terms of the vexation and oppression requirement and replace it with the Scottish concept of forum non conveniens - which in essence meant that proceedings in England would be stayed if the defendant could prove that the foreign jurisdiction was undoubtedly the appropriate forum for litigation. Consequently, by lowering the threshold to grant a stay of proceedings, there was a change in the judicial approach in this respect – the issue was one of judicial comity rather than judicial chauvinism. However, the conversely dilution for the conditions required to grant an anti-suit injunction would

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28 Cohen v Rothfield 1919 1 K.B. 410.
29 Cohen v Rothfield 1919 1 K.B. 416 per Scrutton L.J.
30 Arkins (n 16) 605.
31 Raphael (n 1) 52.
32 Spiliada Maritime Corp v Cansulex Ltd 1987 AC 460 (HL).
decrease deference and would result in an increase of interference.\textsuperscript{33} As a result, the forum non conveniens principle was adopted in the context of anti-suit injunctions. This meant that a more relaxed test was incorporated in the regulation of anti-suit injunctions, which resulted in a non-sequitar.\textsuperscript{34}

English law was then turned upside down in the case of Castanho v Brown & Root,\textsuperscript{35} where Lord Scarman held that principles in relation to an injunction and the stay of proceedings should be the same. Furthermore, Lord Scarman stated that an anti-suit injunction could be granted on the sole ground that England was the most appropriate forum for litigation, although account should be taken, of the fact that the injunction should not deprive the defendant of a legitimate juridical advantage in the foreign jurisdiction. However, Lord Scarman’s statements were treated as hearsay, however if his sentiments were to be applied, it would lead to unnecessary litigation before foreign courts.

Lord Diplock held in the British Airways Board v Laker Airways Ltd\textsuperscript{36} that an injunction could be granted where there was a legal or equitable right not to sued in a foreign court but also in the case where equity gave a pre-emptive effect to a substantive equitable defense by restraining the foreign proceedings. The type of scenarios where such a substantive equitable right may exist included promissory agreements, estoppel and laches which were grouped and described as “unconscionable conduct”.\textsuperscript{37} Lord Scarman in the British Airways case relied on the concept of unconscionability, however, in a more flexible manner; where he stated that the court had the power to grant the injunction:

“If the bringing of the suit in the foreign court is in the circumstances so unconscionable that in accordance with the principle of a wide and flexible equity which could be seen as an infringement of an equitable right of the applicant”.\textsuperscript{38}

Thus, the concept of unconscionable conduct was adopted as the primary test for the granting of an injunction. However, the concept, which means no more than conduct which equity would regard as contrary to good conscience, did not give the courts an indication on the level of misconduct required for it to be unconscionable conduct, which was a relatively new concept and was never used before which led to the abandonment of the previous tests.\textsuperscript{39}

\textsuperscript{33} n 32 above.
\textsuperscript{34} The Abiden Daver 1984 AC 398 (HL).
\textsuperscript{35} Castanho v Brown & Root (UK) Ltd 1981 AC 557 (HL).
\textsuperscript{36} British Airways v Laker Airways Ltd 1985 AC 58 (HL).
\textsuperscript{37} British Airways v Laker Airways Ltd 1985 AC 58 (HL), 82C-F.
\textsuperscript{38} British Airways v Laker Airways Ltd 1985 AC 58 (HL), 95F-H.
\textsuperscript{39} Raphael (n 1) 55.
The law governing the granting of an anti-suit injunction became clearer in the case of *Société Nationale Industrielle Aérospatiale v Lee Kui Jak & Anor* where Lord Goff combined all the previous case law (as stated above) starting from before the Judicature Act and held that an anti-suit injunction would be granted if the ends of justice required it. However, in the broad-spectrum, an injunction would not be granted unless the foreign proceedings were vexatious or oppressive. The concept of interest of justice resembled equitable power, which in essence had the same effect as the concept of unconscionability which was brought about in the *Airways Board v Laker Airways* case. The concepts of vexation and oppression was clarified due to the limitations presented in previous case law; Lord Goff went on to state that these concepts should be applied in a flexible manner and that foreign proceedings would constitute being oppressive even where there was some substantial advantage in favor of the claimant and also taking into account whether the foreign forum was sufficiently inappropriate.

In the case of *Airbus v Patel*, where it was found that in terms of the requirement for the comity of nations, Lord Goff held that in order to grant an anti-suit injunction, the principle of comity required that the English court should have a sufficient interest or connection with the matter to justify the interference with the foreign court in granting the anti-suit injunction. The framework in terms of previous case law in the granting of an anti-suit injunction to restrain a foreign claimant from claiming before his/her own court conceptualized the absence of a sufficient connection or link between the matter and the English courts.

An anti-suit injunction can also be granted in respect to contractual cases. In the case of *Donohue v Armco*, the House of Lords held that where a defendant of an injunction was in breach of an exclusive jurisdiction or arbitration clause, an anti-suit injunction would be granted unless there were aggravating reasons not to grant an anti-suit injunction. As a result of the existence of a contractual obligation, a different set of tests applied to the concepts of vexation and oppression.

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43 *Airbus Industrie GIE v Patel* 1998 1 AC 119 (HL).
44 Raphael (n 1) 56.
45 *Donohue v Armco Inc.* 2002 1 Lloyds Rep 8 (CA).
46 Raphael (n 1) 57.
5 Conclusion

The historical background has been discussed subsequently in respect to anti-suit injunctions in terms of case law which showcased the development of the tests employed to grant anti-suit injunctions. It also discusses the definition, nature and the requirements of an anti-suit injunction as well as the historical context, which presents case law dating back to the 17th century and showcases the development of the tests developed by the learned judges in the granting of an anti-suit injunction. This allows me to further situate the concept and develop a comparative study.
CHAPTER 2
ENGLISH LAW

1 Introduction

This chapter will analyses the development of the tests used to grant an anti-suit injunction in terms of English law by scrutinizing the general principles which govern the granting of an anti-suit injunction to restrain foreign court proceedings. This chapter will focus on the following chapters, the ends of justice, unconscionable conduct, a legal or equitable right, vexatious or oppressive conduct, forum non conveniens, and the principle of comity and the principle of comity (as discussed in the previous chapter).

2 The ends of justice

An anti-suit injunction is granted when it adheres to the ends of justice (or when the “ends of justice” requirement is satisfied). This is seen in the history of an anti-suit injunction where Lord Goff connects modern law to the equitable history of the anti-suit injunction in terms of the cases before and after the Judicature Act. The Court of Chancery would grant an anti-suit injunction to constrain foreign proceedings when the ends of justice required it.47 In terms of the modern law, it would not be suitable to constrain foreign proceedings because, under English law of equity, a defense would arise which a foreign court would not give effect to. Previously, the “ends of justice” concept / requirement would have been satisfied without proving any other criterion.48 However, due to the development of modern case law, the concept is now associated with other principles, namely the vexation and oppression principle and the principles relating to the illegitimate interference with the process of the courts.49

The “ends of justice” concept /requirement play a role in the courts exercise of its discretion. This implies that an injunction may be denied where a single party’s justice results in an injustice in relation to the other party. Hence, it is suggested that to attain justice it would be most suitable to seek assistance from a court where both parties are on equal footing resulting in justice being attained for parties involved.50

47 Raphael (n 1) 88.
49 Société Nationale Industrielle Aérospatiale v. Lee Kui Jak & Anor 1987 AC 871 (PC)892A-894G.
50 Raphael (n 1) 89.
This is the primary test in the granting of an anti-suit injunction as it governs not only private interests but also the interests of the public. It should be noted that the “ends of justice” concept encapsulates various other concepts, such as the concept of unconscionable conduct. It follows, therefore, that it is the best concept for the court to consider when dealing with an anti-suit injunction.

3 Unconscionable conduct

The term “unconscionable conduct” was first brought about in the Turner v Grovit case\(^{51}\) where Lord Hobhouse believed the primary test for the granting of an anti-suit injunction should be whether the injunction defendant’s conduct was unconscionable.\(^{52}\) Unconscionable conduct can be defined as conduct that is contrary to equity and good conscience which connects the modern law with the past equitable jurisdiction of the old Court of Chancery.\(^{53}\)

The concepts of unconscionable conduct and ends of justice both strive for the same goal. Therefore, they can be categorized similarly. The concept of unconscionability which involves the implication of the equitable legacy of the common injunction in the granting of an anti-suit injunction and there is no real sense to engage in the conscious of the injunction defendant.\(^{54}\) The notion of unconscionable conduct focuses on the action of the wrongful conduct of the individual and does not take into account public interest, with the ultimate goal being the ends of justice. Hence, the test of the ends of justice is the correct test to be applied.\(^{55}\)

4 A legal or equitable right

There are two types of equitable rights which will be considered. The first type is that of substantive contractual rights which are rights created in order to prevent persons from being sued in certain jurisdictions. For example, when parties agree on a contractual exclusive forum clause, the parties agree that they will be protected from being sued in a forum other than the forum exclusively elected. In terms of this clause a court will restrain foreign proceedings and it will not be necessary to show that the proceedings are vexatious, oppressive or that they interfere with the English Court.\(^{56}\)

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\(^{51}\) Turner v Grovit 2002 1 WLR 107 (HL).

\(^{52}\) Turner v Grovit 2002 1 WLR 107 (HL), 117C-F.

\(^{53}\) Raphael (n 1) 91.

\(^{54}\) n52 above.

\(^{55}\) Turner v Grovit 2002 1 WLR 107 (HL), 117E.

\(^{56}\) Raphael (n 1) 94.
The second type of right is a specific equitable right. Historically, the Court of Chancery had the power to restrain proceedings before the English Courts of common law by means of a common injunction which was granted where there was a risk that substantial equitable defenses would not be given effect by the common law courts. This is not the case currently as there are insufficient grounds to proceed with interferences of foreign proceedings because it would not comply with the requirement of comity. For an anti-suit injunction to be granted in terms of this right the equitable right must create an obligation or obligations which coincide with the conduct and location of the litigation.\(^{57}\)

5 Vexatious and oppressive conduct

In the *SNI* case\(^{58}\) it was held that where there was no substantive legal or equitable right infringed, an anti-suit injunction in general will be granted where the foreign proceedings are vexatious or oppressive. It can be either for the granting of an anti-suit injunction.\(^{59}\) Initially, the concept of vexation was defined as foreign proceedings that were frivolous or pointless,\(^{60}\) or bound to fail. However, proceedings which would benefit the claimant abroad who brought it in good faith were not considered vexatious and would not be restrained by the injunction. As the time went by, the concept of vexation expanded to allow foreign proceedings to be vexatious when there is a substantial benefit to the claimant abroad, even if the purpose sought to be achieved by the foreign proceedings are illegitimate.\(^{61}\)

The term “oppressive” is used to denote circumstances where foreign proceedings that are instituted abroad, which are to the substantial benefit to the claimant, are so oppressive that it results to an injustice. In other words, the oppressiveness of the foreign proceedings justifies an injunction. In order for the criteria of oppression to be satisfied, the alleged oppression must go beyond inconvenience to the claimant and must involve some elements of injustice.\(^{62}\) Thus, the requirement of vexation and oppression involves a strong test and forms part of the defenses of comity as a court cannot grant an anti-suit injunction when it is just and convenient to do so.\(^{63}\)

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\(^{57}\) n 55 above.

\(^{58}\) *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak & Anor* 1987 AC 871 (PC).

\(^{59}\) *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak & Anor* 1987 AC 871 (PC) 896F-G.

\(^{60}\) Castanho v Brown & Root (UK) Ltd 1981 AC 557 (HL) 10 ER 961, 970-971.


\(^{62}\) *Arab Monetary Fund v Hashim* 1992 (NO6).

\(^{63}\) Raphael (n 1) 104.
6 Forum non conveniens

In the MacShannon case, the House of Lords diluted then abandoned the requirement of vexation in stay cases and replaced it with the concept of *forum non conveniens* in terms of which proceedings in England would be stayed if the defendant could show that the foreign jurisdiction was clearly the more appropriate forum for the litigation. However in *Castanho v Brown*, Lord Scarman held that the principles applying to injunctions and stays should be the same, and that an anti-suit injunction could be granted on the ground that England was the most appropriate forum for the litigation as long as the injunction would not deprive the injunction defendant of a legitimate judicial advantage in the foreign jurisdiction.

In the SNI case, the Privy Council held that in order to permit an injunction on the basis that the foreign court was the inconvenient forum would be inconsistent with the principal of comity and it would be wrong to conclude that the tests for stays and injunctions were the same. Thus, it was later found that the *forum non conveniens* was a weak complaint and could easily be overridden by other factors and considerations which make it clear from the SNI case that *forum non conveniens* cannot suffice as a requirement as it is in itself is a weak requirement.

7 The principle of Comity

Comity entails:

“a policy of non-intervention not only for the same reason that appellate courts are reluctant to interfere with the exercise of a discretion namely, that in the weighing of various factors different judges may arrive at different answers it is also required because the foreign court is entitled without thereby necessarily occasioning a breach of international law or manifest injustice to give effect to the policies of its own legislation.”

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64 MacShannon v Rockware Glass Ltd 1978 AC 795 (HL).
66 n33 above.
68 n39 above.
69 Raphael (n 1) 106.
The correct general approach to comity was stated by Lord Goff in the *Airbus Industrie v Patel* case as follows:

“As a general rule, before an anti-suit injunction can properly be granted by an English Court to restrain a person from pursing proceedings in a foreign jurisdiction in cases of this kind and the consideration of the present case, comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign Court which an anti-suit injunction entails. In an alternative forum case, this will involve consideration of the question whether the English Court is the natural forum for the resolution of the dispute.”

8 Conclusion

In conclusion, it is evident that each of the abovementioned principles are interrelated and interconnected. Ultimately, the primary test, when dealing with the granting of an anti-suit injunction, would be if the ends of justice required such an injunction to be granted. The “ends of justice” concept encapsulates all the other concepts and ensures that there is a strong threshold when dealing with anti-suit injunctions, especially in light of the principle of comity. Importantly, case law continues to guide and shape the application of the concepts when determining whether or not an anti-suit injunction should be granted.

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CHAPTER 3

INDIAN LAW

1 Introduction

The following chapter serves as a discussion and critical analysis of Indian law, specifically the requirements for the granting of an anti-suit injunction as laid down in Modi Entertainment Network case.72

2 Facts

The International Cricket Conference arranged a cricket tournament in Kenya to be played between 3 October and 15 October 2000. An agreement was reached between the second appellant and respondent in terms of which an exclusive license was granted to telecast the tournament by Doordarshan and sell advertisement slots. The appellants were to pay a minimum guaranteed amount of USD 35 lakhs and if the revenue derived by the appellants exceeded the sum the parties would share the excess amount. The second respondent assigned its rights in terms of the agreement to the first appellant. In terms of the agreement the license was restricted to showcasing the terrestrial feed freely to air only in Doordrshan and the satellite broadcast license for India was granted to ESPN. Shortly after the commencement of the telecast a complaint was registered with Doordarshan that the signal was being received in the Middle East which amounts to a breach of contract between the parties and if the complaint was not addressed the feed would be disconnected. Doordarshan responded by stating that it was caused by a natural spill over and under the agreement such a spill over will not constitute a breach. The respondent were, however, not satisfied and kept threatening to disconnect the feed.

The appellants received a notice demanding the full guaranteed amount (as stated above), however the appellants then filed a suit in the Bombay High Court claiming damages for loss of advertising revenue due to the threats made by the respondent. The respondents went on to file an action in the High Court of Justice, Queens Bench Division for the payment of the agreed minimum amount and took out a writ of summons which requested the appellants to notify the English Court of their intention to contest the jurisdiction, as a result failure to do so would conquer to the submission of the jurisdiction of the English Court.

The appellants appeared in the English court however they later filed a motion in the Bombay High Court for the granting of an anti-suit injunction against the respondents on the ground that the Indian court was the natural forum for the adjudication of the dispute and that the continuance of the proceedings in an English court would amount on the facts of the case to be vexatious and oppressive. The respondent contested the motion on the grounds of the non-exclusive clause in the contract. An interim injunction was granted in the High Court of Bombay by a single learned judge, which lead to the respondents lodging an appeal in the High Court. With the consent of the parties the Division Bench of the High Court heard the appeal and set aside the order and dismissed the motion of the appellants. Thus, the appeal was granted.

3 Legal question

The court had to decide whether the Division Bench of the High Court erred in vacating the anti-suit injunction restraining the respondent from proceeding with the action between the same parties pending in an English Court which was the forum that was chosen. To answer this question, the court had to look at the principals involved in the granting of an anti-suit injunction dealing with a court of natural jurisdiction against a party to a suit before restraining such a party from instituting the same suit in a foreign court nominated or chosen by the parties.

4 The requirements set out in the Modi Entertainment case

In exercising discretion to grant an anti-suit injunction the court must be satisfied with the following requirements:

4.1) The defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court

In terms of Rule 31 (5) which was formulated in the Conflict of laws by Dicey and Morris with regard to the judgements set out by the House of Lords and the Privy council which states that an “English court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court, or the enforcement of foreign judgements, where it is necessary in the interest of justice for it to do so.” Rule 32 (4) goes on to state that “an English court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court in breach of a contract to refer disputes to an English court”. It is clear from the above rules that that Rule 35(1) deal with a matter where there is no jurisdiction agreement and Rule 34 (2) deals with matters involving a jurisdiction agreement.73

73 Dicey, Morris and Collins “the Conflict of Laws” 534-535, 583-599, 856, 867-873, 1112 (2012).
4.2) If the injunction is declined the ends of justice will be defeated and injustice will be perpetuated

The High Court in *Australia C.S.R Ltd. v Cigna Insurance Ltd* defined the term ends of justice as being “only if there is nothing which can be gained by them over and above what may be gained in local proceedings”. In essence, this means that the main objective is to enquire how the best interests of justice will be served by asking the question whether the granting of an anti-suit injunction is necessary in the interests of justice.74

In the *Oil and Natural Gas Commission vs Western Company of North America* which dealt with a drilling contract between the appellant and Respondent, a dispute surfaced between the parties which was referred to arbitration governed by the Indian Arbitration Act.75 A non-speaking award was made followed by a supplementary award without allowing any hearing to the parties. The awards were filed in the Bombay High Court, thereafter the respondent filed in the US District Court, in New York for an order validating the award and a judgment for the payment of interest. Thereafter, the appellant filed an application under the Indian Arbitration Act to isolate the award while he hoped that an anti-suit injunction would be granted in the interim to restrict processes in the US court. An interim injunction was granted but vacated from after contest. Thereafter an appeal was lodged where it was held that when it was necessary or practical to do so or when the ends of justice required it, the High Court had jurisdiction to grant such an injunction and that it would be unfair to refuse the restraint order because the action in the foreign court would be oppressive in the facts and circumstances of the case.76

5 The principle of comity

As stated above in the *Oil Natural Gas Commission* case, it was observed in this case that the contract was governed by the Indian Arbitration Act and, as such the Indian Courts had exclusive jurisdiction to determine the validity and enforceability of the awards. This meant that the American Court had no Jurisdiction the appellant approached the US court on the basis of the same legal question that was presented to the Indian court and argued that, if the restraint order was not granted, it would lead to serious prejudice.77

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75 Arbitration and Conciliation Act 1996.
76 *Oil and Natural Gas Commission vs. Western Company of North America* 1987 (1) SCC 496.
5.1 Where there is more than one forum the Court in exercise of its discretion to grant anti-suit injunction has to examine and determine the appropriate forum (*forum conveniens*)

In the *SNI Aerospatiale's* case, the Privy Council laid down the principles to be applied by a court in deciding whether to restrain foreign proceeding. They are as follows:

“The principles applicable to the grant by an English Court of an injunction to restrain the commencement or continuance of proceedings in a foreign jurisdiction were not the same as those applicable to the grant of a stay of English proceedings in favor of a more appropriate foreign forum, and where a remedy for a particular wrong was available both in an English Court and a foreign court the English Court would normally only restrain the plaintiff from pursuing the foreign proceedings if it would be vexatious or oppressive for him to do so.”

In regard to the test laid down in this case, this focuses on the interests of the parties not just the appropriateness of the forum. Injunctions will henceforth be available only on a more limited basis; but that basis expressly balances both the fairness to the parties and the naturalness of the forum. It is open, sufficiently narrow in scope, even-handed and fair. In short, an entirely suitable contemporary test.

In the *Spiliada Maritime's* case (as mentioned above), the House of Lords laid down the following principle:

"the fundamental principle applicable to both the stay of English proceedings because some other forum was the appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that the court would choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice”.

Evidently, in determining the criteria of the most appropriate forum, the court would have to look for the forum with which the action had the most real and substantial connection in terms of ordering a stay of the suit, in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English court, it would normally refuse a stay.

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If, however, the court concluded that there was another forum which was *prima facie* more appropriate, the court would normally grant a stay unless there were circumstances affecting against a stay. It was noted that as the dispute concerning the contract in which the proper law was English law, this meant that England was the appropriate forum in which the case could be more suitably tried.

5.2 Where jurisdiction of a court is invoked on the basis of a jurisdiction clause in a contract, the recitals of the contract specifying exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but only the relevant factors. The court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.

In the *British Indian Steam Navigation* case, the respondent purchased a specified quantity of raw cashew nuts from East Africa which was shipped in a vessel charted by the appellant company incorporated in England. There was clause in the bills of ladings which stated that English law shall govern any disputes in England. There was a short supply of cashew nuts and the first respondent filed a suit in the court of a Cochin seeking damages for the short supply. The suit was defended by the appellant given that it was a charter of the vessel not the owner. Moreover, in terms of the bill of ladings the court of Cochin had no further jurisdiction as opposed to the English courts. The suit was dismissed and on further appeal it was held that in the light of jurisdiction the action of the first respondent was an action in *persona* in private International law and such an action could be decided upon by the parties themselves.\(^81\)

The chosen court may be a country of one or both parties, or it may be a neutral forum and that the jurisdiction clause may provide for submission to the courts of a particular country or a court identified by a formula. It comes down to interpretation governed by the proper law of the contract. The jurisdiction clause may provide for submission to the courts of a particular country or to a court identified by a formula. It is a question of interpretation, governed by the proper law of the contract, whether a jurisdiction clause is exclusive or non-exclusive, or whether the claim which is the subject-matter of the action falls within its terms. If there is no express choice of the proper law of the contract, the law of the country of the chosen court will usually, but not invariably, be the proper law.\(^82\)

\(^{81}\) *British Indian Steam Navigation Co.Ltd. vs. Shanmugavilas Cashew Industries & Ors* 1990 (3) SCC 481.

\(^{82}\) n 80 above.
The other requirements that were set out in the judgment are as follows:

6.1 “a court of natural jurisdiction will not normally grant an anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, which means a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, however in a case where there is good and sufficient reason, with the objective to prevent injustice in circumstances which permit a contracting party to be relieved of the burden of the contract; or in the instance where the date of commencement of the contract of which the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a *vis major*”\(^\text{83}\)

6.2 “where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, an anti-suit injunction will ordinarily not be granted in respect of proceedings in such a forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to a non-exclusive jurisdiction of the court of their choice which cannot be treated just an alternative forum,”\(^\text{84}\)

6.3 “a party to the contract containing a jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot *per se* be treated as vexatious or oppressive, nor can the court be said to be *forum non-conveniens*; and”\(^\text{85}\)

6.4 “The burden of establishing that the forum of choice is a *forum non-conveniens* or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same”.\(^\text{86}\)

7 Conclusion

The requirements set out in this case illustrates both English and Indian law both English and Indian law and how these two legal systems are based on equality and law. The case portrays how learned judges improve a part of their law by taking notice of their learned colleagues’ decisions in different jurisdictions. Consequently, in delivering the judgment, the learned judges provide a comprehensive list of requirements which ought to be considered when deciding whether or not to grant an anti-suit injunction.

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CHAPTER 4
CONCLUSION

In conclusion as seen from above anti-suit injunctions got its birth from English law and were further developed by case law which introduced modified texts and criterion of the granting of an anti-suit injunction. The case law plays a vital role as seen in the above chapters as Indian law used English cases to compile the requirements set out in the Modi Entertainment case which gave rise to a compelling list of requirements in the granting of an anti-suit injunction. As seen in case law, the (dynamic) general principles underpinning the regulation of anti-suit injunctions are always developing. However, one concept has remained constant, namely the requirement of the interests of justice, as it essentially encapsulates all the other concepts and principles. Thus, the courts have laid down a strong test when determining whether an anti-suit injunction is to be granted.

As seen developments of the general principles in regard to anti-suit injunctions but a requirement that always played a role is the interest of justice requirement which in essence captures all the concepts and possess a strong test in the granting of an anti-suit injunction in case law. The most significant observation arising from this research seems to be the constant change in the requirements depending on the law. Additionally exploring a variety of case laws has reiterated the dynamic relationship between the development of law and the requirements guiding anti-suit injunctions. Looking back at the historical background it may be argued that the list comprised by Indian law in the Modi entertainment\textsuperscript{87} case is comprehensive in nature. Anti-suit injunctions are not part of South African law however the developments within English and Indian law would surely serve as an in-depth guide.

Recommendations for further study

While following the nature of anti-suit injunctions and developments of its requirements is dependent on further case studies evaluating its place within the South African law system is an area worth exploring further. Placing this study within a South African context will provide invaluable access into the growth of our own law and the future.

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