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ANTI-SUIT INJUNCTIONS IN MARITIME DISPUTES: A TREND THAT THREATENS TO BE OUT OF CONTROL?

Justice Belinda Ang Saw Ean
President and Judge of the Appellate Division, Supreme Court of Singapore

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Anti-Suit Injunctions in Maritime Disputes: A Trend That Threatens To Be Out of Control?

Justice Belinda Ang[*]

This paper discusses three broad areas relating to the anti-suit injunction in maritime disputes: (a) the grant of the anti-suit injunction against non-parties; (b) the possibility of a damages claim for breach of a forum agreement; and (c) the enforcement of the anti-suit injunction. There has been a significant expansion in the scope of the anti-suit injunction, primarily spearheaded by the English courts. As we venture into these largely unchartered waters, it is critical that we do not lose our 'north star' – ensuring that the anti-suit injunction serves the ends of justice rather than becoming a litigation tactic and procedural weapon where satellite litigation and legal costs distract parties' attention from the main event.

Keywords: Maritime law, anti-suit injunction, conflict of laws, third parties, breach, enforcement.

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1 Introduction

Anti-suit injunctions have been described in Common Law jurisdictions as 'the most internationally sensitive prop in the English court's box of tricks'.[1] In the United States, the anti-suit jurisdiction is familiar under the doctrine of equitable estoppel. As a result of its increasing popularity over the years and its frequent appearances on the dockets of courts, the anti-suit injunction as a strategic tool has, to some extent, 'become legitimised by familiarity'.[2] However, we must not forget that it also has the potential to attract significant controversy and debate.

In this paper, I will discuss three broad areas relating to the anti-suit injunction: (a) the grant of the anti-suit injunction against non-parties; (b) the possibility of a damages claim for breach of a forum agreement; and (c) the enforcement of the anti-suit injunction. Of course, this paper does not purport to provide an exhaustive discussion of these three areas. Nevertheless, it hopes to highlight some of the main points of interest, which can serve to generate further discussion in the future. What is clear is that anti-suit injunctions and damages for breaches of forum agreements – powerful tools at the disposal of Common Law courts and tribunals – are likely to ensure that forum agreements in favour of such courts or tribunals are complied with.

It has been said, and it is true, that shipping often spearheads the development of the Common Law in different areas and the anti-suit injunction is no exception. It is therefore not surprising that many notable examples of the power of anti-suit injunctions have been developed in shipping cases decided by the English courts. English courts have extended the grant of anti-suit injunctions on a contractual basis to the grant of anti-suit injunctions on a 'quasi-contractual' basis, giving rise to the so-called 'quasi-contractual anti-suit injunction' issued against non-parties to the forum agreement. English courts have also awarded

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1 Thomas Raphael QC, 'Do As You Would Be Done By? System-Transcendent Justification and Anti-Suit Injunctions' [2016] LMCLQ 256, 257.

2 Richard Fentiman, 'Anti-Suit Injunctions – Comity Redux?' (2012) CLJ 273.

damages for breach of forum agreements. Such liability has been founded on breach of contract, the tort of inducing breach of contract, and even breach of an equitable obligation. In principle, the damages award could extend to all the losses suffered by the claimant which had been caused by the counterparty's breach of the forum agreement, subject to the normal rules of remoteness, causation, and mitigation. Damages could therefore potentially include all unrecovered costs of the foreign proceedings, as well as any amount that the claimant is ordered by the foreign court to pay and does pay in damages.

The variety of issues surrounding the remedy of damages and the expansive anti-suit jurisdiction, where non-parties to forum agreements can sue those who themselves are non-parties to the forum agreements, I hasten to suggest, speaks to the unrestrained reach of anti-suit injunctions. The title of this paper draws attention to the trend of the ever-expanding scope of the anti-suit jurisdiction, as more and more cases come up to widen the boundaries of anti-suit injunctions in shipping and other international commercial disputes.

2 General principles

Before turning to the three areas mentioned above, I briefly set out some of the general principles surrounding the anti-suit injunction in Singapore (which are the same principles as in England for anti-suit relief). It is well-established that the anti-suit injunction is an equitable remedy and that the court will exercise its jurisdiction to grant an anti-suit injunction in cases where the ends of justice require it.[3]

There are three main categories of cases in which anti-suit injunctions have been granted, the first two of which are the main focus of this paper:[4]

(a) First, anti-suit injunctions granted on the contractual basis. When foreign proceedings are commenced in breach of a forum agreement between the direct contracting parties, an anti-suit injunction will be granted to restrain the party in breach of the agreement, unless there are strong reasons otherwise.[5] This will encompass proceedings

[3] *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 [65].

[4] Chng Wei Yao Kenny, 'Breach of Agreement *Versus* Vexatious, Oppressive and Unconscionable Conduct: Clarifying their Relationship in the Law of Anti-Suit Injunctions' (2015) 27 SAcLJ 340 para 7.

[5] *Sun Travels* (n 3) [68].

commenced in breach of exclusive jurisdiction clauses, arbitration agreements, and under Singapore law, possibly even non-exclusive jurisdiction clauses.[6]

(b) Second, anti-suit injunctions granted on the basis that the commencement of the foreign proceedings by the anti-suit respondent amounts to vexatious or oppressive conduct. In such cases, apart from the question of vexation or oppression, the court will consider other factors including whether the anti-suit respondent is amenable to the jurisdiction of the Singapore court, whether Singapore is the natural forum for the resolution of the dispute between the parties, and whether the anti-suit respondent would be unjustly deprived of any legitimate juridical advantages sought in the foreign proceedings.[7]

(c) Third, anti-suit injunctions granted to restrain the prosecution of foreign proceedings which amount to an abuse of the process of the Singapore court. This category of cases is conceptually distinct from the first two categories – the first two categories are founded on the court's equitable jurisdiction, whereas the third category is founded on the court's inherent jurisdiction to prevent the abuse of its process.[8]

3 Anti-suit injunctions and non-parties

This part of the paper focuses on anti-suit injunctions that are granted on the contractual basis, that is, on the basis of an agreement not to commence or continue legal proceedings in a foreign forum. A straightforward example is an anti-suit injunction that is sought to restrain the *direct* contracting party from acting contrary to the jurisdiction or arbitration agreement. Under Singapore law, this very ground may also encompass proceedings commenced in breach of non-exclusive jurisdiction clauses. In all of these cases, the anti-suit injunction is intended to prevent a breach of the forum agreement between the *direct* contracting parties. The area that merits particular consideration is the issuance of anti-suit injunctions against *non-parties* (ie, persons who are not direct contracting parties). In this situation, an anti-suit injunction is granted 'where the injunction defendant may not fully be party to and bound by a contractual forum clause as a matter of contract, but [is] nevertheless

6 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779; Chng (n 4) paras 12–17.

7 *Sun Travels* (n 3) [66]; Chng (n 4) paras 8–10.

8 *Beckkett Pte Ltd v Deutsche Bank AG* [2011] 2 SLR 96 [19]; *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 [22]; *Masri v Consolidated Contractors International (UK) Ltd and others (No 3)* [2009] QB 503 [100]; Chng (n 4) para 7.

… required to comply with the effect of the clause'.[9] This is the area of anti-suit jurisprudence where English courts have extended the grant of anti-suit injunctions founded on a contractual right not to be sued in a forum other than the one agreed to between the parties to the grant of anti-suit injunctions on a 'quasi-contractual' basis.[10] The 'quasi-contractual' ground for an anti-suit injunction appears to apply where there are foreign proceedings brought by the anti-suit respondent for breach of contract, there is an English exclusive jurisdiction clause or London arbitration clause in that contract and the anti-suit applicant denies that it is a party to that contract. In this developing line of English cases, non-parties can be either anti-suit applicant or anti-suit respondent. I will be identifying with examples the various forms of quasi-contractual cases shortly. I will also be discussing the juridical approach of the English court to determining when persons who are not even direct parties to a forum agreement can be subject to the anti-suit jurisdiction of the English court. In other words, when will anti-suit injunctions be issued and when will anti-suit injunctions not be granted?

Recently, the Singapore High Court in *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd*[11] was invited to consider this 'quasi-contractual' ground that had originated from the English decision in *Sea Premium Shipping Ltd v Sea Consortium Pte Ltd*.[12] Quentin Loh J (as he then was) opined that the *Sea Premium* line of cases were 'persuasive' and found them 'applicable as part of Singapore law',[13] meaning that the court's anti-suit injunction jurisdiction could be invoked on the 'quasi-contractual' ground. At present, *Hai Jiang 1401* is good law until an opportunity arises for the Singapore Court of Appeal or the Appellate Division to consider that decision and come to a different view.

However, the decision in *Hai Jiang 1401* is not without its critics. As Assoc Prof Paul Myburgh puts it, the expansion of the scope of the contractual anti-suit injunction to a non-party on

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9 Thomas Raphael QC, *The Anti-Suit Injunction* (2nd ed, Oxford University Press 2019) para 10.01.

10 The term 'quasi-contractual' is a misnomer, as the grant of anti-suit injunctions in this context has nothing to do with unjust enrichment and restitutionary claims, which the 'quasi-contractual' terminology has traditionally been associated with.

11 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014.

12 *Sea Premium Shipping Ltd v Sea Consortium Pte Ltd* [2001] EWHC 540 (Admlty).

13 *Hai Jiang 1401* (n 11) [81].

the basis of the *Sea Premium* jurisdiction 'gives pause for thought'.[14] He raises two points for consideration. First, he argues that the need for caution in issuing anti-suit injunctions suggests that a contractual anti-suit injunction should not be issued unless the court can point to a clear and direct breach of a forum agreement between the parties. This means examining the existence and governing law of the forum clause and interpreting the scope of the said clause in accordance with its governing law to determine if the nature and substance of the dispute fall within the ambit of the clause. As the nature of the inquiry for anti-suit injunctions is the same – ie, whether there has been a breach of the forum agreement – in principle, it ought not to make any difference whether that forum agreement is governed by Singapore law or foreign law. Expert evidence of foreign law adduced in the usual way suffices to assist the Singapore court in determining the matter. Second, Assoc Prof Myburgh notes that the conceptual foundation for issuing the contractual anti-suit injunction in non-party cases remains unclear. Similarly, Thomas Raphael QC points out that in non-party cases, 'there is no actual contract, and the idea that a party claiming in another's shoes should always be bound by a forum clause in the original contract is not universally shared' although it has 'real moral force'.[15] These points are not without merit. Indeed, Loh J recognised in *Hai Jiang 1401* that 'this is a complex area of law' where 'the juridical underpinnings … are underdeveloped' and 'the boundaries of the effect of exclusive forum clauses … on third parties are being tested'.[16]

In grappling with these complex questions, it may be useful to distinguish between the various types of non-party cases that have arisen. An understanding of the specific basis for the right that the non-party is seeking to enforce (or that is sought to be enforced against the non-party) may shed some light on the question of whether the non-party anti-suit applicant should be allowed to avail itself of the original or extended contractual anti-suit injunction jurisdiction. In this regard, the cases have generally been divided into two broad categories.[17]

(a) First, the derived rights category. Here rights are acquired by a third party (ie, the non-party) who is not an original contracting party to the contract containing a forum clause. When the non-party brings a claim based on such a derived right, the party being sued

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14 Paul Myburgh, 'Non Parties, Forum Agreements and Expanding Anti-Suit Injunctions' [2020] LMCLQ 345, 352.

15 Raphael (n 9) para 10.79.

16 *Hai Jiang 1401* (n 11) [82]–[83].

17 Raphael (n 9) para 10.02.

(who is a party to the contract) seeks an anti-suit injunction on the basis of the forum clause contained in that contract. In English jurisprudence, the obligation of the non-party to comply with the forum clause has sometimes been referred to as a 'derived rights obligation'.

(b) Second, the inconsistent contractual claims category where the anti-suit applicant denies the existence of or validity of the contract under which it is sued but the anti-suit respondent makes a claim under or arising out of the contract in violation of the forum clause contained therein. In these circumstances, the obligation on the part of the anti-suit respondent to comply with the forum clause has been referred to in English jurisprudence as an 'inconsistent claims obligation'.

I propose to draw finer distinctions within these broad categories, in order to lend greater conceptual clarity to the discussion. I will also situate these sub-categories on a spectrum, gradated according to their similarity to the traditional case involving direct contracting parties. I would suggest that the further the facts stray from this archetypal case, the more circumspect the court ought to be about granting a contractual anti-suit injunction. The following diagram neatly encapsulates the various sub-categories which I will discuss, as well as their degree of similarity to the traditional situation involving direct contracting parties.

Before I turn to the various categories of cases, a word of clarification. I have excluded from these various categories of cases the familiar jurisdiction or arbitration clauses found in bills of lading and charterparties. Every shipping lawyer knows that such clauses can bind anyone who subsequently becomes either a holder or endorsee of the bills of lading by virtue of the Bills of Lading Act.[18] There is also the situation where jurisdiction or arbitration clauses in the relevant charterparty are somehow incorporated by reference and thereby form part of the terms of the bills of lading.

[18] Bills of Lading Act (Cap 384, 1994 Rev Ed).

3.1 Subrogation

Turning now to the various categories of cases, the situation that is arguably the most akin to the archetypal case involving direct contracting parties is where a non-party derives rights of suit against a contractual party by virtue of the doctrine of subrogation. Examples of cases involving subrogated claims include *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH* (*The Jay Bola*)[19] and *Fair Wind Navigation SA v ACE Seguradora SA*.[20] In these cases, the insured was a contracting party whose claim was subsequently subrogated to the insurer. The insurer as subrogee then brought an action against the other contracting party, ignoring the forum clause. In response, the contracting party sought a contractual anti-suit injunction against the insurer, which the court readily granted, applying the benefit and burden analysis wherein the insurer was not entitled to take the benefit of the contract (ie, the right to claim damages for breach of contract) without accepting its burden (ie, the obligation to arbitrate).

This analysis is straightforward and is justifiable in principle, having regard to the nature and effect of the doctrine of subrogation. It is often said that the insurer 'steps into the shoes' of the insured by virtue of the subrogation. Indeed, the subrogated proceedings themselves are often, if not always, brought in the name of the insured. Accordingly, it is not controversial that the insurer's derived rights are regarded as subject to the forum clause contained in the contract between the insured and its counterparty.[21] For these reasons, it is generally accepted that a contractual anti-suit injunction may be issued against a non-party as subrogee, notwithstanding the absence of a direct contractual relationship between the anti-suit applicant and the anti-suit respondent. Conversely, if the non-party as subrogee is sued by the contracting party in respect of the subrogated claim, in principle, the non-party as subrogee should also be able to seek a contractual anti-suit injunction against the contracting party.

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19 *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola)* [1997] 2 Lloyd's Rep 279.

20 *Fair Wind Navigation SA v ACE Seguradora SA* [2017] EWHC 3352 (Comm).

21 *The Jay Bola* (n 19) 284–285.

3.2 Assignment

Next, we have cases where a non-party derives rights of suit against a contractual party by virtue of assignment. English courts have no difficulty enforcing jurisdiction or arbitration clauses against assignees of rights.[22] The underlying principle (called the 'conditional benefit' principle) is that an assertion of assigned rights carries with it a duty or burden to comply with the forum agreement. Whilst the burden of a contract (eg, the obligation under a forum clause) cannot be assigned, the so-called 'conditional benefit' principle is taken to be an exception to that general rule that in an assignment, only the benefits of the contract pass from the assignor to the assignee. This exception ensures that the third party assignee who wishes to take action to enforce its substantive right is bound to enforce its right by adhering to the forum agreement. Such an obligation is inextricably linked to the benefit assigned.

I digress here for a moment. In the context of the English court's anti-suit jurisdiction, the applicable equitable principle, as identified by Steven Gee QC, is that 'he who claims to enjoy rights cannot do so without honouring the conditions which are both relevant to and attached to the exercise of those rights'.[23] Put differently, the anti-suit applicant has a recognised 'equitable right' which is enforceable by injunction against the anti-suit respondent (a non-party assignee) who seeks to act inconsistently with the forum clause.[24] It is notable that English law treats the assignee's non-compliance with the forum agreement not as a breach of contract, but as a breach of an equivalent obligation in *equity* which the counterparty is entitled in equity to enforce against the assignee.

Returning to the matter of assignment, while assignment cases are quite similar in purpose to subrogation cases, they remain doctrinally different. Consequently, the justification for issuing contractual anti-suit injunctions is perhaps not as clear under Singapore law because, unlike in subrogation cases, there is some ambiguity surrounding the assignability of a jurisdiction or arbitration clause and the effect of the same on an assignee.

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22 Steven Gee QC, *Commercial Injunctions* (6th ed, Sweet & Maxwell 2016) para 14-024; *Montedipe SpA and another v JTP-RO Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep 11, 15; *Rumput (Panama) SA and Belzetta Shipping Co SA v Islamic Republic of Iran Shipping Lines (The Leage)* [1984] 2 Lloyd's Rep 259; *Shayler v Woolf* [1946] Ch 320; *Aspell v Seymour* [1929] WN 152.

23 Gee (n 22) para 14-024

24 *Airbus SAS v Generali Italia SpA and others* [2019] 2 Lloyd's Rep 59 [95]–[97].

Turning first to the assignability of a jurisdiction or arbitration clause, it has often been *assumed* that such clauses are capable of assignment.[25] In *Hai Jiang 1401*, Loh J had no difficulty concluding that there was a prima facie case that the rights and benefits of the arbitration clause had been assigned to a non-party, thus warranting the grant of a contractual anti-suit injunction in favour of that non-party.[26] However, it is worth taking a closer look at how such an assignment will operate as a matter of Singapore law. It is well-established that an arbitration agreement is founded upon the consent of the original contracting parties. How then does the element of consent feature in the context of assignment? One argument may be that the consent to arbitrate 'is located in the assignee's consent to take the benefit of the substantive right'.[27] However, as the Court of Appeal pointed out in *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA*, this 'potentially gives rise to another conceptual difficulty', which is that 'allowing non-parties to an arbitration agreement to avail themselves of the right to arbitration under the agreement would, on its face, conflict with the doctrine of privity'.[28] One might suggest that it is perhaps because of the ambiguity surrounding the assignability of arbitration clauses that the effect of arbitration clauses on third parties had to be legislated via s 9 of the Contracts (Rights of Third Parties) Act (CRTPA),[29] which I discuss in greater detail below.

Even if a jurisdiction or arbitration clause is capable of assignment, there remain significant difficulties surrounding the question of the effect of such a clause on an assignee as a matter of Singapore law. In *Rals International*, the Court of Appeal observed in obiter that an assignee of a contractual right may be *entitled* to exercise all of the remedies of the assignor in respect of that right, including the right to arbitrate disputes with the obligor falling within the scope of the arbitration agreement.[30] In the Court's view, the more difficult question was whether the assignee is *obliged* to submit to arbitration all disputes with the obligor falling within the scope of the arbitration agreement. In the proceedings below, the High Court had opined that, according to the principle of conditional benefit, the assignee must take the assigned

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25 *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 [52]–[53], citing *Shayler* (n 22).

26 *Hai Jiang 1401* (n 11) [45].

27 *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd* [2016] 1 SLR 79 [118].

28 *Rals International (CA)* (n 25) [55].

29 Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) (CRTPA).

30 *Rals International (CA)* (n 25) [55].

contractual benefit along with the burden of arbitration which is an intrinsic part of the right.[31] Ultimately, the Court of Appeal did not reach any firm view and left the issue open. One of the Court's concerns was how to reconcile the above propositions with the 'well-entrenched common law principle that contractual burdens cannot be assigned'.[32] By analogy, such concerns would extend also to cases involving an exclusive jurisdiction clause.

This is a complex issue that requires some unravelling. I will come to a possible approach to this conundrum later in my discussion on the CRTPA below. It suffices for now to observe that ultimately, whether an assignee can take the benefit of a forum agreement and can be obliged to adhere to the forum agreement is a preliminary question that will need to be answered before the contractual anti-suit injunction even becomes available as a potential remedy.

3.3 Statutes conferring rights of suit onto a third party

I turn now to cases involving statutes that confer rights of suit onto a non-party. An example of such a statute is Singapore's CRTPA,[33] which was based on the Contracts (Rights of Third Parties) Act 1999 (UK).[34] In such cases, as in cases concerning assignment, a similar preliminary question arises as to whether a third party can take the benefit or be made to bear the burden of a forum agreement pursuant to the CRTPA. It is only if this question is answered in the affirmative that the contractual anti-suit injunction will come into play.

The operation of arbitration clauses and exclusive jurisdiction clauses in the context of the CRTPA was recently considered in a non-shipping case by the Court of Appeal in *VKC v VJZ*.[35] Two points about this decision are notable. First, the Court held that exclusive jurisdiction clauses do not fall within the ambit of s 2(1)(b) of the CRTPA.[36] This means that, in the context

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31 *Rals International (HC)* (n 27) [111]–[113], [117]–[123].

32 *Rals International (CA)* (n 25) [53]–[56]. See also *Aspen Underwriting Ltd and others v Kairos Shipping Ltd and others (The Atlantik Confidence)* [2020] 2 WLR 909 [26]–[28], where the United Kingdom Supreme Court discussed the principle of conditional benefit, citing the Singapore Court of Appeal's observations in *Rals International (CA)* (n 25) [55].

33 It is noted, however, that s 7(4) of the CRTPA excludes the application of s 2 in the case of a contract for the carriage of goods by sea, or a contract for the carriage of goods by rail or road, or by air, which is subject to the rules of the appropriate international transport convention, except that a third party may, in reliance on s 2, avail himself of an exclusion or limitation of liability in such a contract.

34 Contracts (Rights of Third Parties) Act 1999 (c 31) (UK) (UK CRTPA).

35 *VKC v VJZ and another* [2021] SLR 753.

36 Ibid [72].

of anti-suit injunctions, s 2(1)(b) of the CRTPA will not be able to assist a third party who seeks a contractual anti-suit injunction where an exclusive jurisdiction clause is involved.

Second, the Court considered the English Court of Appeal's decision in *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP*,[37] and observed that s 8(1) of the UK CRTPA is based on a 'conditional benefit' approach, ensuring that the third party who wishes to take action to enforce its substantive right is not only able to enforce it effectively by arbitration, but is also bound to enforce its right by arbitration.[38] In *Fortress*, the English Court of Appeal clarified that s 8(1) of the UK CRTPA applies only when the benefit of a contractual term is conferred on a third party, the exercise of which is subject to a procedural qualification to do so by arbitration. In such situations, the arbitration clause is a *procedural qualification* to a substantive right. This means that when a third party seeks to enforce a substantive right pursuant to the UK CRTPA, a condition of such enforcement is that it must do so by arbitration. However, a third party who is merely defending proceedings brought against it cannot insist on arbitration, unless it is clear from the language of the contract that the third party's right to avail itself of a particular defence is subject to the dispute being brought in arbitration. On the other hand, s 8(2) of the UK CRTPA applies when the *procedural right* to arbitrate is itself conferred on the third party.[39] In such cases, the third party may choose whether or not to exercise this procedural right.

Since ss 9(1) and 9(2) of Singapore's CRPTA are in pari materia with ss 8(1) and 8(2) of the UK CRTPA, and given the Court of Appeal's endorsement of *Fortress* in *VKC*, it seems likely that the Singapore courts will adopt a similar approach as the English courts in this regard. Notably, the English Court's characterisation of the right to arbitrate as a procedural qualification or a procedural right echoes the Singapore High Court's observations in an earlier case that an arbitration agreement 'is entered into, not as one of the parties' substantive rights or obligations, but only to prescribe a procedural right and obligation which caters for the possibility of future disputes over their substantive rights and obligations'.[40] I pause to clarify,

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37 *Fortress Value Recovery Fund I LLC and others v Blue Skye Special Opportunities Fund LP and others* [2013] 1 WLR 3466.

38 *VKC* (n 35) [63], citing Toulson LJ's decision in *Fortress* (n 37) [42].

39 *VKC* (n 35) [69]–[70].

40 *Rals International (HC)* (n 27) [111]; see also *BXH v BXI* [2020] 1 SLR 1043 [75].

however, that the term 'procedural right' is used in this discussion simply to describe a right that pertains to the *procedure* of dispute resolution. It does not refer to the procedural–substantive dichotomy typically used for purposes of characterisation under conflict of laws rules. Thus, an arbitration agreement being described as giving rise to a 'procedural right' does not necessarily mean that the lex fori applies to govern disputes arising from that arbitration agreement.[41]

In the context of anti-suit injunctions, the analysis in *VKC* and *Fortress* suggests that the UK CRTPA (and by extension, Singapore's CRTPA) may assist a *non-party* in obtaining an anti-suit injunction based on an arbitration clause, but only if the non-party can show that it falls within ss 8(1) or 8(2) of the UK CRTPA, or ss 9(1) or 9(2) of the Singapore CRTPA. However, the UK CRTPA (and the Singapore CRTPA) will not assist a *contracting party* to obtain an anti-suit injunction against a non-party based on an arbitration clause, unless the non-party is seeking to enforce a substantive right which is subject to the procedural qualification to arbitrate, or has chosen to exercise its procedural right to arbitrate.

I use the facts of *Hai Jiang 1401* to illustrate this point. The case involved the vessel, *MV Seven Champion*, which had been bareboat chartered by Hai Jiang 1401 Pte Ltd (Hai Jiang) to Lewek Champion Shipping Pte Ltd (LCS). Among other things, LCS undertook to Hai Jiang to remove the existing crane on the vessel, strengthen the vessel's structure and install a new higher capacity crane. Hai Jiang, LCS, and a sub-bareboat charterer then entered into a general assignment agreement, under which LCS assigned to Hai Jiang various rights and interests. Subsequently, crane upgrading works were carried out on the vessel pursuant to a crane upgrade agreement (CUA) entered into between LCS and Singapore Technologies Marine Ltd (STM). The CUA provided that any dispute arising out of or in connection with the CUA was subject to arbitration in accordance with the rules of the Singapore Chamber of Maritime Arbitration. After LCS was wound up, STM commenced proceedings in Sharjah, United Arab Emirates, against Hai Jiang, seeking to recover the outstanding balance fees for works done to the vessel. Hai Jiang then sought an anti-suit injunction from the Singapore Court to restrain STM from continuing with the Sharjah proceedings. As the party *being* sued, it does

[41] See Koji Takahashi, 'Damages for Breach of a Choice-of-Court Agreement' (2008) Yearbook of Private International Law 57, 67–68.

not appear that Hai Jiang was seeking to enforce any substantive right that was subject to a procedural qualification to do so by arbitration. In other words, it seems unlikely that Hai Jiang would have been able to avail itself of s 9(1) of the Singapore CRTPA. However, given Loh J's finding (on a prima facie basis) that Hai Jiang had been assigned the rights and benefits of the arbitration clause contained in the CUA,[42] Hai Jiang might have been able to avail itself of the benefit of the arbitration clause pursuant to s 9(2) of the Singapore CRTPA, in addition to being able to enforce the clause as assignee. This may have formed a reasoned basis upon which Hai Jiang could have been granted a contractual anti-suit injunction against STM.

One might notice that this discussion regarding the CRTPA is reminiscent of the quandary faced in *Rals International* regarding whether an assignee can take the benefit of an arbitration agreement and/or be obliged to submit to arbitration disputes falling within the scope of the arbitration agreement. The underlying concern in the assignment cases and in the cases involving the CRTPA is ultimately that the law should *not* impose the pure burden to arbitrate onto non-contracting parties. Given this fundamental similarity, it may be possible to apply the approach under the CRTPA (which involves statutory assignment) to cases involving contractual assignment. Under the CRTPA, a 'burden' to arbitrate only arises: (a) as a procedural condition to the third party's exercise of a substantive right; or (b) when the third party has chosen to exercise the procedural right to arbitrate.[43] Reasoning by analogy, in a contractual assignment, a non-party as assignee will be entitled to and obliged to arbitrate in two situations. First, if the assignee is seeking to enforce an assigned substantive right which, as a matter of construction, is subject to a procedural qualification to do so by arbitration. This aligns with the principle of conditional benefit – the assignee must take the benefit of the substantive right along with the burden of arbitration. Second, if the procedural right to arbitrate has itself been assigned to the assignee,[44] and the assignee chooses to exercise that procedural right. Of course, we have to assume that the procedural right to arbitrate is assignable and that the effect of the procedural right covers arbitration with respect to non-parties. Outside of these two situations, an assignee can neither take the

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42 *Hai Jiang 1401* (n 11) [45].

43 *VKC* (n 35) [66]; see also UK Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No 242, 1996) para 14.15; Explanatory Notes to the UK CRTPA paras 34–35.

44 See, eg, in *Hai Jiang 1401* (n 11) [45], where the High Court found that the arbitration clause itself had prima facie been assigned.

benefit of the arbitration agreement, nor be obliged to bear its burden. Taking this reasoning one step further, the same principles arguably ought to apply equally to exclusive jurisdiction clauses.

3.4 Statutes conferring a direct right of action against a wrongdoer's insurer

Moving further down the spectrum, I turn now to the cases involving statutes that confer onto injured parties a direct right of action against the wrongdoer's insurer.[45] Examples of such cases include *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [46] and *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS* (*The Yusuf Cepnioglu*).[47] In these cases, foreign legislation conferred onto the injured party a direct right of action against the shipowner's insurer, in the light of the fact that the shipowner itself had become insolvent. After proceedings were commenced in a foreign court pursuant to such legislation, the shipowner's insurer sought an anti-suit injunction from the English Court against the injured party based on an arbitration clause contained in the terms of the P&I Club cover. One of the main reasons for doing so was to secure the application of a 'pay to be paid' clause in the terms of the P&I Club cover; such a clause would be unenforceable in foreign proceedings but enforceable in the contractual forum. In turn, this ensured the defeat of the injured party's claim as the insolvent shipowner had not expended any money to satisfy the injured party's claim. It is notable that these types of cases are likely to occur in the maritime context. The enactment of foreign legislation conferring direct rights of action onto injured parties is 'far from uncommon', and most if not all shipowners are members of a P&I Club, the rules of which usually contain an arbitration clause and a 'pay to be paid' clause.[48]

Three points are notable about this type of cases. First, the characterisation test that was applied to the injured party's claim. In *The Yusuf Cepnioglu*, the English Court of Appeal determined on the evidence that the relevant Turkish statute did not give to the Turkish

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45 See, eg, the Third Parties (Rights Against Insurers) Act (Cap 395, 1994 Rev Ed).

46 *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67.

47 *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS (The Yusuf Cepnioglu)* [2016] EWCA Civ 386.

48 Ibid [40]–[41]; it is noted that several jurisdictions including Spain, Turkey, Finland and several US states have domestic legislation conferring direct rights of action onto injured parties.

charterer an independent cause of action against the P&I Club. Instead, the direct-action statute allowed the charterer to enforce for its own benefit the contract between the insured (ie, the shipowner) and the P&I Club, in which case the claim being essentially contractual in nature was governed by English law and subject to London arbitration under the P&I Club rules.

Second, once the claim is characterised as contractual, the next query concerns the juridical basis for the court's grant of an anti-suit injunction in such cases, namely, whether it would be on the contractual basis as per the case of *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)*[49] or on the vexatious or oppressive ground? One has to remember that in *The Yusuf Cepnioglu*, the charterer was not a party to a contract with the P&I Club with its London arbitration clause. In that case, the charterer was pursuing a right given to it under Turkish law and there was nothing vexatious or oppressive about that. Longmore LJ held that *The Angelic Grace* applied for the reason that the anti-suit injunction was to protect the P&I Club's contractual right that the dispute be referred to arbitration, a contractual right which equity required the third party (ie, the charterer) to recognise.[50] Moore-Bick LJ used the language of vexation and oppression while analogising the case to the contractual situation. His Lordship accepted the reasoning in *The Jay Bola,* as well as the principle that a claimant who became entitled to enforce a contractual claim directly against an insurer must comply with an arbitration clause in the contract of insurance. He saw 'no distinction of principle' between the facts of *The Yusuf Cepnioglu* where the charterer obtained a statutory right to recover damages directly from an insurer and the position of a person who became entitled to enforce an obligation by virtue of an assignment or other transfer (as was the case in *The Jay Bola*).[51] The manner in which the charterer obtained the right to enforce for its own benefit was immaterial.

We know that the application of the aforementioned principle to a straightforward case involving the original parties to an agreement containing an arbitration or jurisdiction clause is not controversial. However, I would argue that the further one strays from the position

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49 *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87.

50 *The Yusuf Cepnioglu* (n 47) [35].

51 Ibid [51].

involving direct contracting parties, the more cautious the court should be in issuing contractual anti-suit injunctions.

Third, apart from the ambiguity surrounding the juridical basis for the grant of an anti-suit injunction in such cases, it is also notable that concerns regarding the 'conflict of conflicts' are more pertinent in this context. It is often the case in such situations that the rules on conflict of laws in the local forum will point in a diametrically different direction from the rules on conflict of laws in a foreign forum. For example, the foreign forum may characterise the claim differently from the local forum, as was the case in *The Yusuf Cepniolgu*. This may suggest that a more nuanced approach is required in such cases, even if one is to apply the strong cause test. In this regard, Raphael QC has suggested employing what he terms a 'system-transcendent' justification – a justification that is 'capable of being rationalised on a universalisable basis … so that another legal system could, in principle, be rationally persuaded to accept them as legitimate from an international perspective, even if its own rules differ'.[52]

3.5 Inconsistent contractual claims

Finally, I turn to the category of cases that is arguably the most dissimilar from the archetypal case involving direct contracting parties – cases involving inconsistent contractual claims. An example is the case of *Qingdao Huiquan Shipping Co v Shanghai Dong He Xin Industry Group Co Ltd.*[53] In that case, the shipowners agreed to carry a bulk cargo of nickel ore on board the vessel *Confidence Ocean* from Indonesia to China pursuant to a time charter. The charterers failed to pay hire and the shipowners exercised a lien over the cargo at the discharge port in China. The cargo receiver was a Chinese company called Emori (China) Co Ltd (Emori), from whom the shipowners sought to recover the sum owed. A settlement agreement was reached between Emori and the shipowners whereby Emori's agent, Shanghai Dong He Xin Industry Group Co Ltd (SDHX), would pay a lump sum representing the sums owed under the charter to the shipowners in return for the lifting of the lien over the cargo, notwithstanding the fact that SDHX was not a party to the agreement. It was also a term of the settlement agreement that the shipowners would pursue legal proceedings against the charterers to recover the

52 Raphael (n 1) 256.

53 *Qingdao Huiquan Shipping Co v Shanghai Dong He Xin Industry Group Co Ltd* [2019] 1 Lloyd's Rep 520.

sums due under the charter and then account to Emori for any sums recovered as a result, up to the amount received from SDHX. The settlement agreement was governed by English law and disputes were to be submitted to London arbitration. The shipowners sued the charterers, but no sums were recovered. Although SDHX paid the settlement sum, it alleged that there was an oral agreement with the shipowners in which it was agreed that the sum to be paid by SDHX was an advance for which it was entitled to a refund in any event. SDHX commenced legal proceedings in China to claim a refund of the sum paid under the settlement agreement and contended that because its claim was based on the alleged oral agreement, it was not bound by the English law and arbitration clause in the settlement agreement. In other words, an inconsistent contractual claim was run in China. After it became clear from the Chinese proceedings that SDHX's claim was premised upon the settlement agreement, the shipowners applied to the English Court for an interim anti-suit injunction restraining SDHX from pursuing the Chinese proceedings. The issue of whether there was an oral agreement with SDHX was immaterial in the circumstances. This was because the English Court held that the basis of SDHX's claim in the Chinese proceedings was to seek a refund of the sum paid under the settlement agreement. Furthermore, although SDHX was not a party to the settlement agreement, SDHX was bound by the English law and arbitration clause contained therein.

This decision is in line with the *Sea Premium* line of cases like *The Yusuf Cepnioglu* which support the principle that (a) where an agreement contains a forum clause for the resolution of disputes, and (b) a third party who brings proceedings based on the agreement itself is in contravention of the forum clause, then (c) this provides the English court with sufficient grounds to grant an anti-suit injunction, on the basis that the English court must protect the anti-suit applicant's contractual right to settle disputes in accordance with the agreement. In *Qingdao Huiquan*, since SDHX (a non-party) wished to base its claim on the settlement agreement, it could not act inconsistently with the English law and arbitration clause contained therein. The English court would step in to protect the anti-suit applicant's contractual right to settle disputes in accordance with the settlement agreement unless there was a strong reason not to do so. As I alluded to earlier, this has also been referred to as the 'quasi-contractual anti-suit injunction'.

Quasi-contractual anti-suit injunctions originated from a line of cases starting with *Sea Premium*, which was most recently endorsed in *Times Trading Corp v National Bank of Fujairah (Dubai Branch)* (*The Archagelos Gabriel*).[54] The facts of *The Archagelos Gabriel* are as follows. Times Trading Corp (Times) applied to the English Court for an interim injunction to restrain the National Bank of Fujairah (Dubai Branch) from suing or continuing with proceedings in Singapore. Times alleged that the proceedings in Singapore were in breach of the bank's obligation to arbitrate in London. The case concerned a cargo of coal carried on board the vessel, *Archagelos Gabriel*, that had been delivered without production of the bills of lading. The bills of lading were held by the bank. The vessel was owned by Rosalind Maritime LLC (Rosalind). The bills of lading incorporated an arbitration clause requiring disputes to be submitted to London arbitration. The proceedings in Singapore were issued after the limitation period of 12 months. However, the bank commenced London arbitration against Rosalind before the expiry of the time bar. Rosalind asserted the existence of a bareboat charter between Rosalind and Times, making Times the correct counterparty to the bank's claim. The bank joined Times to the Singapore proceedings and applied to add Times as respondent to the London arbitration. Times brought the application for an anti-suit injunction to prevent continuation of the Singapore proceedings against it, relying on the arbitration clause. Times argued the anti-suit injunction application on the basis that it was a *contractual* anti-suit injunction application. The bank submitted that there was an issue as to who was the carrier and in those circumstances the Court could not be satisfied that there was an arbitration clause between the bank and Times. The bank's argument took the arguments into cases on quasi-contractual anti-suit injunctions.

The decision in *The Archagelos Gabriel* is of particular interest because of its detailed analysis of the English cases on quasi-contractual anti-suit injunctions. As mentioned earlier in this paper, quasi-contractual anti-suit injunction cases in England have been divided into two categories: (a) the 'derived rights' category – where the existence of the contract is not in doubt, but the person who has brought proceedings which are sought to be enjoined is not a direct party to that contract (as considered in *The Jay Bola*); and (b) the 'inconsistent

[54] *Times Trading Corp v National Bank of Fujairah (Dubai Branch)* [2020] EWHC 1078 (Comm) (*The Archagelos Gabriel*); see also *Dell Emerging Markets (EMEA) Ltd and another v IB Maroc.com SA* [2017] EWHC 2397 (Comm).

contractual claims' category (the *Sea Premium* line of cases) – where the anti-suit applicant denies the very existence of the contract (or validity of the forum agreement) under which it is sued but the anti-suit respondent seeks to make a claim under the contract in violation of the forum clause which forms part of the contract.

Cockerill J in *The Archagelos Gabriel* opined that both categories of cases share a common underpinning, that is, the prevention of a party from taking the benefit of a substantive contract without also assuming the burden of the forum agreement contained therein. Whilst the facts of *The Archagelos Gabriel* did not fit into either category in that the existence of the direct contract between the two parties which contained the arbitration agreement was in dispute, Cockerill J was nevertheless satisfied that the case fell within the ambit of the common principle. As such, it should be treated 'as if' the injunction sought was contractual and *The Angelic Grace* was applied by analogy.

Commercial law practitioners in England have described the outcome of the decision in *The Archagelos Gabriel* as 'creative'. First, the judgment demonstrates reliance on broad underlying principle to extend by analogy the ambit of quasi-contractual anti-suit injunctions that do not fall within specific existing categories. Second, it shows that an anti-suit injunction may be granted even though the requirement of showing a forum agreement between the parties to the requisite standard could not be met. Enthused by the flexible and pragmatic approach the English court is willing to take in order to reach an outcome that is just in all the circumstances, including the imposition of conditions to the anti-suit injunction where appropriate, commercial law practitioners will have reason to advise a client to apply for an anti-suit injunction even though a client's case does not fit neatly within the existing two broad categories.

In *The Archagelos Gabriel*, the existence of a direct contract between the two parties was in dispute. Should the same approach be taken here in Singapore to grant 'quasi-contractual anti-suit injunctions' without proof to the requisite standard the existence or validity of an arbitration or jurisdiction clause? I would suggest with difficulty. In *Hai Jiang 1401,* as a pre-condition to an anti-suit injunction application on a contractual basis, Loh J required proof,

on a prima facie basis, of a valid arbitration agreement between the parties to the foreign proceedings.[55]

Further, the juridical basis for the English court's grant of quasi-contractual anti-suit injunctions is not entirely clear. Some cases have adopted a contractual analysis. In *Sea Premium*, Steel J opined that although 'the analogy [was] not complete', the case 'should be decided to similar effect' as the contractual cases because the claim was of a contractual nature under the charterparty. The anti-suit applicant was the new owner who claimed not to be party to the contract on which the charterer was suing. The former was allowed to enforce the arbitration clause in the charterparty because the charterer was seeking to bring a contractual claim under the charterparty. Similarly, in *Qingdao Huiquan*, Bryan J observed that an injunction was warranted because the anti-suit respondent was 'not entitled to found a claim on rights arising out of a contract without also being bound by the forum provisions of that contract'.[56]

In contrast, other cases have adopted the language of vexation or oppression. For example, in *Jewel Owner Ltd and another v Sagaan Developments Trading Ltd (The MD Gemini)*, Popplewell J opined that it would be oppressive and vexatious for a party to commence foreign proceedings to enforce its rights under a contract without giving effect to the forum clause which was part and parcel of that contract, notwithstanding that the party being sued maintains that it is not a party to that contract.[57] In that case, the anti-suit applicant was the shipowner who claimed not to be a party to the bunker contract on which the bunker suppliers were suing. In similar vein, Raphael QC opines that there are three possible bases for the grant of an anti-suit injunction in cases involving inconsistent contractual claims: estoppel, the existence of an equitable obligation, and vexation or oppression. Putting Raphael QC's observations in context, the reason why the forum clause can be enforced by injunction in *Sea Premium* and *The MD Gemini* is that it would be inequitable or oppressive

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55 *Hai Jiang 1401* (n 11) [34]; see also the recent decision in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158, where the Court of Appeal held that when a debtor raises a dispute which is the subject of an arbitration agreement to resist a winding-up application filed on the basis of an unsatisfied debt, the prima facie standard of review applies.

56 *Qingdao Huiquan* (n 53) [31].

57 *Jewel Owner Ltd and another v Sagaan Developments Trading Ltd (The MD Gemini)* [2012] 2 Lloyd's Rep 672 [15].

and vexatious for a party to a contract to seek to enforce a contractual claim arising out of that contract without respecting the forum clause within that contract. Raphael QC's views were endorsed in *Hai Jiang 1401*, where Loh J opined that 'all three bases [were] capable of grounding an [anti-suit injunction] depending on the particular facts before the court'.[58]

It is apparent from the above that cases involving inconsistent contractual claims are the least similar to the archetypal case involving direct contracting parties. One may question whether the contractual anti-suit injunction should apply to a non-party just because the non-party's claim is a contractual one which is somehow connected to the contract containing the forum agreement. The introduction of the so-called 'quasi-contractual anti-suit injunction' is telling. It is worth looking into how the language of equitable rights and obligations began to seep into the discussion on anti-suit injunctions and non-parties. In order to bridge the gap between contractual cases and quasi-contractual cases, the use of such language in the English court's reasoning has become quite prevalent and expansive, in that anti-suit injunctions have been granted on so-called quasi-contractual grounds in cases where non-parties to forum agreements can sue those who themselves are even non-parties to the forum agreements. I have earlier referred to the equitable principle identified by Steven Gee QC in broad terms. The notion of an equitable right not to be sued in a foreign forum was expressly referred to in *British Airways Board v Laker Airways Ltd*.[59] In that case, Lord Diplock referred to the anti-suit applicant being entitled under English law to a legal or equitable right not to be sued in a foreign court. In explaining the legal right not to be sued, Lord Diplock provided as an example the situation where there is an exclusive jurisdiction clause in a contract. As for the equitable right not to be sued, Lord Diplock referred to 'conduct that is 'unconscionable' in the eyes of English law'.[60] In other words, Lord Diplock was *not* referring to equitable rights in the sense that they are used today (ie, rights that arise in the fiduciary context for breach of trust). Similarly, although Lord Scarman referred to 'an equitable right of the [anti-suit] applicant', he described this as 'an entitlement to be protected from a foreign suit the bringing of which … is in the circumstances unconscionable and so unjust'.[61] In other words, the term 'equitable right' was used in *British Airways* to describe the anti-suit applicant's

58 *Hai Jiang 1401* (n 11) [83].
59 *British Airways Board v Laker Airways Ltd and others* [1985] AC 58.
60 Ibid 81.
61 Ibid 95.

entitlement to an anti-suit injunction on the basis that there was something affecting the conscience of the anti-suit respondent.

Along the way, however, it seems that the terms 'equitable right' and 'equitable obligation' and the infringement of the anti-suit applicant's equitable right became the requisite 'equity' that affected the conscience of the anti-suit respondent. The jurisprudence has somehow veered to apply to anti-suit injunctions geared towards the protection of forum agreements in situations involving non-parties. The importation of such language to the context of the *contractual* anti-suit injunction has given rise to the hybrid quasi-contractual anti-suit injunction, which applies contractual principles *by analogy* on the basis that it would be inequitable not to do so. I suggest that this grey area between the contractual basis and the vexatious or oppressive basis ought to be clarified. I note that in *Hai Jiang 1401*, in making reference to principles governing anti-suit injunctions in general, Loh J appears to have regarded vexation or oppression and breach of contract as simply factors going towards the court's discretion to grant an anti-suit injunction.[62] However, in light of the Court of Appeal's clarification in *VKC* that these are separate grounds,[63] it may be apposite to clarify exactly which category of anti-suit injunctions the inconsistent contractual claims cases fall under. Given the above analysis, the vexatious or oppressive basis may be more appropriate.

To round up this part of the discussion, I note that the quasi-contractual anti-suit injunction is a concept of considerable elasticity. To play out litigation tactics, claimants will try to stretch its boundaries, as illustrated by the facts of the English case of *Clearlake Shipping Pte Ltd v Xiang Da Marine Pte Ltd*.[64] This case involved a voyage charter and a sub-voyage charter, both of which contained an exclusive English jurisdiction clause. The cargo receiver sued the shipowner in Singapore for misrepresentation arising from certain switch bills of lading. The shipowner then commenced third party proceedings against the voyage charterer and the sub-voyage charterer for various claims, including breach of contract and tortious misrepresentation. In response, the voyage charterer and the sub-voyage charterer applied to the English Court for an anti-suit injunction. At first instance, the anti-suit injunctions were granted – the anti-suit injunction sought by the voyage charterer was granted on the

62 *Hai Jiang 1401* (n 11) [83], [21].
63 *VKC* (n 35) [16]–[18].
64 *Clearlake Shipping Pte Ltd and another v Xiang Da Marine Pte Ltd* [2019] EWHC 2284 (Comm).

contractual basis, while the anti-suit injunction sought by the sub-voyage charterer was granted on the basis of the *Sea Premium* line of cases. Subsequently, the shipowner amended its pleadings in the Singapore proceedings so that its claim against the sub-voyage charterer was solely brought in tort and all contractual claims were abandoned. On appeal, the sub-voyage charterer no longer relied upon the *Sea Premium* line of cases, so that the anti-suit injunction was ultimately granted solely on the vexatious or oppressive basis.[65]

However, *if* the sub-voyage charterer had not abandoned its reliance on *Sea Premium*, the question arises as to whether it would have been justifiable for the Court to initially grant a *contractual* anti-suit injunction, or even a *quasi-contractual* anti-suit injunction on the *Sea Premium* jurisdiction, notwithstanding the absence of any contractual claim. The answer must surely be no. Ultimately, this goes to show that while courts should develop the contractual anti-suit injunction to serve the ends of justice, they must also be wary of unduly expanding the contractual anti-suit injunction beyond the ambit of principle and common sense.

4 Damages for breach of forum agreements

I turn now to the second topic, which is damages for breach of a forum agreement. This topic is not exactly controversial on a first principles basis in a situation where there is a breach of a contractual obligation and a claim for damages is made, although there remains some residual concern regarding judicial comity and the quantification of damages. In contrast to this common law claim for damages, there have also been equitable claims for equitable compensation, which raise an entirely new set of questions and concerns. I will endeavour to find and explain the premise and perimeters of the latter mode of obtaining monetary compensation.

The starting point in the discussion is the common law claim for damages. The main issue in this regard is whether a claimant may recover damages for breach of a forum agreement, such breach having been occasioned by the commencement of proceedings in a non-contractual forum. If so, then a damages claim could potentially supplement or even substitute the anti-suit injunction as another means of giving effect to a forum agreement.

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65 Ibid [25], [34].

Such damages claims can arise in a myriad of circumstances, although these may generally be divided into two categories.[66] First, cases where the non-contractual forum finds that the action has been brought in breach of a forum agreement and accordingly refuses to hear the matter by either dismissing or staying the proceedings. In these cases, the damages sought will most likely consist only of the costs of resisting the proceedings in the non-contractual forum. Second, cases where, notwithstanding the forum agreement, the non-contractual forum decides to hear the case on the merits, and subsequently makes a decision on the substantive claim and possibly a costs order. In these cases, the items of claim for which damages may be sought are more complicated. If the non-contractual forum rules in favour of the party in breach of the forum agreement, the damages sought may not be limited simply to the costs incurred in resisting or defending the proceedings; they may extend even to the amount of substantive liability that has been imposed on the innocent party. I note that while it is possible that damages claims may be brought in that *same non-contractual forum*,[67] we are concerned here with damages claims that are brought in a *different forum*, specifically, the *contractual forum*.

Above all, it is important to bear in mind the principled distinction to be drawn between (a) a claim for damages where the breach of a forum agreement which forms the basis of an anti-suit injunction application relates to a direct contract between the two parties in dispute; and (b) a claim for damages where the grant of the 'quasi-contractual anti-suit injunction' is without proof to the requisite standard of the existence or validity of the forum agreement (especially the category of cases involving inconsistent contractual claims). I would suggest that the case for damages is weaker in the latter. As we shall see, the implications that arise from allowing damages claims or equitable compensation in quasi-contractual cases are illustrated by the English High Court decision in *Argos Pereira Espana SL and another v Athenian Marine Ltd*.[68] With the exception of *Argos*, the authorities mentioned below are all straightforward cases involving direct contracting parties or parties with derived rights, such as subrogees.

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66 Takahashi (n 41) 60–62, 85; see Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008) para 8.15, where the author proposes six different ways in which a non-contractual forum could deal with a claim brought allegedly in breach of a forum agreement.

67 See Takahashi (n 41) 71–74 for a discussion regarding the situation where the damages claim is brought in the same forum.

68 *Argos Pereira Espana SL and another v Athenian Marine Ltd* [2021] EWHC 544 (Comm).

4.1 The English authorities

I begin with an overview of the existing English authorities. Under English law, it is well-established that a claimant may recover damages for a breach of a forum agreement. Such damages may include the costs of defending the foreign proceedings commenced in breach of the forum agreement. In some cases, damages may extend even to the substantive liability that has been or may be imposed by the foreign court.

Authority for this principle can be traced back to the English Court of Appeal decision in *Union Discount Co Ltd v Zoller*,[69] which involved a contract containing an exclusive English jurisdiction clause. In breach of this exclusive jurisdiction clause, one party commenced proceedings in New York, which were eventually struck out. However, no application for costs was made as such costs were not recoverable under New York law. Instead, the successful party sought to recover its costs as damages for breach of contract in English proceedings. Although the claim was struck out at first instance, this was reversed on appeal. In allowing the appeal, the Court highlighted several 'unusual features' of the case, including that the rules of the foreign forum only permitted recovery of costs in exceptional circumstances, and that the foreign court had made no adjudication as to costs. The Court further opined that there were no policy reasons preventing recovery, in particular, no concerns arising in relation to comity or res judicata. Nevertheless, the Court recognised that this was a 'field not much explored in recent litigation', and that there may be more 'doubtful cases', such as where the costs rules in the foreign forum were similar to those under English law.[70]

Around the same time that *Union Discount* was decided, the House of Lords in *Donohue v Armco Inc*[71] made several obiter remarks that supported the approach in *Union Discount*. In *Donohue*, the House of Lords was faced with an application for an anti-suit injunction in respect of proceedings brought in New York contrary to an English exclusive jurisdiction clause. It was argued that if the anti-suit applicant subsequently incurred a greater liability or was put to a greater expense in New York than in London, then he might have a claim in damages for breach of the exclusive jurisdiction clause. Lord Scott agreed that there was 'no

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69 *Union Discount Co Ltd v Zoller and others (Union Cal Ltd, Part 20 defendant)* [2002] 1 WLR 1517.

70 Ibid [18], [23], [26], [35]–[38].

71 *Donohue v Armco Inc and others* [2002] 1 Lloyd's Rep 425.

reason in principle why [the anti-suit applicant] should not recover … such part of those costs as he incurred in his successful defence of the claims that fall within that clause'.[72] Lord Hobhouse took a slightly more qualified approach, observing that the position was 'complex' but if the anti-suit applicant could show that he had 'suffered loss as a result of the breach of the clause, the ordinary remedy in damages for breach of contract would be open to him'.[73]

Since then, *Union Discount* has been robustly applied and developed in subsequent cases. In the words of Professor Adrian Briggs QC, the proposition in *Union Discount* went 'from novelty to banality in a very short time'.[74] In *A/S D/S Svenborg D/S af 1912 A/S Bodies Corporate trading in partnership as 'Maersk Sealand' v Akar*, the innocent party was awarded not only the costs and expenses it had incurred in proceedings brought in the non-contractual forum, but also an indemnity in respect of *future* costs and expenses. In his decision, Julian Flaux QC (sitting as a Deputy High Court judge) read *Union Discount* broadly, opining that its application was not 'dependent upon the claimant showing that the relevant expenses [were] irrecoverable in the foreign proceedings'.[75] Similarly, in *National Westminster Bank plc v Rabobank Nederland*, Colman J awarded the innocent party costs as damages for breach of an anti-claim clause, notwithstanding that the foreign court had already made a limited costs award, and might possibly make a costs order in the future.[76] In *Compania Sud Americana De Vapores SA v Hin-Pro International Logistics Ltd*,[77] Cooke J awarded the innocent party damages not only for the costs of defending the foreign proceedings, but also for any *substantive liability* imposed by the foreign court. This was in relation to sums that had already been paid as well as sums that might be incurred in the future. In quantifying the amount of damages, Cooke J held that the Court '[would] not engage in consideration of what hypothetically might happen if the claims had been brought [in England]', but would simply award the sums that the innocent party had been found liable for in the non-contractual forum.[78]

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72 Ibid [75].
73 Ibid [48].
74 Briggs (n 66) para 8.14.
75 *A/S D/S Svenborg D/S af 1912 A/S Bodies Corporate trading in partnership as 'Maersk Sealand' v Akar and others* [2003] EWHC 797 (Comm) [37].
76 *National Westminster Bank plc v Rabobank Nederland* [2007] EWHC 1056 (Comm) [439]–[440].
77 *Compania Sud Americana De Vapores SA v Hin-Pro International Logistics Ltd* [2015] 1 Lloyd's Rep 301.
78 Ibid [37]–[39]. See also *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm).

4.2 The position in Singapore

The question for consideration is whether the Singapore courts should follow in the footsteps of the English courts and adopt a liberal approach to damages claims for breach of forum agreements. Although there are some obiter remarks by the High Court in *Then Khek Koon v Arjun Permanand Samtani*[79] which ostensibly endorse the approach taken in *Union Discount* and *Rabobank*, this was in the context of analysing the rule precluding recovery of unrecovered costs. The High Court did not specifically consider the question whether the breach of a forum agreement could sound in damages. As it stands, therefore, it remains an open question whether a claim for damages for breach of a forum agreement is permissible under Singapore law.

In considering this question, I note that *Union Discount* was relatively restricted in its finding that damages claims could be brought for breach of forum agreements. As I have mentioned, the English Court of Appeal was careful to emphasise the 'unusual features' of that case.[80] Furthermore, *Union Discount* involved an appeal against summary judgment, where the lower Court had summarily disallowed the costs claim. Therefore, the appellant needed only to show that its claim for costs as damages was not unarguable.[81] Similarly, the observations by the House of Lords in *Donohue* were made in circumstances where the counsel had conceded the point.[82] However, it appears that subsequent English cases have not paid much attention to these aspects of *Union Discount* and *Donohue*. Instead, they have taken a robust approach to applying and extending *Union Discount*, without closely examining its underlying reasoning. I therefore propose to take a closer look at the underlying principles and legal issues surrounding the question whether damages may be awarded for breach of a forum agreement.

4.2.1 Preliminary issue: the governing law

A preliminary issue that arises is which law governs the forum agreement. In the context of a claim for breach of contract (possibly accompanying an anti-suit injunction application), the

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79 *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* [2014] 1 SLR 245 [235]–[237], [244].

80 *Union Discount* (n 69) [18].

81 Daniel Tan, 'Damages for Breach of Jurisdiction Clauses' (2002) 14 SAcLJ 342 para 7.

82 *Donohue* (n 71) [48].

governing law of the forum agreement is relevant as it determines, inter alia, the question of whether the damages remedy is available at all for the breach of the forum agreement or whether particular heads of damage are claimable.[83]

In relation to arbitration clauses specifically, this raises the interesting question of how the governing law of the arbitration agreement is to be identified. In Singapore, several principles are well-established.[84] To determine the governing law of the arbitration agreement, the court will apply a three-stage test. First, the court will look at whether the parties have made an *express* choice as to the governing law. If not, the court will consider whether the parties have made an *implied* choice. Finally, in the absence of any express or implied choice, the governing law is that with which the arbitration agreement has the closest and most real connection. At the second stage, the *expressly* chosen law of the *underlying* contract is a strong indicator of the parties' *implied* choice of law for the *arbitration agreement*. This is even if the parties have chosen a seat with a different law.

The question that merits further consideration pertains to the third stage of the three-stage test: where there is no express or implied choice of law, which has the closest and most real connection to the arbitration agreement – the law of the underlying contract or the law of the seat? This issue was recently considered in *Enka Insaat ve Sanayi AS v OOO 'Insurance Company Chubb'*,[85] where the majority of the United Kingdom Supreme Court preferred the view that the law of the seat was the most closely connected to the arbitration agreement. This issue has yet to be determined in Singapore, as all of the cases so far have been decided either on the first or second stages, so that there was no need to resort to the third stage. While there are some obiter remarks by the High Court in *BNA v BNB* which support the approach taken by the majority in *Enka*,[86] it bears note that *BNA* was reversed on appeal, although the Court of Appeal did not comment on the High Court's analysis of the third stage

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83 Elan Krishna and Yi-Jun Kang, 'Damages for Breach of an Arbitration Agreement: An Available Remedy under Singapore Law?' *Singapore Academy of Law Journal* (published on e-First 11 May 2021) para 25; see also *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367 [16], [22] and [24], where the Court of Appeal referred to the House of Lords decision in *Harding v Wealands* [2007] 2 AC 1 and, in the context of a tortious claim, left as an open question whether the lex causae applies also to the quantification of damages.

84 See *BCY v BCZ* [2017] 3 SLR 357 [40].

85 *Enka Insaat ve Sanayi AS v OOO 'Insurance Company Chubb'* [2020] UKSC 38.

86 *BNA v BNB and another* [2019] SGHC 142 [119].

of the test.[87] There is also much force in the dissenting judgments of the minority judges in *Enka*. One might question why there should be such a great difference in the default position that applies at the second and third stages of the test.[88] Nevertheless, this is by no means a straightforward inquiry and, as the decision in *Enka* shows, there is room for reasonable disagreement. It therefore remains to be seen which approach the Singapore court will adopt.

4.2.2 The legal basis for the court's power to award damages

I turn now to the analysis of damages claims proper. Assuming Singapore law applies, one must first identify the legal basis for the court's power to award damages for breach of a forum agreement. As one legal commentator observes, '[r]emedies are legal responses to wrongs' and it is necessary to ascertain the nature of the wrong before one can determine what remedies are triggered by the same.[89]

I note that some authors have suggested that a claim for damages may be sought on the basis of a *tortious* or *non-contractual* wrong.[90] Although this paper focuses on contractual wrongs, I will briefly allude to some examples to illustrate how a tortious wrong for inducing breach of a forum agreement can arise. Two English cases come to mind: *Kallang Shipping SA Panama v Axa Assurances Senegal (The Kallang (No 2))*[91] and *Sotrade Denizcilik Sanayi ve Ticaret SA v Amadou Lo* (*The Duden*).[92] In both cases, efforts were made by cargo insurers to intervene actively to ensure that cargo claims were heard in the cargo owners' jurisdiction. Both cases arose separately, but on rather similar facts. The vessels each carried a cargo of rice to Dakar, pursuant to the terms of bills of lading which incorporated London arbitration clauses. Disputes arose with regard to the quantity of rice discharged by the vessels at Dakar and the cargo receivers demanded security for their claims for short-landed cargo. In both cases, the policy under which the cargo was insured provided for the cargo insurer, Axa Assurances Senegal (Axa Senegal), to take the place of the assured to take 'mitigating measures to

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87 *BNA v BNB and another* [2020] 1 SLR 456 [62]–[63], [94].

88 See *BCY* (n 84) [61]; *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102 [26].

89 Daniel Tan, 'Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court's Remedial Powers' (2007) 47 Va J Intl 545, 549.

90 Briggs (n 66) para 8.52.

91 *Kallang Shipping SA Panama v Axa Assurances Senegal and another (The Kallang (No 2))* [2009] 1 Lloyd's Rep 124.

92 *Sotrade Denizcilik Sanayi ve Ticaret SA v Amadou Lo and others (The Duden)* [2009] 1 Lloyd's Rep 145.

prevent damage or losses'. Letters of undertaking were offered by the vessels' P&I Club to secure the release of the vessels. Axa Senegal refused to accept the P&I Club's letters of undertaking that were answerable to English law and London arbitration. The cargo receivers then applied to arrest the vessels at Dakar. In accordance with local procedures, a *huissier* attended on board the vessels and demanded payment of the cargo receivers' claim plus a figure for interest and costs, failing which the vessels would be arrested. Payments were not made, and the vessels were arrested. The owners of the vessels commenced proceedings in London claiming that the arrest in Dakar was a breach of the governing law and jurisdiction clauses in the relevant bills of lading, and further claimed that the breach was induced or procured by Axa Senegal against whom they claimed damages. In addition, the owners alleged that Axa Senegal interfered with their business relations with the cargo receivers and that both defendants conspired to do those things.

The English Court delivered judgments on the two cases simultaneously. It held that Axa Senegal was the driving force behind the efforts to displace London arbitration. The main reason for doing so was that Axa Senegal believed that having claims determined in Senegal where the Hamburg Rules applied would be more favourable to cargo interests than if the claims were decided in London arbitration under the Hague-Visby Rules (which were incorporated in the bills of lading). The English Court found that Axa Senegal's conduct was such as to amount to the tort of wrongful inducement or procurement of a breach of contract (ie, the London arbitration clause), for which it was liable to the owners for damages. These cases make clear that third party insurers or assignees who receive the benefit of a contract containing an arbitration or jurisdiction clause must commence claims in accordance with the arbitration or jurisdiction clause in that contract.

Apart from tortious wrongs, assertions of *equitable* wrongs have also formed the basis for obtaining monetary relief. An interesting case in this regard is *Argos*, a 2021 case in which equitable compensation was awarded for the breach of what was termed an 'equitable obligation' to sue only in a particular forum. In this case, a dispute arose after defects were found in a shipment of frozen fish and squid on board the vessel *Frio Dolphin*. By virtue of subrogation, the consignee's insurer brought proceedings in the Spanish Court against the owner's manager and charterer of the *Frio Dolphin*, Lavinia Corp (Lavinia), under the mistaken

belief that Lavinia was the carrier. Lavinia successfully challenged jurisdiction in Spain and was awarded part of its costs. The owner of the *Frio Dolphin* subsequently pursued, by way of arbitration, a claim to recover the irrecoverable costs paid by Lavinia. This was allowed by the tribunal, who held that by suing Lavinia, the insurer was in breach of an equitable obligation equivalent to contract. In other words, the insurer owed an equitable obligation to the owner not to sue the owner otherwise than in accordance with the arbitration clause, and *also* not to sue a third party (ie, Lavinia) in respect of a dispute falling within the arbitration clause. This was referred to as an 'extended' derived rights obligation.[93] On appeal to the English High Court, this finding by the tribunal could not be challenged. Instead, the English High Court gave permission for only two questions to be considered: (a) whether equitable compensation was available in respect of the breach of such an equitable obligation; and (b) whether the owner could rely on the principle of transferred loss to claim such equitable compensation in respect of legal costs incurred by a third party (ie, Lavinia), when the owner itself did not suffer any such loss.[94] Sir Michael Burton GBE (sitting as a Judge of the High Court) answered both questions in the affirmative, upholding the tribunal's decision. I shall discuss his decision in greater detail later. Suffice to say, *Argos* suggests that the English courts are likely to be receptive to the notion that equitable compensation may be awarded in response to a breach of an equitable obligation not to sue otherwise than in accordance with a forum agreement contained in a contract.

I now return to the discussion on claims that are premised on *contractual* wrongs. Primarily, the contractual wrongs are between direct parties to the forum agreement as well as third party insurers as subrogees who receive the benefit of a contract containing a forum clause. The starting point is that forum agreements are contractual in nature – they embody a mutual promise by the parties to sue each other only in the agreed forum.[95] It follows that, applying ordinary contractual principles, damages should be available for the breach of a forum agreement.[96] Indeed, the traditional rationale for the grant of a contractual anti-suit injunction is that damages would be insufficient to vindicate the breach of a forum

93 *Argos* (n 68) [9], [12]–[13].

94 Ibid [4].

95 Albert Dinelli, 'The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract Meets Private International Law' (2015) 38(3) Melb Univ Law Rev 1023, 1025; Takahashi (n 41) 69–70. See also Tan (n 89) 600–601 and 549–550 for the US position in relation to arbitration agreements.

96 Tan (n 89) 551, 597, 603; Dinelli (n 95) 1032; Krishna and Kang (n 83) para 32.

agreement.[97] This presupposes that damages are an available remedy for breach of forum agreements, although the court does not typically examine the potential for a damages remedy before deciding whether to grant an anti-suit injunction.[98] It should also be noted that, while a court will not award specific performance via an injunction when damages would be adequate, the reverse is not necessarily true. In other words, it is not the case that damages should not be awarded when an injunction is available and ordered. On this basis, the court may award common law damages *as well as* grant an injunction when damages alone would not be an adequate remedy.[99]

Furthermore, according to the Supreme Court of Judicature Act, the court has the '[p]ower to grant all reliefs and remedies at law and in equity, including damages in addition to, or in substitution for, an injunction'.[100] As such, it is arguable that in a proper case when it would be equitable to grant an anti-suit injunction, the court has a corollary power to supplement or substitute the injunction by an award of equitable damages if the injunction is inappropriate or ineffectual.[101] For these reasons, it would appear that the court does have the power at common law and/or in equity to award damages *in addition* to or *in lieu* of an anti-suit injunction.

4.2.3 Whether the court should award damages

On this view, the next question is whether the court *should* exercise its power to award damages in addition to or in lieu of an anti-suit injunction. There are several reasons to support allowing the damages remedy. I note that these reasons may apply even to monetary remedies founded upon tortious or equitable wrongs, although my discussion primarily adopts a contractual perspective.

First, allowing the damages remedy is in line with the general approach in favour of upholding the parties' agreement. In Singapore, the courts have frequently emphasised 'that the

97 *The Angelic Grace* (n 49) 96; Tan (n 81) para 33.

98 Daniel Tan, 'Damages for Breach of Forum Selection Clauses, Principled Remedies, and Control of International Civil Litigation' (2005) 40 Tex Int'l LJ 623, 646–647; Takahashi (n 41) 70; *MPVF Lexington Partners, LLC v W/P/V/C, LLC* 148 F Supp 3d 1169 [12].

99 *Versatile Housewares & Gardening Systems, Inc v Thill Logistics, Inc* 819 F Supp 2d 230 [8].

100 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), First Schedule, para 14.

101 Tan (n 81) para 34; Tan (n 89) 603; Dinelli (n 95) 1032–1033; Tan (n 98) 646.

primacy of party autonomy requires them to give effect to the parties' contractual choice as to the manner of dispute resolution unless it offends the law'.[102] If a party is aware of the financial consequences of proceedings in a non-contractual forum, it is less likely that such a course of action will be adopted. In this way, the damages remedy could serve as a powerful deterrent against forum shopping. In turn, this may give the parties more predictability in their commercial affairs.[103] As one US Court has observed, the damages remedy is often sought when other remedies, such as a stay of proceedings or an anti-suit injunction, are unavailable or ineffective. If no damages remedy existed in these circumstances, there would be nothing to stop parties from violating the forum agreement with impunity.[104]

Second, the damages remedy may offer the court greater remedial flexibility, in two ways. First, it broadens the range of remedial options that the court can have resort to when faced with a breach of a forum agreement, so that it can 'fashion appropriate relief to better enforce [forum] agreements'.[105] Second, the damages remedy itself is particularly flexible. Based on the circumstances of each case, the quantum of damages can be adjusted having regard to the recoverable heads of damage and the appropriate measure of damages. This 'gives the courts flexibility to better effect fact-sensitive remedies'.[106] In contrast, other remedies such as a stay of proceedings and the anti-suit injunction are relatively blunt tools in so far as they possess an 'all-or-nothing' nature.[107]

Third, the damages remedy can enable the court to balance between the private interest of a party in ensuring that a forum agreement is upheld, and the public interest in ensuring that disputes are channelled to the appropriate fora. For instance, despite being the agreed forum, the court may find that circumstances are such that it would be more appropriate for the dispute to be heard in another forum. Accordingly, it may order a stay of its proceedings and/or decline to grant an anti-suit injunction. However, in order to vindicate the party's private interest in ensuring that the forum agreement is upheld, the court may award

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102 Krishna and Kang (n 83) para 76; *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 [28].

103 Tan (n 89) 604–605; Dinelli (n 95) 1033; Tan (n 98) 641–642; Richard Frimpong Oppong and Shannon Kathleen Clark Gibbs, 'Damages for Breach and Interpretation of Jurisdiction Agreements in Common Law Canada' (2017) 95(2) Can B Rev 383, 391.

104 *MPVF* (n 98) [12].

105 Tan (n 89) 611.

106 Ibid 604.

107 Tan (n 98) 645; Oppong and Clark Gibbs (n 103) 391.

damages for any additional costs which the party has been put to in relying on the forum agreement.[108] Indeed, this was the situation in *Donohue* – the House of Lords considered that notwithstanding the exclusive English jurisdiction clause, the ends of justice would be better served by a single composite trial in New York. This constituted strong reason not to give effect to the exclusive jurisdiction clause. Nevertheless, the House of Lords left open the possibility of a claim for damages should the innocent party incur a greater liability or be put to a greater expense in New York than would have been the case in London.[109]

Finally, the damages remedy can fill in the gaps occasioned by the limitations of the anti-suit injunction. As I will discuss in greater detail below, not only may the anti-suit injunction be ignored by litigants and foreign courts, it is also limited in its reach as third party courts are unlikely to enforce it. In contrast, the damages remedy gives rise to a monetary judgment, which is much easier to enforce in foreign jurisdictions. In light of these limitations of the anti-suit injunction, employing the damages remedy in tandem with the anti-suit injunction may prove more effective in dealing with breaches of forum agreements.[110]

On the other hand, the strongest argument against allowing the damages remedy is that it could potentially have drastic effects on any substantive liability that has been imposed by a foreign court, which in turn raises concerns regarding judicial comity.[111] As I have mentioned, the English cases contemplate that damages may cover even the substantive liability incurred by the innocent party in foreign proceedings. This would effectively 'unwind' the decision of the foreign court and render the foreign judgment nugatory. While the same argument that is raised in the context of anti-suit injunctions may be raised here – that the damages award is a response to a party's conduct rather than a criticism of the foreign court[112] – the truth is that, as with the anti-suit injunction, the damages award would constitute indirect interference with the decision of the foreign court. Furthermore, the damages award may be considered more egregious than an anti-suit injunction in so far as it 'undo[es] the effect of the foreign decisions after a lot of time, costs and adrenalin have been spent to obtain

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108 Dinelli (n 95) 1033; Edwin Peel, 'Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws' [1998] LMCLQ 182, 225–226; Tan (n 98) 649–650; Takahashi (n 41) 83.

109 *Donohue* (n 71) [36], [48].

110 Tan (n 98) 644–645; Oppong and Clark Gibbs (n 103) 391; Takahashi (n 41) 83.

111 Tan (n 89) 604–605; Dinelli (n 95) 1033.

112 Briggs (n 66) para 8.58.

them'.[113] In that sense, it is more akin to the anti-enforcement injunction, with all of its attendant comity concerns (see part 5.1 below). It is therefore unsurprising that allowing a damages award in such circumstances has been described as a 'grave infringement of comity'.[114]

However, as I have mentioned, there are many different 'permutations' of factual circumstances that can give rise to a damages claim. On one hand, there are cases such as *Union Discount* where the foreign court struck out the proceedings and could not have awarded any costs. On the other hand, there are cases such as *Hin-Pro* where the foreign court proceeded to judgment and damages were sought for the substantive liability thereby imposed. It is thus clear that comity concerns are not the same throughout all the cases. Instead, there are 'degree[s] of implications for international comity',[115] depending on the factual matrix of the case.

4.2.4 Developing principled limits to the damages remedy

In these circumstances, rather than shutting out the possibility of a damages remedy altogether, the court will need to work out principled limits to the remedy.[116] In my view, the starting point is that a forum agreement is *procedural* in nature, not substantive. I have alluded to this point earlier in the discussion on anti-suit injunctions and non-parties. Again, I reiterate that by referring to a forum agreement as being procedural in nature, I mean that a forum agreement gives rise to rights and obligations pertaining to the *procedure* of dispute resolution (see part 3.3 above).[117] Although the cases and the commentaries have not explored this point in much detail, it is apposite in light of the recent decisions in *VKC* and *Fortress*. On this basis, I turn to discuss three possible ways in which the damages remedy can be limited in a principled and coherent manner.

First, the view that a forum agreement confers a procedural right may affect how causation principles are applied to a claim for damages. It is trite that when determining *factual*

113 Takahashi (n 41) 82.
114 Tan (n 81) 46; Tan (n 98) 657; Takahashi (n 41) 80.
115 Takahashi (n 41) 78.
116 Tan (n 81) para 48; Tan (n 89) 605–606.
117 See Takahashi (n 41) 69 for examples of other 'procedural contracts', including choice of law agreements, antisuit agreements, agreements to discontinue an action, etc.

causation, the court will apply the 'but for' test,[118] which would presumably be satisfied in most cases involving the commencement of proceedings in a non-contractual forum in breach of a forum agreement.[119] However, the 'but for' test 'is a necessary but not a sufficient condition of legal responsibility'. In addition to *factual* causation, the claimant must also show *legal* causation.[120] This is where the inquiry becomes slightly less straightforward. In relation to legal causation, it has been observed that 'the courts have avoided laying down any formal tests for causation in contract; instead, they have relied on common sense as a guide to decide whether a breach of contract is a sufficiently substantial cause of the claimant's loss'.[121] In the present case, on the view that a forum agreement is procedural in nature, while its breach may reasonably be said to have caused a party to incur the *costs* of resisting or defending proceedings in a non-contractual forum, common sense dictates that the same cannot be said as regards the incurring of *substantive liability*. In this regard, Glidewell LJ's observation in *Galoo Ltd v Bright Grahame Murray* is apposite: 'it is necessary to distinguish between a breach of contract which causes a loss to the plaintiff and one which merely gives the opportunity for him to sustain the loss'.[122] The bringing of proceedings in breach of a forum agreement merely provides the *opportunity* for the innocent party to incur substantive liability; it should not be regarded as the *effective cause* of such liability. Accordingly, substantive liability incurred in the non-contractual forum should not form the basis for the quantification of damages. This would go some way towards assuaging the concern that an award of damages for breach of a forum agreement would be overly expansive and an infringement of comity. For completeness, I note that this argument from causation is made from a contractual perspective. While the approach to causation in tort is generally the same as in contract,[123] the approach to causation for equitable compensation is slightly different.[124]

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118 *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 [64].

119 Taking the example where a party sues in a non-contractual forum and succeeds on its claim – if the breaching party had not brought proceedings in the non-contractual forum, the innocent party would not have incurred costs in defending these proceedings, and would not have had substantive liability imposed on it by the non-contractual forum. In other words, the 'but for' test is satisfied.

120 *Sunny Metal* (n 118) [53], [64].

121 Ibid [62].

122 *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 [74].

123 *Sunny Metal* (n 118) [63].

124 *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] 1 SLR 1199 [254].

Second, the damages remedy may also be limited by way of the measure of damages used by the court to quantify the loss suffered by the innocent party. In most cases, it would likely be difficult to award damages based on the expectation measure. This would entail a comparison of what occurred (or might occur) in the foreign jurisdiction, and what would have occurred if the action had been brought in the agreed forum.[125] However, this is a highly speculative and time-consuming exercise, not to mention that it may often be challenging for a court to apply foreign procedural and substantives rules in an attempt to pre-empt the foreign court's decision.[126] In these circumstances, the reliance measure may be more appropriate. In other words, the innocent party would be awarded damages for the costs that it had incurred in relying on the forum agreement. This may encompass the costs of staying the foreign proceedings or seeking an anti-suit injunction from the agreed forum. Such costs are more easily ascertainable and this approach will also operate as a limiting mechanism on the potentially over-expansive nature of the damages remedy.[127] Furthermore, if the court finds that the circumstances of the case are such that it is impracticable to award damages either based on the expectation measure or reliance measure, then it is also open to the court to award nominal damages.[128]

Finally, to the extent that a claim for damages for breach of a forum agreement is essentially a contractual claim, other contractual or equitable doctrines may also apply to limit the claimant's recovery.[129] I set out a few examples here.

(a) First, the doctrine of mitigation. It has been suggested that an innocent party's omission to apply for an anti-suit injunction or for a stay of proceedings, or to defend the substantive proceedings in the non-contractual forum, may amount to a failure to

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125 See, eg, *MPVF* (n 98) [13]–[14], where the Court considered that damages should be awarded for the fees and expenses incurred above what the innocent party would have incurred anyway had the action been filed in the contractual forum from the outset.

126 Tan (n 81) para 41; Tan (n 98) 653–654; Oppong and Clark Gibbs (n 103) 393; Briggs (n 66) para 8.25.

127 Dinelli (n 95) 1036; Nik Yeo and Daniel Tan, 'Damages for Breach of Exclusive Jurisdiction Clauses' in Sarah Worthington (ed), *Commercial Law and Commercial Practice* (Hart Publishing 2003) 403, 420–422; Tan (n 98) 658–659.

128 See, eg, *Luv N' Care, Ltd v Groupo Rimar, aka Suavinex* 2015 WL 9463189 at 3, where the Court awarded the claimant nominal damages of $500 for lost time and effort.

129 Tan (n 89) 601–602.

mitigate.[130] Of course, the success of such arguments will depend very much on the factual circumstances of each case.

(b) Second, the doctrine of waiver. In certain cases, it may be argued that by litigating in the non-contractual forum, especially on the merits of the claim, the innocent party has waived the breach of the forum agreement and can no longer claim damages for its breach.[131] On the other hand, it has also been argued that an appearance before a foreign court does not constitute conduct which makes it plain to the reasonable observer that the right under the forum agreement has been given up. If the foreign court ruled that there was no right in the first place, then the party's subsequent defence of the proceedings should not be interpreted as a giving up of a right which that court said it never had.[132]

(c) Third, the doctrines of estoppel and res judicata. Three issues bear highlighting in this regard and, again, I note that the following discussion is from a contractual perspective.

(i) The first issue is whether the decision of a foreign court regarding the existence or validity of a forum agreement will result in issue estoppel or res judicata, thereby preventing the agreed forum from adjudicating again on the same dispute.[133] It has been argued that, by analogy to applications for an anti-suit injunction, no issue estoppel should arise and the court in the agreed forum should be able to consider the forum agreement afresh. Furthermore, a distinction ought to be drawn between considering a forum agreement for the purposes of assuming *jurisdiction*, and considering a forum agreement for the purposes of awarding *damages* for its breach. The former should not give rise to an issue estoppel in respect of the latter.[134]

(ii) The second issue also pertains to issue estoppel, but in relation to a claim for costs. Specifically, the question is whether the costs determination of the foreign court

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130 *Rabobank* (n 76) [439]; Paul D Friedland and Kate Brown, 'A Claim for Monetary Relief for Breach of Agreement to Arbitrate as a Supplement or Substitute to an Anti-Suit Injunction' in Albert Jan Van den Berg (ed), *International Arbitration 2006: Back to Basics?* (Kluwer Law International 2007) 279; Takahashi (n 41) 86–87.

131 Friedland and Brown (n 130) 280.

132 Briggs (n 66) para 8.38.

133 Dinelli (n 95) 1039; Takahashi (n 41) 77; Briggs (n 66) para 8.17.

134 Tan (n 81) para 20; Briggs (n 66) para 8.34.

precludes a subsequent damages claim for costs by way of issue estoppel.[135] In *Rabobank*, this question was answered in the negative, with Colman J opining that the foreign costs determination did not constitute a final judgment on costs and, in any case, the costs issue in the foreign court was completely different from the damages issue before the English Court.[136] Similarly, Prof Briggs argues that the costs decision of the foreign court is 'irrelevant' to a breach of contract claim, except in so far as the claimant must 'give credit for the sums recovered under the foreign costs order'.[137]

(iii) The third issue concerns a situation where the successful party failed to seek costs even though costs were realistically obtainable in the foreign court. In these circumstances, the argument could be made that the claimant is precluded by a *Henderson v Henderson*[138] estoppel from seeking to recover the same in a subsequent action for damages. In *Union Discount*, the English Court of Appeal rejected this argument,[139] although some commentators have raised forceful arguments to the contrary.[140]

(iv) Finally, the rule against recovery of unrecovered costs may also apply to limit a damages claim. This rule was set out by the Court of Appeal in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals*.[141] One ought to consider whether the rule in *Maryani* will preclude a claim for legal costs as damages for breach of a forum agreement. It would appear that, as a matter of authority and principle, the *Maryani* rule will not apply. In the first instance decision, the High Court had opined that the rule would not apply 'where a party seeks to litigate in an inappropriate forum in breach of an exclusive jurisdiction clause or in breach of an arbitration clause'.[142] This was not rejected by the Court of Appeal, who accepted

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135 Takahashi (n 41) 75.

136 *Rabobank* (n 76) [441]. See also Krishna and Kang (n 83) paras 48–49 for a discussion of this question in the context of an arbitration agreement.

137 Briggs (n 66) para 8.18.

138 *Henderson v Henderson* (1843) 3 Hare 100, 114–115; *Turf Club Auto Emporium Pte Ltd and others v Ye Boong Hua and others and another appeal and other matters* [2017] 2 SLR 12 [82], [85].

139 *Union Discount* (n 69) [28].

140 Tan (n 81) para 23.

141 *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496.

142 *Then Khek Koon* (n 79) [228].

that there could be exceptions to the general rule but left their scope an open question.[143] Furthermore, where a *foreign* court makes the costs order, or where *no costs order was made* by the foreign court, it is arguable that the policy considerations underlying the rule in *Maryani* do not arise and there is no resultant need to disallow a subsequent action for damages.[144]

Ultimately, the damages remedy in the context of breach of forum agreements must be refined and delimited so as to strike a balance between the benefits of allowing the damages remedy and its potential pitfalls. The complexity in this area arises from the fact that the damages remedy stands at the intersection of contract law and private international law. Although contractual principles dictate that parties should generally be held to their promises, private international law goes beyond the interests of the contracting parties to consider wider issues of public interest and policy.[145] Thus, ordinary principles of contract law may not apply in such a straightforward manner. As one commentator succinctly describes, 'comity and other private international law policies demand that limits be placed' on an innocent party's right to damages, 'even where domestic law principles would readily award a remedy to him'.[146] Accordingly, the development of the damages remedy in this context ought to be done carefully and in a manner that accords with both principle and policy.

Finally, as alluded to earlier, a distinction should be drawn between the derived rights cases, the inconsistent contractual claims cases, and even cases where there is no clear-cut forum agreement binding the parties as a matter of contract law but the anti-suit respondent is nevertheless required to comply with it. In the latter situations, a claim for damages is probably dubious and should be strenuously resisted. Taking *Argos* as an example, that case involved an *extended* derived rights obligation – the insurer was required to comply with the arbitration clause not only in relation to the carrier (who *was* a contracting party under the bills of lading), but also in relation to a third party (who was *not* a contracting party). In the first place, it is questionable whether the derived rights obligation should have been extended

143 *Maryani* (n 141) [53].

144 This finds support in the High Court's observation in *Then Khek Koon* (n 79) [228] that the general rule against recovery may not apply 'where the costs were incurred in proceedings in a forum other than the forum considering the claim for those costs as damages'. Similarly, see Briggs (n 66) paras 8.18, 8.56–8.57.

145 Dinelli (n 95) 1026; Tan (n 98) 626.

146 Tan (n 98) 637.

by the tribunal in that manner. There is much force in the argument raised by counsel for the insurer that this 'extension' is simply a conflation of the derived rights cases and the inconsistent contractual claims cases. Nevertheless, this part of the tribunal's decision was not appealable to the English High Court in *Argos*. Instead, what was appealed was the question whether equitable compensation was available for the breach of the extended derived rights obligation, and whether the owner could recover such equitable compensation for losses suffered by a third party. In answering these questions in the affirmative, the English High Court appears to have further expanded the existing jurisprudence on non-party cases and damages for breach of a forum agreement.

Is such an expansion justifiable? One might argue that any unrecovered costs should have been borne by Lavinia itself, as part of the ordinary incidents of international commercial litigation, or recovered by Lavinia directly from the insurer pursuant to an independent cause of action, such as negligence. Furthermore, the award of equitable compensation in these circumstances seems somewhat artificial. On the one hand, the English High Court recognised that if this had been a case involving inconsistent contractual claims, Lavinia would not have been entitled to equitable compensation, nor damages in lieu of an injunction. On the other hand, the Court then reasoned that *because* Lavinia was unable to obtain such relief, a legal 'black hole' arose which justified the application of the principle of transferred loss to enable the owner to recover Lavinia's loss.[147] Thus, although the substance of the claim remained the same, switching the identity of the claimant was somehow able to lead to a diametrically different outcome. I also question the basis for a claim for equitable compensation in respect of a breach of an 'equitable obligation' arising in the context of anti-suit jurisdiction, as that is distinct from the equitable obligations that are traditionally recognised as giving rise to equitable compensation. I prefer the arguments of counsel for the cargo interest and insurer who said that equitable compensation is confined to special relationships akin to trust. Claims arising from such special relationships are for breach of trust, breach of fiduciary duty, breach of confidence, and dishonest assistance of a breach of trust. A derived rights obligation and an inconsistent contractual claims obligation do not constitute such a special relationship akin to trust to found equitable compensation. This is all the more so having regard to the origins

147 *Argos* (n 68) [26]–[27].

of the language of equitable rights and obligations in the anti-suit injunction context, which I have discussed earlier (see part 3.5 above). By recognising derived rights obligations and inconsistent claims obligations as 'equitable obligations' which justify the grant of equitable compensation, *Argos* takes the language even further than in the quasi-contractual anti-suit injunction cases and applies it to an entirely new area of jurisprudence. It stretches the concept of an equitable right, arguably beyond that which is permitted by principle and authority.

As a relatively recent decision, *Argos* stands at the forefront of the jurisprudence on non-parties and damages for breach of forum agreements, and it is by no means the last word on this. Will the Singapore courts follow in the footsteps of the English courts in this regard? I would suggest not. In *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals*, the Singapore Court of Appeal clarified that the term 'equitable compensation' ought to be used *only* to refer to compensation for loss in the case of a non-custodial breach of a fiduciary duty.[148] In other words, 'equitable compensation' is not a catch-all term for all compensatory awards the court might make in equity. Nor do all acts considered wrongful in equity attract the grant of equitable compensation. This is quite different from how the terms 'equitable compensation' and 'equitable obligation' have been used in English jurisprudence, particularly in the derived rights cases and inconsistent contractual claims cases. As *Argos* shows, the oft-used language of 'equitable obligation' in such cases has gradually paved the way for equitable compensation to become an available remedy. Given the Court of Appeal's observations in *Winsta Holding*, it seems unlikely that the Singapore courts will adopt such an approach. That would require recognising derived rights obligations and inconsistent claims obligations as 'equitable obligations', the breach of which will lead to the grant of equitable compensation. On both counts, the present state of Singapore's jurisprudence suggests that the Singapore courts will be slow to reach such a conclusion.

To summarise the discussion on the damages remedy, in the straightforward cases involving direct contracting parties and in the derived rights cases involving subrogees, the damages remedy either in contract or in tort is possible provided that principled limits can be imposed to avoid an over-expansive award of damages. The situation becomes murkier when it comes

148 *Winsta Holding* (n 124) [126].

to quasi-contractual cases, that is, cases involving inconsistent contractual claims. These types of cases are one step removed from the situation where the parties share a direct contractual relationship or a relationship akin to a direct contractual relationship. Under English jurisprudence, the remedy employed here is equitable compensation, pursuant to a breach of a so-called equitable obligation. I have expressed my reservations about such an approach.

Taking a step back, one may discern a similar trend here as in the discussion regarding anti-suit injunctions and non-parties. That is, the further the facts veer from the situation concerning direct contracting parties, the more cautious the court ought to be about imposing contract-based remedies, either directly or by analogy, and be it in common law or in equity. Across the discussion on non-parties and the damages remedy, we see also how the use of the language of equitable rights and obligations has gradually morphed – from an expression of unconscionable behaviour to a substantive and enforceable equitable right – so as to justify the imposition of a quasi-contractual anti-suit injunction or the award of compensation, as the case may be. I have suggested that such an approach may be stretching the concept of an equitable right.

5 Enforcement of anti-suit injunctions

I now come to the final topic which is the enforcement of anti-suit injunctions. This goes towards the practical utility of the anti-suit injunction – without the ability to enforce the anti-suit injunction against the intended respondent, there would not be much point in obtaining it. Furthermore, in so far as the purpose of enforcing the anti-suit injunction is ultimately to ensure compliance with a forum agreement, I also discuss some of the ways this objective can be achieved in the event that an anti-suit injunction proves to be of limited effectiveness. In this regard, this section on enforcement brings together nicely the discussion so far by highlighting the interplay between the anti-suit injunction and the damages remedy.

When considering the enforcement of the anti-suit injunction and ensuring compliance with forum agreements, there are at least three perspectives to consider: (a) the perspective of the court that has issued the anti-suit injunction; (b) the perspective of the foreign court whose proceedings are indirectly affected by the anti-suit injunction; and (c) the perspective

of a third party court who may be asked to enforce an anti-suit injunction issued by another court.

5.1 Court issuing the anti-suit injunction

Turning first to the perspective of the court issuing the anti-suit injunction, the effectiveness of the anti-suit injunction will vary depending on the parties' identities and the geographical scope of their activities. An anti-suit injunction issued by the Singapore court is likely to be most effective when the anti-suit respondent is resident in Singapore or has assets in Singapore. In order to effectively enforce the anti-suit injunction, it should contain a penal notice. If the anti-suit respondent is a legal entity, the penal notice should be addressed to directors and officers of the company. Non-compliance may result in committal proceedings, with the anti-suit respondent eventually being found guilty of contempt. The practical implication of a penal notice is that the directors could face a fine or a custodial sentence for contempt arising from non-compliance with the anti-suit injunction order. Settlements could come about for fear of sanctions for contempt. No doubt committal proceedings for contempt are a useful means of ensuring that the foreign proceedings commenced in breach of a forum agreement are promptly stayed or discontinued.

That being said, it is not uncommon that an anti-suit respondent chooses not to comply with the anti-suit injunction even when faced with the threat of committal proceedings for contempt. If the impact of any such committal proceedings is low, the anti-suit respondent may very well decide that it is better off continuing with the proceedings in the non-contractual forum. In these circumstances, the anti-suit applicant will have to come up with more creative methods of ensuring compliance with a forum agreement. Steven Gee QC points to English public policy as a strong reason to refuse recognition of the foreign judgment that was obtained abroad in breach of the anti-suit injunction order.[149] This refusal comes from an indirect enforcement of the anti-suit injunction order by the English court refusing on the grounds of English public policy to recognise or enforce any judgment obtained abroad in breach of the anti-suit injunction. For such a prospect to be viable, I would agree, is a question of public policy to be answered by reference to the facts and whether contempt of

[149] Gee (n 22) para 14-020.

court has resulted in the obtaining of the foreign judgment. Steven Gee QC argues that public policy would take into account the need for an effective deterrent against breaching an anti-suit injunction. A party should not be allowed to obtain an advantage over the other party resulting from its contempt of court.

Another possibility could be to seek an anti-*enforcement* injunction. This would usually be done in the situation where the non-contractual forum has already issued its judgment against the anti-suit applicant. In this regard, the critical questions are these – does it necessarily follow that the failure to abide by the anti-suit injunction will provide a legal basis to seek an anti-enforcement injunction to resist enforcement in Singapore or elsewhere of any foreign judgment or award obtained in breach of that anti-suit injunction? Would an anti-enforcement injunction serve as a means to protect against an abuse of the process of the Singapore court arising from a breach of the anti-suit injunction order? Would breach of an anti-suit injunction order qualify as an exceptional circumstance as required in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd*?[150] The concern in *Sun Travels* was the indirect interference with the execution of the judgment in the country which pronounced the judgment. The question posed here concerns the enforcement of the foreign judgment obtained in breach of the anti-suit injunction ordered by the Singapore court. Would such a breach in and of itself create the necessary equity of the case to favour the grant of an anti-enforcement injunction?

The anti-enforcement injunction and the anti-suit injunction are similar in that both seek to enjoin the anti-suit respondent from pursuing a suit or enforcing a judgment, as the case may be, when the anti-suit respondent had agreed that the dispute would be resolved by a different method.[151] Nevertheless, there remain significant differences between these two injunctions. In particular, an applicant is likely to face additional hurdles in seeking an anti-enforcement injunction than an anti-suit injunction. This is because the anti-enforcement injunction has typically been perceived as a greater interference with the processes of a foreign court, thereby warranting a more cautious approach.[152] If the applicant is before the

150 *Sun Travels* (n 3) [83].
151 *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309 [81].
152 *Sun Travels* (n 3) [90].

court that granted the anti-suit injunction, an anti-enforcement injunction could interfere with the law on recognition and enforcement of a foreign judgment.

It is evident from English jurisprudence that anti-enforcement injunctions are very rarely granted. So far, the few examples include the following:

(a) *Ellerman Lines Limited v Read and others*,[153] where the foreign judgment was obtained by fraud;

(b) *Bank St Petersburg OJSC and another v Arkhangelsky and another*,[154] where there were allegations of fraud and the parties had agreed specifically not to enforce the foreign judgment after it was delivered; and

(c) *SAS Institute Inc v World Programming Ltd*,[155] where the Court partially granted an injunction enjoining the respondent from taking steps to obtain orders from the US Courts which required the applicant to assign certain debts and to turn over certain payments. Notably, the injunction did not prevent enforcement of the US judgment entirely; it only prevented the respondent from seeking certain orders which were viewed as exorbitant by the English Court.

The English courts have reiterated the need for caution in granting anti-enforcement injunctions.[156] However, due to the dearth of cases in which anti-enforcement injunctions have actually been granted, while there is some guidance as to when the court may or may not grant an anti-enforcement injunction, the precise requirements for its issuance are not entirely clear. For instance, although Lawrence Collins LJ observed in *Masri v Consolidated Contractors International (UK) Ltd* that the power to grant an anti-enforcement injunction 'will only be exercised in exceptional circumstances',[157] Males LJ opined in *SAS Institute* that there is no distinct jurisdictional requirement of exceptionality.[158] It therefore remains to be

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153 *Ellerman Lines, Limited v Read and others* [1928] KB 144.

154 *Bank St Petersburg OJSC and another v Arkhangelsky and another* [2014] 1 WLR 4360.

155 *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599. It is noted that at the time of writing this decision was pending appeal.

156 *ED & F Man (Sugar) Ltd v Yani Haryanto (No 2)* [1991] 1 Lloyd's Rep 429, 437, 440; *Industrial Maritime Carriers (Bahamas) Inc v Sinoca International Inc (The Eastern Trader)* [1996] 2 Lloyd's Rep 585, 603; *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90, 108; *Ecobank* (n 151) [136].

157 *Masri* (n 8) [94].

158 *SAS Institute* (n 155) [93].

seen how the English courts will continue to develop the principles surrounding the grant of the anti-enforcement injunction in the future.

In Singapore, the anti-enforcement injunction was dealt with in some detail by the Court of Appeal in *Sun Travels*. In that case, the Court of Appeal held that in order for an anti-enforcement injunction to be granted, the applicant must show exceptional circumstances over and above the usual requirements for the granting of an anti-suit injunction. Such exceptional circumstances include fraud, or where the applicant could not have sought relief before the judgment was given because he had no means of knowing that the judgment was being sought until it was served on him. The Court explained that this high standard is imposed because, not only does the anti-enforcement injunction 'preclude foreign courts from their prerogative to consider whether the judgment in question should be recognised or enforced', the grant of an anti-enforcement injunction 'is comparable to *nullifying* the foreign judgment *or stripping the judgment of any legal effect* when only the foreign court can set aside or vary its own judgments' [emphasis in original].[159]

Based on the tenor of the Court of Appeal's decision in *Sun Travels*, it would appear that the threshold for the grant of an anti-enforcement injunction is quite high. It seems unlikely that the mere breach of an anti-suit injunction ordered by the Singapore court would amount to an 'exceptional circumstance' justifying the grant of an anti-enforcement injunction. Otherwise, it would be in almost every case where an anti-suit injunction had been ordered and subsequently breached that an anti-enforcement injunction would be granted. One might also query whether non-compliance with an anti-suit injunction will automatically amount to an abuse of the process of the Singapore court. As far as abuse of process is concerned, it may well be that much will depend on the actual conduct of the parties in the circumstances of each case. Furthermore, the Court of Appeal in *Sun Travels* was evidently concerned about interfering with the foreign court's prerogative to consider whether the judgment in question should be recognised or enforced. From that perspective, it is arguable that whether or not a judgment should be enforced notwithstanding that it had been obtained in breach of an anti-suit injunction ordered by another court is properly a matter for the foreign court itself to decide. In other words, the mere fact that a judgment or award has been obtained in breach

159 *Sun Travels* (n 3) [97]–[99], [101], [105].

of an anti-suit injunction may not be sufficient in itself to ground an anti-enforcement injunction.

Apart from committal proceedings, resisting enforcement of foreign judgments and seeking anti-enforcement injunctions, what else can a party do to ensure compliance with a forum agreement? The case of *London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain (The MT Prestige) (No 3)*[160] gives a flavour of the range of options that might be available. In that case, the parties' dispute arose from a serious marine pollution incident involving the vessel, *Prestige*. The *Prestige* broke in two and consequently discharged oil causing significant pollution to parts of the shorelines of France and Spain. Initially, the P&I Club, which provided pollution cover to the owners of the *Prestige* and its managers, commenced London arbitration proceedings against Spain and France pursuant to an arbitration agreement in the contract of insurance. The tribunal found, inter alia, that in the absence of any prior payment by the owners to Spain, the P&I Club was not liable to Spain in respect of its claims due to the 'pay to be paid' clause in the insurance contract. Spain did not participate in the arbitration proceedings but instead commenced court proceedings in Spain, which eventually led to the Spanish Court finding the P&I Club liable for up to US$1bn.

At this point, one might think that the resolution of the dispute would simply be a matter of ensuring that the arbitral award was enforced and resisting the enforcement of the Spanish judgment. However, the P&I Club took a slightly different approach. It commenced a *further* arbitration seeking a whole host of relief, including a declaration that Spain was and would be in breach of its obligation not to pursue the claims made in the Spanish proceedings other than by way of London arbitration. The P&I Club also sought equitable compensation for breach of the equitable obligation to arbitrate the claims brought in the Spanish proceedings, in the amount of any liability and costs incurred by the P&I Club arising from Spain's pursuit of those proceedings. In addition, the P&I Club sought contractual damages, an anti-suit injunction and an order enjoining Spain from taking any steps to have the Spanish judgment recognised or enforced in any jurisdiction worldwide. Essentially, it took a belt and braces approach to ensuring compliance with the forum agreement. In the English High Court,

[160] *London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain (The MT Prestige) (No 3)* [2020] EWHC 1582 (Comm).

Henshaw J held that the P&I Club had a good arguable case in respect of some of these claims and partially allowed the P&I Club's application for the Court to appoint an arbitrator. Henshaw J's decision was upheld by the English Court of Appeal in *London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain; London-Steam-Ship Owners' Mutual Insurance Association Ltd v French State*.[161] Notably, the English Court of Appeal endorsed the principle that 'a third party to a contract containing an arbitration clause, who claims a right under such contract, whether by assignment or statutory entitlement, takes that right subject to the arbitration clause which regulates the means by which the transferred right is to be enforced'. This 'obligation to arbitrate the dispute relating to the asserted claim' was said to be 'an equitable obligation imposed by the conditional benefit principle'.[162] These are familiar principles already traversed in the discussion above. Of course, it remains to be seen whether the P&I Club will be successful in its claims before the tribunal. Potential impediments to its claims include res judicata, waiver, and arguments regarding the effect of the Spanish judgments on the tribunal. Nevertheless, this case is a useful illustration of the *range* of procedural tools which are available to a party seeking to ensure compliance with a forum agreement.

5.2 Court whose proceedings are indirectly affected by the anti-suit injunction

Next, I discuss the enforcement of the anti-suit injunction from the perspective of the foreign court whose proceedings are indirectly affected by it. In certain cases, it is possible that the foreign court will respect the anti-suit injunction and stay its own proceedings in favour of the court which has issued the anti-suit injunction. Indeed, that was what the Canadian Court did in response to the decision of the English Court of Appeal in *OT Africa Line Ltd v Magic Sportswear Corp*.[163]

However, an anti-suit injunction may not always be well-received by the foreign court whose proceedings are indirectly affected by it. Indeed, the foreign court need not recognise the

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161 *London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain; London-Steam-Ship Owners' Mutual Insurance Association Ltd v French State* [2021] EWCA Civ 1589 [94].

162 Ibid [62].

163 *OT Africa Line Ltd v Magic Sportswear Corp and others* [2006] 1 All ER (Comm) 32; see *OT Africa Line Ltd and others v Magic Sportswear Corporation and another* [2007] 1 Lloyd's Rep 85 for the decision of the Canadian Federal Court of Appeal.

anti-suit injunction and may well choose to ignore it entirely.[164] The foreign court may even issue what is known as an 'anti-anti-suit injunction' – an injunction restraining a party from seeking or continuing to seek an anti-suit injunction in another court. This was in fact what happened in 2017 in a case involving the Wuhan Maritime Court and the Hong Kong High Court.[165] In that case, the Chinese Court granted a cargo insurer's application to arrest a vessel in order to secure a cargo claim under a bill of lading. The cargo insurer then commenced substantive proceedings in the Chinese Court against the shipowner, and the Chinese Court accepted jurisdiction. In response, the shipowner applied to the Hong Kong High Court for an anti-suit injunction, which was granted on the basis of an arbitration clause in the bill of lading. On the cargo insurer's application, the Chinese Court then issued a maritime injunction against the shipowner, ordering the shipowner to withdraw the Hong Kong proceedings. Notably, the Chinese Court considered that the insurer could not be bound by the arbitration clause as it was not a party to the bill of lading contract. This divergence of perspectives between the Hong Kong Court and the Chinese Court thus led to the issuance of competing injunctions.

A more recent example of when an anti-anti-suit injunction was issued is *Specialised Vessel Services Ltd v MOP Marine Nigeria Ltd*.[166] This case concerned a dispute under a bareboat charterparty which provided for London arbitration. After the vessel was involved in a collision in waters close to Nigeria, the bareboat charterer commenced proceedings in Nigeria seeking, among other things, a negative declaration regarding liability. The owner then sought a stay of the Nigerian proceedings in favour of London arbitration and commenced London arbitration against the bareboat charterer. Subsequently, the bareboat charterer obtained an ex parte injunction from the Nigerian Court preventing the owner from pursuing the arbitration. The owner then sought an anti-anti-suit injunction from the English Court, which was granted. In doing so, Calver J opined that the anti-suit injunction issued by the Nigerian Court was 'not a factor of any great weight against the granting of an injunction', because the obtaining of the anti-suit injunction constituted a breach of the arbitration clause, as well as

164 Tan (n 89) 589.

165 Yu Feng, Steven Zhou and Stephen Du, 'Maritime Injunctions – A Weapon Against Anti-Suit Injunctions?' https://www.kwm.com/en/knowledge/insights/maritime-injunctions-a-weapon-against-anti-suit-injunctions-20171023 (accessed on 1 November 2021). See also *Swissmarine Services SA v Gupta Coal India Pte Ltd* [2015] EWHC 265 (Comm).

166 *Specialised Vessel Services Ltd v MOP Marine Nigeria Ltd* [2021] EWHC 333 (Comm).

'an egregious attempt to prevent [the owner] from exercising its contractual right to arbitrate in London'.[167] In Calver J's view, the grant of an anti-anti-suit injunction was therefore justified.

Arbitral awards containing anti-suit injunctions may face similar difficulties. There have been cases where the foreign court refused to recognise and enforce an award because the award contained an anti-suit injunction in relation to proceedings commenced in that foreign court.[168] This is of practical significance especially where a party intends to eventually seek enforcement of the award in that foreign jurisdiction. Commentators have observed that arbitrators are legitimately concerned that an award containing an anti-suit injunction will be unenforceable in a foreign jurisdiction where anti-suit injunctions are not a recognised remedy, or are against public policy.[169] This may discourage arbitrators from issuing awards containing anti-suit injunctions altogether.

5.3 Third party court

Finally, I turn to the perspective of a third party court. The enforcement of an anti-suit injunction by a third party court is highly unlikely, as comity generally requires that the forum should have a sufficient interest or connection with the matter in order to justify intervention.[170] Interestingly, however, third party courts may be more open to enforcing monetary judgments that award damages for breach of a forum agreement than to enforcing an anti-suit injunction.

The decision of the Hong Kong Court of Final Appeal in *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd*[171] provides an interesting case study which highlights the difference between the anti-suit injunction and the damages remedy. This case involved several cargoes shipped under bills of lading containing an exclusive English jurisdiction clause. The shipper alleged that the cargo had been wrongfully delivered and commenced

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167 Ibid [48]–[51].

168 Turangga Harlin, 'Indonesia: Enforceability of Foreign Anti-Suit Injunctions under Indonesian Law' http://arbitrationblog.kluwerarbitration.com/2018/03/03/indonesia-enforceability-foreign-anti-suit-injunctions-indonesian-law/ (accessed on 1 November 2021).

169 Friedland and Brown (n 130) 269.

170 *People's Insurance Co Ltd v Akai Pty Ltd* [1997] 2 SLR(R) 291; *Airbus Industrie GIE v Patel and others* [1999] 1 AC 119.

171 *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* [2017] 4 HKC 379.

proceedings against the carrier in the Chinese Courts. In response, the carrier sought and obtained an anti-suit injunction from the English Court. However, that did not stop the shipper, who continued to pursue the Chinese proceedings and even obtained judgment in respect of some of them. Nor was the shipper deterred by the fact that the English Court had found it in contempt of court for ignoring the anti-suit injunction. In other words, the English anti-suit injunction had proved ineffectual. The carrier then commenced a second English action seeking damages for the breach of the exclusive jurisdiction clause. While this action was pending, the carrier obtained from the English Court a worldwide freezing order against the shipper in respect of the sums claimed by the shipper in the various Chinese proceedings. The carrier then applied to the Hong Kong Court for a Mareva injunction in aid of the English action and to give effect to the English worldwide freezing order. By the time the matter was heard by the Hong Kong Court of Final Appeal, the English Court had allowed the carrier's claim for breach of the exclusive jurisdiction clause, and had awarded damages amounting to the sums that would be awarded to the shipper by the Chinese Court.

The first instance Court (whose decision was upheld by the Hong Kong Court of Appeal) had initially declined to grant the Mareva injunction sought by the carrier. On further appeal, however, the Hong Kong Court of Final Appeal allowed the appeal and granted the Mareva injunction. In doing so, the Court of Final Appeal observed that the Hong Kong Court was not being asked to assist the English Court to enforce an exclusive jurisdiction clause, which would constitute an intervention in a conflict as to jurisdiction between the English and Chinese Courts and thereby involve a breach of comity. Instead, it was being asked to assist in enforcing an award of damages by the English Court for breach of the exclusive jurisdiction clause. There was no public policy reason barring such enforcement. Accordingly, the Mareva injunction was granted.

This case demonstrates the interplay in practice between the anti-suit injunction and the damages remedy. It reveals how, in certain circumstances, the anti-suit injunction may be limited in its utility. Indeed, despite two anti-suit injunctions having been issued by the English Court, the shipper remained undeterred in pursuing its claims in the Chinese Courts. One might surmise that even an anti-*enforcement* injunction if granted would have been ineffectual as well. This case also demonstrates that, while it would be extremely challenging

to enforce an anti-suit injunction or an exclusive jurisdiction clause in third party courts, a judgment for damages is likely to face much less difficulty in comparison. This reveals the usefulness of a damages claim for breach of a forum agreement, and perhaps explains why, as I have discussed earlier, this has become a burgeoning area of jurisprudence, with parties eager to seek a damages remedy in addition to or in lieu of more traditional remedies.

6 Conclusion

To conclude, it is apparent that there has been a significant expansion in the scope of the anti-suit injunction, primarily spearheaded by the English courts. This robust development is unsurprising; as disputes become more complex and international, especially in the maritime context, and as parties become increasingly sophisticated and well-advised, it is essential that the courts continue to develop the anti-suit injunction so that it meets the needs of international commercial litigation and arbitration. That being said, as we venture into these largely unchartered waters, it is critical that we do not lose our 'north star' – ensuring that the anti-suit injunction serves the ends of justice rather than becoming a litigation tactic and procedural weapon where satellite litigation and legal costs distract parties' attention from the main event. Moreover, it may be worth revisiting the historical origins of the anti-suit jurisdiction and examining how the contractual basis became an independent ground for the grant of an anti-suit injunction. In the past, the breach of a forum agreement provided the requisite 'equity' justifying the court's exercise of its anti-suit jurisdiction. Would inconsistent conduct by a party claiming in contract suffice for such an 'equity' to be established? A closer look at the historical development of the anti-suit injunction may help to shed some light on this inquiry.

Furthermore, while the anti-suit injunction has generally been the principal remedy used to vindicate breaches of forum agreements,[172] this should not constrain the development of other types of remedies. As one commentator observes, the failure to consider and develop a range of remedies will leave the courts 'with a less sophisticated mechanism for enforcing [forum] agreements that fetter their ability to render appropriate and fact-sensitive remedies'.[173] In this regard, a remedy with potential for further development is the damages

[172] Tan (n 89) 561; Dinelli (n 95) 1028.
[173] Tan (n 89) 549.

remedy. However, for the reasons I have mentioned, care ought to be taken that we do not become overzealous about the protection of forum clauses. As I alluded to at the beginning of this paper, anti-suit injunctions and the damages remedy are powerful tools at the disposal of Common Law courts and tribunals, which are likely to ensure that forum agreements in favour of such courts or tribunals are complied with. While upholding party autonomy is important, it does not give parties carte blanche to assert the imposition of an anti-suit injunction or an award of damages in all cases where there is a forum clause which is somehow connected to the parties' dispute, no matter how remote that connection. Indeed, party autonomy cuts both ways – it may be *contrary* to party autonomy to require compliance with a forum clause when the party did not agree to be so bound. Furthermore, as far as damages are concerned, it is apposite to bear in mind the oft-mentioned principle that damages are not meant to be used as a punitive tool; they are simply the means by which the court gives effect to the bargain that has been struck by both parties.[174]

Finally, in developing the anti-suit injunction and the damages remedy, it is crucial that we do not miss the wood for the trees. Ultimately, the anti-suit injunction and the damages remedy are merely two out of several 'interlocking' remedies available to enforce a forum agreement. Their individual development must therefore be undertaken with a view to this overarching framework of remedies and their ultimate purpose, in order to establish a 'principled set of remedial responses' which is coherent, consistent and ultimately directed towards serving the interests of justice.[175]

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174 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] 2 SLR 129 [71]–[72], [135]; *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 [154].

175 Tan (n 89) 610, 613; Tan (n 98) 660.