BREACH OF AGREEMENT *VERSUS* VEXATIOUS, OPPRESSIVE AND UNCONSCIONABLE CONDUCT

Clarifying their Relationship in the Law of Anti-Suit Injunctions

Cases warranting the grant of an anti-suit injunction can be divided into three main categories: breach of agreement, vexatious, oppressive, or unconscionable conduct, and abuse of process. A series of Singapore cases have demonstrated that the boundaries between the first two categories are ambiguous in Singapore law. This ambiguity reflects a lack of clarity about the principles underlying anti-suit injunctions and creates uncertainty as to the applicable analysis for each category. This article argues that the two categories should be distinct in kind, with both categories remaining part of the court's equitable jurisdiction. Such an approach will provide a good foundation in principle for the applicable rules of law and provide a principled foundation for the "strong reasons" standard.

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I. Introduction

1 Anti-suit injunctions are an important feature of private international law. When faced with an application for an anti-suit injunction, the fundamental principles that govern the Singapore court's decision are well settled.[1] These principles were set out in the *dicta* of the Privy Council's decision in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak*[2] ("*Société Nationale*"), which were also accepted in Singapore in *Evergreen International SA v Volkswagen Group Singapore Pte Ltd*[3] ("*Evergreen International SA*").

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1 *Regalindo Resources Pte Ltd v Seatrek Trans Pte Ltd* [2008] 3 SLR(R) 930 at [12]; *VH v VI* [2008] 1 SLR(R) 742 at [37].

2 [1987] AC 871.

3 [2004] 2 SLR(R) 457.

2 Cases warranting the grant of an anti-suit injunction can be divided into three main categories. The first category of cases involves the breach of an agreement. Where there is such a breach, the court will be inclined to enforce the agreement. The party in breach has to show "strong reasons" as to why the court should allow his breach of the agreement.[4] The second category of cases bases the grant of an anti-suit injunction on the vexatious, oppressive or unconscionable conduct of the defendant. In such cases, the party seeking an anti-suit injunction must show the vexatious, oppressive or unconscionable conduct of the other party in commencing foreign proceedings. The third category of cases justifies the grant of an anti-suit injunction on the prevention of abuse of process and protection of the court's jurisdiction.

3 A series of Singapore cases have demonstrated that the boundaries between the first two categories are ambiguous in Singapore law. At times, the courts suggest that breach of an agreement is mere evidence of vexatious and oppressive conduct. At other times, they affirm that breach of an agreement is an independent ground for the grant of an anti-suit injunction. This ambiguity regarding the boundaries between the categories is undesirable – it reflects a lack of clarity about the principles underlying anti-suit injunctions, and creates uncertainty as to the applicable analysis for each category. This article argues that the category of vexatious, oppressive, and unconscionable conduct should be distinct in kind from the category of breach of agreement, with both categories remaining part of the court's equitable jurisdiction. Such an approach will provide a good foundation in principle for the applicable rules of law, and will prevent confusion as to when the "strong reasons" standard will apply.

4 This article will first elucidate the principles underlying the grant of anti-suit injunctions with a view to clarifying the relationship between them. Second, it will critique a series of contemporary Singaporean cases that have developed the law with regard to the boundaries between the two categories. Third, this article will propose three approaches for formulating the boundaries between the two categories, consider the implications of each approach, and recommend a way ahead for the development of the law.

4 *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 All ER 749 at [24]; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 342; *CSR Ltd v Cigna Insurance Australia Ltd (1997)* 189 CLR 345 at 392.

II. Principles underlying the grant of anti-suit injunctions

5 This part will highlight the key principles underlying the grant of an anti-suit injunction, as articulated by commentators and judges across the common law jurisdictions.[5]

A. Equity

6 At the most fundamental level, anti-suit injunctions are grounded in equity. This equitable foundation can be attributed to the origin of the remedy in the English Court of Chancery's equitable jurisdiction. The ancestor of the anti-suit injunction was the "common injunction", developed in the 15th century to prevent a party from suing in English common law courts if such action was against good conscience.[6] The reach of these injunctions eventually extended beyond English shores to proceedings in foreign countries also, resulting in the anti-suit injunction we are familiar with today.[7] This foundation in equity generally means that considerations of natural justice, unconscionability and inequitable conduct are key to justifying the grant of an anti-suit injunction. As stated by Lord Goff in *Société Nationale*, the courts will exercise their jurisdiction to grant anti-suit injunctions only when the ends of justice require.[8]

7 The equitable nature of the remedy lends itself against the formulation of fixed categories dictating when the court will intervene.[9] This sentiment has been echoed by both the Australian and US courts.[10] Nevertheless, for clarity of analysis, judges and commentators alike have

5 Although the subsequent parts of this article will consider English law, it should be noted that the UK is now part of the European Union. Its principles on the grant of anti-suit injunctions to restrain proceedings in EU Member States may thus be modified by the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 and the European Court of Justice. Nevertheless, pre-Brussels Convention cases, such as *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, remain persuasive authority in Singapore. The impact of the Brussels Convention on the English law on anti-suit injunctions is discussed later at para 22 below.

6 Trevor C Hartley, "Comity and the Use of Anti-suit Injunctions in International Litigation" (1987) 35(3) *American Journal of Comparative Law* 487 at 489; today, the Singapore court's injunctive jurisdiction can be found in s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed).

7 Trevor C Hartley, "Comity and the Use of Anti-suit Injunctions in International Litigation" (1987) 35(3) *American Journal of Comparative Law* 487 at 490.

8 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 at 892.

9 Clare Ambrose, "Can Anti-Suit Injunctions Survive European Community Law?" (2003) 52(2) ICLQ 401 at 404.

10 Jonathan R C Arkins, "Borderline Legal: Anti-Suit Injunctions in Common Law Jurisdictions" (2001) 18(6) *Journal of International Arbitration* 603 at 605 and 612; *Laker Airways Ltd v Sabena, Belgian World Airlines* (1984) 731 F 2d 909 at 926; *CSR Ltd v Cigna Insurance Australia Ltd* [1997] HCA 33.

sought to identify categories of cases which warrant the grant of an anti-suit injunction. A survey of the case law and commentary across the common law jurisdictions reveals three main categories: vexatious, oppressive or unconscionable conduct, breach of agreement, and abuse of process or protection of the court's jurisdiction. The third category is distinct from the first two.[11] As described by the Australian High Court,[12] the first two categories of cases are founded in the court's equitable jurisdiction. In contrast, the third category is founded upon the court's inherent jurisdiction to prevent its own processes from being used unjustly and to protect the integrity of its own processes.[13] In view of the issue being discussed, the focus of this article will be on the relationship between the first two categories of cases.

(1) Vexatious, oppressive or unconscionable conduct

8 The first category is where the defendant has acted in a vexatious, oppressive or unconscionable manner in his commencement of proceedings in a foreign court, in view of the local court being the natural forum.[14] A typical scenario illustrating this category of cases is where *B* brings proceedings in Jurisdiction X against *A*, and *A* seeks an anti-suit injunction in the local forum against *B*'s proceedings in Jurisdiction X due to *B*'s vexatious, oppressive or unconscionable conduct.

9 To determine whether an anti-suit injunction should be granted in this category of cases, the English courts will consider the vexation and oppression of the foreign proceedings to the plaintiffs and injustice to the defendant if he is deprived of advantages in the foreign forum.[15]

11 Yeo Tiong Min, "The Effective Reach of *In Personam* Reasoning in Private International Law", Yong Pung How Professorship of Law Lecture (2009) at para 16. An example of such a situation would be in bankruptcy proceedings. If insolvency proceedings have commenced in a local forum, a party may initiate proceedings in a foreign court to obtain the benefit of foreign assets. In such a situation, the local forum may grant an anti-suit injunction against the party initiating foreign proceedings in order to protect the local insolvency proceedings: see *Manharlal Trikamdas Mody v Sumikin Bussan International (HK) Ltd* [2014] SGHC 123 at [110] and *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 at 892–893.

12 *CSR Ltd v Cigna Insurance Australia Ltd* [1997] HCA 33.

13 *CSR Ltd v Cigna Insurance Australia Ltd* [1997] HCA 33; Lee Suet Lin Joyce, "An Injunction on Anti-suit Injunctions? *CSR Limited v Cigna Insurance Australia Limited & Ors*" (1998) 20 *Asia Business Law Review* 48 at 49.

14 Yeo Tiong Min, "The Effective Reach of *In Personam* Reasoning in Private International Law", Yong Pung How Professorship of Law Lecture (2009) at para 16; Clare Ambrose, "Can Anti-Suit Injunctions Survive European Community Law?" (2003) 52(2) ICLQ 401 at 404.

15 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 at 896.

Singapore law broadly follows English law in this regard.[16] The analogous stage of the Canadian court's analysis, as stated in *Amchem Products Inc v British Columbia (Workers' Compensation Board)*,[17] is largely similar to English law as well.[18] In Australia, the Australian High Court in *CSR Ltd v Cigna Insurance Australia Ltd*[19] also applied the *Société Nationale* test, but focused on the unconscionability of the plaintiff's conduct in bringing the foreign proceedings.

10 What amounts to vexatious, oppressive or unconscionable conduct cannot be and should not be defined exhaustively – rather, it depends on the facts of each case.[20] Some situations where the courts have found such conduct involved a party bringing proceedings in bad faith with intention to harass, bringing proceedings that are bound to fail or are brought to achieve illegitimate purpose, causing extreme inconvenience through the foreign proceedings, and subjecting the other party to oppressive procedures in the foreign court.[21]

(2) Breach of agreement

11 The second category is where the court acts to prevent the breach of an agreement by granting an anti-suit injunction. Three different types of agreements will be discussed under this category.

12 The first type of agreement, which forms the main bulk of cases in this category, is a jurisdiction agreement.[22] A typical scenario in this category of cases would be where *A* sues *B* in Jurisdiction X, in breach of a jurisdiction agreement in favour of the local forum.[23] *B* then seeks an

16 *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR(R) 457 at [16]; *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [27].

17 [1993] 150 NR 321.

18 J P McEvoy, "International Litigation: Canada, *Forum Non Conveniens* and the Anti-Suit Injunction" (1995) 17(1) *Advocates' Quarterly* 1; *Amchem Products Inc v British Columbia (Workers' Compensation Board)* [1993] 150 NR 321 at 360.

19 [1997] HCA 33.

20 *Hong Hin Kay Albert v AAHG, LLC* [2014] SGHC 206 at [48]; *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 at 893; *CSR Ltd v Cigna Insurance Australia Ltd* [1997] HCA 33.

21 Rory Butler & Baptiste Weijburg, "Do Anti-Suit Injunctions Still Have a Role to Play? – An English Law Perspective" (2011–2012) 24 *USF Maritime Law Journal* 257 at 284; *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [47].

22 Yeo Tiong Min, "The Effective Reach of *In Personam* Reasoning in Private International Law", Yong Pung How Professorship of Law Lecture (2009) at para 16.

23 Third court situations are also possible, but less typical. Such situations occur where *A* sues *B* in Jurisdiction X in breach of a jurisdiction agreement in favour of Y. *B* seeks an anti-suit injunction against *A* in the local forum. In such cases, the Singapore court has held that it will not act as an "international busybody" (*People's Insurance Co Ltd v Akai Pty Ltd* [1997] 2 SLR(R) 291 at [12]).

anti-suit injunction in the local forum against *A*'s proceedings in Jurisdiction X.

13 At this point, a distinction must be drawn between exclusive and non-exclusive jurisdiction agreements. The intention expressed by each of these agreements is different. A non-exclusive jurisdiction clause evinces an intention of the parties to confer jurisdiction on one or more courts. An exclusive jurisdiction clause, on top of an intention to confer such jurisdiction, also includes an agreement *not* to bring proceedings to any other courts.

14 In Singapore law, the lines are blurred with respect to the *intention* evinced by each jurisdiction clause.[24] The classification of each clause as non-exclusive or exclusive is an exercise in contractual construction, whether it is exclusive or non-exclusive on its face.[25] A jurisdiction clause that appears to be non-exclusive on its face can be interpreted as carrying with it intentions similar to that of an exclusive jurisdiction clause, if an analysis of contractual intention points in that direction.[26] Should this be the case, the non-exclusive jurisdiction clause will be treated, for all intents and purposes, as an exclusive jurisdiction clause. Similarly, as was held in *Abdul Rashid bin Abdul Manaf v Hii Yii Ann*[27] ("*Abdul Rashid*"), a non-exclusive jurisdiction clause can be construed as a "most appropriate jurisdiction clause", should the context point in that direction.[28] Such a clause would effectively have the same effect as an exclusive jurisdiction clause.[29] A non-exclusive jurisdiction clause can also be construed as having the effect of an exclusive jurisdiction clause upon the satisfaction of certain conditions. This was the case in *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan*[30] ("*Sabah Shipyard*"), where a non-exclusive jurisdiction clause was construed as having the same effect as an exclusive jurisdiction clause once proceedings were commenced in England, the chosen jurisdiction.

15 Despite the presently blurred boundaries between non-exclusive and exclusive jurisdiction agreements, it is worth noting that the

24 *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519 at [24] and [30]–[31], citing Yeo Tiong Min, "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306 at 359.

25 *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519 at [24]; Yeo Tiong Min, "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306 at 359.

26 *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519 at [24]; Yeo Tiong Min, "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306 at 359.

27 [2014] 4 SLR 1042.

28 *Abdul Rashid bin Abdul Manaf v Hii Yii Ann* [2014] 4 SLR 1042 at [53].

29 *Abdul Rashid bin Abdul Manaf v Hii Yii Ann* [2014] 4 SLR 1042 at [54].

30 [2003] 2 Lloyd's Rep 571.

Singapore High Court in *Abdul Rashid* expressed an unwillingness to read too much into a non-exclusive jurisdiction agreement and was keen to adhere to the ordinary meaning of the agreement, for the purpose of ensuring commercial certainty regarding the effect of jurisdiction agreements.[31] This decision may be viewed as a signal that although a contractual analysis of jurisdiction agreements is possible in Singapore law, as highlighted by the Singapore Court of Appeal in *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala*[32] ("*Orchard Capital*"),[33] the courts will be wary of going beyond the ordinary meaning of jurisdiction agreements.

16 With respect to the *consequences* of classifying each clause as one or the other, the lines are clear. Since a non-exclusive jurisdiction agreement does not include a promise *not* to commence proceedings in a non-chosen forum, commencing proceedings in a non-chosen forum will not amount to a breach of the agreement. The legal analysis will thus be substantially the same as in the first category of cases. However, the existence of a non-exclusive jurisdiction clause will remain significant as a factor in a natural forum analysis and also to determine if the foreign proceedings were brought in a vexatious, oppressive or unconscionable manner.[34] The strength of the clause as an indicator of natural forum or unconscionable conduct depends on the circumstances.[35] As noted in *Orchard Capital*, in certain situations, the non-exclusive jurisdiction clause may have such a strong impact on the natural forum and vexatious conduct analysis that its practical effect can be similar to that of an exclusive jurisdiction clause, although the two types of clauses remain conceptually distinct.[36]

17 Where the effect of the jurisdiction clause is exclusive, proceedings commenced in a non-chosen forum will amount to a breach of the agreement. In such cases, the courts have applied a different analysis. In English law, where there is an exclusive jurisdiction clause, and there is a claim falling within its scope being pursued in a non-chosen forum, the English court will ordinarily exercise its jurisdiction to grant an anti-suit injunction unless the party suing in the non-chosen forum

31 *Abdul Rashid bin Abdul Manaf v Hii Yii Ann* [2014] 4 SLR 1042 at [54].
32 [2012] 2 SLR 519.
33 *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519 at [24].
34 Christopher J S Knight, "Anti-Suit Injunctions and Non-Exclusive Jurisdiction Clauses" (2010) 69 *Cambridge Law Journal* 25 at 26.
35 Yeo Tiong Min, "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306 at 356; *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519 at [30]. The context of the judgment is a natural forum analysis during a stay of proceedings exercise, but similar principles should apply to the anti-suit injunction context as well.
36 *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519 at [31].

can show strong reasons for being allowed to breach the agreement.[37] The same test applies in Singapore law as well.[38] The effect of the exclusive jurisdiction agreement lies in shifting the burden of proof to the party in breach.[39] To illustrate, considering the typical scenario described earlier, *B* would be granted the anti-suit injunction almost as a matter of course, unless *A* is able to discharge the burden of proof on him to show strong reasons for allowing his breach of the jurisdiction agreement. In contrast, without a breach of agreement, *B* would have the burden of proving *A*'s vexatious, oppressive or unconscionable conduct. This effect applies whether a stay of proceedings or anti-suit injunction is sought.

18 The second type of agreement that can be considered in this category is a settlement agreement. A settlement agreement typically provides for full and final settlement of any claims between the parties, and includes a promise between the parties not to bring any further claims against each other. A hypothetical scenario will illustrate the relationship between settlement agreements and anti-suit injunctions. *A* and *B* have entered into a settlement agreement providing for full and final settlement of any claims between them, including an agreement not to pursue any further claims against each other. *A* subsequently commences proceedings against *B* in Jurisdiction X. In this scenario, there are three options open to *B*. First, *B* can apply for a stay of proceedings in X for breach of the settlement agreement.[40] Second, *B* can commence proceedings in Jurisdiction Y against *A*, obtain a judgment on the merits of the case that there is indeed a breach of the settlement agreement, and apply for a permanent anti-suit injunction to "uphold and enforce the judgment given in the action".[41] This is contingent on *A* submitting to the jurisdiction of Y's courts. This option describes the situation that took place in *Ashlock William Grover v SetClear Pte Ltd*[42] ("*Ashlock v SetClear*"). Third, *B* could commence proceedings in Y against *A*, and apply for an interlocutory anti-suit injunction for breach of the settlement agreement, invoking the same principles applicable to cases of breach of an exclusive jurisdiction agreement. Commentators have argued that the breach of a settlement agreement should provide sufficient grounds for the grant of an anti-suit injunction even if there is

37 *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 All ER 749 at [24]; *The Eleftheria* [1970] P 94 at 99–100; Rory Butler & Baptiste Weijburg, "Do Anti-Suit Injunctions Still Have a Role to Play? – An English Law Perspective" (2011–2012) 24 *USF Maritime Law Journal* 257 at 270–272; Daniel Tan, "No Dispute Amounting to Strong Cause; Strong Cause for Dispute?" (2001) 13 SAcLJ 428.

38 *The Jian He* [2000] 1 SLR 8 at [33]; Vincent Leow, "Exclusively Here to Stay: The Applicable Principles to Granting a Stay on the Basis of an Exclusive Jurisdiction Clause" (2004) Sing JLS 569 at 571.

39 Daniel Tan, "No Dispute Amounting to Strong Cause; Strong Cause for Dispute?" (2001) 13 SAcLJ 428 at 437.

40 *Ashlock William Grover v SetClear Pte Ltd* [2012] 2 SLR 625 at [26].

41 *Ashlock William Grover v SetClear Pte Ltd* [2012] 2 SLR 625 at [28].

42 [2012] 2 SLR 625.

no breach of a jurisdiction agreement.[43] It is suggested that this option is possible in principle, despite the lack of supporting authority, since a settlement agreement can be viewed as conceptually similar to an exclusive jurisdiction agreement, except that the derogation effect of a settlement agreement applies to all jurisdictions and not just the non-chosen ones.[44]

19 The third type of agreement is a choice of law agreement. It may be argued that a choice of law agreement implies an agreement that parties will only commence proceedings in a jurisdiction which will be expected to apply the chosen law.[45] Viewed thus, the agreement can be breached if a party brings proceedings before a jurisdiction which will not apply the chosen law, justifying the grant of an anti-suit injunction. Such an argument was put forth in *Ace Insurance Ltd v Moose Enterprise Pty Ltd*[46] ("*Ace Insurance*"), where the defendant argued that the plaintiff had breached the express choice of Australian law clause by bringing proceedings in California, which would apply Californian law. The New South Wales Supreme Court dealt with the issue by holding that a choice of law clause does not carry with it an implied obligation not to invoke the jurisdiction of a court which would not apply the chosen law – choice of law clauses are generally declaratory of the parties' intention, and not promissory in effect.[47] Without promissory effect, a choice of law clause cannot be breached, and thus cannot be a ground for the grant of an anti-suit injunction. However, the Supreme Court did not preclude the possibility of a choice of law clause having promissory effect, if it was drafted in very clear language. In any case, the Supreme Court found that even if the choice of law clause in the case before them was promissory in nature, it would not have been breached since the Californian court would have applied Australian law. The position of the English and Singapore courts on the availability of an anti-suit injunction for breach of a choice of law clause remains to be seen, although it is suggested that the openness of the Singapore Court of Appeal to conducting a contractual analysis of jurisdiction agreements[48] may be perceived as an

43 James J Fawcett & Paul Torremans, *Intellectual Property and Private International Law* (Oxford University Press, 2nd Ed, 2011) at para 6.269.

44 As described in Yeo Tiong Min, "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306 at 312–313, para 12, prorogation is the function of providing the legal justification for the chosen court to hear the case, while derogation is the function of supplying reasons for not having the case decided in a court which the parties do not want to hear the case.

45 Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) at para 11.52, cited in *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 at [44].

46 [2009] NSWSC 724.

47 *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 at [51].

48 *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519 at [26]–[29].

indication that the Singapore courts will be willing to do the same for choice of law clauses as well.

20 Commentators have observed that the line between the categories of vexatious, oppressive or unconscionable conduct and breach of agreement is not clear – some judges consider the categories distinct, while others appear to combine the two under the broader category of unconscionability.[49] Some English cases apply the language of vexatious and oppressive conduct when granting anti-suit injunctions in cases where there is breach of an agreement.[50] The courts in these cases appear to have viewed breach of the agreement as evidence of vexatious and oppressive conduct. Part III[51] of this article will consider a series of Singapore cases that have touched on the relationship between the two categories to determine if the same ambiguity exists in Singapore law. However, before we proceed to do so, we must consider the principle of comity.

B. Comity

21 Comity is a principle underlying much of the law relating to anti-suit injunctions.[52] It has been famously defined in *Hilton v Guyot*[53] by the US Supreme Court as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws".[54]

22 An anti-suit injunction by nature raises concerns of comity. It seeks to prevent a plaintiff from commencing proceedings in a foreign court through the threat of contempt of court in the local forum. It is sometimes argued that an anti-suit injunction is not antithetical to comity because it operates *in personam* and does not interfere with foreign court procedure. However, commentators widely acknowledge that anti-suit

49 Cameron Sim, "Choice of Law and Anti-Suit Injunctions" (2013) 62 ICLQ 703 at 705–706.

50 *Continental Bank v Aeakos Compania Naviera SA* [1994] 1 WLR 588; *Sohio v Gatoil* [1989] 1 Lloyd's Rep 588 at 592; Daniel Tan, "Anti-Suit Injunctions and the Vexing Problem of Comity (2004–2005) 45 *Virginia Journal of International Law* 283 at 332–333.

51 See paras 25–58 below.

52 Samtani Anil, "Coming to Grips with Comity's Grip on Anti-Suit Injunctions: *Airbus Industrie GIE v Patel and Ors*" (1998) 22 *Asia Business Law Review* 72 at 76; Steven R Swanson, "The Vexatiousness of a Vexation Rule: International Comity and Anti-Suit Injunctions" (1996–1997) 30 *George Washington Journal of International Law & Economics* 1 at 4.

53 [1895] 159 US 113.

54 *Hilton v Guyot* [1895] 159 US 113 at 163–164.

injunctions nevertheless involve an indirect interference with the proceedings of a foreign court – when a local court bars a plaintiff from bringing proceedings in a foreign jurisdiction, the local court in effect has decided whether the foreign court is going to hear the case.[55] Concerns of comity have risen to the fore in Europe with the advent of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. The European Court of Justice ("ECJ") has frowned upon the use of anti-suit injunctions, overturning an anti-suit injunction granted by an English court in *Turner v Grovit*.[56] The ECJ held that anti-suit injunctions demonstrate a lack of trust in the foreign court, conflict with the Brussels Convention's goal of legal harmonisation, and amount to improper interference with the foreign court's jurisdiction.[57]

23 In recognition of the importance of comity, many jurisdictions require the forum to be the natural forum as a prerequisite for the grant of an anti-suit injunction.[58] Lord Goff in *Airbus Industrie GIE v Patel*[59] articulated this requirement as part of an overarching requirement that the forum must have "a sufficient interest in, or connection with, the matter in question" in order to justify the grant of an anti-suit injunction against proceedings in a foreign court.[60] The Canadian courts have gone even further to enshrine comity in their test for the grant of an anti-suit injunction. The first step of the Canadian test applies *forum non conveniens* principles, as do the English and Singaporean tests, but the difference is the perspective the Canadian courts take. In applying *forum non conveniens* principles, the Canadian courts will take the foreign court's perspective to see if it could "reasonably have concluded that there was no alternative forum that was clearly more appropriate".[61] If the foreign court would have concluded thus, either through the application of *forum non conveniens* or other similar principles, the foreign court's

55 Trevor C Hartley, "Comity and the Use of Anti-suit Injunctions in International Litigation" (1987) 35(3) *American Journal of Comparative Law* 487 at 506; Justice Hugh Williams, "Anti-Suit Injunctions: Damp Squib or Another Shot in the Maritime Locker? Reflections on *Turner v Grovit*" (2006) 20 *Australian and New Zealand Maritime Law Journal* 4 at 13; *Dicey and Morris on The Conflict of Laws* (Lawrence Collins gen ed) (Sweet & Maxwell, 13th Ed, 2000) at p 386.

56 [2004] Lloyd's Rep 169.

57 *Turner v Grovit* [2004] Lloyd's Rep 169 at 172–173.

58 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 at 896; *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR(R) 457 at [16].

59 [1999] 1 AC 119.

60 *Airbus Industrie GIE v Patel* [1999] 1 AC 119 at 138.

61 *Amchem Products Inc v British Columbia (Workers' Compensation Board)* [1993] 150 NR 321 at 358–359; J P McEvoy, "International Litigation: Canada, *Forum Non Conveniens* and the Anti-Suit Injunction" (1995) 17(1) *Advocates' Quarterly* 1 at 14–15.

decision will be respected and the application for an anti-suit injunction will be dismissed.[62]

24 An overemphasis on comity has been criticised by commentators who argue that the courts should be cognisant of their main role as dispensers of justice and should not defer too much to comity.[63] Although this issue is not the subject under consideration in this article, this author is inclined to agree that equity should take priority over considerations of comity. Even as the courts should remain aware of the boundaries set by comity, the courts should also be cautious of "conflating the requirements for an injunction with its limiting factors".[64] It is worth noting that the courts have recognised a different balance between comity and equity in situations where there is a breach of an agreement. Where there is such a breach, both the English and Singapore courts have held that comity will take a backseat, provided that the local forum is the chosen forum.[65] In such situations, the courts will be inclined towards upholding the agreement, granting an anti-suit injunction if necessary to do so.

III. Contemporary Singapore cases

25 This section will consider four Singaporean cases on anti-suit injunctions, with a view to elucidating the position in Singapore law regarding the relationship between the categories of breach of agreement and vexatious, oppressive or unconscionable conduct.

A. Kirkham v Trane

26 In *John Reginald Stott Kirkham v Trane US Inc*[66] ("*Kirkham v Trane*"), the appellants and respondents entered into a dispute regarding a distributorship agreement governing the distribution of American air

62 J P McEvoy, "International Litigation: Canada, *Forum Non Conveniens* and the Anti-Suit Injunction" (1995) 17(1) *Advocates' Quarterly* 1 at 15.

63 Samtani Anil, "Coming to Grips with Comity's Grip on Anti-Suit Injunctions: *Airbus Industrie GIE v Patel and Ors*" (1998) 22 *Asia Business Law Review* 72 at 76.

64 Daniel Tan, "Anti-Suit Injunctions and the Vexing Problem of Comity (2004–2005) 45 *Virginia Journal of International Law* 283 at 309. The author in this article advocated caution against a trend in US law to place comity at the substantive centre of analysis.

65 *The Angelic Grace* [1995] 1 Lloyd's Rep 87 at 96; *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088; Yeo Tiong Min, "Party Autonomy in International Civil Litigation: Singapore Law", Centre for Legal Dynamics of Advanced Market Societies Discussion Paper 04/11E (2004) at paras 34 and 35. The requirement to be a chosen forum is particularly relevant in Singapore, because the Singapore Court of Appeal has refused to uphold a jurisdiction agreement in favour of a third country, despite the existence of a breach of agreement. The Court of Appeal held that it did not want to act as "an international busybody": see *People's Insurance Co Ltd v Akai Pty Ltd* [1997] 2 SLR(R) 291 at [12].

66 [2009] 4 SLR(R) 428.

conditioning systems and services in Indonesia. According to the respondents, they terminated the distributor arrangement when they discovered that one of the appellants had been distributing a direct competitor's products. The appellants denied this allegation and commenced proceedings in Indonesia based on rights in Indonesian law arising out of its distributorship in Indonesia. Four months later, the respondents commenced an action in the High Court of Singapore seeking, *inter alia*, an anti-suit injunction to restrain the appellants from continuing proceedings in Indonesia. The High Court granted the anti-suit injunction, holding that the natural forum was Singapore and the continuation of the Indonesian proceedings was vexatious and oppressive. The appellants appealed the decision to the Court of Appeal. The Court of Appeal allowed the appeal, holding, *inter alia*, that the continuation of the Indonesian proceedings was not vexatious and oppressive, since the Indonesian action was based on Indonesian tort law and there would be no conflict in decisions. Further, there was no presumption that a multiplicity of proceedings was vexatious.

27 In coming to this conclusion, the Court of Appeal cited and approved the elements of the test set out in *Evergreen International SA*, originally formulated in *Société Nationale*,[67] to determine whether an anti-suit injunction ought to be granted. The elements are: (a) whether the defendants are amenable to the jurisdiction of the Singapore court; (b) the natural forum for resolution of the dispute between the parties; (c) alleged vexation or oppression to the plaintiffs if the foreign proceedings are to continue; and (d) alleged injustice to the defendants as an injunction would deprive them of the advantages sought in the foreign proceedings.[68]

28 Notably, the Court of Appeal made an addition to the *Evergreen International SA* test: whether the institution of foreign proceedings is in breach of any agreement between the parties. The Court of Appeal held that where such an agreement existed, the court may not feel diffident about granting an anti-suit injunction as it would only be enforcing a contractual promise and the question of international comity is not as relevant.[69] However, in the case at hand, the Court of Appeal did not have to consider this additional element as there was no such agreement between the parties.

29 It is noteworthy that the Court of Appeal in this case cited breach of an agreement as a factor to be considered as part of the court's discretion to grant an anti-suit injunction. However, the role of this factor remained uncertain. Would it function as an independent ground

67 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 at 892–893.
68 *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [28].
69 *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [29].

justifying the grant of an anti-suit injunction, or would it merely serve as strong evidence of vexatious and oppressive conduct? The Court of Appeal's reasoning suggested the latter.[70] When considering the element of vexatious or oppressive conduct, the Court of Appeal cited with approval from *Evergreen International SA*:[71]

> … an assessment or evaluation of the conduct complained of and *the nature of the plaintiff's rights or interests that are being infringed or threatened is needed*. [emphasis added]

30 If consideration of the plaintiff's rights and interests falls under the element of vexatious or oppressive conduct, that would mean that a consideration of the plaintiff's contractual rights under an agreement could potentially fall under the umbrella of the third element in the *Kirkham v Trane* test as well. However, there was no further clarification of the exact role of the new fifth factor, causing the boundaries between the two categories to remain uncertain following this judgment.

B. Ashlock v SetClear

31 The next case to apply the *Kirkham v Trane* test was *Ashlock v SetClear*. The appellant was an employee of the respondent. The appellant subsequently had disagreements with the respondent and ceased his employment with the respondent, signing a severance agreement which provided for "full and final settlement of all claims" against the respondent and its affiliated companies. However, the appellant later commenced proceedings in the New York courts. A year later, the respondent commenced proceedings in the Singapore courts seeking, *inter alia*, a declaration that the appellant was in breach of his severance agreement by commencing proceedings in New York, and an order restraining the appellant from continuing or commencing proceedings related to this matter. The High Court agreed that the severance agreement barred further claims between the parties and therefore granted an anti-suit injunction restraining the appellant from continuing proceedings in New York. The appellants appealed to the Court of Appeal, arguing that the High Court should have first considered the applicable conflict of laws principles as they relate to interlocutory anti-suit injunctions before determining the case on its merits. The Court of Appeal dismissed the appeal, holding, *inter alia*, that the case at hand did not involve an interlocutory application for an anti-suit injunction, but rather a permanent injunction resulting from a judgment on the merits. Therefore, the High Court was correct in making a determination of the merits of the case first.

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70 *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [46]–[52].

71 *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [47]; *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR(R) 457 at [41].

32 While considering whether the anti-suit injunction should be granted, the Court of Appeal held that the principles governing the grant of permanent injunctions are similar to the principles governing interlocutory injunctions on the ground that foreign proceedings are in breach of an exclusive jurisdiction agreement, citing *National Westminster Bank v Utrecht-America Finance*[72] ("*National Westminster Bank*").[73] The Court of Appeal also agreed that the court should readily grant anti-suit injunctions in such situations, in line with *The Angelic Grace*[74] and *Kirkham v Trane*.[75] In addition, the Court of Appeal accepted the *Kirkham v Trane* guidelines with regard to the grant of interlocutory anti-suit injunctions.[76]

33 It is clear that the Court of Appeal recognised a difference in reasoning between cases where an anti-suit injunction is sought in breach of an exclusive jurisdiction agreement and cases without such a breach. However, even with regard to cases involving a breach of an exclusive jurisdiction agreement, the Court of Appeal approved the usage of the language of vexatious and oppressive conduct as the justification for the grant of an anti-suit injunction. In determining the principles to apply to cases where there was a breach of an exclusive jurisdiction agreement, the Court of Appeal cited *National Westminster Bank*:[77]

> Thus it would be *vexatious* to allow Utrecht to continue its breach in circumstances where damages would not be an adequate remedy …. [emphasis added]

34 The Court of Appeal also affirmed[78] the reasoning in *Continental Bank NA v Aeakos Compania Naviera SA*[79] that was cited in *The Angelic Grace*:[80]

> [I]n our judgment the continuance of Greek proceedings amounts to *vexatious and oppressive conduct* on the part of the defendants. [emphasis added]

35 These statements would appear to be support for the proposition that breach of an agreement is relevant to the grant of an anti-suit

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72 [2001] CLC 1372.

73 *Ashlock William Grover v SetClear Pte Ltd* [2012] 2 SLR 625 at [35]; *National Westminster Bank v Utrecht-America Finance* [2001] CLC 1372 at [29]–[35].

74 *Ashlock William Grover v SetClear Pte Ltd* [2012] 2 SLR 625 at [35]; *The Angelic Grace* [1995] 1 Lloyd's Rep 87 at 96 (CA).

75 *Ashlock William Grover v SetClear Pte Ltd* [2012] 2 SLR 625 at [37]; *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [29].

76 *Ashlock William Grover v SetClear Pte Ltd* [2012] 2 SLR 625 at [37].

77 *Ashlock William Grover v SetClear Pte Ltd* [2012] 2 SLR 625 at [35]; *National Westminster Bank v Utrecht-America Finance* [2001] CLC 1372 at [35].

78 *Ashlock William Grover v SetClear Pte Ltd* [2012] 2 SLR 625 at [35].

79 [1994] 1 Lloyd's Rep 505 at 512.

80 *The Angelic Grace* [1995] 1 Lloyd's Rep 87 at 94.

injunction only in so far as it is evidence of vexatious and oppressive conduct. However, the reasoning of the Court of Appeal elsewhere in the judgment suggests that the test for the grant of an anti-suit injunction where there is a breach of an exclusive jurisdiction agreement is wholly separate from the *Kirkham v Trane* test. This is because the court analysed the case before it by first citing authority that the test for the grant of a permanent anti-suit injunction is the same as that for the grant of an interlocutory anti-suit injunction where there is breach of an exclusive jurisdiction agreement, and then going on to consider that *even if* the *Kirkham v Trane* test applied, the result would have been the same. The court made no mention of the *Kirkham v Trane* test in its consideration of the principles applying to interlocutory anti-suit injunctions being sought on the ground of breach of an exclusive jurisdiction agreement. This implied that the *Kirkham v Trane* test applies only to cases where there is no breach of an agreement. The court appeared to envision the *Kirkham v Trane* test as applying to anti-suit injunctions generally, and an entirely different test applying where there is breach of an agreement.

36 Overall, although parts of the judgment support the proposition that breach of an agreement is merely evidence of vexatious and oppressive conduct, other sections of the judgment imply a separation of the two categories to the extent that they are not even part of the same test. Therefore, in the wake of the judgment in *Ashlock v SetClear*, the boundaries between the two categories remained unclear.

C. UBS v Telesto Investments

37 The next opportunity for the issue to be considered arose in the Singapore High Court case of *UBS AG v Telesto Investments Ltd*[81] ("*UBS v Telesto Investments*").

38 The defendants, Telesto Investments, opened an account with the plaintiff, UBS AG (Singapore). The plaintiff extended credit facilities to the defendants, with the second defendant acting as guarantor. The account, facilities and guarantee were governed by Singapore law and contained non-exclusive jurisdiction clauses in favour of Singapore. Subsequently, the account suffered a margin shortfall, entitling the plaintiff to liquidate the collateral. The defendants and plaintiff entered into a standstill agreement, under which the defendants would provide, *inter alia*, a share deposit and letter of undertaking from a separate unit trust, in exchange for the plaintiff not liquidating the collateral.

39 However, the defendants failed to fulfil their obligations under the standstill agreement, leading the plaintiff to furnish a notice of

81 [2011] 4 SLR 503.

termination of the agreement to the defendants. The plaintiff also commenced proceedings in Singapore to recover the liabilities owed under the account agreement. Shortly after, the defendants commenced proceedings in Australia against UBS AG's branch in Australia, arguing that their investments were made as a result of misrepresentations and seeking an order that all the agreements with the plaintiff were *void ab initio*. The plaintiff filed an application for an anti-suit injunction against the defendants in respect of the Australian proceedings. The defendants also filed to stay the Singapore proceedings in favour of the Australian proceedings. The assistant registrar dismissed the stay applications and granted an anti-suit injunction against the defendants from continuing the Australian proceedings.[82] The defendants appealed the dismissal of their stay applications and the grant of the anti-suit injunction to the Singapore High Court.

40 In its judgment, the Singapore High Court affirmed the *Kirkham v Trane* test for the grant of an anti-suit injunction.[83] Notably, the court declared that breach of an agreement is an independent ground for the grant of an anti-suit injunction:[84]

> This ground is founded on a contractual right and is a separate inquiry distinct from the requirement of vexatious or oppressive conduct.

41 Taken on its own, this statement would appear to have settled the issue of the boundaries between the two categories. This statement is further supported by the High Court's citation of the following passage from *Deutsche Bank AG v Highland Crusader Offshore Partners LP*[85] ("*Deutsche Bank*") with approval, in the context of a discussion of the principle to be drawn from *Sabah Shipyard*:[86]

> The decision is best understood to have been based on the finding that the GOP acted in breach of its contract with Sabah by bringing proceedings in Islamabad in which it claimed an injunction to prevent Sabah from enforcing its rights against GOP in England pursuant to the English non-exclusive jurisdiction clause … If I am wrong, and the injunction was granted not in support of a legal right but under the court's power to protect Sabah from vexatious and oppressive litigation, the conduct of the GOP was certainly vexatious and oppressive on the particular facts of the case.

42 It is clear from this passage that the English Court of Appeal understood breach of an agreement and vexatious and oppressive

82 *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 at [44]–[46].
83 *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 at [108].
84 *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 at [111].
85 [2010] 1 WLR 1023.
86 *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 at [125]; *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2010] 1 WLR 1023 at [112].

conduct as separate grounds for the grant of an anti-suit injunction, and the Singapore High Court's citation of such reasoning suggests its approval of this clear distinction.

43 However, the Singapore High Court's reasoning later in the judgment, especially with regard to *Sabah Shipyard*, introduced ambiguity into Singapore law.

44 The Singapore High Court had to determine whether there was a breach of a non-exclusive jurisdiction clause in favour of Singapore by Telesto Investments. An argument raised by the plaintiff was that *Sabah Shipyard* stood for the general proposition that where a non-exclusive jurisdiction clause applies, the court may infer an intention on the part of the contracting parties not to bring or continue parallel proceedings in foreign countries after an action had been commenced in the primary forum stated in the non-exclusive jurisdiction clause.[87] If such an intention could be inferred into the non-exclusive jurisdiction clause, Telesto Investments would be in breach of the clause, with consequent implications for the grant of an anti-suit injunction.

45 A description of the facts and holding in *Sabah Shipyard* will be appropriate at this point. *Sabah Shipyard* concerned a set of agreements between the Government of Pakistan ("GOP"), KESC, a state-owned corporation, and Sabah Shipyard (Pakistan) Pte Ltd ("Sabah Shipyard") relating to the design, construction and maintenance of an electric generation facility in Karachi. GOP entered into a guarantee in favour of Sabah Shipyard under which it guaranteed the obligations of KESC under one of the agreements. Clause 1.91 of the guarantee stated:[88]

> Each Party consents to the jurisdiction of the Courts of England for any action filed by the other Party under this agreement to resolve any dispute between the Parties and may be enforced in England ….

46 Disputes subsequently arose and an arbitration was held in Singapore. This resulted in an award in Sabah Shipyard's favour. Sabah Shipyard demanded payment from KESC, but KESC denied liability. Sabah Shipyard then claimed under its guarantee against GOP. In response, GOP commenced proceedings in Islamabad for a declaration that it was not bound by the arbitration between KESC and Sabah Shipyard and that the guarantee was invalid due to a failure of consideration. Crucially, GOP sought an injunction against Sabah Shipyard to prevent it from making any demand under the guarantee. Sabah Shipyard sought an anti-suit injunction from the English courts against the proceedings in Islamabad. David Steel J granted the anti-suit

87 *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 at [114].

88 *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571 at [1].

injunction. GOP appealed, but Steel J's decision was upheld by the English Court of Appeal.

47 The English Court of Appeal first found that on a construction of the jurisdiction clause and the rest of the contract in question, it cannot have been the intention of the parties that if proceedings were commenced in England, parallel proceedings could be pursued elsewhere unless there was some exceptional reason for doing so. Thus, there was a breach of the jurisdiction agreement by GOP in seeking to prevent Sabah Shipyard from commencing proceedings in the agreed jurisdiction. The court in *Sabah Shipyard* then went on to consider whether an anti-suit injunction should be granted against the proceedings in Pakistan. The English Court of Appeal concluded that the conduct of GOP was vexatious and oppressive in the context of the intention of the parties as "it simply cannot have been contemplated that if proceedings were commenced in the forum each had agreed as convenient, parallel proceedings would still take place in Pakistan".[89]

48 Returning to the case before it, the Singapore High Court held that *Sabah Shipyard* did not stand for the general proposition argued for by the plaintiff.[90] The High Court quoted *Cheshire, North & Fawcett*[91] in support of its reasoning:[92]

> Where the agreement provides for the non-exclusive jurisdiction of the English courts there is no breach of agreement in bringing proceedings abroad and therefore an injunction will not be granted on the basis of breach of an agreement. However, if one party (A) by way of a pre-emptive strike seeks an injunction abroad whereby the other party (B) will be permanently restrained from making any demand under a contract (containing a non-exclusive *English* jurisdiction clause) in the hope of preventing B from starting proceedings in *England*, this is a breach of contract and vexatious. An injunction restraining A from continuing the proceedings abroad will then be granted on the basis of vexation or oppression. [emphasis added]

49 The Singapore High Court subsequently concluded that the anti-suit injunction in respect of the Islamabad proceedings in *Sabah Shipyard* was granted on the ground that the proceedings were vexatious and oppressive as opposed to the drawing of an inference that the parties had intended that no parallel proceedings be commenced upon agreeing

89 *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571 at [42].

90 *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 at [125].

91 J Fawcett & J M Carruthers, *Cheshire, North & Fawcett: Private International Law* (P North consultant ed) (Oxford University Press, 14th Ed, 2008).

92 J Fawcett & J M Carruthers, *Cheshire, North & Fawcett: Private International Law* (P North consultant ed) (Oxford University Press, 14th Ed, 2008) at p 474.

to a non-exclusive jurisdiction clause.[93] The Singapore High Court added that in any case, the breach of contract in *Sabah Shipyard* was not the breach of the non-exclusive jurisdiction clause, but the breach of contract in commencing proceedings to prevent *Sabah Shipyard* from enforcing its rights under the contract.[94] In the case before it, the Singapore High Court found that the anti-suit injunction could be granted on the basis of the court's power to restrain vexatious or oppressive conduct.

50 It is respectfully submitted that the Singapore High Court's interpretation of *Sabah Shipyard* requires reconsideration. In the paragraph from *Cheshire, North & Fawcett* quoted by the High Court, the learned authors describe how a party may breach a non-exclusive jurisdiction agreement by seeking an injunction abroad in the hope of preventing the other party from starting proceedings in the chosen forum. It appears that the High Court interpreted the passage as describing a breach of contract separate from the breach of the non-exclusive jurisdiction agreement. This led to the Singapore High Court's conclusion that the breach of contract in *Sabah Shipyard* was not related to the non-exclusive jurisdiction agreement. However, the breach of contract described in the passage in *Cheshire, North & Fawcett* must have stemmed from the non-exclusive jurisdiction clause. Since the non-exclusive jurisdiction agreement conveyed an agreement to bring proceedings in *England*, the act of seeking an injunction against the commencement of proceedings in *England* could amount to a breach of the non-exclusive jurisdiction agreement. If the non-exclusive jurisdiction agreement had not been present in the contract, there would have been no breach of contract.

51 Therefore, the Singapore High Court correctly identified a breach of contract in *Sabah Shipyard*, but did not properly attribute this breach of contract to the non-exclusive jurisdiction clause. The Singapore High Court's holding can possibly be attributed to an unwillingness to read too much into a non-exclusive jurisdiction agreement, due to a desire to avoid blurring the lines between non-exclusive and exclusive jurisdiction agreements. Such an attitude is justifiable – blurred lines between the two types of jurisdiction agreements may have an impact on commercial certainty, especially when parties are doing forward planning via contract.

52 However, the conclusion to draw from this case is now ambiguous. It depends on one's view of the type of breach of contract that occurred in *Sabah Shipyard*. There are two possibilities. If the breach is viewed as a breach of contract unrelated to the jurisdiction agreement, then the High Court's interpretation of the anti-suit injunction in *Sabah*

93 *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 at [127].
94 *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 at [127].

Shipyard as having been granted under the ground of vexatious and oppressive conduct is unobjectionable.

53 On the other hand, if the breach is viewed as a breach of the non-exclusive jurisdiction agreement, as should be the case, then the Singapore High Court was implicitly approving the proposition that breach of a jurisdiction agreement is merely evidence of vexatious or oppressive conduct. This is because the Singapore High Court concluded that the anti-suit injunction in *Sabah Shipyard* was granted on the ground of vexatious and oppressive conduct. Given that there was no other reason offered to support the finding of vexatious and oppressive conduct, aside from the breach, the finding of vexatious and oppressive conduct must have been based on the breach of the jurisdiction agreement.

54 In sum, the Singapore High Court in *UBS v Telesto Investments* did not bring any resolution to the boundaries between the two categories. The conclusion to be drawn from the Singapore High Court's analysis of *Sabah Shipyard* in *UBS v Telesto Investments* also remains uncertain.

D. Morgan Stanley

55 In *Morgan Stanley Asia (Singapore) Pte v Hong Leong Finance Ltd*[95] ("*Morgan Stanley*"), the contract between the parties contained a non-exclusive jurisdiction clause in favour of Singapore. The clause read:[96]

> This Agreement is governed by and shall be construed in accordance with the laws of the Republic of Singapore. The parties hereto submit to the non-exclusive jurisdiction of the courts of Singapore.

56 In this case, the plaintiffs were pursuing an anti-suit injunction against proceedings started by the defendant in New York. As the High Court considered whether to exercise its power to grant the anti-suit injunction, the court affirmed the *Kirkham v Trane* test.[97] As a guide to applying the test, the High Court added:[98]

> At the outset, I should mention that [the *Kirkham v Trane* factors] are *not independent of each other*, and the authorities cited above have stressed the importance of looking at all the factors in the round. [emphasis added]

95 [2013] 3 SLR 409.
96 *Morgan Stanley Asia (Singapore) Pte v Hong Leong Finance Ltd* [2013] 3 SLR 409 at [39].
97 *Morgan Stanley Asia (Singapore) Pte v Hong Leong Finance Ltd* [2013] 3 SLR 409 at [26].
98 *Morgan Stanley Asia (Singapore) Pte v Hong Leong Finance Ltd* [2013] 3 SLR 409 at [26].

57 The High Court noted that in arguing for the anti-suit injunction to be granted, the plaintiffs did not argue that there was a breach of the non-exclusive jurisdiction agreement. Instead, in the context of the *Kirkham v Trane* test, the plaintiffs relied on the existence of the non-exclusive jurisdiction clause as a very strong indicator in a natural forum analysis.[99] To determine the strength of this indicator, the High Court cited the Court of Appeal judgment in *Orchard Capital*, which held that "the weight to be attributed to it ought to depend on the circumstances".[100] The plaintiffs ultimately failed to show that Singapore was the natural forum, and the High Court eventually refused to grant the anti-suit injunction for reasons of expediency and a lack of vexatious and oppressive conduct.

58 In this case, the High Court considered the existence of the non-exclusive jurisdiction agreement only as part of the natural forum element in the *Kirkham v Trane* test. However, this case is noteworthy in the context of the issue being considered in this article because the High Court expressly stated that the factors in the *Kirkham v Trane* test "are not independent of each other".[101] Unfortunately, by itself, this statement does little to clarify the issue at hand – did the High Court mean that breach of an agreement in itself would not be sufficient to allow the grant of an anti-suit injunction, potentially requiring proof of vexatious and oppressive conduct above and beyond the breach of agreement, or did the High Court mean that breach of an agreement is an independent ground for the grant of an anti-suit injunction in so far as it does not require further proof of vexatious and oppressive conduct, but that it remains part of a holistic test aimed at serving the ends of justice? Both alternatives remain plausible in the wake of the High Court's decision.

IV. Three possible approaches: Reflections

59 As can be seen from the preceding analysis of contemporary Singapore case law, the Singapore courts have not been consistent with regard to the relationship between the categories of vexatious, oppressive or unconscionable conduct and breach of agreement. Even in a single judgment, one can find conflicting indicators as to whether breach of agreement is an independent ground for the grant of an anti-suit injunction or serves as evidence of vexatious and oppressive conduct. The boundaries between the two categories of cases are not clear.

99 *Morgan Stanley Asia (Singapore) Pte v Hong Leong Finance Ltd* [2013] 3 SLR 409 at [56].

100 *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519 at [30], citing Yeo Tiong Min, "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306 at 349, para 88.

101 *Morgan Stanley Asia (Singapore) Pte v Hong Leong Finance Ltd* [2013] 3 SLR 409 at [26].

60 The cases reviewed above present three possible alternatives for the formulation of the boundaries between the two categories.

61 First, breach of an agreement could be viewed as an independent ground for the grant of an anti-suit injunction in so far as it is not merely evidence of vexatious and oppressive conduct but is a ground in itself for an award of an anti-suit injunction. Vexatious and oppressive conduct need not be further proven as long as there is a breach of an agreement. On this view, breach of an agreement and vexatious, oppressive and unconscionable conduct would be distinct categories for the grant of an anti-suit injunction. However, both categories would be analysed under the *Kirkham v Trane* test, both serving as elements in an equitable analysis aimed at pursuing the ends of justice in each case, but differing in *kind*.

62 Second, breach of an agreement could be viewed as evidence of vexatious and oppressive conduct. Viewed thus, breach of an agreement would not be an independent ground for the grant of an anti-suit injunction – proof of additional vexatious and oppressive conduct may be required, although the breach would be a strong indicator of vexatious or oppressive conduct in itself. On this view, the borders between the two categories are blurred. The two categories will also be analysed under the *Kirkham v Trane* test to achieve the ends of justice. However, in contrast to the first approach, the difference between the two categories would be a matter of *degree*, rather than kind.

63 Third, breach of an agreement could be seen as requiring an analysis entirely independent of the *Kirkham v Trane* test. As long as there is a breach of an agreement, the court's concern will be to uphold the parties' bargain. The *Kirkham v Trane* equitable analysis would only apply where there is no such breach. This approach was implied by the court in *Ashlock v SetClear*.

64 All three approaches are possible under the existing case law, despite the fact that all three lead to differing consequences in the test for the grant of an anti-suit injunction. It is suggested that this ambiguity in the existing case law is undesirable, and that clarity regarding the boundaries between the two categories is very important. Clarity in the formulation of the boundaries reflects clarity in the jurisprudential basis of anti-suit injunctions, which is crucial to giving the law a good foundation in principle and allowing the law to develop in a coherent manner.[102] The question thus is which approach to formulating the boundaries between the two categories should be taken.

102 Cameron Sim, "Choice of Law and Anti-Suit Injunctions" (2013) 62 ICLQ 703 at 708.

A. Comparing the first and second approaches

65 Both approaches are founded upon an overarching concern that the ends of justice are met, in recognition of the jurisprudential roots of anti-suit injunctions in equity. The difference between the approaches lies in the nature of the relationship between the two categories.

66 Between these two approaches, it is suggested that the first is preferable. The tendency to blur the boundaries between the two categories can be attributed to their common roots in the court's equitable jurisdiction. Both categories are indeed elements in an equitable analysis, and involve an exercise of the court's equitable jurisdiction, as mentioned above. It thus becomes tempting to conflate the two categories together in an analysis of the equities of the case. However, authority and first principles lean in the direction of a distinction in *kind*, rather than *degree*, between the two categories.

67 First, there is strong authority for the first approach. There are numerous English and Singaporean cases that have drawn a clear distinction between the two categories and recognised the differing analysis triggered by each category.[103] Australian law distinguishes clearly between the two categories as well. In *Ace Insurance*,[104] Brereton J held that his conclusion on the breach of an exclusive jurisdiction clause in the case relieved him of the necessity of considering whether the commencement of foreign proceedings was vexatious and oppressive, thus implying that the two categories are separate and distinct grounds for the grant of an anti-suit injunction.

68 Second, the two categories can be clearly distinguished in principle. In both categories, the basis for the grant of the anti-suit injunction is the personal equity between the parties. However, a distinction can still be drawn between the *type* of equity being acted upon in each category. The equity involved in the category of breach of agreement is grounded in the personal equities generated by the *agreement* between the parties.[105] In contrast, the equity involved in the category of vexatious, oppressive and unconscionable conduct is based on the personal equities arising from the *conduct* of the parties towards each

103 *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088 at [91]; *The Asian Plutus* [1990] 1 SLR(R) 504; *Turner v Grovit* [2002] 1 WLR 107 at [27]; *The Angelic Grace* [1995] 1 Lloyd's Rep 87 at 96; *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 All ER 749 at [24]; *The Eleftheria* [1970] P 94 at 99–100.

104 *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 at [73].

105 Yeo Tiong Min, "The Effective Reach of *In Personam* Reasoning in Private International Law" Yong Pung How Professorship of Law Lecture (2009) at para 16.

other.[106] In addition, breach of an agreement introduces the additional policy concern of maintaining commercial certainty by giving effect to parties' agreements.[107] Therefore, it is clear that cases involving a breach of an agreement stand on a different plane from cases involving vexatious, oppressive and unconscionable conduct.

69 Third, adopting the second approach could lead to conceptual asymmetry, in the light of the law's special treatment of exclusive jurisdiction agreements. As mentioned above, the law imposes a strong reasons requirement on the party in breach of an exclusive jurisdiction agreement to explain why the breach should be allowed. If the second approach is adopted, with the two categories differing in *degree* and not in *kind*, then the justification for the strong reasons requirement would be the *degree* of the vexatious and oppressive conduct evidenced by a breach of a jurisdiction agreement. This justification will lead to conceptual asymmetry between the strong reasons test in the context of the grant of an anti-suit injunction and stay of proceedings. Since there is no requirement to show vexatious or oppressive conduct in the context of a stay of proceedings, this justification for the strong reasons test can no longer apply to the same test in a stay of proceedings exercise. Such conceptual asymmetry is difficult to rationalise, since the strong reasons test applies in exactly the same fashion in both contexts.

70 Fourth, leading on from the new justification for the strong reasons requirement necessitated by the second approach, the second approach would also open the door in theory for particularly vexatious and oppressive conduct to trigger a strong reasons requirement as well, even if there is no breach of a jurisdiction agreement. On the other end of the spectrum, it would also become valid in principle to argue that the strong reasons requirement may not be triggered even in the presence of a breach of an exclusive jurisdiction agreement, if the party in breach is able to show that the balance of the equities in the case is able to mitigate his breach of the agreement. This would lead to some practical difficulties. A confusing shift in the burden of proof will be required – for instance, should the plaintiff be able to prove vexatious, oppressive or unconscionable conduct beyond a certain threshold,[108] he would be able to shift the burden of proof over to the defendant to show strong reasons

106 Yeo Tiong Min, "The Effective Reach of *In Personam* Reasoning in Private International Law" Yong Pung How Professorship of Law Lecture (2009) at para 16.

107 Daniel Tan, "No Dispute Amounting to Strong Cause; Strong Cause for Dispute?" (2001) 13 SAcLJ 428 at 435; Vincent Leow, "Exclusively Here to Stay: The Applicable Principles to Granting a Stay on the Basis of an Exclusive Jurisdiction Clause" (2004) Sing JLS 569 at 573; J Fawcett & P North, *Cheshire and North's Private International Law* (Oxford University Press, 13th Ed, 1999) at p 350; *Dicey and Morris on The Conflict of Laws* (Lawrence Collins gen ed) (Sweet & Maxwell, 13th Ed, 2000) at p 442.

108 The setting of which will involve a lot of practical difficulty in itself.

why the anti-suit injunction should not be granted despite his vexatious conduct. Likewise, a defendant in breach of an agreement should be able to argue that he does not have to show strong reasons because the objective justice of the case mitigates his breach of agreement, thus shifting the burden of proof back to the plaintiff to prove the vexatious, oppressive or unconscionable conduct necessary for the grant of an anti-suit injunction. These possibilities will certainly complicate proceedings and introduce considerable uncertainty as to the effect of jurisdiction agreements, yet are entirely possible in principle on the second approach.

71 The first approach faces no such difficulties. Since the category of breach of an agreement is different in *kind* from the category of vexatious, oppressive or unconscionable conduct, there will be no conceptual asymmetry between the strong reasons test in the context of an anti-suit injunction and stay of proceedings exercise. The same underlying principles for the strong reasons test can apply equally to both contexts. Also, it stands to reason that a unique analysis, *ie*, the strong reasons test, can be properly applied to the first category alone and not the second. Thus, on the first approach, the practical difficulties highlighted above are not possible even in principle. Although the practical difficulties introduced by the second approach are not insurmountable, the question is whether they are necessary evils to be overcome or symptoms of a dysfunctional foundation in principle.

B. Comparing the first and third approaches

72 The third approach draws an even sharper distinction between the two categories. On this approach, the jurisprudential basis for the grant of an anti-suit injunction in each category would be different – for the category of vexatious, oppressive and unconscionable conduct, the jurisprudential basis remains equity and the jurisdiction exercised is equitable, while for the category of breach of agreement, the jurisprudential basis is sanctity of contract and the jurisdiction exercised is legal. Upholding the parties' contractual agreement would thus be the rationale for the grant of the anti-suit injunction in the second category, rather than upholding the ends of justice.

73 The third approach avoids the difficulties arising from a conflation of the two categories, as will occur in the second approach. However, it would be difficult to reconcile this approach with the established jurisprudential basis of anti-suit injunctions. As mentioned previously, anti-suit injunctions are based on the court's equitable or inherent jurisdiction. Adopting the third approach amounts to finding an entirely new jurisprudential basis for anti-suit injunctions, leading to considerable difficulty in rationalising this approach with the existing case law. For instance, this approach would mean that the fifth element

set out by the Singapore Court of Appeal in *Kirkham v Trane* would become superfluous. Also, this approach would be at odds with the general consensus in English and Singapore law that the court's power to grant anti-suit injunctions is discretionary – a characteristic of an exercise of equitable rather than legal jurisdiction.[109] The "strong reasons" test, developed over decades of case law, would have to be discarded if the court's jurisdiction to grant anti-suit injunctions is no longer discretionary. In addition, adopting this approach would leave no space for a consideration of comity as a constraining factor in the exercise of the court's jurisdiction. In view of these issues, it is suggested that the third approach is not tenable unless the Singapore courts wish to undertake a complete revision of the law on anti-suit injunctions.

V. Way ahead

74 Between the three possible approaches to formulating the boundaries, this article argues that the first approach should be taken, and that the Singapore courts should clearly articulate so in their judgments. The first approach will provide a good jurisprudential basis for the law in this area – accounting for the law's long-standing acceptance of upholding the parties' bargain as a distinct principle in the context of the grant of anti-suit injunctions, providing a principled basis for the "strong reasons" test, and cohering with the substantial amount of authority in this area of law. Having a good foundation in principle for the applicable rules of law will allow the law to continue developing in a coherent manner.

75 With the boundaries between the categories thus clarified, the test for the grant of an anti-suit injunction in Singapore would be as follows. Whether the ground relied upon is breach of agreement or vexatious, oppressive or unconscionable conduct, the *Kirkham v Trane* test will apply. The first factor, *ie*, whether the defendants are amenable to the jurisdiction of the Singapore court, is common to both types of cases and requires little explanation.

76 The second factor, *ie*, the natural forum for resolution of the dispute between the parties, is also common to both types of cases. The general requirement is that the forum must be the natural forum for the resolution of the dispute before an anti-suit injunction will be granted to restrain foreign proceedings. Where there is a breach of a forum jurisdiction agreement, the jurisdiction agreement alone should provide

109 *The Angelic Grace* [1995] 1 Lloyd's Rep 87 at 96; *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088 at [85].

a sufficient connection between the forum and the matter in question.[110] However, there are exceptions to this requirement. First, in a single forum situation, where the forum is asked to grant an anti-suit injunction against proceedings in a foreign court which alone has jurisdiction, the requirements of comity can still be met if the transactions between the parties are connected with the forum to a great extent, or if the policies of the forum must be protected.[111] Second, there may be exceptional circumstances where the natural forum requirement can be overlooked to allow the grant of an anti-suit injunction, for example, "where the conduct of the foreign state exercising jurisdiction is such as to deprive it of the respect normally required by comity".[112]

77 The analysis diverges for the remaining three factors. The third and fourth factors, *ie*, alleged vexation or oppression to the plaintiffs and alleged injustice to the defendants, are the primary factors where the ground relied upon is vexatious, oppressive or unconscionable conduct. Where this is the ground relied upon, the applicant will have to prove that the ends of justice will be served by the grant of an anti-suit injunction, taking into account both the vexation and oppression to the applicant if the foreign proceedings were to continue, and the injustice suffered by the defendant if he is unable to follow through on the foreign proceedings. The fifth factor in the *Kirkham v Trane* test will not apply in this analysis.

78 The fifth factor, *ie*, whether the institution of foreign proceedings is in breach of any agreement between the parties, will be the primary factor where the ground relied upon is breach of agreement. Where the agreement involved is a jurisdiction agreement, the courts should first classify the clause through contractual construction to determine if it is exclusive or non-exclusive in effect, taking into account the express wording of the clause and the overall factual matrix. If the effect of the jurisdiction agreement is exclusive, the court will next determine if there has been a breach falling within the scope of the agreement. Should a breach of the agreement be found, it will be sufficient on its own as a ground for the grant of an anti-suit injunction – there is no further requirement to adduce evidence of vexatious, oppressive or unconscionable conduct. The strong reasons requirement will be triggered to shift the burden of proof over to the party in breach to justify the breach of agreement. This does not mean that there is no need to examine the overall justice of the situation in such a case – rather, such an analysis will now fall under the strong reasons test, and can have regard

110 The Singapore courts are unlikely to grant an anti-suit injunction in favour of a foreign jurisdiction clause, in the light of the Court of Appeal's holding that it would not want to act as "an international busybody": see *People's Insurance Co Ltd v Akai Pty Ltd* [1997] 2 SLR(R) 291 at [12].

111 *Airbus Industrie GIE v Patel* [1999] 1 AC 119 at 138–139.

112 *Airbus Industrie GIE v Patel* [1999] 1 AC 119 at 140.

to the third and fourth factors in the *Kirkham v Trane* test as well. If the effect of the jurisdiction agreement is non-exclusive, then the ground relied upon for the grant of the anti-suit injunction will be vexatious, oppressive or unconscionable conduct. The analysis in the preceding paragraph will apply. However, the existence of the non-exclusive jurisdiction agreement will remain significant as one of the factors to determine the natural forum and how vexatious the defendant's conduct is, and the strength of this factor will depend on the circumstances of the case.

79 Where the agreement involved is a settlement agreement or choice of law clause, in principle, the breach of such agreements through the commencement of foreign proceedings can also be remedied by the grant of an anti-suit injunction. The principles applicable to an anti-suit injunction awarded on these grounds should be substantially the same as those applying to exclusive jurisdiction agreements. However, as noted in Part II,[113] the authority to support the grant of anti-suit injunctions for breach of such agreements is not as extensive as that for the grant of anti-suit injunctions for breach of jurisdiction agreements. It remains to be seen how the Singapore courts will develop the law in this regard.

VI. Conclusion

80 This article has sought to elucidate the principles applicable to anti-suit injunctions, demonstrate that Singapore case law has been ambiguous regarding the boundaries between the categories of cases for the grant of anti-suit injunctions, argue that the boundaries must be made distinct, and offer a way ahead for the clarification of the boundaries between the two categories.

81 The ambiguous boundaries between the categories of cases for the grant of an anti-suit injunction can be easily rectified with greater clarity about the principles underlying anti-suit injunctions. The ambiguity in the case law highlighted above is merely a symptom of this lack of clarity. It is hoped that the analysis offered in this article will serve as an aid to clarifying the law of anti-suit injunctions.

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113 See paras 11–20 above.