Case No: A3/2004/2553

Neutral Citation Number: [2005] EWCA Civ 710
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE (Commercial Court)
Mr Justice Langley
[2004] EWHC 2441 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Monday, 13 June 2005

Before :

LORD JUSTICE LAWS
LORD JUSTICE RIX
and
LORD JUSTICE LONGMORE

- -

Between :

O.T. AFRICA LINE LTD	**Respondent/ Claimant**
- and -	
(1) MAGIC SPORTSWEAR CORPORATION **(2) BLUE BANANA** **(3) EASTERN MARINE UNDERWRITERS INC** **(4) CNA CANADA HOLDINGS INC** **(5) SUBROGATE WAY INC**	**Appellants/ Defendants**

- -

(Transcript of the Handed Down Judgment of
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- -

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Judgment

Lord Justice Longmore:

1. Introduction

The critical question in the present appeal is whether an English court, on which the parties to a contract of carriage have conferred exclusive jurisdiction to resolve their

disputes, should in its discretion decline to stay proceedings in this country and grant injunctive relief to restrain one of the parties from bringing and continuing proceedings in the courts of a country whose law permits proceedings to be brought in those courts. The traditional answer to this question has in the past been that it depends on the proper law of the contract of carriage. If the proper law provides that the exclusive jurisdiction clause is unenforceable, the English court will have no regard to it; if the proper law says that it is enforceable, or enforceable in the absence of strong reason for it not to be enforced and no such strong reason exists, the question will then arise whether, as a matter of discretion, it is appropriate to support that enforceability by injunctive relief.

2. It can often be difficult to ascertain the proper law of contracts of carriage whereby goods are shipped in one country for delivery in another country on board a ship whose owners may carry on business in a third country. For this reason it is common for the parties to the carriage contract to agree on the law which is to govern their relationship. In the present case the contract of carriage did contain such an agreement viz that it should be governed by English law. There can be no doubt that in the light of such agreement, the proper law of the contract was English law. It would, therefore, on any ordinary view of the principles of private international law, be English law which determines whether the exclusive jurisdiction clause applies to the dispute; it should also be a matter of English law to determine whether it is appropriate to restrain any party from acting contrary to the clause by bringing proceedings in some court other than that provided for by that clause.

3. Facts

The claimants, O.T. Africa Line Ltd ("OTAL"), were the owners of the "Mathilde Maersk" on which the goods were shipped at New York on 5th February 2002 for a voyage to Monrovia in Liberia. OTAL is an English company and also has offices in Toronto. It was at Toronto that they issued the bill of lading covering the goods naming the first defendants, Magic Sportswear Corporation, as shippers. The intended receivers of the cargo were the second defendants, an entity known as Blue Banana. I shall refer to them as "Magic" and "Blue Banana". Insurance was taken out with Canadian insurers who are the third, fourth and fifth defendants, all of whom are based in Toronto. The vessel arrived at Monrovia in March 2002, but complaint is made of short delivery. Magic and Blue Banana started proceedings before the Federal Court Trial Division in Toronto on 1st August 2003. The insurers were the instigators of those proceedings, exercising rights of subrogation. OTAL issued proceedings in England on 2nd September 2003 against Magic and Blue Banana claiming (inter alia) a declaration that there was no short delivery, and an injunction restraining the Canadian proceedings.

4. The bill of lading contained the following terms:-

> "24. USA/CANADA CLAUSE
>
> If the Bill of Lading covers the transportation of the goods to or from ports of the United States of America or Canada this Bill of Lading shall be subject to United States Carriage of Goods by Sea Act 1936 and/or subject to Carriage of Goods by Water Act 1936 of Canada which shall be incorporated herein and the

provisions of said act shall govern before loading and after discharge and throughout the entire time the goods are in the custody of the Carrier. If anything herein contained to be (sic) invalid or unenforceable under the provisions of said act such circumstances shall not affect the validity or enforceability of any other part or term of this Bill of Lading. The Carrier shall not be liable in any capacity whatsoever for loss, damage or delay of goods while the goods are not in his actual custody.

25. LAW AND JURISDICTION

(1) Any claim or dispute whatsoever arising in connection with the carriage under the Bill of Lading shall exclusively be governed by English law and determined by the High Court of London.

(2) In the event that anything herein contained is inconsistent with any applicable international convention or national law which cannot be departed for private contract, the provisions hereof shall to the extent of such inconsistency but no further be null and void."

5. I take the course of the proceedings from the concise judgment of Langley J. The basis on which the insurers invoked the jurisdiction of the Canadian Court, despite clause 25 of the bill of lading, was Section 46(1) of the Canadian Marine Liability Act 2001 which provides:-

> "46(1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada where:
>
> (a) the actual port of loading or discharge under the contract, is in Canada;
>
> (b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or
>
> (c) the contract was made in Canada."

Sub-sections (b) and (c) applied because OTAL had a place of business, branch or agency in Canada and the bill of lading was issued in Toronto.

6. On 8 September Gross J granted permission to serve the English proceedings on Magic and Blue Banana and also granted OTAL an anti-suit injunction in respect of the Canadian proceedings. On 28th October Magic and Blue Banana (again at the

instigation of the insurers) filed an Acknowledgement of Service indicating an intention to contest the jurisdiction. However, no jurisdiction application was made thereafter and so, in accordance with CPR 11(5), both Magic and Blue Banana are to be treated as having accepted that the English court has jurisdiction to try OTAL's claims against them.

7. Notwithstanding the anti-suit injunction the Canadian proceedings have continued. OTAL, also on 8 September, filed a challenge to the jurisdiction of the Canadian court. Judgment on that challenge was given on 22nd December. The challenge was rejected. In the course of her judgment, Madam Prothonotary Milczynski found that the conditions of Section 46 were satisfied, that the Act "clearly removes the determining or binding effect of a forum selection clause in a bill of lading" and that Canada was the appropriate forum for the trial of the claim. The last of these findings was addressed in paragraph 18 of the judgment as follows:

> "In this case, taking into account all of the facts and surrounding circumstances relating to the shipment of goods from New York to Monrovia, including the value of the goods, the fact that the true Plaintiffs are in Canada, the Defendants have business interests in Canada, and most particularly the fact that most if not all of the material witnesses will come from Monrovia and/or New York, (which factor favours neither England nor Canada), I find that the most convenient and appropriate forum for the determination of the Plaintiff's claim, including the interpretation and application of English law, is this Court."

8. OTAL appealed this decision to the Federal Court Judge. The appeal was heard in February 2004. It was dismissed on 23rd August by Mr Justice John A. O'Keefe. It was held that the Prothonotary's analysis of the issues was "not clearly wrong nor did she exercise her discretion based upon a wrong principle or upon a misapprehension of the facts". OTAL has now lodged a further appeal against this decision to the Canadian Federal Court of Appeal. This appeal is, we were told, to be heard on 14th June 2005.

9. No further steps were taken in the proceedings in the English court until, on OTAL's application, on 5th April 2004, Cooke J made an order pursuant to CPR Part 19 granting OTAL permission to join the insurers as defendants to the action (and amend the claim accordingly) and to serve the amended claim on the insurers out of the jurisdiction in Canada.

10. The grounds on which the claim was served on the insurers out of the jurisdiction were:

> (i) that, pursuant to CPR Rule 6.20(8)(a), a claim was made in tort where damage was sustained within the jurisdiction. The tort alleged was procuring a breach of contract by Magic and Blue Banana by procuring those companies to commence the proceedings in Canada in breach of Clause 25 of the Conditions of the bill of lading. The damage relied upon was the legal costs of

the proceedings against Magic and Blue Banana in England;

(ii) that, pursuant to CPR Rule 6.20(17), OTAL sought an order that the court exercise its power under Section 51 of the Supreme Court Act 1981 to make a costs order against the insurers who were not parties to the proceedings.

11. Langley J decided that jurisdiction could not be founded on CPR Part 6.20(8)(a) against the insurers but decided that jurisdiction could (and, subject to the prospects of injunctive relief being granted, should) be exercised pursuant to Part 6.20(17) and also pursuant to part 6.20(3) because, in any event, the insurers were necessary and proper parties to the claim made against Magic and Blue Banana. He, therefore, declined to set aside the proceedings against the insurers for any want of jurisdiction. He did not think that he should grant a stay of proceedings or set aside the injunction already granted because, apart from what he called "the overriding issue", there was no good reason why the exclusive jurisdiction clause should not take effect. He then considered that overriding issue which he described as being whether a stay should nevertheless be granted and the proceedings against the insurers be set aside on the ground that otherwise

> "there will be a clash of jurisdictions, with the appalling prospect of an apparent challenge from this court to Canadian legislation and the cost and disruption of the same claims proceeding in two jurisdictions with the added risk of different outcomes."

He said that he did not find the answer easy but that Section 46 of the Canadian statute did not constitute a sufficiently exceptional circumstance to justify departure from the exclusive jurisdiction clause agreed by the parties. He then continued the anti-suit injunction granted by Gross J against Magic and Blue Banana and granted an anti-suit injunction against the insurers to ensure the parties abided by their agreement.

12. <u>The Issues</u>

Logically there are two separate but inter-related questions which have to be determined on this appeal:-

(1) should the proceedings against Magic and Blue Banana be stayed and the proceedings against the insurers set aside?

(2) if the answer to either or both of these questions is No, so that the proceedings should continue, should that continuance be buttressed by the continuance of the anti-suit injunctions currently in force?

13. <u>Stay and Jurisdiction</u>

But for the provisions of section 46(1) of the Canadian Marine Liability Act 2001, it is clear to my mind that there would be insufficient reason to grant a stay of the English proceedings as against Magic and Blue Banana. Since they never challenged the jurisdiction of the English court, no jurisdictional point arises. Their argument is that the proceedings should be stayed but strong reasons are required for staying proceedings in the forum in which the parties have agreed that they will litigate. The judge correctly observed (para. 34) that Canada was the country where the contract was made, where the freight was payable and where OTAL had an office but that these factors would not justify a stay on the principles applied by the English court as most recently set out in Donohue v Armco Inc [2001] UKHL 64, [2002] 1 Lloyds Rep 425.

14. Like the judge, moreover I have no doubt that the English court has jurisdiction to order service of the proceedings on the insurers (pursuant to CPR Part 6.20(3)) on the basis that they are necessary or proper parties to the proceedings brought against Magic and Blue Banana. OTAL have asserted that Magic and Blue Banana are in breach of contract in instituting proceedings in Canada and the English court has restrained them from proceeding in Canada. The insurers accept that they have instigated the Canadian proceedings by virtue of their rights of subrogation. The rights to which they are subrogated are the contractual rights contained in or evidenced by the bill of lading. If it is appropriate to restrain Magic and Blue Banana from continuing Canadian proceedings, insurers should not be permitted to act inconsistently with the rights (and correlative obligations) to which they are subrogated and should be restrained from further authorising the breach of contract which Magic and Blue Banana are committing. The mere fact that the English court has jurisdiction to order service of proceedings on insurers does not, of course, mean that the jurisdiction will necessarily be exercised because the court still has to determine whether, as a matter of the court's discretion, it is appropriate for proceedings to be brought against the insurers in England. This is an open-ended discretion and the burden of showing that it is appropriate for the jurisdiction to be exercised is on the claimant who seeks to persuade the court to exercise the jurisdiction. In this respect OTAL is not in such a strong position against the insurers as it is against Magic and Blue Banana where it is for the defendant to show strong reasons why the parties should not be kept to their bargain. Nevertheless, apart from the "overriding" issue, the same sort of considerations will apply to the exercise of jurisdiction over the insurer since it would obviously be unsatisfactory if proceedings were to be brought against Magic and Blue Banana in one country but against the insurers in another.

15. It can thus be seen that the critical issue for the court in respect of the application for a stay of the current English proceedings against Magic and Blue Banana and the application to set aside the proceedings as against the insurers is the extent to which if at all it is appropriate for this court to have regard to section 46(1) of the Marine Liability Act 2001 entitling the cargo-owners to proceed in Canada and to the decisions of the Canadian courts refusing to stay the proceedings which have been instituted. It was on this question that the parties concentrated their argument and to that question I now turn. (I add, in parenthesis, that I see no need to address separately the question whether permission can or should be given to serve insurers pursuant to CPR 6.20(17) because, subject to the overriding issue, insurers will now be parties to the English proceedings.)

16. The overriding issue

Mr McParland for cargo interests submitted:-

(1) that the Canadian legislature had effectively sought to incorporate the Hamburg Rules into its domestic law and that such a decision deserved to be respected;

(2) there was nothing offensive to the principles of private international law in seeking to incorporate into domestic law provisions which had been internationally agreed and which, it was to be hoped, would be adopted by all maritime countries;

(3) that these considerations provided a sufficiently strong reason for the English court to stay the English proceedings, recognising that proceedings would continue in Canada;

(4) that an anti-suit injunction was inappropriate;

(5) that the ends of justice were met by the principle that damages would be an adequate remedy; and

(6) (more delicately) that any injunctive relief might be likely to be ineffective.

17. The Hamburg Rules

These rules are the product of the United Nations Conference on the Carriage of Goods by Sea, held at Hamburg between 6th and 31st March 1978. They differ from the Hague Rules of 1924 and the Hague–Visby Rules of 1968 in that they impose a somewhat more onerous regime on shipowners. For example there is no defence of act, neglect or default of the master or servants of the carrier in the navigation or management of the ship (Article IV 2.(a) of the Hague and Hague-Visby Rules). Rather, if the carrier is to escape liability he must prove that he his servants and agents took

> "all measures that could reasonably be required to avoid the occurrence and its consequences", Article 5.1

It may be for this reason that not many countries with a developed shipowning fraternity have yet chosen to adopt them. Part II of the Canadian Water Carriage of Goods Act 1993 gave the Hamburg rules the force of law in Canada but Part II of the Act will only come into force on a day to be fixed by order of the Governor in Council made on the recommendation of the Minister of Transport. Every 5 years, consideration has to be given to the possibility of the Hamburg Rules coming into force, but they are not yet part of the enforceable law of Canada. They have not been brought into force in England and Wales and there are no current plans to do so.

18. Neither the Hague nor the Hague-Visby Rules make any provision about jurisdiction. The Hamburg Rules, by contrast, do. Article 21, broadly, provides that the plaintiff at

his option may institute an action in a court within the jurisdiction of which (a) the defendant has his principal place of business or habitual residence, (b) the contract was made, (c) the cargo was loaded or discharged or (d) any additional place is designated by the contract of carriage. Article 23 then provides that any stipulation in the contract is null and void to the extent that it derogates from the provisions of the Convention. An exclusive jurisdiction clause is, therefore, to be of no effect to the extent that it does not permit actions to be brought in the place designated in Article 21.

19. Section 46 of the Canadian Marine Liability Act has a definite similarity to the jurisdiction provisions of the Hamburg Rules but is more generous to cargo-interests in that it is sufficient if the defendant has a place of business, branch or agency in Canada. It does not have to be the principal place of business or the habitual residence of the carrier. Nevertheless it seems to me that Mr McParland can fairly say that the Canadian legislature has effectively introduced an equivalent of the Hamburg Rules in relation to jurisdiction into its own domestic law. If England had done the same, OTAL would not, in English courts, be able to rely on any exclusive jurisdiction in the contract of carriage. England has not, however, enacted any such provision. In England, the autonomy of the parties is regarded as more important and any contractual agreement that proceedings will be started only in a particular country will be enforced unless there are strong reasons why the parties should not he held to their contract. The principles governing the exercise of a court's discretion to stay an action brought in the country which has been agreed between the parties for the purpose of the proceedings are set out in the Eleftheria [1970] P 94 and The El Amria [1981] 2 Lloyds Rep 119 which have been approved by appellate courts on many occasions, see Donohue v Armco, already cited.

20. Stay of proceedings?

The question thus arises: what is to happen if Canadian cargo-interests seek to invoke the provisions of the Canadian Marine Liability Act 2001, legitimately according to Canadian law, and the shipowner seeks to invoke the agreed jurisdiction of England, legitimately according to English law? I have already observed that the traditional answer to this question is that it is to be resolved by reference to the proper law of the contract. Indeed, most countries which have adopted the common law system will resolve this difficulty by reference to the proper law. It may, however, be somewhat more accurate to say that the country, in which the question has to be resolved, will answer the question by reference to its own rules of private international law. Since the matter has now arisen in England, we have no option but to resolve it by reference to our own private international law rules, one of which is that questions of interpretation and enforcement of contracts are resolved by reference to the proper law.

21. There are many authorities for this proposition, see eg Adams v National Bank of Greece [1961] AC 255 and, in particular, Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277 in which goods were shipped from Newfoundland under a bill of lading which contained an exemption for loss caused by the servants of the carrier. This exemption was void by the law of Newfoundland, whose legislature had enacted the Hague Rules, but the action was brought in Nova Scotia where the courts had to apply the proper law of the contract contained in its bill of lading – English law – by which the exemption clause was valid. Lord Wright said at page 296:-

> "But whatever view a Newfoundland Court might take, whether they would hold that the contracts contained in the bills of lading must be taken to have incorporated the Hague Rules or whether they would hold them to have been illegal, the result would be the same in the present case, where the action was brought not in a Newfoundland but in a Nova Scotian Court. It may be that, if suit were brought on these bills of lading in a Newfoundland Court, and the Court held they were illegal, the Court would refuse to give effect to them, on the basis that a Court is bound to obey the laws of its own Legislature or its own common law . . . . But it does not follow that any other Court could properly act in the same way. If it has before it a contract good by its own law or by the proper law of the contract, it will in proper cases give effect to the contract and ignore the foreign law."

We have not been told that this is not still the law of Nova Scotia. It certainly remains English law.

22. Now that England is a party to the Rome Convention by virtue of the Contracts (Applicable Law) Act 1990 it may be that the term "applicable law" is to be used rather than proper law. But there is no difference of substance because the first principle of applicability is that a contract is governed by the law chosen by the parties. "Freedom of choice" is the heading to Article 3 of the Rome Convention which, as the editors of Dicey and Morris, Conflict of Laws 13th edition page 1216 say,

> "expresses the basic principle of party autonomy, which represented the law prevailing in all the Contracting States and in most other countries".

The applicable or proper law is here the law of England.

23. It is not surprising to find that Canadian law is exactly the same as a matter of principle. In cases to which the Marine Liability Act 2001 has no application eg because it was not yet in force or because the relevant contract is a contract of towage rather than a contract of carriage, the principles set out in the Eleftheria [1970] P 90 and The El Amria [1981] 2 Lloyds Rep 119 apply and party autonomy is given its due weight, see Z.I. Pompey Industrie v. ECU-Line N.V. (2003) 224 DLR (4th) 577 (SCC), 2003 SCC 27 and Anraj Fish Products Industries Ltd v Hyundai Merchant Marine Co (2000) 262 NR 270 (Fed CA; leave to appeal denied 269 NR 393).

24. In the light of these authorities, no English court would expect a foreign court to grant a stay by reason of any provision of English law, if an action was proceeding in that foreign court by virtue of an agreement, governed by the law of that court, that proceedings were to be brought in the courts of that country. Conversely an English court would hope that a decision to retain an action brought in England, pursuant to an exclusive jurisdiction clause in a contract governed by English law, would be respected by any foreign court.

25. In a similar way, if the issue is one of forum non conveniens and a foreign court applies rules of private international law generally conforming to English rules of forum non conveniens and decides that its own court should retain jurisdiction, that decision will usually be respected. In Canada the position is, unsurprisingly, the same, see Amchem Products Incorporated v. Workers' Compensation Board [1993] 1 SCR 897, 934 per Sopinka J to whom Lord Goff of Chieveley was later to pay graceful tribute in Airbus Industrie v Patel [1999] 1 AC 119, 135E. As a matter of English private international law, exclusive jurisdiction clauses will not be governed by any different principle.

26. There is no English authority precisely analogous to the present case, but a moderately close parallel can be found in litigation involving section 8 of the Insurance Contracts Act 1984 of Australia. That enacted that if the proper law of a contract of insurance would be the law of one of the states in Australia but for an express provision to the contrary then, notwithstanding that provision, the proper law of the contract would be the law of that state. A New South Wales insured had a credit insurance contract with a Singapore insurer which contained an English law and jurisdiction clause; when one of their major debtors went into receivership, the insured brought proceedings in Australia which the High Court of Australia refused to stay because, by virtue of section 8 of the Act, the English law and jurisdiction clause was rendered void. Because there were potential problems with the Australian action (the lower courts had indeed stayed the Australian proceedings by reason of the English law of jurisdiction clause) the insured had also started English proceedings claiming an indemnity from the insurers; the insurers in due course served a defence pleading a time bar, counterclaimed for a declaration that they were not liable by reason of that time bar and applied for summary judgment. The insured responded by seeking to stay the insurers' counterclaim by reason of the concurrent proceedings which the High Court of Australia had permitted to continue there. The insurers then added to their counterclaim a claim for an anti-suit injunction.

27. These were the facts of Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyds Rep 90. Thomas J considered whether the English court should stay the English counterclaim and, in effect, the English action first out of respect to the High Court of Australia as a matter of comity and secondly on the ordinary principles as to stay as set out in The Eleftheria and The Al Amria. On the first question, he cited the Vita Food case and concluded that, although the insurance contract had a very close connection with Australia, that was not decisive. What was decisive (page 100) was that the parties to the insurance contract bargained for English law and that the English court should give effect to that bargain and their freely negotiated choice of law and jurisdiction:-

> "It should not, as a matter of comity, give effect to the decision of the High Court that overrode that bargain and that choice."

On the second question, he held that there were no strong reasons for deciding not to hold the parties to their bargain. A stay of the proceedings was accordingly refused.

28. Thomas J was doing no more than following well-accepted principles of English law and, for my part, I would approve both aspects of his decision and come to the same conclusion in this case.

29. It would be sufficient to say that in my judgment Langley J made no error of principle in refusing to order a stay of the English proceedings and to say that what he called the overriding issue is no justification for such stay. I would, however, go further and say positively that, for the reasons I have given, his decision was correct. I turn, therefore, to the more difficult question viz. whether it is appropriate to enjoin the defendants from proceeding further in Canada.

30. Injunction

It is not now a controversial question whether, in a normal case, an anti-suit injunction should be granted, if a party to an exclusive jurisdiction agreement, in breach of that agreement begins proceedings in a jurisdiction other than the one agreed.

31. As a broad proposition of law, an anti-suit injunction may be granted where it is oppressive or vexatious for a defendant to bring proceedings in a foreign jurisdiction but Société Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871 emphasised that the mere fact that the English court refused a stay of English proceedings on the grounds of forum non conveniens did not itself justify the grant of an injunction to restrain foreign proceedings. The doctrine of comity requires restraint since (a) another jurisdiction may take the view that the courts of that jurisdiction are an equally (or even more) appropriate forum than the English court and (b) any anti-suit injunction can be perceived as an, at least indirect, interference with such foreign court. Even so an anti-suit injunction may be granted if the defendant's conduct in launching or continuing the foreign proceedings is, in fact, oppressive or vexatious as the defendant's conduct was held to be in the Aerospatiale case itself.

32. In the case of exclusive jurisdiction clauses, however, comity has a smaller role. It goes without saying that any court should pay respect to another (foreign) court but, if the parties have actually agreed that a foreign court is to have sole jurisdiction over any dispute, the true role of comity is to ensure that the parties' agreement is respected. Whatever country it is to the courts of which the parties have agreed to submit their disputes is the country to which comity is due. It is not a matter of an English court seeking to uphold and enforce references to its own courts; an English court will uphold and enforce references to the courts of whichever country the parties agree for the resolution of their disputes. This is to uphold party autonomy not to uphold the courts of any particular country.

33. The corollary of this is that a party who initiates proceedings in a court other than the court, which has been agreed with the other party as the court for resolution of any dispute, is acting in breach of contract. The normal remedy for this breach of contract is the grant of an injunction to restrain the continuance of proceedings unless it can be shown that damages are an adequate remedy; but damages will not usually be an adequate remedy in fact, since damages will not be easily calculable and can indeed only be calculated by comparing the advantages and disadvantages of the respective fora. This is likely to involve an even graver a breach of comity than the granting of an anti-suit injunction.

34. All of this is clear on previous authority. In Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR 588; [1994] 1 Lloyds Rep 505 the defendants

had instituted proceedings in Greece in breach of an exclusive jurisdiction clause. Steyn LJ said:-

> ". . . a claim for damages for breach of contract would be a relatively ineffective remedy. An injunction is the only effective remedy for the appellants' breach of contract. If the injunction is set aside, the appellants will persist in their breach of contract, and the bank's legal rights as enshrined in the jurisdiction agreements will prove to be valueless. Given the total absence of special countervailing factors, this is the paradigm case for the grant of an injunction . . ."

Although this decision must be regarded as being overtaken by the decision of the European Court of Justice in Erich Gasser GmbH v Misat [2005] 1 QB 1 in respect of actions between parties domiciled in European Community countries, it remains good law in respect of actions brought, in contravention of an exclusive jurisdiction clause in a contract, the parties to which are not both domiciled in a European Community country. The decision in Aeakos was, moreover, followed in The Angelic Grace [1995] 1 Lloyds Rep 87 where a foreign action was brought in contravention of a London arbitration clause in which Millett LJ said (page 96):-

> ". . . there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them. . . . The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case."

35. One submission of cargo-interests was that to grant an injunction would inevitably be regarded in Canada as a breach of comity because the Canadian courts, by reason of section 41 of the Marine Liability Act, had no other option than to exercise the jurisdiction vested in them by the statute. This is, however, only a correct statement of the position once the cargo-interests have decided to invoke the court's jurisdiction. The Canadian court does not become involved unless the cargo-interests choose to involve it; it is the exercise of that choice, contrary to the cargo-interests' contractual obligations, which the English court restrains by granting an injunction. Once one appreciates this, one can see that the injunction granted by the judge is not, in any way an attack on the legislature or the courts of Canada or a breach of international comity; it is merely restraining a party to a contract from doing something which he has promised not to do. In Sabah Shipyard (Pakistan) Ltd v Islamic Republic Of Pakistan [2002] EWCA Civ 1643, [2003] 2 Lloyds Rep 571 this court recently upheld an injunction granted to restrain a party from acting contrary to a non-exclusive jurisdiction clause; the case for upholding an injunction against a party in breach of an exclusive jurisdiction clause is even stronger.

36. All these considerations were present in Turner v Grovit [2002] UKHL 65, [2002] 1 WLR 107 and particularly in the speech of Lord Hobhouse who said:-

> "26 The making of a restraining order does not depend upon denying, or pre-empting, the jurisdiction of the foreign court . . . For the foreign court, its jurisdiction and whether to

> exercise that jurisdiction falls to be decided by the foreign court itself . . . International recognition of the jurisdiction assumed by the foreign court only becomes critical at the stage of the enforcement of the judgments and decisions of the foreign court by the courts of another country. Restraining orders come into the picture at an earlier stage and involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction. . ."

37. It is, of course, true that the European Court of Justice did not follow Lord Hobhouse's views when the case reached that court. That court had already held in Erich Gasser GmbH v Misat, already cited, that, in the context of the Lugano Convention, it must always be for the court first seised to determine its own jurisdiction, even if there is an exclusive jurisdiction clause for the courts of another Community State. The European Court likewise held in Turner v Grovit [2005] 1 AC 101 that, no matter how much bad faith was displayed by a party to litigation in beginning proceedings in a Contracting State it must always be for that Contracting State to assume or decline jurisdiction. That is because a Jurisdiction and Judgment Convention creates a closed system in which it is assumed that every Contracting State will come to a similar decision about jurisdiction. That would have been the position if, for example, both Canada and England had incorporated the Hamburg Rules as part of their law.

38. The current case is, of course, quite different. It is not a case of the jurisdictional requirements being the same and it being automatically improper for one court to tell another court whether that other court has jurisdiction. In the present case there is no doubt that the Canadian courts have jurisdiction; the only question is whether a party is to be allowed to invoke that undoubted jurisdiction. If he has agreed not to do so, there is no impropriety in his being restrained from so doing and Lord Hobhouse's approach is still, with respect, correct in a non-European context. Indeed, since Mr Grovit was acting vexatiously rather than in breach of contract, it could be said that the present case for an injunction is even stronger than it was in Turner v Grovit.

39. If the existence of section 46 of the Marine Liability Act is an insufficiently strong ground for granting a stay, so likewise it cannot, in my view, be a sufficiently strong reason for not exercising the jurisdiction to grant an injunction in this case. In Akai Thomas J granted an injunction to restrain further Australian proceedings almost as a matter of course in the light of the jurisdiction clause. So here I can see no ground for refusing the injunction to which OTAL are prima facie entitled.

40. There is this further consideration. It is only by granting an injunction that it will be possible to avoid duplicity of proceedings. If these English proceedings are not to be stayed, as I do not think they should be, they will inevitably continue. Whether or not the judge was right to describe the prospect of the same claim proceeding in both England and Canada with the risk of different outcomes as "appalling" (para. 38), it is certainly uncommercial and undesirable. It is only if injunctive relief is granted that the prospect can be avoided.

41. Mr McParland's final argument was that it was possible that an anti-suit injunction might be ineffective. This was a submission which he whispered rather than

trumpeted. He positively did not submit that if this court thought it right to uphold the injunctions granted that either the insurers or the cargo owners would disobey them. We were told Magic and Blue Banana were now empty shells. It was thus the insurers who had the carriage of the proceedings both in Canada and in England. It would be surprising to hear a respectable cargo-insurer assert that he would not comply with the order of a foreign court; it would be no less surprising to hear that a cargo-insurer deliberately decided not to comply with the order of a foreign court. A cargo-insurer wishes to do his business in a number of jurisdictions. To put the matter at its lowest, any deliberate breach of a court order would make problematic the doing of business in the jurisdiction of the court which had made the order.

42. I would therefore dismiss the cargo-interests' appeal and uphold the order of Langley J for the much the same reasons as he gave.

43. Conclusion

It is to be hoped that the Canadian courts will not see this decision as an interference of any kind even if the cargo-insurers or their lawyers were to choose to categorise it that way. Freedom of contract is usually much valued in all common law systems; of course if England were to enact the Hamburg Rules or the equivalent of their jurisdictional provisions, there would be no problem. But until that time comes, the maintenance of the principle that parties should be free to choose the courts where their disputes are to be resolved must be of paramount importance and cannot be reduced to a mere legal aspiration.

Lord Justice Rix :

44. I agree and gratefully adopt Lord Justice Longmore's statement of the facts, the issues and the parties' submissions.

45. There is no dispute in this case that as a matter of English law, which it is accepted is the proper law of the bill of lading, the parties have agreed to submit their disputes "arising in connection with" the bill of lading to the exclusive jurisdiction of the English courts. Clause 25, which governs both law and jurisdiction, contains an express choice of English law. Even though Mr McParland on behalf of the appellants has suggested that the agreement to found jurisdiction exclusively in England might be viewed, for the purposes of an exercise of discretion, as part of a contract of adhesion (*cf* Lord Bingham's reference to The Fehmarn [1958] 1 WLR 159 at paragraph 26 of his speech in Donohue v. Armco [2001] UKHL 64, [2002] 2 Lloyd's Rep 425 at 433), he has not suggested that the proper law of the contract is other than English law. Madam Prothonotary Milczynski (at para 18 of her judgment) and Mr Justice O'Keefe (at para 22 of his) similarly recognised that the litigation in Canada would be conducted by reference to the English proper law.

46. In these circumstances, whatever might be the status of jurisdiction in Canada by reference to section 46(1) of the Canadian Marine Liability Act 2001, the appellants' submission that Langley J was wrong to refuse a stay of these English proceedings brought by the shipowners becomes an extremely difficult one. Mr McParland did not submit that the exclusive jurisdiction clause was invalid under English law. It operates mutually in respect of claims by either cargo or ship. It is a standard type of clause which parties who make contracts for the international carriage of goods can in

the ordinary way of things expect a bill of lading contract to contain. In the present case, it is consistent with the chosen proper law. It reflects an agreement by the parties as to where it would be convenient for the parties to conduct their litigation: see British Aerospace plc v. Dee Howard Co [1993] 1 Lloyd's Rep 368 at 375/6, where Waller J was even prepared to assume that he was dealing with a non-exclusive jurisdiction clause.

47. Such an agreement is readily understandable in the context of carriage of goods by sea where the potential ramifications and complexities of varying international factors are likely to be numerous. Thus in this case we find that the goods were shipped in New York by a Delaware shipper (Magic) bound for Monrovia to a Liberian receiver (Blue Banana) on a ship owned by an English shipowner (OT Africa) with offices operated by a Canadian agent in Toronto, where the bill of lading was issued and freight was payable. The goods were insured by Canadian insurers, part of a large international group. Normally the identity or even existence of insurers is irrelevant, but in this case Mr McParland submits that it is relevant and relies on Madam Prothonotary Milczynski's description of the Canadian insurers as "the true Plaintiffs". It is indeed common ground that the nominal cargo interests, Magic and Blue Banana, are both dormant and that it is the insurers who are conducting the litigation in Toronto, and the latter have been made parties here in England, if only for the purpose of remedies in the form of an anti-suit injunction and costs. If the insurers are, practically speaking, the true claimants in Toronto, it is at least relevant to point out that cargo in international trade is, barring accidents, nearly always insured; that carriage of goods by sea litigation is nearly always conducted at the expense of and controlled to a greater or lesser degree by insurers of cargo and ship; and that, even if, in the nature of things, a bill of lading is a standard form document into which individual shippers have little input, insurers are large, international undertakings with a sophisticated understanding of all aspects of litigation, and are well able to bring their bargaining power to bear in the negotiation of such bill of lading forms.

48. Although it would be unfortunate to have parallel proceedings in two jurisdictions, and although cargo interests were, by a period of about a month, the first to bring their claim in Canada, a jurisdiction clause would be rendered entirely nugatory if a party could prevent litigation in an agreed forum by the simple expedient of commencing its claim in a non-contractual forum. In a closed system, such as that previously represented by the Brussels and Lugano Conventions and now by the (jurisdiction) Regulation, the state parties to it may of course agree, reciprocally, that the critical factor is that of "first seisure": see Erich Gasser GmbH v. MISAT Srl (Case C-116/02) [2005] QB 1. However, that does not apply outside that closed system.

49. The critical question is therefore whether Langley J was right (a) to refuse to stay the English proceedings and (b) to grant an anti-suit injunction in support of the parties' agreement. On that issue, English law which favours the autonomy of the parties comes, in the context of this case, into conflict with Canadian law as expressed in section 46(1). How is such a conflict to be resolved, and what role does the doctrine of comity play in its resolution?

50. The basic rule in English law, expressed recently by the House of Lords in Donahue v. Armco and Turner v. Grovit [2001] UKHL 65, [2002] 1 WLR 107, is that the English courts will ordinarily secure compliance with an exclusive jurisdiction clause unless the party suing in the non-contractual forum can show, the burden being on

him, "strong reasons" for suing in that forum; and, where an anti-suit injunction is in issue, considerations of comity will also be highly relevant. As Lord Bingham said in Donahue v. Armco (at para 24):

> "I am mindful that the principles governing the grant of injunctions and stays are not the same: see Aérospatiale at p. 896. Considerations of comity arise in the one case but not in the other."

And as Lord Hobhouse of Woodborough said in Turner v. Grovit (at para 28):

> "Similarly, English law attaches a high importance to international comity (Airbus Industrie GIE v Patel, per Lord Goff, at pp 133 and 138) and the English court has in mind how the restraining order will be perceived by foreign courts. This is the prime reason for strictly limiting the making of restraining orders on grounds of forum non conveniens."

51. It is true that that the European Court of Justice in Turner v. Grovit [2005] 1 AC 101 and in Gasser v. MISAT has ruled that the parties to the European Union have agreed to promote the concept of first seisure above all other considerations, and in that context to emphasize "that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect" (Gasser v. MISAT at para 72). However, as stated above, those considerations are not directly relevant outside the closed system of which the European Court was speaking. Outside that system, the English law remains that stated by the House of Lords: see Through Transport Mutual Insurance Association (Eurasia) Ltd v. New India Assurance Co Ltd [2004] EWCA Civ 1598, [2005] 1 Lloyd's Rep 67 at paras 84, 89.

52. In the present case, the appellants rely on section 46(1) together with its legislative purpose as the novel feature which is said to provide both the strong reason required for declining to enforce the exclusive jurisdiction clause and also the basis for promoting considerations of comity to the point where an anti-suit injunction will be refused. In truth, the appellants seek to go further than merely to ask the English court to decline to enforce the exclusive jurisdiction clause: they are asking for a stay of the English proceedings which, in the light of clause 25 of the bill of lading, are prima facie properly founded here. I will deal with the question of the stay of the English proceedings first.

53. Stay of the English proceedings

Does section 46(1) therefore provide "strong reason" for declining to give effect to the exclusive jurisdiction clause? This raises the question of how the clash between English law, which prima facie would recognise the autonomy of the parties to provide for the forum for their disputes, and Canadian law, whose section 46(1) derogates from that autonomy, is to be resolved.

54. In this connection, it is important to note the essential difference between the law applied in Canada and in England. It is in my judgment not a matter of discretion or remedy for breach. It is not a matter of whether there is jurisdiction in Canada over

OT Africa. Those would be, or might be, matters for the local law of the forum. The critical issue is whether or not the agreement of the parties contained in clause 25 of the bill of lading is to be given effect. Under English law that agreement will be interpreted and given effect in accordance with its meaning and scope, subject only to a residual discretion in the court to decline jurisdiction in favour of another jurisdiction in the ultimate interests of justice, on principles analogous to those of *forum non conveniens*. This is because ultimately not even the agreement of the parties can insist on imposing a piece of litigation on the jurisdiction of the English courts, if the interests of justice demand otherwise. However, the prima facie rule in relation to an exclusive jurisdiction clause is a matter of contract: see Donahue v. Armco per Lord Bingham at para 45:

> "The position of a party who has an exclusive English jurisdiction clause is very different from one who does not. The former has a contractual right to have the contract enforced. The latter has no such right."

55. In Canada, however, because of section 46(1), and within its scope, an exclusive jurisdiction clause is deprived, as a matter of statute, of all effect. Section 46(1) achieves at least two separate things. Acting positively, it confers jurisdiction within Canada in accordance with the terms of sub-sections (a), (b) and (c). Secondly, however, acting negatively, it removes essential contractual effect from jurisdiction and arbitration clauses providing for a forum otherwise than in Canada. As Madam Prothonotary Milczynski said (at para 14 of her judgment):

> "Section 46 of the *Marine Liability Act* clearly removes the determining or binding effect of a forum selection clause in a bill of lading or contract for the carriage of goods by sea."

56. She made a similar observation at para 16. Mr Justice O'Keefe agreed, saying (at para 21 of his judgment) that it "clearly denies this Court discretion to grant a stay based on a forum selection clause". That merely left to OT Africa the argument that a stay might be ordered on standard *forum non conveniens* principles, under which various factors might be weighed – but not the parties' own choice of forum: see Madam Prothonotary Milczynski's judgment at para 17/18, and Mr Justice O'Keefe's judgment at paras 22/23. This is because, as explained in Mr Justice O'Keefe's judgment, and as highlighted in Mr McParland's submissions, the legislative purpose of section 46 was influenced by the same considerations as gave rise to (while at the same time going beyond) the provisions of articles 21/23 of the Hamburg Rules (see Lord Justice Longmore at paras 17/19 above).

57. In sum, therefore, section 46(1) deprives forum clauses providing for adjudication or arbitration otherwise than in Canada (in contracts for the carriage of goods by water to which the Hamburg Rules do not apply) provided there is a ground for Canadian jurisdiction within the terms of subsections (a), (b) or (c). It does so possibly on the philosophical ground, as Mr McParland submits, that all jurisdiction clauses are deemed to be contracts of adhesion, or at any rate that, where there is a sufficient connection with Canada, that connection should take precedence to any agreement on a forum outside Canada. There is no doubt that such a statute amounts to a rewriting of the parties' contract.

58. To revert to the question of how a clash of this kind between English and Canadian law is to be resolved: I agree with Lord Justice Longmore that the answer provided by the conflict of law rules of English law, and as I understand by those of most common law nations, and in all probability by a conflict of law rule well recognised throughout the nations of the world, is that the effect of a contractual provision is a matter for the proper law of the contract. As Lord Wright said in Vita Food Products Inc v. Unus Shipping Co Ltd [1939] AC 277 at 296:

> "If it has before it a contract good by its own law or by the proper law of the contract, it will in proper cases give effect to the contract and ignore the foreign law."

59. This doctrine has been repeatedly applied: see also National Bank of Greece and Athens SA v. Metliss [1958] AC 509, Adams v. National Bank of Greece [1961] AC 255, Macmillan Ltd v. Bishopsgate Investment Trust Plc [1996] 1 WLR 387, Akai Pty Ltd v. People's Insurance Co Ltd [1998] 1 Lloyd's Rep 90, and Through Transport [2005] 1 Lloyd's Rep 67. For the reasons explained by Lord Justice Longmore (at paras 26/27 above), Akai is particularly revealing in the present context. It is an authority which has been frequently cited and applied, and in Donohue v. Armco (see at para 25) by the House of Lords.

60. Thus this doctrine has been specifically applied under English conflict of law rules to choice of forum clauses themselves: See *Dicey & Morris, The Conflict of Laws*, 13th ed, 2000, Vol I at paras 12-077ff. It is true that under the Rome Convention (see article 1(2)(d)) arbitration agreements and agreements on the choice of forum are excluded from its scope. Thus for these purposes English common law doctrine survives intact. Apparently, the exclusion was a matter of controversy, and the UK argued for the inclusion of arbitration and other jurisdiction agreements. *Chitty on Contracts*, 29th ed, 2004, Vol I (at para 30-039) explains that the prevailing view was nevertheless that choice of forum agreements should be excluded as lying in the realm of procedure and public policy and as being a matter for the forum. That indicates that there may well be a difference of view between common law and civil law jurisdictions as to whether choice of forum clauses are a matter for the proper law or for the forum. It is plain, nevertheless, that Canadian law, outside section 46(1), follows the same rule as English law in giving prima facie effect to the autonomy of the parties: see Z I Pompey Industrie v. ECU-Line NV (2003) 224 DLR (4th) 577 (SCC), 2003 SCC 27.

61. In these circumstances, the existence of section 46(1) cannot, under English conflict of law rules, provide a strong reason for departing from the English rule that gives prima facie effect to the parties' choice of forum. It follows that OT Africa's founding of jurisdiction in England is properly and securely based. It follows a fortiori that the appellants' application for a stay was properly refused by Langley J. His reasoning displays no error of principle, but, like Lord Justice Longmore, I would say positively that his decision in this respect was correct.

62. Anti-suit injunction

Under this heading it is necessary, in addition, to take international comity into account and to attach high importance to it. But what do considerations of comity require?

63. To some extent such considerations are built into the basic requirements for the principled exercise of the jurisdiction to grant an injunction. The principles have been defined in a series of cases in the House of Lords such as South Carolina Insurance Co v. Assurantie Maatschappij 'de Zeven Provincien' NV [1987] AC 24, SNI Aérospatiale v. Lee Kui Jak [1987] AC 871, Airbus Industrie GIE v. Patel [1999] AC 119, Donohue v. Armco and Turner v. Grovit. Thus, as Lord Hobhouse's speech in Turner v. Grovit makes clear, with which the other members of the House agreed, an injunction will only be granted to restrain unconscionable conduct or (which prima facie might be said to amount to the same thing) conduct in breach of a contractual arbitration or exclusive jurisdiction clause. It is only such conduct which provides the legal or equitable right for the protection of which the injunction can be granted. The underlying principle is one of justice in support of the "ends of justice" (see Aérospatiale at 892, 893). Secondly, to reflect the interests of comity and in recognition of the possibility that an injunction, although directed against a respondent personally, may be regarded as an (albeit indirect) interference in the foreign proceedings, an injunction must be necessary to protect the applicant's legitimate interest in English proceedings.

64. As more explicit guidance on the requirements of the doctrine of comity, an injunction will not easily be granted where the only unconscionable conduct alleged is the commencement of proceedings by the respondent in an inappropriate forum, or what is alleged to be a *forum non conveniens*. As Lord Hobhouse said (Turner v. Grovit at para 25):

> "This is a weak complaint and is easily overriden by other factors or considerations: see for example Castanho v Brown & Root (UK) Ltd [1981] AC 557, Spiliada Maritime Corpn v. Cansulex Ltd [1987] AC 460 and Société Industrielle Aérospatiale v Lee Hui Jak [1987] AC 871. Most of the criticism of anti-suit injunctions (ie restraining orders) relates to their use in this field. These criticisms are recognised and for reasons of comity an English court will be reluctant to take upon itself the decision whether the forum court is an inappropriate one (Airbus Industrie GIE v Patel [1999] 1 AC 119) and it will not do so where the foreign country is a Brussels Convention country (p 132)."

65. Lord Hobhouse went on to make the following observations about the circumstance that the foreign court was prepared to assume jurisdiction under its own laws (*ibid* at para 26):

> "The making of a restraining order does not depend upon denying, or pre-empting, the jurisdiction of the foreign court… Jurisdiction is a different concept. For the foreign court, its jurisdiction and whether to exercise that jurisdiction falls to be decided by the foreign court itself in accordance with its own laws (including Conventions to which the foreign country may be a party). The jurisdiction which the foreign court chooses to assume may thus include an extraterritorial (or exorbitant) jurisdiction which is not internationally recognised. International recognition of the jurisdiction assumed by the

> foreign court only becomes critical at the stage of the enforcement of the judgments and decisions of the foreign court by the courts of another country. Restraining orders come into the picture at an earlier stage and involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction. English law makes these distinctions. Indeed, the typical situation in which a restraining order is made is one where the foreign court has or is willing to assume jurisdiction; if this were not so, no restraining order would be necessary and none should be granted."

66. It is always possible that, in a matter which ultimately turns on the interests of justice and the court's discretion, other considerations might impinge. Thus in Donohue v. Armco, which concerned an exclusive English jurisdiction clause, the House of Lords did not impose an anti-suit injunction out of consideration for the interests of third parties and the desirability of finding, if possible, a single forum in which the whole of a complex and composite dispute could be adjudicated in a single trial. See in this context the discussion of earlier authority at paras 27/28 of Lord Bingham's speech.

67. There is not much other guidance to be found in the cases about the requirements of comity. On the contrary, Mr Collins, on behalf of OT Africa, has pressed on us the well-known passage in the judgment of Lord Justice Millett in The Angelic Grace [1995] 1 Lloyd's Rep 87 at 96, where he distinguishes between the greater need for caution and sensitivity "where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved" and continues:

> "In the former case [ie where *forum non conveniens* is alleged], great care may be needed to avoid casting doubt on the fairness or adequacy of the procedures of the foreign Court. In the latter case [ie where the foreign proceedings are said to be vexatious or oppressive], the question whether proceedings are vexatious or oppressive is primarily a matter for the Court before which they are pending. But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them."

68. In Donohue v. Armco, which was concerned with an exclusive jurisdiction clause but where in the event the House of Lords did not grant an injunction, The Angelic Grace was listed with a number of other authorities for the proposition (at para 25) that –

> "Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause."

69. In Turner v. Grovit, which was not concerned with an exclusive jurisdiction (or arbitration) clause and where The Angelic Grace was cited to but not by their

Lordships even though there was a passing reference to the contractual situation (at para 25), Lord Hobhouse nevertheless stated that English law attaches a high importance to international comity (at para 28).

70. Mr Collins submits that the reconciliation is to be found in the distinction made by Lord Justice Millett and that that is conclusive in the present case, where the interests of other parties are not involved. In my judgment, however, the matter is more complex. In The Angelic Grace the issue submitted to the English court was whether the maritime collision within an Italian port fell within the scope of the parties' English arbitration clause as a matter of its construction. Once that issue had been settled in favour of arbitration, nothing else, other than the entirely understandable existence of jurisdiction in Italy for a tortious claim arising out of the collision, was relied upon by the claimant in Italy as a reason for not giving effect to the contractual agreement to arbitrate the dispute. The facts in The Angelic Grace were all one way: see Lord Justice Leggatt's citations from the judgment at first instance at 92. One will therefore look in vain in The Angelic Grace for guidance in more difficult cases where "strong reason" is advanced in argument as to why the court's discretion should be exercised differently from the prima facie rule.

71. In the present case, Mr McParland relies once again, at this second stage of the argument, on section 46(1) of the Canadian statute and the legislative purpose that lies behind it, reflective, as he submits, of the growing international consensus to be found in articles 21/23 of the Hamburg Rules, as a strong reason, in the interests and supportive of considerations of comity, for departing from any prima facie rule in favour of specifically enforcing the exclusive jurisdiction clause in the parties' bill of lading. It reflects a public policy view, expressive of a wider, shared, international concern, which the Canadian courts are bound to vindicate and which our courts should, out of considerations of comity, respect.

72. In my judgment, Mr McParland's argument is a substantial and effective one, which has caused my thinking to waver, but it ultimately fails, for reasons which I will seek to express as follows.

73. First, for reasons already stated above, in connection with the question of a stay of the English proceedings, and which I will not repeat, in this context the role of the proper law of the contract is of great importance, not only in English private international law but generally, at any rate in the common law world. There will always be differences in the substantive, procedural and policy rules of different jurisdictions. It is the role of rules of conflict of law, of private international law, to resolve such conflicts. In matters of contractual agreement, it should not be surprising that the principle of the autonomy of the parties provides strong guidance. Otherwise the parties' legitimate expectations are disappointed. The role granted to the proper law in private international law reflects a consensus which goes far to remove concerns about any lack of international comity.

74. Secondly, the arguments advanced by Mr McParland for regarding the exclusive jurisdiction clause in this case as a mere contract of adhesion, and thus to be viewed as emptied of contractual force, are weak. I refer to what I have said at para 47 above. Mr McParland has not sought to show that the exclusive jurisdiction clause is ineffective under English law.

75. Thirdly, the Hamburg Rules are not in force in either Canada or England, nor, after nearly thirty years, are they apparently likely to be (see Lord Justice Longmore at paras 17/19 above). England and Canada are not members of a club, who have agreed to be bound by its rules. They have been offered the chance to join, but have declined.

76. Fourthly, although section 46 to some extent reflects the philosophy of the Hamburg Rules, it also goes significantly beyond them. It may also be noted that, by removing the effect of an arbitration clause which provides for arbitration elsewhere than in Canada, it appears to run counter to this country's obligations under the New York Convention. However, I recognise that there is a real connection with Canada in the underlying facts that the bill of lading was issued in Canada by a Canadian agent of OT Africa and the bill of lading provides for payment of freight in Canada.

77. Fifthly, on the particular facts of this case, the effective claimants in Canada, and defendants in England, are large, international, albeit Canadian based, insurers. There is nothing of the "consumer" about them.

78. Sixthly, it would seem that if the situations were reversed, a Canadian court would come to the same conclusion. In Amchem Products Inc v. British Columbia (Workers' Compensation Board) [1993] 1 SCR 897 the Supreme Court of Canada had to consider its attitude to an injunction given by a Texan court. It held that the Texas court's injunction was not a demonstration of disrespect or lack of comity vis a vis the Canadian court. Many of the cases cited in the judgment of the Court, given by Sopinka J, are the cases familiar to English law. At 913/4 Sopinka J adopted the definition of comity approved by La Forest J in Morguard Investments Ltd v. De Savoye [1990] 3 SCR 1077 at 1096:

> "Comity" in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is 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."

79. Sopinka J went on to formulate a test which was summed up in the following passage (at 934):

> "The result of the application of these principles is that when a foreign court assumes jurisdiction on a basis that generally conforms to our rule of private international law relating to the *forum non conveniens*, that decision will be respected and a Canadian court will not purport to make the decision for the foreign Court. If, however, a foreign court assumes jurisdiction on a basis that is inconsistent with our rules of private international law and an injustice results to a litigant or "would-be" litigant in our courts, then the assumption of jurisdiction is inequitable and the party invoking the foreign jurisdiction can be restrained. The foreign court, not having, itself, observed

the rules of comity, cannot expect its decision to be respected on the basis of comity."

80. That case was not concerned with an exclusive jurisdiction clause but with the doctrine of *forum non conveniens* where the English authorities inform us that the doctrine of comity has a particularly important role. However, in Donohoe v. Armco Lord Bingham says (at para 25) that in the matter of exclusive jurisdiction clauses the Canadian (among other) courts have followed a similar approach to that found in English law: and Z I Pompey (cited above) confirms that that is so (subject to the section 46 exception). On that basis, Amchem in my judgment can be understood to tell us that a Canadian court would not grant an anti-suit injunction against proceedings in England founded on an exclusive jurisdiction clause in an English proper law contract, even in support of Canadian jurisdiction properly founded in Canadian law under section 46(1); and would also understand without offence an English injunction granted in such circumstances against litigants in Canada who sought to disregard their contractual obligations under the proper law on the basis of a jurisdiction available to them in Canada under a Canadian statute which exceptionally did not recognise the foreign jurisdiction clause. It goes without saying that the Canadian courts are familiar with the doctrine of the anti-suit injunction, and understand that, even though it has an indirect effect on litigation in their courts, it is in no way intended to interfere with the jurisdiction of those courts, as distinct from seeking to address a perceived injustice in the conduct of litigants. I say that, bearing in mind Lord Hobhouse's comment that the English court has in mind how the restraining order will be perceived by foreign courts.

81. In these circumstances, despite I hope every regard for the requirements of comity, and despite taking fully into account the exceptional provisions of section 46(1) as well as the real connections with Canada generated by the underlying facts, I conclude that there is no sufficient reason why the parties to the exclusive jurisdiction clause should not be held to their bargain as it is understood under their chosen proper law, and as that proper law, and the conflict of law principles which are applied in these courts, prima facie mandate.

82. Conclusion

In all other respects, such as the issues of the effectiveness of an injunction and those relating to jurisdiction over the insurers, I agree with the judgment of Lord Justice Longmore and have nothing to add. In sum, I would uphold the judgment of Langley J in full.

Lord Justice Laws:

83. I agree with both judgments.