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THE SCOPE OF TRANSNATIONAL INJUNCTIONS

Richard Fentiman*

Worldwide freezing orders and injunctions restraining foreign proceedings are important remedies in international commercial litigation. In this keynote address, Richard Fentiman identifies and analyses the problems of principle underlying such cross-border relief. The keynote address considers the jurisdictional basis of transnational injunctions, and the extent to which such relief is consistent with the principle of comity. It suggests the proper limits to such relief, and examines the conceptual confusions which undermine a proper understanding of the issues. It explains the prevalence of cross-border injunctions in English law, analyses recent English decisions which explore the basis of such remedies, and suggests how the English courts have sought to limit their scope. Although rooted in English law and practice, it addresses wider issues of principle and policy affecting the scope of cross-border injunctions.

I TWO CASES

Early in 2008, Mobil Cerro Negro Ltd, a company in the Mobil oil group, sought an injunction from the Commercial Court in London to freeze the worldwide assets of Petroleos de Venezuela SA (PDV), the Venezuelan national oil company, up to the amount of USD 12 billion, the sum claimed by Mobil in arbitration proceedings in New York.[1] There were no substantive English proceedings, and it was common ground that PDV had neither a presence in England, nor assets there. The lack

* Professor of Private International Law, University of Cambridge. This paper represents in substance a keynote address delivered at the 20th Annual Conference of the Australian and New Zealand Society of International Law in Wellington, 5–7 July 2012, amended to reflect the illuminating discussion which followed, and updated to include consideration of the subsequent decision in *Royal Bank of Scotland plc v FAL Oil Co Ltd* [2012] EWHC 3628 (Comm), [2013] 1 Lloyd's Rep 327.

1 *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm), [2008] 2 All ER (Comm) 1034 [*Mobil Cerro Negro Ltd*]. For comment, see Adam Johnson "Interim Injunctions and International Jurisdiction" (2008) 27 CJQ 433. Section 37 of the Supreme Court Act 1981 (UK) permits the grant of injunctions "in all cases in which it appears to the court to be just and convenient to do so." Civil Procedure Rules (UK), r 25.1(1)(f) permits orders "restraining a party from dealing with any assets whether located within the jurisdiction or not."

of substantive English proceedings was no obstacle to such relief.[2] But, in the absence of any such connections with England, Walker J refused to grant the injunction.[3] In such circumstances, the outcome is perhaps unsurprising. What is striking, however, is that Teare J had previously granted precisely the injunction sought[4] – and that the parties clearly thought it realistic to seek such relief at all.

More recently, JFC Group Ltd, a Russian company, appealed against a decision of the Commercial Court to restrain it from pursuing a claim in Russia against Star Reefers Inc, the applicant for the injunction.[5] The appeal was successful, and the injunction was discharged. Again, the result was perhaps inevitable. JFC had not agreed to the English Court's jurisdiction, nor had they submitted by appearing in the English proceedings. They had also sued first in Russia before Star Reefers had commenced substantive proceedings in England, Russia being the country of JFC's domicile, and the place of performance of the disputed obligation. But, again, what is striking is that such an order was initially granted by the trial judge at all – and that Star Reefers ever thought such an application to be viable.

Both cases are but examples of two common forms of relief in the English courts: the worldwide freezing injunction, restraining a defendant from concealing or dissipating its foreign assets; and, the antisuit injunction, restraining a party from pursuing abusive proceedings in a foreign jurisdiction. In different ways, both cases illustrate how the scope of such relief is not as settled as might be supposed. But they also suggest a deeper narrative. They show how litigants, and some judges, are willing to exploit the court's discretion in such cases so as to push such relief to its limits (and perhaps beyond). And they highlight the recent countervailing tendency in other courts to rein in such expansionism and place limits on the scope of transnational injunctions.

One purpose of the following remarks is to identify the conceptual problems that arise in such cases, and to propose some solutions. But they prompt two broader conclusions. They suggest that much of the uncertainty in this area is generated by two conceptual confusions. The first concerns

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2 Section 44 of the Arbitration Act 1996 (UK) permits a court to grant interim injunctions, including freezing injunctions, in aid of arbitral proceedings, but only if the tribunal has no power to do so, or cannot act effectively. By s 2(3) a court may do so even if the seat of the arbitration is outside England; but in that event, the court may refuse relief if the fact that the arbitral seat is abroad makes it "inappropriate" to do so. This echoes s 25 of the Civil Jurisdiction and Judgments Act 1982 (UK), which permits an English court to grant relief, collateral to foreign judicial proceedings, where, given the absence of substantive proceedings in England, it is not "inexpedient" to do so.

3 *Mobil Cerro Negro Ltd*, above n 1.

4 Unreported without notice application, 24 January 2008.

5 *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14, [2012] 2 All ER (Comm) 225 [*Star Reefers* (Appeal)]. For comment, see Richard Fentiman "Antisuit Injunctions – Comity Redux?" [2012] 71 CLJ 273 ["Comity Redux"].

the distinction, often obscured, between issues of obligation and of regulation – between the scope of a court's power to determine the parties' rights and obligations, and its power to regulate its process by granting injunctive relief. The second concerns the difference between issues of substance and of jurisdiction – between whether a ground exists in equity for granting relief and whether such relief is a proper exercise of the court's power. The following remarks also suggest that the English courts have recently begun to curb such relief, not by limiting the circumstances in which it can be granted, but by clarifying (and so narrowing) the nature of the enquiry. As this implies, the following discussion is in one respect parochial, rooted in English law and practice. But its implications are broader, addressing through the prism of English law wider issues of principle and policy.

II FOUR ISSUES

English courts have been wrestling for some two decades with the scope of injunctive relief in cross-border proceedings. Four conceptually distinct but interconnected questions have arisen concerning such relief:

(1) The question of *connection*. What is a legitimate basis for granting relief when one party, or both, or the effects of the remedy, are foreign? When does a court have the necessary "interest in, or connection with, the matter in question" to justify asserting jurisdiction?[6]
(2) The question of *comity*. Notwithstanding the existence of a sufficient jurisdictional connection, when does the principle of comity require a court to abstain from exercising jurisdiction? When does the assertion of jurisdiction trespass on the exclusive preserve of a foreign court?
(3) The question of *fairness*. When does such relief, although directed at preventing injustice to the applicant, cause injustice to the respondent?
(4) The question of *efficiency*. To what extent does such relief promote or frustrate the goal of procedural efficiency?

Each of these is important. Each has been addressed in the recent English case law on transnational injunctions.[7] But what follows is concerned only with the first and second, with the issues of connection and comity. These above all have proved to be the most problematic in practice, and raise questions of wider theoretical interest.

But it is first necessary to address two preliminary issues. The first is conceptual. What should we understand by the concepts of connection and comity, and the related concept of competence? The second is contextual. The scope of transnational injunctions is a matter of particular concern in

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6 *Airbus Industrie GIE v Patel* [1999] 1 AC 119 at 138 (HL) per Goff LJ [*Airbus*].

7 See generally Richard Fentiman *International Commercial Litigation* (Oxford University Press, Oxford, 2010) chs 15 and 17 [*Commercial Litigation*].

English law. But why have these issues become so prominent in English law; why have the English courts become a laboratory for testing the limits of cross-border injunctions?

III OF COMITY, CONNECTION AND COMPETENCE

Much of the jurisprudence relating to transnational injunctions is concerned with the issue of jurisdictional connection. What degree of connection is required between the subject-matter of the relief and the court granting such relief to justify the exercise of jurisdiction? Alternatively expressed, what manner and degree of interest in such relief is necessary? But this begs two conceptual questions. Is the idea of connection or interest apt to describe all the reasons that may exist to establish a court's competence? And what is the relationship between connection/interest and the principle of comity?

The first question arises because the existence of jurisdiction may depend not merely on personal or subject-matter connections with a court's territory. It may be established by consent, by submission, by appearance or prior agreement – something not readily embraced by the concepts of connection and interest. Despite any semantic awkwardness, however, submission is assumed in what follows to be an aspect of what is commonly referred to as the requirement of connection or interest. Like personal or subject-matter connection, submission is a prima facie reason for asserting jurisdiction. Like such connections, it supplies a reason for asserting jurisdiction which satisfies the requirement that the exercise of jurisdiction should not be exorbitant. Moreover, submission is, like personal or subject-matter connection, subject to the principle of comity. In principle, consent does not justify the existence of jurisdiction if comity demands that it should not be exercised.[8]

The second question concerns the function of comity in the exercise of jurisdiction. International jurisdiction is justified for two reasons. There must be jurisdictional connection between the matter and the court. But even if such a connection exists, comity may demand that jurisdiction should not be exercised. In that sense, connection and comity are ingredients of jurisdictional competence.

Here a distinction must be drawn, however, between the exercise of jurisdiction generally, and the exercise of jurisdiction in cases involving another court. In the first case, it is inapt to think of comity as a consideration. It is clearly necessary to ensure that a court's jurisdiction is not exorbitant, but unless it is suggested that another court has a greater connection with or interest in the matter, comity is not in play. By contrast, where another court has a competing jurisdictional claim, comity is of prime importance. The need to respect any competing claim is an established requirement for the exercise of jurisdiction. For that reason, comity is of central concern in the two situations which are the principal focus of the following remarks – the grant of injunctions

8 See also the relationship between arts 22 and 23 of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 [Regulation 44/2001]. Consensual jurisdiction under art 23 is subject to the exclusive subject-matter jurisdiction conferred by art 22.

restraining foreign proceedings, and the grant of freezing injunctions in support of proceedings in another court.

As this suggests, comity may prevent the exercise of jurisdiction where connection exists. But the existence of connection may also be relevant to whether comity is complied with. Comity may prevent the exercise of jurisdiction notwithstanding that the court granting relief has a connection with the matter. It may do so where a court has jurisdiction but the foreign court's jurisdiction is exclusive. But comity also operates where a foreign court has jurisdiction and the court granting relief has none. This explains Lord Goff's familiar treatment of comity in *Airbus Industrie GIE v Patel* (*Airbus*).[9] There, the English courts were asked to restrain proceedings in Texas although the alternative proceedings had commenced in India, not in England. The House of Lords considered that such relief was illegitimate, given the absence of any connection with, or interest in, the matter. But for Lord Goff, the importance of this requirement was that it was necessary to ensure compliance with the principle of comity:[10]

> As a general rule, before an anti-suit injunction can properly be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction in cases of the kind under consideration in the present case, comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an antisuit injunction entails.

Importantly, however, this does not mean that the existence of jurisdictional competence is a sufficient condition for compliance with comity, although it is evidently a necessary condition. This important distinction has not always been articulated in the English cases. But, as we shall see, more recent authorities have emphasised that the existence of a ground of jurisdiction does not foreclose further consideration of comity. Even if we suppose, for example, that the presence of assets in England is a sufficient basis for freezing a defendant's worldwide assets,[11] comity may be infringed if we conclude that only the courts of the country where the defendant is located may legitimately regulate a defendant's handling of assets within their jurisdiction.[12] Again, even if we consider that the necessary connection or interest is present (and that a ground for relief is established), it may be improper to restrain foreign proceedings if the court considers that comity would be infringed.[13]

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9 *Airbus*, above n 6, at 138.

10 At 138.

11 Itself a controversial issue, considered further below.

12 *Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicaciones de Cuba SA* [2007] EWCA Civ 662, [2007] 2 All ER (Comm) 1093 [*Empresa*].

13 *Star Reefers* (Appeal), above n 5, at [27].

As this suggests, jurisdictional connection may be a necessary condition for compliance with comity, but it is not a sufficient condition. It forms part of, but does not exhaust, the enquiry. For that reason, connection and comity are distinguished in what follows.

IV THE ENGLISH CONTEXT

Why have these issues become so prominent in English law; why have the English courts become a laboratory for testing the limits of cross-border injunctions? One reason is contextual. Very probably, the English courts, especially the Commercial Court, hear more cross-border cases than any other courts.[14] Most commercial disputes in London involve foreign parties, or foreign laws, or foreign assets, or parallel foreign proceedings, or acts or omissions abroad – often in combination. In such circumstances, it is commonplace that a party might wish to freeze a defendant's foreign assets pending judgment, or restrain abusive parallel proceedings in a foreign court. What is more, such cases are even more frequent than they were, in the fallout from the economic downturn.

Another reason is that the English courts have been gifted a conceptual tool of remarkable potency – the equitable injunction. As s 37(1) of the Senior Courts Act 1981 (UK) states, crystallising the court's equitable power:

> The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

The fertility of s 37 lies not just in the existence of such a broad ground for granting relief – if conduct is unjust, it should be enjoined. It lies in the jurisdictional basis of such relief. Equitable injunctions operate in personam. So as long as the respondent is present in England or is a party to English proceedings, relief can be granted – even if the effect is to freeze foreign assets, or restrain foreign proceedings. To put it differently, English law does not regard such equitable relief as extraterritorial at all, as evident by the express statement in the Civil Procedure Rules that a defendant may be restrained from dealing with any assets "whether located within the jurisdiction or not".[15]

But there are three particular reasons why the problems of connection and comity have come to the fore in the last two decades.

First, there is the important decision of the House of Lords in *Airbus* in 1998. There, an injunction was sought to restrain proceedings in Texas, as being vexatious or oppressive. The House of Lords refused relief because there were no substantive English proceedings. The alternative

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14 Fentiman *Commercial Litigation*, above n 7, at [1.19]–[1.20].

15 Civil Procedure Rules (UK), r 25.1(1)(f)(ii). For an influential treatment of the conceptual basis for such relief, see the judgment of Collins LJ in *Masri v Consolidated Contractors International SAL* [2008] EWCA Civ 303, [2009] QB 450 [*Masri*].

forum to Texas was Bangalore, and the House of Lords declined to act as a "world policeman'" in a forum dispute involving Texas and India. But, as we have seen, in doing so, Lord Goff enunciated an important principle. Comity requires that an English court must have an "interest in, or connection with," the dispute (usually because the relief is ancillary to pending English proceedings).[16] This principle contains an important ambiguity. Is such a connection or interest a sufficient condition for compliance with comity or merely a necessary condition? In practice, however, the courts have generally assumed the former, with important implications for the scope of such relief, as apparently evident at first instance in *Star Reefers Pool Inc v JFC Group Co Ltd* (*Star Reefers* (Comm)).[17] An English court has competence to grant relief if it has the necessary "interest or connection'", and if it does, it cannot be said that the restraint of foreign proceedings infringes the principle of comity.

Secondly, by s 25 of the Civil Jurisdiction and Judgments Act 1982 (UK), an English court is empowered to grant freezing orders (including worldwide freezing orders) collateral to foreign proceedings. This represents a statutory reversal of the principle famously enunciated by Lord Diplock in *Siskina (owners of Cargo Lately Laden on Board) v Distos Compania Naviera SA*,[18] to the effect that injunctive relief may be granted only in defence of a legal or equitable right enforceable by final judgment in the English courts. There is now no need for substantive English proceedings against the respondent.

What matters here, however, is not so much how s 25 has opened the floodgates to applications for collateral relief in support of foreign proceedings. It is the manner in which the legislator did so. Far from prescribing when such relief is possible, it was left to the courts to construct an answer unaided. In the words of s 25(2):

> On an application for any interim relief under subsection (1) the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it.

The legislator thereby removed a potential obstacle to such relief, but has effectively left it to the courts to work out for themselves when it should be granted. The result has been to force the courts to consider from scratch the jurisdictional basis for such relief (the problem of *connection*), and the implications of the fact that necessarily another court has primary jurisdiction in the dispute (the problem of *comity*).

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16 *Airbus*, above n 6, at 138.

17 *Star Reefers Pool Inc v JFC Group Co Ltd* [2010] EWHC 3003 (Comm) [*Star Reefers* (Comm)].

18 *Siskina (owners of Cargo Lately Laden on Board) v Distos Compania Naviera SA* [1979] AC 210 at 256 (HL).

Thirdly, and more recently, the landmark judgment of Lawrence Collins LJ (as he then was) in *Masri v Consolidated Contractors International SAL* (*Masri*) confirms the demise of the old assumption that equitable jurisdiction requires only that the respondent is present in the jurisdiction. It affirms the need to comply with the requirements of subject-matter jurisdiction and comity. As his Lordship said:[19]

> … the mere fact that an order is in personam and is directed towards someone who is subject to the personal jurisdiction of the English court does not exclude the possibility that the making of the order would be contrary to international law or comity, and outside the subject matter jurisdiction of the English court.

Masri confirms that in personam jurisdiction is not sufficient. But it poses rather than answers a question, or rather two questions. When does want of subject-matter jurisdiction, and when do considerations of comity, require a court to decline to grant relief that it would otherwise grant against a person present in England or a party to substantive English proceedings?

Together, these developments beg fundamental questions about the legitimate scope of transnational injunctions, and indeed the nature of such injunctions – injunctions with (in practice) extraterritorial effects. And they have prompted considerable debate amongst English courts and commentators alike.

V CONTESTED ISSUES

What are the conceptual problems at the heart of the current debate, and how might they be resolved?

It is necessary to clarify first what is not controversial, at least for the English courts. Importantly, the legitimacy in principle of worldwide freezing injunctions and antisuit injunctions is taken for granted. It is never suggested, and could not be suggested as a matter of authority, that there is anything wrong with restraining the handling of foreign assets, or restraining a claimant from pursuing foreign proceedings. The important reason is that such relief operates in personam. The subject-matter of the claim for relief is the respondent's conduct. So competence to grant such relief exists provided that the respondent is personally subject to English jurisdiction. As has been said:[20]

> … there is abundant authority for the proposition that, where a defendant is personally subject to the jurisdiction of the court, an injunction may be granted in appropriate circumstances to control his activities abroad.

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19 *Masri*, above n 15, at [35].

20 *Babanaft International Co SA v Bassatne* [1990] Ch 13 at 37. See further Nicholls LJ at 41.

This reflects the long-established principle, that:[21]

> … in granting injunctions the Court operates *in personam.* The person to whom its orders are addressed must be within the reach of the Court or amenable to its jurisdiction … As a consequence of the rule, that in granting an injunction the court operates *in personam,* the court may exercise jurisdiction independently of the locality of the act to be done, provided the person against whom relief is sought is within the reach and amenable to the process of the court. That jurisdiction is not founded upon any pretension to the exercise of judicial or administrative rights abroad, but on the circumstance of the person to whom the order is addressed being within the reach of the court.

So neither courts nor commentators see anything controversial in the mere fact that both antisuit and worldwide freezing injunctions have extraterritorial effect on the conduct of parties in foreign countries. Indeed, the possibility is expressly endorsed by the procedural rules for granting freezing injunctions, which permit injunctions "restraining a party from dealing with any assets whether located within the jurisdiction or not".[22] The question is not whether such relief is possible. It concerns when it is legitimate.

Again, in connection with worldwide freezing injunctions, no debate arises concerning the grant of such relief ancillary to English proceedings. Rightly or wrongly, no issues of competence or comity are perceived to arise if such relief facilitates substantive English proceedings. Finally, in connection with antisuit injunctions, no significant debate arises concerning the grounds for granting relief. Broadly, such relief will be granted if foreign proceedings infringe the contractual rights of the applicant (as where they infringe an exclusive jurisdiction agreement in favour of England); or if they abuse the applicant's procedural rights (as where the claimant seeks to relitigate abroad a matter previously determined by an English court, or where the foreign claim is bound to fail).[23]

What, then, is controversial? First, controversy surrounds the grant of collateral freezing injunctions in support of foreign proceedings. Here four issues arise:

(1) Should such relief be confined to local assets? If not, three further questions arise:
(2) Is jurisdiction established merely by the presence in England of the defendant's agent?
(3) Is jurisdiction established by the mere presence in England of the defendant's assets?
(4) Is comity infringed if relief is granted in circumstances in which the foreign court had the power to grant equivalent relief but declined to do so?

Secondly, controversy surrounds two questions arising from the grant of antisuit injunctions. First, does a court necessarily lack the requisite jurisdictional interest or connection in the absence

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21 JM Paterson *Kerr on Injunctions* (6th ed, Sweet and Maxwell, London, 1927) at 11. This is an early articulation of the principle.

22 Civil Procedure Rules (UK), r 25.1(1)(f)(ii).

23 See Fentiman *Commercial Litigation*, above n 7, at [15.18]–[15.64].

of substantive proceedings in England? Secondly, are there circumstances in which antisuit relief infringes the principle of comity, the decision in *Airbus* notwithstanding?[24]

How are these problems to be resolved? What does that teach us, more generally, about the conceptual basis of cross-border litigation?

VI COLLATERAL FREEZING INJUNCTIONS

A The Problem of Connection

When does a court have jurisdiction to grant collateral relief? As a matter of English law, the existence of assets in England is regarded as sufficient to found jurisdiction to freeze those assets.[25] Given that such relief operates in personam in English law, not in rem, the justification is presumably that any transfer or dissipation of such assets must necessarily occur in England. In that sense, the enjoined conduct, the subject-matter of the injunction, is conduct in England. It is irrelevant in such cases that the defendant is located abroad, and that the targeted conduct is directed from abroad.

More difficult questions arise when an injunction is sought freezing a defendant's foreign assets. Whether jurisdiction exists in such a case depends upon which ground or grounds of jurisdiction may be relied upon. Six principal grounds may be proposed.

1 Submission by conduct

It is possible that jurisdiction may be established not because any single decisive factor is present, but because the defendant, by its activities in England, has in effect submitted to the court's jurisdiction. This is one possible explanation for Gloster J's important decision in *Royal Bank of Scotland plc v FAL Oil Co Ltd* (*Royal Bank of Scotland*).[26] Section 25 relief was granted against a defendant resident in the United Arab Emirates, in the absence of assets in England, where there was other evidence of links with England. First, the substantive proceedings concerned loan agreements concluded between the defendant and an English bank. Secondly, the loan agreements were expressly subject to English law, and to the English court's exclusive jurisdiction. The defendant, therefore, had rights and duties under English law. Thirdly, the defendant had bank accounts in England, notwithstanding that they contained no funds. Fourthly, although the defendant's subsidiaries in England were distinct entities, the defendants held themselves out as having a business presence in England through those companies. Fifthly, the defendant's controlling directors

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24 *Airbus*. above n 6.

25 *Empresa*, above n 12, at [18].

26 *Royal Bank of Scotland plc v FAL Oil Co Ltd* [2012] EWHC 3628 (Comm), [2013] 1 Lloyd's Rep 327 [*Royal Bank of Scotland*].

had visited England in the past, and there was no evidence that they would not do so in the future, with the effect that any injunction might be enforced against them.

It appears that none of these elements was by itself decisive, but in combination, they suggested a connection between the defendant and England that justified granting relief. Intriguingly, moreover, the effect of these connecting factors was that the defendant was in effect estopped from denying the English court's jurisdiction. As Gloster J said, "it is not open to the Defendants, when it suits their purposes to do so, to deny that they have any relevant connection or link with this jurisdiction."[27] As this suggests, the reason for asserting jurisdiction may not have been that such factors suggested a general connection with England, but that they established the defendant's submission by conduct.

2 Submission by consent

It appears that jurisdiction may be established by consent. This represents an important alternative explanation for Gloster J's decision in *Royal Bank of Scotland*. Not only had the defendant in *Royal Bank of Scotland* agreed to the jurisdiction of the English courts, it had consented expressly "to the giving of any relief and the issue of any process, in any proceedings" in England.[28] This included "the grant of any judgment or order, and its enforcement against any asset".[29] Gloster J denied that this amounted to a contractual submission to the making of any worldwide freezing order. But it did constitute "a clear contractual intention, or recognition, on the part of the Defendants that they would indeed be subject to the enforcement powers and procedures of the English courts".[30] The defendants had not, therefore, waived any objection they might have had to the grant of relief, but they had in effect submitted to the court's jurisdiction to consider granting it.

3 Necessity

Less clearly, jurisdiction may be justified in such cases where collateral relief in an English court offers the only means for protecting any future foreign judgment. The possibility of such a jurisdiction of necessity is suggested by dicta in several cases, and most notably by Millett LJ in *Crédit Suisse Fides Trust v Cuoghi* (*Crédit Suisse*), for whom "the circumstance which justified the exercise of the jurisdiction was that otherwise no effective protection could be given to the plaintiffs anywhere."[31]

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27 At [44].

28 At [12].

29 At [12].

30 At [43].

31 *Crédit Suisse Fides Trust v Cuoghi* [1998] QB 818 at 828–829 (CA) [*Crédit Suisse*].

4 Enforceability of any final judgment

Enforceability of any final judgment may be the localising factor. Jurisdiction may be justified because any final judgment obtained in the primary court will be (or may be) enforced in England. This theory asserts the secondary, enforcement role of such relief. By doing so, it confines such relief to cases where the defendant has relevant assets in England.

5 Enforceability of the injunction

Alternatively, enforceability of the freezing injunction may be the localising factor. Such relief is enforced by the imposition by the court of the usual remedies for contempt of court. These may be personal, which requires that either the defendant or its agent is present in England. Or they may be directed at a disobedient defendant's assets, which would require the presence of such assets in England.

6 Jurisdiction over local conduct

The subject-matter of the injunction may be the localising factor. In those legal systems in which freezing injunctions operate in rem by way of attachment, relief is targeted at the defendant's assets. Those assets represent the subject-matter of the remedy, and their presence within the court's jurisdiction is necessary to found relief. By contrast, the equitable in personam relief granted in English law is targeted at controlling the conduct of the respondent. The restraint of the defendant is the subject-matter of the remedy, with the effect that jurisdiction is founded if the defendant is present in England.

Importantly, principle suggests that this sixth ground of jurisdiction may extend to cases where the defendant's agent is present in England. Famously, the Court of Appeal in *Republic of Haiti v Duvalier* (*Duvalier*) held that it might.[32] One justification is enforceability of the injunction. If the agent has notice of the injunction and disobeys it, they will be guilty of contempt. The injunction may be enforced in England so may be granted. As we shall see, however, it is unclear that the enforceability of an injunction in England is a sufficient basis of jurisdiction when the restrained conduct is entirely in another country. A better explanation is that if the third party is truly an agent acting on the defendant's instructions then, in effect, the defendant is present in the jurisdiction. Alternatively, if the third party has independent control of the defendant's assets, and is located in England, it might be said that the true controlling hand, and a proper target for relief, is located there.

Which of these posited jurisdictional bases is legitimate where injunctive relief is sought in support of foreign proceedings? Here, the question is not whether any ground is uniquely correct. More than one may be available in principle.

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32 *Republic of Haiti v Duvalier* [1989] 2 WLR 261 at 266 (CA) [*Duvalier*].

As a matter of English law, two propositions are clear. It is fundamental that the presence of the defendant in England (or possibly its agent) is sufficient to found jurisdiction.[33] This expresses the cardinal principle that equitable relief operates in personam. Again, it is apparent as a matter of English law that the jurisdiction to grant collateral freezing injunctions is not confined to English assets. This is supported by principle. Even if the objective is to promote the enforcement of judgments obtained in foreign proceedings, it is unclear why this should be limited to enforcement of such judgments in England.[34] Moreover, if it is accepted that jurisdiction in such cases depends on the existence of a connection between England and the subject-matter of the relief sought, this suggests that jurisdiction is not confined to local assets. Given that freezing injunctions in English law operate in personam, it means that the presence of the defendant in England is sufficient, and that, provided the restrained conduct is in England, the injunction may extend even to foreign assets.

But what other grounds are available? To suggest, as did Millett LJ in *Crédit Suisse*, that jurisdiction by necessity may exist in such cases is of considerable interest.[35] But the proposition is unsupported by authority, and English law has no general doctrine of *forum necessitatis*. Arguably, the proper role of the necessity concept in this context is merely to reinforce any finding that granting relief in a given case is not inexpedient. Of perhaps greater significance is Gloster J's intriguing and suggestive decision in *Royal Bank of Scotland*.[36] Principle suggests that consent to the jurisdiction of the English courts, especially if reinforced by a contractual provision submitting to the grant of any available relief, should also found jurisdiction. Again, to imply that a defendant's voluntary connections with England may found submission by conduct is attractive and plausible. But principle also suggests that such submission, by consent or conduct, might be overridden by comity (and jurisdiction qualified) if another court has a unique interest in granting relief. As this suggests, the scope of submission in this context is uncertain. It also remains to be seen whether Gloster J's approach achieves traction in other cases.

A less speculative question concerns the possibility that the presence of assets held by the defendant in England may found jurisdiction to freeze that defendant's worldwide assets, an issue of current debate on which the authorities are divided.

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33 *Crédit Suisse*, above n 31, at 827.

34 There is a distinct argument for saying that collateral relief should be confined to local assets in cases subject to art 31 of Regulation 44/2001, above n 8. However, that is because the ultimate purpose of the Regulation is to ensure the enforcement of judgments between European Union member states. See also Louise Merrett "Worldwide Freezing Orders in Europe" (2008) LMCLQ 71.

35 *Crédit Suisse*, above n 31, at 827.

36 *Royal Bank of Scotland*, above n 26.

B The Relevance of Local Assets

Does jurisdiction exist – to freeze *foreign* assets, it must be recalled – merely because the defendant has assets in England? The question has become prominent in English law because of a conflict of authority between two differently constituted Courts of Appeal in *Motorola Credit Corporation v Uzan* (*Motorola*),[37] and *Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicaciones de Cuba SA* (*Empresa*).[38]

In *Empresa*, the Court of Appeal held that it was an insufficient basis of jurisdiction for the grant of a worldwide injunction that the defendant has assets in England. Only a domestic order was permissible in connection with local assets. There was "no connecting link at all between the subject matter of the measure sought and the territorial jurisdiction of this court."[39] The subject-matter of such relief is control of the defendant's conduct, so no such link exists unless the defendant (or perhaps its agent) is present in England.

By contrast, in *Motorola*, the Court of Appeal confirmed the grant of a worldwide injunction against a defendant who was present outside the jurisdiction but had assets in England. The justification was that the presence of the defendant's assets offered the Court a means to enforce any order for contempt in the event of the defendant's disobedience to the injunction. This "was not a case where the court would be devoid of means of enforcement … by reason of the existence within the jurisdiction of assets worth millions of pounds."[40]

It might be suggested that *Motorola* and *Empresa* may be distinguished on technical grounds.[41] *Empresa* concerned relief sought in support of proceedings in another European Union state, a matter governed by art 31 of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and implicating considerations particular to the Regulation. In particular, it concerned whether the grant of relief satisfied the jurisdictional requirement for collateral relief established by the European Court of Justice in *Van Uden Maritime BV v Firma Deco-Line* (*Van Uden*).[42] The issue was whether there was "a real connecting link between the subject matter of the measures sought" and the territorial jurisdiction of the English court. But to distinguish the decisions in this way is unconvincing. The *Van Uden* principle

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37 *Motorola Credit Corporation v Uzan* [2003] EWCA Civ 752, [2004] 1 WLR 113 [*Motorola*].

38 *Empresa*, above n 12.

39 At [29] per Tuckey LJ.

40 *Motorola*, above n 37, at [128] per Potter LJ. Compare *Refco Inc v Eastern Trading Co* [1999] 1 Lloyd's Rep 159 (CA) [*Refco*], where the defendant was not present in England, but had assets there, although the issue of jurisdiction was not apparently considered.

41 See Merrett, above n 34, at 82–83.

42 Case C-391/95 *Van Uden Maritime BV v Firma Deco-Line* [1998] ECR I-7091 at [40] [*Van Uden*].

expresses a general principle of international law. It does not depend on the particular circumstances or objectives of Regulation 44/2001.

If the decisions are, therefore, irreconcilable, it is strongly arguable that *Empresa* is correct. Arguably, the Court of Appeal in *Motorola* made three errors in deciding that the existence of assets within England justified the grant of a worldwide freezing injunction.

First, the Court appears to have overlooked the important principle. As we have seen, the subject-matter of equitable injunctive relief lies in the control of the defendant's conduct. Where an injunction is granted to restrain the handling of those assets, it is the act of handling those assets, not the assets themselves, at which the remedy is directed. The implication is that jurisdiction to grant collateral relief exists in two situations. It exists where the object of the relief sought is assets located in England. But in connection with foreign assets, it exists only if the defendant (or a third party in control of the assets) is present there.

Secondly, the Court appears to have treated a necessary condition for the grant of an order (that it be enforceable) as a sufficient condition. Clearly pointless relief will not be granted. But this does not mean that relief should be granted merely because enforcement is possible.

Thirdly, and more fundamentally, the Court of Appeal appears not to have considered the territorial limits to its powers. It is one thing to regulate the conduct abroad of a defendant present in England, or that of a foreign defendant in respect of assets in England. But it is a different matter to police the activities of a foreign defendant in connection with its dealings with foreign assets. To do so is arguably illegitimate for two distinct but connected reasons. It may be illegitimate to regulate conduct which has no connection with England. And it may be illegitimate to penalise by means of contempt proceedings a party who engages in such conduct.[43]

Authority confirms this limitation. Consider the established approach of the English courts to regulating the conduct abroad of third parties having notice of a worldwide order (typically the defendant's bank). Such a bank is not required to comply with such an order, and cannot be held in contempt in respect of its conduct abroad, to the extent that its infringement of the order was necessary to comply with the bank's legal obligations abroad.[44] It enjoys such immunity notwithstanding that it may have a presence in England (through a branch) and as such is subject to the court's in personam jurisdiction.

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43 Lawrence Collins "The Territorial Reach of Mareva Injunctions" (1989) 105 LQR 262 at 281–287.

44 *Baltic Shipping Co v Translink Shipping Ltd* [1995] 1 Lloyd's Rep 673 (QB). This might be read as authority that such conduct may in principle be regulated by an English court. But the better view is that the proviso is recognition that such conduct cannot legitimately be penalised.

Consider also the important and suggestive decision of Gloster J in *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK*.[45] The facts of the case are complex. It concerned distinct issues concerning the court's jurisdiction to grant a freezing order against a third party defendant. But a more general principle emerges from Gloster J's judgment. She was not prepared to grant worldwide relief against a party without a presence in England where any infringing conduct would have occurred in Singapore. It was both impractical and illegitimate to restrain such foreign conduct. As she said:[46]

> … there is no realistic ability on the part of this court to monitor HSTPL's [the defendant's] business activities and payments in Singapore, or wherever else in the world it carries on business. Any attempt to do so might trespass on a foreign court's jurisdiction. In relation to HSTPL, the proposed worldwide freezing order is not subject to any Babanaft proviso because HSTPL is a defendant. In my view, that would be an exorbitant exercise of the court's jurisdiction.

As this suggests, the position adopted in *Motorola* is insecure. It rests especially on two doubtful and controversial conclusions: first, that jurisdiction over the conduct of a foreign party is established merely because breach of the order may be penalised in England; and, secondly, that foreign parties' conduct in respect of foreign assets can be penalised in England at all.

C The Problem of Comity

Whether the presence of assets in England alone may found jurisdiction to freeze foreign assets goes to the degree (or nature) of the necessary connection between such relief and the English courts. A distinct issue is whether, even if a sufficient connection exists, comity may nonetheless prevent the grant of such relief. In recent years, the problem has resolved itself into a single issue before the English courts. Is comity infringed if relief is granted in circumstances in which the foreign court had the power to grant equivalent relief but declined to do so?

The answer depends on what is meant by equivalent relief. Surely no order can be granted if the foreign court had the same powers as the English court but on the facts, or in its discretion, declined to grant relief. Again, there is surely no objection if the foreign court would have granted relief but for the fact that the defendant was outside its territorial jurisdiction. But what if the foreign court simply had no power to grant equivalent relief – perhaps because it regards extraterritorial freezing orders as illegitimate? Or what if the foreign court has a more limited power to grant relief and so could not have done so on the facts (perhaps having a higher threshold for judging the risk of dissipation)? Here, the English court may be regarded as filling a gap in the foreign court's injunctive armoury, and doing so with the (unobjectionable) object of ensuring the enforcement of

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45 *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK* [2011] EWHC 3143 (Comm), [2012] 2 All ER (Comm) 513.

46 At [102]. The "Babanaft" proviso protects foreign third parties from the contempt powers of the English courts in respect of their activities abroad, as explained in Collins, above n 43, at 281–287.

any final judgment in the foreign court. This is, however, subject to one important contrary consideration. Presumably, the foreign legal system had good reason to limit the powers of its courts in such cases. Is it not disrespectful to grant relief that the foreign court has decided should be unavailable?

These different approaches came to a head in a sharp difference of opinion between the majority and a dissenting Millett LJ in *Refco Inc v Eastern Trading Co* (*Refco*).[47] There, relief was sought ancillary to proceedings in Illinois in relation to assets in England. Advised that it would certainly fail, the claimants made no application in Illinois to prevent the dissipation of the defendant's assets. The Court of Appeal assumed that overlapping relief was thus available in the foreign court, but would have been refused on the facts. Morritt LJ, with whom Potter LJ apparently agreed, concluded that ancillary relief could be granted under s 25 of the Civil Jurisdiction and Judgments Act (UK) 1982 where an equivalent remedy was available in the foreign court, which on the facts would not have been granted, provided that the principles governing relief in the foreign court were different from those of English law. They did not take *Crédit Suisse* to mean that equivalent relief must be unavailable in the foreign court. Whether the principles in the foreign court were the same as those employed by an English court was, for Morritt LJ, a decisive consideration.[48] Presumably, it would be a breach of comity to grant s 25 relief where the foreign court had applied the same principles differently. It would amount to reviewing the foreign court's decision. But no such difficulty arises if the principles involved are different.[49]

It is uncertain, however, whether the distinction made in *Refco* is robust. To suggest in any case that an English court is entitled to grant relief where a foreign court has refused to do so may be regarded as an infringement of comity. Indeed, to do so where foreign law is different may be seen as attempting to correct a deficiency in that law. Millett LJ, therefore, took the contrary view as he thought comity and *Crédit Suisse* required. For Millett LJ, comity meant not providing a remedy that a foreign court had refused:[50]

> A court which is invited to exercise its ancillary jurisdiction to provide assistance to the court seized of the substantive proceedings need feel no reluctance in supplying a want of territorial jurisdiction but for which the other court would have acted. But it should be very slow to grant relief which the primary

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47 *Refco*, above n 40.

48 At 172.

49 This understanding of comity echoes that adopted by some English judges when granting antisuit injunctions. There are suggestions in the case law concerning antisuit injunctions that such relief should not be granted if the foreign court has declined to stay proceedings on grounds identical to those available in an English court: *Airbus Industrie GIE v Patel* [1997] 2 Lloyd's Rep 8 (CA).

50 *Refco*, above n 40, at 168.

> Court would not have granted even against persons present within its own jurisdiction and having assets there.

In principle, therefore, it is unclear whether a coherent distinction can be drawn between a case where equivalent relief is unavailable in the foreign court (where worldwide relief is not recognised, or where it is but the court lacks the necessary jurisdiction), and one where it is available, but has been declined. In both, the position of the foreign legal system is that relief should not be granted. The only difference is that in the first situation, the objection to relief is generic, and in the second, it is specific to the facts of a given case. Certainly, it may be inappropriate to assume in the first case that the foreign court would have granted relief if only it could have done so. The inference is that the considered position of the foreign legal system is that such relief should not be available.

VII ANTISUIT INJUNCTIONS

In practice, difficulty does not arise concerning the jurisdiction of the English courts to grant antisuit injunctions, although how the cases are to be explained is not always straightforward. More precisely, it is clear when the necessary interest in, or connection with, the dispute is present. This is invariably supplied either because such relief is sought in the course of pending English proceedings, or where the English court, in any event, has exclusive jurisdiction over the dispute.[51]

Greater difficulty arises because it may be argued, notwithstanding the existence of an appropriate link with England, that comity requires that relief should not be granted. Are there circumstances in which antisuit relief infringes the principle of comity, notwithstanding that the necessary "interest or connection" is established? There is a tendency, reflected in the readiness with which courts grant relief, to assume that if relief is sought ancillary to English proceedings, it may always be granted if the court concludes that the respondent's conduct in bringing the foreign proceedings is abusive. The unstated assumption is that an English court may do what it may in defence of the rights of a litigant before the court.

This is reinforced by a misunderstanding of the requirement stipulated by Lord Goff in *Airbus* that an English court must have an interest in or connection with the dispute.[52] Importantly, this does not necessarily mean that compliance with the interest/connection test is a *sufficient* condition for granting relief. It is evident, indeed, that more reflective judges (at least at the appellate level) have read the jurisdictional requirement of interest or connection as a *necessary* but not *sufficient* condition of compliance with comity. It is not enough that the parties are properly before the court.[53] Judges have differed, however, as to what additional test must be satisfied to legitimise the grant of relief.

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51 See Fentiman *Commercial Litigation*, above n 7, at [15.13]–[15.17].

52 *Airbus*, above n 6.

53 *Star Reefers* (Appeal), above n 5, at [26].

Three different views are possible in principle. The first rests on a refined idea of when an English court has an interest in granting relief. Arguably, relief may be granted only where the court has an interest in policing its own process. Only if the foreign proceedings trench on the integrity of the English court's process is relief permissible.[54] This would justify, for example, restraining proceedings which involve re-litigation of an issue determined by an English court, or which seek to compel a party in English proceedings to desist. But it would not justify restraining proceedings which are unjust to the defendant in the foreign proceedings where there is no impact on English proceedings.[55]

The second and third views, by contrast, attempt to identify the circumstances in which the foreign court is best able to police the respondent's conduct, but they do so in different ways. Arguably, relief may be granted only if the exercise of jurisdiction by the foreign court is itself illegitimate, because it is exorbitant, a possibility perhaps suggested in *Highland Crusader Offshore Partners LP v Deutsche Bank AG*.[56] The implication is that the foreign court is exclusively entitled to police the conduct of the claimant in the foreign proceedings unless the foreign court's own jurisdiction is illegitimate. This extreme view expresses a strong commitment to the principle of comity. But it has the effect of reducing the court's jurisdiction to grant relief to vanishing point.

Alternatively, relief may be denied by reason of comity if targeted at a particular issue which the foreign court can more appropriately address. For example, although an applicant is not required to exhaust its remedies in the foreign court before seeking an injunction – by challenging the foreign court's jurisdiction, or seeking a stay or dismissal – such considerations may apparently affect the exercise of the court's discretion.[57] Again, it may be proper to wait for a decision by the foreign court. Where, for example, one party obtains an order from an English court limiting its damages to the other, it is for the foreign judge to determine the English order's effect, not for the English court to prevent it from doing so by restraining the foreign proceedings.[58]

It remains profoundly uncertain which of these views is correct in principle. With the important decision in *Star Reefers Pool Inc v JFC Group Co Ltd* (*Star Reefers* (Appeal)), however, the English courts have recently favoured the third view.[59] Antisuit relief may be granted only if the

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54 Trevor C Hartley "Comity and the Use of Antisuit Injunctions in International Litigation" (1987) 35 Am J Comp L 487 at 509.

55 Preventing relief in familiar cases such as *SNI Aerospatiale v Lee Kui Jak* [1987] AC 871 (PC).

56 *Highland Crusader Offshore Partners LP v Deutsche Bank AG* [2009] EWCA Civ 725, [2009] 2 All ER (Comm) 987 at [56]–[61]. This view originates in the decision of the Supreme Court of Canada in *Amchem Products Inc v BC Workers Compensation Board* [1993] 1 SCR 897.

57 *Amoco (UK) Co v British American Offshore Ltd (Service of Process)* [1999] 2 All ER (Comm) 201.

58 *Seismic Shipping Inc v Total E&P UK plc (The Western Regent)* [2005] EWCA Civ 985, [2005] 2 All ER (Comm) 515.

59 See *Star Reefers* (Appeal), above n 5, at [40]–[41] considered below.

English court has a connecting link with the relief sought (to adapt the phrase used in connection with freezing injunctions). Typically, this exists because the injunction is sought ancillary to substantive English proceedings. But it has become clear that this is merely a necessary but not sufficient condition for compliance with the principle of comity. Comity may nonetheless be infringed if the foreign court has an overriding claim to control the defendant's conduct in commencing proceedings within its jurisdiction. The English courts have not taken the extreme view that a foreign court invariably has such an overriding claim. To do so would restrict the power to grant relief to nothing, or almost to nothing. But nor do they apparently accept that relief is possible whenever a jurisdictional connection exists and the respondent's conduct is found to be unjust. When exercising its discretion to grant relief, a court must always consider whether comity requires that no injunction should be granted, although when that might be the case remains unclear.

VIII TWO CONFUSIONS

The preceding discussion describes the current conceptual uncertainty surrounding transnational injunctions in English law. But it prompts two more general observations. First, much of the uncertainty in this area derives from two more fundamental confusions between the concepts of obligation and regulation, and between issues of substance and of jurisdiction. Secondly, there are indications in the case law that some courts at least are seeking to curb the scope of such relief and to lessen the prevailing uncertainty – both issues being intimately connected. They have done so, not by restricting the circumstances in which such relief can be granted, but by clarifying the nature of the enquiry.

As to the first confusion, difficulty has been caused by a failure to distinguish between civil and regulatory issues, between a court's jurisdiction to provide private remedies and its jurisdiction to regulate the conduct of litigants – between matters of obligation and regulation. Alternatively expressed, the confusion lies in a failure to appreciate the distinction between "original" and "enforcement" jurisdiction, the jurisdiction to grant injunctions being the latter.[60]

Where a civil remedy is sought (damages in tort or contract, say) it is surely sufficient, as national jurisdiction regimes invariably confirm, that a court has personal jurisdiction over the defendant. Subject-matter jurisdiction is not also required. A court is no less competent to hear a claim in damages against an English resident just because the contract was broken abroad. But injunctions are different. Consider, for example, the operation of orders attaching to a defendant's assets in those jurisdictions where they operate in rem. Even if the proprietary effect of such relief is limited, principle suggests that such relief can be granted only in respect of local assets, because principle ordains that only the lex situs has jurisdiction in proprietary matters. Consider, by contrast,

60 FA Mann "The Doctrine of International jurisdiction Revisited after Twenty Years" (1984) 186 Recueil des Cours 13; and Campbell McLachlan "The Jurisdictional Limits of Disclosure Orders in Transnational Fraud Litigation" (1998) 47 ICLQ 3.

freezing and antisuit injunctions in English law. Such injunctions involve an instruction to the enjoined party to abstain from forbidden conduct. The order is intended to control abusive behaviour, backed by judicial sanctions for disobedience. Such orders threaten a defaulting defendant with a regulatory, court-imposed penalty for contempt. They also have a public, police character in so far as disobedience is not merely a wrong done to the applicant seeking relief, but an abuse of the court's process and an infringement of the respondent's duty to the court.

That injunctive relief has a special character, whether it operates in rem or in personam, was aptly expressed by the European Court of Justice in *Van Uden*.[61] As noted above, although concerned with the specific problems surrounding the grant of collateral injunctions subject to EU Regulation 44/2001,[62] the Court prescribed a jurisdictional test for such relief that expresses a more general principle of international law. To justify granting relief in support of foreign proceedings, there must be a real connecting link between the subject-matter of the measures sought and the jurisdiction of the court where it is sought.[63]

Assuming that the *Van Uden* test expresses a principle of universal application, how does this assist in answering the question with which we are now concerned? The implication is that jurisdiction to grant relief exists if it is granted ancillary to substantive English proceedings, or (presumably) if the respondent has submitted to the court's jurisdiction by prior agreement. It further suggests that jurisdiction exists if the respondent (or its alter ego, as in *Duvalier*)[64] is present within the court's jurisdiction, or has submitted to its jurisdiction by appearance or prior agreement. This explains *Masri*.[65] Jurisdiction exists to grant injunctive relief ancillary to pending proceedings. It also explains *Airbus*.[66] In the absence of submission, jurisdiction in personam over the respondent is insufficient. Importantly, it also explains *Empresa*,[67] and at the same time undermines *Motorola*.[68] A collateral worldwide freezing injunction should not be granted merely on the basis that the defendant has assets in England.

As to the second confusion, between substance and procedure, the grant of transnational injunctions has often been approached as if the existence of a ground for relief – the need to prevent

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61 *Van Uden*, above n 42.

62 For discussion of the particular issues arising in such cases (which are beyond the scope of the present remarks), see Fentiman *Commercial Litigation*, above n 7, at [17.129]–[17.164].

63 *Van Uden*, above n 42, at [40].

64 *Duvalier*, above n 32.

65 *Masri*, above n 15.

66 *Airbus*, above n 6.

67 *Empresa*, above n 12.

68 *Motorola*, above n 37.

unjust conduct – is the only question. Formerly, the issue of a court's jurisdiction to restrain foreign proceedings was ignored on the (unstated) assumption that if equity demanded relief it should be granted. Only when the singular facts of *Airbus* arose were the courts forced to consider their jurisdiction explicitly.[69] Similarly, when restraining foreign proceedings, it is tempting to ignore considerations of comity, or merely to pay lip service to such concerns, as perhaps at first instance in *Star Reefers* (Comm).[70]

The courts' previous tendency to overlook the jurisdiction to grant relief, and the more current failure to recognise the importance of comity, reflect the idea that jurisdiction is supplied by the existence of a ground for relief and that comity can be no problem if that is the case. The ideology of Equity persuades us that the court can do as it likes to prevent unconscionable conduct. To adapt a phrase, we assume that extremism in the pursuit of justice is no vice. As this suggests, underlying the confusion between the substantive and the procedural, most obviously in the context of antisuit injunctions, lies a more fundamental distinction – between an "equitable" approach, led by the imperative of avoiding injustice, and an "international" approach, driven by concerns about jurisdictional connection and comity.

A related but distinct confusion of procedure and substance was, for some time, visible in the English case law concerning s 25 of the Civil Jurisdiction and Judgments Act (UK) 1982. Until recently, courts have tended to ignore issues of jurisdiction when enquiring whether, in the absence of jurisdiction in substantive proceedings, it is "inexpedient" to grant relief. Attention has been focused instead on whether such relief would be enforceable, or otherwise serve a purpose, or infringe the principle of comity, or impede the foreign court's case management of the dispute.[71] At first sight, this omission is puzzling, given that the absence of substantive jurisdiction implies that jurisdiction is at stake. But it is no doubt explained by the focus of s 25 on whether such relief is "inexpedient".

IX TWO CASES AGAIN

Here, the two cases with which we began become important again. In *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* (*Mobil*), the Commercial Court recognised that the discretion to grant a collateral freezing injunction is not just a matter of expediency, defined in terms of comity and efficiency.[72] It involves a question of jurisdiction. Does the English court have competence to consider the application? As counsel for Petroleos de Venezuela expressed it in *Mobil*, "it will only be just and convenient … for this court to grant a worldwide freezing order if there is a connection

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69 *Airbus*, above n 6.

70 *Star Reefers* (Comm), above n 17.

71 An approach endorsed in *Crédit Suisse*, above n 31, at 831–832.

72 *Mobil Cerro Negro Ltd*, above n 1, at [103].

with England and Wales".[73] Walker J agreed. A precondition for granting relief was the existence of a sufficient connection with England.[74]

This is not to say that the Court (or counsel) in *Mobil* were promulgating any new principle. In *Masri*, a case involving the appointment of receiver over foreign assets, Collins LJ emphasised that "any power or discretion must be exercised in accordance with internationally recognised principles on the limits of the exercise of jurisdiction."[75] Nor have the courts been indifferent to issues of jurisdictional connection in s 25 cases. In *Crédit Suisse*, Millett LJ clearly regarded the presence of the defendant in England as significant:[76]

> It is a strong thing to restrain a defendant who is not resident within the jurisdiction from disposing of assets outside the jurisdiction. But where the defendant is domiciled within the jurisdiction such an order cannot be regarded as exorbitant or as going beyond what is internationally acceptable.

But Millett LJ's remarks do not suggest that the existence of jurisdiction to grant relief is a distinct precondition for granting relief, merely that the presence of the defendant provides a defence to any charge of exorbitance. Indeed, such remarks merely confirm that, until *Mobil*, the decisive role of jurisdiction in the grant of collateral freezing injunctions was largely obscured.

Again, in *Star Reefers* (Appeal), Rix LJ ensured that considerations of comity have a distinct and decisive role in the grant of antisuit injunctions.[77] This was achieved by emphasising the court's residual discretion in such cases, and the role of comity in exercising that discretion. English courts often nod towards comity (without elaboration) to justify caution in such cases. But Rix LJ's approach formalises comity's role as a required consideration at the discretionary stage. There were perhaps scant reasons in any event to conclude that the respondent's conduct by suing in Russia was unconscionable. But Rix LJ also considered that the judge had erred in the exercise of his discretion by taking no account of comity.[78] The consequence is that the court's task is not done merely if it has jurisdiction to restrain foreign proceedings, and because it considers that the respondent's conduct is unconscionable. There is a third, distinct question, going to the exercise of discretion: would it infringe comity to grant the injunction?

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73 At [27]. Counsel thereby avoided the limitations of the "inexpediency" test by appealing to the overriding principle (embodied in s 37 of the Supreme Court Act 1981 (UK)) that the grant of relief must be "just and convenient", a dual requirement embracing the need for jurisdictional connection.

74 At [103]. See also [27]–[28].

75 *Masri*, above n 15, at [34].

76 *Crédit Suisse*, above n 31, at 827.

77 *Star Reefers* (Appeal), above n 5.

78 At [40].

Uncertainty remains as to when concerns about comity might check the grant of an injunction.[79] But to highlight comity, as a factor to be considered in the exercise of the court's discretion to grant relief, establishes an important principle. It confirms that the requirements of equity are not a sufficient basis for granting relief. Principles of international law must be considered as well. As with *Mobil*, the basic concept is familiar. Of course, references to comity abound in the cases. But more often than not this is just a ritual genuflection in the direction of comity. Now it is part of the court's checklist of considerations, located firmly at the discretionary stage.

The significance of these decisions is not merely, however, that they illustrate a mindset which prizes jurisdiction as much as substance, and which is "international", not "equitable". Both decisions have the effect of clarifying the enquiry to be undertaken in such cases and thus potentially limiting the scope of cross-border equitable relief. By highlighting the requirements of jurisdictional connection and comity, respectively, they guard against the risk that such relief will be granted merely because, in the exercise of its discretion, the court thinks it should be. And by structuring the enquiry (by expanding the checklist of matters to be considered), they ensure that such issues are not forgotten, and that the court's treatment of such matters is made explicit. In this way, the scope of such relief is not restricted by fettering the courts' discretion, which no English court is likely to favour, and which undermines the flexibility that animates equitable relief. Any limitation is achieved instead by insisting that potential limits on such relief are considered, and by requiring transparency in the grant of such relief.

The significance of these developments is structural. Both *Mobil* and *Star Reefers* (Appeal) suggest a more nuanced approach to cross-border injunctive relief.[80] Neither suggests, however, how the remaining issues of jurisdictional connection and comity should be resolved. *Mobil* may have highlighted jurisdiction as the fundamental issue in s 25 cases. But what is the nature of the jurisdictional connection necessary to justify freezing foreign assets in support of foreign proceedings? Is the presence of assets in England a sufficient basis, as suggested in *Motorola* but denied in *Empresa*?[81] More fundamentally, can jurisdiction depend on justifications broader than connection in the strict sense? Is necessity such a justification, a possibility hinted at by Millett LJ in *Crédit Suisse*? Is submission a proper jurisdictional basis, whether established by consent or conduct, as suggested by Gloster J in *Royal Bank of Scotland*?[82]

Again, *Star Reefers* (Appeal) may establish considerations of comity as an essential element in the exercise of the discretion to grant relief, but what does comity require? Notwithstanding that the requisite jurisdictional connection may exist, does comity require that collateral freezing injunctions

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79 Fentiman "Comity Redux", above n 5, at 274.

80 *Mobil Cerro Negro Ltd*, above n 1; and *Star Reefers* (Appeal), above n 5.

81 *Motorola*, above n 37; and *Empresa*, above n 12.

82 *Royal Bank of Scotland*, above n 26, at [43]–[44].

can never be granted if the foreign court would have declined equivalent relief, the issue raised in *Refco*?[83] Even if an English court considers that a respondent's conduct in launching foreign proceedings is reprehensible, when exactly does comity require that the discretion to grant relief should not be exercised, the question begged by *Star Reefers* (Appeal)?

Such issues set the agenda for future debate. But, even if the answers remain contested, it is of paramount importance to ask the right questions. *Mobil* and *Star Reefers* (Appeal) suggest how the enquiry in such cases should be calibrated, and the issues crystallised, with matters of jurisdictional connection and comity accorded their proper place in defining the scope of transnational injunctions.

83 *Refco*, above n 40.