ANTI-SUIT INJUNCTIONS AND THE RECOVERABILITY OF LEGAL COSTS AS DAMAGES FOR BREACH OF AN ARBITRATION AGREEMENT

By JUSTIN MICHAELSON and GORDON BLANKE

INTRODUCTION

All the discussion at the moment is about the failing support around Europe for the very English remedy of the anti-suit injunction. Europe is determined to get rid of the remedy, very much maligned and misunderstood, even if it means construing the exemption in the Brussels Regulation 44/2001 (Brussels Regulation) in unrecognisable fashion. Of course, the arbitration exemption was not inserted to encourage intrusions into the legal process of another sovereign state. By restraining arbitration in another country, the supervisory court of that arbitration arguably feels the effect also. But is this not simply a remedy designed to compel a defaulting party to comply with a promise? It depends on how one sees it.

It is widely expected that the reference by LV Finance/IPOC cases, or the “MegaFon Dispute”, a multi jurisdictional dispute concerning a controlling stake in the Russian mobile telephone company, MegaFon. The case involved related arbitrations in Zurich, Geneva and Stockholm, as well as ancillary litigation in the British Virgin Islands, Bermuda, and, as explained below, Russia. The anti-suit injunction was ordered in Bermuda (Country A) (therefore outside the scope of the Brussels Regulation), to stop proceedings in Russia (Country B) brought in breach of an arbitration agreement with a seat in Switzerland (Country C). The governing law of the arbitration agreements (as well as the underlying agreements) was England and Wales (Country D).

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Using the anti-suit: a case study

The anti-suit injunction is not an interference with the actions of another court, or another State. It is a personal remedy, against a breaching party, preventing them from continuing to breach a bargain that just so happens to involve a promise regarding where to arbitrate or sue. The case below illustrates how it retains its predominant role in enforcing forum clauses and arbitration agreements in States outside the scope of the Brussels Regulation.

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some considerations will be made as to whether interest on legal costs can be awarded as damages under English law and more particularly as part of the legal costs sounding in damages for breach of the arbitration agreement.

3 Case C-159/02 [2004] E.C.R. 1-3565.
6 SJ Berwin LLP was instructed by LV Finance, together with Conyers Dill Pearlman of Bermuda (Jeffrey Elkinson) and Homburger of Zurich, Switzerland (Dr Balz Gross and Marsella Orelli). Freshfields (Nigel Rawding and Daniel Kalderimis) and Attride-Stirling & Wolonecki (Jan Wolonecki) were instructed by CT-Mobile. Winston & Strawn (Barry Vitou and Danvers Baillieu) and Marshall, Diel & Myers (Mark Diel) of Bermuda represented IPOP International Growth Fund. Appearing before the Court of Appeal were Richard Millett Q.C. for LV Finance; Robert Miles Q.C. for CT-Mobile and Richard Hacker Q.C. for IPOP International Growth Fund Ltd.
The facts

The underlying dispute concerned two option agreements under which IPOC (a Bermuda incorporated mutual fund) purportedly had the right to purchase from LVFG (a British Virgin Islands incorporated company) 100 per cent of the shares of a Bahamian company Trans Continental Mobile Investment Ltd (TMI). IPOC alleged that an option was taken over the TMI shares because it had indirect control over what became the 25.1 per cent stake in MegaFon (the Disputed Stake).

The first option agreement, the April Option Agreement, provided for arbitration in Zurich, and the second, the December Option Agreement, provided for ICC-administered arbitration in Geneva. Both agreements were governed by English law. The two Option Agreements purported to grant an option over 77.7 per cent and 22.3 per cent of the Disputed Stake respectively.

IPOC alleged that it had exercised the options but that LVFG had unlawfully diverted the Disputed Stake to other third parties, in breach of the Option Agreements. In full compliance with the dispute resolution provisions of the Option Agreements, IPOC commenced two arbitrations. These two arbitrations claimed declaratory relief against LVFG, as well as an order for specific performance relating to the TMI shares. The ultimate aim of the arbitrations was to facilitate IPOC’s attempts to acquire direct ownership of the Disputed Stake. They also commenced a third arbitration, against the shareholders of MegaFon, which did not involve LVFG, but involved the holding entity of the Disputed Stake, CT-Mobile (a Russian company).

Despite the fact that IPOC had commenced all three arbitration proceedings in accordance with the respective dispute resolution provisions, it commenced litigation almost three years later in the St Petersburg and Leningrad Oblast Arbitration Court (the St Petersburg Action). This action was against, principally, the same defendants—LVFG and CT-Mobile—and the main relief sought was similar if not identical to the relief sought in the arbitrations, viz. direct ownership of the Disputed Stake.

On June 8, 2006, LVFG successfully applied to the courts in Bermuda for an anti-suit injunction restraining IPOC from continuing with the St Petersburg Action. An interim order was made, which was upheld at trial.

The submissions

IPOC’s appeal to the Court of Appeal in Bermuda was decided on March 23, 2007 before Stuart-Smith, Nazareth and Zucca L.J.J. In effect, IPOC appealed the jurisdiction of the Bermuda Court to order an anti-suit injunction against IPOC in the first place, claiming that, although Bermuda was the domicile of IPOC, Bermuda had no “sufficient interest” in the dispute to act.

IPOC claimed that the objection to the Court’s involvement went to the issue of jurisdiction in the wider sense as defined by Lord Scott of Foscote in *Fourie v Le Roux*:

“It involves an examination of the restrictions and limitations which have been placed by a combination of judicial precedent and rules of court on the circumstances in which the injunctive relief in question can properly be granted.”

Stuart-Smith L.J. summarised it:

“Although injunctions of this nature are commonly and conveniently called anti-suit injunctions, as Lord Hobhouse has pointed out in *Turner v Grovit* [2007] 1 WLR 107 at paragraph 23, the terminology is misleading since it fosters the impression that the order is addressed and intended to bind another court and that the jurisdiction of the foreign court is in question. That is not the case. In making the order the injunction court is addressing only the party before it. It is in personam jurisdiction. It is common ground that there are two categories of anti-suit injunction. The first is where the claimant has no contractual right to have the defendant restrained from pursuing foreign proceedings. This is referred to as the non-contractual type. The second type is where the claimant has a contractual right, founded on an agreement between the parties, that the defendant will not litigate in any state or forum save that agreed. These are commonly exclusive jurisdiction or arbitration agreements, and are referred to as the contractual cases.”

IPOC based its submission upon the authority of *Airbus Industries GIE v Patel*. This case held that before granting an injunction the English court must have a sufficient interest to protect, and that a sufficient interest was the proceedings which had been commenced in England to resolve the dispute. Lord Goff said:

“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 anti-suit injunction entails.”

The Angelic Grace

LVFG relied upon *The Angelic Grace*. For IPOC’s submission to succeed, it had to get around the very clear language of the decision. In that case, Millet L.J. stated:

“I agree and wish only to add a few observations of my own on the approach which the Courts should adopt when asked to exercise its undoubted jurisdiction to restrain a party from taking or continuing proceedings in a foreign

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court in breach of an agreement to refer the dispute to arbitration.

In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it 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. In the former case, 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, 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.

The Courts in countries like Italy, which is a party to the Brussels and Lugano Conventions as well as the New York Convention, are accustomed to the concept that they may be under a duty to decline jurisdiction in a particular case because of the existence of an exclusive jurisdiction or arbitration clause. I cannot accept the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline.

In The Golden Anne [1984] 2 Lloyd’s Rep. 489, the Court refused a similar injunction because the foreign Court had not yet ruled on an application to stay the proceedings in favour of arbitration in London. We were pressed to follow that decision and leave it to the Italian Court to determine the limits of its own jurisdiction, even though that jurisdiction depended upon a question of construction of a contract governed by English law. We should, it was submitted, be careful not to usurp the function of the Italian Court except as a last resort, by which was meant, presumably, except in the event that the Italian Court mistakenly accepted jurisdiction, and possibly not even then. That submission involves the proposition that the defendant should be allowed, not only to break its contract by bringing proceedings in Italy, but to break it still further by opposing the plaintiff’s application to the Italian Court to stay those proceedings, and all on the ground that it safely can be left to the Italian Court to grant the plaintiff’s application. I find that proposition unattractive. It is also somewhat lacking in logic, for, if an injunction is granted, it is not granted for fear that the foreign Court may wrongly assume jurisdiction despite the plaintiff’s objection, but on the surer ground that the defendant promised not to put the plaintiff to the expense and trouble of applying to the Court at all. Moreover, if there should be any reluctance to grant an injunction out of sensitivity to the feelings of a foreign Court, far less offence is likely to be caused if an injunction is granted before that Court has assumed jurisdiction than afterwards, while to refrain from granting it at any stage would deprive the plaintiff of its contractual rights altogether.

In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in Continental Bank N v Aeakos Companies Naviera S.A. [1994] 1 WLR 588. The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. 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.”

IPOC attempted to distinguish this case from the position of the Bermuda Court. First, IPOC said that The Angelic Grace was dealing with an English arbitration, thereby acting to protect its own arbitration proceedings. This was different, IPOC said. The Bermuda Court was acting to protect two Swiss arbitrations, and a Swedish one. Also, the English Court derived in personam jurisdiction in The Angelic Grace by applying English law to the arbitration agreement. In this instance, Bermuda does not have this connection: the arbitration agreement is governed by the law of England and Wales.

The Front Comor

IPOC then relied upon the concept of comity, and argued that international comity demanded that courts without a sufficient interest should not interfere in actions brought in foreign courts, even where there is a contractual obligation to do so (viz. The Angelic Grace position). In a nutshell, IPOC claimed that, unless the court ordering the anti-suit was the “supervisory court” of the arbitration, then it should have no interest in getting involved. That is to say, Bermuda should have refused to grant LVFG and CT-Mobile any relief, and sent them both packing to Switzerland and Sweden respectively (where anti-suit relief is not available).

In support of this, IPOC relied upon West Tankers Inc v Ras Runtone Adriatica de Sicurta SP (The Front Comor),12 This was considered by Stuart-Smith L.J. to be the high point of IPOC’s submission, but it was rejected.

As is well known, there was an English arbitration clause in The Front Comor and the Court was asked to give effect to it by granting an anti-suit injunction. The real issue before the court was whether this was or was not consistent with the

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Brussels Regulation. The House of Lords referred the question to the European Court of Justice. In order to assist the European Court Lord Hoffman set out the rationale for the grant of anti-suit injunctions:

“19. But perhaps the most important consideration is the practical reality of arbitration as a method of resolving commercial disputes. People engaged in commerce choose arbitration in order to be outside the procedures of any national court. They frequently prefer the privacy, informality and absence of any prolongation of the dispute by appeal which arbitration offers. Nor is it only a matter of procedure. The choice of arbitration may affect the substantive rights of the parties, giving the arbitrators the right to act as amiables compositeurs, apply broad equitable considerations, even a lex mercatoria which does not wholly reflect any national system of law. The principle of autonomy of the parties should allow them these choices.

20. Of course arbitration cannot be self-sustaining. It needs the support of the courts; but, for the reasons eloquently stated by Advocate General Darman in The Atlantic Emperor, it is important for the commercial interests of the European Community that it should give such support. Different national systems give support in different ways and an important aspect of the autonomy of the parties is the right to choose the governing law and seat of the arbitration according to what they consider will best serve their interests.

21. The Courts of the United Kingdom have for many years exercised the jurisdiction to restrain foreign court proceedings as Colman J. did in this case; see Pena Copper Mines Ltd v Rio Tinto Co. Ltd (1911) 105 LT 846. It is generally regarded as an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration. It promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court. As Professor Schlosser also observes, it saves a party to an arbitration agreement from having to keep a watchful eye upon parallel court proceedings in another jurisdiction, trying to steer a course between so much involvement as will amount to a submission to the jurisdiction (which was what eventually happened to the buyers in The Atlantic Emperor: see (1992) 1 Lloyd’s Rep 624) and so little as to lead to a default judgment. That is just the kind of thing that the parties meant to avoid by having an arbitration agreement.

22. Whether the parties should submit themselves to such a jurisdiction by choosing this country as the seat of their arbitration is, in my opinion, entirely a matter for them. The courts are there to serve the business community rather than the other way around. No one is obliged to choose London. The existence of the jurisdiction to restrain proceedings in breach of an arbitration agreement clearly does not deter parties to commercial agreements. On the contrary, it may be regarded as one of the advantages which the chosen seat of arbitration has to offer. Professor Schlosser rightly comments that if other Member States wish to attract arbitration business, they might do well to offer similar remedies. In proceedings falling within the Brussels Regulation it is right, as the Court of Justice said in Gasser and Turner v Grovit, that courts of Member States should trust each other to apply the Regulation. But in cases concerning arbitration, falling outside the Regulation, it is in my opinion equally necessary that Member States should trust the arbitrators (under the doctrine of Kompetenz-Kompetenz) or the court exercising supervisory jurisdiction to decide whether the arbitration clause is binding and then to enforce that decision by orders which require the parties to arbitrate and not litigate.

23. Finally, it should be noted that the European Community is engaged not only with regulating commerce between Member States but also in competing with the rest of the world. If the Member States of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no shortage of other states which will. For example, New York, Bermuda and Singapore are also leading centres of arbitration and each of them exercises the jurisdiction which is challenged in this appeal. There seems to me to be no doctrinal necessity or practical advantage which requires the European Community to handicap itself by denying its courts the right to exercise the same jurisdiction.”

The Court of Appeal rejected IPOC’s submission. Stuart Smith L.J. stated that the quotes in The Front Comor as to the rationale behind anti-suit relief:

“do not bear the weight that [IPOC] seeks to put upon them, namely, that only the courts of the seat of Arbitration can issue anti-suit injunctions”.

Finally, IPOC relied upon Professor Briggs:

“a court should not intervene unless England is the chosen court, and then should not do so unless no relevant foreign court, taking a broad and reasonable view of the matter, could be expected to dissent from the view that the bringing of the proceedings by the respondent is a breach of contract. And in this respect, if the foreign court has rejected a jurisdictional challenge brought on the basis of the jurisdiction agreement, there are good reasons to be very cautious before granting an anti-suit injunction”.

Stuart-Smith L.J. rejected IPOC’s reliance on this passage:

“It is not clear whether Professor Briggs is saying that in his opinion this is the law or merely that it should develop in the future, which may be a different thing. Moreover in footnote 271 he says: ‘There may be room for an exception where the basis of a claim for the injunction is that the respondent should not be bringing proceedings anywhere.’ This is the position, it seems to me, where there is an arbitration clause as distinct from an exclusive jurisdiction clause, because as Lord Hoffman points out in the Front Comor resort to arbitration may be of particular importance to the parties for many very good reasons, in particular because they do not wish to come before any court.”

Findings of the Court of Appeal

Their Lordships found that the Airbus line of cases did not apply to The Angelic Grace contractual cases. In fact, the case itself made the distinction, where Lord Goff actually said:

“I wish to stress however that, in attempting to formulate the principle, I shall not concern myself with those cases in which the choice of forum has been, directly or indirectly, the subject of a contract between the parties. Such cases do not fall to be considered in the present case.”

Stuart-Smith L.J. found that IPOC had “confounded the two separate strands of anti-suit injunctions” without any support:

“It has long been established that the courts of equity will enforce a negative covenant by way of injunction (Doherty v Allman [1878] 3 App Cas 709 per Lord Cairns at p.719). An exclusive jurisdiction or arbitration clause contains an implied negative obligation not to litigate in any other forum (Chitty on Contracts 29th edn para 27-068). The power to grant injunctive relief is now contained in s.37 of the Supreme Court Act 1981 in England and s.19 of the Supreme Court Act 1905 in Bermuda.

An injunction will be granted when damages are not an adequate remedy. It is common ground that damages is not an adequate remedy for breach of an arbitration clause. Though in some cases, for example Donohue v Armco [2002] 1 Lloyd’s Report 425 where there are strong reasons why an injunction should not be granted, the innocent party may have to be left to his remedy in damages against the contract breaker.

The court can grant an injunction provided it has jurisdiction in personam over the defendant. The clearest possible case of in personam jurisdiction is where the defendant is domiciled within the jurisdiction of the court. There is no dispute that this is so in this case and it is not a tenuous link. The cases that have come before the English Courts are concerned with arbitration in England and it is that which gives the English Court jurisdiction, either under Order 11 prior to the CPR, or the provisions of the CPR or the Arbitration Act. Nowhere in the contract cases or the books on contract is it said that the court must have a further interest in the resolution of the dispute itself.

I can find nothing in the cases that have been cited to us which casts doubt on the statement of principle in the judgment of Millett L.J. (specifically endorsed by Neill L.J.) in the ‘Angelic Grace’ and Longmore L.J. in OT Africa [2005] 2 Lloyd’s Report 170. The latter case was an unusual one, where it was contended that the existence of the Canadian statute, with its claim to override the jurisdiction conferred by the arbitration clause, was a strong reason (in the Donohue v Armco sense) not to grant the injunction. In such a case it is understandable that questions of comity arise, because there may be a conflict of jurisdictions. But that is not this case”.

It followed that in personam jurisdiction alone based on IPOC’s domicile in the jurisdiction sufficed. The action in Russia was withdrawn by IPOC, and the injunctions upheld in Bermuda.

RECOVERING DAMAGES

An anti-suit injunction provides immediate relief when an action is brought in breach of an exclusive jurisdiction clause or arbitration agreement. Damages are not an adequate remedy. That is not to say, however, that damages cannot be claimed when proceedings are brought back on track.

Damages in breach of an exclusive jurisdiction clause

There have been previous cases in which a defendant to foreign proceedings brought in breach of an exclusive jurisdiction clause successfully applied to the English courts to recover legal costs incurred in those proceedings.

Union Discount The leading authority is Union Discount Co Ltd v Union Cal Ltd. In this case, the contracting parties had agreed on the exclusive jurisdiction of the English courts over disputes arising from their contractual relationship. Union Discount, however, brought proceedings in the New York courts in breach of the exclusive jurisdiction clause. Union Cal applied for a strike-out, which was granted by the New York courts. In subsequent proceedings brought by Union Cal before the English courts, it was held that Union Cal was entitled to recover as damages the costs incurred in securing the strike-out. Delivering the leading judgment in the Court of Appeal, Schiemann L.J. ruled:

“In our judgment, just as a malicious prosecutor should not be able to rely for his own benefit on any policy consideration which is designed to keep down the cost of litigation, so a...”


16. [2002] 1 W.L.R. 1517, also known as Union Discount Co Ltd v Zoller and Others.

17. The practice in New York being not to award costs to a party successfully applying for a strike-out. It should be noted that Union Cal did not make any application to the New York court for legal costs incurred for bringing the strike-out action.
person who starts totally unnecessary proceedings in a foreign jurisdiction in breach of an exclusive jurisdiction clause should not be able to rely on such policy considerations.”18

However, Schiemann L.J. took care to stress the unique features of the present case, thus inviting the conclusion that applications for legal costs by way of damages for breach of an exclusive arbitration agreement would have to be treated case by case:

“18. It is important to emphasise that in the present case the following unusual features are all present: (i) The costs which the claimant seeks to recover in the English proceedings were incurred by him when he was a defendant in foreign proceedings brought by the defendant in the English proceedings. (ii) The claimant in the foreign proceedings brought those proceedings in breach of an express term, the exclusive jurisdiction clause, which, it is assumed for present purposes, has the effect of entitling the English claimant to damages for its breach. (iii) The rules of the foreign forum only permitted recovery of costs in exceptional circumstances. (iv) The foreign court made no adjudication as to costs.

19. It is common ground that there is no binding authority which inhibits us from granting Union Cal relief in damages in the present case. That relief is predicated on the assumption, not in issue before us, that the bringing of the New York proceedings itself constituted a breach of contract which has resulted in damages which are prima facie recoverable. Thus it is common ground that the action should not have been struck out unless there are policy reasons which prevent the recovery of these damages.”19

Schiemann L.J. further stressed that, for an application to be successful, there had to be a separate cause of action, i.e. “a freestanding cause of action entitled [the applicant] to seek to recover [its] costs as damages”20.

“Absent a separate cause of action, there is no doubt that costs, even if irrecoverable under the procedural rules of the foreign court, cannot be recovered as damages in separate proceedings in England. The claimant has suffered damnum sine injuria.”21

Schiemann L.J. voiced his doubts as to whether the bases upon which the Court of Appeal was prepared to grant the comity and res judicata arguments. On the res judicata point more specifically, Schiemann L.J. explained:

“25. The courts manifestly should avoid two adjudications on the same point. That is common ground. However, in cases such as the present, where there is assumed to be an independent cause of action, then, as Devlin L.J. points out in the fourth passage we cite from Berry's Case in paragraph 10, what is being adjudicated upon on the second occasion is not the same point.

26. In the present case there is the additional point that in fact there was no adjudication upon costs in the New York court and so res judicata does not arise.


21. Union Discount [2002] 1 W.L.R. 1517. As to the existence of a separate cause of action, Schiemann L.J. cites with approval Devlin L.J. in the earlier case of Berry v British Transport Commission [1962] 1 Q.B. 306 at 320-321: ‘The reason for the rule is not that the costs incurred in excess of the party and party allowance are deemed to be unreasonable; it is that what is presumed to be the same question cannot be gone into twice. The rule appears to have been first laid down by Mansfield C.J. in Hathaway v Barrow (1807) 1 Camp 151 where he put it on the ground that: ‘it would be incongruous to allow a person one sum as costs in one court, and a different sum for the same costs in another court.’ If in the earlier case there has been no adjudication upon costs (as distinct from an adjudication that there shall be no order as to costs), a party may recover all his costs assessed on the reasonable, and not on the necessary, basis. If a party has failed to apply for costs which he would have got if he had asked for them, a subsequent claim for damages may be defeated; but that would be because in such a case his loss would be held to be due to his own fault or omission. In any case in which the legal process does not permit an adjudication, the rule does not apply.”

application in the present case could also be readily extended to other cases which he termed to be “more doubtful”:

“36. Suppose, for instance, that the costs rules in Australia were broadly the same as those which apply here. Suppose an attempt to litigate there in breach of an exclusive jurisdiction clause which nominated England. Assume successful proceedings there to strike out the Australian litigation. Assume that costs are awarded to the successful defendant but he only recovers two-thirds of those costs although the remainder was reasonably incurred. That defendant then sues here asking to be awarded the remaining third as damages for breach of the exclusive jurisdiction clause. Would our public policy prevent him from recovering?”

The Henderson v Henderson point

27. This founds on the well known passage in Henderson v Henderson (1843) 3 Hare 100,115, in the judgment of Sir James Wigram V.C. where he said:

‘where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have...omitted part of their case.’

28. We accept of course that it is important that there should be an end to litigation but that principle has no sensible application to the present case. Since it was Union Cal’s contention that the New York courts had no jurisdiction to consider breaches of the contract between Zoller and Union Cal, the latter could not in New York bring an action for damages caused to Union Cal by the bringing of the action in New York. If it wished to advance that contention it

18 Union Discount Co Ltd v Zoller and Others [2002] 1 W.L.R. 1517 at [12].

19 Union Discount [2002] 1 W.L.R. 1517 at [18] and [19]. Note that Schiemann L.J. then dismissed any potential policy grounds whose invocation could have resulted in a less favourable decision for Union Cal, including...
had to do so in England. The principle in *Henderson v Henderson* is manifestly inapplicable."

37. Or suppose an arbitration clause which nominates arbitration in England. One of the parties sues in the High Court. The other obtains a stay and a court order for costs which does not fully recompense him for his costs reasonably incurred.

38. We prefer to leave such cases for the future. The present case concerns someone who in breach of an exclusive jurisdiction clause litigates in a jurisdiction which, save exceptionally, does not award costs in strike-out proceedings. Hence, no costs are asked for by the party who successfully applied for the strike-out. It would have been pointless to do so. In such a case, on the assumption that to bring suit in the foreign jurisdiction amounts to a breach of contract, we consider that justice requires that he should recover the damages which has suffered by reason of the breach. Those damages will be what he has reasonably expended on the strike-out proceedings. The situation appears to us to be akin to malicious prosecution and the same rule as that established in *Berry’s Case* [1962] 1 QB 306 should prevail."

In the above extract, Schiemann L.J. expressly singles out the situation where the application for legal costs would be in relation to costs incurred in foreign proceedings brought in breach of an *arbitration agreement*, reserving a decision on this situation for future consideration by the English courts. This, however, does not mean that recovery in those circumstances would be impossible. To the contrary, what Schiemann L.J. seems to be saying is that any applications—whether in relation to legal costs incurred due to a breach of an exclusive jurisdiction clause or an arbitration agreement—have to be considered on their own individual merit and that there is no firm and fast rule which the English courts have to apply in making a decision provided the outcome is just. In the words of a contemporary commentator:

"[t]he attraction of the argument that there was a breach of contract which caused loss will be difficult to displace, at least with hard-edged and convincing doctrinal argument. There is an intuitive rightness about the decision in *Union Discount Co Ltd v Union Discount Cal.*" 25

*Donohue v Armco* Despite the more cautious approach taken by Schiemann L.J. in *Union Discount*, it has been argued that their Lordships in *Donohue v Armco Inc* 26 advocated a somewhat broader basis for awarding legal costs incurred in foreign legal proceedings brought in breach of an English exclusive jurisdiction clause. As noted by Tan and Yao:

“Although the Court of Appeal in *Union Discount* purported to restrict its findings to the particular facts of that case, several of their Lordships in the almost contemporaneous case of *Donohue v Armco Inc* accepted, at least in principle, that damages were available for breach of a jurisdiction clause on a somewhat broader basis: not only to recover any greater expense (for example, unrecovered litigation costs, without any of the *Union Discount* limitations) but also to recoup any greater liability in the foreign forum than would have been the case in England.” 25

In Lord Scott’s words in *Donohue*:

“If it should transpire that Mr Donohue is successful in the New York proceedings but is unable to recover his costs, being costs that he would have expected to have been awarded if he had successfully defended in England, I can see no reason in principle why he should not recover, as damages for breach of the exclusive jurisdiction clause, such part of those costs as he incurred in his successful defence of the claims that fall within that clause.” 26

*Svenborg v Akar* In a more recent case, Julian Flaux Q.C., sitting as a Deputy High Court Judge, confirmed obiter their Lordships’ findings in *Union Discount*:

“Any doubts there might have been as to the recoverability of costs in foreign proceedings taken in breach of an exclusive jurisdiction clause as damages for that breach have been laid to rest by the recent decision of the Court of Appeal in *Union Discount v Zoller*… That case confirms the principle that the claimant is entitled to recover its reasonable expenses of litigating at the instigation of the defendant in the jurisdiction which the defendant has chosen in breach of the exclusive jurisdiction clause (see paragraph 34 of the judgment).” 28

In a second step, however, Mr Flaux extended the scope of the principle developed in *Union Discount* by arguing that it would apply irrespective of whether the claimed expenses would have been recoverable from the non-

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25. See Daniel Tan and Nik Yao, “Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?” (2003) 4 L.M.C.L.Q. 435, 436 fn.3: “[t]heir lordships’ comments were in reply, and were not the subject of any further analysis. In support of his argument that an anti-suit injunction should not be granted against New York proceedings notwithstanding a jurisdiction clause exclusively choosing English courts, counsel conceded that the applicant for the injunction would still have the right to sue for damages for breach of the jurisdiction clause once the New York proceedings were resolved.”
26. See also *Donohue* [2002] 1 Lloyd’s Rep. 425 at 437, per Lord Bingham.
contractual forum had an application to that forum been made:

“It does not seem to me that the application of that principle is dependent upon the claimant showing that the relevant expenses are irrecoverable in the foreign proceedings and, in any event, in the present case they have not been recovered in the foreign proceedings and Mr Diwan [claimants’ counsel] confirmed that if his clients recovered damages and an indemnity in these proceedings, they would not recover sums twice over in Hong Kong or Guinea [where the court proceedings had been brought by the defendants in breach of the exclusive jurisdiction clause].”

Tan and Yao have commented with approval:

“That must be right. Whether the claimant has recovered, or is likely to recover, anything in the foreign jurisdiction should relate only to the issue of quantification and not the availability of the remedy itself...difficulties in quantifying loss are not a good reason to deny a cause of action.”

Merrett appears to coincide with this view when she interprets Flaux’s words as meaning that “the fact that some costs may have already been awarded (if that is the case) is simply relevant to the assessment of the loss.”

Mr Flaux found, in light of the defendants’ continuous breaches of the exclusive jurisdiction clause, that the claimants, “are entitled to the indemnity they seek in respect of future costs and expenses incurred in the proceedings in Hong Kong and Guinea.” Some commentators have supported this view, noting that the court in Akar extended the principle to the recoverability of future costs and expenses:

“notwithstanding that at least one of the relevant foreign jurisdictions, Hong Kong, had a costs regime similar to that of England, by which the defendant would (if successful) have been awarded at least some of his costs.”

Other commentators have reported upon the outcome of the above cases with approval. In Professor Thami’s words:

“It cannot be doubted that the outcomes in Armaco [i.e. Donohue], Zoller and Akar were fair, just and reasonable. It cannot be right that parties can ignore the presence of a freely negotiated exclusive jurisdiction clause and expect to get away with it.”

As Merrett has confirmed:

“provided that the claimant is not seeking to make a double recovery, there appears to be no problem with a claim for damages being based on loss suffered through costs suffered in the non-contractual forum. Nor does there seem to be any policy or comity reasons why such a claim cannot be made. The costs cases themselves (in particular, Donohue v Armaco, Union Discount v Zoller, and Svenborg v Akar) confirm the availability of damages for breach of an exclusive jurisdiction clause. Thus it now appears to be established that as a matter of English common law damages are available for breach of an exclusive jurisdiction clause.”

Damages in breach of an arbitration agreement

According to Professor Merkin, an application for legal costs in the circumstances outlined in the Introduction above may succeed by analogy with the Court of Appeal’s ruling in Union Discount:

“If party B to an arbitration clause commences judicial proceedings in some other jurisdiction in breach of an arbitration clause, party A may potentially incur two types of expenditure to restrain the breach. The first is that of obtaining an anti-suit injunction in England to prevent party B from pursuing the judicial action abroad. In Kyrgyz Mobil Tel Ltd v Fellows International Holdings Ltd, Cooke J. held that the costs of a successful application should be awarded to party A on an indemnity rather than standard basis. The learned judge expressed the principle as follows:

‘Looking in particular at the terms of CPR 44 in relation to costs...the correct approach where there has been a breach of a jurisdiction clause by a party in initiating proceedings in a non-chosen jurisdiction is that the costs should be awarded on an indemnity basis. The reason for that is plain. If a party has breached his agreement, then the damages which flow from the breach of that agreement are all the costs incurred by the party who successfully relies upon the choice of jurisdiction clause. In my experience, the Commercial Court in particular but courts generally in this country adopt such an approach.’

Alternatively (or in addition) party A may have successfully contested the foreign judicial proceedings on jurisdictional grounds. In that situation party A may find that he has suffered loss in the form of the costs incurred by him in defending those

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34 Chee Ho Tham, “Damages for Breach of English Jurisdiction Clauses: More than Meets the Eye” 02/2004 [2004] L.M.C.L.Q. 46, 70. In this context, note, however, that Tham's general stance on the recoverability of damages for breach of an exclusive jurisdiction clause using orthodox contractual grounds is more critical. He thinks that for this to be possible, an exclusive jurisdiction clause would have to constitute more than a mere ancillary obligation to the overarching substantive contract (e.g. on the sale of goods) and give rise to a primary or secondary contractual obligation in its own right.
35 Merrett, “Enforcement of Jurisdiction Agreements”.
37 [2005] EWHC 1329 (QB). (Footnote in the original.)
proceedings, particularly in those jurisdictions which do not award costs to the successful party. In such a case, party A may have an action for damages for breach of the arbitration clause.38

As Merrett pointed out in a recent article, “indeed, in the case of breach of a promise to arbitrate, it has long been established that damages are available.”39

Mantovani v Carapelli The leading authority is Mantovani v Carapelli SpA,40 in which the English Court of Appeal held that damages could arise from an ancillary breach of an arbitration agreement. In this case, two Italian companies concluded a sales contract containing a Scott v Avery clause.41 A dispute arose between the parties and was submitted to arbitration in London. Within the course of the arbitration proceedings on the substance of the dispute, the seller successfully applied to the Italian courts for security in relation to its claim. The buyer then claimed that the application had been made in breach of the arbitration agreement and applied to the English courts to recover damages incurred as a result of the seller’s commencement of ancillary proceedings in a foreign court.

The Court of Appeal acknowledged the novelty of the case, noting that there was “no reported case in which damages have been awarded for breach of such a clause.”42 Browne L.J. pointed out that “in principle there must be a right to bring an action for damages in respect of breach of such a clause.”43 In similar words, Megaw L.J. noted: “I can see no basis for the suggestion that in an appropriate case, where damages can be proved to have followed from a breach of contract of the nature with which we are here concerned, damages should not be recoverable.”44

Tan and Yao have favourably commented on the Mantovani case, noting that, “in fact, courts readily recognize that the damages are in principle available for breach of arbitration clauses”.45

Following the Court of Appeal’s judgment in Mantovani, the right to recover damages for breach of an arbitration clause has occasionally come before the English courts for further consideration.

Tracomin v Sudin In Tracomin SA v Sudin Oil Seeds Co Ltd,46 an arbitration award and an award on costs had been made in favour of the defendant. The defendant invited the Commercial Court to increase the costs award to take into account the fact that the claimant had breached the parties’ arbitration agreement by bringing related court proceedings in Switzerland. The defendant claimed that it had incurred additional damages as a result of that breach and sought to rely on Mantovani for the proposition that such damages could include costs incurred on defending proceedings abroad. The court refused to address this issue, leaving it to the arbitral tribunal to decide on the defendant’s potential loss flowing from the breach of the arbitration agreement.47

41 Scott v Avery clause is a term in an arbitration agreement that explicitly provides for arbitration—and in particular the arbitral award—as a condition precedent to initiating judicial proceedings.


44 Mantovani [1980] 1 Lloyd’s Rep. 375 at 384, per Megaw L.J.


46 For this summary history of the proceedings, see Jane Wessel and Sherri North Cohen, “In Tune With Mantovani: The ‘Novel’ Case of Damages for Breach of an Arbitration Agreement’ (2001) 4 Int. A.L.R. 65, 66. See also Tracomin [1982] Transcript no.1211 (Comm Ct) per Staughton J.: “A third point was taken by Mr Merriman. He says that the conduct of the plaintiffs in commencing their action in Switzerland was a breach of contract. That submission featured in the course of his arguments on liability. He says that when he goes to the FOSFA arbitrators, as no doubt he will do, he will be able to recover damages for that breach of

47 Schiffsfrachtgesellschaft Detlev v Voest In Schiffsfrachtgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH,48 the Court of Appeal made the point that, “the aggrieved party also has the option to sue for damages for breach of contract [i.e. the arbitration agreement where court proceedings had been brought in Brazil] though this is rarely a satisfactory remedy.”49

Re Boodhoo and A v B (Costs) Most recently, the possibility to recover legal costs as damages for breach of an arbitration agreement was confirmed by Re Boodhoo50 and A v B (Costs)51 although these cases addressed the question of the recoverability of costs flowing from court proceedings brought in England. In both the Court of Appeal held with respect to the recoverability of costs flowing from the unwarranted breach of an arbitration agreement as well as an exclusive jurisdiction clause as follows:

“If a costs order in favour of a successful applicant for a stay or for an anti-suit injunction directed to giving effect to an arbitration agreement or an English jurisdiction clause was made on the standard contract. He points to the case of Mantovani v Carapelli [1980] 1 Lloyd’s Rep. 375, where the damages included money spent resisting proceedings abroad. Mr Merriman goes further than that, and says that if I do not award him all his costs here, he will be able to recover the balance as damages before the FOSFA arbitrators. Therefore, he says, I should not refrain from ordering Mr Grace to pay all his costs. I say nothing whatever about that claim at the present stage. If it is made before the FOSFA arbitrators, they will have to consider, amongst other things, whether the loss which the sellers will be saying they have suffered was caused by the buyers’ breach of contract in commencing proceedings in Switzerland, or by something else, such as commencing this action, or even the exercise by me of the discretion with which I am entrusted by law. No doubt they will consider that amongst any other arguments that are put before them. In the result I order that the plaintiffs pay half the defendants’ costs.”48


50 [2007] EWHC 54 (Comm).
basis, there would necessarily be a part of the successful applicant’s costs of the application which it could not recover because of the restrictive process of assessment. That unindemnified portion of costs would then be loss that could only be recovered as damages for breach of the jurisdiction or arbitration agreement, if such a damages claim were permissible. Where the cause of action for relief enforcing the agreement by stay or injunction in the English court and the cause of action for damages for breach of that agreement were, as they normally would be, the same, the effect of the authorities was to prevent separate proceedings for damages by reference to unrecovered costs, notwithstanding the breach of the arbitration or jurisdiction agreement, Berry v British Transport Commission [1962] 1 Q.B. 306 and Union Discount Co Ltd v Zoller (Costs) [2001] EWCA Civ 1755, [2002] 1 W.L.R. 1517 considered. That would give rise to a fundamentally unjust situation. In such circumstances the successful party should not have to forgo any part of its costs. It followed that, provided that it could be established by a successful application for a stay or an anti-suit injunction as a remedy for breach of an arbitration or jurisdiction clause that the breach had caused the innocent party reasonably to incur legal costs, those costs should normally be recoverable on an indemnity basis. The conduct of a party who deliberately ignored an arbitration or jurisdiction clause so as to derive from its own breach of contract an unjustifiable procedural advantage was sufficiently abnormal to warrant an indemnity costs order.”

INTEREST ON LEGAL COSTS AS DAMAGES UNDER ENGLISH LAW

With respect to recovering interest on legal costs as damages in breach of an arbitration agreement, the judgment of the High Court in Svenborg v Akar\(^{53}\) is instructive. Even though this case concerned the recoverability of legal costs as damages in breach of an exclusive jurisdiction in favour of the English courts, there is no reason to believe that the High Court’s \textit{ratio decidendi} should not also apply to corresponding situations of recoverability where there is a breach of an arbitration agreement. This case confirmed the earlier judgment of the Court of Appeal in \textit{Union Discount v Zoller}\(^{54}\) that costs in foreign proceedings commenced in breach of an exclusive jurisdiction clause are recoverable as damages for that breach. Accordingly, the claimant is entitled to recover its reasonable expenses of litigating at the instigation of the defendant in the jurisdiction that the defendant has chosen in breach of the exclusive jurisdiction clause.\(^{55}\) As regards the recoverability of interest as damages more specifically, Julian Flaux Q.C., sitting as a Deputy High Court Judge, held as follows:

\textbf{Quantum of the claim}

45. The claimants produced a schedule attached to Mr Nielsen’s statement of losses, consisting of legal and investigative fees and other expenses, together with supporting documentation. I am satisfied that on the basis of that material and Mr Nielsen’s statement, the claimants have established that they have suffered a loss currently quantified at US$130,941.48. Although prior to the trial it was thought by the claimants that this sum in fact relates to the first claim which it is seeking, are a direct result of the opponent’s breach of the arbitration agreement on an indemnity basis provided that the affected party can establish a separate cause of action for recovery of the legal costs concerned. The affected party has to show that the legal costs, recovery of which it is seeking, are a direct result of the opponent’s breach of the arbitration agreement and are reasonable.

The fact that some costs have already been awarded to the affected party in previous proceedings before a tribunal or a foreign court does not deny that party’s cause of action for damages, but is simply taken into account in the assessment of the amount of legal costs still due (in order to avoid double recovery).

Taken together with the English court’s power to restrain proceedings in breach of arbitration in countries that do not fall

\(^{52}\) Quoted from the case summary, no transcript available.


\(^{54}\) [2002] 1 W.L.R. 1517.


\textbf{CONCLUSION}

A party to an arbitration agreement can bring proceedings in the English courts to recover legal costs, including interest, as damages for breach by its opponent of that arbitration agreement on an indemnity basis provided that the affected party can establish a separate cause of action for recovery of the legal costs concerned. The affected party has to show that the legal costs, recovery of which it is seeking, are a direct result of the opponent’s breach of the arbitration agreement and are reasonable.

The fact that some costs have already been awarded to the affected party in previous proceedings before a tribunal or a foreign court does not deny that party’s cause of action for damages, but is simply taken into account in the assessment of the amount of legal costs still due (in order to avoid double recovery).
under the jurisdiction of the Brussels Regulation, this makes England a particularly arbitration-friendly venue for international dispute resolution, allowing parties that have contracted for England as their forum of choice for the resolution of their contractual disputes fully to recover any of their legal costs as damages for breach of an arbitration clause before the English courts. Now, over to the European Court of Justice for the *West Tankers* decision.

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