

Asia Pacific Judicial Colloquium 2017

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Comity in multi-jurisdictional disputes

A. Introduction

1. The five jurisdictions represented at this colloquium share a common bond in that the legal system of each owes much to its inheritance of the English common law. This inheritance, like greatness in some cases, was thrust upon our forebears through colonisation and our legal systems were born at a time when there was an acknowledged judicial chauvinism on the part of English courts arising from their sense of “innate superiority over those unfortunate enough to belong to other races” (in the words of Lord Reid²), or (as Lord Diplock reminded us) “as Kipling more forthrightly phrased it, ‘lesser breeds without the law.’”³ In *The Abidin Daver*, however, Lord Diplock acknowledged that the change of attitude in the English courts to pending or prospective litigation in foreign jurisdictions demonstrated that judicial chauvinism had been replaced by judicial comity in this regard.⁴ A recent decision of the Hong Kong Court of Final Appeal (“the CFA”)⁵ demonstrates that the concept of judicial comity can, however, be misunderstood and that care must be taken when applying the concept.

2. In this paper I seek to identify issues that can arise in multi-jurisdictional disputes in respect of which the principles of comity may (or may not) be relevant.

¹ Permanent Judge of the Hong Kong Court of Final Appeal. I wish to record my thanks to Mr Hui Sui Hang, Mr Franklin Koo and Ms Amanda Xi, Judicial Assistants of the Court of Final Appeal (2016-2017), for their assistance in the preparation of this paper.

² *The Atlantic Star* [1974] A.C. 436 at 453.

³ *The Abidin Daver* [1984] A.C. 398 at 407. The phrase “lesser breeds without the Law” comes from Kipling’s poem *Recessional*, composed by him for the occasion of Queen Victoria’s Diamond Jubilee in 1897.

⁴ *Ibid.* at 411. In that case, the House of Lords reinstated a stay of English proceedings on the basis that the Turkish court in which the English plaintiff had been sued as defendant was the natural and appropriate forum for the resolution of the dispute between the parties.

⁵ *Compania Sud Americana De Vapores S.A. v Hin-Pro International Logistics Limited*, FACV 1/2016, (14 November 2016); reported in (2016) 19 HKCFAR 586.

B. The CSAV case

3. *Compania Sud Americana De Vapores S.A. v Hin-Pro International Logistics Limited* concerned disputes between a Chilean shipping company, CSAV, and a Hong Kong incorporated freight forwarder, Hin-Pro.

B.1 The facts of CSAV

4. Hin-Pro shipped goods under bills of lading issued by CSAV for carriage from Ningbo to Venezuela but alleged that they had been misdelivered. Hin-Pro then commenced proceedings against CSAV in the PRC. For its part, relying on what it contended was an exclusive jurisdiction clause in the bills of lading, CSAV brought proceedings in London and obtained an injunction restraining Hin-Pro from pursuing the PRC proceedings. Hin-Pro ignored that injunction and continued to pursue those proceedings (which resulted in its director and sole shareholder being held in contempt) and also commenced various other similar proceedings in the PRC courts. CSAV contested these claims relying on, amongst other things, the exclusive jurisdiction clauses in the bills of lading. The PRC courts held that these clauses were void but did not address the question of whether or not the jurisdiction clause was exclusive. CSAV also defended the claims on the basis that they were fraudulent and based on documents which were forgeries.

5. CSAV then commenced a second action in London against Hin-Pro in relation to further breaches of the exclusive jurisdiction clauses and obtained a further anti-suit injunction. Hin-Pro continued to ignore this injunction as well and proceeded to judgment against CSAV in one of its PRC actions. CSAV then obtained a worldwide freezing order in support of its two English actions against Hin-Pro's assets in the sum of US\$27,835,000, equivalent to the total sums claimed by Hin-Pro in its PRC actions.

6. Shortly thereafter, in support of those English proceedings, CSAV commenced an action against Hin-Pro in Hong Kong and obtained *Mareva* injunctions against Hin-Pro's assets (and other ancillary orders). These were obtained under s.21M⁶ of the High Court Ordinance (Cap.4) which had been

⁶ This is headed "Interim relief in the absence of substantive proceedings" and provides, *inter alia*, that:
“(1) Without prejudice to section 21L(1), the Court of First Instance may by order appoint a receiver or grant other interim relief in relation to proceedings which: (a) have been or are to be commenced in a place

enacted to reverse the effect of *The Siskina*.⁷ That section is the Hong Kong equivalent of s.25 of the Civil Jurisdiction and Judgments Act 1982 In England and Wales.

7. The second English action went to trial and CSAV prevailed. The judge (Cooke J) held that the jurisdiction clause in the bills of lading was an exclusive jurisdiction clause so that, in bringing proceedings in the PRC, Hin-Pro had acted in breach of contract. Cooke J granted a permanent anti-suit injunction and awarded CSAV damages representing the damages and costs it had been ordered and might further be ordered to pay Hin-Pro in the PRC proceedings.

8. In the meantime, Hin-Pro continued to prosecute its claims against CSAV in the PRC and had applied to discharge the *Mareva* injunctions (and ancillary orders) in Hong Kong. Its application in Hong Kong was determined on the day after Cooke J gave judgment in the English proceedings. The judge (Deputy Judge W. Chan) discharged the orders⁸ for the reasons that will be summarised below. An appeal by CSAV to the Court of Appeal failed⁹ for the reasons that will also be addressed below.

B.2 The judge's reasons for discharging the Hong Kong orders

9. Judge Chan held that “it would be ‘unjust’ and judicially ‘inconvenient’ for this court to exercise its section 21M jurisdiction by [arrogating] to itself the role of referee or adjudicator over cases in which two courts are in Judicial Conflict with each other – since such conduct would be contrary to this court’s judicial policy of judicial comity ...”.¹⁰

outside Hong Kong; and (b) are capable of giving rise to a judgment which may be enforced in Hong Kong under any Ordinance or at common law.

...

(3) Subsection (1) applies notwithstanding that: (a) the subject matter of these proceedings would not, apart from this section, give rise to a cause of action over which the Court of First Instance would have jurisdiction; or (b) the appointment of the receiver or the interim relief sought is not ancillary or incidental to any proceedings in Hong Kong.

(4) The Court of First Instance may refuse an application for appointment of a receiver or interim relief under subsection (1) 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 concerned makes it unjust or inconvenient for the Court to grant the application.”

⁷ [1979] A.C. 210, holding that a claim for an interlocutory injunction was not itself a cause of action and so was incapable on its own of founding jurisdiction. In terms of Hong Kong law, *The Siskina* was followed by the Privy Council’s decision in *Mercedes Benz AG v Leiduck* [1996] A.C. 284.

⁸ In HCMP 1449/2014, Decision dated 15 October 2014 (Deputy High Court Judge W. Chan).

⁹ In CACV 243/2014, Judgment dated 11 March 2015 (Lam VP, Barma JA and Poon J).

¹⁰ HCMP 1449/2014, Decision dated 15 October 2014 at [35] and [38].

10. The judge had defined the “Judicial Conflict” in question as being the situation pertaining at the time when CSAV applied for s.21M relief in Hong Kong, namely: (a) the English court having tentatively asserted upon an interim basis (the substantive issue not having been decided) that it alone had jurisdiction to decide Hin-Pro’s claims; and (b) the PRC courts having rejected the interim assertion of the English court and having assumed and exercised jurisdiction over Hin-Pro’s claims.¹¹

11. Hence, Judge Chan concluded:

“39. By these proceedings, the plaintiff is seeking to have this court assist the English court in thwarting the defendant’s claims in the PRC courts. As the two courts are in clear conflict over the question of jurisdiction, I agree that the policy of section 21M(4) and this court’s policy of judicial comity require this court to refuse to make any order.

40. This court has been and is being asked to choose between the two courts and to take a course which has always been contrary to the policy of our courts, namely: “*to arrogate to itself the decision how a foreign court should determine the matter*” [see: the *Deutsche Bank AG* case, *Supra* at 1036F-G]. Here, as in England, our court’s policy of judicial comity and respect for foreign courts requires that no choice between the two courts should be made. It follows that the Hin-Pro Mareva (upon which the Hin-Pro Receivership Order, the Soar Mareva and the Soar Receivership Order were based) should be discharged due to the requirement of section 21M(4).”

B.3 The Court of Appeal’s primary basis for dismissing CSAV’s appeal

12. By the time CSAV’s appeal from the discharge of its Hong Kong *Mareva* injunctions was heard, the judgment given in England by Cooke J had been the subject of an appeal to the English Court of Appeal. That court dismissed the appeal from Cooke J’s judgment.

13. The Hong Kong Court of Appeal dismissed CSAV’s appeal. It asked itself, as a first question on jurisdiction, whether the facts would warrant the relief sought if the substantive proceedings were brought in Hong Kong.¹² On the basis that the primary relief sought in England was an anti-suit injunction, the Court of Appeal held that this presented “a special problem” because “if the substantive anti-suit proceedings were brought in Hong Kong, we have to be

¹¹ *Ibid.* at [33].

¹² CACV 243/2014, Judgment dated 11 March 2015 at [32].

cautious in light of the requirement of judicial comity and the lack of primary jurisdiction over the subject matter in our courts”.¹³

14. After citing Lord Goff’s speech in *Airbus Industrie GIE v Patel* [1999] 1 A.C. 119, the Court of Appeal concluded:

“45. Having regard to the principle of judicial comity, had the plaintiff commenced a claim for anti-suit injunction in Hong Kong, it is doubtful whether our court would grant such injunction to prohibit proceedings in another jurisdiction when it does not have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court. In the present context, the court in Hong Kong is not a natural forum for the disputes in relation to the bills of lading. Nor is it designated as a forum for the disputes in the bills of lading. Neither have the parties come to Hong Kong to litigate on such disputes.”

15. Although it noted that CSAV was seeking a *Mareva* injunction to protect its claim for damages rather than an anti-suit injunction, the Court of Appeal held that this did not make any difference in view of the requirement to consider whether an anti-suit injunction would be granted if the substantive claim were brought in Hong Kong. The Court of Appeal considered *The Angelic Grace*¹⁴ and *Deutsche Bank AG v Highland Crusader Partners LP*¹⁵ and held that there was no breach of comity in an English court enforcing an English exclusive jurisdiction clause or in a Hong Kong court enforcing a Hong Kong exclusive jurisdiction clause but that, in this case, CSAV was asking the Hong Kong court to enforce an exclusive jurisdiction clause in favour of the English court.

16. Hence, the Court of Appeal concluded:

“53. ... Viewed in this light, these orders had been obtained by the plaintiff for the purpose of implementing the anti-suit injunctions granted in England though they had not (and could not have) applied for such injunctions in Hong Kong. We do not think one can side-step the requirement to have regard to judicial comity in this way.”

B.4 The appeal to the CFA

17. The questions in the CFA relevant to this paper raised the issues of whether and if so, how, the principle of judicial comity is engaged in the Hong Kong Court’s consideration of an application under s.21M and whether it was

¹³ *Ibid.* at [35].

¹⁴ [1995] 1 Lloyd’s Rep 87.

¹⁵ [2010] 1 WLR 1023.

correct for the Court of Appeal to have relied on the general principles regarding anti-suit injunctions and comity formulated by Lord Goff in *Airbus Industrie GIE v Patel* in the context of a s.21M application where Hong Kong was not the agreed upon contractual forum.

18. Lord Phillips of Worth Matravers NPJ (with whose judgment the other members of the court agreed) referred to the belief, largely founded on observations of Lord Goff in *Airbus Industrie GIE v Patel*, that it was considered to infringe judicial comity for a court of one country to enforce an exclusive jurisdiction clause in a contract by issuing an injunction restraining a defendant from proceeding in a court of another country. He then noted the more recent recognition that an anti-suit injunction in support of an exclusive jurisdiction clause, although constituting an indirect interference with the process of a foreign court, does not thereby infringe judicial comity. This was “because the relief is directed not against the foreign court but against the individual defendant who is disregarding his contractual obligations”.¹⁶

19. In the *CSAV* case, these considerations led the Court of Appeal to hold (correctly) that no breach of comity was involved in the English Court issuing an anti-suit injunction to restrain a defendant from breaching an English exclusive jurisdiction clause; consequently, the Court of Appeal accepted that there had been no breach of comity in the English Court issuing an anti-suit injunction in favour of *CSAV*.

20. However, it was here that the Court of Appeal’s reasoning “went awry” in these two respects. First, it treated the application for a *Mareva* to provide protection in relation to an award of damages by the English Court as being equivalent to asking the Hong Kong Court to enforce an exclusive jurisdiction clause in favour of an English Court. Secondly, it treated proceedings aimed at assisting the enforcement of the English Court’s judgment as being an intervention in a conflict as to jurisdiction between the English and the PRC Courts that involved a breach of comity.

21. Lord Phillips NPJ held:

¹⁶ (2016) HKCFAR 586 at [57]; this point being supported by the observations of Millett LJ (as Lord Millett then was) in *The Angelic Grace* at p.96.

“59. The Hong Kong Court has not been asked to assist the English Court to enforce an exclusive jurisdiction clause. It has been asked to assist in enforcing an award of damages by the English Court for breach of such a clause. If the action of the English Court in awarding such damages involved a breach of comity towards the PRC courts, then I accept that to assist in enforcing those damages might also involve a breach of comity. In that case enforcement of any judgment would seem open to objection on grounds of public policy and the *Mareva* should have been refused for that reason. But for reasons already explored, the action of the English Court involves no such breach of comity. There is no bar on the ground of public policy to enforcing an award of damages made by the English Court nor to the grant of a *Mareva* injunction in support of the judgment of the English Court.”

22. Thus, the Court of Appeal’s primary basis for dismissing CSAV’s appeal was unsound and, since CSAV had established a good arguable case in the English proceedings (indeed, it had by then obtained final judgment), the *Marevas* had been properly granted in the Hong Kong proceedings and its appeal was allowed.

B.5 Comity not relevant in the CSAV case

23. The principle of comity was therefore not properly invoked as a reason to refuse CSAV’s application for injunctive relief under s.21M. As will be apparent, the Hong Kong court’s decision whether to grant a *Mareva* injunction in support of CSAV’s English proceedings did not involve the Hong Kong court in preferring the English proceedings or jurisdiction over the PRC proceedings or jurisdiction. It was not a matter, as Judge Chan held, of the Hong Kong court having to choose between two different competing courts, nor was it arrogating to itself the decision of how a foreign court should decide the matter. Moreover, contrary to the Court of Appeal’s decision, the application for injunctive relief did not involve the Hong Kong court enforcing an English exclusive jurisdiction clause. It was simply a case of the Hong Kong court accepting that the jurisdictional basis for the grant of injunctive relief existed and that there was no good reason why it should not exercise its discretion to grant that relief in the circumstances. This decision did not amount to any affront to judicial comity or respect for the jurisdiction of the PRC courts.

24. As we shall see, there are other contexts in which the courts of one jurisdiction (which one may call the home jurisdiction) will exercise a jurisdiction notwithstanding parallel or related proceedings (or other competing interests) in another (overseas) jurisdiction. In such cases, too, one can see that

judicial comity does not preclude the exercise of jurisdiction by the courts of the home jurisdiction.

C. Comity

25. It is not the purpose of this paper to address the theoretical basis of private international law. Lord Collins of Mapesbury, writing extra-judicially in 2002, pointed out that the leading textbooks on conflicts of laws (Dicey, Morris and Collins¹⁷ and Cheshire and North¹⁸) have long doubted that comity is the basis for the rules of private international law and the consequence that the application of foreign law and the recognition of rights under foreign law, or the recognition of foreign judgments, depend on reciprocity.¹⁹ He stated that it is now orthodox theory in common law and civil law countries that the basis of private international law lies in the domestic law of the forum and that, while reciprocity has a role to play in some areas, particularly in the recognition and enforcement of foreign judgments in some countries, it is not an overriding principle of the conflict of laws.²⁰ Notwithstanding this, Lord Collins noted “that there are, quite literally, thousands of decisions in the field of the conflict of laws in the British Commonwealth and the United States which invoke the concept of comity.”²¹

26. In a series of lectures delivered as part of the Collected Courses of the Hague Academy of International Law, published under the title *The Principle of Comity in Private International Law*,²² Professor Adrian Briggs has rejected comity as being limited to reciprocity or deference and stressed that the essential characteristics of comity should be understood as having two components, namely:

¹⁷ *The Conflict of Laws*, originally under the editorship of A.V. Dicey, now in its 15th edition (2012) under the general editorship of Lord Collins.

¹⁸ *Private International Law*, now in its 14th edition (2008).

¹⁹ *Comity in Modern Private International Law*, Lawrence Collins, in *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Edited by James Fawcett, OUP, 2002) at pp.91-93.

²⁰ *Ibid.* at p.93.

²¹ *Ibid.* at p.95.

²² *Collected Courses of the Hague Academy of International Law*, Volume 354, (Brill/Nijhoff, Leiden/Boston, 2012).

- (1) “placing and demonstrating mutual trust and confidence in foreign judicial institutions, not interfering with them, and determining the precise conditions by which this is to be done;” and
- (2) “giving full faith and credit to, or respecting the conclusiveness of, the acts of foreign institutions, and working out exactly what this means.”²³

27. Importantly, Professor Briggs draws attention to the distinction between the international and private aspects of private international law and notes that comity understands both of these. He states:

“The international element is concerned with giving effect to the acts and adjudications of courts, giving effect to (and not questioning) the laws made by sovereign legislatures, not trespassing on or interfering with the allocation or delegation of adjudicatory authority which sovereign legislatures confer on their courts. All of these are acts of sovereign authority, to be respected as such by reference to laws which make provision for them as such. But the private element is concerned with the distinct relationships which individuals enter into or assume for themselves: these may be, and should be, accorded respect and conclusiveness on the basis that they do not implicate the State interests previously referred to, but take their effect at a lower, private level. This distinction is fundamental in understanding what the principle of comity does and does not permit.”²⁴

28. In analysing the manner in which comity explains the common law rules of private international law which resolve situations of apparent conflicts between jurisdictions, Professor Briggs identifies comity by reference to twelve propositions.²⁵ These principles have been reproduced as an Appendix to this paper. I am much indebted both to Professor Briggs and also Lord Collins for their valuable insights on this subject and, in this paper, I have adopted a number of their ideas in formulating some suggested questions for discussion.

D. Categories of proceedings where jurisdictions may be competing

29. There are a number of categories of proceedings where jurisdictions may be competing and where comity may (or may not) have a role to play in the decision by the home jurisdiction to exercise jurisdiction.

²³ *Ibid.* at p.91.

²⁴ *Ibid.* at pp.91-92.

²⁵ *Ibid.* at pp.181-182.

D.1 Staying court proceedings

30. Perhaps the most obvious type of case involving competing jurisdictions is one where parallel proceedings have been commenced in two jurisdictions leading to an application by a defendant in the home jurisdiction to stay those proceedings in favour of the proceedings in the overseas jurisdiction on the basis of (a) *lis alibi pendens*. Similarly, even where parallel proceedings have not already been commenced abroad, a defendant in the home jurisdiction may apply for a stay of proceedings under the doctrine of *forum non conveniens*, on the basis that (b) there is another available forum overseas, having competent jurisdiction, where the action may be tried more suitably for the interests of all the parties and the ends of justice, or alternatively on the basis that (c) the claimant has, by contract, agreed to litigate any disputes with that defendant in another jurisdiction.

31. In (a), litigation in the home jurisdiction runs the obvious risk of a conflict of decisions between it and the overseas jurisdiction but this risk may also arise in (b) or (c).

32. The readiness of English courts to stay proceedings brought as of right in that jurisdiction developed in the series of cases – *The Atlantic Star*,²⁶ *MacShannon v Rockware Glass Ltd*,²⁷ and *The Abidin Daver*²⁸ – leading ultimately to the House of Lord’s decision in *Spiliada Maritime Corp v Cansulex Ltd* is well known.²⁹ The extent to which this principle has been adopted and developed in the jurisdictions participating in this colloquium is succinctly summarised in Dicey, Morris and Collins.³⁰ As mentioned above, in *The Abidin Daver*, Lord Diplock noted the replacement of judicial chauvinism by judicial comity in this field of law. But what exactly did he mean by that?

33. It might generally be thought that the principles on which the courts act in staying proceedings in each of situations (a), (b) and (c) are consistent with comity. However, although the non-interference aspect of comity is not

²⁶ [1974] A.C. 436.

²⁷ [1978] A.C. 795.

²⁸ [1984] A.C. 398.

²⁹ [1987] A.C. 460.

³⁰ *The Conflict of Laws*, 15th Ed., Vol.1 at 12-011.

breached by the grant of a stay on the grounds of litispence (situation (a))³¹ and also on the grounds of a contractually agreed jurisdiction (situation (c)),³² it can be argued that the non-interference aspect of comity is in fact breached by the grant of a stay on the grounds of *forum non conveniens* (situation (b)).³³ That is because the decision to stay proceedings and, in effect, force the parties to litigate their dispute elsewhere is based on a court in the home jurisdiction making a judgment about the comparative suitability of courts and “is a comparison which identifies a foreign court’s jurisdictional rule as being more suited to the adjudication than is the English court’s own jurisdictional rule.”³⁴ In this respect, there is much to be commended in the approach of the High Court of Australia in *Voth v Manildra Flour Mills Pty Ltd*³⁵ in preferring to exercise restraint in finding that a foreign court (in that case the Missouri court) is the right place to sue. As the High Court held:

“... there are powerful policy considerations which militate against Australian courts sitting in judgment upon the ability or willingness of the courts of another country to accord justice to the plaintiff in the particular case. Those policy considerations are not dissimilar to those which lie behind the principle of ‘judicial restraint or abstention’ which ordinarily precludes the courts of this country from passing upon ‘the provisions for the public order of another State’ (see generally *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, at pp.40-44).”

34. Notwithstanding this view, one might debate whether a stay on the grounds of *forum non conveniens* may nevertheless be consistent with comity in the sense of demonstrating mutual trust and confidence in foreign judicial institutions and/or giving full faith and credit to the acts of foreign institutions. In any event, there is certainly a difference (but, query, whether a distinction) between a court’s determination that the foreign jurisdiction is not a suitable place for trial, on the one hand, and its determination that a claimant’s action may fairly be tried in the foreign jurisdiction.

³¹ Collected Courses of the Hague Academy of International Law, Volume 354, (Brill/Nijhoff, Leiden/Boston, 2012) at pp.118 and 125.

³² *Ibid.* at pp.122 and 125.

³³ *Ibid.* at pp.118-121 and 122-125.

³⁴ *Ibid.* at p.123.

³⁵ (1990) 171 CLR 538 at [38]-[39].

D.2 *Anti-suit injunctions*

35. Another typical situation in which there is a potential conflict between jurisdictions is when a party suing or being sued in jurisdiction A seeks an injunction to restrain an opponent from bringing separate proceedings in jurisdiction B. When a court grants an anti-suit injunction to restrain foreign proceedings, there is every appearance of an interference with the process of the foreign court in jurisdiction B. Is this consistent with comity?

36. Traditionally, the justification for regarding the grant of an anti-suit injunction as not infringing the non-interference aspect of comity has been that the injunction is *in personam* and is directed at the individual litigant and not the foreign court in which he is litigating or intending to litigate. However, as Lord Collins has pointed out, and as the High Court of Australia also recognised in *CSR Ltd v Cigna Insurance Australia Ltd*,³⁶ this is a view that may well not be shared by the foreign court.³⁷

37. Comity's role in the context of anti-suit injunctions was authoritatively addressed (in English law) by Lord Goff in *Airbus Industrie v Patel*, where he 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.”³⁸

38. Lord Goff drew on Australian³⁹ and Canadian⁴⁰ authority in reaching this statement of principle and noted that, of the two competing standards applied by the US federal courts, his view was in line with the stricter standard,⁴¹ requiring the court to consider international comity and to grant an injunction only to protect its own jurisdiction or to prevent evasion of its public policies.

³⁶ (1997) 189 CLR 345 at pp.395-397.

³⁷ *Comity in Modern Private International Law*, Lawrence Collins, in *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Edited by James Fawcett, OUP, 2002) at p.101.

³⁸ [1999] 1 AC 119 at p.138.

³⁹ *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

⁴⁰ *Amchem Products Inc v British Columbia (Workers' Compensation Board)* [1993] 1 S.C.R. 897.

⁴¹ Applied by the Second, Sixth and District of Columbia Circuits; to be contrasted with the laxer standard applied by the Fifth, Seventh and Ninth Circuits (under which an anti-suit injunction is granted if the foreign proceedings are vexatious, oppressive or will otherwise cause inequitable hardship).

39. We may consider, as an example of a court being caught between two competing jurisdictions, the case of *Akai Pty Ltd. v The People's Insurance Co. Ltd.* A dispute arose between an Australian company, Akai, and its credit insurers, a Singaporean company, under a contract which contained an express choice of English law and jurisdiction. Akai commenced proceedings on the same day in both England and Australia. The insurers sought an injunction in Singapore, where its assets were located and where any Australian judgment would be likely to be sought to be enforced, to restrain Akai from proceeding before the Australian court.

40. In Singapore,⁴² the judge (Choo Han Teck JC) dismissed the interim injunction that had been granted. He concluded that Akai was not amenable to the jurisdiction of the Singapore courts. This was, in itself, enough to justify the refusal of the injunction. However, he went on to hold that:

“... the Singapore court should not assume the role of an international busybody and direct that the parties litigate in England when the English court may well decline to assume jurisdiction on the ground of *forum non conveniens*. The courts of the two competing jurisdictions are entitled to come to different conclusions, and that does not concern the Singapore courts unless the parties come to this jurisdiction for the purposes of enforcing their respective judgments, but that would be an entirely different matter.”⁴³

41. In the circumstances of that case, this conclusion was entirely consistent with the non-interference required by comity. Those circumstances, of course, did not pertain in *CSAV v Hin-Pro* since there was no question of the grant of *Mareva* relief to CSAV in support of its English proceedings amounting to an interference in the PRC proceedings of Hin-Pro.

42. In the *Akai* case, having failed to obtain an injunction in Singapore, the insurers then brought their own proceedings in England and sought and obtained an anti-suit injunction there restraining Akai from prosecuting the Australian proceedings.⁴⁴

43. An argument can well be made that there is a distinction between injunctions to enjoin the continuation of proceedings already afoot before a

⁴² [1998] 1 SLR 206.

⁴³ *Ibid.* at [12].

⁴⁴ [1998] 1 Lloyd's Rep. 90.

foreign court and injunctions to restrain proceedings where a foreign court is not seised with proceedings.⁴⁵ It may be said that the former amount to “a direct and unacceptable breach of the principle of comity which insists on non-interference” but the latter are different in that the home jurisdiction does not rule on the jurisdiction of the foreign court but instead rules on the agreement between the parties,⁴⁶ so does not thereby obviously breach comity. Based on that distinction, the grant of the injunction by the English court in *Akai* was inconsistent with the requirements of comity since the Australian court was already seised of the proceedings.⁴⁷

44. This distinction, which Lord Goff does not make in *Airbus Industrie v Patel*, is worthy of discussion. It would seem to be odd that one could obtain injunctive relief on a *quia timet* basis but not when the wrong has started to happen.⁴⁸ Is it a convincing answer to this point to say that it is simply the effect of the principle which prevents judicial orders which would, if made, interfere with what is actually taking place in a foreign court?

D.3 Service out of the jurisdiction

45. Another context in which courts regularly make decisions which may be seen as interfering with the jurisdiction of a foreign country is when a claimant seeks permission to serve a writ on a defendant out of the jurisdiction. In Hong Kong, that jurisdiction derives from Order 11 of the Rules of the High Court (modelled on the former RSC Order 11 in England and Wales) and the other jurisdictions participating in this colloquium have equivalent statutory regimes governing service out of the jurisdiction.

46. There are a number of clear judicial statements to the effect that service out of the jurisdiction is an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected and that the rules regarding leave to do so involve an invasion of the principles of comity so

⁴⁵ Collected Courses of the Hague Academy of International Law, Volume 354, (Brill/Nijhoff, Leiden/Boston, 2012) at p.126.

⁴⁶ E.g. *The Angelic Grace* [1995] 1 Lloyd's Rep 87.

⁴⁷ Collected Courses of the Hague Academy of International Law, Volume 354, (Brill/Nijhoff, Leiden/Boston, 2012) at p.131.

⁴⁸ *Ibid.* at p.132.

that requests for leave must be approached with circumspection and only allowed where clearly within the letter and spirit of Order 11.⁴⁹

47. Notwithstanding such judicial statements that the act of serving a writ out of the jurisdiction is an interference with the exclusive jurisdiction of a foreign court, courts regularly do make such orders. It is true that, before doing so in this jurisdiction (as in England and Wales), it must be demonstrated to the satisfaction of the court that “the case is a proper one for service out of the jurisdiction under this Order.”⁵⁰

48. Is this jurisdiction (to serve out) simply a specific statutory exception to the requirements of comity? Or does the requirement of showing a “proper” case for service out involve the court in determining whether the exercise of jurisdiction in the foreign jurisdiction (albeit for the purposes of commencing proceedings in the home jurisdiction) is consistent with comity?

D.4 Letters of request and mutual legal assistance

49. Considerations of comity may be relevant to decisions by a court as to whether to provide judicial assistance to the judicial authorities of an overseas jurisdiction. Generally, where the relief sought is that which the home jurisdiction could grant by reference to its own law, comity will favour acceding to the request. For example, in *The State of Minnesota v Philip Morris Inc*, Lord Woolf MR said:

“[T]he approach of this court and other courts in this jurisdiction will be to seek to assist a foreign court wherever it is appropriate. For that reason the courts will seek to give effect to a Letter of Request wherever this is practical. Comity between jurisdictions demands no different an approach.”⁵¹

50. But comity does not go further and require the home jurisdiction to make orders which it could not have made if the matter were purely internal. In the context of letters of request under the Hague Convention,⁵² *Rio Tinto Zinc Corp*

⁴⁹ See, e.g., *Vitkovice Horni a Hutni Tezirstvo v Komer* [1951] AC 869 per Lord Radcliffe at p.882; *Tyne Improvement Commissioners v Armement Anversois S/A (The Brabo)* [1949] AC 326 per Lord Normand at p.357; *George Monro Ltd v American Cyanamid* [1944] KB 432 per Scott LJ at p.437; and *Mackender v Feldia AG* [1967] 2 QB 590 per Diplock LJ at p.599; and *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50 per Lord Diplock at p.65.

⁵⁰ Rules of the High Court (Cap.4A), O.11 r.4(2).

⁵¹ [1998] I.L.Pr. 170 at p.176.

⁵² The Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

*v Westinghouse Electric Corp (Nos.1 and 2)*⁵³ provides an example of this limitation. The American court's request in aid of proceedings in the US was one which the English courts could have granted but, since the evidence requested was much wider than could be obtained and used in corresponding English proceedings, the English court declined to grant the relief sought.⁵⁴ This result was entirely consistent with comity: comity dictates that it is right to make orders which a foreign court requests but this is subject to limitation. In *Rio Tinto Zinc*, the limitation was that relief should not be granted for which the law of the home jurisdiction does not make provision.

51. Another limitation is that relief should not be granted in support of proceedings which, from the perspective of comity, would not be recognised. The decision of the House of Lords in *Re Norway's Application*⁵⁵ illustrates how this limitation operates. In that case, the letters of request issued by the State of Norway were for the purpose of obtaining evidence in England about assets of the estate of a deceased shipowner which would then be used to allow the State to collect taxes due under Norwegian law. The House of Lords dismissed the objections to the English court assisting in the collection of the evidence. The collection of taxes by the Norwegian State by legal process within its own jurisdiction was what comity required the English court to do. It would have been otherwise if the purpose of the legal assistance requested had been to enable the Norwegian State to take steps to enforce a Norwegian judgment for the payment of Norwegian taxes in England. In that case, comity would not have permitted the enforcement of a foreign judgment for the payment of Norwegian taxes against assets in England.⁵⁶

52. *Rio Tinto Zinc* and *Re Norway's Application* were cases where the assistance was requested by the foreign court and may be contrasted with other cases where English courts have provided assistance notwithstanding that it was not asked for by the foreign court. *Cuoghi v Credit Suisse Fides Trust SA*⁵⁷ is an example of this, where English court granted a worldwide *Mareva* injunction and ordered disclosure of a defendant's assets. This was not relief that was available in the Swiss court which was seised with the substantive proceedings.

⁵³ [1978] AC 547.

⁵⁴ See, *ibid.* at pp.634-635, per Lord Diplock.

⁵⁵ [1990] 1 AC 723.

⁵⁶ See, *ibid.*, per Lord Goff at pp.808-809.

⁵⁷ [1998] QB 818.

In his judgment, whilst recognising that the jurisdiction to make such protective orders should be exercised with caution, Millett LJ (as Lord Millett then was) noted:

“In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention. International fraud requires a similar response. It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other’s jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.”⁵⁸

53. One may fairly ask whether un-asked-for assistance is compatible with comity. *Motorola Credit Corp v Uzan*⁵⁹ is an example of a case where the English court made orders in aid of US proceedings notwithstanding a decision of the US Supreme Court that US courts could not grant relief of that particular kind. Does the principle of non-interference mean that where the assistance has its principal impact on the trial of the merits, it should not be given unless the foreign court has asked for it? One may contrast the position where an order is sought to make the enforcement of a foreign judgment more effective: there, the principle against interference does not provide a reason to withhold the relief applied for, since the enforcement of a judgment once given is not something over which the adjudicating court has primary jurisdiction.⁶⁰ (Note that this latter scenario would cover the case of *CSAV v Hin-Pro* since the *Mareva* relief sought in Hong Kong was to aid enforcement of the English judgment.) Is the difference between requested judicial assistance and un-asked-for assistance a sufficient distinction to require the court in the home jurisdiction to decline, on grounds of comity, to provide the assistance?

D.5 Recognition and enforcement of judgments

54. The second component of comity, that of “giving full faith and credit to, or respecting the conclusiveness of, the acts of foreign institutions”, provides the basis for the role of comity in the recognition and enforcement of judgments. Respect for territorial sovereignty explains the giving effect to

⁵⁸ *Ibid.* at p.827.

⁵⁹ [2004] 1 WLR 113.

⁶⁰ Collected Courses of the Hague Academy of International Law, Volume 354, (Brill/Nijhoff, Leiden/Boston, 2012) at p.171.

foreign laws applying to property within the territory of that foreign State (similarly the limits of the reach of foreign legislation beyond that territory, as to which see below). This respect for territorial sovereignty also explains the view that a judgment is confined to the territory of the State in which it was given. If, at common law, it is to be enforced in the home jurisdiction, it must first be converted into a local judgment of the home court. But respect for territorial sovereignty is the reason a foreign judgment is recognised in the home jurisdiction and may then be converted into a local judgment of the home court which can then be enforced there.

55. This illustrates the proposition that comity, rather than reciprocity, explains the law on foreign judgments, specifically why (i) we recognise judgments against defendants and in respect of property within the territory of a foreign sovereign when adjudication was commenced because “comity requires us to respect, and not to question, the adjudication”, and (ii) we do not enforce such adjudications but instead recognise them as the basis for the home court making its own order which can then be enforced in the home jurisdiction because “comity explains that the compulsion in a foreign judicial order is confined to the foreign State and has no effect, as compulsion or an entitlement, in [the home jurisdiction]”.⁶¹

56. In the *Akai* case, the English court declined also to grant an anti-enforcement injunction against Akai from seeking to enforce in Singapore (or elsewhere) any judgment it might obtain in Australia. Thomas J (now Thomas LCJ) held that it would not be right to grant this since it would be “inviting this court to interfere, albeit indirectly, with the process of the court in Singapore and the right of that court to decide in accordance with their own law whether to recognise and enforce a judgment of a foreign court. In such circumstances a court in this country would have to act with great caution; there are very powerful arguments that it is more consistent with comity to leave it to the courts in Singapore to decide what course to take in the light of their own law”.⁶² This would seem to be an entirely orthodox approach of respecting the territorial sovereignty of Singapore.

⁶¹ *Ibid.* at p.150.

⁶² [1998] 1 Lloyd’s Rep. 90 at p.108.

57. One might, however, consider what exceptional circumstances might justify such interference. In this context, an interesting question arises as to whether there are circumstances in which the courts of one jurisdiction should view the quality of the judicial process leading to a judgment in another State has being so bad, for example by reason of corruption, that respect for territorial sovereignty may be disregarded. Courts have on occasion declined to recognise foreign judgments on the basis that it was demonstrated that the judicial process was so flawed as to justify ignoring the foreign judgment: *Korea National Insurance Co v Allianz Global Corporate & Specialty AG*⁶³ (in relation to a North Korean judgment); *AK Investment v Kyrgyz Mobil Tel*⁶⁴ (in relation to a Kyrgyzstan judgment); *Yukos Capital Sarl v OJSC Rosneft Oil Co*⁶⁵ (in relation to a Russian judgment); and *Merchant International Co Ltd v NAK Naftogaz Ukrayniy*⁶⁶ (in relation to a Ukrainian judgment).

58. Do decisions of this nature amount to a new form of judicial chauvinism? Is this a failure to observe the self-restraint that comity requires and to give respect to territorial sovereignty? Or should comity yield to an inquiry imposed by a higher law, such as the fair trial requirements of international conventions protecting fair trial rights?⁶⁷ Are there circumstances in which the principle of respect for territorial sovereignty “has occasionally to be set aside” and is this simply “regrettable, but inevitable and correct”?⁶⁸

D.6 Cross-border insolvency

59. Bankruptcy and insolvency law is an area in which complex cross-border questions may be raised. Questions may arise as to the scope of legislation to set aside transactions disadvantageous to creditors where such legislation is silent as to its territorial reach. On a practical level, there may be a need to determine whether and to what extent courts in different jurisdictions will cooperate in relation to international insolvencies. As Lord Collins recently

⁶³ [2008] EWCA Civ. 1355.

⁶⁴ [2011] UKPC 7.

⁶⁵ [2011] 2 Lloyd’s Rep. 443.

⁶⁶ [2011] 2 All ER (Comm.) 755.

⁶⁷ E.g., Article 6 of the ECHR or Article 14 of the ICCPR.

⁶⁸ Collected Courses of the Hague Academy of International Law, Volume 354, (Brill/Nijhoff, Leiden/Boston, 2012) at p.151.

observed, “there is no doubt that today international co-operation in cross-border insolvencies has become a pressing need.”⁶⁹

60. Examples of assistance provided by the courts of one country to the insolvency courts of another include: the cancelling and reissuing of shares in a Manx company at the request of a US court as a step made in the collection of assets by the US court for the orderly protection of creditors;⁷⁰ sending English assets overseas to Australia where they could be distributed in accordance with a winding up by the Australian courts in accordance with the Australian scheme for priority of claims;⁷¹ and enforcing repayment judgments made in overseas insolvency proceedings in England.⁷²

61. In jurisdictions, like England and Wales, which have adopted the principle of modified universalism as the approach to international insolvency, courts co-operate, so far as is consistent with justice and public policy, with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution.⁷³ “No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.”⁷⁴ As a matter of comity, where a process of distribution is taking place under such a universal process, English courts should not allow steps to be taken in that jurisdiction which would interfere with that process.⁷⁵

62. On the other hand, comity does not require co-operation where the policy of the forum militates against it: the Supreme Court of Canada rejected a universalist approach to international insolvency in *Holt Cargo Systems Inc v*

⁶⁹ *Rubin and another v Eurofinance SA and others; In re New Cap Reinsurance Corp Ltd (in liquidation)* [2013] 1 AC 236 at [14].

⁷⁰ *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508.

⁷¹ *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852.

⁷² *Rubin and another v Eurofinance SA and others; In re New Cap Reinsurance Corp Ltd (in liquidation)* [2013] 1 AC 236 (in *Rubin*, the Supreme Court held the judgments could not be enforced at common law or under statute; whilst in *New Cap Reinsurance*, the Supreme Court held the judgment could be enforced under statute rather than common law).

⁷³ *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 per Lord Hoffmann at [30].

⁷⁴ *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 per Lord Hoffmann at [16].

⁷⁵ *Galbraith v Grimshaw* [1910] AC 508 per Lord Dunedin at p.513, cited in *Rubin and another v Eurofinance SA and others; In re New Cap Reinsurance Corp Ltd (in liquidation)* [2013] 1 AC 236 per Lord Collins at [12].

*ABC Containerline NV (Trustees of)*⁷⁶ and held that the judge had been right to place primary emphasis on the fact he was dealing with an *in rem* action against a ship which, at the time of the bankruptcy order, had already been arrested and ordered to be sold.

63. In terms of comity, there is a tension between affording respect to the judgments of foreign courts and respecting territorial sovereignty. On the one hand, when a foreign court has assumed insolvency jurisdiction, comity requires that this be respected so far as it takes effect within the territorial jurisdiction of that court. However, where orders are made by such a foreign court against individuals who were not within the jurisdiction of that court, in the absence of submission to that jurisdiction, comity does not provide any reason to give effect to judgments of that foreign court against them.

64. Comity at the international level neither requires nor forbids the recognition and enforcement of judgments – comity requires that these be respected insofar as they take their effect within the territorial jurisdiction of the insolvency court – so is a solution to the tension to be found in the principle of private law, that persons who assume obligations voluntarily should be held to them?⁷⁷ Within these parameters, though, there would seem nevertheless to be considerable scope for the courts to render assistance at the request of a foreign insolvency court (as the passage from Millett LJ’s judgment in *Cuoghi v Credit Suisse Fides Trust SA* quoted above illustrates).

D.7 Commercial litigation

65. As with cross-border insolvency, the potential for conflicts between jurisdictions in the context of commercial litigation is obvious and comity may be a relevant consideration in assisting a court to resolve that conflict. By way of example, claims may be asserted on the basis of foreign laws which purport to have extra-territorial reach. Acts which are thereby unlawful (e.g. tortious breach of anti-trust laws) may give rise to conflicts because they are lawful in the foreign jurisdiction in which they have taken place. Alternatively, the question may arise as to whether restraining an act in one jurisdiction is justified where it would mean acting in contempt of a court order in another jurisdiction;

⁷⁶ 2001 SCC 90.

⁷⁷ Collected Courses of the Hague Academy of International Law, Volume 354, (Brill/Nijhoff, Leiden/Boston, 2012) at pp.178 & 180.

or whether a contract governed by the law of one jurisdiction is rendered unenforceable by reason of its performance in another jurisdiction in which that performance was in breach of the law of that other jurisdiction.

66. On the question of extra-territorial reach, one may consider as an example the application of the US anti-trust jurisdiction under the Sherman Act. This may give rise to a potential conflict because conduct which is contrary to the anti-competitive provisions of legislation enacted in one jurisdiction because of its commercial effect in that jurisdiction may be lawful in an overseas jurisdiction in which it is carried out. This was the position in *Hartford Fire Insurance Co. v California*,⁷⁸ where by a majority the US Supreme Court held that the provisions of the Sherman Act applied, notwithstanding that the conduct was not unlawful in England where it had been carried out, because of the direct and reasonably foreseeable effect on the US or commerce within the US brought about by the reinsurers' conduct. It had not been argued in that case that US law did not apply and so the issue of whether the proper governing law was English law rather than US law was not raised. Once US law applied, the Sherman Act applied and the material question was simply as to its reach. There was no reason, as a matter of comity, why it could not extend to cover the acts of the reinsurers in London which had an adverse impact on the US insurance market.

67. One may consider also the situation of a potential conflict in which a court order in one country requires a party to act in a way which would amount to a breach of a duty owed to a counterparty in another jurisdiction. This was the situation in *F.D.C. Co Ltd and Others v The Chase Manhattan Bank NA*,⁷⁹ where an injunction was sought in Hong Kong by a customer against its bank on the basis of a duty of confidentiality which would have the effect of placing the restrained bank in contempt of a foreign court order. Would the grant of the injunction be contrary to comity? The Hong Kong Court of Appeal thought not, holding:

“... we are not bound to hold back from enforcing the law of Hong Kong at the dictate of a foreign power: see *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd* [1953] Ch 19, 27. Like Lord Evershed, M.R. I do not conceive that I am offending in any way the principles of comity which apply between two countries. All persons opening accounts with banks in Hong Kong, whether local or foreign

⁷⁸ 509 US 764 (1993).

⁷⁹ [1990] 1 HKLR 277.

banks, are entitled to look to the Hong Kong courts to enforce any obligation of secrecy which, by the law of Hong Kong, is implied by virtue of the relationship of customer and banker.”⁸⁰

68. A final example in this context is to consider the role of comity in the development of the rule that it is contrary to public policy to enforce a contract made to break the laws of a friendly foreign state: the rule in *Foster v Driscoll*⁸¹ and *Regazzoni v KC Sethia (1944) Ltd.*⁸² The principle is that:

“It is ... nothing else than comity which has influenced our courts to refuse as a matter of public policy to enforce, or to award damages for the breach of, a contract which involves the violation of foreign law on foreign soil ... Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign State, and it will do so because public policy demands that deference to international comity.”⁸³

69. In this context, comity refers to respect for foreign law and also to the notion that assisting or encouraging a breach of foreign criminal law in the foreign country interferes with its sovereignty, or amounts to participation by the judicial authorities of the home jurisdiction in a crime in the foreign jurisdiction.⁸⁴ However, as a recent decision of the Court of Final Appeal shows, the context of the illegality involved will be relevant. Not every breach of foreign law would fall within the principle. It would certainly not apply where a breach was found not to be a very serious contravention of the law, not to be conduct which could be described as iniquitous, not to have resulted in actual criminal or enforcement proceedings in the foreign jurisdiction, and to have been mere administrative contraventions.⁸⁵

D.8 Criminal law

70. The primary basis of criminal law is territorial. A statute may, however, contain no express geographical limitation and, in such cases, the limit to prosecution of a person for an offence within the home jurisdiction is provided by comity. But, in this sense, comity refers particularly to rules of public

⁸⁰ *Ibid.* per Sir Alan Huggins VP at pp.284-285.

⁸¹ [1929] 1 KB 470.

⁸² [1958] AC 301.

⁸³ *Ibid.* per [Viscount Simonds/Lord Reid] at pp.318-319.

⁸⁴ *Comity in Modern Private International Law*, Lawrence Collins, in *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Edited by James Fawcett, OUP, 2002) at p.100.

⁸⁵ *Ryder Industries Ltd v Chan Shui Woo* (2015) 18 HKCFAR 544 per Lord Collins of Mapesbury NPJ at [50], [57]-[59].

international law rather than a potential for courts competing over making orders inconsistent with each other.⁸⁶ Lord Diplock explained the reason for the geographical limitation on criminal jurisdiction in *Treacy v DPP* as follows:

“The only relevant reason ... is to be found in the international rules of comity which, in the absence of express provision to the contrary, it is presumed that Parliament did not intend to break. It would be an unjustifiable interference with the sovereignty of other nations over conduct of persons in their own territories if we were to punish persons for conduct which did not take place in the United Kingdom and had no harmful consequences there. But I see no reason in comity for requiring any wider limitation than that upon the exercise by Parliament of its legislative power in the field of criminal law.”⁸⁷

71. It is now not uncommon for conspiracies to be entered into in one country which involve acts to be carried out, and directed against victims, in a separate country. In this situation, comity will not preclude the assumption of jurisdiction. Thus, where a conspiracy is formed out of the jurisdiction to commit a crime in Hong Kong, it has been held that the Hong Kong courts should assume jurisdiction “since the conspiracy is not directed at the residents of the country where it is entered into, the courts of that country could raise no reasonable objection to this course on the ground of comity.”⁸⁸ As Lord Diplock put it in *Treacy v DPP*:

“There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom. Indeed, where the prohibited acts are of a kind calculated to cause harm to private individuals it would savour of chauvinism rather than comity to treat them as excusable merely on the ground that the victim was not in the United Kingdom itself but in some other state.

Nor, as the converse of this, can I see any reason in comity to prevent Parliament from rendering liable to punishment, if they subsequently come to England, persons who have done outside the United Kingdom physical acts which have had harmful consequences upon victims in England.”⁸⁹

72. Comity’s role in relation to criminal law can therefore be seen as a means to ensure that there are limits to the jurisdiction of a forum to assert jurisdiction

⁸⁶ *Comity in Modern Private International Law*, Lawrence Collins, in *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Edited by James Fawcett, OUP, 2002) at p.97.

⁸⁷ [1971] AC 537 at pp.561.

⁸⁸ *Attorney General v Yeung Sun-Shun and another* [1987] HKLR 987 per Roberts CJ at p.998; approved by the Privy Council in *Somchai Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225 at p.249.

⁸⁹ [1971] AC 537 at pp.561-562.

over acts taking place in the territory of another sovereign: in Canada, the outer limits of the test of a “real and substantial link” applied in *R v Libman* were said to be “coterminous with the requirements of international comity”.⁹⁰ In the context of criminal law, where prosecution for an offence is normally dependent on physical presence within a jurisdiction, there is unlikely to be much scope for competition or conflicts between two jurisdictions. But might there nevertheless be examples of this?

E. How comity might have been relevant in the context of the CSAV case

73. If we now return to the case of *CSAV v Hin-Pro*, it is possible to see that, had the facts of the case been different, comity might have been relevant. Suppose, for instance, that the PRC courts had addressed the question of whether or not the jurisdiction clause was exclusive and had made a conclusive finding that, rather than being void, the clause was positively not an exclusive jurisdiction clause. On that finding, *Hin-Pro* would have been fully justified in suing *CSAV* for damages in the PRC courts. The underlying basis of the English proceedings seeking to claim damages for breach of the exclusive jurisdiction clause in the bills of lading would be cast into doubt (at least in the context of the PRC proceedings). It would also mean that, if it granted injunctive relief in support of the English proceedings, the Hong Kong court would be making an order which directly contradicted a final and binding conclusion as between the parties in the PRC proceedings, to which the Hong Kong court ought, as a matter of comity, recognise and respect.

74. Suppose, further, that instead of being faced with a s.21M application, the Hong Kong court was asked to enforce a judgment entered in the PRC against *CSAV* but, on such enforcement application the Hong Kong court came to a conclusion, differing from the PRC courts, that the jurisdiction clause in the bills of lading was in fact an exclusive jurisdiction clause. Should the Hong Kong court decline to enforce any PRC judgment based on the bills of lading on the basis that the dispute had been brought contrary to an agreement that it be litigated in the courts of another jurisdiction (England and Wales)?

75. Alternatively, what if *Hin-Pro* itself had made a s.21M application in aid of its PRC proceedings at the same time as *CSAV* was making a like application

⁹⁰ [1985] 2 SCR 178 at [76].

in aid of its English proceedings? In that scenario, the Hong Kong court would have been caught squarely between the two foreign jurisdictions in that it would have discretion to grant relief to both claimants.

76. Even on the facts of the case as they were, there is also an argument as to whether to allow proceedings to be brought in England to recover as damages for breach of the exclusive jurisdiction clause the damages which the PRC court had ordered to be paid in the actions which formed the basis of the allegation of breach of the jurisdiction clause would or would not be consistent with comity.⁹¹

F. Conclusion

77. As will be apparent, courts sometimes pray in aid comity as a reason for fashioning solutions to potential problems of conflicts between competing jurisdictions. As the Appendix to this paper shows, though, there are a number of different propositions which may be involved when courts refer to comity in any given context. It is clear that comity does not mean the same thing in every context and care must obviously be taken to identify the correct proposition applicable to any particular legal issue.

78. The caveat in proposition (12) of Professor Briggs' twelve points is very important. Does this ability to override comity open the door to the re-emergence of judicial chauvinism? Not every jurisdiction is equal but is it proper for a court to say this? Is it right to think that comity should always proceed on the gentlemanly assumption of Lord Diplock? How do the courts in our respective jurisdictions resolve the difficult question of how to deal with judgments from foreign jurisdictions where the quality of justice may legitimately be open to doubt?

79. In practical terms, where courts seek answers to difficult questions which are thrown up by conflicts between competing jurisdictions, there is much to be said for judicial co-operation in order to arrive at a correct and consistent answer.

⁹¹ See Professor Brigg's discussion of this issue at pp.132-133 in *Collected Courses of the Hague Academy of International Law*, Volume 354, (Brill/Nijhoff, Leiden/Boston, 2012).

80. An interesting approach where there may be conflicting judgments on overlapping issues is shown in the Singaporean case of *Chan Chin Cheung v Chan Fatt Cheung and others*, in which the court was faced with parallel proceedings in Singapore and Malaysia. The Court of Appeal upheld a limited stay of Singaporean proceedings on a temporary basis pending the outcome of the Malaysian proceedings holding:

“The limited stay thus ensures that the courts of the two countries will not go on their separate and independent ways, with the attendant risk of inconsistent findings. The stay thus promotes international comity. In fact, in granting the limited stay, the Judge was also able to avoid treating the evaluation of the competing factors as a zero-sum game.”⁹²

81. Toulson LJ (as Lord Toulson JSC then was) observed in *Joujou v Masri*:

“While comity involves self-restraint in refraining from making an order on a matter which more properly appertains to the jurisdiction of a foreign state, the courts of one country may legitimately wish to state plainly how they see the issues in a case in which they have a legitimate interest, in the hope that their perspective may assist the foreign court in its judgment of the matter. That is not the same as trying to dictate to a foreign court how it should decide a matter within its own jurisdiction. Conversely, part of the concept of comity is an expectation that the courts of different countries will, where appropriate, lend their assistance to one another.”⁹³

82. There is much common sense involved in these sentiments and there would seem to be no good reason why practical solutions to difficult questions which are fashioned in accordance with the principles of comity and common sense should not coincide. Indeed, it would be rather odd if these two concepts produced divergent answers.

⁹² [2010] 1 SLR 1192 at [46].

⁹³ [2011] EWCA Civ. 746 at [55]; with which, at [77], Arden LJ expressly associated herself.

Appendix

“The doctrine of comity, principally:

- (1) requires a court to respect, and to not question, the laws of a foreign State in so far as these apply to persons, property, and events located within the territorial jurisdiction of a foreign State;
- (2) requires a court to respect, and to not interfere with, the integrity of judicial orders made by a foreign court in so far as these apply to persons and property within the territorial jurisdiction of the foreign State; and
- (3) requires a court to respect, and to not interfere with, the integrity of judicial proceedings taking place before the courts of a foreign State.

And to achieve these ends, the doctrine of comity secondarily:

- (4) requires a court to interpret (and if this means to limit the scope of, then to limit the scope of) its own laws in such a way that they are not applied so as to interfere as above; and
- (5) requires a court to exercise its powers in relation to jurisdiction in such a way as not to interfere as above.

Properly understood, the doctrine of comity

- (6) is separate, distinct from, and unaffected by, any reciprocity, or lack of reciprocity, in respect of a foreign State; and
- (7) accepts that there may be parallel, co-existent, reasons for a court to act which are neither mandated by comity nor precluded by it.

And though the doctrine of comity

- (8) does not require a court to give effect to a foreign judgment against a defendant who was not within the territorial jurisdiction of the court (though it does not prevent it either); and
- (9) does not require a court to give effect to the laws of a foreign State in relation to property outside the territorial jurisdiction of that State (though it does not prevent it either),

the doctrine of comity

- (10) does not prevent a court giving effect to private agreements, contracts, or other voluntary relationships assumed by parties inter se unless the effect of the order applied for would cause the court to violate the first, second, or third points above, or
- (11) does not prevent a court rendering assistance to a foreign court which has sought the assistance of the court, and
- (12) does not, or cannot, in the final analysis, prevent a court overriding the restrictions of the doctrine of comity where it finds that it has been so directed by its sovereign (whether on grounds of public policy, or human rights, or otherwise howsoever).”

Adrian Briggs, *Collected Courses of the Hague Academy of International Law*, Volume 354, (Brill/Nijhoff, Leiden/Boston, 2012) at pp.181-182.