IN THE COURT OF APPEAL FOR BERMUDA

CIVIL APPEAL No. 22 & 23 of 2006

Between:

IPOC INTERNATIONAL GROWTH FUND LTD.
Appellant

-and-

OAO "CT-MOBILE"
LV FINANCE GROUP
Respondents

Before: Zacca, P.
Nazareth, JA
Sir Murray Stuart-Smith, JA

Date of Hearing: **13, 14, 15 March 2007**
Date of Judgment: **23 March 2007**

Judgment

Sir Murray Stuart-Smith J A

Introduction

1. This is an appeal by IPOC International Growth Fund Ltd (IPOC) from a judgment of Kawaley J. and an Order made on the 12 October 2006 by which he granted an anti-suit injunction against IPOC (i) requiring it to discontinue proceedings it had brought against OAO "CT-Mobile" (CTM) in the courts of Russia (the Russian proceedings) in breach of agreements to arbitrate; (ii) requiring IPOC to discharge the injunctions which IPOC had obtained from the court in St. Petersburg freezing CTM's shareholdings in a company called MegaFon; (iii) prohibiting IPOC from commencing any legal proceedings against CTM relating to any claim in respect of the MegaFon Stake in breach of the agreement to arbitrate.

2. In separate but related proceedings in which LV Finance Group Limited (LVFG) had sought similar relief to that claimed by CTM, the judge made a similar Order against IPOC. IPOC now appeals that Order also.

Background

3. ("CTM") is a Russian company which is the registered owner of 25.1% of the shares of a Russian telecommunications company referred to in these proceedings as MegaFon. CTM and the Defendant, IPOC, a mutual trust fund Company incorporated in Bermuda, are parties to two agreements dated August 6, 2001. One agreement is a Shareholder Agreement ("SHA") and the other is a Business Combination Agreement ("BCA"). Both agreements relate to the shareholding of various parties in MegaFon, and contain arbitration clauses providing for arbitration in Sweden under Swedish law.

4. LVFG is a British Virgin Islands incorporated company which entered into two Option Agreements with IPOC on April 10, 2001 and December 14, 2001 (respectively, "the April Option Agreement" and "the December Option Agreement"). The Option Agreements purportedly gave IPOC the right to purchase from LVFG 100% (77.7% and 22.3%, respectively) of the shares of a Bahamian company, Transcontinental Mobile Investment Ltd. ("TMI"), which, as the April Option Agreement contemplated, owned the shares of CTM. IPOC purportedly exercised both options and expected to become indirect owner of CTM's 25.1% "MegaFon Stake". Instead, LVFG sold its TMI shares, which eventually were acquired by companies belonging to the Alfa Group. The April Option Agreement provided for arbitration in Zurich, and the December Option Agreement provided for an ICC administered arbitration in Geneva. Both agreements were expressed to be governed by English law.

5. On or about August 15, 2003, IPOC commenced an ICC arbitration proceeding in Geneva, Switzerland, against LVFG, and on or about September 22, 2003, IPOC commenced an arbitration proceeding against LVFG in Zurich, Switzerland, under the December and April Option Agreements, respectively. On or about October 14, 2003, IPOC commenced an arbitration proceeding against, *inter alios*, CTM in Stockholm, Sweden, under the SHA. The broad purpose of the Swiss and Swedish arbitrations was to (a) enforce the Options Agreements, so that IPOC would become indirect owner of CTM's 25.1% MegaFon Stake and (b) have CTM's MegaFon Stake transferred to IPOC because of alleged breaches of the SHA, so that it would become the direct owner of the MegaFon Stake.

6. In the ICC arbitration proceeding, a final award was made in IPOC's favour under the December Option Agreement affecting 22.3% of the disputed stake on August 15, 2004 ("the ICC award"). On October 19, 2004, the Zurich arbitral tribunal gave a First Partial Award ("FPA"), and on May 22,

2006 the Zurich tribunal declared that the April Option Agreement was unenforceable on grounds of illegality in the Second Partial Award ("SPA"). LVFG appealed the ICC Award, and it was set aside on August 30, 2006. The FPA and the SPA have been appealed by IPOC, but they were recognized by Supreme Court in granting leave to enter judgment in their terms under section 40(1) of the Bermuda International Conciliation and Arbitration Act 1993 on August 31, 2006. Judgment was entered in terms of these awards on September 1, 2006.

7. On March 30, 2006 in Case No. A56-15164/2006, IPOC commenced proceedings in St. Petersburg and Leningrad Oblast Arbitration Court against, principally, LVFG, CTM and the four other respondents to the Stockholm arbitration proceedings, ("the St. Petersburg Proceedings"). The main relief sought was (a) direct ownership of the MegaFon Stake, and (b) consequential rectification of the SHA and the BCA. On April 4, 2006 in the St. Petersburg proceedings, IPOC obtained an injunction effectively placing CTM's shares in MegaFon under the control of a court bailiff. On April 26, 2006, IPOC obtained a second injunction restraining CTM from liquidating or reorganizing in any way.

8. On June 6 and 7, 2006, respectively, CTM and LVFG issued a Generally Indorsed Writ of Summons in the Supreme Court of Bermuda against IPOC seeking, *inter alios*, permanent injunctions restraining IPOC from pursuing the St. Petersburg Proceedings or similar proceedings elsewhere in breach of the relevant arbitration agreements. An interim injunction in broadly similar terms was granted by that Court on June 8, 2006, the applications (like the expedited trials) being heard together.

9. When the litigation relating to the present commercial dispute began in about the summer of 2003 the MegaFon Stake was believed to be worth just over USD 320 million. It is now estimated by CTM to be worth some USD 1.5 billion. The Bermuda proceedings follow not just the three arbitration proceedings (in Switzerland and Sweden) which were still pending at the time of the trial before the judge, but various previous litigation skirmishes in the Bahamas and BVI, including an application for leave to appeal to the Privy Council and in Russia.

10. With a view to saving costs the judge ordered an expedited trial of the Plaintiff's application for permanent injunctive relief. He also ordered the trial of a preliminary issue. In the case of CTM, so far as it is still relevant, it was in these terms: [Whether the Russian proceedings] is in breach of the dispute resolution provision in the SHA and the BCM dated the 6 August 2001 made between, *inter alios*, [CTM and IPOC] (the breach of the agreement to arbitrate issue) and ought, on this ground alone, to be enjoined.

11. A similar preliminary issue was ordered in the LVFG case mutatis mutandis.

12. There were other preliminary issues relating to IPOC's contentions that in the exercise of the judge's discretion no injunction should be granted, for example, that the Plaintiffs' did not come to the Court with clean hands. But those are no longer in issue, IPOC's appeal on those matters having been recently withdrawn.

13. The hearing took place between the 5-8 September 2006. The judge heard a considerable amount of expert evidence on both Swedish and Russian law. He held that the Russian proceedings had been issued in breach of the respective arbitration agreements. He said that IPOC's contention to the contrary was "nonsense on stilts". He held that the Bermuda court had a sufficient interest to grant the injunction and he rejected IPOC's arguments that in the exercise of his discretion the relief should not be granted.

14. Since the judge's judgment there have been various further developments. First, IPOC's appeal to the Swiss court against the award in the Zurich arbitration has been dismissed. Secondly, in a hearing in the Khanty-Manisk region of Russia (the Russian proceedings having been transferred from St. Petersburg on the 12 July 2006) IPOC withdrew the Russian proceedings with prejudice. This was not opposed and accordingly the Khanty-Manisk court made an Order dismissing IPOC's claims and lifting the Russian injunctions. This application was made by IPOC of its own accord and not as a result of the judge's Order, which had been stayed pending the determination of the appeal in this court.

The Order under Appeal

15. The Order on the 12 October 2006 was backed with a penal notice. IPOC was ordered to discontinue or otherwise bring to an end the Russian proceedings and the Order continued as follows:-

"It is hereby ordered that [IPOC] its servants or agents shall NOT:

5. Take any further steps in the Russian proceedings, whether by itself, its servants, agents, representatives, attorneys or directors, or otherwise howsoever directly or indirectly…

6. Commence, prosecute or assist in any claim, action or proceedings, or in seeking any relief, whether in Russian proceedings, Russia or elsewhere, whether by itself, its servants, agents, representatives, attorneys or directors or otherwise howsoever that constitutes a breach of the arbitration agreement."

The injunction in paragraph 5 was directed to the then extant Russian proceedings. The injunction in paragraph 6 was referred to as the wider injunction.

Grounds of Appeal

16. In the original notice of appeal there were 24 paragraphs in which IPOC challenged most, if not all, of the judge's findings of law and fact. However, on the 2 March 2007, shortly before the hearing of the appeal, IPOC abandoned much of its appeal. Bermudian counsel, in a letter dated 2 March 2007, indicated that:

There was no longer any suggestion:

(a) that any of the judge's findings of fact, including his findings as to Russian and Swedish law, and as to the scope of the arbitration agreement, were wrong;

(b) that the judge exercised his discretion wrongly by reference to his consideration of the evidence or the weight he gave to it;

(c) that CTM and LVFG did not come to the court with clean hands;

(d) that IPOC was denied a fair trial.

Issues in the Appeal

17. In the result the scope of the appeal has been much reduced. The first and main question is whether the Bermudian court is entitled as a matter of law/ jurisdiction to issue the injunction to restrain a breach of the arbitration agreement on the basis that it has *in personam* jurisdiction over IPOC; or whether, as IPOC contends, it must in addition have some sufficient interest before it can do so. In this case the appellant contends that there is no sufficient interest unless Bermuda is the seat of the arbitration. Or as Mr. Hacker QC for IPOC defined it in his skeleton argument: "In circumstances where two contending parties (D and P) agree to submit any dispute to arbitration in State A (the arbitration State) and, in breach of that agreement, D commences proceedings in State B (the litigation State), when (if at all) is P justified in seeking relief in State C (the third State) [and, I would add, which has in personam jurisdiction over D in virtue of its domicile in State C] by way of anti-suit injunction to halt the proceedings in the litigation State." The second question relates to the wider injunction, it being IPOC's contention that it was improperly made.

The Main Question

18. There appears to be no direct authority on this point other than a decision of the Eastern Caribbean Supreme Court (BVI) which is in the Respondents' favour. The views of such academic authors that have been cited, namely Professor Briggs and the editors of Dicey & Morris, appear to differ. Both

sides contend that as a matter of principle, and by analogy with other cases, their submissions are correct.

IPOC's Contentions

19. First, Mr. Hacker QC submits that this is not a challenge to the exercise of the judge's discretion, but goes to the court's jurisdiction in the wider sense as defined by Lord Scott of Foscote in *Fourie –v- Le Roux* [2007] UKHL 1. At paragraph 25 he said "*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.*" I accept this submission, though as I have pointed out there is at present no judicial precedent and no rules of court that inhibits the grant of the injunction.

20. 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 injuncting 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.

21. The first step in Mr. Hacker's argument is to look at the non-contractual cases. In *Airbus Industries GIE –v- Patel* [1999] 1 AC 119 it was 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. At page 138 G, Lord Goff said:

> "*I approach the matters as follows. 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. In an alternative forum case, this will*

involve consideration of the question whether the English court is the natural forum for the resolution of the dispute."

But Lord Goff made it plain that what he was saying did not apply to the contractual cases. At page 138 F he said:

"*I wish to stress however that, in attempting to formulate the principal, 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*."

22. In *Anchem Products Inc. –v- British Columbia Workers' Compensation Board* [1993] 1 SLR 897 Sopinka J. explained the importance of comity in non-contractual cases. At page 913 he said:

"Although both the remedy of a stay and an injunction have as their main objectives the selection of an appropriate forum for the trial of the action, there is a fundamental difference between them which is crucial to the development of the principles which should govern each. In the case of the stay the domestic court determines for itself whether in the circumstances it should take jurisdiction whereas, in the case of the injunction, it in effect determines the matter for the foreign court. Any doubts that a foreign court will not regard this as a breach of comity are dispelled by reading the reaction of Wilkey J. of the District of Columbia Circuit of the United States Federal Court of Appeal in Laker Airways –v- Sabena, Belgian World Airlines, 731 F. 2d 909 (1984).

23. In *Turner –v- Grovit* [2005] ICR is the decision of the European Court of Justice on a reference by the House of Lords. It is another non-contractual case where an injunction was sought on the basis of the defendant's unconscionable conduct in starting proceedings in Spain when the dispute was already subject to proceedings in England. The court said at paragraph 27 of its judgment:

"A prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention."

24. So much is clear in the non-contractual cases. But Mr. Hacker submits that similar principles should apply in the contractual cases as well and that without a special interest in the form of protection of Bermudian-based arbitration, or in the case of exclusive jurisdiction clause in protection of the

exclusive jurisdiction of the Bermuda court, the court here has no such interest.

25. In making this submission he immediately comes up against what was said in the "*Angelic Grace*" [1995]1 Lloyd's Law Reports 87. At page 96 Millet LJ said:

> *"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 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.*
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> *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 plaintiffs, 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.A. –v- Aeakos Compania 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."

Neil LJ specifically endorsed what Millett LJ had said. It is worth pointing out that the court in that case consisted of three very experienced commercial judges.

26. Mr. Hacker submits that this case is of no assistance on the point on the present issue because it was English arbitration and therefore so far as non-Bermudian arbitration is concerned it is obiter dictum. But it is to be noted that the in personam jurisdiction over the defendant which enabled the court to injunct the defendant derived from the English arbitration agreement. The

question is whether this was a sufficient tact to establish jurisdiction or a necessary one.

27. Mr. Hacker submits that support for the proposition that the question of comity is still important in contractual cases is to be found in *OT Africa Line Ltd. –v- Magic Sportswear Corporation et al* [2005] 2 Lloyd's Law Reports 170. At paragraph 30 Longmore LJ said:

> "*30. It is not now a controversial question whether, in a normal case, an anti-suit injunction should be granted, if a party to an exclusive jurisdiction agreement, in breach of that agreement begins proceedings in a jurisdiction other than the one agreed.*
>
> *31. As a broad proposition of law, am anti-suit injunction may be granted where it is oppressive or vexatious for a defendant to bring proceedings in a foreign jurisdiction but Societe Nationale Industrielle Aerospatiale –v- Lee Kui Jak and Another [1987] AC 871 emphasised that the mere fact that the English court refused a stay of English proceedings on the grounds of forum non conveniens did not itself justify the grant of an injunction to restrain foreign proceedings. The doctrine of comity requires restraint since (a) another jurisdiction may take the view that the courts of that jurisdiction are an equally (or even more) appropriate forum than the English court and (b) any anti-suit injunction can be perceived as an, at least indirect, interference with such foreign court. Even so an anti-suit injunction may be granted if the defendant's conduct in launching or continuing the foreign proceedings is, in fact, oppressive or vexatious as the defendant's conduct was held to be in the Aerospatiale case itself.*
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> *32. In the case of exclusive jurisdiction clauses, however, comity has a smaller role. It goes without saying that any court should pay respect to another (foreign) court but, if the parties have actually agreed that a foreign court is to have sole jurisdiction over any dispute, the true role of comity is to ensure that the parties' agreement is respected. Whatever country it is to the courts of which the parties have agreed to submit their disputes is the country to which comity is due. It is not a matter of an English court seeking to uphold and enforce references to its own courts; an English court will uphold and enforce references to the courts of whichever country the parties agree for the resolution of their disputes. This is to uphold party autonomy not to uphold the courts of any particular country.*
>
> *33. The corollary of this is that a party who initiates proceedings in a court other than the court, which has been agreed with the other party as the court for resolution of any dispute, is acting in*

> *breach of contract. The normal remedy for this breach of contract is the grant of an injunction to restrain the continuance of proceedings unless it can be shown that damages are an adequate remedy; but damages will not usually be an adequate remedy in fact, since damages will not be easily calculable and can indeed only be calculated by comparing the advantages and disadvantages of the respective fora. This is likely to involve an even graver a breach of comity than the granting of an anti-suit injunction.*

Mr. Hacker submits that this statement of the law is obiter and wrong because the court was dealing with an English arbitration. He relies strongly on the judgment of Rix LJ. At paragraph 62 under the heading "Anti-Suit Injunction" he said:

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

He then goes on to consider first the non-contractual cases. At paragraph 70 Rix LJ distinguished the *"Angelic Grace"* on the grounds that the instant case was more complex. That is because of the provisions of the Canadian Maritime Liability Act 2001 Section 46 (1) which provides:

> "*If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for adjudication or arbitration of claims arising out of the contract in a place other than Canada, the claimant may institute judicial or arbitral proceedings in Canada [provided certain conditions are satisfied]*."

It was contended on behalf of the defendant that the clause represented an international agreement and that it was not simply a case where the law of Canada was different, but it was a kind of super-international law which effectively overrode the English exclusive jurisdiction clause.

28. The question in <u>*OT Africa*</u> case was whether the existence of the Canadian jurisdiction was "strong reason" not to grant the injunction. This was the question that was posed as a result of the decision of the House of Lords in <u>*Donohue –v- Armco*</u> [2002] 1 All ER 749. At page 759 Lord Bingham of Cornhill at paragraph 24 said:

> "*If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to*

> *secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognize that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause, effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other parties' prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case."*

In that case, the strong reason was that other defendants in the American proceedings were not parties to the exclusive jurisdiction clause and great difficulty would be caused by separate trials.

29. It seems to me that the court in *OT Africa* was dealing with a special case where the provisions of the Canadian statute specifically gave jurisdiction to the Canadian tribunals. Any grant of an injunction in the English courts was therefore bound to trespass upon the Canadian jurisdiction and accordingly the question of comity was involved to some extent. That is not so in the ordinary case where the relief sought is simply to restrain breach of an exclusive jurisdiction or arbitration agreement.

30. Mr. Hacker further relied upon *People Insurance Company –v- Akai PTY* [1998]1 SLR 206. In that case the Plaintiff, a Singapore company, issued credit insurance in favour of the defendant, an Australian company. The defendant made a claim on the policy, which was rejected. The defendant started proceedings in England and Australia simultaneously. Before service of the English proceedings the Australian Court of Appeal directed that the action proceed to trial. The plaintiff applied in the Singapore court and obtained an ex-parte injunction restraining the defendant from proceeding in Australia in breach of an exclusive jurisdiction clause in the policy that the matter should be dealt with in England. The defendant successfully applied to discharge the injunction. It seems that the ground upon which the plaintiff sought the injunction was that it feared that any judgment would be enforced in Singapore.

31. In my judgment that case does not assist the appellant because it is clear that the Court had no jurisdiction over the defendant (see paragraph 9 of the judgment of Choo Han Teck JC) and the fact that any judgment might be

sought to be enforced in Singapore did not give such in personam jurisdiction.

32. The next case relied upon by Mr. Hacker is *Econet Wireless –v- Vee Networks* [2006] EWHC 1568. But in my judgment that case does not assist. It was a case under Section 44 of the Arbitration Act and not an anti-suit case. However, the original interim injunction was issued in a mistaken belief that the arbitration agreement in question was an English arbitration. In fact it was not; it was Nigerian. The court had no jurisdiction over the defendant and the injunction was discharged for that reason. Mr. Hacker's reliance on this case is in my view misplaced.

33. Mr. Hacker submitted that the most important decision in his favour is West Tankers Inc v R.A.S. Riunione Adriatica de Sicurta SP (the Front Comer) [2007] UK HL 4. In that case there was an English Arbitration clause 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 Brussels Convention. 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.

34. Since Mr. Hacker attaches much importance to what is said in this case it seems to be necessary to set out at some length what was said by Lord Hoffman and Lord Mance. At paragraph 17 the former said:

> *"17. 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.*
>
> *18. Of course arbitration cannot be self- sustaining. It needs the support of the courts; but, for the reasons eloquently stated by Advocate General Darmon 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.*

19. 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.

20. 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 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.

21. 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 handicap itself by denying its courts the right to exercise the same jurisdiction."

At Paragraph 29 Lord Mance said:

"*The purpose of arbitration (enshrined in most modern arbitration legislation) is that disputes should be resolved by a consensual mechanism outside any court structure, subject to no more than limited supervision by the courts of the place of arbitration. Experience as a commercial judge shows that, once a dispute has arisen within the scope of an arbitration clause, it is not uncommon for persons bound by the clause to seek to avoid its application. Anti-suit injunctions issued by the courts of the place of arbitration represent a carefully developed – and, I would emphasise, carefully applied – tool which has proved a highly efficient means to give speedy effect to clearly applicable arbitration agreements.*

It is in practice no or little comfort or use for a person entitled to the benefit of a London arbitration clause to be told that (where a binding arbitration clause is being – however clearly – disregarded) the only remedy is to become engaged in the foreign litigation pursued in disregard of the clause. Engagement in the foreign litigation is precisely what the person pursuing such litigation wishes to draw the other party into, but is precisely what the latter party aimed and bargained to avoid."

35. In my judgment the passages cited do not bear the weight that Mr. Hacker seeks to put upon them, namely, that only the courts of the seat of Arbitration can issue anti-suit injunctions. The House was dealing with the case in front of it where there was an English Arbitration Clause. But equally it was by reason of this clause that the English Courts had jurisdiction in personam against the Defendant. It does not follow that, if the in personam jurisdiction arises from the presence of the defendant, that only the courts of the seat of the arbitration can issue the anti-suit injunction. The role of the courts of the seat of arbitration is to supervise

the arbitration itself. They are not the only courts that can prevent a party breaking his contract to arbitrate.

36. The high water mark of Mr. Hacker's submissions is the opinion of Professor Briggs, (Briggs & Rees Civil Jurisdiction and Judgments 4th edition at para. 5.39). After a lengthy discussion of the principles in which Professor Briggs seems basically to follow Mr. Hacker's arguments. He concludes:

> "*Given all this, the lines of future development should perhaps be these: a court should not intervene unless England is the chosen court, [1] 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.*"

37. 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.

38. Three further arguments were raised by Mr. Hacker. First, he submitted that if the matter were left to the Russian Court to determine whether a stay should be granted, which if the Russian proceedings fell within the arbitration clauses, they would be bound to do being parties to the New York Convention and having adopted the Model Law, there would be no necessity for the Bermuda Court to hear extensive evidence on Russian law. That may be so, but the Russian Court would still have to hear evidence of Swedish and English law as to the scope of these arbitration clauses. This is an argument of convenience and not principle.

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[1] There may be room for an exception where the basis of the claim for an injunction is that the respondent should not be bringing proceedings anywhere.

39. Secondly, Mr. Hacker advanced a floodgates argument. If the Bermuda Court granted the injunction in this case it would be flooded with applications of a similar sort because so many companies are domiciled in Bermuda. The courts have never been very impressed by floodgates arguments. In my judgment this cannot affect the question of jurisdiction, if it otherwise exists.

40. Thirdly, Mr. Hacker submitted that the parties, having chosen the seat of arbitration in Sweden and Switzerland, neither of which countries grants anti-suit injunctions in support for arbitration clauses, are stuck with the consequences of their bargains. And their only remedy is to apply for a stay in the Russian proceedings. This appears to me to be a highly cynical approach to arbitration; particularly in this case where IPOC submitted the dispute to arbitration, but now does not like the results. In my judgment it should be assumed that parties enter into the arbitration agreement in good faith, not with their fingers crossed so that they can break their bargains with impunity if the result of the arbitration does not suit them. That may be the result where no other state has in personam jurisdiction over the contract breaker. But that is unlikely, since most arbitrations are conducted in a neutral state which is not the domicile of either party.

Conclusion on the Main Question

41. I am unable to accept Mr. Hacker's submission. In the course of dealing with his submissions, I have so far made comments, which in my view militate against his overall thesis. I do not propose to repeat them. In my opinion Mr. Hacker has conflated the two separate strands of anti-suit injunctions. Or as Mr. Miles QC puts it, he has blurred the distinction between them. In truth the non-contractual cases are quite different. All they have in common is that the court grants injunctive relief to restrain the defendant from pursuing foreign proceedings. This is clear from Dicey & Morris (the Conflict of Laws 14th Edition), which is generally regarded as the leading text book on private international law, where non-contractual cases are dealt with in Rule 31, whereas jurisdiction and arbitration agreements are dealt with in Rule 32. The editors state Rule 32(4) as follows:

> *"An English Court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court in breach of a contract to refer disputes to an English (or, Semble, another foreign) Court.*

The word "semble" is used no doubt because no direct authority is cited, since there is none. But the important thing, it seems to me, is that the

power is said to exist in respect of a person over whom the court has personal jurisdiction.

42. The distinction has been drawn in all the cases to which we have been referred (see for example per Lord Goff in Airbus in the passage cited in para. 21 above and per Phillips LJ giving the judgment of the Court of Appeal in Toepfer International Gmb H –v- Société Cargill France [1998] 1 Lloyd's Reports 379 at p. 384 and *Through Transport Mutual Assurance Association (Erasia) Ltd. –v- New India Assurance Co. Ltd*. [2005] 1 Lloyd Law Report 67.)

43. 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 Ed para 27 -068). The power to grant injunctive relief is now contained in Section 37 of the Supreme Court Act 1981 in England and Section 19 of the Supreme Court Act 1905 in Bermuda.

44. An injunction will be granted when damages is 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, 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.

45. 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 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.

46. 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 LJ (specifically endorsed by Neill LJ) in the "Angelic Grace" and Longmore LJ in OT Africa. 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.

47. Mr. Hacker made it plain that it was not a question of comity to the Swedish and Swiss Courts that was in question, but comity towards the Russian Court which was a party to the New York Convention and Model law and could be expected to stay the proceedings if asked to do so. Therefore, he said, the appellant should be left to its remedy of seeking a stay in the Russian Courts. But that argument has been rejected in the Front Comer. At first instance [2005]2 Lloyds Law Reports 257 Colman J said at para 56:

"It should be added that article II.3 of the New York Convention provides:

> *"The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being preformed."*

Whereas this provision identifies the duty which rests on the court seised of court proceedings to stay those proceedings and to refer the parties to arbitration, it contains nothing which vests in that court exclusive jurisdiction to enforce that arbitration agreement. In this respect the Convention crucially has no provision equivalent to article 27 of Regulation 44/2001 which vests exclusive jurisdiction in the court first seised of the issue. There is therefore no conventional provision of a similar nature to that which influenced the decision in Turner v. Grovit, supra.

Accordingly, I conclude that under English conflicts rules, article II.3 does not provide a ground for refusal of an anti-suit injunction.

The appeal was leapfrogged to the House of Lords. Lord Hoffman at paragraph 6 said:

"*[Colman J] certified two other issues which do not raise questions of European law, namely, whether the grant of the injunction was inconsistent with the New York Convention and whether as a matter of discretion an English court should refuse to restrain proceedings in another Member State. In my opinion the judge was right to give negative answers to both these questions and it is unnecessary to enlarge upon the reasons which he gave."*

48. The outcome of that decision in my judgment is that it is not only unnecessary to consider whether the Russian Court would feel offended, but it is actually inappropriate for the matter to be left only to the Russian Court when the parties have entered into a contract that that court (or any other) will not be the court of jurisdiction.

49. For these reason I have come to the clear conclusion that Mr. Hacker's submissions in this main question must fail. *In Finecroft –v- Lamane Trading Corporation* (unreported, Caribbean Supreme Court (BVI) 6 June 2006), which is the only decision on this issue that the parties have been able to find, Hariprashad – Charles J came to the same conclusion. And I take comfort from that decision as persuasive authority.

50. Accordingly it is unnecessary to consider the reasons which the judge referred to in giving the Bermudian Court sufficient interest. If Mr. Hacker had been correct nothing less than Bermuda being the seat of arbitration would suffice. Since he fails, it follows that in personam jurisdiction alone based on IPOC's domicile in the jurisdiction suffices.

The Second Question: Was the Court Right to Issue the Injunction in the Wide Terms of Para. 6 of the Order?

51. For convenience I have set out again the wider Order. IPOC was ordered not to:

> *"commence, prosecute or assist in any claim, action or proceedings, or in seeking any relief, whether in the Russian proceedings, Russia or elsewhere, whether by itself, its servants, agents, representatives, attorneys, officers, or directors, or otherwise howsoever that constitutes a breach of the arbitration agreement."*

52. Mr. Hacker makes a number of submissions as to why this wide injunction is contrary to principle. First, the grant of an anti-suit injunctive relief in relation to a particular set of foreign proceedings necessarily involves an exercise of the court's discretion. Accordingly, the grant of relief in respect of each alleged breach depends upon a consideration by the court of all the circumstances. (See the passage already cited from *Donohue –v- Armco* from the speech of Lord Bingham). There may be strong reasons, as in the *Donohue* case or because of delay or failure of the Plaintiffs to come to the court with clean hands, not to grant the relief in a different case.

53. Secondly, although IPOC have commenced litigation in other jurisdictions (Bahamas and BVI) the only proceedings which are in breach of the arbitration clauses are the Russian proceedings. It is said that there is no threat of proceedings in any other jurisdiction in breach of the agreement.

54. Mr. Hacker also relied on the case of *Coflexip SA –v- Stort Comex Seaway MS Ltd.* [2001] 2 All ER 952. That was a case involving the infringement of a patent. Laddie J held the patent was infringed in the particular circumstances alleged at trial. He declined to give wider relief against possible future infringement because it restrained the Defendant from doing things he had not threatened to do and exposed it to contempt proceedings in

respect of processes or products which had not been considered in the proceedings.

55. Thirdly he submits that there may be genuine disagreement as to whether particular proceedings are in breach of the arbitration agreement. He refers to the difference of judicial views on the point whether the American proceedings were in breach of the exclusive jurisdiction clause in Donohue's case. Accordingly a decision should not be taken in advance of a particular case of alleged breach.

56. Fourthly, the judge gave no reasons for his decision. The preliminary issue was a narrow one and relevant only to the Russian proceedings. When the question of the scope of the order was discussed before the judge the matter seems to have proceeded on the basis of rival draft orders. No reasons were advanced from LVFG's counsel as to why the wider relief should be granted.

57. Respondents' counsel have sought to counter these submissions. First it is said that the English Commercial Court frequently grants injunctions in these terms. They cite *Toepfer* at first instance. *Welex v AG v Rosa Maritime (The Epsilon Rosa)* [2002] 2 Lloyds Rep 701. *Youel v Kara Mara Shipping Co* [2000] 1 Lloyds Rep 102 and ACE Bermuda v Petersen (a Bermudian Case) [2005] Bda LR 44. But I cannot see that the point was argued in these cases. In *Toepfer* Coleman J merely, said 'that he was not satisfied that there was good reason for withholding the injunctive or declaratory relief claimed'. The claimed relief included the wider injunction. But it seems to me to be arguable that though this is relevant to the grant of the specific injunction, where it is for the defendant to show good reason why it should not be granted, it should be for the plaintiff to show why this wider relief should be granted.

58. Counsel further submits that it is frequently the case that rival drafts are submitted to the judge, who may accept one rather than another, or parts of one and parts of another as in this case, without giving reasons. That is frequently done in relation to applications for costs and perhaps also where the relief originally claimed was in the wider injunctive relief. Counsel points out that the main submission on behalf of IPOC in the court below, as to which draft should be accepted, seems to have been that the words 'that constitutes a breach of the Arbitration Agreement' should be added at the end of the paragraph, as proposed by LVFG. That was a submission that the judge accepted. But I think that IPOC's counsel did oppose this wide injunction in principle.

59. The Respondents' counsel further contend that IPOC is sufficiently protected if it is given "liberty to apply" so that it can come back to the court and seek its opinion whether certain contemplated proceedings are in breach. I was at one time attracted by this argument. But I think that Mr. Hacker is right in saying that this procedure would take a long time to resolve and IPOC and its

advisors ought not to be at risk of contempt proceedings in the event that their decision or advice is wrong.

60. Then it is said that this is a matter within the judge's discretion, and the judge was entitled to take into consideration what he had learned about the case over the four days hearing and his view that IPOC's case that the Russian proceedings were not within the arbitration clauses was "nonsense on stilts". I accept that this was a matter at the judge's discretion. But if it was contrary to principle, or he failed to take into account matters which he should have taken into account, or took into account matters which he should not, this court can interfere and exercise its own discretion. I am persuaded for the reasons advanced by Mr. Hacker that that is the case here.

61. But that is not the end of the matter because the Respondents submit that if this court is to exercise its discretion afresh, it should take into account what has happened since the trial; and what has happened since the trial shows that there is a threat of further breach. On 2 March 2007 CTM's solicitors drew attention to a press release which had been issued by IPOC the previous day. The press release referred to the withdrawal of the Russian proceedings and continued:

> *"In Russia this dispute is the responsibility of the Prosecutor's office and not the Arbitration Court. In response to an application by IPOC International Growth Fund there is a criminal case initiated by the Moscow Prosecutor's office. That investigation continues.*
>
> *"Within this criminal case the Prosecutor's office has recognised IPOC as the victim of fraudulent actions and named the accused. IPOC filed its civil claim within this criminal case. We are awaiting the outcome of the investigation and the decision of the court and expect it to consider returning it assets to IPOC."*

62. CTM's solicitors did not receive an answer which they considered satisfactory; they pressed for further clarification and a sight of the claim involved in the Russian Criminal Proceedings. I think that they had some grounds for the dissatisfaction, since IPOC's solicitors seemed to be somewhat coy in answering and still have not produced copies of the claim. However, in the letter dated the 7th March 2007 IPOC's solicitors stated that the Russian Criminal Proceeding is against Mr. Rozhetskin, who apparently was a former principal of LVFG and, indirectly, a former beneficial owner of CTM, but was not party to the arbitration agreement. The letter continues "for the avoidance of any doubt no civil claim has been issued in Russia (or elsewhere) by our client against LVFG (or for that matter, CTM) since the order of the 12th of October 2006 nor is it our client's present intention to do so".

63. It is clear that that statement was intended to be put before this court in support of IPOC's contention that the wider injunction should not be granted

since no threat is being made. In my judgment IPOC's solicitors must be taken to have satisfied themselves that what is stated is correct, otherwise this court will have been misled, which would be a very serious matter. For these reasons I have come to the conclusion that the wider injunction should be discharged.

64. Accordingly I would dismiss the appeal on the main question but would allow the appeal on the second question as to the width of the injunction.

65. Since the conclusion of the hearing the court has received a letter from IPOC's solicitors seeking further to elucidate the nature of the Russian criminal proceedings, and a riposte from the Respondent's solicitors. This is not a satisfactory way of proceeding, but in my view there is nothing in these letters which alters my conclusion just expressed.

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Sir Murray Stuart-Smith, J A

I Agree. _____

Zacca P.

I Agree. _____

Nazareth, J A

Mr. Hacker QC, Mr. Diel and Mr. Michelmore for IPOC

Mr. Miles QC and Mr. Turner for CTM

Mr. Millett QC, Mr. Elkinson and Mr. Adamson for LVFG