EDITORIAL COMMENT

Forum Non Conveniens and Antisuit Injunctions: An Update

In the April 1997 issue of the *Journal*, I reported on three cases in which the response to an action brought in the court of one country led not to an answer, but to a countersuit in another country—for an antisuit injunction, a declaration of nonliability or both.[1] One of the cases I discussed arose out of a controversy between an asbestos manufacturer, CSR, and a group of insurance companies, the Cigna Group, that may or may not have been obligated to defend and indemnify the manufacturer in respect of claims in the United States for product liability. The manufacturer brought suit in federal court in New Jersey, raising both contract and antitrust claims. The insurers, as I reported, succeeded in securing an antisuit injunction in the Supreme Court of New South Wales (a court of first instance), and thereafter in defeating a motion by the manufacturer to stay or dismiss, on grounds of *forum non conveniens*, the insurers' action seeking a declaration of nonliability.[2] I thought that outcome was wrong: in my view, the Australian court should not have stepped into the controversy, and the insurers should have brought their challenge to the jurisdiction and suitable venue of the New Jersey court in that court.

The decisions of the Supreme Court of New South Wales—both on the antisuit injunction and on the suit for declaration of nonliability—have now been reversed, in a 6-1 decision by the High Court of Australia,[3] in a judgment that I believe makes an important contribution to the international law of international litigation.[4]

The High Court did not condemn all antisuit injunctions, but it said that the power to grant such injunctions should be exercised "when necessary for the protection of the court's own proceedings or processes."[5] For example, if an estate is being administered or a bankruptcy proceeding has been commenced, it may be right to enjoin a proceeding abroad designed to give a particular person the sole benefit of certain foreign assets. Possibly, an antisuit injunction may be granted in aid of a promise not to sue in a foreign jurisdiction but to submit all disputes to the exclusive jurisdiction of the forum. That leaves open the most common ground for granting an antisuit injunction—the allegation by the applicant, as in the *CSR* case, that the foreign proceedings, where it is defendant, are vexatious or oppressive.

[1] Andreas F. Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AJIL 314 (1997).

[2] Cigna Ins. Austl. v. CSR Ltd, Case No. 50133/95 (Aug. 15, 1995).

[3] CSR Ltd v. Cigna Ins. Austl. Ltd, Nos. S119 and S120, 1996 (High Ct. Aug. 5, 1997) [hereafter Slip op.].

[4] The Court of Appeal of New South Wales denied leave to appeal from the decisions of Rolfe, J., in the Supreme Court, and the manufacturers thereupon applied for and were granted special leave to appeal to the High Court of Australia. Though technically only the refusal of the NSW Court of Appeal to grant leave to appeal was before the High Court, once the case was there the Court resolved to take up the underlying issues. The Court wrote:

> The proper approach to the resolution of jurisdictional conflict between Australian and foreign courts is a matter of considerable importance. Moreover, . . . the potential for jurisdictional conflict has increased significantly in recent years. Given these considerations . . . , it is appropriate that the various questions of law raised in these appeals be fully considered whether or not they were raised before Rolfe J.

Id. at 38.

[5] *Id.* at 41.

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Judge Rolfe in New South Wales thought the action brought in the United States, including a claim under the Sherman Antitrust Act, was indeed vexatious and oppressive. The High Court rejected that view. The fact that a Sherman Act suit may result in treble damages does not make it oppressive; on the contrary, the fact that such relief is (probably) not available in Australia supports the view that the pursuit of such relief where it is available is not vexatious.

Further, while technically an antisuit injunction operates *in personam*, it nevertheless interferes with a court's processes and may well be perceived as a breach of comity by that court. Accordingly, "the power to grant injunctions in restraint of foreign proceedings should be exercised with caution."[6]

The High Court rejected the invitation to lay down a general rule that antisuit injunctions should not be granted unless the applicant has moved for a stay or dismissal of the foreign proceedings on grounds of *forum non conveniens*.[7] But the relation between *forum non conveniens* in the first forum and in Australia is clearly significant. Here, the lower court first granted the antisuit injunction, and then declined to hold that Australia was an inappropriate forum. As the High Court saw it, the sequence should have been reversed: If Australia were a clearly inappropriate forum, an injunction against a foreign proceeding should never be granted.[8] If Australia were not a "clearly inappropriate forum," then the court must consider, in the light of equity and of comity, whether to grant an antisuit injunction or to require the applicant to go back to the first forum—here the U.S. court in New Jersey—to apply for dismissal or stay on grounds of *forum non conveniens*.

In the actual case, it would be hard to conclude that New South Wales was a "clearly inappropriate forum" with respect to the contract issues between the parties. But as to the antitrust claims under the Sherman Act, New South Wales is a "clearly inappropriate forum." And since the dominant purpose of the proceedings brought by the insurers in Australia was to prevent the manufacturer from pursuing remedies available in the courts of the United States, it was "seriously and unfairly . . . prejudicial [and] damaging," and therefore "oppressive," as earlier Australian cases had defined that term, for purposes of *forum non conveniens* motions.[9] Conversely, the High Court concluded:

> [T]here is nothing to suggest that the relief which the [insurers] seek in the NSW proceedings . . . is not available to them by way of cross-claim in the US proceedings. In these circumstances, to allow the fact that a negative declaration is sought in the NSW proceedings with respect to the Australian asbestos claims to have a decisive influence would, in colloquial terms, be to allow the tail to wag the dog.[10]

The controversy between the parties is not over, of course. Indeed, the American proceeding is just now permitted to begin. I think the message sent by the High Court of Australia, however, is an important one, not limited to the parties in the case or to the courts of Australia. At the risk of going beyond the explicit statement of the High Court, I construe the message of *CSR v. Cigna Australia* as follows:

> (1) In an international legal system built largely on comity, courts should proceed from a built-in reluctance to enjoin litigation initiated in foreign states. Declara-

[6] *Id.* at 47.

[7] *Compare* Amchem Prods. v. British Columbia (Workers Compensation Board), [1993] 1 S.C.R. 897, [1993] 102 D.L.R. (4th) 96.

[8] That seems to be consistent with the reasoning of the House of Lords in British Airways Board v. Laker Airways Ltd, [1984] 3 W.L.R. 413, 1985 App. Cas. 58, which reversed the injunction issued by an English court against a Sherman Act proceeding in the United States, essentially because the injunction would have meant determining the outcome of a controversy that no court had heard on the merits.

[9] See, in particular, Voth v. Manildra Flour Mills Pty Ltd, (1990) 97 A.L.R. 124, (1990) 171 C.L.R. 538.

[10] Slip op. at 54.

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tions of nonliability are less challenging to another court than injunctions, but courts ought to view applications for such relief with skepticism as well.

(2) Courts should not enjoin litigation elsewhere if they cannot provide a suitable forum themselves.

(3) Courts should be wary of parties who come running to them for relief rather than answering or moving to dismiss a lawsuit in the court where it has been brought.

(4) In addressing applications to dismiss a lawsuit on grounds of *forum non conveniens*, courts should consider not only whether the suit belongs in their court, but also whether another forum is available.

I hope these teachings—regardless of their precise formulation—come to command wide acceptance. I am encouraged by the decision of the High Court of Australia that it is worth pursuing the suggestion made in my prior comment,[11] that is, to include *forum non conveniens*, *lis pendens*, and antisuit injunctions in the current negotiations of a multilateral judgments convention.

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[11] Lowenfeld, note 1 *supra*, at 321–24.

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