COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Li v. Rao,*
2019 BCCA 264

Date: 20190726
Docket: CA45061

Between:

Peipei Li

Respondent
(Claimant)

And

Luhua Rao

Appellant
(Respondent)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Savage
The Honourable Mr. Justice Abrioux

On appeal from: an order of the Supreme Court of British Columbia, dated January 12, 2018
(*Li v. Rao*, 2018 BCSC 47, Vancouver Docket E170206)

Counsel for the Appellant:	M.A. Clemens, Q.C. J. Parker
Counsel for the Respondent:	B. Olthuis A. Calvert
Place and Date of Hearing:	Vancouver, British Columbia June 11 and 12, 2019
Place and Date of Judgment:	Vancouver, British Columbia July 26, 2019

Written Reasons by:
The Honourable Mr. Justice Savage

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Abrioux

Summary:

The chambers judge granted an injunction enjoining a litigant from proceeding with a foreign arbitration until various applications in a civil action were ruled upon in the court below. The appellant submitted that the judge erred in his application of the law of anti-suit injunctions and in finding that allowing the arbitration to proceed would be a breach on an agreement between the parties. Held: Appeal dismissed. A forum section clause in the form of a negative covenant can be enforced by anti-arbitration injunction. In doing so the court is exercising in personam jurisdiction over the litigant. There was no error in granting the injunction in this case.

Table of Contents

Reasons for Judgment of the Honourable Mr. Justice Savage:

I. Introduction

[1] This appeal addresses what a British Columbia court can do to control the conduct of a litigant who, in this order, first files a civil claim in British Columbia, files a counterclaim in family proceedings in British Columbia, launches an arbitration in a foreign jurisdiction and then covenants not to take steps in the foreign arbitration until the British Columbia court rules on extant applications in the domestic civil action.

[2] The issue underlying all the various proceedings is a dispute over $17.65 million that was transferred by the appellant, Luhua Rao, to a company that is owned jointly by Mr. Rao and the respondent, Ms. Peipei Li. The dispute and subsequent litigation ensued when the parties' romantic relationship and marriage broke down upon Ms. Li's learning that Mr. Rao was already married. The family law proceedings as well as the circumstances involving the breakdown in the marital relationship are more fully described in the reasons for judgment released concurrently with this appeal, indexed as *Li v. Rao*, 2019 BCCA 265.

[3] The chambers judge granted an injunction enjoining Mr. Rao from proceeding with the foreign arbitration until various applications in the civil action were ruled on by the Supreme Court of British Columbia. Mr. Rao challenges the injunction in this Court, arguing the judge erred in his application of the law of anti-suit injunctions and in finding that allowing the arbitration to proceed would be a breach of an agreement between the parties.

[4] For the reasons that follow, I would dismiss the appeal.

II. Background

[5] Ms. Li, a resident of British Columbia, and Mr. Rao, a resident of China, met in August 2015 when Mr. Rao was on a trip to Vancouver. They commenced a romantic relationship.

[6] In September 2015, the parties discussed starting a real estate business together. Ms. Li incorporated a company for that purpose, which later came to be called LPP Properties Inc. ("LPP").

[7] In October 2015, the parties executed an agreement, entitled the "Capital Increase and Share Expansion Agreement", whereby Mr. Rao agreed to invest $20 million in LPP in return for becoming a 50% shareholder in the company (the "LPP Agreement"). Ms. Li had invested $1,000 in LPP and is the other 50% shareholder.

[8] The LPP Agreement contained a dispute resolution clause which provided that disputes under the LPP Agreement were to be submitted to the Shenzhen branch of the Chinese International Economic and Trade Arbitration Commission ("CIETAC") for final and binding arbitration and that Canadian law would be applied to disputes. Mr. Rao transferred a total of $17.65 million to LPP between January and May 2016.

[9] On April 10, 2016, the parties underwent a marriage ceremony in Las Vegas, Nevada. Mr. Rao was already married at that time and he continues to be married to his first wife. Ms. Li asserts she was unaware that Mr. Rao was already married.

[10] In September and October 2016, Mr. Rao borrowed $16 million from LPP and executed two promissory notes in favour of LPP. The promissory notes directed that $10 million was to be paid to the parties' joint account and $6 million into Ms. Li's personal account.

[11] The parties' romantic relationship ended in the fall of 2016 when Ms. Li asserts she first learned that Mr. Rao was still married to his first wife. After the romantic relationship ended, a series of proceedings were commenced in British Columbia and China, three of which are relevant to this appeal.

[12] On December 5, 2016, Mr. Rao commenced a civil action against LPP and Ms. Li in British Columbia, seeking return of the $17.65 million he transferred to LPP, or alternatively, a declaration that Ms. Li held the funds in trust for him (the "Civil Action"). His notice of civil claim did not disclose his status as a shareholder of LPP or his past romantic relationship with Ms. Li.

[13] On January 24, 2017, Ms. Li filed a notice of family claim seeking, among other things, spousal support, 100% reapportionment in her favour of all property in British Columbia and an order that the $17.65 million transferred to LPP is not subject to exclusion (the "Family Proceeding"). Mr. Rao filed a counterclaim, alleging that Ms. Li held various assets in trust for him.

[14] In the Civil Action, Ms. Li filed an application for summary judgment returnable April 12, 2017. Mr. Rao obtained an adjournment of this application.

[15] The third relevant proceeding is the arbitration that Mr. Rao commenced with CIETAC

in June 2017 (the “CIETAC Arbitration”). As with the Civil Action, when Mr. Rao commenced the CIETAC Arbitration he did not mention the parties’ relationship history or the promissory notes executed in favour of LPP. On July 24, 2017, counsel for Mr. Rao wrote to counsel for Ms. Li, advising that the CIETAC Arbitration had been commenced, enclosing a copy of the filed petition for arbitration and inquiring whether they would accept service for Ms. Li.

[16] In the Civil Action, on August 22, 2017, Mr. Rao filed an application to stay the proceedings pending the conclusion of the CIETAC Arbitration. Ms. Li then re-set her summary judgment application to be heard on the same day.

[17] On August 29, 2017, counsel for Mr. Rao again sent counsel for Ms. Li a copy of the CIETAC notice of arbitration and requested acceptance of service. Counsel for Ms. Li responded by letter dated September 8, 2017, advising that Ms. Li would accept service on two conditions. The first condition was that Mr. Rao covenant not to take any steps in the CIETAC Arbitration, and not to require Ms. Li to take any steps in such arbitration, until the Supreme Court had ruled on the extant applications in the Civil Action (namely, Ms. Li’s application for summary judgment and Mr. Rao’s application for a stay of proceedings). The second condition was that Ms. Li’s acceptance of service was without prejudice to any position or argument she may have as to CIETAC’s jurisdiction and the merits of the CIETAC Arbitration itself. Counsel for Mr. Rao advised by email on September 12, 2017, that Mr. Rao agreed to the conditions. I will refer to this exchange of correspondence and emails as the “Standstill Agreement”.

[18] On November 9, 2017, counsel for Mr. Rao informed counsel for Ms. Li that Mr. Rao intended to discontinue the Civil Action and proceed with the CIETAC Arbitration. Counsel for Ms. Li filed a notice of trial to preserve the status quo and to prevent Mr. Rao from being able to file a notice of discontinuance unilaterally. Mr. Rao then applied for leave to discontinue the Civil Action, which was granted on the condition that Mr. Rao pay special costs to Ms. Li. As of the hearing of this appeal, Mr. Rao has not paid the special costs required to discontinue the action.

[19] On November 15, 2017, Mr. Rao filed an application in the Family Proceeding seeking a declaration that the parties’ marriage was void *ab initio* and an order striking Ms. Li’s claims for division of property and spousal support. The application to strike was dismissed by Justice Forth on January 30, 2018, and an appeal from Forth J.’s order was dismissed by

this Court in reasons for judgment indexed as *Li v. Rao,* 2019 BCCA 265 and released concurrently with these reasons.

[20] Meanwhile, Ms. Li became aware on December 8, 2017, that the CIETAC Arbitration was possibly proceeding on January 16, 2018. She filed an application in the Family Proceeding on December 22, 2017, seeking an order that Mr. Rao take all necessary steps to withdraw the CIETAC Arbitration proceedings, or alternatively, an order that Mr. Rao take no further steps in the CIETAC Arbitration or require Ms. Li to take any further steps.

[21] The application was heard by Justice Funt who in reasons for judgment indexed as *Li v. Rao*, 2018 BCSC 47, granted Ms. Li injunctive relief.

[22] The judge rejected Mr. Rao's argument that an anti-suit injunction was not available to Ms. Li because she had not first sought a ruling on jurisdiction and *forum non conveniens* from the CIETAC arbitral panel. He reviewed the leading Canadian case on anti-suit injunctions, *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 [*Amchem*], and concluded it had limited application to the case at bar because CIETAC is an arbitration commission, not a foreign court, and thus comity concerns did not arise.

[23] The judge also rejected Mr. Rao's argument that the Family Proceeding and the CIETAC Arbitration were not parallel proceedings, as required for an anti-suit injunction. He found the formation, interpretation and operation of the LPP Agreement—the subject matter of the CIETAC Arbitration—was a live issue in the Family Proceeding and was central to the dispute over whether the $17.65 million was family property. The judge also concluded that Mr. Rao would be in breach of the Standstill Agreement if he were to proceed with the CIETAC Arbitration.

[24] In the result, the judge ordered that Mr. Rao is enjoined from taking further steps in the CIETAC Arbitration, or requiring Ms. Li to take any further steps, without leave of the court.

III. Issues

[25] The parties frame the issues on appeal somewhat differently. I would rephrase the issues on appeal as follows:

(1) Did the judge commit a palpable and overriding error in concluding that Mr.

Rao's proposed course of action in continuing with the CIETAC Arbitration was a breach of the Standstill Agreement?

(2) Did the judge err in enjoining Mr. Rao from pursuing the CIETAC Arbitration as a means of enforcing the Standstill Agreement?

(3) Did the judge err in proceeding on the basis that an anti-suit inunction is available in respect of a foreign arbitration proceeding?

(4) Did the judge err in enjoining Mr. Rao from pursuing the CIETAC Arbitration without allowing the arbitral panel to first decline jurisdiction?

IV. Discussion and Analysis

[26] I will first consider whether the Standstill Agreement is a binding and enforceable agreement, then whether the Standstill Agreement can provide the basis for injunctive relief, and finally whether injunctive relief should have been granted in the circumstances here.

A. The Standstill Agreement

[27] The existence of a binding, enforceable agreement concerning forum selection is a prerequisite to the granting of an anti-suit injunction on a contractual basis. The judge held the following with respect to the existence and effect of the Standstill Agreement:

> [39] I will also add that there is a September 2017 agreement between counsel, stating that Mr. Rao would not take steps in the CIETAC Arbitration until the Court had ruled on Ms. Li's application for summary judgment in the civil action.
>
> [40] As a result of Mr. Rao's withdrawal of his civil claim, there was never a ruling on Ms. Li's summary judgment application. I agree with Ms. Li's counsel that Mr. Rao's discontinuance of his civil claim is not a breach of the September 2017 agreement but his proceeding with the CIETAC Arbitration is.

[28] Mr. Rao suggests that the judge did not make a finding regarding the validity of the Standstill Agreement, and he challenges the judge's interpretation of the terms of the Standstill Agreement.

[29] The interpretation of a contract is a question of mixed fact and law, and unless there is an extricable question of law, the standard of review is palpable and overriding error: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 52-53; *Moulton Contracting Ltd.*

v. British Columbia, 2015 BCCA 89 at para. 77. Likewise, the standard of review regarding the existence of a contract is palpable and overriding error: *Strother v. Darc*, 2016 BCCA 297 at paras. 13-15, *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at para. 22. An extricable question of law in contract interpretation, however, such as applying the wrong principle, not considering part of a legal test or failing to consider a relevant factor, is reviewable on a correctness standard: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36; and *Sattva* at para. 53.

[30] I cannot agree with Mr. Rao that the judge failed to make a finding regarding the validity of the Standstill Agreement. The conclusion that the Standstill Agreement is binding on Mr. Rao is implicit in the judge's findings concerning the Standstill Agreement (at paras. 39–40). The exchange of emails and correspondence between counsel that created the Standstill Agreement provide ample evidence to support the judge's conclusion that the parties agreed to the terms of the Standstill Agreement. In my view there is no basis for interfering with this conclusion.

[31] There is likewise no basis for interfering with the judge's conclusion that Mr. Rao would be in breach of the Standstill Agreement if he proceeded with the CIETAC Arbitration. The judge found it was a term of the Standstill Agreement that "Mr. Rao would not take steps in the CIETAC Arbitration until the Court had ruled on Ms. Li's application for summary judgment in the civil action" (at para. 39). This finding comes directly from the wording of the Standstill Agreement. The Standstill Agreement also provided that Mr. Rao covenants not to take any steps in the arbitration until the Supreme Court has ruled on his application for a stay of proceedings.

[32] Mr. Rao argues that the agreement was only intended to create a temporary standstill pending the hearing of the two extant applications. He says that on the judge's interpretation, he would be precluded forever from advancing the CIETAC Arbitration since he intends to discontinue the Civil Action and thus the applications are moot and will likely never be heard. He says this is a commercially unreasonable interpretation.

[33] In my view, it cannot be said the judge made a palpable and overriding error in relying on the unambiguous wording of the Standstill Agreement. There is no support in the wording of the Standstill Agreement that Mr. Rao would be released from the Standstill Agreement if he discontinued the Civil Action. The agreement provides that Mr. Rao will not take any steps "until the BC Supreme Court rules on the extant applications". The judge's decision to rely on

the wording of the Standstill Agreement was not unreasonable and is deserving of deference from this Court.

[34] While Mr. Rao's decision to discontinue the Civil Action would impede his ability to proceed with the CIETAC Arbitration, it is a dilemma of his own making. In any event, Mr. Rao has not yet filed a discontinuance in the Civil Action or paid the special costs owing to Ms. Li. Indeed, it is a condition of discontinuance in the Civil Action that he pay the special costs owing to Ms. Li and he has chosen not to do so.

[35] Mr. Rao submits that the judge could not have made any determination concerning the Standstill Agreement on an interlocutory application. He provided no authority in support of this assertion. In my view, the judge was within his authority to determine there was a valid contract between the parties and to interpret its terms: *Douez v. Facebook*, *Inc.*, 2017 SCC 33. *Douez* provides an example of a case where a court considered a forum selection clause on an interlocutory application, albeit in the context of an application for a stay of proceedings, rather than an anti-suit injunction. Further, it is recognized that "although the application is heard summarily and based on affidavit evidence, the order results in a permanent injunction which ordinarily is granted only after trial": *Amchem* at 930. In my view, the interlocutory nature of the application before the judge was not a bar to finding that the Standstill Agreement was binding.

[36] In summary, the Standstill Agreement is a valid, enforceable contract under which Mr. Rao may not proceed with the CIETAC Arbitration until the Supreme Court has ruled on the extant applications in the Civil Action. Mr. Rao's intended course of action of proceeding with the CIETAC Arbitration would be a breach of that agreement. It remains to be considered whether the Standstill Agreement can be enforced through an anti-suit injunction restraining Mr. Rao from proceeding with the CIETAC Arbitration.

B. Contractual Basis for an Anti-Suit Injunction

[37] Ms. Li submits that, as a matter of principle, the Standstill Agreement can justify injunctive relief in the circumstances. She submits it was open to the chambers judge to restrain Mr. Rao from proceeding with the CIETAC Arbitration in breach of his covenant under the Standstill Agreement on the basis of either of two principles. First, she says that under the general law of specific performance, courts will regularly enforce negative covenants by way of injunctions. Second, she says that conflict of laws principles allow for an

anti-suit injunction to enforce an agreement between the parties as to the forum in which disputes will be resolved.

[38] Mr. Rao opposes granting an injunction on a contractual basis, and he raises two additional issues. He submits that the judge erred in granting an injunction before CIETAC first had an opportunity to rule on its jurisdiction and erred in applying principles relating to anti-suit injunctions in the context of a foreign arbitration proceeding.

[39] I will first explain general principles of anti-suit injunctions that are necessary to understand the subsequent analysis. I will then consider whether CIETAC was required to rule on its jurisdiction before injunctive relief could be granted. Finally, I will consider whether an anti-suit injunction can be granted to enforce the negative covenant in the Standstill Agreement or on the basis of conflict of laws principles concerning enforcing a forum selection clause.

1. General Principles of Anti-Suit Injunctions

[40] The leading Canadian case on anti-suit injunctions restraining proceedings in foreign courts is *Amchem*. The case concerned an anti-suit injunction issued in British Columbia that prevented the appellants from pursuing an action against the respondents in Texas for damages from injuries caused by exposure to asbestos.

[41] In *Amchem*, the Supreme Court of Canada discussed two remedies that control a party's choice of forum: a stay of proceedings and an anti-suit injunction. A stay of proceedings enables the forum chosen by the plaintiff (i.e., the domestic forum) to stay the domestic action at the request of the defendant if it is satisfied that the case should be tried elsewhere. An anti-suit injunction may be granted by the domestic forum at the request of a party in a foreign suit. Such an injunction is typically applied for by the plaintiff in a domestic action to restrain the domestic defendant from commencing or continuing a proceeding in a foreign court.

[42] While a stay of proceedings and an anti-suit injunction both concern selection of the appropriate forum for resolving a dispute, they have a crucial difference. With a stay of proceedings, the domestic court determines for itself whether it should take jurisdiction. With an anti-suit injunction, the domestic court can be said to "in effect" determine jurisdiction for the foreign court. While an anti-suit injunction operates *in personam* on the plaintiff in the

foreign suit, rather than on the foreign court itself, it has the effect of restraining continuation of a proceeding in the foreign court: *Amchem* at 912–913.

[43] Given the effect on a foreign court, anti-suit injunctions raise issues of comity: *Amchem* at 913–914. The meaning of comity endorsed by the Supreme Court of Canada in *Amchem* is that articulated by the United States Supreme Court in *Hilton v. Guyot*, 159 U.S. 113 at 163–164 (1895), and approved by La Forest J. in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at 1096. It recognizes that proceedings in the modern legal world require at times the subordination of purely parochial interests:

> "Comity" in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.…

[44] In light of the comity concerns, the Supreme Court held that a court should only entertain an application for an anti-suit injunction if a serious injustice will occur because of a failure of a foreign court to decline jurisdiction. In order to determine whether failing to decline jurisdiction results in a serious injustice, it is necessary to consider whether the foreign court departed from the Canadian test for *forum non conveniens* to a sufficient extent.

[45] The test for *forum non conveniens* in Canada is based on English law and requires that there be some other forum that is more convenient and appropriate for the pursuit of the action and for securing the ends of justice: *Amchem* at 920. Similar tests for *forum non conveniens* exist in England, the United States, Australia and New Zealand: *Amchem* at 917–918.

[46] The Court in *Amchem* formulated a two-stage test for determining whether to grant an anti-suit injunction. In addition, it set out preliminary procedural requirements that must be satisfied before a court should entertain an application for an anti-suit injunction. The first procedural requirement is that a foreign proceeding is pending. In addition, "it is preferable that the decision of the foreign court not be pre-empted until a proceeding has been launched in that court and the applicant for an injunction in the domestic court has sought from the foreign court a stay or other termination of the foreign proceedings and failed.": *Amchem* at 930–931. This requirement strives to make anti-suit injunctions consonant with

the principle of comity, and it allows for the possibility that the anti-suit application will not be needed if the foreign court stays or dismisses the foreign action.

[47] With respect to the substantive test, the first stage of the analysis is to determine whether there is another forum that is clearly more appropriate than the domestic forum. If, applying the principles of *forum non conveniens*, the foreign court could reasonably have concluded there was no alternative forum that was clearly more appropriate, then the domestic court should dismiss the application, thereby giving respect to comity. If, however, the domestic court finds that the foreign court assumed jurisdiction in a manner inconsistent with the principles of *forum non conveniens* and that it could not have reached its conclusion by applying those principles, then the court must proceed to the second stage of the analysis.

[48] At the second stage of the analysis, a court must not grant an anti-suit injunction if "it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him": *Amchem* at 932, citing *SNI Aérospatiale v. Lee Kui Jak*, [1987] 3 All E.R. 510 at 522 (J.C.P.C.). Circumstances that amount to an injustice commonly include a loss of juridical advantage, a factor also considered in the first stage, but an injustice may also arise from other circumstances.

2. Anti-Suit Injunctions to Enforce Forum Selection Clauses

[49] Mr. Rao argues that an anti-suit injunction is an extraordinary remedy and there is no case law supporting the granting of an anti-suit injunction to enforce a contract. Ms. Li says that while no Canadian court has considered whether a litigant can be enjoined from proceeding in a foreign jurisdiction in breach of a forum selection agreement in favour of a Canadian court, it is well-established in English law that an anti-suit injunction is available to enforce a forum selection agreement. She argues that this law should be adopted in Canada and that an anti-suit injunction to enforce the Standstill Agreement can be granted on this basis.

[50] It is not disputed that in Canada, courts routinely stay domestic proceedings to enforce forum selection agreements made in favour of foreign courts. That is, if parties have agreed to litigate elsewhere, but one party has commenced parallel litigation in Canada, the Canadian court will routinely stay the domestic proceeding in order to enforce the parties' agreement. However, no Canadian court appears to have yet considered whether to grant an

anti-suit injunction to enforce a forum selection agreement made in favour of a domestic court. Canadian courts have only granted anti-suit injunctions on the “interests of justice” basis developed in *Amchem*, applying the principles of *forum non conveniens,* as described above.

[51] In England, however, courts routinely grant both stays of domestic proceedings and anti-suit injunctions to enforce forum selection agreements. Thus, there are two grounds on which an anti-suit injunction may be granted in England: a non-contractual ground that is analogous to *Amchem* and a contractual ground.

[52] The operative principle for the contractual basis for an anti-suit injunction in England is that where a party has obtained a right not to be sued in a foreign proceeding through an agreement, the opposing party must show strong reasons why the court should not protect that right by way of an anti-suit injunction: *The Eleftheria*, [1970] P. 94 at 99–100; *Donohue v. Armco Inc. and Others*, [2001] UKHL 64 at paras. 24, 53.

[53] The anti-suit injunction is a discretionary remedy, but the courts will generally hold parties to a forum selection agreement in the absence of strong reasons to depart from it, as Lord Bingham explained in *Donohue*:

> 24 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 recognise 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 party’s prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case.
>
> [Emphasis added]

[54] The circumstances to be considered in determining whether there is strong reason not to impose an anti-suit injunction include: (a) the country in which evidence is situated or more readily available, and the effect of that on the relative convenience and expense of a trial in each jurisdiction; (b) whether the law of the foreign court applies and whether it differs in material respects from domestic law; (c) the connection of the parties to each jurisdiction and the degree of that connection; (d) whether there is genuine desire for trial in the foreign country as opposed to pursuit of a procedural advantage; and (e) whether the plaintiff would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim, would be unable to enforce a judgment, would be faced with a time-bar not imposed by a domestic tribunal, or would be unlikely to have a fair trial due to political, racial or other reasons: *The Eleftheria* at 99–100. These circumstances are not exhaustive.

[55] This “strong reason” test for not imposing an anti-suit injunction on contractual grounds, is analogous to the “strong cause” test applied by Canadian and English courts in exercising their discretion to grant or decline a stay of domestic proceedings to enforce a forum selection clause. The “strong cause” test for a stay of proceedings was applied in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 at paras. 1, 19–21. It provides that where parties are bound by a valid forum selection clause in favour of a foreign jurisdiction, a court must grant a stay of the domestic proceeding unless the plaintiff can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in all of the circumstances to require the plaintiff to adhere to the terms of the forum selection clause: *Z.I. Pompey* at para. 39.

[56] In my view, there is no reason for this Court not to adopt the English approach and grant anti-suit injunctions on a contractual basis in appropriate circumstances. I see no principled reason why an anti-suit injunction should not be granted to hold parties to their agreements concerning forum selection in the absence of strong reasons to the contrary.

[57] Although issues of comity arise with any anti-suit injunction given the effect of an anti-suit injunction on a foreign court, in my view, comity concerns are less significant where the ground for imposing the injunction is contractual. Under the contractual ground for an anti-suit injunction, a court is not deciding that the domestic forum is the more appropriate forum; it is enforcing the parties’ contractual agreement to proceed in the domestic forum, in the absence of strong reasons not to. In this respect, it is the parties’ agreement, rather than a

discretionary decision of the domestic court, or a commentary on the appropriateness of proceeding in a foreign court, which is the foundation of the remedy.

[58] Lord Millett explained the different policy concerns underlying the contractual and non-contractual bases for anti-suit injunctions in *Aggeliki Charis Compania Maritima S.A. v. Pagnan S.p.A.*, [1995] 1 Lloyd's Rep. 87 at 96 (Eng. C.A.):

> 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. <u>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.</u>
>
> [Emphasis added]

[59] In considering whether to grant an anti-suit injunction to enforce a forum selection clause, I would apply the "strong cause" test that governs applications for a stay of proceedings to enforce a forum clause. In my view, the covenants made by Mr. Rao in the Standstill Agreement are appropriately characterized as a forum selection clause in respect of parallel proceedings. The parties agreed to suspend the CIETAC Arbitration pending the determination of applications in British Columbia. Such an agreement is a form of forum selection agreement.

[60] In my view, no strong cause exists to support the conclusion that it would be unreasonable or unjust to require Mr. Rao to adhere to the terms of the Standstill Agreement and not proceed with the CIETAC Arbitration until the Supreme Court has ruled on the extant applications. Indeed, there are good reasons to <u>enforce</u> the Standstill Agreement: (i) the chambers judge found that Mr. Rao was trying to gain an unfair tactical advantage by switching forums; (ii) the underlying dispute concerns a contract that was formed in British Columbia and real property that is located in British Columbia; (iii) Canadian law applies to

disputes under the Standstill Agreement and the LPP Agreement; (iv) one of the parties, Ms. Li, is located in British Columbia; (v) Mr. Rao freely entered into the Standstill Agreement with legal advice; and (vi) the Standstill Agreement was entered into after, and with knowledge of, the LPP Agreement and arbitration.

3. Enforcement of Negative Covenants

[61] Ms. Li submits that a contract-based anti-suit-injunction may also be granted in this case on the basis of the court's willingness to enforce negative covenants by way of injunction.

[62] The typical test for issuing an injunction is the three-part test described in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334: A preliminary assessment must be made of the merits of the case to ensure that (i) there is a serious question to be tried, (ii) a consideration of whether the applicant will suffer irreparable harm if the application were dismissed, and (iii) an assessment of the balance of convenience, that is, which of the parties would suffer the greater harm from the granting or refusal of the injunction pending a decision on the merits of the case. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case.

[63] The willingness of courts to enforce negative covenants agreed between parties was first expressed by Lord Cairns in *Doherty v. Allman* (1878), 3 App. Cas. 709 at 719-720 (H.L.):

> … If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case, the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury — it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves.

[64] This principle was endorsed in subsequent cases of the British Columbia courts. In *Gulf Islands Navigation Ltd. v. Seafarers International Union of North America (Canadian District)* (1959), 18 D.L.R. (2d) 216 (B.C.S.C.), aff'd (1959), 18 D.L.R. (2d) 625 (B.C.C.A.), the Supreme Court cited *Doherty* and held that proof of irreparable damage is not an

absolute requirement to enjoin breach of a negative covenant – if a party has agreed not to do a particular thing, then that party will, as a rule, be enjoined: at 226. Similarly, in *Montreal Trust Co. v. Montreal Trust Co. of Canada* (1988), 24 B.C.L.R. (2d) 238 (C.A.), this Court concluded, relying on *Doherty* as well as *Shelfer v. City of London Electrical Lighting Co.*, [1895] 1 Ch. 287, that "[i]f the defendant has agreed that a particular thing shall not be done, and proceeds to do it, he will, as a rule be enjoined": at 246. Other jurisdictions in Canada also endorsed the principle from *Doherty*: see e.g., *Miller v. Toews* (1990), 70 Man. R. (2d) 4 (C.A.); and *Canada (Attorney General) v. Saskatchewan Water Corp.* (1991), 109 Sask. R. 241 (C.A.).

[65] Some decisions of this Court have expressed less willingness to grant injunctions as a general rule where a party has breached a negative covenant. In *Belron Canada Inc. v. TCG International Inc.*, 2009 BCCA 577, this Court rejected the appellant's argument that there was no basis for the chambers judge to consider irreparable harm or balance of convenience after determining there was a strong *prima facie* case of breach of a negative covenant. It reviewed various case authorities, including the cases cited above, and held:

> [21] In my opinion, these cases cannot be read as enunciating the fairly rigid proposition argued by [the appellant]. In addition, all of them except [*Coast Hotels Ltd. v. Northwest Hotels Inc.*, 2001 BCCA 496] pre-date *RJR-MacDonald*. There is emphasis in some of these cases that apparent breach of a negative covenant in a commercial agreement will usually attract an injunctive order. But these authorities do not preclude consideration of irreparable harm and balance of convenience as later clearly enunciated in *RJR-MacDonald* to be part of the applicable test. Each of the cases cited by [the appellant] was decided on the particular circumstances of the case and the most that can be said about them being in support of [the appellant's] proposition is that irreparable harm on some sets of facts has been seen to be a lesser consideration.
>
> [22] It is probably correct to say that in most commercial cases involving sophisticated and solvent litigants in which a strong *prima facie* case is made out that there has been or will be breach of a negative covenant, an interim injunction will be granted. But this area of law would not be well served by formulating a rule, as suggested by [the appellant], that the injunction should always be granted absent exceptional circumstances. The questions of irreparable harm and balance of convenience should be addressed. Each motion for an interim injunction should be determined on a discretionary basis under the three-part test. On the present state of the law, there is no basis for holding that the test is not of general application.
>
> [Emphasis added]

[66] In concurring reasons in *Vancouver Aquarium Marine Science Centre v. Charbonneau,* 2017 BCCA 395, Justice Saunders (Donald J.A. concurring), reviewed the case law and held that "[w]here a *prima facie* breach is found, a negative covenant may be enforced by a court without great consideration of irreparable harm": at para. 88. She explained that this "stance has the benefit of preventing the disquieting denial by a litigant of his or her commitment, freely made". Saunders J.A. was of the view, however, that the negative character of the covenant at issue in that case should not of itself determine the outcome.

[67] The preceding authorities lead me to conclude that where a party breaches a negative covenant, an injunction enforcing this negative covenant will be regularly granted. This outcome has the benefit of ensuring parties are held to commitments they entered into freely. An injunction does not, however, follow the breach of a negative covenant as a matter of course or as a general rule. A judge should consider each prong of the three-part test from *RJR-MacDonald* (or the two-part test from *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.), aff'd [1991] 1 S.C.R. 62). However, irreparable harm typically will be a subordinate consideration in determining whether to grant an injunction to enforce a negative covenant.

[68] I acknowledge that there is some doubt as to whether applying the tripartite *RJR-MacDonald* test is consistent with the contractual basis for anti-suit injunctions. I say that because in *Z.I. Pompey,* Justice Bastarache, speaking for the Court noted that when considering the factors which are taken into account by a court determining whether to stay proceedings in "ordinary" cases applying the *forum non conveniens* doctrine, a different approach is warranted in the presence of a forum selection clause where "the starting point is that the parties should be held to their bargain": at para. 21. I agree that a different approach may be warranted based on that starting point but, in any event, applying the *RJR-MacDonald* test in these circumstances does not affect the outcome.

[69] The Standstill Agreement clearly contains a negative covenant: Mr. Rao's promise not to proceed with the CIETAC Arbitration until the Supreme Court of British Columbia has ruled on the extant applications in the Civil Action. There is no dispute that there is a serious question to be tried, namely, the impact of the *Family Law Act*, S.B.C. 2011, c. 25, on the parties' respective obligations under the LPP Agreement. With respect to irreparable harm, the judge found that Mr. Rao was seeking to achieve an unfair tactical advantage after first

having commenced a civil claim without recourse to CIETAC, then, after a year of litigation, seeking to withdraw his claim, and in his petition for arbitration not referring to the family law claim (at para. 38). Ms. Li has been awarded special costs which have been unpaid. The judge effectively found the balance of convenience to favour Ms. Li, noting that granting the injunction would serve to secure the "just and efficient resolution of the matters that have arisen between the parties" (at para. 42). In my view that conclusion is correct regardless of the starting point in this case.

4. Anti-Arbitration Injunction and Competence-Competence

[70] Mr. Rao submits that the Court below should have required Ms. Li to apply to CIETAC for its determination of jurisdiction, it being "clear on the authorities and principle of 'competence-competence' that questions regarding the arbitration panel's jurisdiction are the responsibility of the arbitration panel in the first instance", citing *Seidel v. TELUS Communications Inc*., 2011 SCC 15; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34; and *Heller v. Uber Technologies Inc.*, 2018 ONSC 718, rev'd 2019 ONCA 1, leave to app. granted [2019] S.C.C.A. No. 58. Thus, matters going to the jurisdiction of the arbitrator should generally be decided by the arbitrator.

[71] Mr. Rao submits whether the LPP Agreement and the arbitration clause in it was "a non-arm's-length agreement" and was, therefore, somehow ineffective or invalid is an issue that engages questions regarding the parties' relationship within the sole jurisdiction of the arbitration panel. Mr. Rao referred this Court to, *inter alia*, the decision of Hamblin J. in *Claxton Engineering Services v. TXM Olaj-Es Gazkutato KTF*, [2011] EWHC 345 (Comm.). Hamblin J. referred to the grant of an anti-arbitration injunction as a "matter of debate and controversy in the international arbitration community", but nevertheless found that despite this, there was clear authority "that the English courts have jurisdiction to grant such injunctions": at paras. 27–28. The authorities established that such injunctions will "generally only be granted in exceptional circumstances": at para. 29.

[72] In *Claxton Engineering*, exceptional circumstances were said to arise in circumstances where the claimant can establish that the continuation of the arbitration will be a breach of its legal rights: at paras. 34–35. Where this is founded on a breach of a contractual right, it is "generally appropriate to enforce [such right] by way of injunctive relief unless there are 'strong reasons for not giving effect to the exclusive jurisdiction clause'": at para. 35.

[73] I accept that courts should exercise caution before granting any injunction affecting the conduct of foreign proceedings whether those be judicial or arbitral in nature. Courts should pay due regard to the objectives of arbitration before granting an anti-arbitration injunction, just as they must pay due regard to comity before granting an anti-suit injunction. On the other hand, neither comity nor the objectives of arbitration justify exceptional diffidence where the injunction is based on a breach of contract, i.e., on a party's own conduct.

[74] As I have said, an injunction of the sort granted by the chambers judge, based on a breach of contract, operates personally against a litigant over which the British Columbia court has *in personam* jurisdiction. It does not engage the jurisdiction of the foreign court or tribunal. The contract based injunction does not involve a decision upon the jurisdiction of the foreign arbiter, but an assessment of the conduct of the relevant party in invoking that jurisdiction, that is, whether to enforce a promise freely made. As I have noted (at para. 60), there are no strong reasons not to enforce the Standstill Agreement, and there are good reasons to enforce it.

5. Conclusion on Contractual Basis

[75] In my view, a forum selection clause in the form of a negative covenant can be enforced by an anti-arbitration injunction. In so doing, the Court is exercising *in personam* jurisdiction over the litigant. While courts should exercise caution before granting any injunction affecting the conduct of foreign proceedings, whether those be judicial or arbitral in nature, a contract-based injunction does not involve a discretionary decision on the jurisdiction of the foreign arbiter, but an assessment of the conduct of the relevant party in invoking that jurisdiction in the particular circumstances of the case. In my view it was not an error to grant the injunction in this case.

C. The Interests of Justice Basis for an Anti-Suit Injunction

[76] Even if Ms. Li were not entitled to injunctive relief by virtue of the Standstill Agreement, she says it was open to the chambers judge to issue an anti-suit injunction in the interests of justice, and he committed no error of principle in doing so. The non-contractual ground for an anti-suit injunction engages the court's residual discretion to enjoin a litigant from proceeding in a foreign court where the interests of justice require it.

[77] A Canadian court must satisfy itself of two things before granting an anti-suit injunction on this ground: (1) the Canadian court must be satisfied that it is the natural forum, and where a foreign court has assumed jurisdiction, that the foreign court could not reasonably have reached the conclusion that no competing forum was clearly more appropriate; and (2) the interests of justice must favour granting the injunction, having regard to both the injustice to the defendant of having to respond to the foreign proceedings and the injustice to the plaintiff of not allowing him to pursue the foreign proceedings: *Amchem* at 931–934.

[78] As I have found that the injunction should be upheld on a contractual basis, it is unnecessary to consider this alternate ground, and I decline to do so.

V. Conclusion

[79] I would dismiss the appeal.

"The Honourable Mr. Justice Savage"

I agree:

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Abrioux"