1 Introduction

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Subject(s):
Injunctions to restrain proceedings in England and Wales — Remedies
1.01 An anti-suit injunction, in its most typical form, orders a party to cease to pursue, or not to commence, court proceedings abroad. It is backed by the threat of punishment for contempt of court if it is not obeyed. It is little surprise that it is one of the most controversial and contested remedies in the court’s armoury.

1.02 Anti-suit injunctions have been criticized, especially by authors and judges from civil law systems, where anti-suit injunctions are largely, although not entirely unfamiliar. It has been argued that they are irreconcilable with international comity and public international law, and amount to an unjustifiable interference with the sovereignty of the foreign state and the jurisdiction of the foreign court. Yet there should be little doubt about the power of the remedy as a practical tool. In the game of ‘multi-dimensional chess’ that international litigation can become, the anti-suit injunction can be a dramatic way of reducing the number of pieces on the board, and shaping the moves that can be taken. Experience also shows that it can, on occasion, be the only effective tool for achieving practical justice.

1.03 This book is intended to provide a detailed analysis of the principles and case law governing the grant of anti-suit injunctions by the courts of England and Wales.

1.04 The remainder of this Introduction will deal with the following topics:

• Terminology and characterization (section A).
A. Terminology and Characterization

1.05 An anti-suit injunction is an order of the court requiring the injunction defendant not to commence, or to cease to pursue, or not to advance particular claims within, or to take steps to terminate or suspend, court or arbitration proceedings in a foreign country, or elsewhere in the court’s own territorial jurisdiction. The order is addressed to, and binds, the actual or potential litigant in the other proceedings, and is not addressed to, and has no effect on, the other court.

1.06 Although a remedy of this type has formed part of English law for centuries, until recently it used to possess no convenient abbreviation. The label ‘anti-suit injunction’ is a late twentieth-century import from the USA, but has become the usual name in modern English law. It is true there is an ambiguity in the term ‘anti-suit’, which might suggest that the injunction affected the other court directly, when it only affects the party litigating there. So, referring to the ‘anti-pursuit of suit’ injunction would be more accurate, if unacceptably clumsy. Yet the phrase ‘restraining order’ is a little more than a tautology for any prohibitory injunction; it does not identify the particular type of restraint in which we are interested. Lord Hobhouse’s recharacterization has found no supporters, and the term ‘anti-suit injunction’ has become the uncontested and standard terminology.

B. The Landscape of the Remedy

1.08 The English courts’ willingness to grant anti-suit injunctions has waxed and waned, and there have been divergences of opinion and development of principle.

1.09 However, the broad landscape of the law of the remedy is now settled for most purposes short of a root-and-branch challenge in the Supreme Court. Injunctions will be predominantly granted in two main situations: first, ‘contractual’ injunctions, where foreign proceedings are in breach of a contractual forum clause; and second, ‘alternative forum’ cases, where foreign proceedings overlap with matters that are being or can be litigated in England, and should be injunctioned, in particular where they are considered to be vexatious and oppressive. There are also other less common categories where injunctions can be granted. These include injunctions to protect the insolvency jurisdiction of the English courts; ‘single forum’ cases, where injunctions are granted to restrain the pursuit of foreign proceedings abroad which can only be pursued abroad, and anti-anti-suit injunctions. Injunctions to restrain the pursuit of proceedings in England are possible, but rare in practice (outside the context of insolvency, where they are routine). Injunctions can in principle be granted to restrain the pursuit of foreign arbitration proceedings as well as the pursuit of court proceedings, but the supervisory role of the court of the seat of the
arbitration, and the growing recognition of the principle of Competence-Competence, make this rare.

1.10 The Brussels–Lugano regime, and the other instruments of European jurisdicational law, so long as they remain the law in England, impose restrictions on the grant of anti-suit injunctions where they seek to restrain proceedings in other Brussels–Lugano member states, following the decision of the European Court of Justice in Turner v Grovit. The effect of Brexit is discussed in section I.

C. Anti-Suit Injunctions in Other Legal Systems

1.11 Anti-suit injunctions have deep roots in English law common law and equity, and are part of the legal heritage which English law shares with the other common law legal systems to which it gave birth.

1.12 The common law legal systems all approach the anti-suit injunction with similar principles in mind. Outside the USA, the English case law is often applied, and the jurisprudence of the Privy Council has been important in maintaining a common body of principle.

1.13 We give, here, a brief tour d’horizon of the position in a number of the Commonwealth systems (and Hong Kong):

- Australian and Canadian law have pursued somewhat different paths to England, largely because of the different jurisdictional background. Yet the nature of the remedy is the same, and the principles to be applied have a strong family resemblance to English law.
- In the British Virgin Islands and Brunei, the Privy Council has stated the law on anti-suit injunctions in terms drawing no distinction to English law.
- Hong Kong law on anti-suit injunctions in substance follows English law.
- Indian law recognizes anti-suit injunctions. The principles applied are similar to English law and draw on English and Commonwealth authorities.
- But their application is sometimes unfamiliar. In recent years the international arbitration community has criticized the Indian courts for what has been perceived as excessive readiness to intervene in international arbitrations.
- New Zealand and Singapore law essentially follow English law on anti-suit injunctions and the decisions of the Privy Council, although the jurisprudence of other commonwealth systems is also influential.

1.14 This work addresses Singapore and New Zealand law on anti-suit injunctions in more detail in separate chapters (Chs 19 and 20, respectively).

1.15 In US law, the anti-suit injunction is an established remedy. Since the modern English anti-suit injunction developed after US independence, it is unsurprising that the US jurisprudence has a rather different cast. But US judges have needed to confront many of the same problems as their English counterparts, and the solutions reached, though expressed differently, are often similar. English and US law on anti-suit injunctions have interacted, sometimes in conflict, but also with mutual respect and influence.

1.16 Scots law stands between the common law and the civil law systems, but in certain fields is strongly influenced by English law. The Scottish courts have a common law power to interdict (injunct) a foreign action, and have so far applied the same basic principles as English law. In contrast, in South Africa, which also has a mixed civil and common law
system, anti-suit injunctions have not yet been granted, and it is unclear whether they would be acceptable in principle.

1.17 The civil law countries have a different legal heritage, and the anti-suit injunction was an alien and often unwelcome idea to many civil lawyers.\textsuperscript{26} Between 1980 to the early 2000s, when the anti-suit injunction became a focus of attention in Europe, there were hostile reactions from civil law writers and judges to English anti-suit injunctions.\textsuperscript{27} Arbitrators from civil law backgrounds were also, initially, reluctant to grant anti-suit injunctions to protect arbitral references.

1.18 But it would be wrong now to view the civil law attitude to anti-suit injunctions as universal rejection. Remedies akin to anti-suits have occasionally been granted by some civil law systems. The former tendency for civil lawyers to react to anti-suit injunctions with incomprehension and hostility has become more nuanced, and anti-suit injunctions are sometimes met with a degree of acceptance and even occasionally sympathy,\textsuperscript{28} which previously would have been surprising.

(p. 6) 1.19 In France, in \textit{Banque Worms c Brachot}, the Cour de Cassation appears to have accepted the legitimacy of an order equivalent to an anti-suit injunction, enforceable by astreinte (a daily fine for non-compliance), to protect French insolvency proceedings.\textsuperscript{29} Subsequently, at the crest of the wave of European hostility, in \textit{Stolzenberg},\textsuperscript{30} the Cour de Cassation took the approach that anti-suit injunctions were inappropriate in principle. But in its more recent decision, \textit{In Zone Brands},\textsuperscript{31} the Cour de Cassation concluded that a US anti-suit injunction to enforce an exclusive jurisdiction clause was not contrary to international public policy, nor the right of access to the court, and should be recognized and enforced by the French courts. Arguments that the injunction was an interference with French sovereignty and a breach of Article 6 of the European Convention on Human Rights (ECHR) were not accepted.\textsuperscript{32}

1.20 Subsequently, in \textit{Vivendi c Gerard},\textsuperscript{33} the Paris Court of Appeal rejected an appeal against the refusal by the Tribunal de Grande Instance (‘TGI’) to grant an anti-suit injunction restraining proceedings in the USA. But although it had been argued that French courts did not have power to grant such injunctions, the Court of Appeal of Paris (like the TGI) did not adopt that reasoning, rejecting the injunction on the grounds that the USA was a natural forum for the substantive litigation, there was no illegitimate ‘forum shopping’, and that the necessary ‘fraude’ (which can perhaps be best translated as wrongfulness, or even vexation) was not made out on the facts. The Court of Appeal abstained from commenting on the question of power.\textsuperscript{34}

1.21 This work will leave it to French scholars to assess whether anti-suit injunctions will indeed become part of French legal practice.\textsuperscript{35} But in Quebec, where the legal system is essentially French in heritage but influenced by the common law, anti-suit injunctions have been granted, and are accepted by many legal writers.\textsuperscript{36}

1.22 Elsewhere in continental Europe, there have been decisions from the Netherlands and Belgium which are akin to anti-suit relief, although it is difficult for this writer to judge the extent to which they are anomalies.\textsuperscript{37} In contrast, other continental courts and writers have (p. 7) reaffirmed the view that anti-suit injunctions should not be granted as a matter of principle, or cannot operate within their own legal system.\textsuperscript{38}

1.23 At the international level, a compromise was hammered out in the International Law Institute’s Bruges Resolution of 2003, which did not reject anti-suit injunctions, and comes close to giving them a grudging endorsement, if closely confined.\textsuperscript{39}
Even within the framework of European Union (EU) law, the initial flat hostility reflected in the decision of the European Court of Justice (ECJ) in Turner v Grovit has since become more modified. The consequences of the decision in The Front Comor, which concluded that anti-suit injunctions could not be granted within Europe to enforce an arbitration clause, were regretted by many, even outside the world of the common law. The high point of sympathy so far has been Advocate General Wautelet's bold opinion in the Gazprom case, where he went so far as to argue that in the light of Recital 12 of the Brussel I Recast, the Brussels–Lugano regime should not preclude the grant of anti-suit injunctions to restrain proceedings brought in breach of an arbitration clause.

1.25 It would be going too far to suggest that the anti-suit injunction has conquered civil lawyers’ affections. It seems unlikely that the remedy will be adopted by civil law systems in any general fashion. Nevertheless, civil law hostility to the injunction is no longer monolithic nor universal, and while disapproval persists, it is now tempered with greater understanding.

D. Anti-Suit Injunctions and Comity

1. Principles of Comity

1.26 In ordinary language, the word ‘comity’ refers to mutual courtesy or civility. In common law thinking on public and private international law, the phrase the ‘comity of nations’ refers to several different concepts that bear a family relationship. The linking idea is the underlying notion that different nations, and in particular their courts and legal systems, owe each other mutual and reciprocal respect, sympathy, and deference, where appropriate. Comity is a principle d’ordre public, and not a question of private rights and duties; it reflects mutual respect between different states, legal systems, and courts.

1.27 This underlying notion finds its expression variably in different contexts. Comity can refer to the mutual obligations imposed on states by public international law. However, comity goes beyond the principles of public international law and includes more general imperatives of international public policy which do not amount to rules of law. Reasoning based (p. 9) on comity is deployed to justify particular rules of international and domestic law. Thus, comity is used to justify the principles of sovereign immunity and non-justiciability, and to explain the cooperation that the English courts give to requests for international judicial assistance in evidence gathering.

1.28 As relevant to anti-suit injunctions, the notion of comity underpins, or is deployed in, five main concepts in English jurisprudence:

- the principle that jurisdiction should not be exercised in an exorbitant way;
- the perception that one state’s courts should not, without good reasons to do so, grant remedies that interfere even indirectly with the territorial and adjudicatory sovereignty of a foreign legal system;
- the acceptance that the decisions and judgments, and decision-making independence, of foreign courts and states are entitled to a degree of deference, over and above the rules of res judicata and the recognition of foreign judgments;
- the idea that each state’s legal system has its own natural sphere of influence, within which the presumption against interference by another state’s courts is of particular force, but outside which a state is entitled to a lesser degree of deference;
- the converse concept that a court has a greater standing to intervene if a matter does fall within its own natural sphere of influence.
1.29 Comity in this context is a set of principles or values, rather than a hard-edged rule, and is weighed against other principles or values. The principles of comity have shaped the existing rules for the grant or refusal of anti-suit injunctions; and comity also remains an independent consideration in the exercise of the court’s discretion whether to grant an injunction.

2. The English Courts’ Commitment to the Anti-Suit Injunction

1.30 The principles of comity are in potential tension with the grant of anti-suit injunctions to restrain foreign proceedings, although what comity actually demands in any particular case is debatable. Thus, in *Midland Bank v Laker*, Leggatt J at first instance took the view that ‘comity with the courts of a friendly state required that any action which was properly commenced in the US courts in accordance with US procedure ought not to be restrained by the English court’; but the Court of Appeal begged to differ: ‘comity in such a context as this is a matter on which different views can be held’.

1.31 Indeed, it has been obvious from the very beginnings of the anti-suit injunction that it is a remedy with the potential to cause conflict with other legal systems. The first reported application for an anti-suit injunction to restrain foreign proceedings where the question of principle was discussed was rejected on the grounds that it was a ‘dangerous case’. Even the anti-suit injunction’s domestic parent, the ‘common injunction’, by which the Court of Chancery restrained proceedings before the common law courts of England, gave rise to acute conflicts between the courts of common law and the Court of Chancery which lasted until after the Glorious Revolution.

1.32 However, the legitimacy of the remedy has not faced a serious root-and-branch challenge in England since *Bushby v Munday* in 1821, where it was contended that ‘it would be a violation of the principles of international law to stay [the proceedings in the Scottish court] by (p. 11) the injunction of this court’. Sir John Leach VC dismissed the argument. He accepted that ‘over the Court of Session this court has not, nor can pretend to have, any authority whatsoever’ but thought this did not matter. He reasoned that:

> where parties Defendants are resident in England, and brought by subpoena here, this Court has full authority to act upon them personally with respect to the subject of the suit, as the ends of justice require; and with that view, to order them to take, or to omit to take, any steps or proceedings in any other Court of Justice, whether in this country, or a foreign country.

1.33 The personal logic which lies at the heart of Sir John Leach’s decision remains the starting point of the common law’s response to the argument that the anti-suit injunction is irreconcilable with comity. Although it has been criticized, the personal logic of the anti-suit injunction is real, as the injunction does not seek to compel the foreign court. Nevertheless, there has been a growing acceptance that the anti-suit injunction does indirectly interfere with the foreign court. In recent case law, the anti-suit injunction has been tested against comity at the margins of the remedy. But the question of whether the anti-suit injunction is inherently irreconcilable with comity has not been given a fresh examination in modern times.

1.34 There is little prospect of any radical challenge to the anti-suit injunction succeeding before the English courts. The House of Lords, Supreme Court, and Privy Council have considered (p. 12) the anti-suit injunction on numerous occasions in recent years and have given no hint that they were concerned about the nature of the remedy.

3. Practical Justice
The English courts' commitment to the anti-suit injunction reflects a perception that it can be a vital tool for achieving practical justice. The court may be faced with a situation where it has concluded that the injunction defendant’s pursuit of foreign litigation is clearly wrongful by English standards, and it has to hand an immediate and effective remedy to deal with the situation in the anti-suit injunction. Even if the foreign court will eventually reach the same conclusion, a similarly useful remedy may well not be available in the foreign court; for example if its procedure is notoriously slow, or if its procedure provides no means for a quick dismissal on jurisdictional grounds. Letting the injunction defendant continue with his litigation will not only cause the innocent party to incur unnecessary costs abroad, but it can also change the result of the dispute between the parties. The experienced litigator will know that it can be extremely difficult to conduct litigation in unfamiliar jurisdictions, and that even parties with strong claims, when faced with harassment on other fronts, can lose the will to fight.

Further, the anti-suit injunction is the only remedy capable of dealing with the situation where a well-funded party, convinced of the weakness of his prospects in the natural forum for the dispute, commences litigation in a multiplicity of other courts or arbitration tribunals. Requiring the injunction claimant to contest those claims in every single other court will be disproportionately burdensome.

These advantages must be weighed against the difficulties to which anti-suit injunctions can give rise when the foreign court objects. Very real offence has been taken by foreign courts to the perceived interference with their sovereignty, and anti-suit injunctions will often be refused enforcement abroad. Between two countries that grant anti-suit injunctions, an escalating ‘arms race’ could result, with anti-suit injunctions being met or pre-empted by anti-anti-suit injunctions, which might in turn be met or pre-empted by anti-anti-anti-suit injunctions. Clashes of this nature have occurred, most famously in the Laker Airways litigation, but also on other occasions. The perceived need to avoid such conflicts has led some writers to suggest that ‘offensive’ anti-suit injunctions should not be granted, and that courts should confine themselves to the grant of ‘defensive’ anti-anti-suit injunctions, where this is necessary. However, conflicts of this kind are likely to be rare provided that both legal systems pay sufficient regard to comity when considering whether to grant anti-suit injunctions, and in particular anti-anti-suit injunctions. Where conflicts do arise, they can be resolved by the exercise of common sense. The grant of anti-suit injunctions as between common law courts has not disrupted the generally harmonious relations between them. To abstain from all ‘offensive’ uses of the anti-suit injunction because of the risk of conflicts would be an overreaction.

Nevertheless, even if sufficient caution is deployed in the grant of anti-suit injunctions to render their use acceptable in practice, it is worth examining whether the anti-suit injunction can be reconciled with the principles of comity.

4. The Absolute Challenge Based on Sovereignty and Jurisdiction

A fundamental challenge to the anti-suit injunction’s legitimacy has been advanced by scholars and judges from civil law legal systems. The challenge is made up of two main arguments. First, as a matter of sovereignty it must always be the court before which proceedings are brought, applying its own national law and policy, that should decide on whether those proceedings are or are not properly brought before it. Second, it must always amount to an illegitimate interference with the adjudicatory jurisdiction of a court.
for another court to decide whether or not that adjudicatory jurisdiction can or cannot be invoked.\(^{84}\)

1.41 From the perspective of these arguments, the common law analysis that there is no direct interference with the foreign court because the injunction operates *in personam* only is dismissed as irrelevant, since the production of the same result by indirect means is viewed as equally objectionable.\(^{85}\)

1.42 The conflict between this absolute challenge and the common law approach to the anti-suit injunction derives from irreconcilably different assumptions as to the role of a legal system, and the values to which it should give primacy.

(p. 15) The ‘civil law’ arguments based on sovereignty and jurisdiction sketched out give priority to public judicial authority rather than private justice. The dominant consideration is not where a dispute should justly be resolved, but the doctrinal principle that the receiving court’s authority to determine what litigation may be brought before it should be unquestioned by foreign courts. Compared to this principle of sovereignty, the private rights and obligations of the parties, and the practical consequences of upholding the principle, are of relatively little importance.\(^{86}\)

1.43 In contrast, at the heart of the common law concept of civil justice is the imperative that a just resolution must be achieved for a private dispute. In relation to conflicts of jurisdiction, the question of principal importance, as a matter of justice, is where a dispute should be resolved in order to do practical justice between the parties, and in accordance with their private law rights.\(^{87}\) Public law considerations of the sovereignty of foreign courts, and relations between courts, encapsulated in the concept of comity, are second-order constraints, to be deployed sparingly where they conflict with private justice. This conception of the function of courts and of justice naturally leads to a personal logic being applied to anti-suit injunctions, not merely as a matter of formality, but as a substantive reflection of the court’s underlying concept of justice.\(^{88}\)

1.44 There is a sense in which conflicts as deeply rooted as this\(^{89}\) are not susceptible to resolution by argument.\(^{90}\) It is no part of the purpose of this chapter to contend that all cases in which the English courts have granted anti-suit injunctions can be justified from an international perspective. Yet there are cases where a rigid application of a dogmatic conception of sovereignty would be unjustified, and would clash with principles as valid as those it seeks to uphold. Indeed, by giving overwhelming importance to the judicial sovereignty of the courts of the ‘receiving’ state Y, the sovereignty of the courts of the ‘originating’ state X to regulate their own proceedings could be undermined.

1.45 To take one example, it is standard in common law systems for one party to be required to disclose private documents to the other party, subject to controls, including obligations of confidentiality not to use the documents obtaining on disclosure or discovery in (p. 16) any other context or for any other purpose. Breaches of these obligations—for example by leaking protected information to the press—can be restrained by injunction, or even directly punished by contempt of court.\(^{91}\) If a party who threatened to breach these obligations by deploying that material in foreign proceedings could not be prevented from doing so by injunction, the ability of the original court to control the proceedings before it would be seriously undermined.

1.46 Similarly, if an absolute rule based on sovereignty or jurisdiction were adopted, it would be impossible even to grant anti-anti-suit injunctions. Even those writers within the common law world who doubt the legitimacy of anti-suit injunctions tend to make an exception for anti-anti-suit injunctions to protect the jurisdiction of the originating state from inappropriate foreign anti-suit injunctions.\(^{92}\)
To dismiss the personal logic of anti-suit injunctions as an irrelevant formalism is particularly inaccurate in cases where the injunction defendant owes a concrete personal jurisdictional obligation not to litigate abroad. A contractual anti-suit injunction does, in a very real sense, enforce personal obligations of the injunction defendant. But once this is recognized, one of the foundations of the absolute ‘civil law’ challenge is weakened. Even if the injunction does indirectly affect the sovereignty or jurisdiction of the foreign court, this is a direct consequence of the personal obligations which the injunction defendant has assumed. It appears to be a recognition of the force of this point that has driven the French courts to accept the legitimacy of foreign contractual anti-suit injunctions.

The English courts do not consider that a foreign anti-suit injunction is necessarily an illegitimate interference with their own process. Further, although the reaction from foreign courts to English anti-suit injunctions has occasionally been hostile, this has not always been the case. Unsurprisingly, the courts of common law legal systems that grant anti-suit injunctions have accepted that injunctions restraining the pursuit of proceedings before them may be legitimate, and the French Cour de Cassation has accepted that a foreign contractual anti-suit injunction can be enforced in France.

Consequently, at least in those cases where the jurisdictional relationships between the states in question are not regulated by a controlled ‘closed system’ of jurisdiction, an absolute principle that comity must always preclude the grant of anti-suit injunctions to restrain the pursuit of proceedings before the courts of a foreign state has little attraction other than its simplicity.

5. Comity and the Right to Decide

There is a more subtle line of challenge, derived from considerations of comity, which has been articulated by some writers from both civil law and common law systems.

In many cases, the arguments that can be put before the originating court in support of an injunction, or parallels to them, can be put before the receiving court, on an application to stay proceedings before it. If an argument can only be advanced with force before the originating court, that will usually be because of a difference of national law and policy between the two states. Consequently, two questions must be asked: where the same points or parallels to them can be made abroad, what is the need, or what gives the right, for the originating court to intervene? And where the same points cannot be made abroad, what gives the originating court the right to intervene (the need being obvious)? It could be argued that, if those questions are treated with sufficient seriousness, then it will be apparent that anti-suit injunctions should not be granted as a matter of comity, save perhaps in very limited circumstances, because the indirect interference with the foreign court is not justified by any need or right that can be identified. This argument has the attraction of flexibility, because it admits of the possibility that the originating court might have the need and right to intervene.

The English courts, and the Privy Council, have not been deaf to these questions. In Aérospatiale, a radical change in the case law was introduced by Lord Goff’s conclusion that it would be inconsistent with comity for an injunction to be granted merely because there was a difference of view between the injuncting court and the foreign court as to which is the natural forum, and that something more was required to justify intervention. Further, in Airbus v Patel, Lord Goff articulated the principle that, as a matter of comity, the English court must have a ‘sufficient interest’ in the matter to justify intervention. Nevertheless, there are many cases where the English courts have answered, and continue to answer, the question of whether they have a need and right to intervene with a resounding affirmative.
1.53 Thus, in contractual cases, the English court has derived its right to intervene from the parties’ contractual choice of England as the forum. There are strong arguments to support this. It is possible to hypothesize a clear and clearly valid contractual clause which gives exclusive jurisdiction over any underlying dispute arising out of the contract to the courts of X, also gives exclusive jurisdiction over any dispute as to forum to the courts of X, and finally provides that the courts of X may award damages in respect of, and restrain by injunction, any breach of the clause committed by litigating elsewhere than in the courts of X. If such a clause has been agreed, then to prohibit the grant of the injunction for which it provides would interfere with freely assumed contractual obligations.

1.54 In turn, the need for the injunction follows from the fact that if the injunction is not granted, the injunction claimant will have to defend himself, or make an appearance to challenge jurisdiction, in the foreign court, which is exactly what he contracted to avoid, as well as from the unjustified costs and expense that the continuation of the foreign proceedings (in breach of contract) will produce, and the risk that the defendant abroad may involuntarily submit to the jurisdiction of the foreign court.

1.55 Nevertheless, these arguments do not get to the heart of the problem. The situations where the greatest controversy is likely to arise are those where the foreign jurisdiction applies different conflicts of laws rules, or mandatory rules of public policy, that invalidate an exclusive forum clause which English conflicts of laws rules and contract law would treat as valid. In such a case, what gives the English court the right to impose its view of the validity of the clause over the injunction defendant’s ability to invoke the possibly contrary view that might be taken by the foreign court?

1.56 The primary response given by the English courts has been simply that they must apply their own conflicts of laws rules, and give effect to the contractual obligation that those rules dictate. But from an international perspective, this may not be enough. It is arguable that, in order for an injunction in such a case to be reconcilable with comity, and to avoid parochialism, there would at least have to be some system-transcendent reason why it was appropriate for English conflicts of laws rules to be given overriding effect, and for the English court to intervene. One possible candidate for a system-transcendent rationale is the principle of freedom of contract itself: if the parties have elected to contract under a particular system of law, including that system’s conflicts of laws rules, and for the exclusive jurisdiction of that system’s courts, then their personal choices should be respected, and their personal obligations enforced; and it is legitimate for the chosen court to enforce those obligations.

1.57 However, the opponent of anti-suit injunctions might respond that even this tribute to comity is insufficient, there being no such thing as a system-transcendent rationale, since no legal system can escape its own prejudices, and that in any event, no such rationale
(p. 20) would justify overriding the injunction defendant’s right to rely on the foreign court’s law and policy choices.

1.58 At this point of the analysis, we are therefore brought hard up against a fundamental choice between values: does the importance that comity places on the sovereignty of other legal systems, and their right to impose their own law and policy choices, require non-intervention, irrespective of any system-transcendent rationale? Or can the importance of doing practical justice, and enforcing a party’s personal obligations, according to the originating system’s own perception of what is right (especially on as system-transcendent a basis as is achievable), be sufficient to warrant an order against the party concerned, even at the price of tensions with comity? The common law chooses the latter result.117 This is, again, a choice between fundamental values, which is as much a political as a legal issue.

1.59 Yet in defence of the common law answer, it can be noted that insisting on non-intervention is not a neutral solution. Although intervention by anti-suit injunction enforces the injuncting legal system’s perception of what is right, insisting on non-intervention would conversely ensure that a party could, without interference, procure that his freely agreed obligations be overridden by finding a legal system that was willing to override them.118 To give a practical example, the question in issue in *The Front Comor*119 was not, from one perspective, whether the English court ‘trusted’ the Italian court: it was whether Italian or English conflicts of laws rules and contract law should be applied to determine whether an English law arbitration clause providing for arbitration in England is binding.120

1.60 A parallel and perhaps even more problematic debate arises where injunctions are sought on the basis that the foreign litigation is vexatious and oppressive. In these non-contractual cases, the interference to comity is not warranted by any concrete personal obligation, nor by any express or implied agreement that the originating court is the appropriate court to determine questions of forum. So, the argument that the originating court has a right to intervene necessarily starts from a weaker foundation.

1.61 The common law has recognized this, in particular by Lord Goff’s imposition of the requirement that the court must have ‘sufficient interest’ in determining the question of forum before an injunction can be granted.121 Yet the difficulty, and the debate, arises in identifying the level of connection or interest that should be required to give the originating court the right to intervene, notwithstanding the indirect interference with the foreign court that the (p. 21) injunction involves.122 For example, under current English law, the English courts will have a sufficient interest if they view themselves as the natural forum for the dispute (and an injunction can then in broad terms be granted if the foreign litigation is vexatious and oppressive).123 In contrast, some American circuits have taken a generally more restrictive approach, and require that anti-suit injunctions can only be granted to protect the forum’s jurisdiction, to prevent evasion of the forum’s important public policies, or where the foreign suit was brought in bad faith or to vex or harass the party seeking the injunction.124 Some US scholarship has gone further and suggested that it is only where the originating legal system needs to protect its own judicial sovereignty by granting anti-anti-suit injunctions that it will have a legitimate ground to intervene.125

1.62 It is suggested that to preclude all non-contractual anti-suit injunctions, or to adopt restrictive and rigid rules in respect of them, would be inappropriate. For example, the English court has restrained applications to the US courts for the purpose of evidence gathering, where the actual substantive proceedings were in England, and the evidence-gathering methods in the USA would clash with the good management of an English trial.126 These injunctions are clearly consistent with comity. The English courts were entitled to control the proceedings before them, and the evidence to be adduced therein,
and it appears that the US courts may have welcomed the grant of appropriate injunctive relief by the court with jurisdiction over the merits.127

1.63 In principle, in order to pay due regard to comity, something more should be required, over and above a conclusion that the originating court is the natural forum for the litigation. To use the language of Hoffmann J (as he then was), there has to be some good reason why the decision to stop the litigation should be taken ‘here rather than there’.128

1.64 However, it is unlikely, at least for the foreseeable future, that the English courts will accept that the barriers imposed by comity, even in non-contractual cases, should be raised high enough sharply to limit their powers to grant anti-suit injunctions. One of the fundamental assumptions of many of the writers who seek to restrict anti-suit injunctions is that one cannot criticize or suspect the quality of justice done in foreign courts, or the approach they (p. 22) take to their own jurisdiction. The English courts are hesitant to criticize foreign courts, and will usually refrain from doing so explicitly. But outside closed jurisdictional systems, such as the Brussels–Lugano regime, there is no reason to assume that foreign courts will exercise restraint in the exercise of jurisdiction.129 By declining to intervene by injunction, the English court would be without an effective remedy in the face of exorbitant assumptions of jurisdiction by foreign courts.130 Confronted with the ‘jungle’131 of independent jurisdictions that make up the world, the English courts are not likely unilaterally to disarm themselves, nor to adopt a degree of deference to comity which would preclude them from doing practical justice in the face of vexatious litigation abroad.

E. Human Rights Law

1. The Right of Access to a Court

1.65 It has been argued132 that the grant of an anti-suit injunction to restrain a party from litigating in the court of his choice is an infringement of his human rights, and in particular an unwarranted restriction on his right of effective ‘access to a court’, as guaranteed by Article 6 of the ECHR,133 which the English courts are obliged to enforce.134 However, it is suggested that such a sweeping view is unlikely to be right. We analyse the principles applicable under Article 6, and they do not support any absolute preclusion. The English courts, unsurprisingly, have rejected any suggestion that their anti-suit injunctions are contrary to Article 6.135 In addition, the more recent case law of continental courts, and the ECJ, suggest that they too will accept that the anti-suit injunction is consistent with Article 6, at least in (p. 23) many cases.136 If Article 6 does impose any pertinent constraints, it is likely to be at the margins of the remedy.

2. Does the Right of Access to a Court Apply Extraterritorially?

1.66 Any restrictions imposed on rights of access to a court by anti-suit injunctions will limit the injunction defendant’s freedom to act in the state of the court of the proceedings restrained, not in the state of the court granting the injunction. Consequently, two threshold questions must be answered: first, does the injunction defendant fall within the originating state’s jurisdiction for the purposes of the ECHR; and second, does the right of access to a court apply extraterritorially?

1.67 As to the first question, a defendant to an extraterritorial injunction granted by the courts of a contracting state will probably fall within the ‘jurisdiction’ of that state for the purposes of the ECHR, and therefore be within the scope of the Human Rights Act 1998,137 if the Convention right in question applies extraterritorially.

1.68 The question of whether the right of access to a court under Article 6 applies extraterritorially, and can potentially be affected by the effect of anti-suit injunctions in the foreign state, is more difficult.
1.69 The general principle of the Strasbourg case law is that Article 1 only requires the contracting states to ensure compliance with the Convention rights within their jurisdiction, which is principally their territorial jurisdiction. Acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases. Exceptional cases may include where the state exercises effective control over an area in the foreign state; or even where state agents exercise physical power and control over the applicant in the foreign country, although the scope of the rights that apply to him will be tailored to the nature of the control. In some cases, the Convention has been applied to the exercise of extraterritorial jurisdiction by national judges, albeit in cases where this has occurred with the consent of the ‘receiving’ state.

(p. 24) 1.70 Understanding whether this would apply in respect of the right of access to a court is not self-evident. The existing Strasbourg case law on the right of access to the court under Article 6 concerns only the obligations of states to protect, and not impede, the right of access to their own courts. If this approach is extrapolated, the originating state will not have any general responsibility to ensure that individuals can access the courts of the foreign state, nor any obligations in respect of the fairness of proceedings in that state, which may not be party to the Convention.

1.71 However, the ECtHR has held that in extradition and deportation cases, Article 6 has a limited extraterritorial effect. A contracting state will breach Article 6 if the extradition or deportation creates a real risk that the individual will suffer a ‘flagrant denial of justice’ in the receiving state, a phrase which is intended to set a higher threshold than a mere breach of Article 6. These decisions do not expressly concern the extraterritorial application of the right of access to the court. Nevertheless, it is suggested that the Strasbourg Court might well conclude that the right of access to a court does have extraterritorial effect, at least in respect of rights of access to the courts of other contracting states. The injunction’s effects on rights of access to courts in other countries are immediate and direct, and certainly ‘proximate’. Further, the exercise of control by injunction could be viewed as analogous to the case where a state agent exercises physical power and control over the applicant in the foreign state. Consequently, the grant of anti-suit injunctions may well be treated as one of those exceptional situations where the Convention rights can have extra-territorial effect.

1.72 In McElhinney v Ireland, the ECtHR was apparently prepared to accept, when considering whether Ireland had unjustifiably restricted access to its own courts, that the ability of the applicant to access the courts of the United Kingdom for the determination of the same matters was a material factor against a finding that Article 6 had been infringed, illustrating that the right of access to a court can legitimately be assessed on a transnational basis.

1.73 However, even if the right of access to a court does apply extraterritorially, it remains to be seen whether it will only apply to prevent ‘flagrant denials of justice’, or whether it will apply according to its ordinary logic without requiring a higher threshold. The reasons for the limited scope of the extraterritorial obligation in the extradition cases include the uncertainty of predictions as to an individual’s future treatment, and the point that the extraditing state will not itself be directly involved in any violation of the applicant’s rights. In contrast, where an anti-suit injunction is granted, any potential interference with the injunction defendant’s rights of access to a court will follow directly from the orders of the courts of the state whose responsibility is said to be engaged. It is arguable that the right of access to the courts will apply to anti-suit injunctions extraterritorially without qualification.
The discussion will proceed on that assumption; but it must be borne in mind that some higher threshold might be required.

3. The Right of Access to a Court and Contractual Anti-Suit Injunctions

1.74 Even if no higher threshold for the application of the right of access is required, the argument that anti-suit injunctions infringe the right of access to a court has little force in the standard ‘contractual’ case where an anti-suit injunction is sought to enforce an exclusive forum clause. The Strasbourg Court accepts that a party may ‘waive’ his Article 6 rights by a freely chosen exclusive arbitration clause.\(^{150}\) There is no good reason why the same should (p. 26) not apply to exclusive court jurisdiction clauses. In turn, if a party has waived his Article 6 rights to access a particular court, there is no right which the anti-suit injunction could infringe. This is consistent with the reasoning of Popplewell J in *Mauritius Bank v Hestia*, where without reference to the waiver case law he concluded that a unilateral jurisdiction clause was not inconsistent with Article 6, because: ‘Article 6 is directed to access to justice within the forum chosen by the parties, not to choice of forum.’\(^{151}\) There might, however, be more credible Article 6 issues in cases where the consent of a party to the forum clause is deemed rather than real, since the waiver ‘must be made in an unequivocal manner’, and be ‘knowing’ and ‘voluntary’.\(^{152}\)

1.75 In addition, in *The Kribi*, Aikens J rejected an argument that Article 6 should preclude him from granting a contractual anti-suit injunction, without referring to the argument that the exclusive jurisdiction clause had waived the injunction defendant’s rights of access to a court, on the simple and neat ground that the right of access to ‘a’ court does not entail a right of access to the court of your choice.\(^{153}\)

(p. 27) 1.76 It is therefore submitted that where there is a clear contractual agreement to the exclusive forum clause any case for breach of Article 6 is unpromising.

4. The Right of Access to a Court and Alternative Forum Cases

1.77 The reasoning used by Aikens J in *The Kribi*, if correct, would also apply to all non-contractual alternative forum cases. However, it is not clear that Aikens J is right. A restriction on access to a particular court can in practice amount to a material hindrance on your rights of access to courts generally, especially where the restriction on your choice requires you to use one legal system rather than another. In another legal system, different procedural rules will operate, and if the choice of law rules are different, a different substantive law might also apply. Instead, the relevance of the availability of another court may well be that it reduces the seriousness of the restriction on access, and renders it more easily justifiable.\(^{154}\) So it may well be necessary to consider whether the restrictions imposed by non-contractual alternative forum injunctions are permissible.

1.78 The Strasbourg case law makes clear that the right of access to a court does not entail unrestricted access to any court at all, still less to the court of your choice. It is not an absolute right, but may be subject to limitations, provided those limitations do not impair the very essence of the right, pursue a legitimate aim, and comply with proportionality.\(^{155}\) Thus, the various mechanisms by which legal systems terminate or stay unmeritorious litigation before them, or deny their own jurisdiction over litigation, can in principle be compatible with the right of access to a court enshrined in Article 6.\(^{156}\) In particular, the English provisions restricting the commencement of actions by vexatious litigants before the English courts themselves are compatible with Article 6.\(^{157}\)

1.79 However, from the point of view of the right of access to a court, the principal and perhaps only difference between the courts of state X granting an injunction to restrain vexatious litigation (or litigation in breach of contract) in state Y, and state Y itself staying or dismissing such litigation, is the identity of the decision-maker. Consequently, in an alternative forum case, the only restriction which an anti-suit injunction inherently involves
is a restriction of the right to select the court that will make the decision. There is no obvious reason why the right of access to a court should carry within it a right to insist that the question as to whether a party can proceed with his litigation in state X must be decided (p. 28) in state X rather than state Y, as the substantive effect on the party’s actual access to a court is broadly the same. This illustrates that many arguments against the anti-suit injunction which purport to be based on human rights are in reality driven by a hidden assumption as to what comity requires, and do not in truth derive from the right of access to a court.\textsuperscript{158} So the degree of restriction on the right of access to a court imposed by a normal alternative forum anti-suit injunction is limited, even in a non-contractual case.

1.80 In many alternative forum cases, the injunction is granted to prevent a party from proceeding with duplicative litigation in a second court when the substance of his dispute is already being litigated in the injuncting court. The desire to proceed with duplicative litigation, which \textit{ex hypothesi} will have been found to be vexatious and oppressive, does not deserve, and is unlikely to attract, extensive protection from the Strasbourg Court. It can be argued with force that the limitations imposed by normal alternative forum injunctions pursue a legitimate aim\textsuperscript{159} and will be proportionate. Indeed, the injunction claimant’s right not to be vexed and oppressed by duplicative litigation could also be viewed as an element of his own right to a fair trial.

1.81 However, even if the restrictions imposed by an anti-suit injunction were viewed as pursuing a legitimate aim (such as preventing vexatious litigation), it is by no means certain that the ECtHR would always accept that it was a proportionate method of pursuing that aim.

1.82 In particular, in alternative forum cases there could be situations where the inability of a party to obtain a determination of whether he can proceed before the courts of state X from those very courts could be viewed as a material restriction on the effectiveness of his rights of access to a court, for example where the party in question was a consumer resident in state X, and it would be burdensome for him to be involved in proceedings in state Y.\textsuperscript{160}

1.83 Consequently, it is arguable that the English court should, in appropriate cases, take account of the possibility of restrictions on the right of access to a court in the exercise of its discretion whether or not to grant the injunction. However, it is to be hoped that the requirements of English law—such as that the injunction should only be granted when ‘the ends of justice’ require it, and that it should not be granted if it would ‘deprive the [injunction defendant] of advantages in the foreign forum of which it would be unjust to deprive him’\textsuperscript{161}—will already have created an adequate level of protection. If so, then save in marginal cases it may not be necessary to perform a second analysis specifically directed to Article 6.\textsuperscript{162}

\textbf{(p. 29) 5. Article 6 and Single Forum Cases}

1.84 Article 6 is most likely to be relevant in ‘single forum’ cases (discussed in Chapter 5, section D), where the grant of an injunction will not merely deprive the litigant of his choice of court but will also prevent him from bringing a particular claim, which can only be brought in one forum, in the only forum where it can be brought. The Strasbourg Court has held that while procedural restrictions on the exercise of a right are permissible, ‘the limitations applied must not restrict or reduce the individual’s access in such a way or to such an extent as to impair the very essence of the right.’\textsuperscript{163} It is submitted that this does not mean that a single forum injunction is inherently irreconcilable with the right of access to a court.\textsuperscript{164} Single forum injunctions will only be granted if there is something inappropriate about the targeted forum. If a party can effectively exercise such rights as he has under the appropriate law, as determined by an appropriate set of choice of law rules in the appropriate forum, the fact that the injunction will prevent him from exercising a right which only arises in an inappropriate forum should not be regarded as a necessarily...
disproportionate restriction on his exercise of his rights. By analogy, Article 6 would not prohibit the striking out of claims by the court before which the proceedings were brought on the grounds that they are vexatious or oppressive, or an abuse of process, or brought in the wrong forum. Nevertheless, the possibility of tension with Article 6 is real. This suggests, first, that greater caution should be exercised before concluding that the grant of a single forum injunction is indeed in ‘the interests of justice’ (a requirement which is in any event part of English law), and second, that tampering with the high thresholds required for the grant of a single forum injunction could well lead to Article 6 problems.

**F. Anti-Suit Injunctions and Public International Law**

1.85 It is a long-established principle of public international law that the territorial sovereignty of independent states, including their adjudicatory sovereignty, should in general not be interfered with by other states, although this principle is not absolute.\textsuperscript{165} However, the implications of the principle of territoriality for the exercise of extraterritorial civil jurisdiction by states remain uncertain. A rigid application of the concept of territorial sovereignty to the exercise of civil jurisdiction internationally would be unworkable,\textsuperscript{166} and would not represent state practice. Indeed, it has been suggested that customary international law imposes (p. 30) no material limitations on the exercise of civil jurisdiction by municipal courts, other than established restrictions such as diplomatic and sovereign immunity.\textsuperscript{167} Even if, as is likely, public international law does place certain substantive limitations on the exercise of municipal civil jurisdiction internationally, the restrictions imposed are neither numerous nor constricting.\textsuperscript{168} A possible summary of the boundary drawn by the modern law is that the courts of a state can exercise jurisdiction over acts of a foreigner in a foreign state so long as there is a ‘sufficiently close connection to justify the first state in regulating the matter’.\textsuperscript{169} Brownlie suggests that ‘there should be a real and not colourable connection between the subject-matter and the source of the jurisdiction ... the principle of non-intervention in the territorial jurisdiction of other states should be observed, notably in an enforcement context. Elements of accommodation, mutuality and proportionality should be taken into account.’\textsuperscript{170}

1.86 This language is similar to the tests of comity applied to the grant of anti-suit injunctions by the English courts since Airbus v Patel.\textsuperscript{171} However, the coincidence of phrasing by no means guarantees the international legitimacy of the English court’s practice of granting relief, as public international law might not accept the English view that there can be a sufficiently close connection between the originating court and the pursuit of litigation abroad by the injunction defendant, either at all or in any particular case.

1.87 Nevertheless, it seems, on the basis of the available materials, that customary international law does not materially conflict with the exercise of the current English principles that govern the power to grant anti-suit relief.

1.88 First, the principle of territorial sovereignty is a rule of customary international law derived from state practice. Anti-suit injunctions have been granted by common law courts for centuries without any apparent diplomatic protest by foreign states,\textsuperscript{172} and with only limited occasions of significant judicial objection. In the circumstances, there is a forceful argument that state practice cannot support the conclusion that the principle of territorial sovereignty contains within it a prohibition of anti-suit injunctions.\textsuperscript{173} Indeed, so far as there is state practice it would appear to establish rather than refute the legitimacy of anti-suit injunctions.

1.89 Second, the English courts have concluded that anti-suit injunctions can be reconciled with public international law, although the analysis has been relatively shallow. As discussed,\textsuperscript{174} the argument that there was a conflict between the principle of territorial sovereignty and the grant of anti-suit injunctions was rejected by the English courts in Bushby v Munday,\textsuperscript{175} on the basis that the injunction was granted against the defendant
only, and did not interfere with the courts of the foreign state. Similarly, arguments that anti-suit injunctions to enforce arbitration clauses are inconsistent with the New York Convention have met with curt rejections by the English courts.\(^{176}\)

1.90 Third, there is some support in international law writings for the conclusion that anti-suit injunctions can, in principle, be reconciled with international law. The International Law Association has recognized the legitimacy of anti-suit injunctions in limited circumstances which are seemingly modelled on the conditions imposed by English law;\(^ {177}\) and (p. 32) anti-suit injunctions have also received the approval of some ‘highly qualified publicists’\(^ {178}\) on international law.\(^ {179}\) There are civil law writers who have adopted the contrary view, but thus far their arguments have consisted largely of assertion, and are not grounded in state practice.\(^ {180}\)

G. The Hague Convention on the Choice of Court

1.91 The Hague Convention on the Choice of Court agrees a common regime for the protection of exclusive jurisdiction clauses and the enforcement of judgments. It came into force with effect from 1 October 2015, but at the time of writing this section (1 May 2019), has been acceded to only by Mexico, the EU, Denmark, Montenegro, Singapore, and the United Kingdom.\(^ {181}\) Within its scope, the Convention confers a mandatory exclusive jurisdiction on the court designated by an exclusive jurisdiction clause, which is similar to, and overlaps with, the jurisdiction created by Article 25 of the Brussels I Recast,\(^ {182}\) and creates a mutual regime for the enforcement of judgments given by the courts designated by such a clause.

1.92 Since the Convention creates a coordinated regime for jurisdiction and the mutual recognition of judgments between the contracting states, in cases where there is a relevant exclusive jurisdiction clause selecting one of the contracting states, the question arises whether, like the Brussels–Lugano regime, it will preclude anti-suit injunctions between its contracting states. But the Convention does not purport expressly to abolish the anti-suit injunction within its domain, and it is implausible that common law members of the Hague Conference, like the USA, should be read as having consented tacitly to abolition by omission. Indeed, it is clear from the Travaux Préparatoires\(^ {183}\) that the Convention on Choice of Court was not intended to preclude anti-suit injunctions to protect proceedings in the chosen court.\(^ {184}\) Whether and to what extent the Hague Convention may affect the principles for, or exercise of discretion in relation to, the grant of anti-suit injunctions remains to be seen.\(^ {185}\)

H. The New York Convention

1.93 It has been argued that the New York Convention 1958 precludes the grant of anti-suit injunctions to enforce arbitration clauses as between contracting states. Article II.3 requires the courts of the contracting states, when seised of an action covered by an arbitration clause, to ‘refer’ the matter to arbitration. The simplest and most direct argument is that this gives exclusive ‘negative’ competence to the courts seised with the substantive litigation, and thereby precludes the involvement of the court of the seat.\(^ {186}\) However, this is not convincing, save to those with a preconceived idea that anti-suit injunctions are inconsistent with international comity, and who are casting around for a weapon. Article II(3) simply does not address the question of whether or how arbitration clauses may be enforced by courts other than the court seised with the litigation; it does not confer exclusive jurisdiction on the court seised.\(^ {187}\) The imposition by Article II(3) of a duty to ‘refer’ on the court seised is not inconsistent with other courts enforcing the same policy by injunction.\(^ {188}\) The Travaux Préparatoires show that the subject was never addressed;\(^ {189}\) it is most unlikely that the common lawyers that participated in the formulation of the Convention envisaged that it was abolishing anti-suit injunctions to enforce an arbitration clause; and the civil lawyer participants were probably not aware of the issue at
all, given its lesser prominence at that time. The Convention is not a closed system analogous to the Brussels–Lugano regime because it does not control the jurisdiction of the courts of contracting states.\(^{190}\) Were the (p. 34) argument for preclusion to be correct, it would also shut out the grant of anti-suit awards by arbitrators, which is now a growth industry.

1.94 In *The Front Comor*, the ECJ briefly addressed the relationship between the New York Convention and anti-suit injunctions in somewhat ambiguous terms, which could be read as supporting the proposition that the court seised should have exclusive jurisdiction.\(^{191}\) But this is by no means clear; it may well be that the ECJ, like its Advocate General, was only observing, correctly, that the court seised had a jurisdiction of its own to enforce the arbitration clause, in support of its other conclusions of European Law,\(^{192}\) and the ECJ has no power to interpret the New York Convention; if it was trying to do so, it was wrong. It is also commonly thought that the reasoning in *The Front Comor* was not the ECJ’s finest hour;\(^{193}\) and when the ECJ returned to anti-suit injunctions and arbitration in *Gazprom*, there was no suggestion of any inconsistency between the anti-suit injunction and the New York Convention.\(^{194}\)

1.95 The English courts have firmly rejected all arguments that the New York Convention precludes the grant of anti-suit injunctions to enforce arbitration clauses.\(^{195}\) It seems that a similar approach prevails in the USA.\(^{196}\)

1.96 A more subtle argument would avoid absolutism, and focus on the demands of comity in the context of the New York Convention. It could be suggested, in particular, that since the (p. 35) New York Convention envisages that the court seised will assess whether the arbitration clause is void, inoperable, or incapable of being performed, and implicitly accepts that it will do so applying its own conflicts of rules, so respect for the application of the other court’s conflicts rules is consistent with the spirit of the Convention.\(^{197}\) In turn, this could support the proposition that the grant of an injunction to impose the substantive law selected by English conflicts of laws rules, even where the foreign conflict rules would select a different substantive law, may be in tension with the spirit of, and implicit allocation of jurisdiction under, the Convention. If accepted, arguments along these lines could support a greater regard for the ‘conflict of conflicts’ than has so far been shown by the English courts.\(^{198}\)

1.97 Arguments based on the New York Convention have more force in respect of anti-arbitration injunctions which restrain the pursuit of arbitration proceedings with a seat abroad—where, in any event, the English courts only grant injunctions in very limited circumstances.\(^{199}\) However, it is important to distinguish two situations.

1.98 First, if a national court concludes that there is no binding foreign arbitration clause, the grant of an injunction to restrain the pursuit of the arbitration cannot be inconsistent with the New York Convention obligation to refer matters to arbitration, as *ex hypothesi* in the absence of a valid arbitration clause, the New York Convention obligation is not engaged. The argument that it should be for the court of the seat, not the injuncting court, to assess whether or not the arbitration clause is binding may have force as a matter of comity, but it is not an obligation that follows from the terms of the New York Convention itself: the Convention does not allocate any exclusive jurisdiction to the court of the seat, although Article V(e) does indicate the importance of the court of the seat.

1.99 The argument that anti-arbitration injunctions may be in tension with the New York Convention is at its strongest where it is accepted that there is a binding arbitration clause, and an anti-arbitration injunction is nevertheless sought to restrain the pursuit of the arbitration. In such a case there is a real prima facie sense in which interfering with the foreign arbitration could be in tension with the obligation to ‘refer’ to arbitration.\(^{200}\) The English courts have, rightly, adopted a restrictive approach to the grant of injunctions in these situations.\(^{201}\) Nevertheless, it is submitted that the New York Convention does not
justify an absolute prohibition. Such injunctions can be justified on the basis that they enforce separate obligations which are not inconsistent with the arbitration clause: if, for example, the pursuit of the arbitration would be duplicative and would amount to vexatious and oppressive interference with existing national proceedings, then an injunction would be enforcing the separate obligation not to act vexatiously. There will also be cases where, as a matter of practical justice, a national court which is not the court of the seat is the appropriate forum to assess the question of whether proceedings should be permitted to proceed in arbitration; for example where a party has already litigated and lost in that court, and a party seeks to pursue a duplicative arbitration on the same facts. In principle, the position is not so very different to where an English court is asked to restrain proceedings before another court selected by an exclusive jurisdiction clause: there must be some very good reason why the English court would be an appropriate court to interfere, and in general strong factors of comity tending against an injunction, but no absolute bar to the grant of an injunction.

I. Brexit

1.100 On 23 June 2016 the majority of voters in the referendum on the United Kingdom’s membership of the EU voted to leave the Union. That referendum was advisory and not self-executing, and at the date of writing this section (1 May 2019) its consequences remain uncertain in a number of dimensions. The Article 50 deadline has been extended to 31 October 2019, and it is still uncertain whether Brexit will happen, and if so when and on what terms; and it is also uncertain what will happen if there is no deal. This matters because English jurisdictional and choice of law rules are at present in large part contained in the European jurisdictional and choice of law instruments, in particular the Brussels I Recast and New Lugano Convention and the Rome I and Rome II Regulations. While it seems likely that the choice of law regime will at least initially remain the same whatever happens, there is uncertainty as to the future for civil jurisdiction and the enforcement of judgments. There is a range of different possibilities, including continuation of or reversion to something very similar to the existing arrangements, during an initial transition period and perhaps even thereafter as part of the final status arrangements, but also including a breakdown of civil justice cooperation and a reversion to the common law, subject to the continued effect of the Hague Convention on the Choice of Court.

1.101 So there are very different paths that English private international law may take. Which path we go down will affect a range of issues discussed in this work. Most directly it will affect the jurisdictional rules discussed in Chapters 16-18, and the constraints imposed on anti-suit injunctions by the Brussels-Lugano regime, discussed in Chapter 12. For the most part, this work proceeds on the assumption that something rather similar to the existing regimes will be preserved, but the position will need to be reviewed.

Footnotes:

1 A Briggs, ‘Anti-Suit Injunctions and Utopian Ideals’ (2004) 120 LQR 529, 530, observes that ‘as an antidote to jurisdictional shenanigans its usefulness is second to none’.


3 In this work, ‘England’ will be used as a convenient abbreviation for England and Wales, and ‘English law’ likewise. Readers on the other side of Offa’s Dyke are asked to forgive this.
Injunctions to restrain arbitrations in England are traditionally viewed as part of the court’s supervisory jurisdiction over arbitration, rather than as anti-suit injunctions: Ch 11.

Bank of Tokyo v Karoon [1987] AC 45 (Note) (CA) 59F.

See eg AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2013] 1 WLR 1889 (HL) [25], [58].

Turner v Grovit [2002] 1 WLR 107 (HL) [16], [23]. In Australian Broadcasting v Lenah Game Meats (2001–02) 208 CLR 199 (Aus HC) 243, Gummow and Hayne JJ referred to ‘what are somewhat loosely called anti-suit injunctions’.

Lord Hobhouse’s relabelling should be seen as a one-off rhetorical device aimed, without success, at making the anti-suit injunction appear respectable to the European Court of Justice. His use of ‘restraining order’ formed part of his opinion on the question of whether the anti-suit injunction was compatible with the Brussels–Lugano regime, which the House of Lords was referring to the European Court. The linchpin of his argument that the injunction was unobjectionable was the contention that it was a merely personal remedy. So, language which shifted the jurisprudential focus onto the litigant abroad and away from the foreign proceedings was helpful. But the European Court was unmoved, viewing any such ‘prohibition’, however labelled, as incompatible with the Brussels–Lugano regime: Case C-159/02, Turner v Grovit [2004] ECR I-3556 [27]. In Donohue v Armco [2002] 1 Lloyds Rep 425 (HL) [43], [45], decided by the House of Lords on the same day that it ordered the reference in Turner, Lord Hobhouse was content to refer to the ‘anti-suit injunction’ (albeit on one occasion in inverted commas).


Donohue v Armco [2002] 1 Lloyds Rep 425 (HL) [19]-[20].


Case C-159/02, Turner v Grovit [2004] ECR I-3565. The restrictive effect of European jurisdictional law (so long as it applies) is discussed in Ch 12.

See C McLachlan, Lis Pendens in International Litigation (Martinus Nijhoff 2009).

However, Australia is something of a cavalier seul on jurisdictional questions because of its rejection of the doctrine of forum non conveniens in Voth v Manildra Flour Mills (1990) 171 CLR 538 (HCA).

Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] AC 871 (PC) (Brunei); Stichting Shell Pensionfonds v Krys [2015] AC 616 (PC) (British Virgin Islands, on appeal from the Eastern Caribbean Court of Appeal).

The leading case in Australia is CSR v Cigna Insurance Australia (1997) 189 CLR 345 (HCA).

Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] AC 871 (PC) (Brunei); Stichting Shell Pensionenfonds v Krys [2015] AC 616 (PC) (British Virgin Islands, on appeal from the Eastern Caribbean Court of Appeal).


Singapore law is discussed in Ch 19. New Zealand law is discussed in Ch 20.


Young v Barclay (1846) 8 D 774 (Ct of Sess); Dawson’s Trustees v Macleans (1860) 22 D 685 (Ct of Sess); Pan American Airways v Andrews [1991] ILPr 41 (Ct of Sess); Shell UK Exploration and Production v Innes (1995) SLT 807 (Ct of Sess); FMC v Russell (1999) SLT 99 (Ct of Sess); P Beaumont and P McElheavy, Anton’s Private International Law (3rd edn, Sweet & Maxwell 2011) paras 8.425–8.438. The modern Scottish cases have all treated Aérospatiale as stating Scots law and have identified no material difference to English law.


In 1989 the Brussels Civil Court held that an American anti-suit injunction could not be recognized in Belgium because it was repugnant to Belgian public policy and Article 6 of the European Convention on Human Rights (ECHR): Civ Bruxelles (18 December 1989) RW 1990–91, 676. In 1996, the Dusseldorf Regional Court of Appeal similarly declined to
enforce an English anti-suit injunction saying that it interfered with the jurisdiction of the German court: *Re the Enforcement of an English Anti-Suit Injunction* [1997] IL PR 73. For civil law academic writers who have expressed opposition to anti-suit injunctions, see nn 26 and 82.


30 *Stolzenberg v Daimler Chrysler Canada* [2005] ILPr 24 (Cours de Cassation) [4].


Similarly the Belgian courts have granted a form of anti-anti-suit injunction: Civ Bruxelles (18 December 1989) RW 1990–91, 676; noted in JT (1992) 438 (Note H Born and M Fallon); and commented on by A Nuyts, ‘Les principes directeurs de l’Institut de Droit International sur le recours à la doctrine du forum non conveniens et aux anti-suit injunctions’ (2003) 2 Revue Belge de Droit Intl, 536, 552-53. But this may be an isolated instance: R Asariotis,

Finally, an anti-arbitration injunction has apparently been granted by the Brazilian courts: Curitiba Court of First Instance (23 June 2003) Compania Paranaense de Energia (COPEL) v UEG Arancaria, discussed in A Lakatos and M Hilgard, 'Anti-Suit Injunctions in Defence of Arbitration: Protecting the Right to Arbitrate in Common and Civil Law Jurisdictions’ Part II (2008) 2 Bloomberg Eur L J 41 . However, Lakatos and Hilgard doubt that the anti-suit injunction is really part of Brazilian law.


A non-contractual anti-suit injunction has, it seems, been granted by the Supreme Court of Germany long ago in an international divorce case, Reinhard RG 03/03/1938, RGZ 157 (referred to in F Schlosser, ‘Anti Suit Injunctions in International Arbitration’ (2006) RIW 486 and M Lenenbach, ‘Anti-Suit Injunctions in England, Germany and the United States: Their Treatment under English Civil Procedure and the Hague Convention’ (1997–98) 20 Loy LA Intl & Comp L 257, 273–74). However, the decision has been described as dubious and not generalizable: H Schack, ‘Germany’ in J Fawcett (ed), Declining Jurisdiction in Private International Law (OUP 1995), 189 at 204; see also A Dutta and C Heinze, ‘Anti-Suit Injunctions to Protect Arbitration Agreements’ (2007) RIW 411, stating that anti-suit injunctions are not available in German law and A Lakatos and M Hilgard, ‘Anti-Suit Injunctions in Defence of Arbitration: Protecting the Right to Arbitrate in Common and Civil Law Jurisdictions’ Part II (2008) 2 Bloomberg Eur L J 41 , stating that anti-suit injunctions are not available in German law. N Sifakis, ‘Anti-Suit Injunctions in the European Union: A Necessary Mechanism in Resolving Jurisdictional Conflicts?’ (2007) 13 JIML 100, 104, suggests that anti-suit injunctions may be available in Germany, but this seems to be out of line. The Oberlandesgericht (Dusseldorf), when rejecting an application for an anti-suit injunction to restrain the pursuit of proceedings before the German Cartel Office, accepted that such a power existed in principle, but rejected the injunction because the necessary ‘special need for legal relief’ by way of a preventative measure had not been made out. See I Klass, ‘Case Comment: Oberlandesgericht (Dusseldorf) (DFL) (VI-Kart 1/09 (V)’ [2010] ECLR N42–N43. But this domestic situation sheds little light on what would happen in relation to anti-suit injunctions to restrain proceedings before foreign courts.


41 Case C-536/61, Gazprom, EU:C:2015:316; AG [134], [188]. The ECJ did not feel the need to follow him on these points. See also European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI)), which at Recital M and para 10 recommended the reinstatement of anti-suit injunctions to enforce an arbitration clause. However, this was not picked up by the European Commission’s drafting. The argument that Recital 12 of the Brussels I Recast removes the European preclusion of anti-suit injunctions to enforce arbitration clauses is not convincing: see Ch 12, paras 12.19-12.27.


43 British Airways Board v Laker Airways [1984] QB 142 (CA) 186H.

44 Buck v Attorney General [1965] Ch 745 (CA) 770D, per Diplock LJ; Treacy v Director of Public Prosecutions [1971] AC 537 (HL) 561F-562C.

45 M Akehurst, ‘Jurisdiction in International Law’ (1972-73) 66 BYBIL 145, 214-16.


47 Luther v Sagor [1921] 3 KB 532 (CA) 554-56; Buck v Attorney General [1965] Ch 745 (CA) 768E, 770G; Yukos Capital v Rosneft Oil [2014] QB 458 (CA) [66]; although this is subject to qualifications: Belhaj v Straw [2015] 2 WLR 1105 (CA) [53]-[55], [65]-[67], [2017] AC 964 (SC) [12], [56], [89], [222], [225].


49 JSC Bank of Moscow v Kekhman [2015] 1 WLR 3737, [59].


51 Barclays Bank v Homan [1993] BCLC 680, 690, 692; Yukos Capital v Rosneft Oil [2014] QB 458 (CA) [87], [125]: ‘comity … cautions that the judicial acts of a foreign state acting
within its territory should not be challenged without cogent evidence'; *Stichting Shell Pensionenfonds v Krys* [2015] AC 616 (PC) [42].

52 Thus, comity imposes fewer restraints on English courts where the foreign court seeks to exercise exorbitant jurisdiction over matters which do not fall within its own natural sphere of influence: *British Nylon Spinners v Imperial Chemical Industries* [1953] Ch 19 (CA) 27, 28; *Yukos Capital v Rosneft Oil* [2014] QB 458 (CA) [128]; or in a way contrary to international law: see, by analogy, *Kuwait Airways v Iraqi Airways* [2002] 2 AC 883 (HL) [24]-[29]. See *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871 (PC) 894D–E and *Stichting Shell Pensionenfonds v Krys* [2015] AC 616 (PC) [42].

53 *Airbus Industrie v Patel* [1999] 1 AC 119 (HL) 140D; *Deutsche Bank v Highland Crusader Offshore Partners* [2010] 1 WLR 1023 (CA) [50].

54 *Deutsche Bank v Highland Crusader Offshore Partners* [2010] 1 WLR 1023 (CA) [50]. In the USA, see *Hilton v Guyot* 159 US 113 (1895) (US Sup Ct) 163–65; *Somportex v Philadelphia Chewing Gum*, 453 F 2nd 435 (3rd Cir 1971) 440; cert denied 405 US 1017 (1972).

In *Ecobank Transnational v Tanoh* [2016] 1 WLR 2231 (CA), the Court of Appeal discussed comity in terms that suggested it was principally relevant as a matter of transnational case management. These comments should be seen as focused on the contractual case before the court; and should not be interpreted as creating any new principle in non-contractual situations. The law in a line of cases from *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871 (PC), to *Airbus Industrie v Patel* [1999] 1 AC 119 (HL), to *Deutsche Bank v Highland Crusader Offshore Partners LP* [2010] 1 WLR 1023 (CA) and *Stichting Shell Pensionenfonds v Krys* [2015] AC 616 (PC), firmly establishes that, at least outside the contractual case, comity does operate to discourage interference as a question of principle and judicial sovereignty, and not merely transnational case management.

55 See Ch 4, section L, ‘Comity’.


57 *Midland Bank v Laker Airways* [1986] QB 689 (CA) 705D. See also *R Griggs Group v Evans* [2005] 1 Ch 153, 159H–160B:

In general, however, when our courts say that they intend to refrain from making a particular order because it would be a breach of international comity, they mean that, in their judgment, a foreign court would reasonably construe it as an invasion of the sovereignty of its country, and resent it accordingly. We do not mean to offend foreign courts, as by seeming to undermine their jurisdiction and authority, and expect a similar degree of self-imposed judicial restraint on their side. But how do we know where to draw the line? At times the line is tolerably clear, because it has been drawn in our own case law, or because it is demarcated by established concepts of international law. At other times the line is less clear.

58 *Love v Baker* (1665) 1 Chan Cas 67, 22 ER 698, (1664–65) Nels 103, 21 ER 801; also *sub nom Lowe v Baker* (1665) 2 Freem Chy 125, 22 ER 1101 (a claim for an injunction to restrain proceedings in the courts of Leghorn, that is to say Livorno).

were, in substance, that the common injunction was a disregard of the ‘comity’ owed to them by the Court of Chancery.

60 In *Beazley v Horizon Offshore Contractors* [2005] Lloyds Rep IR 231, it was argued that the European Court of Justice’s decision in Case C-159/02, *Turner v Grovit* [2004] ECR I-3565 should lead the English courts to review their view that anti-suit injunctions were compatible with comity, but this was rejected: ‘The idea that the European Court of Justice has revealed “the emperor’s new clothes” of the common law is fanciful. In recent times the common law has had a punctilious regard for the position of affected jurisdictions’ (at [39]). Similar arguments were dismissed in *Midgulf International v Group Chimique Tunisien* [2010] 2 Lloyds Rep 543 (CA) [66]–[69].

61 *Bushby v Munday* (1821) 5 Madd 297, 56 ER 908, 913, followed in *Stichting Shell Pensionenfonds v Krys* [2015] AC 616 (PC) [17]; see also *Ecobank Transnational v Tanoh* [2016] 1 WLR 2231 (CA). In *Amchem Products v British Columbia (Workers Compensation Board)* [1993] 1 SCR 897 (Can SC) 912, the approach taken in *Bushby v Munday* was viewed as ‘parochial’.

62 *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871 (PC) 892C; and see the doubts expressed in *Philip Alexander Securities and Futures v Bamberger* [1997] ILPr 73 (CA) [48].


66 See eg in *Airbus Industrie v Patel* [1999] 1 AC 119 (HL); *Star Reefers v JFC Group* [2012] 1 Lloyds Rep 376 (CA); *Stichting Shell Pensionenfonds v Krys* [2015] AC 616 (PC).

67 Arguments based on comity were advanced by the injunction defendant in *West Tankers v Ras Riunione Adriatica di Sicurtà (The Front Comor)* [2007] 1 Lloyds Rep 391 (HL) but Lord Hoffmann dismissed them by a curt reference to the first instance judge’s reasoning: at [6]. However, Colman J had regarded the point as a matter of precedent, not principle, and had alluded to it only briefly: *West Tankers v Ras Riunione Adriatica di Sicurtà (The Front Comor)* [2005] 2 Lloyds Rep 257 [51], [55]. Comity challenges based on the European Law approach were mounted in *Beazley v Horizon Offshore Contractors* [2005] Lloyds Rep
IR 231 and in *Midgulf International v Group Chimique Tunisien* [2010] 2 Lloyds Rep 543 (CA) [66]-[69], but did not get far.


69 In *The Front Comor*, the House of Lords made clear that they viewed the anti-suit injunction as a valuable and legitimate part of the court’s armoury—*West Tankers v RAS Riunione Adriatica di Sicurta (The Front Comor)* [2007] 1 Lloyds Rep 391 (HL) [21], [28]-[30]—and gave short shrift to arguments that comity should preclude the grant of anti-suit injunctions: see n 67. The Privy Council has recently reasserted the equitable basis of the remedy: *Stichting Shell Pensionfonds v Krys* [2015] AC 616 (PC).

70 In *Continental Bank v Aeakos* [1994] 1 Lloyds Rep 505 (CA) 511–12, the evidence of Greek procedure was that it was impossible to make a jurisdictional challenge without filing an expensive defence to the action at the same time.


73 *Re the Enforcement of an English Anti-Suit Injunction* [1997] ILPr 320 (Oberlandesgericht Düsseldorf); Case C-24/02, *Marseilles Fret v Seatrano Shipping* [2002] ECR I-3383 (Tribunal de Commerce de Marseille); *Shifco Somali High Seas International Fishing v Davies* (Tribunale di Latina, Italy, 29 May 2003) (an anti-suit injunction was an ‘evident and fraudulent violation of the convention rules’).

74 H van Houtte, ‘May Court Judgments that Disregard Arbitration Clauses and Awards be Enforced under the Brussels and Lugano Conventions?’ (1997) 13 Arb Intl 85, 91.

75 There would also, in theory, be a danger that in a dispute between A and B, the courts of state X might restrain party A from litigating on the merits before the courts of state Y, while the courts of state Y might restrain party B from litigating in the courts of state X. If this were to happen, the parties would find themselves stymied—no one would be able to commence or continue substantive proceedings on pain of punishment. This was one of the objections raised by AG Kokott in Case C-185/07, *Allianz v West Tankers (The Front Comor)* [2009] ECR I-663, AG [72]. It is an uncommon scenario. There appear to be two examples in the reported English cases: *Amoco (UK) Exploration v British American Offshore* [1999] 1 Lloyds Rep 772, 776; and the situation resulting from the decision in *Petter v EMC* [2016] ILPr 3 (CA) (see Ch 4, paras 4.44–4.46). It can be avoided so long as the courts do not take an unjustifiably expansive approach to the anti-suit injunctions. The fact that this problem has apparently occurred in *Petter* is an illustration of the dangerously expansive nature of that decision: see T Raphael, ‘Do as You Would be Done By? System-Transcendent Justification and Anti-Suit Injunctions’ (2016) LMCLQ 256.

76 For an example of an anti-anti-anti-suit injunction, see *GE Francona Reinsurance v CMM Trust No 1400* [2004] EWHC 2003 [10]. In theory the iteration could continue; but in reality, one does not tend to go further down the chain. Sufficiently broad drafting will ensure that an anti-anti-suit injunction is also in effect an ‘anti-anti-anti-anti-suit injunction’.

77 Laker Airways Ltd, a British airline flying transatlantic, went into insolvency. Its liquidator commenced US anti-trust proceedings alleging a conspiracy by various British and European airlines to drive Laker out of business. ‘Single forum’ anti-suit injunctions were granted to restrain the US proceedings at first instance and by the Court of Appeal at the application of two British airlines: *British Airways Board v Laker Airways* [1984] QB 142.
(applying the since discredited approach based on forum non conveniens derived from Castanho v Brown & Root (UK) [1981] AC 557 (HL)). These injunctions were subsequently discharged by the House of Lords because Laker and the other airlines, by operating on both sides of the Atlantic, had voluntarily brought themselves within the scope of US domestic law, including US anti-trust law, and therefore it was not unjust for US anti-trust law to be applied to them: British Airways Board v Laker Airways [1985] AC 58 (HL) 84. In the meantime, the US courts had reacted strongly to what was perceived as an unjustified interference with their jurisdiction. Anti-anti-suit injunctions were granted against other European airlines, including Sabena, which had not obtained anti-suit injunctions from the English courts but seemed likely to; and the English approach to anti-suit injunctions was criticized: Laker Airways v Pan Am World Airways 559 F Supp 1124, 1138 (DDC 1983), aff’d Laker Airways v Sabena, Belgian World Airlines 731 F 2nd 909 (DC Cir 1984). The Laker Airways imbroglio is discussed by R Raushenbush, ‘Anti-Suit Injunctions and International Comity’ (1985) 71 Va Law Rev 1039; T Hartley, ‘Comity and the Use of Anti-Suit Injunctions in International Litigation’ 35 AJCL 487 (1987); L Collins, ‘The Anti-Suit Injunction: Laker Airways and the Airlines’ in Essays in International Litigation and the Conflicts of Laws (OUP 1994) 107-17.


82 A Briggs, ‘Anti-Suit Injunctions and European Ideals’ (2004) 120 LQR 529, observes that ‘it is well known that many continental lawyers have a peculiar hostility to the anti-suit injunction’.

For court decisions, see Re the Enforcement of an English Anti-Suit Injunction [1997] ILPr 320 (Oberlandesgericht Düsseldorf) [14]-[19] (criticized in J Harris, ‘Restraint of Foreign Proceedings—The View from the Other Side of the Fence’ [1997] CJQ 283, and reacted to in Philip Alexander Securities & Futures Ltd v Bamberger [1997] ILPr 73); Ref Bruxelles (18 December 1989) RW 1990–91, 676; noted in JT (1992) 438 (Note H Born and M Fallon); Stolzenberg v Daimler Chrysler Canada [2005] ILPr 24 (French Cour de Cassation) [4]. But as discussed at paras 1.18-1.25, some continental courts have now moved to an acceptance that at least contractual anti-suit injunctions are not inherently illegitimate.


See also the discussion of the evidence of Belgian, French, and Italian lawyers in OT Africa Line v Hijazy (The Kribi) (No 1) [2001] 1 Lloyds Rep 76 [76]–[86], [95(5)]; Navigation Maritime Bulgare v Rustal Trading (The Ivan Zagubanski) [2002] 1 Lloyds Rep 106 [115]–[119], [121(5)] (where the evidence of Professor Bonassies was that the French courts would regard an anti-suit injunction as ‘a grossly offensive intrusion to their own functioning’); Evialis v SIAT [2003] 2 Lloyds Rep 377 [52]–[58]; West Tankers v Ras Riunione Adriatica di Sicurta (The Front Comor) [2005] 2 Lloyds Rep 257 [43]–[46].

However, it is not the case that all ‘civilian’ lawyers are adamantly opposed to anti-suit injunctions. For examples of those who think the remedy has its place, see ML Niboyet, ‘Le Principe de Confiance Mutuelle et Les Injonctions Anti-Suit’ in P de Vareilles-Sommières, Forum Shopping in the European Judicial Area (2007) 77; A Nuyts, L’Exception de forum non conveniens (Bruylant 2003) para 370; and see the developing position discussed at paras 1.18–1.25 of this chapter.


85 Re the Enforcement of an English Anti-Suit Injunction [1997] ILPr 320 [15]–[16]; Case C-159/02, Turner v Grovit [2004] ECR I-3565, AG [32], [34].

86 For an illustration of this mindset, see the ECJ’s decision in Case C-281/02, Owusu v Jackson [2005] ECR I-1383; and see T Hartley, ‘Anti-Suit Injunctions and the Brussels Jurisdiction and Judgments Convention’ (2000) 49 ICLQ 166, 169–70.


88 At the risk of oversimplification, this ‘civil law’ approach, based on sovereignty, can be viewed as flowing from the inquisitorial concept of justice, under which it is the proper role and function of the court to seek out truth, and impose justice on the parties. In contrast, under the ‘common law’ approach, based on private justice, the court is more akin to a ‘referee’, whose function is to resolve justly a dispute between the parties which may properly be brought before it. From this perspective, the judicial sovereignty of the court to resolve cases before it is less important.

89 See Airbus Industrie v Patel [1999] 1 AC 119 (HL) 131H for commentary on the fundamental differences between the civil and common law approaches to jurisdiction.

90 See L Wittgenstein, Philosophical Investigations (2nd edn, Blackwell 1958), Remark 217: ‘If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: “This is simply what I do”.’ Briggs has referred to the clash between civil law and common law perspectives as like ‘chickens talking to a duck; and if it is, it is pointless to say that one approach is right and the other is wrong’: A Briggs, ‘The Impact of

91 Medway v Doublelock [1978] 1 WLR 710; Bourns v Raychem (No 3) [1999] FSR 641 [11], [15]-[20], [55] (Laddie J) 679–82 (CA); Bourns v Raychem (No 4) [2000] FSR 841, 845–46 (referring to earlier unreported judgments).


93 Apple Corps v Apple Computer [1992] RPC 70, 79; see also G Bermann, ‘The Use of Anti-Suit Injunctions in International Litigation’ (1990) 28 Col J Transnatl Law 589, 620–23. In contrast, it is more doubtful whether injunctions granted on the basis of vexation or oppression (or unconscionability) enforce any real underlying substantive right, or correlative personal obligation: see Ch 3, section B, ‘A Legal or Equitable Right?’. Even if as a matter of English law an underlying equitable obligation not to litigate abroad were identified, a foreign court could be forgiven if it were to view this ‘obligation’ as the expression of a conclusion that injunctive relief should be granted, rather than a genuine concrete personal obligation. In the absence of such a concrete personal obligation, the personal logic of the anti-suit injunction is more contestable. In Barclays Bank v Homan [1993] BCLC 680, 686, Hoffmann J explained:

in theory the injunction merely operates in personam upon a person subject to the jurisdiction of the English court. There are cases, such as the enforcement by injunction of a contractual submission to the exclusive jurisdiction of the English court, in which this is a fair description of the proceedings. There are others where it is less realistic, as for example when the English court considers that the foreign proceedings would be unjust because the foreign court is asserting an excessive jurisdiction.


96 Western Electric v Racal-Milgo [1979] RPC 501, 511 (Whitford J), 518–19 (CA); Through Transport Mutual Insurance Association (Eurasia) v New India Assurance [2005] 1 Lloyds Rep 67 (CA) [91]; Walanpatrias Stiftung v Lehman Brothers International (Europe) [2006] EWHC 3034 [52]-[56]; Winnetka Trading v Julius Baer International [2009] Bus LR 1006. There are, however, examples where the English courts have objected to applications for foreign anti-suit injunctions which were perceived as illegitimate: General Star

97 See eg OT Africa Line v Magic Sportswear [2007] 1 Lloyds Rep 85 (Can Fed Ct of Appeal) [55], [75], [81]–[82] (responding to the anti-suit injunction granted in OT Africa Line v Magic Sportswear [2005] 2 Lloyds Rep 170 (CA)).


99 The Brussels–Lugano regime is the paradigm case of such a ‘closed system’ of jurisdiction (OT Africa Lines v Magic Sportswear [2005] 2 Lloyds Rep 170 (CA) [37]), and we now know from Case C-159/02, Turner v Grovit [2004] ECR I-3565 that it does preclude the grant of anti-suit injunctions within its territorial and material scope (so long as it remains the law). Resolution 1/2000 of the International Law Association, otherwise known as the Leuven/London principles, suggests that anti-suit injunctions should not be granted within closed systems of jurisdiction which define the original jurisdiction of the courts of the parties: para 7.1.

The Hague Convention on the Choice of Court (2005) establishes a partly controlled jurisdictional and mutual enforcement system. However, this does not preclude the power to grant anti-suit injunctions to enforce jurisdiction clauses: see section G, ‘The Hague Convention on the Choice of Court’.


the core of the technique of the anti-suit injunction is to be found in the ambition to cause one’s own view of which jurisdiction is competent, and where appropriate of whether an arbitration agreement is valid or invalid, to prevail, over the views of any other jurisdiction, whether state court or arbitral tribunal, which could be seised or has been seised with the question [author's translation].


103 Aggeliki Charis Compania Maritima v Pagnan (The Angelic Grace) [1995] 1 Lloyds Rep 87 (CA) 96; OT Africa Lines v Magic Sportswear [2005] 2 Lloyds Rep 170 (CA) [27], [32], [58]–[61], [73].


107 In English law there is no doubt that arbitration clauses and exclusive forum clauses create substantive contractual obligations not to sue abroad. See eg Pena Copper Mines v Rio Tinto Co (1911) 105 LT 846; AES Ust-Kamenogorsk Hydropower Plant LLC v Ust-Kamenogorsk Hydropower Plant JSC [2013] 1 WLR 1889 (SC) [1], [21]–[23], [24].

108 Aggeliki Charis Compania Maritima v Pagnan (The Angelic Grace) [1995] 1 Lloyds Rep 87 (CA) 96; West Tankers v Ras Riunione Adriatica di Sicurta (The Front Comor) [2007] 1

This problem can be called the ‘conflict of conflicts’. See Ch 8, paras 8.31–8.44.


See eg West Tankers v Ras Riunione Adriatica di Sicurta (The Front Comor) [2005] 2 Lloyds Rep 257, 262–63.

For system-transcendence and the importance of symmetry, see T Raphael, ‘Do as You Would be Done By? System-Transcendent Justification and Anti-Suit Injunctions’ [2016] LMCLQ 256, which refers to the ‘Golden Rule’—that you should do as you would be done by. On the same theme see TS Production v Drew Pictures (2008) 172 FCR 433 (FCA) [60].

In Apple Corps v Apple Computer [1992] RPC 70, 79, Hoffmann J referred to the ‘universal principle that until some good contrary reason has been shown, men should be held to their bargains’.

OT Africa Lines v Magic Sportswear [2005] 2 Lloyds Rep 170 (CA) [27], [32], [58]–[61], [73].

A Briggs, ‘Anti-Suit Injunctions in a Complex World’ in F Rose (ed), Lex Mercatoria (LLP 2000) 219, 237, suggests that the mere fact that an exclusive forum clause is governed by English law is insufficient to mean that the English court should ‘claim the role as the exclusive enforcer of such a contractual term’, as the court whose jurisdiction is allegedly excluded is at least as legitimate an enforcer of the clause.

See, in Canada, Amchem Products v British Columbia (Workers’ Compensation Board) [1993] 1 SCR 897, 934.


West Tankers v Ras Riunione Adriatica di Sicurta (The Front Comor) [2007] 1 Lloyds Rep 391 (HL); see Ch 12.

The root of the problem, in arbitration cases within the European Community, is that arbitration is excluded from the Rome Convention and the Rome I Regulation, and thus arbitration clauses are not subject to the ‘putative proper law’ rule for choice of law provided for in Article 8 of the Rome Convention and Article 10 of the Rome I Regulation. See by analogy XL Insurance v Owens Corning [2000] 2 Lloyds Rep 500 (where the US court would apply the Federal Arbitration Act as the lex fori to override the agreed proper law of the contract). See also OT Africa Line Ltd v Hijazy (The Kribi) (No 1) [2001] 1 Lloyds Rep 76, where it seems that if no injunction had been granted, the consequence would have been that Belgian contract law rather than English contract law would have applied to determine the validity of an express English exclusive jurisdiction clause expressly governed by English law: see at [23], [73(3)].

Airbus Industrie v Patel [1999] 1 AC 119 (HL) 138G; the requirement of a sufficient interest is discussed further at Ch 4, paras 4.80–4.83. In Masri v Consolidated Contractors (No 3) [2009] QB 503 [81], Lawrence Collins LJ suggested that to grant an anti-suit injunction in a case which has no relevant connection with England ‘may be a breach of international law’.
R Fentiman, ‘Anti-Suit Injunctions and the Brussels Convention’ [2000] CLR 45, 45-46, argues that the grant of anti-suit injunctions to restrain duplicative litigation that harasses a party to litigation here is reconcilable with comity, because the interference with the English litigation is ‘an issue uniquely within an English court’s province’.

Airbus Industrie v Patel [1999] 1 AC 119 (HL) 138H-139A.


Bankers Trust International v PT Dharmala Sakti Sejahtera (No 1) [1996] CLC 252, 263B-F. Similarly, in Allstate Life Insurance v Australian New Zealand Banking Group (No 4) (1996) 64 FCR 61 (Aus Fed Ct) it appeared that the US court, far from objecting to the injunction, would welcome the exercise of control by the court with jurisdiction over the merits.

Barclays Bank v Homan [1993] BCLC 680, 687 per Hoffmann J; followed in Deutsche Bank v Highland Crusader Offshore Partners [2010] 1 WLR 1023 (CA) [56]; and see Stichting Shell Pensionenfonds v Krys [2015] AC 616 (PC) [42].

Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] AC 871 (PC) 894E-F: Their Lordships refer, in particular, to the fact that litigants may now be encouraged to proceed in foreign jurisdictions, having no connection with the subject matter of the dispute, which exercise an exceptionally broad jurisdiction and which offer such great inducements, in particular greatly enhanced, even punitive, damages, that they may tempt litigants to pursue their remedies there.

For the necessity of the anti-suit injunction in a world outside controlled closed systems of jurisdiction, see Airbus Industrie v Patel [1999] 1 AC 199 (HL) 132G-133H; and see also Amchem Products v British Columbia (Workers Compensation Board) [1993] 1 SCR 897 (SC Can) 914-15.

Airbus Industrie GIE v Patel [1999] 1 AC 119, 132C.

This conclusion was reached by the Oberlandesgericht Düsseldorf in Re the Enforcement of an English Anti-Suit Injunction [1997] ILPr 320 [17]-[18]; and according to JT (1992) 438 (Note H Born and M Fallon), was also deployed by the Belgian court in Ref Bruxelles (18 December 1989) RW 1990-91, 676. It was also the view of AG Kokott in Case C-185/07, Allianz v West Tankers (The Front Comor) [2009] ECR I-663, AG [58], but her analysis is brief and not well reasoned (eg she made no reference to the principle of waiver) and was not picked up by the ECJ in that case.
Article 6 provides ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’ The European Court of Human Rights (ECtHR) has held that a right of access to ‘a’ court is ‘inherent’ in Article 6: Golder v UK (1975) 1 EHRR 524 [28], [36]; and further that the individual has a right of effective access to ‘a’ court: Airey v Ireland (1979) 2 EHRR 305 [24], [28]. Sometimes the phase used is a ‘right of access to court’: see eg TP and KM v UK (2002) 34 EHRR 23 [96], [99]. The Convention protects foreigners as well as citizens (or subjects), including foreigners from non-Convention states: Article 1; while Article 6 protects companies as well as natural persons: see eg Marpa Zeeland BV and Metal Welding BV v The Netherlands (2005) 40 EHRR 407. The right is not absolute and may be subject to limitations which pursue a legitimate aim and are proportionate: Radunovic v Montenegro (2018) 66 EHRR 19 [62]–[63].

The ECHR has been incorporated into English domestic law by the Human Rights Act 1998. The combined effect of ss 3 and 6 of the 1998 Act is that the power to grant anti-suit injunctions contained in s 37(1) of the Senior Courts Act 1981 must be exercised compatibly with the Convention rights.

The Cour de Cassation has expressly concluded that a contractual anti-suit injunction is consistent with Article 6: In Zone Brands International v In Beverage International, Cass Civ 1 (14 October 2009) Nos 08-16.369 and 08-16.549. Similarly, Case C-536/61, Gazprom, EU:C:2015:316, accepted the legitimacy of anti-suit injunctions granted by arbitrators.

The territorial scope of the protection given to the Convention rights by the Human Rights Act is congruent with the territorial scope of the protection offered by the Convention itself: Al Skeini v Secretary of State for Defence [2008] 1 AC 153 (HL) [56]–[59] (Lord Rodger); [133]–[151] (Lord Brown) (Baroness Hale and Lord Carswell agreed with Lords Rodger and Brown; Lord Bingham dissented).

Article 1: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’ The scope of the state’s jurisdiction is primarily territorial: Bankovic v Belgium (2001) 11 BHRC 435 [59]–[61].

Catan v The Republic of Moldova and Russia, No 43370/04, ECHR (2012) [103]–[106].

Al-Skeini v UK (2011) 53 EHRR 18 [136]–[137]; Hassan v UK 38 BHRC 358; Alseran v Ministry of Defence [2018] 3 WLR 95 [79]–[80]; although see the doubts expressed in Mohammed v Ministry of Defence [2017] AC 821 (SC) [46]–[49].

App Nos 7289/75 and 7349/76, X and Y v Switzerland (1977) 9 DR 57 (ECmHR) (the Swiss courts by agreement with Liechtenstein exercised jurisdiction over immigration into Liechtenstein; Switzerland was responsible under the Convention for their acts in doing so); Al-Skeini v UK (2011) 53 EHRR 18 [135]; Jaloud v The Netherlands, No 47708, ECHR (2014) [139]. See also App No 48205/99, Gentilhomme v France (14 May 2002) (Art 6(1) applied without query to the excessive length of French administrative court procedures relating to Algerian residents and facts in Algeria).

See eg Golder v UK (1975) 1 EHRR 524 [35]–[36]; and Wos v Poland (2007) 45 EHRR 28 [98]; ECHR, Guide on Article 6: Right to a Fair Trial (civil limb) (2013). An argument that Article 6 relates only to access to a state’s own courts gains some support from Vasilescu v Romania (1999) 28 EHRR 241 [43] (where it was said that in civil cases, Art 6(1) is merely a
‘lex specialis’ of Art 13, the right to an effective remedy), since it is difficult to conceive of Article 13 having any effect in respect of other states’ legal systems.

143 Soering v UK (1989) 11 EHRR 439 [112]-[113]; Mamutkulov and Askarov v Turkey (2005) 41 EHRR 494 [84]-[91]; App No 7155/01, Einhorn v France (16 October 2001) [32] (where the extraterritorial operation of Art 6 was regarded as exceptional); App No 64599/01, Razaghi v Sweden (11 March 2003) 9; App No 17837/03, Tomic v UK (14 October 2003) 12; App No 24668/03, Olaechea Cahuas v Spain (10 August 2006) [59]-[62]; Othman (Abu Qatada) v UK, No 8139/09, ECHR (2012) [258]-[261]. Similarly, a court of a contracting state must refuse enforcement of a foreign judgment if the judgment is the result of a flagrant denial of justice in the foreign state: Drozd and Janousek v France and Spain (1992) EHRR 745 [101].

144 Othman (Abu Qatada) v UK, No 8139/09, ECHR (2012) [260]:

‘flagrant denial of justice’ is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.

145 The main justification for the extension of extraterritorial effect articulated in Soering (in relation to Art 3, which was the main issue in the case) was that extradition in circumstances that would lead to a breach of Article 3 ‘would be contrary to the spirit and intendment of the Art’; at Soering v UK (1989) 11 EHRR 439 [88]. It would be arguable that an extraterritorial order that unjustifiably restricted rights of access to a foreign court (or rights of access globally) would be contrary to the spirit and purpose of Article 6. This conclusion also makes sense when tested in hypothetical situations. Imagine that Poland passed a law banning any person from commencing proceedings in the German courts for restitution of property seised at the end of the Second World War, on pain of criminal punishment in Poland; this could severely restrict individuals’ rights of access to the courts. However, there would be no grounds for an application to be made against Germany, even though the restriction would bite in respect of rights of access to the German courts; the only state whose responsibility could be relevantly engaged would be Poland, and so concluding that the right of access to a court had no extraterritorial application would mean that there was no effective Convention remedy, and thus a potential ‘gap or vacuum in human rights protection’. Any gap or vacuum of that kind should not be permitted, at least within the combined territories of the contracting states: see Bankovic v Belgium (2001) 11 BHRC 435 [80] (and n 146).

146 In Bankovic v Belgium (2001) 11 BHRC 435 [80], the court noted that, when considering whether to extend the ‘jurisdiction’ of a state for the purposes of assessing its Convention responsibilities beyond its narrow territorial jurisdiction, it had only done so in cases where that extension was within the territory of the contracting states as a whole, because the Convention was designed to create a regional space of human rights protection and was not intended to be applied beyond the territories of the contracting states. See also Al Skeini v Secretary of State for Defence [2008] 1 AC 153 (HL) [77]-[79]. The concepts of ‘jurisdiction’, and the extraterritorial effects of the Convention rights, are not cleanly separable: see Bankovic v Belgium (2001) 11 BHRC 435 [68]. It could therefore be argued that the responsibility of a state for the extraterritorial effect of the right of access to the court should not be interpreted to apply beyond the territories of the contracting states, within which, but not outside which, the right of access to the court should be protected. But this point seems unlikely to stand, as in the more recent case law of the European Court
of Human Rights, the extraterritorial effects of the Convention Rights have extended beyond the territories of the contracting states: see eg *Al-Skeini v UK* (2011) 53 EHRR 18.

147 *Ilascu v Moldova and Russia* (2004) 40 EHRR 1030 [317], the European Court of Human Rights explained the *Soering* line of case law by saying: ‘A State’s responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.’

148 *McErlinney v Ireland* (2002) 34 EHRR 13 [39]; however, see the dissenting judgment of Judge Loicades (at 341), suggesting that, in assessing whether the right of access to the court was infringed, it was relevant to consider only the possibilities of access to the courts of the contracting state whose responsibility was allegedly engaged.

149 Deploying the threshold test concepts used in the extradition cases: see para 1.71.


It would appear from the case law that the waiver must ‘not run counter to any important public interest’: App No 11960/86, *Axelsson v Sweden* (13 July 1990); *Stretford v Football Association* at [54]; *Warren v The Random House Group* at [32]; *Simeonovi v Bulgaria* (2018) 66 EHRR 2 [115]; but there is no case where an arbitration agreement has been held to run counter to any such interest; and in *Stretford v Football Association* it was held that arbitration under the FA rules and Arbitration Act 1996 was not contrary to any important public interest.

The Oberlandesgericht Düsseldorf did not refer to any of this jurisprudence in *Re the Enforcement of an English Anti-Suit Injunction* [1997] ILPr 320.

151 *Mauritius Commercial Bank v Hestia Holdings* [2013] 2 Lloyds Rep 121 [43]. See also the Cour de Cassation’s reasoning in *In Zone Brands International v In Beverage International*, Cass Civ 1 (14 October 2009) Nos 08-16.369 and 08-16.549: ‘there cannot have been deprivation of the right of access to the judge, since the decision taken by the Georgian judge had precisely the purpose of ruling on his own competence and, in the interests of finality, to ensure respect of the jurisdiction clause agreed by the parties’.

152 App No 11960/86, *Axelsson v Sweden* (13 July 1990); *Hakansson and Sturesson v Sweden* (1991) 13 EHRR 1, 16 [66]; *Transado-Transportes Fluviais do Sado v Portugal*, 35943/02, ECHR (2003); *Simeonovi v Bulgaria* (2018) 66 EHRR 2 [115], [128]; and in England *Stretford v Football Association* [2007] Bus LR 1052 (CA) [48], [60]. If arbitration is imposed by law, then the compulsory arbitration must respect the normal guarantees of the court which Article 6(1) envisages. This includes the requirement of publicity of debates which is inconsistent with most arbitration systems. See *Suda v Czech Republic*, No 1643/07, ECHR (2010), where provisions of Czech law requiring minority shareholder disputes to be brought before private arbitrators were held to be an infringement of Article 6(1). But this should be interpreted in a practical way. In *Stretford v Football Association* [2007] Bus LR 1052 (CA) [43]–[66] it was held that there was a valid waiver and no breach
of Article 6 where a football agent was required, as condition of holding a license, to comply with the Football Association Rules, which included an arbitration provision, and where as a result as a matter of English law an arbitration clause was incorporated into his contract, even though there was no express voluntary agreement to arbitration.

153 OT Africa Line v Hijazy (The Kribi) [2001] 1 Lloyds Rep 76 [28(9)], [41]-[44]; discussed in J Fawcett, ‘The Impact of Article 6(1) on the ECHR on Private International Law’ (2007) 56 ICLQ 1, 11–12. This approach gains some support from the fact that the ECtHR has never yet considered that a requirement to use a particular court rather than any other within a national legal system could amount to a breach of the right of access to a court; in order to satisfy the right, all that has been necessary is that there is a court within the state in which the applicant’s legal claims can be fully and fairly heard: Alatulkila v Finland (2006) 43 EHRR 34 [41]-[43], [47]-[54] (applicants confined to review by the Finnish Supreme Administrative Court; the question was whether the hearing in that court was sufficient). Aikens J’s analysis is also supported by JT (1992) 438 (Note H Born and M Fallon), criticizing Ref Bruxelles (18 December 1989) RW 1990–91, 676. See, however, McElhinney v Ireland (2002) 34 EHRR 13, discussed at para 1.72.


156 See Tolstoy Milošlavsky v UK (1995) 20 EHRR 442 [59]-[67] (security for costs order); TP and KM v UK (2002) 34 EHRR 23 [102] (striking out); Z v UK (2001) 34 EHRR 97 [95]-[100] (striking out); Reid v UK (21 June 2001); Clunis v UK (11 September 2001); Al Adsani v UK (2002) 34 EHRR 11 [52]-[56] (state immunity); Carnduff v UK (10 February 2004); Luordo v Italy (2005) 41 ECHR 26 [83]-[88] (restrictions on bankrupt’s right to commence actions found disproportionate on the facts); Banovic v Croatia, No 44284/10, ECHR (2015) [43]-[44] (foreseeable limitation periods);

157 Golder v UK, Series B, No 16 (ECmHR) 52 [95]; H v UK 45 DR 281 (1985) (ECmHR) 283–85; Stone Court Shipping v Spain (2005) 40 EHRR 31 [33]–[42].

158 ML Niboyet, ‘Le Principe de Confiance Mutuelle et Les Injonctions Anti-Suit’ in P de Vareilles-Sommières, Forum Shopping in the European Judicial Area (Hart 2007) 77, 85, rejects the argument that anti-suit injunctions to restrain vexatious conduct are contrary to Article 6.

159 The good management of litigation is a legitimate aim. Thus, in particular, the aim of avoiding an appellate court’s list being overloaded is legitimate: García Mandibaro v Spain (2002) 34 EHRR 6 [38].

160 In Re the Enforcement of an English Anti-Suit Injunction [1997] ILPr 320, the German injunction defendants were consumers, which was one of the main reasons which led the English court to conclude that there was no arbitration clause binding on them, and to discharge the injunctions: see Philip Alexander Securities & Futures Ltd v Bamberger [1997] ILPr 73.

See by analogy *Lubbe v Cape* [2000] 1 WLR 1545 (HL), 1561.

*Zvolsky and Zvolska v Czech Republic*, No 46129/99, ECHR (2002) [47].


R Jennings and A Watts (eds), *Oppenheim’s International Law* (9th edn, OUP 2008) Vol I (hereafter ‘Oppenheim’) 385–86; FA Mann, ‘The Doctrine of Jurisdiction in International Law’ Part I (1964) 111 Hague Recueil des Cours, 1, 26–28. *Lotus Case* PCIJ, Series A, No 10, 18; see also J Crawford, *Brownlie’s Principles of Public International Law* (8th edn, OUP 2012) (hereafter ‘Brownlie’) 297–98. The principle of territoriality is not, however, an absolute principle: *Lotus Case* PCIJ, Series A, No 10, 20. The unquestioned doctrine that no anti-suit injunction can be granted against the foreign court itself is consistent with, and an implication of, the principle of territoriality. Similarly, the English court’s powers to punish for contempt of court cannot be exercised within the foreign state: see FA Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964) 111 Hague Recueil des Cours 1, 129.

FA Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964) 111 Hague Recueil des Cours 1, 43–51, describing a rigid approach based on territoriality as ‘procrustean’, and propounding a doctrine based on ‘closeness of connection’.


‘International law does not impose hard and fast rules on States delimiting spheres of international jurisdiction ... it does, however, postulate the existence of limits ...’: Sir G Fitzmaurice, in *Case Concerning Barcelona Traction, Light and Power Ltd*, ICJ Reports (1970) 105 [70] (see also *The Lotus Case* PCIJ, Series A, No 10, 20). In *The Lotus Case* at 20, the PCIJ suggested that international law did not contain ‘a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory’ and that:

> far from laying down a general prohibition to the effect that States may not extend the application of their own laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide margin of discretion which is only limited in certain cases by prohibitive rules.

This decision is heterodox, in so far as it suggests that states have a discretion (see FA Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964) 111 Hague Recueil des Cours 1, 34–36; and G Triggs, *International Law: Contemporary Practice and Principles* (LexisNexis 2006) para 7.10) but it does reflect the point that states have considerable freedom in the exercise of extraterritorial jurisdiction at the current stage of development of public international law. M Akehurst, ‘Jurisdiction in International Law’ (1972–73) 66 BYBIL 145, 170 observes that ‘when one examines the practice of states ... one finds that states claim jurisdiction over all sorts of claim and parties having no real connection with them and that this practice has seldom if ever given rise to diplomatic problems’.

Oppenheim, 457–58, 462, 467–68. Another phrasing is a ‘direct and substantial connection between the state exercising jurisdiction and the matter in relation to which jurisdiction is exercised’. See also FA Mann, ‘The Doctrine of Jurisdiction in International Law’ Part I (1964) 111 Hague Recueil des Cours 1, 43–51, 78–81, and ‘The Doctrine of International Jurisdiction’ Part III (1984) 186 Hague Recueil des Cours, 29, 31, 67. However, for an even more liberal approach, see M Akehurst, ‘Jurisdiction in International Law’ (1972–73) 66 BYBIL 145, 176–77. Public international law draws a distinction between the exercise of jurisdiction over citizens abroad and over non-citizens abroad. The nationality of the injunction defendant was treated as a key factor in the earlier English case law: see *Carron Iron v Maclaren* (1855) 5 HLC 439, 442; *Re Distin* (1871) 24 LT 197; *Re Chapman* (1873) LR 15 Eq 75; *Ellerman Lines v Read* [1928] 2 KB 144 (CA) 152–53.
The modern English law of anti-suit injunctions does not cleave to such a bright line, and there is no hesitation in granting anti-suit injunctions against foreigners (see *Stichting Shell Pensionenfonds v Krys* [2015] AC 616 (PC) [33]-[40] and Ch 2, paras 2.12–2.13). However, the citizenship, residence, and domicile of the injunction defendant and the injunction claimant may remain relevant factors in the assessment, within the modern criterion of comity, of whether the English court has a sufficient connection with the matter in question for an injunction to be granted (see eg *General Star International Indemnity v Stirling Cooke Brown Reinsurance Brokers* [2003] Lloyds Rep IR 719, 722). This approach is consistent with public international law: see FA Mann, 'The Doctrine of Jurisdiction in International Law’ Part I (1964) 111 Hague Recueil des Cours 1, 149–50, accepting the legitimacy of the grant of anti-suit injunctions in certain cases against non-residents or non-nationals.

170 Brownlie, 486.


172 Although there have been protests by foreign courts and writers (see paras 1.17, 1.40), there appear not to have been any diplomatic protests by foreign states at the international level.


174 See paras 1.32–1.33.

175 *Bushby v Munday* (1821) 5 Madd 297, 56 ER 908.


177 International Law Association, Bruges Session (2003), Second Commission, Resolution: ‘The Principles of Determining When the Use of the Doctrine of Forum non Conveniens and Anti-Suit Injunctions are Appropriate’ (Rapporteurs: Sir L Collins and G Droz), para 5:

> Courts which grant anti-suit injunctions should be sensitive to the demands of comity, and in particular should refrain from granting such injunctions in cases other than (a) a breach of a choice of court agreement or arbitration agreement; (b) unreasonable or oppressive conduct by a plaintiff in a foreign jurisdiction; or (c) the protection of their own jurisdiction in matters such as the administration of estates and insolvency.

For discussion see A Nuyts, ‘Les principes directeurs de l’Institut de Droit International sur le recours à la doctrine du *forum non conveniens* et aux anti-suit injunctions’ (2003) 2 Revue Belge de Droit International 536. However, Resolution 1/2000 of the International Law Association, (otherwise known as the ‘Leuven/London principles’) had been in slightly more restricted terms, less influenced by the common law: at para 7 it suggested that contractual anti-suit injunctions were permissible if a jurisdiction clause had been ‘manifestly’ breached, but otherwise that anti-suit injunctions should only be granted if the
foreign court had not itself respected the jurisdictional principles outlined in the Leuven/London principles.

178 See Article 38(1) of the Statute of the International Court of Justice.

179 See eg FA Mann, ‘The Doctrine of Jurisdiction in International Law’ Part I (1964) 111 Hague Recueil des Cours 1, 149–50, accepting the legitimacy of the English approach in ‘alternative forum’ cases, and specifically approving of the decision in Royal Exchange Assurance v Compania Naviera Santi (The Tropaioforos) [1962] 1 Lloyds Rep 410: ‘the principle upon which these English cases rest is sound and also highly significant from the point of view of the doctrine of international jurisdiction and ... the cases which illustrate it are valuable examples of the test of closeness of connection and its advantages over the test of territory’; and FA Mann ‘The Doctrine of International Jurisdiction’ Part III (1984) 186 Hague Recueil des Cours 19, 47–48. P Schlosser, ‘Anti Suit Injunctions in International Arbitration’ (2006) RJW 486, 490–91 concludes that there is no basis in public international law for assertions that anti-suit injunctions are prohibited.

Judge Stephen Schwebel has argued that injunctions to restrain arbitrations abroad can amount to a ‘denial of justice’, because it prevents a party from proceeding before the forum where he is entitled to obtain justice: S Schwebel, ‘Anti-Suit Injunctions in International Arbitration: An Overview’ in Gaillard (2005) 5, 12–13. However, this contention is somewhat circular: it only has force if an injunction is granted to restrain a party from proceeding with valid arbitration proceedings; it does not follow that there is any denial of justice if a court has concluded, for example, that there is no valid arbitration agreement and grants an injunction on that basis.


181 There are complications related to the UK’s accession and the transitional consequences of Brexit for the Hague Convention which we do not address here, but which are touched on in Ch 16, para 16.04.

182 The relationship between Article 25 of the Brussels I Recast and the Hague Convention is addressed in Ch 17, para 17.46.


184 See further Ch 7, para 7.09.

Bachand also argues that the presumption of non-intervention in Article 5 of the UNCITRAL Model Law, and thus s 1(c) of the Arbitration Act 1996 which implements it, precludes anti-suit injunctions: see at 101-11.


Indeed, if Article II(3) were to apply at all, it might be said that its terms positively justify the grant of anti-suit injunctions to enforce the arbitration clause so as to ‘refer’ the parties to arbitration: J. Fernandez Rozas, ‘Anti-Suit Injunctions Issued by National Courts’ in Gaillard (2005) 75, 81. See also G. Kim, ‘After the ECJ’s West Tankers: The Clash of Civilisations on the Issue of An Anti-Suit Injunction’ (2011) 12 Cardozo J Conflict Res 573, 578-83.

And instead a proposal (ECOSOC, E Conf 26.2, 6 March 1958, paras 16-24) that control of the validity of arbitration awards should be exercised only in the state of enforcement was not accepted.

The ad hoc committee of ECOSOC that drafted the initial version of the Convention was made up of the representatives of eight states including Australia, India, and the UK; and the UK representative was part of the drafting sub-committee. The UK submitted extensive comments to ECOSOC.

Shashoua v Sharma [2009] 2 Lloyds Rep 376 [38].

Case C-185/07, Allianz v West Tankers (The Front Comor) [2009] ECR I-663, AG [55]-[56]; ECJ [33].

This is how the ECJ’s judgment was read in Shashoua v Sharma [2009] 2 Lloyds Rep 376 [35]-[39] and in Midgulf International Ltd v Group Chimique Tunisien [2010] 2 Lloyds Rep 543 (CA) [66]-[69] the Court of Appeal could not see that it made any difference.


Case C-536/61, Gazprom, EU:C:2015:316. Advocate General Wautelet expressly concluded that the fact that an arbitration award contained an anti-suit injunction is not a ground to refuse to enforce it under the New York Convention (AG [180]-[188]), although strictly this was none of his business.

The combined reasoning of the English courts on this point is terse, but is unlikely to change. This conclusion was arguably held to be the law in Aggeliki Charis Compania Maritima v Pagnan (The Angelic Grace) [1995] 1 Lloyds Rep 87 (CA) 94 (per Leggatt LJ; Millett LJ did not comment expressly on the point, although it is implicit in his conclusion that he agreed); see also Toepfer International v Société Cargill France [1998] 1 Lloyds Rep 379 (CA) 386. In West Tankers v Ras Riunione Adriatica di Sicurta (The Front Comor) [2005] 2 Lloyds Rep 257 [56]-[58], Colman J concluded that Article II(3) did not confer any exclusive jurisdiction on the court seised; and in the House of Lords [2007] 1 Lloyds Rep 391 (HL) [8], Lord Hoffmann, in a brief passage, which is nevertheless apparently ratio decidendi, and with which a majority of the House agreed, simply concluded that Colman J was right and that it is ‘unnecessary to enlarge on the reasons that he gave’. Following the comments of the ECJ in The Front Comor, an attempt was made to re-argue the New York Convention point, but this was rejected by Cooke J in Shashoua v Sharma [2009] 2 Lloyds Rep 376 [35]-[39].
It must, however, be mentioned that in *Toepfer International v Société Cargill France* [1998] 1 Lloyds Rep 379 (CA) 386, Phillips LJ raised the question of whether as a matter of practice, in light of the New York Convention, it might not usually be better to leave the matter to the court seised with the litigation. However, this hesitation has been overtrodden by the subsequent case law, following the more sweeping precedent of *Aggeliki Charis Compania Maritima v Pagnan (The Angelic Grace)* [1995] 1 Lloyds Rep 87 (CA).

In *Karaha Bodas Co v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 335 F 3rd 357 (5th Cir, 2003), the US Court of Appeals (5th Cir) held that ‘there is nothing in the Convention which expressly limits the inherent authority of a federal court to grant injunctive relief’. However, the US Court of Appeals suggested that, where the arbitration award was made in state X, the structure of the Convention did discourage (although it did not preclude) the grant of anti-suit injunctions by the courts of state Y, where the award had been enforced, to restrain proceedings in respect of the validity of state Z, as the courts of state Y are only courts of ‘secondary jurisdiction’. This is similar to the hesitations expressed by Phillips J in *Toepfer International v Société Cargill France* [1998] 1 Lloyds Rep 379 (CA) 386. For further discussion of the US approach to the interplay between the New York Convention and anti-suit injunctions, see C Lamm, E Hellbeck and J Brubaker, ‘Anti-Suit Injunctions in Aid of International Arbitration: The American Approach’ (2009) 12 Int ALR 115.

For the ‘conflict of conflicts’ see Ch 8, paras 8.31–8.44 and T Raphael, ‘Do as You Would be Done By? System-Transcendent Justification and Anti-Suit Injunctions’ (2016) LMCLQ 256.

If there is a deal, the draft Withdrawal Agreement of November 2018 would continue the Rome I and Rome II Regulations during the transition period. Further, it is the UK Government’s intention that the Rome Regulations would continue after the end of any transition period subject to some limited modifications: see HM Government, ‘Providing a Cross-Border Civil Judicial Cooperation Framework’ (22 August 2017). For the Rome Regulations this can be done unilaterally without the EU’s consent, in contrast to the jurisdictional instruments. Similarly, if there is no deal, the UK Government’s no-deal legislation would continue the essential effect of the Rome I and Rome II regulations subject to limited modifications: see the relevant no-deal statutory instrument The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019, SI 2019 No 834, and the guidance contained in HM
These issues are discussed in more detail in Ch 16, paras 16.04-16.05, 18.01, 18.40-18.41.