ANTI-SUIT INJUNCTIONS
IN TRANSNATIONAL LITIGATION.
IS THEIR USAGE STILL JUSTIFIABLE?

By
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Thesis submitted in partial fulfilment of the degree of Doctor of Laws

Faculty of Laws
University of Malta
May 2015
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ABSTRACT

In the game of ‘multi-dimensional chess’ that international litigation can become,¹ the usefulness of the anti-suit injunction as an ‘antidote to jurisdictional shenanigans is second to none.’² However, as with all ‘miracle cures’, this remedy comes at a dear price. The anti-suit injunction has been contested by many for being incompatible with principles of public international law and international comity on the ground that it interferes with the sovereignty of a foreign court.

The anti-suit injunction is a creature of common law, and as such is virtually unknown amongst civil law jurisdictions. Yet, it appears that authors from the civilian school of thought are equally enthusiastic to share their views on such remedy. Everyone, it seems, wants to be part of the ever more lively debate on anti-suit injunctions.

The different perspectives which emerge from the on-going saga of anti-suit injunctions are not only relevant to ascertain the role of anti-suit injunctions in transnational litigation, but also shed light on the intrinsic differences that exist between these different legal families.

Discussions on anti-suit injunctions were vigorously re-ignited after Turner v Grovit,³ where the CJEU unveiled for the first time its position on the availability of anti-suit injunctions in Europe. From Turner v Grovit onwards, the controversies revolving around anti-suit injunctions acquired a European dimension. This made the debate, perhaps, even more interesting.

More recently, the issue which was of paramount importance was whether in the light of the arbitration exception in the Brussels I Regulation, anti-suit injunctions could be permitted to be granted to restrain proceedings brought before another Member State’s court in breach of an arbitration agreement. Much to the dismay of the supporters of anti-suit injunctions, the CJEU answered such question in the negative in The Front Comor.⁴ Any hope that this common law remedy could ever survive in the European

⁴ C-185/07 Allianz SpA and Others v West Tankers Inc. [2009] E.C.R
judicial sphere was thereby shattered. However, there may now be a twist in the tale of anti-suit injunctions in Europe which comes as a consequence to Recital 12 of the new Brussels I (Recast) Regulation. It is, in fact, a matter of time until the CJEU revisits its stance on the issue of anti-suit injunctions.

This thesis will outline the conceptual foundations of the remedy and the arguments in favour and against its usage. This thesis also aims at predicting the future of anti-suit injunctions in the European Union in the light of the latest developments in the European judicial sphere. Finally, this thesis will attempt to explore any legal basis for the grant of an anti-suit injunction or a similar order under Maltese law.

Keywords: PUBLIC LAW – PRIVATE INTERNATIONAL LAW – TRANSNATIONAL LITIGATION - JURISDICTION – ANTI-SUIT INJUNCTION – BRUSSELS I REGULATION – BRUSSELS I RECAST
To Mum for her endless support,

To Dad for instilling the importance of hard work,

And to Andrea for her love, patience and understanding.
TABLE OF CONTENTS

DECLARATION OF AUTHORSHIP .................................................................................. II
ABSTRACT .................................................................................................................. III
TABLE OF CONTENTS ............................................................................................... VI
TABLE OF STATUTES ................................................................................................. X
TABLE OF JUDGMENTS ......................................................................................... XII
ACKNOWLEDGEMENTS ......................................................................................... XX
ABBREVIATIONS ...................................................................................................... XXI

Introduction............................................................................................................... 1

Chapter 1- CONCEPTUAL FOUNDATIONS AND BEYOND .................................... 3
1.1- Characterization and Categorization .................................................................. 3
1.2- The Context in which the Remedy Operates ..................................................... 4
1.3- Origins and Evolution: From Domestic to Extraterritorial .............................. 6
  1.3.1- Domestic ........................................................................................................ 6
  1.3.2- Extraterritorial .............................................................................................. 7
1.4- Preconditions, Grounds and Thresholds ............................................................ 9
1.5- Legal Basis & Discretion ................................................................................... 15
  1.5.1 - Legal Basis .................................................................................................. 15
  1.5.2- Discretionary Considerations ....................................................................... 15
1.6- Other Models .................................................................................................... 18
  1.6.1- United States ............................................................................................... 18
    A. INTRASTATE CONTEXT .................................................................................. 18
B. FOREIGN CONTEXT.......................................................................................................................... 20

1.6.2- Canada .................................................................................................................................. 23

1.7- Civil Law Jurisdictions .................................................................................................................. 26

1.8- Conclusion .................................................................................................................................. 29

Chapter 2 – ‘SIDE EFFECTS’ ................................................................................................................. 32

2.1- The Effect on Comity ..................................................................................................................... 32

2.2- Anti-suit Injunctions and the ‘Right of Access to a Court’ ............................................................. 39

2.3- Conclusion .................................................................................................................................. 43

Chapter 3- ANTI-SUIT INJUNCTIONS IN THE EUROPEAN JUDICIAL SPHERE ...... 44

3.1- Introduction ................................................................................................................................. 44

3.2- English Conflict of Laws and the Brussels I Regulation (EC) no 44/2001 ................................. 44

3.3- The ‘First Come First Served Rule’ of Lis pendens and the ‘Italian Torpedo’ ......................... 46

3.4- Turner v Grovit ............................................................................................................................... 48

   3.4.1 - Case Overview ....................................................................................................................... 48

   3.4.2 - The Effects of Turner v Grovit ............................................................................................... 51

      A. Contractual Injunctions ............................................................................................................. 52

      B. Proceedings outside the EU ...................................................................................................... 53

3.5- West Tankers ................................................................................................................................ 55

   3.5.1 - Case Overview ....................................................................................................................... 55

   3.5.2 - Comment ............................................................................................................................... 57

   3.5.3 - The Effects of West Tankers ................................................................................................. 59

3.6- National Navigation v Endesa Generacion (the Wadi Sudr): The Declaration of Validity .......................................................................................................................... 61

   3.6.1 - Introduction .......................................................................................................................... 61

   3.6.2 - Case Overview ....................................................................................................................... 61

   3.6.3 - Court of Appeal’s Judgment ................................................................................................. 63
3.7- The European Convention on International commercial arbitration and the UNICITRAL Model Law. ................................................................. 65
3.8 - The Heidelberg Report .......................................................................................... 66
3.9- The Commission’s Report and Green Paper of 2009.............................................. 68
3.10- Parliament Resolution of 7th September 2010 .................................................... 71
3.11- The Commission’s Proposal of 16 December 2010 ........................................... 72
3.12- Parliament’s Reaction to the Commission’s Proposal ........................................ 73
3.14- The Gazprom Case ............................................................................................... 76
  3.14.1 - Case Overview ............................................................................................... 76
  3.14.2 - AG Wathelet’s Opinion ................................................................................ 77
  3.14.3- The CJEU’s Decision ...................................................................................... 80
  3.14.4- Comment ......................................................................................................... 81
  3.14.5- Concluding Remarks .................................................................................... 81

Chapter 4- A MALTESE PERSPECTIVE .......................................................... 83
4.1- Introduction ........................................................................................................... 83
4.2- Injunctive Relief under the COCP ....................................................................... 84
4.3- Concurrent Proceedings ....................................................................................... 86
4.4- Choice of Court Agreements ................................................................................ 88
  4.4.1- Choice-of-court Agreements Conferring Jurisdiction to a Foreign Court ...... 89
  4.4.2- Choice-of-court Agreements Conferring Jurisdiction to a Maltese Court ...... 89
4.5- Arbitration Agreements ....................................................................................... 90
  4.5.1- The Arbitration Act ......................................................................................... 90
  4.5.2- The COCP ...................................................................................................... 92
4.6- Conclusion ............................................................................................................ 93

Conclusion .................................................................................................................. 95
TABLE OF STATUTES

**International Statutes**


**Maltese Statutes**

Arbitration Act, Chapter 387 of the Laws of Malta

Code of Organization and Civil Procedure, Chapter 12 of the Laws of Malta
Other Jurisdictions

**U.S**

Constitution of the United States


**U.K**

Arbitration Act 1996

The Judicature Acts of 1873 and 1875

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**Switzerland**

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Wharton v May (1799) 5 Ves Jun 27, 31 ER 454, 476; (1789-1817) 1 VES Jun Supp 489, 34 ER 887
ACKNOWLEDGEMENTS

My deepest gratitude goes to my supervisor Dr. Alex Sceberras Trigona Dip.N.P LL.D M.A (Oxon.), without whom this thesis would not have been possible, for finding time to meticulously review my thesis and for his assistance throughout.

Special thanks go to Dr. Paul Cachia B.A. M. Jur. (Oxon) M. Phil. (Oxon) LL.D with whom I discussed the proposal for my thesis; for the interest expressed towards the research topic, for making himself available and for contributing to this work with his highly esteemed feedback and ideas.

Last but not least, I would like to wholeheartedly express my appreciation for my family’s unflinching support. God bless you all!
### ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>COCP</td>
<td>Code of Organization and Civil Procedure</td>
</tr>
<tr>
<td>ECHR/ The Convention</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>JR</td>
<td>Judgment Regulation (EC) No. 44/2001</td>
</tr>
<tr>
<td>Regulation</td>
<td>Brussels I Regulation (EC) no 44/2001</td>
</tr>
<tr>
<td>TGI</td>
<td>Tribunal de Grande Instance</td>
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<tr>
<td>FCA</td>
<td>French Committee on Arbitration</td>
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Introduction

The anti-suit injunction is an effective device for deterring duplicative proceedings. However, its means often imply jurisdictional conflict, rather than jurisdictional cooperation, assimilated with other conventional measures deployed to focus litigation in one court. Anti-suit injunctions seem incompatible with the principle of comity, and that such injunctions are issued against the litigant *in personam*, rather than against the foreign court itself, does not necessarily lessen the element of conflict. Consequently, it comes as no surprise that from the various measures deployed to intercept parallel proceedings, the usage of anti-suit injunctions has been the most controversial.

The usefulness of such remedy is undoubtedly compelling, yet its dangers can be a sufficient deterrent. This thesis will endeavour to examine whether the ends of the anti-suit injunction remedy could ever justify its controversial means. This thesis aims at ascertaining the present role of anti-suit injunctions in private international law, with particular reference to the European judicial sphere. An attempt is made, to provide foresight on the future role of anti-suit injunctions in transnational dispute resolution.

This thesis will primarily discuss the conceptual foundations of the remedy of the anti-suit injunction while analysing the context in which it operates and tracing back its origins. The anti-suit injunction has evolved from a domestic remedy to an extraterritorial one and during its development, the pre-conditions and criteria for granting such injunction were continuously modified by the English courts. This thesis will provide a comprehensive study of these pre-conditions and thresholds which need to be fulfilled, in order that the grant of an anti-suit injunction can be justified. This thesis will also explore the availability and the requirements of anti-suit injunctions in other common law jurisdictions and analyse the rationales for its unavailability in civil law jurisdictions.

Attention will then be diverted to the ‘side effects’ and implications of the anti-suit injunction remedy on comity and human rights law and its other negative consequences in practice. In this part, the thesis will tackle the controversies surrounding the anti-suit injunction and analyse the arguments against it, while demonstrating the hazards posed by such remedy.
After having dealt with the theoretical foundations of anti-suit injunctions, the thesis will focus on its main theme, namely anti-suit injunctions in the European judicial sphere. An analysis of the CJEU’s case-law will be carried out starting from *Turner v Grovit* and ending with *Gazprom*. This thesis will also delve into how the exclusion of anti-suit injunctions has inevitably paved the way for ‘first come, first served rules’ and how such rules give rise to unwanted litigation tactics such as the ‘Italian torpedo actions.’

Particular attention will be given to anti-suit injunctions which are deployed in aid of arbitration agreements and to the consequences of their unavailability in international arbitration. This thesis will examine, the position of the European Commission, the European Parliament and of other stakeholders vis-à-vis the arbitration exception in the Brussels I Regulation. This will be followed by a discussion on the availability of anti-suit injunctions under the Brussels I (Recast) Regulation in the light of the AG’s opinion and the CJEU’s decision in *Gazprom*.

Although the position of common law and civil law jurisdictions with regards to anti-suit injunctions is lucid enough, the position of ‘mixed’ legal systems, such as the Maltese legal system, is unclear. Since anti-suit injunctions were never sought before our courts, an attempt is made to identify any legal basis on which an anti-suit injunction may be requested before a Maltese Court. In this regard, reference is made to the Code of Organization and Civil procedure in order to analyse the remedies which are available in the context of transnational disputes and concurrent jurisdiction and to outline the modes of injunctive relief which are available under Maltese law. The availability of anti-suit injunctions deployed in aid of arbitration agreements, will also be discussed with reference to local instruments on arbitration, including the Arbitration Act.

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6 C-536/13, ‘Gazprom’ OAO [2015]  
7 Ibid.  
8 Code Of Organization And Civil Procedure, Chapter 12 of The Laws of Malta.  
9 Arbitration Act, Chapter 387 of the Laws of Malta.
Chapter 1 - CONCEPTUAL FOUNDATIONS AND BEYOND.

1.1- Characterization and Categorization

In its widest meaning, an anti-suit injunction is an order issued by a competent court to restrain one of the parties to a dispute from commencing or from continuing proceedings elsewhere.\(^{10}\)

English jurisprudence demonstrates that there are two main categories of anti-suit injunctions, namely ‘contractual’ injunctions and ‘alternative forum cases.’ The former type refers to situations where the claimant commences foreign proceedings in breach of a contractual ‘choice-of-forum’ clause, which confers jurisdiction to an English court, or which provides for London arbitration. The latter refers to situations, where the foreign proceedings could have been brought before a court in England, and are vexatious and oppressive to the defendant. Less common forms of anti-suit injunctions include, those granted in ‘single forum’ cases, which restrain the claimant from commencing or continuing foreign proceedings that can only be brought abroad ‘anti-anti-suit injunctions’ which, as their terminology implies, are deployed to counter the effects of an anti-suit injunction.\(^{11}\)

One should also consider the possibility of an injunction being granted to prevent the pursuit of arbitration proceedings abroad. Such injunctions can in theory be granted by an English court, however, in practice, the supervisory role of the court and the evolving principle of ‘kompetenz-kompetenz’\(^{12}\) make this a difficult application.\(^{13}\)

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\(^{11}\) ibid 6.

\(^{12}\) Kompetenz-Kompetenz or competence-competence is a principle widely accepted in international arbitration which refers to the power of an arbitral tribunal to decide itself the extent of its own competence.

\(^{13}\) Raphael (n 10) 6.
The majority of anti-suit injunctions granted by the courts are prohibitory in nature. Hence, they aim to restrain the claimant from initiating proceedings abroad. However, occasionally, in order for it to be effective, the court may alternatively grant a ‘mandatory’ anti-suit injunction. Consequently, the claimant must either obtain the stay of the foreign proceedings or take active steps towards discontinuing them. For instance, in *Kallang Shipping SA v Axa Assurances Senegal*, a mandatory injunction was issued, whereby the lifting of the arrest of a ship was also ordered.

### 1.2- The Context in which the Remedy Operates

Before delving further into the specific nature of anti-suit injunctions, it is apt to outline first the context in which such remedy operates. The fundamental right to access a court and to obtain adequate relief for damages suffered are of utmost significance in every judicial system. In a transnational context, the claimant’s right of access to a court and to obtain relief against the damages suffered also implies that he gets to choose the forum. However, this can be of great detriment to the defendant, to the extent that the fundamental principle of the equality of arms may become substantially tainted. It follows that there should be a remedy at hand for the would-be defendant which is capable of limiting the claimant’s capacity of ‘forum-shopping’ in the absence of regulations which pre-determine jurisdiction.

Upon proceedings being filed against him in a foreign country, the defendant will typically have various options. First, the defendant may submit to the jurisdiction of the foreign forum and proceed to defend his case. This is particularly prudent, if he has substantial seizable assets in that foreign country. This is however far from ideal, as it can be quite cumbersome to litigate the case in a foreign, unfamiliar setting and thus,

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the defence may, to a certain extent, become tainted. The defendant might ‘lose the will to fight’, particularly if there is an imbalance of power between the parties, and he may be coerced to settle.\textsuperscript{16} Furthermore, even if the defendant is successful in defending his case in the foreign jurisdiction, this is destined to be costly and time-consuming and particularly unjust, if such success was predictable from the start.\textsuperscript{17}

Another option would be to request a stay of proceedings from the foreign court on the basis of \textit{forum non conveniens} and to rely on the foreign court to deal with the wrongful conduct of the claimant in pursuing litigation abroad. But, then again, this may not be optimal, since the foreign court’s standards and conclusions on the ‘appropriate forum’ may very well differ from those of the domestic court. The foreign court may not view the proceedings to be substantially oppressive or vexatious to the defendant. Moreover, the foreign court may not provide the defendant with a remedy to deal with the conduct of the claimant, and even if such remedy is made available to the defendant, proceedings may not be as swift as those of the defendant’s domestic court.\textsuperscript{18}

If the defendant has no substantial assets in that foreign country and does not foresee having any assets there in the future, he may simply opt to ignore the foreign suit. However, this is risky, since an unfavourable judgment may still be enforced by a court which has jurisdiction \textit{in personam} over him against any substantial assets liable to seizure he may have in that country.\textsuperscript{19}

Another option for the defendant would be to launch counter-proceedings elsewhere. Again, this option is not ideal, for the simple fact that in virtue of the \textit{lis pendens} rule, the court second seized may have to stay proceedings until the first court has ruled on the issue of jurisdiction. Thus, this option is only plausible, if when faced with an anticipated suit, the potential defendant initiates proceedings beforehand.\textsuperscript{20}

Alternatively, the defendant may obtain a declaration of non-liability from another court. However, in practice the effectiveness of such declaration is often limited and such declaration may not be capable of being recognized elsewhere.\textsuperscript{21}

\textsuperscript{16} Raphael (n 10) 13.
\textsuperscript{18} Raphael (n 10) 12.
\textsuperscript{19} ibid.
\textsuperscript{20} ibid.
\textsuperscript{21} ibid.
Given the disadvantages of each option highlighted above, an equitable remedy has been developed with great practical significance in the form of an ‘anti-suit injunction.’ In fact, in A. Briggs’s words, ‘as an antidote to jurisdictional shenanigans its usefulness is second to none.’ Anti-suit injunctions fix the forum in a direct and forcible manner, and represent a logical response to the problems of parallel litigation. An anti-suit injunction has a significant bearing on the outcome of litigation because the determination of the forum will also entail which conflict of law rules are to be applied, and thus, ultimately, which law is to be applied.

Moreover, the anti-suit injunction provides the only solution for the uncommon, but not unheard of situation, where a financially powerful claimant initiates an array of proceedings against a weaker litigant simultaneously in various courts. In such situations it would be grossly unfair to expect the defendant to contest all the suits. A remedy in the form of an anti-suit injunction is undeniably an effective tool to curb such abusive tactics.

1.3- Origins and Evolution: From Domestic to Extraterritorial

1.3.1- Domestic

The anti-suit injunction originated in England and evolved from a mechanism intended to restrain proceedings in another domestic court, to an effective tool capable of restraining the pursuit of litigation overseas.

The origins of anti-suit injunctions can be traced back to the jurisdictional contretemps between the common law courts and the Ecclesiastical and Admiralty Courts. The

24 Raphael (n 10) 13.
common law courts availed themselves of what was known as a ‘writ of prohibition’, against the pursuit of litigation before the Ecclesiastical Courts and the Admiralty Courts.\(^{25}\)

The anti-suit injunction eventually became an effective means, by which the Court of Chancery sought to restrain the pursuit of proceedings before the common law courts, the outcome of which, was anticipated to be incompatible with the principles of equity. This type of anti-suit injunction could be granted in two situations, namely where common law failed to protect and enforce an equitable right or where the ends of justice required it.\(^{26}\)

Following the Judicature Acts of 1873 and 1875, which brought about the establishment of the High Court, the distinction between courts of law and the courts of equity was dissolved. After the enactment of this Act, proceedings which had already started and were pending before the High Court or the Court of Appeal, could not be restrained by an injunction as per article 24 (5) of the same Act. However, the commencement of proceedings in the High Court could still be restrained but no longer to ensure that equitable principles are enforced over common law, since any division of the High Court could now, dispense equity. On the other hand, both the continuation and the commencement of litigation before courts of inferior or concurrent jurisdiction could be restrained by an injunction.\(^{27}\)

1.3.2 - Extraterritorial

Although initially, the scope of application of anti-suit injunctions was limited to restraining litigants from starting proceedings in another domestic court in the same jurisdiction, it was soon realized that foreign courts may also grant a judgment which is contrary to the principles of equity.

The question of whether the Court of Chancery had the power to issue anti-suit injunctions to restrain litigants from pursuing foreign litigation first arose in the seventeenth century in *Love v Baker*\(^{28}\). Contrary to the Bar’s opinion, Lord Claredon LC warned that the granting of such injunction would be a ‘dangerous case’ and opined


\(^{26}\) Raphael (n 10) 41-42.

\(^{27}\) ibid 48.

\(^{28}\) *Love v Baker* [1665] 1Chan Cas 67, 22 ER 698, [1664-1665] Nels 103, 21 ER 801.
that it is perhaps safest to reject the application for the injunction in restraint of foreign proceedings in Livorno.\footnote{Raphael (n 10) 42.}

Lord Claredon’s conservative concerns were however short-lived, and in \emph{Lord Portland’s} case\footnote{Ibid; \emph{Lord Portland’s Case}, 114 Harg MSS 166.} it was agreed that the Court had the power to issue an anti-suit injunction to restrain proceedings in Holland. The injunction was eventually shot down on procedural grounds. However, this case marked the first step towards the permissibility of anti-suit injunctions in restraint of foreign proceedings.\footnote{Raphael (n 10) 42-44.}

Given that the court had already ruled on the power of the court to issue such an injunction, in the subsequent case of \emph{Wharton v May},\footnote{Wharton v May [1799] 5 Ves Jun 27, 31 ER 454, 476; [1789-1817] 1 Ves Jun Supp 489, 34 ER 887.} an anti-suit injunction was successfully granted to restrain proceedings in Ireland without further ado.

During the early nineteenth century, the grant of ‘extraterritorial’ anti-suit injunctions to restrain proceedings before other courts of the British Empire became quite habitual. First, to restrain proceedings in Scotland,\footnote{Bushby v Munday [1821] 5 Madd 297, 56 ER 908.} then in Ireland,\footnote{Beauchamp v the Marquis of Huntley [1822] Jac 546, 37 ER 956.} and then in Jamaica.\footnote{Beckford v Kemble [1822] 1 Sim & St 7, 57 ER3 (Jamaica).} By the end of the eighteenth century, anti-suit injunctions where being granted to restrain proceedings in foreign countries which had no ties with the British Empire starting with \emph{Hope v Carnegie}\footnote{Hope v Carnegie [1866] LR 1 Ch App 320 (Netherlands).} where an anti-suit injunction was deployed in restraint of proceedings in Holland.\footnote{Raphael (n 10) 42.}
1.4- Preconditions, Grounds and Thresholds

It is important to emphasize that an anti-suit injunction is not issued directly against the foreign court, but rather against the injunction defendant himself, thereby restraining him from commencing or continuing proceedings abroad. It follows that the quintessential pre-condition for granting an injunction is that the English Courts have *in personam* jurisdiction over the injunction defendant. In accordance with established English jurisprudence, this requirement is satisfied if the injunction defendant is present and can be served with the writ in England.38

Upon establishing that the English courts have jurisdiction over the defendant, the next step would be for the courts to determine, whether in the particular situation, the necessary criteria for granting an anti-suit injunction have been satisfied.

The tests and criteria for granting an anti-suit injunction have evolved throughout the history of the remedy. Initially, the courts made no distinction between the anti-suit injunction which is deployed in restraint of foreign proceedings and that which was granted to restrain proceedings in another court of England. What is particularly important to note is that foreign proceedings were also capable of being restrained if the defendant showed that there was an equitable defence on the merits. This was demonstrated in *Lord Portarlington v Soulby*,39 amongst others,40 where an injunction was granted to restrain proceedings in Ireland on the ground that there was an equitable defence which could not be availed of in a court of common law.41

Eventually, starting with *Bushby v Munday*,42 the ground of a substantive equitable defence for granting an ‘extraterritorial’ anti-suit injunction was abandoned and the preferred ground for granting such injunctions was that the ‘ends of justice’ required it. If the defendant could successfully convince the court that the ends of justice require that the foreign proceedings be restrained, or that the pursuit of proceedings overseas is clearly incompatible with principles of equity, then there is naturally an equity to be

39 *Lord Portarlington v Soulby* [1834] 3 My & K 104, 40 ER 40.
40 *Wharton v May* [1799] 5 Ves Jun 27, 31 ER 454, 476; (1789-1817) 1 VES Jun Supp 489, 34 ER 887; *Harrison v Gurney* [1821] 2 Jac & W 563, 37, ER 743; *Beauchamp v The Marquis of Huntley* [1822] Jac 546, 37 ER 956; *Marquess of Breadalbane v Marquess of Chandos* [1873] 2 My & Cr 711 40 ER 811.
41 Raphael (n 10) 44.
42 *Bushby v Munday* [1821] 5 Madd 297, 56 ER 908.
protected.\textsuperscript{43} This would be sufficient to justify the grant of an equitable relief in the form of an anti-suit injunction. In \textit{Carron Iron Co v Maclaren},\textsuperscript{44} it was moreover held, that the power to grant an anti-suit injunction in restraint of foreign proceedings shall be exercised in accordance with the ‘principle of convenience’, which should take into account the convenience and inconvenience of the proceedings being brought abroad and the inequity caused by the concurrence of proceedings.\textsuperscript{45}

In due course, the English Courts also came to realize that such injunctions deployed in restraint of foreign proceedings should be handled with greater caution, and sought to implement necessary constraints on the power to grant anti-suit injunctions. Hence, in \textit{Pennell v Roy},\textsuperscript{46} in the absence of concurrent litigation before the English courts, the Court of Chancery acknowledged that the question of whether the Scottish proceedings where frivolous and vexatious, was to be decided by the Scottish Courts and refused to grant an injunction.\textsuperscript{47}

Furthermore, it was felt that more stringent limitations should be imposed, on the power to grant anti-suit injunctions against a foreigner claiming before his home court. In \textit{Carron Iron v Maclaren}, the House of Lords held that in such situation, this power must be used exceptionally and with utmost diligence.\textsuperscript{48}

During the late nineteenth century, developments in jurisprudence relating to the stay of proceedings also influenced the grounds for granting anti-suit injunctions. In \textit{McHenry v Lewis} it became established that the test for staying proceedings should be based on whether the proceedings where ‘vexatious or oppressive’ or ‘an abuse of its process.’\textsuperscript{49} In \textit{Peruvian Guano Co v Bockwoldt} it was held that concurrent proceeding were vexatious if there is no ‘substantial reasons of benefit’ to the claimant.\textsuperscript{50} The test of ‘vexation or oppression’ was explicitly made applicable to anti-suit injunctions in \textit{Hyman v Helm}, where the Court of Appeal held that the requirement of vexation or oppression, which had developed in stay cases, was also required to restrain foreign proceedings by an anti-suit injunction.\textsuperscript{51} Subsequent jurisprudence demonstrates that a

\textsuperscript{43} \textit{Beckford v Kemble} [1822] 1 Sim & St 7, 57 ER 3, 7; \textit{Pennell v Roy} [1853] 3 De Gm & G 126, 43 ER 50, 55-56; \textit{Carron Iron v Maclaren} [1855] 10 ER 961, HLC 416, 439; \textit{Liverpool Marine Credit Co v Hunter} [1867] LR 4 Eq 62; [1868] LR 3 Ch App 479, 484.
\textsuperscript{44} \textit{Carron Iron v Maclaren} [1855] 10 ER 961, HLC 416, 438.
\textsuperscript{45} \textit{Raphael}, (n 10) 46.
\textsuperscript{46} \textit{Pennell v Roy} [1853] 3 De GM & G 126, 43 ER 50, 53-56.
\textsuperscript{47} \textit{Raphael}, (n 10) 46.
\textsuperscript{48} \textit{Carron Iron v Maclaren} [1855] 10 ER 961, HLC 416, 441-444.
\textsuperscript{49} \textit{McHenry v Lewis} [1881] 2 Ch D 202, (1882) 22 Ch D 397 (CA), 399-400, 405, 407-408.
\textsuperscript{50} \textit{Peruvian Guano Co v Bockwoldt} [1882] 23 Ch D 225 (CA), 230, 232.
\textsuperscript{51} \textit{Hyman v Helm} [1883] 24 Ch D 531 (CA), 537-538, 539-540, 540, 543.
consensus might have been reached upholding ‘vexation or oppression’ as the primary criteria for granting an anti-suit injunction.\textsuperscript{52}

As case-law progressed, the English courts became ever more cautious about deploying such injunctions to restrain foreign litigation, and such power was exercised very exceptionally.\textsuperscript{53} Furthermore, the concept of ‘pure vexation’ was imported from \textit{McHenry v Lewis} as a further constraint on such power. According to the concept of ‘pure vexation’, proceedings were vexatious if they did not give a substantial advantage to the claimant or where the advantage sought was illegitimate.\textsuperscript{54}

In respect of the stay of proceedings, it was soon realized that in consequence of the threshold of ‘vexation or oppression’ and ‘abuse of process’, motions for stay of proceedings in England were being unnecessarily withheld despite there being a more appropriate forum.\textsuperscript{55}

Starting with \textit{Atlantic Star v Bona Spes}\textsuperscript{56} and \textit{Macshannon v Rockware Glass Ltd},\textsuperscript{57} and ending with \textit{Spiliada Maritime Corporation v Consulex Ltd}\textsuperscript{58} in the 80s, the House of Lords gradually adopted a more lenient approach towards the requirement of vexation or oppression and subsequently replaced it with the Scottish concept of ‘\textit{forum non conveniens}’. Under this doctrine, proceedings in England could be stayed on the mere evidence that the foreign jurisdiction was clearly the more appropriate forum.\textsuperscript{59}

In \textit{Castanho v Brown & Root} it was held by Lord Scarman that the criteria for granting an anti-suit injunction should remain identical to those developed by the courts for the stay of proceedings. Consequently, an anti-suit injunction could be granted solely on the ground that England was the most appropriate forum, so long as the claimant does not have a legitimate benefit in pursuing litigation in the foreign court.\textsuperscript{60}

However, the mechanical importation of the criteria of ‘\textit{forum non conveniens}’ to anti-suit injunctions was criticized on the ground that while the atonement of criteria in


\textsuperscript{53} \textit{Cohen v Rothfield} [1919] 1 KB 410 (CA), 413; \textit{Ellerman Lines Ltd v Read} [1928] 2 KB 144 (CA), 158; \textit{Settlement Corp Hochschild} [1966] 1 Ch 10, 15G.

\textsuperscript{54} \textit{McHenry v Lewis} [1881] 2 Ch D 202, [1882] 22 Ch D 397 (CA).

\textsuperscript{55} Atlantic Star (Owners) v Bona Spes (Owners) (The Atlantic Star case) [1974] AC 436 (HL) 453E-H.

\textsuperscript{56} ibid.

\textsuperscript{57} \textit{Macshannon v Rockware Glass Ltd} [1978] AC 795 (HL).

\textsuperscript{58} \textit{Spiliada Maritime Corporation v Consulex Ltd} [1987] AC 460 (HL), 474-478.

\textsuperscript{59} \textit{Raphael} (n 10) 52.

\textsuperscript{60} \textit{Castanho v Brown & Root (UK) Ltd} [1981] AC 557 (HL), 574-577.
respect of stay of proceedings meant greater submission towards international comity, when the same criteria were applied in reverse for the granting of anti-suit injunctions, it resulted in an unnecessary and unjustified interference with the foreign proceedings. Nevertheless, the reasoning adopted in Castahno was adopted in subsequent cases including; Smith Kline & French Laboratories Ltd v Bloch, British Airways Board v Laker Airways Ltd and South Carolina Insurance Co v Assurantie Maatschappij.

The reasoning of Castahno was subsequently, 'officially' shot down in Aerospatiale, where the Privy Council held that the criterion of ‘England being the more appropriate forum’ for the grant of anti-suit injunctions, ran counter to international comity.

Following Castahno, another criterion was put forward in British Airways Board v Laker Airways Ltd. Since this was a ‘single forum’ case which could only be litigated abroad, it was evident that the criteria set in Castahno were inapplicable. Consequently, Lord Diplock utilised the test of ‘unconscionability’ or ‘unconscionable conduct.’ In accordance with this criterion, an anti-suit injunction could be granted, not only when there was a legal or equitable right not to be sued abroad, but also where there was a substantive equitable defence which justifies the retraining of foreign proceedings. Lord Diplock’s reliance on the obsolete notion of substantive equity was not supported in subsequent cases. However, the concept of “unconscionable conduct”, as a test for the grant of an injunction, was used in Midland Bank Plc v Laker Airways Ltd and South Carolina Insurance Co v Assurantie Maatschappij.

However, it was eventually felt that this test was unsatisfactory in guiding the court to identify the level of misconduct required, and consequently fell into misuse.

Once again, dust settled with Aerospatiale where it was held by Lord Goff that the proper test for granting an anti-suit injunction is whether the ends of justice require it. However, in order for an anti-suit injunction to be granted, the foreign proceedings must

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61 Adrian Briggs, ‘No Interference with Foreign Court’ (1982) 31 ICLQ 189.
63 British Airways Board v Laker Airways Ltd [1984] QB 142 (CA), 187.
64 South Carolina Insurance Co v Assurantie Maatschappij ‘De Seven Provincien’ NV [1987] AC 24 (HL), 40F-G.
67 British Airways Board v Laker Airways Ltd [1985] AC 58 (HL), 80B-H.
69 South Carolina insurance Co v Assurantie Maatschappij ‘De Seven Provincien’ NV [1987] AC 24 (HL), 40D.
70 Raphael (n 10) 55.
also be vexatious or oppressive. In addition, Lord Goff went even further by saying that the pursuit of litigation abroad could also be considered oppressive, if despite being significantly beneficial to the claimant, the foreign forum is substantially inconvenient.\footnote{Societe Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871 (PC), 894-902.}

Although the decision in Aerospatial applied only to Brunei Law, this approach was upheld as reflecting English law in \textit{Du Pont de Nemours & Co v Agnew},\footnote{Du Pont de Nemours & Co v Agnew [1988] 2 Lloyds Rep 240 (CA), 243-244, 249.} and was subsequently applied in \textit{Airbus Industrie GIE v Patel}\footnote{Airbus Industrie GIE v Patel [1998] 1 AC 119 (HL), 133C-F.} and \textit{Donohue v Armco}\footnote{Donohue v Armco Inc [2002] 1 Lloyds Rep 425 (HL).} By the end of the 1990s, Lord Goff’s modernized concept of vexation and oppression became the standard test for granting anti-suit injunctions.\footnote{Raphael (n 10) 56.}

The law on anti-suit injunctions remained untouched until \textit{Turner v Grovit}\footnote{Turner v Grovit [2002] 1 WLR 107 (HL) 117-118.} where Lord Hobbshouse held that ‘unconscionable conduct’ was the primary test in England to determine whether or not an anti-suit injunction should be granted. This was somewhat strange due to the fact that the decision in \textit{Turner v Grovit} was handed down on the same day as \textit{Donohue v Armco}\footnote{Donohue v Armco Inc [2002] 1 Lloyds Rep 425 (HL).} which ratified the test in \textit{Aerospatiale}\footnote{Societe Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871 (PC).} to be the primary test in England for granting an anti-suit injunction. Consequently, there was once again some confusion on which test should be applied.\footnote{Raphael (n 10) 56.}

In subsequent cases such as \textit{Glencore International AG v Exter Shipping Ltd}\footnote{Glencore International AG v Exter Shipping Ltd [2002] 2 All ER (Comm) 1 (CA), 13-14.} and \textit{Sabah Shipyard (Pakistan) Ltd v the Republic of Pakistan},\footnote{Sabah Shipyard (Pakistan) Ltd v the Republic of Pakistan [2003] 2 Lloyd Rep 571 (CA), 580-581.} it was held that the test of ‘unconscionable conduct’ was the primary test, of which vexatious or oppressive behaviour was a mere example. However, this synthesis of the two tests was not supported unanimously. In \textit{Royal Bank of Canada v Cooperative Centrale Raiffeisen-Boerenleenbank BA},\footnote{Royal Bank of Canada v Cooperative Centrale Raiffeisen-Boerenleenbank BA [2003] EWHC 2913 [2004] 1 Lloyd Rep 471 (CA), 474-475.} for example, Evans-Lombe J supported this synthesis, while Mance LJ appeared to prefer the test laid down by Lord Goff in \textit{Aerospatiale}. Similarly, in \textit{OT Africa Line Ltd v Magic Sportswea},\footnote{OT Africa Line Ltd v Magic Sportswe [2005] 2 Lloyd's Rep 170 (CA), 183-184.} Longmore LJ preferred Lord Goff’s approach, whilst Rix LJ showed support to the synthetic approach.\footnote{Raphael (n 10) 58.} Judging from
more recent case-law, it seems that Lord Goff’s approach turned out to be the preferred test.\textsuperscript{85}

In the absence of a pre-established set of criteria which ought to be applied in all cases of anti-suit injunctions, it is left to the court’s discretion to decide whether the case at hand merits the grant of an anti-suit injunction. However, at least with regards to the safeguards to be deployed, it appears that these should be applied in every application of anti-suit injunctions.

In \textit{Airbus Industrie GIE v Patel}, Lord Goff established three fundamental safeguards, which should be applied in every case of anti-suit injunctions. Primarily, Lord Goff stated that the power to grant such remedy should always be exercised with caution, in the light of comity considerations. Secondly, before granting an injunction, the court must ensure that it has a ‘sufficient interest’ in the substantive subject matter of the dispute. Only if it is evident that such ‘sufficient interest’ exists, can the court consider the foreign proceedings to be vexatious or oppressive, and only if there is a ‘sufficient interest’, can the intervention of the English Court be justified. Finally, as creatures of equity, an anti-suit injunction should only be granted when the ends of justice require it.\textsuperscript{86}

\textsuperscript{85} Deutsche Bank AG v Highland Crusader Offshore Partners [2010] 1 WLR 1023 (CA), 50; Elektrim SA v Vivendi Holdings 1 Corporation [2009] 1 Lloyds Rep 59 (CA), 82.
\textsuperscript{86} Airbus Industrie GIE v Patel [1998] 1 AC 119 (HL), 128.
1.5- Legal Basis & Discretion

1.5.1 - Legal Basis

The English court’s power to grant an anti-suit injunction arises from statutory provisions. Section 37 (1) of the Senior Courts Act of 1981 has been recited several times as a legal basis for the grant of anti-suit injunctions. This provides that ‘the High Court may by order (whether interlocutory or final) grant an injunction… in all cases in which it appears to the court to be just and convenient to do so.’

Undoubtedly, this provision endows the English Courts with a significant amount of discretion, and although the anti-suit injunction is nowadays issued under statutory provisions, it remains, in nature, an equitable remedy.

In Donohue v Armco Inc., it was held that an anti-suit injunction will be issued by the court, provided there are no ‘strong reasons’ against their issuance. Whether there are ‘strong reasons’ or not should be assessed by taking into account all the circumstances of the case. Notably, the court will therefore, ‘weigh in the balance any discretionary factors which support the grant of an injunction.’

1.5.2 - Discretionary Considerations

In the context of contractual injunctions, the first consideration which the court may take into account in deciding whether there are ‘strong reasons’ against the grant of an injunction, is the nature of the choice of court clause. If it appears that the injunction defendant did not personally consent to the contractual clause, then this factor might

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88 Previously known as the Supreme Court Act.
89 The Senior Courts Act 1981 section 37(1).
90 British Airways Board v Laker Airways Ltd [1985] 1 AC 58 (HL), 80H-81G, 95F-H; Midland Bank Plc v Laker Airways Ltd [1986] 1 QB 689 (CA), 711B.
92 Raphael (n 10) 204.
suggest against the grant of the injunction.\textsuperscript{93} Although, it is unlikely that this consideration alone constitutes a 'strong reason' against the grant of an injunction, it may nevertheless be taken into account by the court in deciding whether to grant an anti-suit injunction or not.\textsuperscript{94}

On the other hand, in the absence of a jurisdiction clause, the court may, in the exercise of its discretion, employ several factors in order to establish which of the two courts, local or foreign, is the most appropriate forum. These are often referred to as the \textit{forum conveniens} considerations, and can include considerations, such as: the location of witnesses and other relevant evidence, the connection of the litigants with the foreign forum, the applicable law, the reasons which may have motivated the other party to pursue litigation in the foreign forum and any significant prejudice which he may have suffered, had he brought proceedings in the other forum. Moreover, any overlapping proceedings in another forum and whether the foreign court would have adhered to the principle of equality of arms and granted a fair trial to both litigants are also factors which may be taken into account by the court.\textsuperscript{95}

Since anti-suit injunctions are deeply rooted in equity, then the equitable maxim of 'whoever comes to equity must come with clean hands' is also applicable. This can be translated as meaning that the conduct of the injunction claimant is also taken into account.\textsuperscript{96} Delay by the claimant in initiating proceedings for the anti-suit injunction, as well as voluntary submission to the foreign jurisdiction and inconsistent behaviour, are all factors which the court is likely to consider, when requested to issue an anti-suit injunction.\textsuperscript{97}

Comity considerations may also play an important role in deciding whether or not to grant an injunction. If an injunction is requested to halt proceedings in a foreign forum which is more likely to consider the injunction as an abusive interference with its jurisdiction and sovereignty, then the court may want to exercise a higher degree of diligence in its decision. Although this may seem logical, it has been debated whether such considerations may constitute a 'strong reason' against the issuance of an anti-suit injunction. In the \textit{Angelie Grace}, Millett J held that a foreign court 'would not' be

\textsuperscript{93} \textit{Bankers Trust Co v PT Jakarta International Hotels and Developments} [1999] 1 Lloyds Rep 206, 39, [2005] 1 Lloyds rep 67 (CA).
\textsuperscript{96} \textit{Raphael} (n 10) 209.
\textsuperscript{97} ibid. 209-211.
offended by an anti-suit injunction if it is deployed in order to address a breach of a contractual forum clause.\textsuperscript{98} This was however interpreted as ruling out \textit{a priori} any evidence which shows that the foreign forum is likely to be offended by the anti-suit injunction.\textsuperscript{99} Nonetheless, the reasoning of \textit{The Angelic grace} was further developed in subsequent cases, including \textit{Through Transport}, where the Court of Appeal maintained that there is no reason why the court ‘should be’ offended by an anti-suit injunction deployed to remedy a breach of a mutually agreed contract clause to sue in a particular court.\textsuperscript{100}

Furthermore, in \textit{The Front Comor} it was held that ‘whatever terminology is adopted—“offended”, “affronted”, or “contrary to comity”, evidence that the foreign court would treat the order as an impermissible exercise of jurisdiction by the English courts, is as a matter of English conflicts of laws rules, not in itself a reason to withhold such an order to procure compliance with an agreement to arbitrate.’\textsuperscript{101}

Failure to bring a motion for stay of proceedings in the foreign court may also be taken into account by the courts in the exercise of their discretion. This factor is held in high regard in other anti-suit injunction friendly jurisdictions, such as Canada.\textsuperscript{102} However, the position of the UK, as reflected in \textit{Angelic Grace}, does not seem to regard this factor as constituting a ‘strong reason’ against the grant of an anti-suit injunction.\textsuperscript{103} Similarly, according to the English courts, it is not a ‘strong reason’ against the issuance of an injunction, where the motion for stay of proceedings is initiated in the foreign proceedings, but has not as yet been determined.\textsuperscript{104}

On the other hand, if the foreign ruling on the motion for stay of proceedings has been delivered before the domestic ruling on the grant of the anti-injunction, and the foreign court has refused to stay proceedings, then this may be considered a ‘strong reason’ against the grant of an injunction, provided that the foreign court has not applied principles which are incompatible with those applied by the English courts.\textsuperscript{105}

\textsuperscript{98} \textit{Aggeliki Charis Compania Maritima SA V Pagnan Spa ( The Angelic Grace)} [1995] 1 Lloyds Rep 87 (CA), 96.
\textsuperscript{99} \textit{OT Africa Line Ltd v Hijazy ( The Kribi) ( No 1)} [2001] 1 Lloyds Rep 76, 93.
\textsuperscript{100} \textit{Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd} [2005] 1 Lloyds Rep 67(CA), 85-88.
\textsuperscript{101} \textit{West Tankers Inc v Ras Riuione Adriatica di Sicurta ( The Front Comor)} [2005] 2 Lloyds Rep 257, 266-268.
\textsuperscript{102} \textit{Amchem Products Inc. v British Columbia Compensation Board} [1993] 1 S.C.R 897.
\textsuperscript{104} \textit{Aggeliki Charis Compania Maritima SA V Pagnan Spa ( The Angelic Grace)}[ 1994] 1 Lloyds Rep 168 (Rix J), 182; [1995] 1 Lloyds Rep 87 (CA), 95.
\textsuperscript{105} \textit{Akai Pty Ltd V People’s Insurance Co. Ltd} [199]1 Lloyds Rep 90, 105.
Another consideration which could be taken into account by the courts in their exercise of discretion is the likelihood that the foreign court will recognise such injunction. Whether such factor should be taken into account was debated in the aftermath of Philip Alexander v Bamberger where German courts refused to recognise an anti-suit injunction granted by an English court. In consequence to this decision, Legatt LJ proposed that the courts should start taking into consideration the foreign court’s willingness to recognise and enforce the anti-suit injunction, especially when the defendant has no presence or assets in England. Legatt LJ’s proposition found little to no support in subsequent judgments. In fact, in Re Liddell’s Settlement Trust, it was held by the Court of Appeal that ‘it is not the habit of this court in considering whether or not it will make an order to contemplate the possibility that it will not be obeyed.’ This echoes the principle that the court does not proceed on the assumption that its orders will not be obeyed.

1.6- Other Models

1.6.1- United States

A. INTRASTATE CONTEXT

It is well-established in U.S jurisprudence that the U.S courts have the power to restrain litigants from pursuing foreign proceedings by issuing an anti-suit injunction. In Quaak v Klynveld Peat Marwick Goerdeler Bedriffsrevi-soren it was held that ‘it is common ground that federal courts have the power to enjoin those subject to their personal jurisdiction from pursuing litigation before foreign tribunals.’

107 Raphael (n 10) 221.
108 Re Liddell’s Settlement Trust [1936] Ch 365 (CA), 347.
109 Quaak v Klynveld Peat Marwick Goerdeler Bedriffsrevi-soren [2004] (1st Cir.) 361 F.3d 11.
It is generally accepted that for an anti-suit injunction to be granted by a U.S court, two pre-conditions must be satisfied, namely that both the domestic and the foreign proceedings must involve the same parties and that both proceedings must involve the same subject-matter.\textsuperscript{110}

In accordance with US jurisprudence, the first criterion is satisfied if the parties are ‘sufficiently similar’.\textsuperscript{111} Thus, what matters is that ‘the real parties in interest are the same.’\textsuperscript{112} The second requirement is satisfied, if the ‘resolution of the case before the enjoining court be dispositive of the enjoined action.’\textsuperscript{113}

Similar to the English model, the United States' anti-suit injunction evolved from the domestic intrastate context to an extra-territorial means of restraining foreign proceedings.\textsuperscript{114}

In the intrastate context, anti-suit injunctions are typically issued; to restrain proceedings in another sister-state which are vexatious, where the pursuit of litigation elsewhere breaches the forum’s public policy or where it interferes with its judicial process.\textsuperscript{115}

Issues of comity are of little concern in the intrastate context. However, it is still important that parallel litigation between sister-state courts is regulated and that the structure of the Union is preserved. Furthermore, the Constitution of the United States provides that ‘full faith and credit’ should be given to sister-state judgments.\textsuperscript{116} This principle is naturally undermined by the anti-suit injunction and thus, constraints should also be placed on the power of US Courts to grant such remedy against the pursuit of litigation before sister-state courts.\textsuperscript{117}

\textsuperscript{110} ibid 18.
\textsuperscript{112} Motorola Credit Corp v Uzan [2003] No. 02 Civ 666 (JSR) WL 56998, 6 (S.D.N.Y. January 7 2003) 2.
\textsuperscript{113} China Trade 837 F.2d at 36; Canon Latin Am. Inc v Lantech [2007] (8th Cir)(CR) SA, 508 F.3d 597 602.
\textsuperscript{116} Constitution of the United States, Article 4, section 1.
It has been further established that a Federal Court of the United States can grant an injunction to restrain proceedings before another Federal Court.\textsuperscript{118} However, to the end of preserving ‘harmony… by avoiding…friction between two systems of courts,’\textsuperscript{119} the Anti-injunction Act provides that a Federal Court ‘may not grant an injunction to stay proceedings in a state court, except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment.’\textsuperscript{120}

\textbf{B. FOREIGN CONTEXT}

There is a common awareness amongst U.S Courts that in the light of comity considerations, injunctions restraining foreign proceedings should be granted with great caution and in exceptional circumstances.\textsuperscript{121}

U.S Jurisprudence, however, demonstrates that courts apply different criteria in determining whether the grant of an injunction is justified vis-à-vis principles of comity. The divergence of opinion seems to revolve around the question of which of the ‘equitable factors’ should be considered as warranting the grant of an anti-suit injunction over and above principles of comity.\textsuperscript{122}

In \textit{Laker Airways v Sabena} and \textit{Smoothline Ltd & Greastino Electronic Ltd v. North American Foreign Trading Corp.}, it was established that these equitable factors are:

i) Frustration of an important public policy of the domestic forum.

ii) Threat to the domestic court’s jurisdiction.

iii) The fact that a foreign action is vexatious or oppressive.

iv) Delay, inconvenience, expense, inconsistency or a race to judgment.

v) Prejudice to other equitable considerations.\textsuperscript{123}

It is generally agreed that there are two main approaches regarding which of the above equitable factors should be considered of so much importance to warrant the restraint of foreign proceedings, namely, a liberal and a restrictive approach.\textsuperscript{124}

\textsuperscript{118} \textit{American Horse Protection v Lyng}, 690 F.Supp.40, 42.

\textsuperscript{119} \textit{Casa Marie Inc v Superior Court of Puerto Rico}, 988 F.2d 252, 261.

\textsuperscript{120} The Anti-Injunction Act, ch.22 of the Acts of the 2\textsuperscript{nd} United States Congress, 2\textsuperscript{nd} Session, 1 Stat. 333, 28 U.S.C. 2283.

\textsuperscript{121} \textit{Paramedics v GE Medical Systems}, 369 F.2d 909, 937; comp. par.20.

\textsuperscript{122} \textit{China Trade v M.V. Choong} [1987], 837 F.2d 33; \textit{Karaha Bodas Company, L.L.C v Perusahaan Pertambangan Miniyak} [2004], 335 F.3d 357, 366.

According to the liberal approach, an anti-suit injunction may be issued, where there are any of the above-mentioned equitable factors. Supporters of this approach, consider mere judicial economy, inconvenience, delay or additional expenses to be sufficient grounds for the grant of anti-suit injunction. Consequently, according to this approach, comity can be easily outweighed by any of these factors.

In Allendale Mut Ins Co. v Bull Data Sys. Inc., the Court of Appeal of the Seventh Circuit submitted that comity ‘is a purely theoretical concern’ and should only bar the use of anti-suit injunctions, when the foreign relations of the United States are significantly undermined.

On the other hand, the restrictive approach, which seems to be the preferred approach, views the anti-suit injunction as directly hazardous to the comity of nations. Under this approach, anti-suit injunctions should be used as sparingly as possible and only where there are sufficient compelling reasons to do so.

Since, according to the restrictive approach, the domestic court should refrain from interfering with the jurisdiction of the foreign court, then it is likewise expected from the foreign court, to refrain from interfering with the domestic proceedings. It follows that if the foreign proceedings pose a significant threat to the jurisdiction of the domestic forum, then concerns of comity cannot prevail and thus an anti-suit injunction is permissible and justifiable under the restrictive approach, if it is deployed to protect the jurisdiction of the domestic court. An example would be, where the plea of res judicata could be pleaded in a foreign forum vis-a-vis a judgment delivered in a domestic court. In such a case, an anti-suit injunction may be issued to safeguard against re-litigation abroad. Another example would be, where the foreign court endows itself with

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exclusive jurisdiction, such as, by issuing an anti-suit injunction restraining the pursuit of litigation in the domestic forum. 130

Another case where an anti-suit injunction is justifiable under the restrictive approach is where the claimant has opted to litigate his case abroad in order to evade the public policy of the domestic court. However, in this respect, there must be a public policy which is regarded as having paramount legal status. Seeking to obtain a tactical advantage in substantive or procedural law of the foreign court is not enough to warrant the issuance of an injunction. 131

Another approach has been developed by the courts, merging elements from both the restrictive and liberal approach, thereby creating a middle ground approach. This is the preferred approach of the First and Second Circuits. This middle ground approach adopts a presumption against the grant of an anti-suit injunction, which can however be rebutted by the equitable factors highlighted by the liberal approach. 132

This approach was first outlined in the Quaak judgment. In the appeal, the court noted that both the restrictive and liberal approach were unsatisfactory. The court held that the liberal approach failed to take into account comity considerations and allowed anti-suit injunctions to be granted without considering the effects of such injunctions on the U.S’s relations with other sovereign states. On the other hand, the court also rejected the restrictive approach, holding that while it gave due consideration to comity, the restrictive approach fell short of paying due regard to important equitable factors. The court consequently opined that the best approach would be one which adopted a ‘totality of the circumstances’ standard. 133

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133 Quaak v Klynfeld Peat Marwick Goerdeler Bedrijfsrevisoren (KPMG-B) [2004] 361 f.3D, 18.
1.6.2- Canada

The Canadian position vis-à-vis the anti-suit injunctions remedy is best reflected in Amchem Products Inc. v British Columbia Compensation Board where the Supreme Court of Ontario held that in order for an anti-suit injunction to be requested, proceedings must have already commenced in the foreign court and such court must have failed to entertain the request for a stay or termination of the proceedings brought before it.\cite{134}

Upon fulfilment of these conditions, the court can move on to decide whether to grant an anti-suit injunction. In this regard, the Supreme Court held that an anti-suit injunction may only be granted if it is shown that the foreign forum, in finding its own jurisdiction, applied principles which were incompatible with Canadian principles of ‘forum non conveniens’, and if the proceedings were to continue abroad, injustice would most likely result.\cite{135}

The test laid down in Amchem, pays due regard to comity considerations, in that, it requires the foreign court’s ruling on the stay of proceedings prior to the domestic court’s ruling on the grant of the anti-suit injunction. This is based on the presumption that if a foreign court is left to decide whether or not to grant a stay of proceedings, the foreign court would not feel that there has been an abusive interference of its judicial process, and issues of comity are thereby, neatly resolved.\cite{136}

Despite its authoritative status, the Amchem test set no absolute rules, and there still remain some contrasting views between judges, with regards to the appropriate criteria for granting an anti-suit injunction. In fact, following Amchem, several anti-suit injunctions were issued, despite the lack of a prior foreign ruling on the stay proceedings.\cite{137}

In Hudon v Geos Language Corp, the Ontario court granted an anti-suit injunction, despite the fact that a stay of proceedings was not requested before the Japanese Court. The court held that the requirement of seeking a stay of the foreign proceedings prior to requesting an anti-suit injunction, as set out in the Amchem judgment, was

\begin{footnotesize}
\begin{enumerate}
\item\cite{134} Amchem Products Inc. v British Columbia Compensation Board [1993] 1 S.C.R 897.
\item\cite{135} Ibid 931.
\item\cite{137} Ibid.
\end{enumerate}
\end{footnotesize}
merely the preferred course of action and not an indispensable pre-condition. The court held that since this was not an absolute precondition for granting an anti-suit injunction, and since the Ontario Court had already decided that it was the appropriate forum for the dispute, then an anti-suit injunction should be granted.\textsuperscript{138}

Similarly, in Dent Wizard International Corp v Brazeau, an anti-suit injunction was granted, despite the fact that the defendant failed to challenge the arbitration proceedings in Missouri. Judge Weber held that case-law demonstrates that failure to seek a stay is not fatal to the grant of anti-suit injunctions. Weber noted that similar requests for stays were previously rejected in Missouri and that it was doubtful whether Missouri was the appropriate jurisdiction. In the light of the above, the Court granted an anti-suit injunction to restrain the proceedings in Missouri.\textsuperscript{139}

In Bell'O International LLC v Flooring & Lumber Co., the defendant held that he could not be reasonably expected to bring a motion for stay of proceedings in the New Jersey, as this would certainly be costly. The court granted an anti-suit injunction in spite of the plaintiff’s assertion that the defendant did not provide specific evidence of financial hardship.\textsuperscript{140}

Also, in Precious Metals Capital Corp. v Smith,\textsuperscript{141} Justice Campbell granted an anti-suit injunction restraining UK proceedings, despite the fact that there was no prior request for a stay of proceedings in the UK.

On the other hand, in Speers Estate v Reader’s Digest Association (Canada) ULC, Justice Paul Perell, in the absence of a prior motion for stay of proceedings in the foreign court, rejected the request for an anti-suit injunction on the ground that the Quebec Court was not given the opportunity to decline jurisdiction. Unlike in the aforementioned cases, in Speers Estate, the Amchem test’s requirement of a prior motion for stay of proceedings in the foreign court, was regarded as an indispensable precondition for the grant of an anti-suit injunction.\textsuperscript{142}

A strong adherence to the Amchem test was also demonstrated in Elga Laboratories Ltd. v Soroko Inc. Similarly, in this case, the applicant requested the grant of an anti-suit injunction in restraint of proceedings in New Jersey, without bringing a prior motion for a stay of the foreign proceedings. The applicant argued that a prior motion for stay

\textsuperscript{138} Hudon v Geos Language Corp [1997], 34 O.R. (3d) 14 (Div. Ct.).
\textsuperscript{140} Bell'O International LLC v Flooring & Lumber Co. [2001] 11 C.P.C. (5\textsuperscript{th}) 327 (Ont. S.C.J.).
\textsuperscript{141} Precious Metals Capital Corp. v Smith [2008] O.J. No. 4956 (S.C.J. [Comm. List]).
\textsuperscript{142} Speers Estate v Reader’s Digest Association (Canada) ULC [2009] 73 C.P.C. (6th) 281 (Ont. S.C.J.).
of proceedings abroad would impose on him a financial burden due to his lack of funds. However, Justice Alexandra Hoy dismissed this claim on the ground that his opponent too lacked funds, and there was no significant injustice to warrant the grant of an anti-suit injunction. The request for enjoining foreign proceedings was thereby denied, despite the fact that the Ontario court was probably the most appropriate forum.\textsuperscript{143}

In the more recent case of \textit{Canadian Standards Assn v Solid Applied Technologies Ltd.}, the Ontario Court refused to grant an anti-suit injunction to restrain proceedings before Tel Aviv, as the requirements set out in \textit{Amchem} were not satisfied.\textsuperscript{144} Similarly, in \textit{Agemian v Pactic LLC}, the test in \textit{Amchem} was restated and upheld once again. In Justice Pattillo’s words, ‘first, the applicant must establish that the foreign court assumed jurisdiction on a basis that is inconsistent with the principles relating to \textit{forum non conveniens}. In the event the applicant establishes the first test, the court must then go on to determine whether an injustice will result from allowing the foreign action to proceed in the foreign jurisdiction.’ Given that the applicant failed to meet the criteria of the test, the request for an anti-suit injunction in restraint of proceedings in Illinois was refused.\textsuperscript{145}

Therefore, it seems that although the \textit{Amchem} test is held in high regard and is generally considered as representing the Canadian position on anti-suit injunctions, there is evidently a divergence of opinion on whether this test should be regarded as a indispensable precondition or merely a suggestion of the preferred course of action in the light of comity considerations. It seems that the courts are more willing to grant an injunction; in the existence of a prior decision stating that the Canadian Court is the appropriate forum, where it is evident that the applicant lacks funds to bring a motion for stay of proceedings abroad and where it is evident, from previous jurisprudence of the foreign court that it is unlikely that the foreign court will accede to the request for the stay the proceedings.\textsuperscript{146}

Requesting the foreign court to consider the case for a stay of proceedings prior to requesting an injunction from the domestic court is generally accepted as the appropriate course of action in the light of comity considerations, and thus, naturally, a prior request for a stay of proceedings before the foreign court decreases the likelihood

\textsuperscript{143} \textit{Elga Laboratories Ltd. v Soroko Inc.} [2002], 61 O.R. (3d) 324 (S.C.J.).
\textsuperscript{145} \textit{Agemian v Pactic LLC} [2012] ONSC 4571.
that the Ontario court would refuse to grant an anti-suit injunction, should the request for staying proceedings be refused by the foreign forum. However, seeking a stay of proceedings abroad is almost certain to be costly and time-consuming. It follows that seeking a stay of foreign proceedings is only advisable if the applicant is well-funded, has sufficient time at his disposal, and only where it is unlikely that the court will grant an anti-suit injunction in the absence of a prior motion to stay proceedings abroad.  

1.7- Civil Law Jurisdictions

Anti-suit injunctions are virtually unknown amongst Civil Law countries. In Civil Law countries one would expect issues of parallel litigation to be addressed by the less draconian remedy of *lis alibi pendens* which mandates the court second seized to stay proceedings until the first court decides on the issue of jurisdiction.  

Civil Law jurisdictions often regard the remedy of the anti-suit injunction as an unacceptable interference with the judicial process of another court, and which therefore constitutes a direct violation of the principle of comity.  

Not only will a civil jurisdiction refrain from granting an anti-suit injunction to restrain foreign proceedings, but it will probably also refrain from recognising a foreign anti-suit injunction, on the ground that it is incompatible with article 6 of the ECHR and hence, also with its public policy.

In *Re the Enforcement of an English Anti-Suit Injunction*, the applicant obtained an anti-suit injunction in England, thereby restraining a German resident from pursuing litigation in Germany as this would be in breach of a contractual clause conferring jurisdiction to the London Court of International arbitration. The German court held that an anti-suit injunction, is nothing more than a direct interference with the sovereignty of

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147 *ibid.*


149 Oberlandesgericht [OLG] Düsseldorf, German Court of Appeal of Düsseldorf, [1996].

150 European Convention on Human Rights, Article 6- Right to a fair trial.
Germany, and the argument that an anti-suit injunction is not directed against the German court but against the litigant, was irrelevant.\textsuperscript{151}

Similarly, in \textit{Philip Alexander Securities and Futures Limited v Bamberger and others}, the German court refused to recognise an English anti-suit injunction, as such injunction abusively interferes with its jurisdiction. The English court however held that, if the claimant, in the absence of enforcement of the injunction, proceeds with litigation and obtains a judgment in his favour, then such claimant would have to be held accountable for contempt of the English court for breaching such order. Consequently, such judgment would not, as a matter of English public policy, be able to be enforced in England.\textsuperscript{152}

Despite the Germans' firm position on the disallowance of anti-suit injunctions, there still remain unique cases, where the need for an anti-suit injunction was strongly felt. In fact, there has been at least one case where the German courts have discretely granted an order similar to that of the anti-suit injunction to restrain foreign proceedings. In this case, the claimant pursued divorce proceedings in Latvia to circumvent the German rule that only the non-guilty party may pursue the divorce proceedings. The Reichsgericht held that this was against good morals and constituted a tort under article 826 of the German Civil Code. Consequently, the Reichsgericht restrained the husband from pursuing further the proceedings in Latvia. This order had a similar effect to an anti-suit injunction.\textsuperscript{153} Furthermore, it is generally accepted that the German courts may also restrain a party from commencing litigation in a domestic court in aid of an agreement to arbitrate.\textsuperscript{154}

Similarly, in the Netherlands there is a lack of case-law on anti-suit injunctions, which evidences hostility towards interfering, albeit indirectly, with the jurisdiction of a foreign sovereign state. However, in \textit{Medinol v Cordis}, in the preliminary relief judgment, the District Court of The Hague issued an order to restrain a party from commencing other preliminary relief proceedings in the Netherlands.\textsuperscript{155}

Switzerland is perhaps the most unwilling jurisdiction to restrain the pursuit of litigation or arbitration, be it national or foreign, by an anti-suit injunction. Anti-suit injunctions

\textsuperscript{151} \textit{Re the Enforcement of an English Anti-Suit Injunction}, Case 3 VA 11/95; [1997] I.L.Pr. 73 (CA).

\textsuperscript{152} \textit{Philip Alexander Securities and Futures Limited v Bamberger and others}, [1997] I.L.Pr. 73.


\textsuperscript{154} ibid.

\textsuperscript{155} \textit{Medinol v Cordis}, [2004] District Court of the Hague.
and similar orders are seen as incompatible with the principles of sovereignty and comity and are thus strictly prohibited. The Swiss approach provides that problems of concurrent litigation are sufficiently addressed by the less extreme remedies of *lis pendens* and *res iudicata*.

In *Air (PTY) Ltd v International Air Transport Association (IATA) and C. SA*,\(^{156}\) the court denied a request for restraining the arbitration proceedings. The court held that an anti-suit (or anti-arbitration) injunction would be incompatible with Swiss law where the latter requires a prior decision of the arbitral body on the issue of jurisdiction before the court can decide for itself on whether or not it has jurisdiction.\(^{157}\)

The French position is now reflected in *Zone Brands Inc.*, where the Cour de Cessation recognised and enforced an American anti-suit injunction. This marked a significant twist in the approach towards anti-suit injunctions which contrasts with the typical antagonistic approach of Civil Law jurisdictions. According to the Cour de Cessation, a foreign anti-suit injunction can be executed in France; provided there is no fraud, in the presence of a sufficient link between the foreign court and the dispute and in the absence of violation of international public policy - particularly the right to access court and respect of European law. The court held that an anti-suit injunction is not contrary to international public policy, which outside the scope of the agreements or Community law, the object is only, to punish the violation of a pre-existing contractual obligation.\(^{158}\)

This decision left many surprised because the French Courts had previously been consistent in denying requests for enforcing foreign anti-suit injunctions on the ground that such injunction infringes upon the autonomous exercise of jurisdiction of the French Court. In *Stolzenberg v, Daimler Chrysler Canada*,\(^{159}\) for example, the court, while enforcing a Mareva injunction, noted that this remedy, unlike that of the anti-suit injunction, does not interfere with the jurisdiction of the court.\(^{160}\)

The decision in *Zone Brands Inc.* was also interesting, due to the fact that it came during the turbulent backwash of *West Tankers*, where the CJEU had explicitly

\(^{156}\) *Air (PTY) Ltd v International Air Transport Association (IATA) and C. SA* [2005], Case-No. C/1043/2005-15SP.


\(^{158}\) *Beverages International, ex. Zone Brands Europe v In Zone Brands Inc.* [2009], Cass. 1e Civ.

\(^{159}\) *Stolzenberg v. Daimler Chrysler Canada* [2004], 1e Civ.

prohibited Member States of the EU from granting an anti-suit injunction to restrain proceedings in another Member State. Notably, the decision in Zone Brands Inc. reflects the current position that as long as an anti-suit injunction is granted by a non-EU Member State, then such injunction may be recognised and enforced in a Member State of the EU, as long as this is not incompatible with the public policy of the Member State where enforcement is sought.

This does not mean that the French courts can generally grant anti-suit injunctions against non-EU state courts. In fact, it was recently held by the TGI\(^{162}\) in Vivendi v Gerard that the French Courts do not have the power to grant an anti-suit injunction in restraint of proceedings in the United States. The judgment of the Court of Appeal was even more interesting due to the fact that this court, unlike the TGI, did not delve into the issue of jurisdiction and power, but opted instead to support its rejection by reasons and criteria which are deeply rooted in English jurisprudence. The Court of Appeal held that there was no illegitimate ‘forum shopping’ and no ‘fraude’ or vexation and thus, there were no reasons which could justify the grant of the injunction. A contrario senso, the Court of Appeal could be interpreted as saying that there is nothing in French law which absolutely and a priori prohibits the grant of an anti-suit injunction provided that all pre-requisites and criteria are satisfied.\(^{163}\)

### 1.8- Conclusion

Common law jurisdictions regard the anti-suit injunction as an indispensable tool in transnational litigation. In both England and the United States, the anti-suit injunction evolved from a domestic to an extraterritorial remedy to safeguard against both domestic and foreign threats to private justice, and to prevent against conflicting judgments. The myriad of advantages of this remedy, make its usage enthralling. However, it would be premature to justify this remedy merely on its benefits.

\(^{161}\) Allianz SpA and Others v West Tankers Inc. [2009] EUECJ C-185/07.

\(^{162}\) Tribunal de Grande Instance (TGI).

\(^{163}\) Vivendi v Gerard, Courd’Appel de Paris, [2010], No 10/01643.
As demonstrated throughout this chapter, this remedy is virtually unknown outside common law jurisdictions, yet, certainly not unheard of. No Jurisdiction lives in a vacuum and courts of civil law jurisdictions were on various occasions faced with a foreign anti-suit injunction. It appears that apart from the interesting position of France as demonstrated in Zone Brands Inc,\textsuperscript{164} civil law jurisdictions are reluctant to recognise foreign anti-suit injunctions, let alone issue such injunctions themselves. The reason for their exclusion in civil jurisdictions appears to be based on the dangers or 'side effects' which such remedy poses on the international relations between states.

Common law jurisdictions, aware of these ‘side effects’, have been continuously modifying the criteria and imposing strict thresholds on the grant of anti-suit injunctions. The English Courts apply the tests of vexation and oppression' and ‘unconscionable conduct.’ In some cases it was held that ‘unconscionable conduct’ is the primary test of which vexatious or oppressive behaviour was a mere example.\textsuperscript{165} In other cases, the English courts have maintained their preference to either one of the two tests. Whichever test is applied, it appears that the fundamental safeguards established in Airbus Industrie GIE v Patel should be applied to every case of anti-suit injunctions. In this regard, the English court must have a 'sufficient interest' in the subject matter of the dispute, and in deciding whether to issue an anti-suit injunction, due regard shall be had to comity considerations. Furthermore, an anti-suit injunction should only be granted when the ends of justice require it.\textsuperscript{166} In Donohue v Armco Inc,\textsuperscript{167} it was held that an anti-suit injunction will only be issued provided there are no ‘strong reasons’ against their issuance. The court will therefore examine both the arguments in favour and against the issuance of the anti-suit injunction. There are no pre-established criteria for the issuance of anti-suit injunction. Undoubtedly, the English courts are given a wide discretion to decide on whether an anti-suit injunction should be granted in the particular circumstance. In a nutshell, in the exercise of their discretion, the English courts will weigh in a balance, the prejudice which may be caused by the non-issuance of the injunction to the party requesting it, as well as the prejudice which may be caused to the opposing party by the issuance of such injunction.

Similarly, in the United States, courts enjoy a wide discretion in deciding whether to grant an anti-suit injunction. U.S courts give due regard to comity considerations but

\textsuperscript{164} Beverages International, ex. Zone Brands Europe v In Zone Brands Inc [2009], Cass. 1e Civ.
\textsuperscript{165} Glencore International AG v Exter Shipping Ltd [2002] 2 All ER (Comm) 1 (CA), 13-14; Sabah Shipyard (Pakistan) Ltd v the Republic of Pakistan [2003] 2 Lloyd Rep 571 (CA), 580-581.
\textsuperscript{166} Airbus Industrie GIE v Patel [1998] 1 AC 119 (HL), 133C-F.
\textsuperscript{167} Donohue v Armco Inc [2002] 1 Lloyds Rep 425 (HL).
will grant an anti-suit injunction if there are sufficient equitable factors which override comity considerations.\textsuperscript{168} U.S courts apply different criteria in deciding whether to grant an anti-suit injunction. The divergence of opinion that exists between the U.S courts is associated, with which of the ‘equitable factors’ should be considered as being of so much importance to warrant the grant of an anti-suit injunction, over and above principles of comity.

Arguably, the Canadian position appears to be more conscious of the effects that the anti-suit injunction may have on comity. As demonstrated in \textit{Amchem}, the Canadian courts are willing to grant an anti-suit injunction, provided that proceedings have already commenced in the foreign court and such court has failed to entertain the request for stay of, or termination of the proceedings brought before it.\textsuperscript{169} Therefore, in Canada, the anti-suit injunction is a supplementary tool which is used where a prior request for a stay in proceedings was denied by the foreign court. However, even in Canada there are some conflicting judgments. In some cases, a prior request for a stay of proceedings from the foreign court, has been regarded as an indispensable prerequisite for the granting of an anti-suit injunction, whilst in other cases a prior stay was held to be merely the preferred course of action and one which would simply increase, but not determine, the likelihood that the Canadian court will grant an anti-suit injunction.\textsuperscript{170}

It is therefore clear that courts of common law jurisdictions tread with caution when it comes to granting an anti-suit injunction. An application for an anti-suit injunction is scrutinised through a variety of tests and an anti-suit injunction will only be granted in exceptional circumstances. However, the question of whether such tests and criteria could be considered adequate to justify the usage of anti-suit injunctions cannot be answered until the controversial effects of the remedy are thoroughly examined.

\textsuperscript{168} \textit{Laker Airways v Sabena},[1984] 731 F.2d 909, 927.
\textsuperscript{169} \textit{Amchem Products Inc. v British Columbia Compensation Board} [1993] 1 S.C.R 897.
\textsuperscript{170} \textit{Hudon v Geos Language Corp} [1997], 34 O.R. (3d) 14 (Div. Ct.).
Chapter 2 – ‘SIDE EFFECTS’

2.1- The Effect on Comity

In general terms, comity refers to courtesy between nations. It is the mutual and reciprocal respect between states for the legal systems and judicial processes of one another. Comity is therefore legal reciprocity, which one state exercises by recognising the validity of executive, legislative and judicial acts of another state.171

Comity, as a concept, can be applied in quite a few contexts. It may refer to the reciprocal obligations between states imposed by public international law or it may be used to justify concepts, such as that of sovereign immunity and non-justiciability.172 It is however judicial comity which we are particularly concerned with. Judicial comity has been described as being, ‘shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards’.173

Derived from the traditional notions of judicial comity is the concept of ‘mutual trust’, which characterizes the relationship between EU Member State courts. In West Tankers,174 the CJEU held that comity translates to trust between the courts of the states, and if there is indeed a substantial degree of ‘trust’ between the courts, then a remedy such as that of the anti-suit injunction, should not be required.175

Of course, comity does not imply that all laws are of universal application and thus capable of being recognised and enforced anywhere. Principles of comity only apply,

provided that the recognition of foreign laws or judgments does not conflict with the public policy of the state where such recognition is sought.  

In the context of anti-suit injunctions, concerns of comity arise most frequently in requests for recognition and enforcement of such injunctions before a foreign court, but also with regards to the power of the domestic court to issue an order, which could potentially affect the interests of a foreign sovereign.

The granting of an anti-suit injunction would essentially mean that the court granting it believes that it is the most appropriate or convenient forum for the dispute. Comity, in its most rigid application, suggests however that the right course of action would be one which allows the foreign court to decide for itself whether or not to stay its proceedings upon finding that it is not the most convenient forum, rather than having one court determine the jurisdiction of another court by means of an anti-suit injunction.

A strict adherence to comity also suggests against selective enforcement, that is, where the receiving court regards an anti-suit injunction as a mere indication (rather than an offensive order) that the matter at hand requires further examination in the light of equitable considerations as this could still motivate the litigants to seek an anti-suit injunction, which although unenforceable, could nevertheless influence the proceedings of the receiving court.

Comity considerations lie at the heart of the controversies surrounding the usage of anti-suit injunctions. However, ‘comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain.’ Comity is therefore a ‘fluid concept’, and its principles are not absolute rules, but mere values which can be easily outweighed by equitable factors.

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176 Raphael (n 172) 8.
177 Ibid. 8-9.
179 Ibid.
Nevertheless, ever since its first application in *Love v Baker*, the remedy’s potential for conflict in the eyes of comity considerations was anticipated and thereby rejected, on the ground that it would be indeed “a dangerous case” to restrain foreign proceedings by an injunction of this sort. Similarly, in *Bushby v Munday* it was held that ‘it would be a violation of the principles of international law’ to restrain foreign proceedings by means of an injunction.

Civil law jurisdictions, in particular, hold that a remedy which has the effect of interfering with the judicial process of a foreign court is unacceptable in the eyes of comity. Consequently, they refuse to recognise such injunctions received from common law jurisdictions. This significantly undermines the effectiveness of such remedy, articulated primarily towards achieving the ends of justice, fairness and equity.

A logical assumption can be drawn, where it is concluded that anti-suit injunctions are only effective when they are granted between courts, both of which admit of having the power to grant and recognise anti-suit injunctions and which therefore, do not perceive an anti-suit injunction to be hazardous to the comity of nations. The truth is however that between such ‘common-minded’ courts, a situation may arise, where an anti-suit injunction is followed by a counter-anti-suit injunction issued by the foreign court. In turn, the domestic court may then want to issue another injunction to counter the effects of the counter-anti-suit injunction. This would inevitably result in a stultification of both the domestic and foreign proceedings. Conflicts of this nature are fortunately rare, but do occur occasionally.

Conflicts like these often lead to suggestions that abusive anti-suit injunction should not be issued in the first place. If the foreign court is convinced of the legitimacy of the anti-suit injunction, it is unlikely that it will counter it by an anti-anti-suit injunction. To prohibit the use of anti-suit injunctions on the basis of such conflicts is however premature. The best solution for these conflicts seems to lie in the regard that each court is prepared to give to comity considerations. If one court respects the judicial processes of the other and deploys sufficient diligence in deciding whether the case at hand truly merits its intervention, then a similarly comity Considering court will most probably recognise the injunction based on the fact that it would have arrived to the same conclusion, had it been the court adjudicating on the grant of the injunction.

\[182^\text{Love v Baker} [1665] 1\text{ Chan Cs 67, 22 ER 698} , (1664-1665)\ Nels 103, 21 ER 801.
\[183^\text{Bushby v Munday} [1821] 5\text{ Madd 297, 56 ER 908, 913}.
\[184^\text{British Airways Board v Laker Airways ltd} [1984] \text{ QB 142}.
\[185^\text{Raphael (n 172) 15}.

Civil law jurisdictions hold that only the court before which the matter is brought is jurisdictionally competent to decide on the legitimacy or otherwise of the litigation being brought before it, and that as a matter of sovereignty, no other court can interfere with its judicial process. Furthermore, the Common law argument that an anti-suit injunction only operates *in personam*, and that it is not invoked against the foreign jurisdiction is deemed irrelevant by civil law jurisdictions on the ground that, in effect, such remedy, albeit indirectly, is still capable of tying the foreign court’s hands.\(^{186}\)

The ‘civil law contestation’, with regards the remedy of anti-suit injunctions is not quite a product of strict adherence to comity considerations, but rather, a result of prioritising public judicial authority over private justice. Civil Law jurisdictions are more concerned with non-interference by foreign courts and with preserving principles of sovereignty, than they are with upholding the private rights and obligations of the parties and preventing injustice. Contrastingly, common law jurisdictions give priority to the rights and obligations of the parties and to the prevention of injustice over public law considerations of sovereignty and comity.\(^{187}\)

It can be argued that in contesting the originating court’s power to issue an anti-suit injunction on the basis of public law considerations of sovereignty and comity, the receiving court would also be interfering with the judicial process of the originating court, hindering it from conducting its own proceedings and from applying its own procedural measures, including granting an anti-suit injunction.\(^{188}\)

Alternatively, it could be argued that the court’s power to exercise jurisdiction over its subjects in virtue of its sovereignty, is only tolerable unless the sovereignty of another state is undermined. Once an anti-suit injunction is issued by the originating court, then by refusing to recognise such injunction on the basis of its sovereignty, the receiving court would be doing nothing more than applying the principle of reciprocity embedded in the concept of comity. Furthermore, comity confers no obligation on the receiving court, to recognize an anti-suit injunction deployed by the originating court, since the former court, can in no way be obliged to give effect to an order which runs counter to its public policy.\(^{189}\)


\(^{187}\) Raphael (n 172) 16-18.

\(^{188}\) Ibid 18-19.

A strict adherence to public law considerations would however also render the most effective tool to curb abusive anti-suit injunctions, namely, the anti-anti-suit injunction, unusable. In order to avoid this ‘catch-22’ situation, an exception perhaps ought to be made over and above principles of sovereignty to make it possible for the receiving court to grant an anti-anti-suit injunction against abusive anti-suit injunctions issued by the originating court.¹⁹⁰

Another argument against the granting of anti-suit injunctions in the light of comity considerations is that, if the same points could be raised before the foreign court for a stay of proceedings, then on what basis could the necessity to grant an anti-suit injunction be justified? It seems that the necessity of the originating court to intervene can only be justified if the same points or arguments cannot be made abroad for the stay of proceedings due to a difference in national law and national policy. But, then again, should a mere difference in perspective between the originating court and the receiving court, as to which is the most appropriate forum for the dispute, be considered a sufficient basis for the grant of an injunction?¹⁹¹ This issue was addressed in Aerospatiale, where Lord Goff upheld the view that it would, in fact, be contrary to comity, if an injunction could be granted solely on the basis of a difference in views, as to which is the most convenient forum.¹⁹² Consequently, intervention of the originating court, in order to be justified, requires stronger reasons than merely a difference in forum conveniens considerations between the two courts, otherwise, the originating court would still lack ‘sufficient interest’ to justify its intervention.¹⁹³

Therefore, the necessity to intervene, is quite natural when the same points or arguments cannot be made abroad to obtain a stay of proceedings from the foreign court. However, this necessity alone, although undisputed, does not give a court the right to intervene. Thus, another question emerges- from where does this right to intervene derive?¹⁹⁴

It is argued that the right to intervene in contractual cases emanates from the contractual clause itself, which confers exclusive jurisdiction over a dispute to a particular court. The contractual clause operating between the parties, may itself, explicitly cater for the use of anti-suit injunction should one of the parties attempt to pursue litigation elsewhere, thereby breaching such clause. In such case, to prohibit

¹⁹⁰ Raphael (n 172) 19.
¹⁹¹ ibid 21.
¹⁹² Societe Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871 (PC), 895G-H
¹⁹⁴ Raphael (n 172) 21.
the grant of an anti-suit injunction would entail an unacceptable dilution of the contractual obligations imposed on the parties by the same clause to which they have mutually agreed.\textsuperscript{195}

Identifying the right to intervene is however not that simple, when, according to the foreign court’s conflict of laws rules or public policy, such contractual clause is deemed invalid. In such a situation, the right of the originating court to impose its conflict of law rules (thereby rendering the clause valid) over that of the receiving court is somehow uncertain.\textsuperscript{196}

In the \textit{Front Comor}, the English court maintained that it must apply its own conflict of law rules to actuate the obligatory effects of the contractual clause.\textsuperscript{197} From an international context, however, comity demands stronger reasons for imposing the conflict of law rules of the originating court over and above the conflict of law rules of the receiving court and hence, to justify intervention. In response to this demand of comity, it is sometimes argued that the principle of freedom of contract, is in itself a sufficient basis for imposing the conflict of law rules of the court chosen by the parties in the contractual clause and hence, also to justify intervention.\textsuperscript{198} In \textit{Apple Corps Ltd}, Hoffman J held that it is a ‘universal principle that until some good contrary reason has been shown, men should be held to their bargains’. Therefore, once the parties have mutually agreed that a particular court and its legal system, including its conflict of law rules, should govern their contractual relationship, then such choice ought to be respected.\textsuperscript{199}

Detractors of anti-suit injunctions, however hold that the principle of freedom of contract, as applied to choice of forum clauses, is applied differently between jurisdictions, and as such, one cannot safely say that it is of universal application. Civil Law jurisdictions, in particular, maintain that choice of forum and choice of law clauses, should not be treated as any other form of contractual clauses and thus, the general rules applicable under contract law, are not shared with such a \textit{sui generis} form of contractual clauses.\textsuperscript{200} Hence, a strict adherence to comity considerations, leaves no

\begin{itemize}
\item \textsuperscript{195} Aggeliki Charis Compania Maritima SA V Pagnan Spa (\textit{The Angelic Grace}) [1995] 1 Lloyds Rep 87 (CA), 96; \textit{OT Africa Line Ltd v Magic Sportswear} [2005] 2 Lloyds Rep 170 (CA), 27,32, 58-61, 73.
\item \textsuperscript{196} Raphael (n 172) 23.
\item \textsuperscript{197} \textit{West Tankers Inc v Ras Riunione Adriatica di Sicurta (\textit{The Front Comor})} [2005] 2 Lloyds Rep 257, 262-263.
\item \textsuperscript{198} Raphael (n 172) 23.
\item \textsuperscript{199} \textit{Apple Corps Ltd v Apple Computer Inc} [1992]RPC 70, 79.
\end{itemize}
room for any justification whatsoever for the intervention of the originating court; not even, it seems, in contractual cases.

Such strict adherence to comity often comes at the expense of private justice, and the total abolishment of anti-suit injunctions in contractual cases can, in this regard, have some devastating consequences. It would in fact be hazardous to disarm the freedom of contract of its enforcement by anti-suit injunctions. Choice of court and choice of law contracts would be of little avail if they could be disregarded by another jurisdiction which may not share the same views of the court chosen by the parties to decide upon their dispute.\textsuperscript{201}

Comity bites even harder on anti-suit injunctions deployed in the absence of a choice-of-court clause, sought on the basis of vexatious or oppressive foreign proceedings. It is more challenging to justify intervention in such cases, since there is no concrete obligation which could warrant enforcement.

Common law jurisdictions, hence, limit the ‘right’ to intervene to cases where it is evident that the court has ‘sufficient interest’ in the dispute in question.\textsuperscript{202} The threshold of ‘sufficient interest’ has not however been applied in a uniform fashion between the courts of common law jurisdictions. In the UK, for instance, the English courts will consider themselves as having sufficient interest, if it is established that England is the natural forum. An anti-suit injunction will thereby be justified, if it is granted to restrain vexatious and oppressive foreign proceedings.\textsuperscript{203} US courts, on the other hand, consider that they have a right to intervene in such cases, where it is necessary to protect the forum’s jurisdiction or public policy, or where the foreign proceedings were brought abusively to undermine the defence of the defendant.\textsuperscript{204}

Detractors of anti-suit injunctions do not however consider these thresholds for ‘sufficient interest’ to give an indisputable right to intervene, especially with regards to the UK’s argument of the ‘natural forum’, since the notion of ‘natural forum’ often varies from one legal system to the other.\textsuperscript{205}

One should have come to realize by now that justifying anti-suit injunctions in the light of comity is quite a difficult task. Further discussion on this topic is unlikely to come up with some new justification, which could be accepted by the highest standards of

\textsuperscript{202} Airbus Industrie GIE v Patel [1998] 1 AC 119 (HL), 138G-H.
\textsuperscript{203} ibid 138H-139A.
\textsuperscript{205} A Bell, ‘Forum Shopping and Venue in Transnational Litigation’ (2003), 3.58-3.64.
comity. It seems that the resounding remark which should follow any discussion of this sort is that, this tension between anti-suit injunctions and comity is more a product of political considerations, rather than a legal issue. The real issue revolves around which of the public law considerations or private justice should be given the upper hand. Common law jurisdictions give prevalence to private justice and prioritise the enforcement of the personal obligations of the litigants against the risk of clashing with the principles of comity, whilst civil law jurisdictions adopt an approach, which perceives considerations of comity and sovereignty, as warranting the utmost regard, even if this comes at the cost of sacrificing private rights and duties.  

2.2- Anti-suit Injunctions and the ‘Right of Access to a Court’

The right to a fair trial, as established in article 6 (1) of the European Convention on Human Rights (hereinafter referred to as ECHR), encompasses the right to an effective judicial remedy, which allows the claimant to assert his civil rights. Since everyone should have a right to initiate proceedings to assert his civil rights, then naturally, article 6 (1) of the ECHR intrinsically provides for the ‘right to a court’, of which the ‘right of access’ is one fundamental facet.  

Although it has been accepted that these rights are not absolute, any restriction on such rights must not limit the ‘access to a court’ to the extent that the very ethos of the right is tainted.  

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206 Raphael (n 172) 24; D Tan 'Enforcing International Arbitration Agreements in Federal Courts; Rethinking the Federal Court’s Remedial Powers' 47 Virg J Int Law 545, 591-597.  
207 Beles and others v. the Czech Republic App no 47273/99 (ECHR, 12 November 2002) par 49.  
208 Golder v United Kingdom [1975] 1 EHRR 524 par 36.  
In *Re the enforcement of an English anti-suit injunction*, it was concluded that the grant of an anti-suit injunction to restrain litigation in a foreign court amounts to an infringement of the right of access to a court under article 6 of the ECHR.\(^{210}\)

In the defence of the anti-suit injunction, it has been argued that the right of access to court under article 6 of the ECHR does not apply when the injunction is sought to restrain the pursuit of litigation in a foreign court. In other words, supporters of this line of thought hold that the right of access to a court only comes in where a claimant is restrained from pursuing litigation before a domestic court.\(^{211}\) Consequently, if this discussion could prove that acts done by a state authority, with effects outside its jurisdiction, do not trigger responsibilities under the Convention, and that the right of access to a court does not apply extraterritorially, then the argument that an anti-suit injunction is unjustifiable vis-à-vis article 6 of the Convention, would presumably lack sufficient basis.

Article 1 of the Convention provides that ‘the high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of the Convention.’ In *Bankovic v Belgium* it was held that the jurisdiction to which the Convention here refers to, is primarily territorial.\(^{212}\) Yet, in other cases such as *Freda v Italy*, it was also held that the exercise of state authority by state officials outside the territory of that state may still trigger the state’s responsibility under the Convention.\(^{213}\) A question which begs to be answered at this point is precisely, whether this line of reasoning can also be applied to the exercise of judicial authority extraterritorially by a judge sitting in a court of a signatory state. This question can be answered with an analogy drawn from *X and Y v Switzerland*. In this case, the Swiss courts agreed with Liechtenstein to exercise jurisdiction over the issue of immigration in Liechtenstein. The European Court of Human Rights (hereinafter referred to as the ECtHR) found Switzerland responsible under the Convention.\(^{214}\) Consequently, by analogy, one may conclude that responsibilities under the Convention may also be triggered when an official of the state, such as a judge sitting in a domestic court, exercises authority within its own territory, but with extraterritorial effect. Hence, the scope of application of the Convention does not seem to be restricted to the exercise of a state’s authority over its subjects in its territorial jurisdiction. Consequently, it seems that the defendant

\(^{210}\) *Re the enforcement of an English anti suit injunction* [1997] ILPr 320 par 17-18.

\(^{211}\) Raphael (n 172) 29.

\(^{212}\) *Bankovic v Belgium* App No 52207/99 (ECHR 12 December, 2001).

\(^{213}\) *Freda v Italy* App No 8916/80 (ECHR 7 October, 1980).

\(^{214}\) *X and Y v Switzerland* [1978] 9 DR 57 (ECmHR).
to the injunction granted extraterritorially may still fall under the jurisdiction of the 
originating court for the purposes of the Convention.215

We proceed now to analyse, whether article 6 and in particular the right of access to a 
court applies extraterritorially. The prominent question here is whether the obligation 
imposed on signatory states by article 6 refers solely to the free access to the domestic 
courts of that state, or whether such obligation also restrains the court from doing 
anything which can impede the claimant’s access to a foreign court.

It is evident from the ECtHR’s case-law that the right of access to a court entrenched in 
article 6 of the Convention only refers to the obligation of signatory states to safeguard 
the right of access to their own courts, and does not impose any obligation on states to 
protect the right of access also to foreign courts.216 However, given the proximate and 
direct effects of anti-suit injunctions on the right of access to the foreign court, it 
remains possible for the ECtHR to find that article 6, and most particularly the right to 
access court, merits extraterritorial application. In fact, in Ilascu v Moldova and Russia, 
the ECtHR held that ‘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.’ 217

In McElhinney v Ireland, the Strasbourg Court was prepared to accept that article 6 
violations can be assessed from an extra-territorial perspective, yet, since the claimant 
could still access another court other than that to which he was impeded from 
accessing, the court opined that there was no violation of article 6.218 Judge Loicades, 
in his dissenting opinion, however opined that in its assessment the court should have 
only taken into account the access to the courts of the signatory state whose 
obligations were allegedly triggered.219

Even if it is accepted that the right of access to court may apply extraterritorially and 
that as a consequence, anti-suit injunction may in fact constitute an infringement of 
such right, in contractual cases at least, this argument can be shot down for the simple 
fact that the ECHR allows waiver of the rights under article 6 by means of a choice of 
arbitration or choice of court clause. 220
Furthermore, in *The Kribi*, without entering into issues of waivers, the court held that article 6 does not preclude the use of anti-suit injunctions deployed to enforce a contractual clause, for the simple reason that article 6 only provides for access to a court and not access to the court of the claimant’s choice. In fact, the ECtHR’s case-law demonstrates that the right of access to a court does not ensure absolute unrestricted access to any court. This reasoning equally applies to non-contractual alternative forum cases.\(^{221}\)

In alternative forum cases, however, a situation may arise, where, although the claimant is still able to access another court other than that of his choice, to initiate proceeding in that court, would, in practice, impose a burden so great that in effect he did not really have a choice in the first place. Therefore, it is probably best for the court to also take into account the practical considerations involved in restricting the claimant’s choice to one court, when deciding on whether or not to grant an injunction.\(^{222}\)

The right of access to a court is perhaps more relevant in ‘single forum cases’, since in such cases, the claimant is left with no choice but to initiate proceedings in one court. Granting an anti-suit injunction in such cases, will not merely restrict the claimant’s choice, but it will restrict access to the only court before which the dispute can be decided. However, bearing in mind that the right of access to a court under article 6 is not absolute, and that it can be reasonably restricted, it cannot be said that an injunction granted in a single forum scenario unequivocally violates article 6 of the Convention. Hence, a restriction on the right of access to a court may still be justifiable if the injunction is granted on the ground that, if allowed, the pursuit of litigation abroad would be clearly vexatious and oppressive to the defendant or on the ground of abuse of process.\(^{223}\)

Therefore, it seems that despite the fact that there is nothing in article 6 per se which is inherently incompatible with the grant of an anti-suit injunction, utmost diligence must be exercised by the courts in the exercise of their discretion, in order to avoid a possible violation of the fundamental right of access to a court under article 6, especially in cases where the matter in question can only be brought before one court.

\(^{221}\) *OT Africa Line Ltd v Hijazy (The Kribi)* [2001] 1 Lloyds Rep 76.

\(^{222}\) *Raphael* (n 172) 33.

\(^{223}\) *Raphael* (n 172) 36.
2.3- Conclusion

Although it is undeniable that the anti-suit injunction is an effective, if not the most effective means to safeguard against duplicate concurrent proceedings by focusing litigation in one court, it is an equally undeniable fact that an application for an anti-suit injunction gives rise to litigation in itself. An anti-suit injunction compels the injunction defendant to make an appearance before the originating court to defend the foreign proceedings he initiated. This is almost certain to be costly and time consuming for the claimant in the foreign proceedings.\(^\text{224}\)

On the other hand, in the absence of an anti-suit injunction, it is the defendant in the foreign proceedings that has to go abroad and contest the jurisdiction of that court, and this will not only be equally time-consuming, costly and involves the hardship of contesting a claim in a foreign, unfamiliar jurisdiction, but, if the defendant is unsuccessful in obtaining a stay of proceedings from the foreign proceedings, he will have to go back to the other court to request an anti-suit injunction. The foreign claimant, which will now simultaneously be the injunction defendant, will have to appear before the originating court and practically repeat the same arguments which he made for the stay of proceedings in the foreign court, this time, before the originating court, against the grant of the injunction.\(^\text{225}\)

It follows that as a tool created primarily to address the puzzling game that transnational litigation may become, the anti-suit injunction, by creating a new set of proceedings itself, may, as witnessed, defeat its own purposes.

The logical conclusion is therefore that, even if it is accepted that an anti-suit injunction is not incompatible with comity or with human rights law, the mere practical considerations of such injunction adequately demonstrate that the anti-suit injunction will always be an extra-ordinary remedy, and as such should only be granted in exceptional circumstances, where otherwise, injustice would most likely ensue.

\(^\text{225}\) ibid 11-13.
Chapter 3- ANTI-SUIT INJUNCTIONS IN THE EUROPEAN JUDICIAL SPHERE

3.1- Introduction

The EU’s position with regards the usage of anti-suit injunctions can be siphoned through an analysis of two leading judgments delivered by the Court of Justice of the European Union (hereinafter referred to as CJEU) namely, Turner v Grovit, and West Takers. In brief, the position reflected by these two judgments has been that an anti-suit injunction, in whatever form and circumstances it is issued, is incompatible with the rationale of the Brussels-Lugano regime and with the principle of mutual trust which characterizes the relationship between the courts of the Member States. This position was also implied in the prior case of Gasser v Misat, where the CJEU upheld the lis pendens rule as the main rule under the Convention to address the problems posed by duplicative proceedings. In so doing, the court also proclaimed the supremacy of the Brussels Regime, over and above the national laws of the Contracting States.

3.2- English Conflict of Laws and the Brussels I Regulation (EC) no 44/2001

To understand the difference between these two legal systems, a concise assessment of the characteristics of the two systems is in order. First of all, one must keep in mind

that to a large extent the English system of conflict of laws owes its origins to the common law, and as such, consists of a set of rules and remedies which were formulated by judges on a discretionary basis along the passage of time. This lies in stark contrast with the Continental system, where rules and remedies of private international law, like the vast majority of other rules, are codified. Civil Law jurisdictions view legislation as superior to judge-made law. The need to have a clear and systematic framework prevails over concerns of practicality and operation of laws in civil law jurisdictions.\footnote{227}{Trevor C. Hartley, ‘The European Union and the Systematic Dismantling of the Common law of Conflict of Laws’, The International and Comparative Law Quarterly, Vol. 54, No. 4 (Cambridge University Press 2005) 813-815.}

This ideological divergence also seems to influence the civil approach towards private law. Civil law jurisdictions often regard adherence to principle or to the strict wording of the law as prevailing over the attainment of a just and equitable result. One can perhaps say that the civil law approach, unlike the common law approach, is more concerned with theory, than it is with practice. In addition, the Continental approach prioritises public law concerns over those of private justice. This same attitude is apparent in the case-law of the CJEU. In its interpretation of the Regulation,\footnote{228}{Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L 12.} the CJEU, as expected from a pre-dominantly civilian court, appears to be more concerned with the interests of the Member States and the European Community, than with the interests of the litigants.\footnote{229}{ibid 814.}

Likewise, the provisions of the Regulation are largely inspired by civil law tradition and therefore, it could have been anticipated that the idiosyncrasies of the common law, may, in some instances, clash with the disposition of the Convention.\footnote{230}{Thomas Raphael, The Anti-Suit Injunction (first published 2008, Oxford University Press) 265-268.} Under the Regulation, ‘where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.’ Furthermore, where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.’ Unlike the common law system, the Regulation does not endow the court second seized with any discretion in deciding which court is the most appropriate forum for the dispute as noted by the mandatory term ‘shall.’ The only exception to this rule is in respect of related (rather than identical)
actions, where ‘the court first seized, may, while the actions are pending at first instance, stay its proceedings.’ In a nutshell, the Regulation upholds the straightforward *lis pendens* rule, over the discretionary remedy of *forum conveniens* formulated by the common law system. The pre-dominance of the *lis pendens* rule, was clearly demonstrated in Gasser v MISAT, where the CJEU held that such rule should be applied even when the proceedings in question are in breach of an exclusive jurisdiction agreement.

Unsurprisingly, the issue of compatibility of anti-suit injunctions with the Regulation was put on centre stage as soon as the UK acceded to the Brussels Convention. From the very beginning it was foreseen that such Common law remedy may collide with the provisions of the Brussels Convention.

The English courts were however reluctant to surrender one of their most useful tools in their armoury in favour of the *lis pendens* principle which bestowed the courts with no discretion. In fact, in *Continental Bank v Aeakos* and in some other subsequent cases, the English courts denied any evidential incompatibility between the usage of anti-suit injunctions and the UK’s obligations under the Convention.

### 3.3- The ‘First Come First Served Rule’ of *Lis pendens* and the ‘Italian Torpedo’

Undoubtedly, the *lis pendens* rule, owing to its straightforward mechanism, is the simplest way of safeguarding against conflicting judgments between the same parties on the same subject-matter. Yet, unlike its common law counterpart- the *forum*
conveniens rule, it does not allocate jurisdiction on the basis of the most appropriate forum, but on the basis of which court is first seized of the dispute. This rule prevents two courts from reaching different conclusions on the issue of jurisdiction, and in this regard, it has a slight edge over the forum conveniens rule. Yet, at the same time, it promotes unwanted litigation tactics known as 'Italian torpedos'.

The 'continental' rule of lis pendens encourages a party to the dispute to fix its chosen forum for the dispute by being first to initiate proceedings. Therefore, this rule creates a race which is more likely to be won by the party who sees a dispute coming from afar and who is first on its feet to initiate proceedings in the court of his preference.

However, an unscrupulous party may seize a court of the imminent or actual dispute, not because it believes it is the most appropriate court for the dispute, but rather, for the sole purpose of delaying the proceedings as much as possible. Thus, even better it is for such party to initiate proceedings in a court which is notoriously slow moving, such as the Italian court.

Mario Franzosi, an Italian lawyer, demonstrates how this slow-moving attribute of specific courts can be used as a litigation tactic to delay proceedings. Franzosi named this tactic, the 'Italian Torpedo.' A party against whom proceedings are about to be initiated may commence proceedings before an Italian court for a declaration of non-liability, thereby protecting itself from other actions brought against him before other Member State’s courts, in virtue of the lis pendens rule. The Italian court may not uphold the demands of the litigant. However, at least, it would take quite a long period of time until the Italian court delivers its decision. This would essentially freeze the proceedings for a substantial period of time.

This unwanted effect of the lis pendens rule was brought to the attention of the CJEU in Gasser v MISAT, where proceedings were brought in Italy in breach of an exclusive jurisdiction agreement which conferred jurisdiction to the court of Austria. Amongst the other questions referred to the CJEU, it was questioned, whether the lis pendens rule applied in the case, where the proceedings in the court first seized are notoriously slow. The UK, in its submissions added that even if it is agreed that the court other

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237 Ibid 815-1817.
238 Ibid.
239 Ibid 816.
than the court first seized should stay its proceedings, there ought to be an exception to avoid abusive tactics deployed to delay proceedings.\textsuperscript{241}

The CJEU maintained its status quo and upheld the \textit{lis pendens} rule with no reservations, even if that meant giving the ultimate ‘go ahead’ to torpedo actions and similar litigation tactics, deployed to delay proceedings. In its view, the Member States should trust the judicial systems of one another, even if the other Member State’s judicial process wasn’t as swift.\textsuperscript{242}

\section*{3.4- Turner v Grovit}

\subsection*{3.4.1 - Case Overview}

In \textit{Turner v Grovit},\textsuperscript{243} the CJEU was called upon to take a stance on the issue of anti-suit injunctions vis-à-vis the obligations of Member States under the Brussels Convention. The Brussels Convention has since been replaced by the Brussels I Regulation. However, since the Regulation adopts the same structure and workings of the Convention, the rules laid down in this judgment are equally applicable under the Brussels I Regulation.

Before delving into an analysis of the CJEU’s decision, a brief chronological breakdown of the facts as purported by the House of Lords is necessary.

Mr Paul Turner, a lawyer of British nationality and of British domicile had entered into a contract of employment with a group of companies directed by Mr. Grovit by the name of Chequepoint Group. Mr Turner’s initial contract was with China Security Ltd but was eventually taken over by Chequepoint UK Ltd, another subsidiary of the Chequepoint Group. Mr Turner worked in London, but he eventually moved to Spain and started

\begin{flushright}
\textsuperscript{241} ibid 817.
\textsuperscript{243} C-159/02 \textit{Turner v Grovit} [2004] ECR I-3565.
\end{flushright}
working with Changepoint, another company of Chequepoint group in Madrid. By the end of the same year, Harada Ltd, another company of the same group, took over Chequepoint UK, and at the beginning of the coming year, Mr Grovit gave notice of resignation to Harada Ltd upon finding out that the whole group of companies was involved in tax fraud.

As he returned back to London, Mr Grovit initiated proceedings against Harada Ltd before the employment tribunal for unfair dismissal. Mr. Grovit alleged that Harada had tried to implicate him in illegal conduct. Mr Grovit was eventually awarded damages by the Employment Appeal Tribunal. However, Changepoint Ltd initiated proceedings against Turner in Madrid, claiming damages arising from his professional misconduct. Turner, rather than contesting the proceedings in Madrid, made an application for an anti-suit injunction before the High Court of Justice of England and Wales to restrain the company from continuing the proceedings and to restrain Mr. Grovit and Harada Ltd. from initiating similar proceedings elsewhere. The High Court acceded to the request of Turner by issuing an interlocutory injunction but refused to grant him an extension beyond the stipulated time of the original injunction.

Mr. Turner appealed to the Court of Appeal (England and Wales) and succeeded. The Court of Appeal found that the Spanish proceedings were brought in bad faith and with the aim of disturbing the proceedings initiated by Turner before the Employment Tribunal. The Court of Appeal emphasized that the Spanish court ought not be offended by the granting of an anti-suit injunction, as the aim of such injunction was simply to protect the appropriate application of the Brussels Convention.  

The Judgment delivered by the Court of Appeal was subsequently appealed to the House of Lords by the injunction defendants, on the ground that the English Court had no power under the Brussels Convention to enjoin proceedings before another contracting state’s court. Consequently, the House of Lords, as obliged to do, made a reference to the CJEU, asking whether the grant of such injunction against defendants, who initiated or threatened to initiate proceedings in bad faith and in order to disturb proceedings brought before the English courts, is incompatible with the Brussels Convention.  

244 Turner v Grovit [2002] 1 WLR 107 (HL).
Note that this case referred to the granting of a non-contractual injunction, granted on the basis of ‘vexatious and oppressive’ proceedings; the type of injunction, the English Courts were not so ‘trigger happy’ with, and also the type of injunction which supporters of anti-suit injunctions felt most challenging to defend, in the outbreak of criticism of Civil Law jurisdictions.

In the preliminary question, the House of Lords presented an overview of the Common law remedy, where it tried to present the injunction in the least offensive way to the CJEU. In its defence, Lord Hobhouse put forward the same old argument that such injunction was issued in personam and not against the foreign court, and as such could not be said to interfere with the foreign jurisdiction. In this respect, the terminology used for this remedy, ‘anti-suit’ is somehow misleading. 246 Furthermore, he held that since this was not a jurisdictional issue, but rather an issue of national procedural law, then this was clearly beyond the scope of the Convention. Specifically on the compatibility of this remedy with the Brussels Regime, Lord Hobhouse argued that if anything, the anti-suit injunction shares the same goals of the Convention, of resolving conflicts of jurisdiction between the Member States and of safeguarding against duplicative proceedings. Neither should it be problematic that the remedy of the anti-suit injunction is unknown outside Common law jurisdictions, since the Brussels Convention does not aim at uniformity of laws, but merely the allocation of jurisdiction through a clear-cut set of rules, he explained.247

In respect of the argument that an anti-suit injunction is only issued against the litigant and that there is thus, no interference with the foreign court’s jurisdiction, the Advocate-General held that although an anti-suit injunction is not issued directly against the foreign court, if a litigant is restrained, under the threat of punishment, from initiating or proceedings with the litigation abroad, this would still constitute an indirect interference with the jurisdiction of such court. Considering that the relationship between Member States should be governed by ‘the reciprocal trust established between the various national legal systems’, one court should not be allowed to review or interfere with the jurisdiction of another Member State court or to ‘arrogate to themselves the power to resolve the difficulties which the European initiative itself seeks to deal with.’ 248

247 Raphael (n 230) 267.
The argument that such issue was a matter of national procedural law, hence, outside the scope of the Convention, was similarly shot down on the basis that national law was only autonomous, unless it fetters with the efficacy and overall spirit of the convention. Likewise, the UK’s argument that the anti-suit injunction furthers the objectives of the Convention was also dismissed. The Advocate-General noted that the anti-suit injunction, if allowed, would render the convention’s own rule to deal with duplicate proceedings, namely, the *lis alibi pendens* redundant and would give rise to new conflicts which are not addressed by the Convention because the Convention does not cater for the eventuality of contradictory injunctions. Similarly, the convention does not cover instances, where a foreign court gives judgment despite the existence of an injunction. Furthermore, since the anti-suit injunction is virtually unknown amongst the other contracting states, to allow it to be granted, would create a significant imbalance amongst the Member States. 249

Whilst giving utmost regard to the principle of mutual trust, the CJEU, like the Advocate-General concluded that the Brussels Convention ought to be interpreted as prohibiting such injunctions deployed to restrain proceedings in another Member State. 250

In *Turner v Grovit*, the CJEU set the record straight, with respect to the controversy surrounding the incompatibility of anti-suit injunctions with the Brussels Regime. Yet, it failed to answer all the questions of the debate, most importantly, whether the prohibition subsists in cases outside the scope of the Brussels convention/ regulations. For instance, where anti-suit injunctions are granted to restrain proceedings in a Third State court and where an anti-suit injunction is deployed to effectuate an arbitration agreement. This latter question was to come before the CJEU in *West Tankers*. 251

### 3.4.2 - The Effects of Turner v Grovit

Undoubtedly, supporters of anti-suit injunctions found themselves in a state of disquiet with the CJEU’s decision in *Turner v Grovit*; yet in the light of the questions left unanswered, there remained hope that in the presence of other variables, the anti-suit

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249 *ibid.*
250 *ibid.*
251 *Raphael (n 230) 269.*
injunction may survive in the European judicial sphere. This prospect was however short lived, when the anti-suit injunction received its debilitating blow in West Tankers.

A. Contractual Injunctions

The preclusion of anti-suit injunctions in Turner v Grovit referred to the use of anti-suit injunctions granted on the ground of vexation and oppression and therefore, it could be argued that the decision is only applicable to non-contractual injunctions, and that there is nothing in the judgment which explicitly prohibits contractual injunctions that is, injunctions granted to restrain proceedings in breach of an exclusive jurisdiction clause. Yet, the parameters of the preclusion of anti-suit injunctions in the CJEU’s Judgment are of such width that it is very unlikely that it targets solely and specifically non-contractual injunctions.252

Apparently, the principle of mutual trust, on which the prohibition of anti-suit injunctions is particularly based, will be infringed no matter in what form and context the anti-suit injunction is granted, and thus, it seems that a contractual injunction is similarly precluded.

Moreover, given that in the prior case of Gasser v MISAT,253 the lis pendens rule was held to apply over and above any jurisdiction agreement, and that in Turner v Grovit, the CJEU affirmed once more the supremacy of the Convention and of its rules over the rules and remedies afforded under national law, it is logical to assume that a contractual anti-suit injunction is nonetheless precluded.

In the light of the above, it can be concluded that the question of the compatibility of contractual (rather than non-contractual) injunctions with the Brussels Convention has been implicitly resolved in Turner v Grovit. As long as the matter falls within the ambit of the Brussels Convention/Regulation, an anti-suit injunction, whether granted to restrain vexatious and oppressive proceedings or to enforce a contractual agreement is prohibited. In fact, in his speech in West Tankers, Lord Hoffman seemed to take it for granted that an injunction to enforce a contractual right is likewise precluded.254

252 ibid 270.
253 C-116/02 Gasser v MISAT [2003] ECR I-14693
B. Proceedings outside the EU

One of the issues which *Turner v Grovit* failed to resolve is whether an anti-suit injunction is similarly precluded when it is granted to restrain proceedings before a non-EU Member State court. The matter may be one which falls explicitly within the scope of the Convention/Regulation, and the defendant may be domiciled in an EU Member State. The plaintiff may however be domiciled in a non-EU Member State, such as Japan. The conflict of laws rules of Japan may confer jurisdiction to a Japanese court. An anti-suit injunction may hence be useful to restrain the litigant from initiating or continuing proceedings in Japan, provided that the originating court has *in personam* jurisdiction over the injunction defendant.\(^{255}\)

In such a situation, an injunction, rather than being inconsistent with the Brussels Convention, will contribute to the recognition of third state judgments within the EU. Article 34 (4) of the Brussels I Regulation states that a court may refuse to recognise a judgment if it is irreconcilable with another judgment delivered by a third state court, involving the same parties and the same cause of action. In this regard, an anti-suit injunction may assist in the prevention of irreconcilable judgments.\(^{256}\)

The principle of mutual trust only applies between contracting states and does not apply, to say, the relationship between an English court and a Japanese court. It follows that the principle on which the preclusion of anti-suit injunctions was based in *Turner v Grovit*, cannot be used as a basis to prohibit the use of anti-suit injunctions deployed to restrain third state proceedings.\(^{257}\)

Thus, it can be argued that *Turner v Grovit* does not impose restrictions on the power of the English courts to grant anti-suit injunctions to restrain proceedings before Third States. In fact, anti-suit injunctions continued to be granted in the period following *Turner v Grovit* to restrain proceedings which fall outside the Brussels system. In *OT Africa*, the Court of Appeal held that the prohibition of anti-suit injunctions in *Turner v Grovit*, had no effect beyond the ambit of the Brussels-Lugano regime.\(^{258}\) In contrast, in

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\(^{256}\) Ibid.

\(^{257}\) Ibid.

\(^{258}\) *OT Africa Ltd. V Magic Sportswear Corp* [2005] 2 Lloyds Rep 170 (CA).
Beazley v Horizon, it was proposed that Turner v Grovit ‘transformed the general ethos in which comity falls to be considered’ and thus, it was implied that Turner v Grovit had an effect on the court’s discretion to grant such remedy, even where the aim is to restrain proceedings before Third State courts. 259 However, the court did not seem to give due importance to such argument. The general consensus seems to be that the constraints imposed by Turner v Grovit, do not apply outside the European judicial sphere. 260

A. Anti-suit Injunctions Deployed in Aid of Arbitration Agreements

From the discussion above it transpires that the CJEU in Turner v Grovit placed constraints on the power of the English court to grant anti-suit injunctions in non–contractual cases, explicitly, and in contractual cases, implicitly. Thus, anti-suit injunctions are precluded irrelevant of the fact that the injunction is aimed at enforcing an exclusive jurisdiction clause. But, what if it is an arbitration agreement which the anti-suit injunction seeks to enforce? Arbitration is expressly excluded from the scope of the convention as per article 1 (2) (d) of the Regulation. 261

In the Atlantic Emperor and Van Uden Maritime, 262 the CJEU seemed to imply that the arbitration exception in article 1 (2) (d) of the Brussels Regulation does not only apply to arbitration proceedings specifically, but also applies to court proceedings where the subject matter of the dispute is arbitration. 263

It seems that the English Courts did not regard the constraints imposed by Turner v Grovit, to apply to an anti-suit injunction deployed in aid of an arbitration agreement. In Through Transport v New India, the Court of Appeal, despite refusing to grant an injunction, asserted that an anti-suit injunction deployed to enforce an arbitration agreement falls under the exception in article 1 (2) (d) of the Regulation and as such, fell completely outside the scope of the Brussels Regulation. The court concluded that

260 Raphael (n 230) 273.
there is nothing in the Convention to prevent the courts of a contracting state from granting an injunction to restrain a claimant from beginning proceedings in a contracting state which would be in breach of an arbitration clause.\textsuperscript{264}

In \textit{Through Transport v New India}, the Court of Appeal seemed to believe that the answer to the question of whether the arbitration exception applies to anti-suit injunctions deployed to restrain proceedings in breach of an arbitration agreement was quite obvious. However, in \textit{West Tankers}, the House of Lords begged to differ. In its conviction that there was more to the question than purported in \textit{Through Transport v New India}, the House of Lords sought to make a preliminary reference to the CJEU.\textsuperscript{265}

\section*{3.5- West Tankers}

\subsection*{3.5.1 - Case Overview}

An Italian oil refinery company by the name of Erg Petroli SpA chartered a vessel from West Tankers Inc by the name of Front Comor. In August 2000, the Front Comor collided with a jetty owned by Erg Petroli SpA. Consequently, Erg Petroli brought a claim against its Italian insurer by the name of Allianz SpA (formerly, Riunione Adriatica di Sicurta SpA). The insurer compensated Erg Petroli under the insurance policy, but Erg Petroli claimed the insurance excess from West Tankers, (the owner of the vessel) through arbitration in London, as stipulated in the charterparty agreement. West Tankers Inc. denied any liability on its part arising from the collision of its vessel while chartered to Erg Petroli. Consequently, the insurance company, now subrogated into the rights of Erg Petroli, initiated proceedings in Italy against West Tankers to recover the sum of money it paid to Erg Petroli under the insurance policy. In the meanwhile, West Tankers Inc. brought a motion for an anti-suit injunction before the English Court, in order to restrain the insurer from proceeding further with the action in Italy, as these

\textsuperscript{264} \textit{Through Transport Mutual Insurance Association (Eurasia) Limited v. New India Assurance Association Co. Limited} [2004] EWCA (Civ) 1598; LMLN 0658.

\textsuperscript{265} \textit{West Tankers Inc. v Ras Riunione Adriatica di Sicurta SpA} [2007] 1 Lloyds Rep 391 (HL).
proceedings it claimed, were clearly in breach of the arbitration agreement. The High Court followed the reasoning of *Through Transport v New India*, where it had been settled that an injunction to restrain proceedings which were in breach of an arbitration agreement, was covered by the arbitration exception in the Brussels Regulation, and granted an anti-suit injunction to restrain the Italian proceedings. The Italian insurer appealed, and the House of Lords held that as previously noted by the High Court, the arbitration exception in the Brussels exception also applies to court proceedings, where the subject matter is arbitration. In this regard, it agreed with the decision of the High Court. However, convinced that the answer to the question was ‘not obvious’, and that this issue was of ‘very considerable practical importance’, the House of Lords made a preliminary reference to the CJEU.  

AG Kokott held that an injunction deployed in such a situation, is nonetheless incompatible with the principle of mutual trust, upon which the Convention/ Regulation is founded. In her opinion, in order to decide whether the arbitration exception applies in such a case, it must first be established, not ‘whether the application for an anti-suit injunction- in this case the proceedings before the English courts- falls within the scope of application of the Regulation’, but ‘whether the proceedings against which the anti-suit injunction is directed- the proceedings before the court in Syracuse-do so.’ Since, by virtue of the underlying subject matter, the Italian proceedings for damages, against which the anti-suit injunction was directed, fell within the scope of the convention/regulation, it is the Italian court, as the court first seized, which must decide whether it has jurisdiction or not, and only If it finds that it does not have jurisdiction, must it refer the case to arbitration.

The CJEU held that ‘if, because of the subject matter of the dispute that is the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/ 2001, a preliminary issue concerning the applicability of an arbitration agreement including in particular its validity, also comes within its scope of application.’

On the issue of the anti-suit injunction, the CJEU noted that such an injunction ‘necessarily amounts to stripping [the Italian court] of the power to rule on its own jurisdiction under Regulation 44/2001’ and that it is therefore, contrary to the principle

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266 Ibid.
268 C-185/07 Allianz SpA and Others v West Tankers Inc. [2009] E.C.R
that the court first seised must decide on its own, whether it has jurisdiction or not. Furthermore, the CJEU held that the anti-suit injunction ‘runs counter to the trust which the Member States accord to one another’s legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based.’ The Court added that ‘if by means of an anti-suit injunction, the Tribunale di Siracusa was prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, then a party could avoid proceedings merely by relying on that agreement and the applicant, which considered that the agreement is void, inoperative or incapable of being performed would be barred from access to the court before which it brought proceedings under article 5 (3) of the Regulation 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.’

The CJEU concluded that an anti-suit injunction, even if deployed to restrain proceedings which are clearly in breach of an arbitration agreement, is inconsistent with the Brussels Convention/ Regulation. The CJEU maintained that its decision is supported by the New York Convention of 1958, where it is stated, where proceedings are brought before a court of a contracting state and there is an arbitration agreement in respect of the subject matter of the dispute, it is that court, which must refer the parties to arbitration, provided that the said agreement is found to be valid by that same court.

3.5.2 - Comment

The decision in West Tankers perhaps came more as a surprise than Turner v Grovit. It seems that although the House of Lords was aware that the question should be referred to the CJEU for clarification, they had a significant basis on which to hope that such injunction would be exempted from the preclusions laid down in Turner v Grovit. On the other hand, the breadth of the CJEU’s interpretation of the principle of mutual trust in Turner v Grovit, and the hostility expressed by the CJEU towards such injunctions, should have left little doubt amongst the English courts that the outcome of the preliminary question in West Tankers would be equally disappointing.

\[269\] ibid.
\[270\] ibid; New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, Article 2(3)
Upon analysing the wording used by the CJEU, it transpires that the CJEU did not faithfully present the nature of the anti-suit injunction, particularly in describing the injunction as ‘stripping’ the court first seised of its jurisdiction. It has been reiterated ad nauseam that such injunction is not deployed directly against the foreign proceedings or against the jurisdiction of the foreign court.\(^{271}\) Although, it could be argued that the injunction has the same effect, the CJEU could have certainly chosen its words better, at least to demonstrate that although the injunction is virtually unknown outside Common law jurisdictions, the CJEU fully grasps its intrinsic nature, to an extent that makes it competent to deliver a respectable decision which despite being unfavourable, is based on sane conceptual foundations.

The CJEU’s decision is bizarre, to say the least. There is nothing in the Brussels I Regulation or in the CJEU’s ruling, which prohibits an arbitral tribunal from issuing itself an order to restrain a litigant from initiating or continuing to pursue the court proceedings which are in breach of an arbitration agreement. Therefore, as the position stands after West Tankers, where proceedings are initiated by one party in breach of an arbitration agreement in respect of a dispute, the subject matter of which falls within the scope of the Brussels Regulation, the other party cannot, until an arbitral tribunal is appointed, demand an interim relief such as that of an anti-suit injunction from the court of the seat of arbitration.\(^{272}\)

The principle of Kompetenz-Kompetenz of arbitration tribunals is left untouched in West Tankers. In other words, arbitral tribunals remain free to decide whether they have jurisdiction or not, irrespective of the decision of the court. Furthermore, as per article 38 (1) and 48 (1) of the Arbitration Act 1996, parties may choose to confer powers upon the arbitration tribunal which go beyond the general powers of the court. Consequently, there could be an imbalance of powers between the tribunal and the supervising court and an increased risk of the possibility of conflicting decisions between the two, since the court might decide against the validity of the agreement and proceed to deliver judgment, whilst the tribunal may contrastingly decide that the agreement is valid. The decision of the court must be recognised under the Brussels Regulation and the decision of the tribunal is to be recognised under the New York Convention. This will naturally result in a clash between the New York Convention and

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\(^{272}\) Ibid 22.
the Brussels Regulation, since most EU Member States are members of both the Brussels Regulation and the New York Convention. 273

3.5.3 - The Effects of West Tankers

*West Tankers* significantly limited the right of disputants to have the chosen court’s supervision over the arbitration process. Simultaneously, the CJEU’s decision restrained the chosen supervisory court from effectively carrying out its functions, in that, it prohibits such court from extending its power to issue an order capable of stopping a party from initiating or continuing the court proceedings, brought before another Member State court, in breach of the arbitration agreement. 274

Prior to *West Tankers*, London was perceived by many as one of the most favourable seat of arbitration within Europe. It could be argued that now, the parties are more likely to choose non-European arbitration centres, since Third State courts may still issue an anti-suit injunction or similar orders to restrain a party from initiating or continuing court proceedings, in breach of an arbitration agreement. It is granted that the power of the supervising court to issue an anti-suit injunction may have been an important decisive factor in choosing London as an arbitration seat, yet, one must also keep in mind that other arbitration centres such as Paris, Stockholm, Zurich and Geneva, have also been regarded as arbitration strongholds, despite the fact that their courts did not grant anti-suit injunctions. Furthermore, there are still ample reasons to choose London as an arbitration seat which go far beyond merely the availability of anti-suit injunctions. 275 In fact, according to the ICC276 statistics, after *West Tankers*, London has maintained its position as the second most popular seat of arbitration after Paris. 277


275 ibid.

276 International Chamber of Commerce.

In its decision, the CJEU held that the right course of action in such situations would be for the court before which the proceedings are initiated, in breach of an arbitration agreement, to refer the case to arbitration, provided that it finds the arbitration agreement valid and operative. The CJEU supported its argument by stating that, after all, this is the course of action envisaged by article 2 (3) of the 1958 New York Convention. This may not however, be the ideal course of action, since if the court accedes to the request for referral to arbitration, then this would still constitute a needlessly time-consuming and costly procedure for the parties. The requesting party would have to make an appearance in the foreign court to convince the court to refer the matter to arbitration, and if he succeeds, the dispute would need to start all over again before the arbitration tribunal.\textsuperscript{278} This shares some of the disadvantages of the \textit{lis pendens} rule, upheld by the CJEU in \textit{Gasser v Misat} and \textit{Turner v Grovit}, in that, it can likewise give rise to unwanted litigation tactics, such as those known as ‘Italian torpedos’. A party may initiate proceedings knowingly in breach of an arbitration agreement merely to delay the proceedings and obtain a tactical advantage.\textsuperscript{279}

\textsuperscript{278} Philip Clifford and Oliver Browne, ‘Lost at Sea or a Storm in a Teacup? Anti-suit Injunctions after Allianz Spa (Formerly Riunione Adriatica Di Sicurta Spa) v West Tankers Inc.’ Int. A.L.R Issue 2, Thomson Reuters (Legal) Limited and Contributors,(2009) 22.
3.6- National Navigation v Endesa Generacion (the Wadi Sudr): The Declaration of Validity

3.6.1 - Introduction

In the midst of the outbreak of criticism against West Tankers, the High Court was given an opportunity in the Wadi Sudr\(^\text{280}\) to reconsider its stance on the issue of anti-suit injunctions deployed to restrain proceedings in breach of an arbitration clause before another Member State’s court. This judgment is also relevant as it explores declaratory actions as a possible alternative to anti–suit injunctions deployed to restrain proceedings in breach of an arbitration agreement.

3.6.2 - Case Overview

An English company by the name of National Navigation Co. hired a vessel by the name of Wadi Sudr to Endesa Generacion S.A, a Spanish company. National Navigation Co., the owner of the vessel, entered into a bill of lading with Endesa for the delivery of coal to a Spanish port. The charterparty agreement contained an arbitration clause which stipulated that in the eventuality of a dispute, any claim shall be brought before London arbitration. The ship sustained damage on its way to the Spanish port and consequently, the ship had to discharge the cargo. Endesa initiated court proceedings in Spain, claiming compensation from National Navigation for the losses incurred. National Navigation, simultaneously initiated proceedings in the English Commercial Court, seeking a declaration of non-liability. Moreover, National Navigation initiated arbitration proceedings before the London Arbitration Centre, and requested a

declaration of the validity of the arbitration agreement from the High Court and an anti-suit injunction against Endesa to discontinue the Spanish Proceedings.\textsuperscript{281}

Drawing from the CJEU’s judgment in West Tankers, The English Commercial Court refused to grant an anti-suit injunction in restraint of the Spanish proceedings. However, it found no objection in issuing a declaration of validity of the arbitration agreement. The High Court considered that under Article 2 of the New York Convention, the English courts are bound to give effect to an arbitration agreement. According to the High Court, in such case, a declaration of validity is not only an option but also an obligation under the Convention. In the meanwhile, Endesa claimed before the Spanish Court that it was not bound by the arbitration agreement of the charterparty. Endesa also asserted that by initiating proceedings in the High Court, National Navigation had waived any rights derived from the arbitration clause.\textsuperscript{282}

The Spanish Court, in applying Spanish Law, found that the arbitration clause, as incorporated in the bill of lading was not valid and agreed with the assertions of Endesa that National Navigation had waived its rights under the arbitration agreement by initiating proceedings before the Commercial Court. Having obtained a favourable judgment from the Spanish Court, Endesa argued before the English Commercial Court that the English courts were also bound by the Spanish Court’s decision. The English court was of the view that the Spanish decision did not have any ‘estoppel effect’ with regards to the arbitral proceedings. Furthermore, Gloster J opined that the Spanish court’s decision was contrary to the public policy of England and was therefore not bound by it, since according to English Law, the arbitration agreement incorporated in the Bill of Lading was valid.\textsuperscript{283}

The decision of the High Court gave some hope that the breadth of the CJEU’s decision in West Tankers could be narrowed. Although the position with regards to anti-suit injunction was maintained, the High Court’s decision opened the doors for an alternative remedy to strengthen arbitration agreements within the European judicial space.

However, it can be argued, that a declaration of validity of the arbitration agreement is in effect very similar to an anti-suit injunction, since it still has the effect of restraining the enforceability, if not the foreign proceedings themselves, of a possibly contradicting

\textsuperscript{281} ibid.
\textsuperscript{283} ibid.
foreign judgment in the court of the seat of arbitration. In fact, many have regarded such declaration as an ‘injunction in disguise’ and one which therefore, makes it nonetheless incompatible with the Brussels Regulation.  284

However, such comments are perhaps mistaken, since it cannot be said that in practice, a declaration such as that issued by the High Court is intended to restrain the foreign proceedings, since it cannot be said that such declaration impinges on the principle of mutual trust, on which the prohibition of anti-suit injunctions is largely based. It is therefore unclear, whether the CJEU would have likewise prohibited such declaration.  285

On the other hand, while this seems to be a plausible solution to strengthen arbitration clauses, a declaration of validity of an arbitration agreement may give rise to conflicting decisions on the validity of the arbitration clause. Since the national laws of states often differ in their criteria for the validity of an arbitration agreement, an arbitration agreement may be regarded as valid in one state but invalid in another. Consequently, a judgment obtained in one Member State may not be capable of being recognised in another.  286

3.6.3 - Court of Appeal’s Judgment

The English Court of Appeal held that the Spanish decision was res judicata in England with regards to both court and arbitration proceedings and allowed the appeal of Endesa. The Court of Appeal held that the Spanish Judgments fell within the scope of the Brussels Regulation since the decision in West Tankers should be interpreted as stating that a judgment on a preliminary issue, such as the incorporation of the arbitration agreement in the Bill of Lading will fall within the scope of the Regulation, if it is ancillary to the proceedings, the underlying subject-matter of which, falls within the scope of the regulation. Consequently, the English court must stay its proceedings and

285 ibid.
286 ibid.
defer the dispute on the incorporation of the arbitration agreement to the Spanish court in virtue of the *lis pendens* rule.  

The Court of Appeal held that the English court was bound by the Spanish judgment in respect of the arbitration proceedings, even though arbitration is excluded from the scope of the Regulation, since a *[R]egulation judgment can...give rise to an issue estoppel as much in Arbitration proceedings excluded from the [R]egulation as in any other proceedings in an English court.*

Moreover, Lord Justice Moore-Bick did not agree with the High Court’s assertions that the recognition of the Spanish Judgment was incompatible with English public policy, since in accordance with the CJEU’s decision in *West Tankers*, Endesa had every right under Brussels Regulation to initiate proceedings in the Spanish Court on the issue of the incorporation/validity of the arbitration agreement, and the English courts had no right to decide themselves on the issue of incorporation of the arbitration clause. Consequently, the English court was obliged to recognise the Spanish court’s decision. Furthermore, according to Lord Justice Miller, the UK’s obligation under the New York Convention, to recognise and give effect to an arbitration agreement, does not extend to refusing to recognise a decision on the validity of an arbitration agreement, delivered by another Contracting State’s court.

Therefore, any hope which was given to arbitration practitioners by the judgment at first instance, that there may be a limit to the breadth of the CJEU’s ruling in *West Tankers* was withdrawn by the Court of Appeal. The effect of the Court of Appeal’s judgment is that, it remains difficult for an arbitration agreement to be enforced within the EU. Furthermore, since there is no unification of laws on the validity of arbitration agreements, Member States are free to apply their own national laws in order to determine the validity of an arbitration agreement. Consequently, a declaration from the court of the seat of arbitration, such as that issued by the High Court will very often result in a deadlock brought by conflicting decisions on the validity of the arbitration

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agreement. On the other hand, the allocation of jurisdiction to a court other than that chosen by the parties to decide on the validity of the arbitration agreement, may very well be lethal to the arbitration agreement itself. 290

3.7- The European Convention on International commercial arbitration and the UNICTRAL Model Law.

As acknowledged by Advocate General Kokott,291 and as implied by the Court of Appeal in National Navigation292 whilst interpreting the CJEU’s Ruling in West Tankers, the current position of the EU in respect of the interface of arbitration with court proceedings is anything but satisfactory. In such situations, one is compelled to turn to other instruments of international arbitration, such as the European Convention on International Commercial Arbitration (hereinafter simply referred to as the European Convention) with the hope of finding solutions to the problems exemplified in West Tankers. 293

The European Convention states that it is the arbitral tribunal itself, which must decide on its own jurisdiction and on the question of validity of the arbitration agreement, and if a court is subsequently seized of the dispute, then it shall stay its decision until an arbitral award is granted. However, this only applies when the arbitral tribunal is seized of the dispute before court proceedings are initiated and does not cater for situations similar to that in West Tankers, where the court is seized of the dispute before the arbitral tribunal. In such case, even the European Convention’s position is similar to

that of the New York Convention (on which the CJEU supported its decision in *West Tankers*). In this regard, the court which has been seized of the dispute before the arbitral tribunal, is to decide on the validity of the arbitration agreement.\textsuperscript{294}

Similarly, the UNCITRAL Model Law on International Commercial Arbitration fails to give the arbitral tribunal the necessary power to have the last word in cases where a court is seized first. In fact, in article 8 (1), it states that the court before which the matter is brought allegedly in breach of an arbitration agreement shall decide itself, whether the arbitration agreement is valid or not and whether it is still operative and capable of being performed. If it finds that the agreement is valid, it is required to refer the matter to arbitration. However, the crux of the issue is that it is the court and not the tribunal, (as it should be) which is given the upper hand to decide on the validity or otherwise of the arbitration agreement, and as such, it is still not satisfactory in the light of the notion of competence-competence.\textsuperscript{295}

### 3.8 - The Heidelberg Report

The Heidelberg Report of 2007 recognizes and affirms the problems related to the arbitration exception and attempts to resolve them by proposing the deletion of the arbitration exception from regulation 44/2001. The Heidelberg Report proposes the creation of a ‘device as effective as an English anti-suit injunction which is capable of ‘discouraging, obstructing or frustrating litigation.’\textsuperscript{296}

In the report, it was suggested that the arbitration exception be deleted from the Brussels Regulation in order that ‘..a (declaratory) judgment on the validity of an arbitration agreement could be recognized under Article 32 JR.’ Consequently, the

\textsuperscript{294} Art 5(3) European Convention on International Commercial Arbitration.


probability of conflicting decisions on the effectiveness of arbitration agreements would be significantly diminished.\footnote{Ibid 122.}

Furthermore, the report proposes the insertion of a new Article 27A which states that ‘a court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to the existence and scope of an arbitration agreement if a court of the Member State that is designated as a place of arbitration in the arbitration agreement is seized for declaratory relief in respect to the existence, the validity, and/or scope of that arbitration agreement.\footnote{Ibid. 131 – 136.}

According to the rapporteur, ‘proper performance of such an agreement can only be enforced by safeguarding that a party of an arbitration agreement is not in fact compelled to defend a lawsuit in an ordinary court, particularly in a “foreign” one. The aim could be realized by protecting arbitration agreements in a similar way as proposed here in view of jurisdiction agreements. Court proceedings are to be stayed once proceedings for declaratory relief regarding the binding effect of an alleged arbitration agreement are instituted in the country of the place of the arbitration in due time (to be decided by the court seized).’ \footnote{Ibid 123.}

The report aims at focusing the proceedings relating to the validity of the arbitration agreement in one court, the court for the seat of arbitration. To further this objective, the Report suggests inserting a new article in regulation 44/2001, article 22 (6), which shall confer exclusive jurisdiction to the court of the Member State of the seat of arbitration.\footnote{Dr. Gerold Zeiler, FCIArb, ‘West Tankers, The Heidelberg Report And The Principle Of Competence-Competence.’ <http://anali.ius.bg.ac.rs/Annals%202009/Annals%202009%20p%20045-053.pdf> accessed 15 March 2015.}

Although the report does not suggest empowering the arbitral tribunal to determine its own jurisdiction in accordance with the principle of competence-competence, the report still makes a step in the right direction, in that, it at least attempts to concentrate the issue of validity of the arbitration agreement in the court of the Member State of the arbitration seat.\footnote{Ibid.}

However, the authors of the report themselves acknowledged that if the proposals of the report were to be implemented in the Regulation, it would mean that arbitration will directly become ‘a matter of Community Law and that it will replace the autonomous...
concepts in the Member States’, and as such the ‘harmonisation of international arbitration might be considered as a severe intrusion into the procedural culture of the Member States.’ 302

3.9- The Commission’s Report and Green Paper of 2009

The Commission’s Report of 2009 acknowledged once more the negative consequences of the arbitration exclusion in Regulation 44/2001. In this regard, the issues which were of particular concern were: the problems relating to simultaneous arbitration and court proceedings, the incompatibility of national procedural law measures which are deployed to restrain court proceedings in breach of an arbitration agreement such as anti-suit injunctions with Regulation 44/2001 and the necessity of an organized set of rules which determine the jurisdiction in situations where there is an underlying arbitration agreement. 303

Furthermore, the Report delved into the issue of recognition and enforcement of judgments relating to the validity of an arbitration agreement and of arbitral awards within the EU, as well as the recognition and enforcement of arbitral awards as per the New York Convention and its interface with the Brussels Regulation. 304

The Green Paper similarly acknowledged that the current position with regards to arbitration is a ‘matter of great importance to international commerce.’ In order to clear any doubts, while acknowledging that the New York Convention does not cater for all the situations which may arise, it emphasized the New York Convention’s superiority

302 ibid.
304 ibid.
and assured that any legislative action in this area will not alter the prevailing status of the New York Convention.  

Essentially, the Green Paper sought to obtain the reactions of Member States with regards the legislative intervention in the field of arbitration. The Green Paper contained a questionnaire which aimed at inviting the Member States and other stakeholders to give their opinion on whether the arbitration exception should stay or whether it should be deleted or 'partially-deleted' from the Regulation. The paper questions about a possible alternative mechanism which could be implemented to strengthen arbitration agreements and to improve and simplify the coordination between arbitration and court proceedings and to render arbitral awards more effective.

The Green Paper aroused mixed reactions from Member States and other stakeholders. Sweden, Belgium, Germany, Spain and Slovenia showed support for legislative intervention to address the collaboration between court proceedings and arbitration. On the other hand, France, the UK and Austria expressed contentment with the current position and accordingly legislative intervention was not necessary.

Other interested parties, including stakeholders in arbitration such as; lawyers and law firms, arbitration associations and also Switzerland, as an interested party under the Lugano Convention submitted their critique on the proposals of the Green Paper. The Milan Chamber of Arbitration submitted to the European Commission a Position Paper, wherein it showed its support for the effort of the Commission to address the current position regarding transnational arbitration. However, the Chamber did not consider the problems arising from the interface of arbitration with the regulation as necessitating legislative intervention. Moreover, in its view, the Brussels regulation should maintain consistency with other EU legislations which exclude arbitration from their scope of application. In this regard, according to the chamber, the deletion of the arbitration exception from the Regulation may give rise to difficulties in its interface with other legal instruments of private international law, most particularly with the New York Convention 1958. Also, the chamber expressed concern with the proposal of conferring exclusive jurisdiction to the seat of arbitration for ancillary proceedings, particularly due

307 ibid.
to the fact that the parties’ freedom of choice of the arbitration seat, according to the rules of the arbitration tribunal is of paramount importance and should be duly respected.308

The Green Paper proposes the solution of obtaining a declaratory judgment on the validity of the arbitration agreement from the court of the seat of arbitration before the arbitration proceedings are initiated as to circumvent the application of the *lis pendens* rule. The Green Paper moreover, suggests that in the absence of choice, the arbitration seat is to be determined according to the rules allocating jurisdiction in the Regulation. In this regard, the Chamber in point five of its Position Paper expresses concern on the fact that this proposition may allow a party to fix the arbitration seat in a particular Member State without consenting with the other party. Furthermore, the Chamber draws the attention of the commission on the fact that the proposal of declaratory actions to circumvent the *lis pendens* rule is not fail proof. In this regard, the Chamber exemplifies that a declaratory action cannot safeguard against enforcement proceedings which are initiated in a court other than that of the seat of arbitration.309

Similarly, the Commission’s Green Paper received much criticism from the French Committee on Arbitration (herein after referred to as FCA). According to the FCA, the proposal that the court of the seat of arbitration shall have the competence to decide on the validity of the arbitration agreement, runs counter to the principle of competence-competence which requires the arbitration institution itself to decide on its own competence, rather than the court for the seat of arbitration. The proposition that the court of the seat of arbitration be conferred with exclusive jurisdiction to recognize the arbitral award, was likewise criticised by the FCA since the court of the Member State where enforcement of the award is sought would no longer have discretion in recognising the award. According to the FCA, this directly conflicts with the position under the New York Convention, where each state is given the right to refuse to recognise an award on the basis that it runs counter to its public policy. Finally, the

FCA considered that by giving state courts an important role in the arbitration proceedings, the Green paper dilutes the main attributes and purposes of arbitration and its attractiveness over court litigation.\textsuperscript{310}

3.10- Parliament Resolution of 7\textsuperscript{th} September 2010

In response to the Commission’s Report and Green Paper of 2009 on the review of the Brussels I Regulation, the European Parliament held that ‘various national procedural devices developed to protect arbitral jurisdiction (anti-suit injunctions so long as they are in conformity with free movement of persons and fundamental rights, declaration of validity of an arbitration clause, grant of damages for breach of an arbitration clause, the negative effect of the ‘kompetenz-kompetenz principle’, etc.) should continue to be available.’\textsuperscript{311} In its Resolution, the Parliament argued against the proposed deletion of the arbitration exception from the Regulation and held that the right thing to do was to re-establish the position as it was before West Tankers.

3.11- The Commission’s Proposal of 16 December 2010

The Commission’s proposal for the recast of Regulation 44/2001 was not as far reaching as the previous Report and Green Paper of 2009. In fact, the proposal of 2010 only proposes one amendment. However, it is nonetheless an improvement on the previous position with regards the interface of arbitration with the Regulation. 312

The Commission’s proposal did not propose a deletion of the arbitration exception, but added to article 1 the following words; ‘save as provided for in Articles 29, paragraph 4 and 33, paragraph 3.’ Article 29 of the proposal imposes an obligation on a court which has its jurisdiction challenged on the ground that there exists an arbitration agreement to stay its proceedings.’ This rule applies when arbitration proceedings have been initiated or when the court of the seat of arbitration is seized with an issue which is ancillary to the arbitration agreement. According to recital (20) of the Proposal, this new provision is aimed at ‘avoiding parallel proceedings and abusive litigation tactics’ and strengthening arbitration agreements ‘in order to give full effect to the will of the parties.’ 313

The proposal does not empower the courts of Member States to issue measures aimed at enforcing an arbitration agreement, such as anti-suit injunctions and in this regard, it does not cancel the effects of the West Tankers decision. However, arguably, the new rule would have similar effects to an anti-suit injunction. The proposal also fine-tuned the position of the EU with regards choice of court agreements. As demonstrated in Gasser v Misat, the position of the EU has been that the lis pendens rule prevails over any choice of court agreements. In Turner v Grovit, the CJEU implicitly prohibited the usage of anti-suit injunctions to restrain proceedings in the court first seised brought in breach of a jurisdiction clause. Consequently, the effectiveness of jurisdiction agreements which the regulation itself seeks to protect, was significantly diluted. The Commission’s Proposal rectified this situation by giving priority to the court chosen by

312 COM (2010) 748 final, art.29(4).
the parties in the jurisdiction agreement over the court first seized; any other court shall stay its proceedings until the jurisdiction of the chosen court is determined. 314

3.12- Parliament’s Reaction to the Commission’s Proposal

In the Draft Report of June 2011, the Parliament expressed its view that arbitration should remain completely outside the scope of the Regulation. 315 This Report was consistent with its resolution of 2010 wherein it held that the arbitration exception should neither be deleted not partially deleted from the Regulation. Consequently, the proposed rule in article 29 (4) of the Proposal was not adopted in its Draft Report since, in the Parliament’s view, it is not only arbitration that should be excluded from the scope of arbitration, but also any ancillary procedures on the validity of an arbitration agreement. 316

It follows that by advocating the widening of the arbitration exception, the Parliament’s proposal places anti-suit injunctions deployed in aid of arbitration agreements back on the table. In other words, in its opinion that the arbitration exception should not only remain, but should also be extended to any incidental proceedings thereto, the European Parliament supported the position as it was pre-West Tankers. 317

314 Ibid.
317 Ibid.
3.13- Anti-suit injunctions under Brussels Regulation (Recast) No. 1215/2012

On the 6th of December 2012, the Council adopted the Recast of Regulation 44/2001, Regulation 1215/2012. The new recital clarifies that arbitration is excluded from the scope of the Brussels I Regulation and that such Regulation does not interfere in any way with the application and the workings of the New York Convention. Moreover, it states that Member State courts are free to refer the parties to arbitration and to decide on issues of validity of an arbitration agreement. Furthermore, it is stated that the rules of recognition and enforcement of judgments under the Brussels I Regulation do not apply to the decision of one Member State court on the validity of an arbitration agreement. Also, the recital clarifies that the Regulation does not apply to any proceedings which are ancillary to the arbitration proceedings.318

A question which arises from the wording of the new recital 12 is precisely whether, by excluding proceedings ancillary to arbitration from the scope of the Brussels Recast regulation, anti-suit injunctions may be re-introduced in the European judicial sphere to protect arbitration agreements.

The European Parliament has in its proposals voted to re-establish the position pre-West Tankers, where Member States were still free to take measures according to their national law to protect arbitration agreements such as by issuing an anti-suit injunction. However, it cannot be argued that the Council, by excluding ancillary proceedings from the scope of arbitration intended to open the doors once more for anti-suit injunction in the EU. 319

Arguably, the prohibition of anti-suit injunctions in West Tankers was not found on the reasoning that ancillary proceedings to the arbitration process, unlike the arbitration proceedings themselves, fell within the scope of the Regulation. In fact, the CJEU had explicitly acknowledged that ancillary proceedings, such as those of the anti-suit

injunction, did not as such fall within the scope of the Regulation. However, the CJEU also held that the fact that such injunction or similar orders are granted in proceedings which are ancillary to the arbitration proceedings and therefore fall outside the scope of the Regulation, does not mean that their effect is irrelevant under the Regulation. Therefore, according to the CJEU, an order such as that of the anti-suit injunction, ‘runs counter to the trust which the Member States accord to one another’s legal systems … and on which the system of jurisdiction under [the Regulation] is based’, even if it is granted in the context of proceedings which per se do not fall within the scope of the Regulation.\(^{320}\)

It follows that the explicit exclusion of “ancillary proceedings” in the new recital 12, does not provide a legal basis for the re-introduction of anti-suit injunctions within the EU. Furthermore, taking into account the strong stance of the CJEU with regards the incompatibility of such injunctions with the principle of mutual trust on which the Regulation is founded, the re-introduction of anti-suit injunctions would have been explicitly mentioned in the new Regulation 1215/2012. The fact that the new Regulation does not explicitly address the issue of anti-suit injunctions can be taken to mean that the issue of anti-suit injunctions have been dealt and done with by the CJEU to the extent that the case for their compatibility vis-à-vis the Regulation does not need to be revisited.\(^{321}\)

Also, the Commission’s proposals, which ultimately led to the adoption of the new regulation, did not support anywhere the remedy of anti-suit injunctions as a possible solution to improve the interface of arbitration with the regulation and to solve the problems of duplicate proceedings and conflicting judgments in general. Instead, the Commission proposed the alternative remedy of ‘partial deletion’ of the arbitration exception from the Regulation and the introduction of the new mechanism of article 29 (4), which ultimately did not make it to the new Regulation.\(^{322}\)

It seems that the compatibility of anti-suit injunctions with the Regulation does not depend solely on the mere broadening of the arbitration exception. Apparently, although the breadth of the arbitration exception is now wide enough to embrace anti-suit injunctions deployed in aid of arbitration, the principle of mutual trust remains a persistent obstacle which the anti-suit injunction, it seems, cannot overcome.

\(^{320}\) ibid.  
\(^{321}\) ibid.  
\(^{322}\) ibid.
3.14- The *Gazprom* Case

Until *Gazprom*, it was doubted whether the recast of the Brussels I Regulation could in any way lead to a modification of the position established in *West Tankers*. Much to the surprise of sceptics however, AG Wathelet’s opinion in *Gazprom* inspired new hope that anti-suit injunctions granted by Member State courts to enforce arbitration agreements may become available again in Europe. Yet, the much anticipated judgment of the CJEU left many questions raised by the AG’s opinion unanswered. As a matter of fact, the CJEU, in its brief judgment, did not add anything to the discussion of anti-suit injunctions which had not already been brought to light in its previous judgments.\(^{323}\)

### 3.14.1 - Case Overview

Lietuvos dujos AB (LD), a Lithuanian company which was owned by Gazprom, E.ON and the State, was engaged by Gazprom to supply gas to Lithuania. In an agreement between the Lithuanian Ministry of Energy, E. ON and Gazprom, which regulated the gas supply, including the setting of the gas price, there was an arbitration clause with Stockholm as the chosen arbitration seat. The Ministry of Energy initiated court proceedings in 2011 against LD, where it requested an investigation on the chosen formula used for the setting of gas prices. Consequently, Gazprom initiated arbitration proceedings in Stockholm *as per* the agreement, where it requested the tribunal to issue an order similar to that of the anti-suit injunction to restrain the ministry of energy from continuing the court proceedings. In July 2012, the Stockholm Tribunal acceded to the request of Gazprom. However, in September 2012, the Lithuanian Court of First Instance found jurisdiction and proceeded to issue an order for the investigation requested by the Lithuanian Ministry of Energy.\(^{324}\)

\(^{323}\) Note, that although the Judgment in *Gazprom* was decided under the Brussels 1 Regulation due to the timing of the proceedings, and although this has been repealed by the Recast with regards to national proceedings commenced on or after the 10\(^{th}\) of January 2015, the observations made by the CJEU in *Gazprom* are still applicable under the Recast.

Gazprom appealed and sought to recognise the arbitral award before the Court of Appeal. However, the Court of Appeal held that according to Lithuanian Law, the award could not be enforced as it ran counter to the public policy of Lithuania since according to Lithuanian Law, a statutory investigation such as that requested by the Ministry of Energy cannot be arbitrated. Consequently, it refused to recognise the award under Articles 5(2)(a) and (b) of the New York Convention 1958.\footnote{325}

Gazprom appealed again from this decision and the Ministry of Energy argued before the Lithuanian Supreme Court that not only is such refusal to recognise such award supported by the New York Convention, but its recognition is also prohibited under the Brussels I Regulation via the CJEU’s decision in *West Tankers*, wherein it was stated that anti-suit injunctions and similar orders are incompatible with the Brussels I Regulation.\footnote{326}

In response to such arguments, the Lithuanian Supreme Court made a reference to the CJEU, wherein it questioned, whether according to the Brussels I Regulation, a court could refuse recognition of an arbitral award on the basis that it restrains the court from determining its own jurisdiction and whether the tribunal's award could be refused recognition in virtue of the public policy exception in Article 5 (2)(b) of the New York Convention, on the basis that it restricts the court’s power to determine its own jurisdiction under the Brussels I Regulation.\footnote{327}

\subsection*{3.14.2 - AG Wathelet’s Opinion}

With regards the question of whether the court should refuse the recognition of the award, the AG argued that such question should be determined solely by the New York Convention. According to the AG, the Brussels I Regulation did not impose an obligation on the court to refuse such award.\footnote{328}

\footnotesize
\begin{itemize}
\item \footnotemark[325] ibid.
\item \footnotemark[326] ibid.
\item \footnotemark[327] ibid.
\item \footnotemark[328] ibid.
\end{itemize}
The AG held that at such point in time, although the recast regulation has not yet been enforced, Recital 12, which elaborates on the correct interpretation of the arbitration exception should nevertheless be taken into consideration.\textsuperscript{329}

In this regard, Recital 12 states that where there is an underlying arbitration agreement, any proceedings, even if ancillary or incidental to such an agreement, are considered to fall outside the scope of the Brussels I Regulation. Therefore, as long as the arbitration agreement is not deemed invalid, inexisten or inoperative, an anti-suit injunction or similar order restraining court proceedings, falls within the arbitration exception and is thus excluded from the scope of the Brussels I Regulation.\textsuperscript{330} Furthermore, the AG considered that the tribunal is not subject to the Brussels I Regulation. An arbitral tribunal is therefore not prohibited from granting an order to restrain a party from pursuing court litigation. From this it follows that an award granted by such tribunal and its recognition is similarly excluded from the scope of the Brussels I Regulation.\textsuperscript{331}

In respect of the public policy exception under the New York Convention, the AG opined that the provisions of the Brussels I Regulation should not be considered as forming part of the public policy of Lithuania and as such, the exception of public policy under the New York Convention is not triggered by any restriction of the power accorded by the Brussels I Regulation to a court to decide on its own jurisdiction.\textsuperscript{332} So far, the decision of the AG only concerned anti-suit injunctions and similar orders granted by an arbitration tribunal to safeguard an arbitration agreement. In this regard, the AG’s opinion did not challenge the decision of \textit{West Tankers} since \textit{West Tankers} only prohibited anti-suit injunctions deployed by the supervising court and did not impose any limitations on the tribunals’ power to determine their own jurisdiction and to issue any such order themselves. The principle of \textit{kompetenz-kompetenz} was left untouched by \textit{West Tankers}.\textsuperscript{333}

However, in his critical assessment of the CJEU’s decision in \textit{West Tankers}, the AG was far more radical. The AG opined that Brussels (Recast) Regulation intrinsically aims at rectifying the CJEU’s position post-\textit{West Tankers} with regard to arbitration.

\textsuperscript{329} ibid 91.
\textsuperscript{330} ibid 125-133.
\textsuperscript{331} ibid 153-156.
\textsuperscript{332} ibid 180-188.
Relying heavily on regulation 1215/2012 (which was not yet in force), the AG implied that the *West Tankers* ruling is now obsolete in the light of the new Brussels I (Recast) Regulation and that the CJEU’s position regards arbitration agreements and ‘ancillary proceedings’ should be revisited accordingly. AG Wathelet maintained that ‘in reality it [West Tankers] had extended the scope of the Brussels I Regulation to arbitration in a way that could undermine its effectiveness’. Consequently, he sought to emphasize that the controversial effects of *West Tankers* should not rise again under Regulation 1215/2012. It follows, that by supporting the position pre-*West Tankers*, the AG paved the way for the permissibility of anti-suit injunctions granted by the chosen supervisory court to restrain proceedings in another EU- Member State court in breach of an arbitration agreement.335

3.14.3- The CJEU’s Decision

The CJEU concurred with the AG’s opinion where it held that the Brussels 1 Regulation does not prohibit Member State courts from recognising and enforcing an anti-suit injunction granted by an arbitration tribunal. The reasoning of both the AG and the CJEU was that, since the Brussels 1 Regulation does not apply to arbitration, then matters relating to arbitration fell out of the scope of the Brussels I Regulation and should continue to be regulated by the national laws of Member States.

The CJEU explained that the preclusion of anti-suit injunction in its previous judgment of West Tankers was based on the dictum that decision of one Member State court should not be reviewed by another Member State court and that the determination of one Member State court’s own jurisdiction should not be commandeered by another Member State court.\textsuperscript{336} Since, in Gazprom, the anti-suit injunction was issued by an arbitral tribunal and not by another Member State court, then the principle of mutual trust, on which such prohibition was particularly based in the CJEU’s previous judgement was inapplicable.\textsuperscript{337}

The CJEU also held that in West Tankers, the prohibition of an anti-suit injunction was due to the fact, that apart from running counter to the principle of mutual trust, such injunction, in effect, also barricaded the applicant who contested the validity of the arbitration agreement from accessing the court before which he brought the proceedings. In this case however, the CJEU observed that such litigant remains free to oppose the recognition and enforcement of the arbitral award before the relevant court.\textsuperscript{338}

Finally, the CJEU also observed that, whilst one’s failure to comply with a court ordered injunction would trigger a court-ordered penalty, non-compliance with a similar order issued by an arbitral tribunal in the form of an award, would not trigger the imposition of a penalty.\textsuperscript{339}

Consequently, the CJEU concluded that the Brussels 1 Regulation does not, in any way, interfere with a Member State court’s discretion in deciding whether to recognise and enforce an anti-suit injunction issued by an arbitral tribunal to restrain a party from continuing with court proceedings, since the Regulation does not intend to regulate the ‘recognition and

\textsuperscript{336} Ibid 32-33, 35-36
\textsuperscript{337} Ibid 34, 37-39
\textsuperscript{338} Ibid
\textsuperscript{339} Ibid 40.
enforcement, in a member state, of an arbitral award issued by an arbitral tribunal in another Member State’.  

3.14.4- Comment

In Gazprom, the CJEU merely confirmed that the Brussels 1 Regulation does not impose restraints on Member State courts to recognise and give effect to an anti-suit injunction granted by an arbitration tribunal. The recognition and enforcement of arbitral awards remains regulated by national law and, in particular, by the New York Convention. Similarly, the Brussels 1 Regulation does not interfere with the competence of an arbitral tribunal to grant an anti-suit injunction.

The ruling in Gazprom clarifies that the Brussels 1 Regulation does not regulate the relationship between arbitral tribunals and EU Member State Courts and thus, it cannot intermeddle with an arbitral tribunal’s ability to grant an anti-suit injunction to protect an arbitration agreement. However, this revealed nothing that wasn’t already known.  

3.14.5- Concluding Remarks

The CJEU’s decision left many who were kept at the edge of their seats by the AG’s opinion, disconcerted and yearning for some answers to the controversial issues raised by the AG. In particular, one would have hoped for some elucidation on whether the new Recital 12 permits an EU Member State Court to grant an anti-suit injunction in aid of an arbitration agreement.

It appears that the CJEU decided the case under the Brussels 1 Regulation since no reference was made to the Recast or to Recital 12, on which the AG’s opinion was based. Therefore, whether the new Recital 12 could resuscitate intra-EU Member State Court anti-suit injunction is something which remains to be seen. Until then, it seems that the AG’s

340 Ibid 45.
341 See ‘comment’ on West Tankers in Chapter 3, Sub Chapter 3.5.2
opinion remains a cogent basis for any argument in favour of a prospect of survival for anti-suit injunctions within the European judicial sphere. 342

Chapter 4- A *MALTESE PERSPECTIVE*

4.1- Introduction

The position of common law and civil law systems with regards to anti-suit injunctions is sufficiently lucid. On the other hand, the position of legal systems falling under the ‘mixed’ category necessitates further observation. The Maltese legal system has traditionally been regarded as inherently continental but which through some 160 years of British rule has naturally acquired some common law characteristics. In this regard, the Maltese system is best described as a ‘mixed’ or ‘hybrid’ legal system.343 Remnants of English private international law can still be traced in our system of private international law, and where there existed any lacuna in our embryonic private international law, reference was to be made to English private international law.344 However, since Malta’s accession to the EU, our private international acquired its dose of enrichment through the EU’s legislative intervention in the area of conflict of laws. Since the Brussels 1 Regulation is part of our law, where such Regulation applies, any discussion on the availability of anti-suit injunctions shall be conducted in the light of the relevant CJEU’s jurisprudence. Yet, where the Brussels 1 Regulation does not apply, each member state is free to apply its own rules of private international law. Hence, from a local perspective, reference is to be made to the COCP, Chapter 12 of the Laws of Malta.

Given that anti-suit injunctions were never sought before our courts, there is a complete lack of jurisprudence on the subject. However, this should not, of its own constitute an inference of their unavailability under our law. The aim of this chapter is to identify the legal basis on which an anti-suit injunction can be issued by the Maltese Courts. Having established

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344 See *C. Smith v V. Muscat Azzopardi et, Kollezzjoni ta’ Decizjonijiet tal-Qrati Superjuri ta’ Malta, Volum XXIX, Pt.II; G. Spiteri v. E. Soler et*, Court of Appeal, 22/10/1937
whether the means for the issuance of an anti-suit injunction are available under our current law of procedure, the next step would be to speculate on whether our courts will, in the appropriate circumstances, avail themselves of such means to grant an anti-suit injunction or similar order to restrain a party from initiating or continuing proceedings abroad.

4.2- Injunctive Relief under the COCP

Injunctive relief, whether interlocutory or final, may fall under one of two categories, namely, prohibitory or mandatory. Hence, an injunction may be ordered by the court either to restrain or to mandate a particular conduct. Anti-suit injunctions are generally issued to restrain a litigant from initiating or from continuing proceedings elsewhere and are therefore, generally prohibitive. Yet, where proceedings have already been initiated in a foreign court, the domestic court may issue a mandatory anti-suit injunction whereby, an official discontinuance of the proceedings is also ordered.345

Section 37 (1) of the Senior Courts Act of 1981, has been recited several times as a legal basis for the grant of anti-suit injunctions by the English Courts. This provides that ‘the High Court may by order (whether interlocutory or final) grant an injunction… in all cases in which it appears to the court to be just and convenient to do so.’ Undoubtedly, this section endows the English Courts with ample space for creative use of discretion when granting injunctions. In a disparate fashion, our courts are bound by the limited set of precautionary acts set out under article 830 of the COCP.

An application for the grant of an anti-suit injunction under Maltese law is conspicuously feasible under the rubric of the warrant of prohibitory injunction- admittedly one of the most versatile precautionary warrants available under our law.346

In Dragonara Casino Limited vs Dragonara Resort Limited, it was affirmed that a prohibitory injunction can be issued in any case where it is necessary to restrain a person from doing

346 “The object of a warrant of prohibitory injunction is to restrain a person from doing anything whatsoever which might be prejudicial to the person suing out the warrant “Code of Organization and Civil Procedure, Chapter 12 of the Laws of Malta, Article 873(1)
anything whatsoever which might be prejudicial to the person suing out the warrant.\textsuperscript{347} In \textit{Angelo Xuereb et noe vs Marin Hili et noe}, the phrase, ‘anything whatsoever which might be prejudicial to the person suing out the warrant’ was interpreted as meaning that whatsoever the person suing out the warrant is trying to restrain, if it is not so restrained, might cause prejudice, in the sense that not only does it cause damage, but the damage which will be sustained will be incapable of being alternatively remedied pending the proceedings or that the remedial alternative is disproportionate.\textsuperscript{348} Furthermore, article 873(2) of the COCP states that ‘the court shall not issue any such warrant unless it is satisfied that such warrant is necessary in order to preserve any right of the person suing out the warrant, and that \textit{prima facie} such person appears to possess such right.’

Therefore, it transpires that there are three essential elements which need to be satisfied in order for a warrant of prohibitory injunction to be issued. Primarily, the injunction defendant’s conduct must be one which may cause damage to the person suing out the warrant, secondly, the person suing out the warrant must show that he has a \textit{prima facie} right to restrain the defendant from doing anything whatsoever which could cause him prejudice and thirdly, the warrant of prohibitory injunction must be necessary for the protection of such right.\textsuperscript{349}

In view of the versatile nature of the prohibitory injunction, there appears to be no reason why a prohibitory injunction cannot be granted to restrain a litigant from initiating or continuing proceedings abroad. In the spirit of this apparent feasibility, the applicant must demonstrate to the satisfaction of the Maltese court that the pursuit of the proceedings in the foreign court may cause him prejudice, either because they are evidently intended to ‘vex or oppress’ the applicant or because it is evident that their scope is to obtain a tactical advantage over the applicant to which the injunction defendant is not entitled. In addition, the applicant must show that he has a \textit{prima facie} right to restrain the injunction defendant’s misconduct. Such right may derive from a contractual clause which confers jurisdiction to the courts of Malta or to a Maltese arbitral tribunal. Finally, the applicant would have to convince the court that a prohibitory injunction is necessary in order to safeguard such right and that no alternative remedy exists, or that such alternative remedy is disproportionate.

\textsuperscript{347} \textit{Dragonara Casino Limited vs Dragonara Resort Limited}, Civil Court First Hall, 14/03/2006
\textsuperscript{348} \textit{Angelo Xuereb et noe vs Marin Hili et noe}, Civil Court First Hall, 22/09/1995; \textit{See also Victor Mizzi vs Joseph Gasan et}, app. 4216/92; \textit{Avv Dr Victor Borg Grech vs Joseph Gasan et}, app. 3984/92
\textsuperscript{349} \textit{John Vella Et vs GGD Properties Limited Et}, Civil Court First Hall, 19/07/2007
4.3- Concurrent Proceedings

Primarily, it must be noted that where the matter falls within the ambit of Regulation (EU) no 1215/2012, jurisdiction is determined in accordance with the rules found therein. Therefore, in the eventuality that more than one Member State court is seized of the same dispute between the same parties, the rule of *lis alibi pendens* as set out in the Regulation prevails over any other rule of Maltese private international law. Thus, the court second seized is obliged to stay proceedings until the court first seized of the same cause between the same parties has decided on the issue of jurisdiction. On the other hand, where a non-Member State court is seized of an action involving the same cause of action and between the same parties, a Member State court has discretion to decide whether to stay or not the proceedings.

However, where the matter falls outside the scope of the Brussels I Regulation, then the Rules set out in the COCP apply. In this regard, article 742(2) provides that, ‘the jurisdiction of the courts of civil jurisdiction is not excluded by the fact that a foreign court is seized with the same cause or with a cause connected with it. Where a foreign court has a concurrent jurisdiction, the courts may in their discretion, declarea defendant to be non-suited or stay proceedings on the ground that if an action were to continue in Malta it would be vexatious, oppressive or unjust to the defendant.’

In *Patrick Pillion Et vs Smarta Navigation Ltd*, it was held that it cannot be said that there is concurrent jurisdiction, unless both courts, Maltese and foreign, have been seized of the same cause and the foreign court has already found jurisdiction. If the jurisdiction of the foreign court was contested and the foreign proceedings suspended, and the foreign Court had not yet issued a decision on the issue of jurisdiction, then article 742(2) cannot apply.

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350 Code Of Organization And Civil Procedure, Chapter 12 of The Laws of Malta, Article 742(6)
353 Code Of Organization And Civil Procedure, Chapter 12 of The Laws of Malta, Article 742(2)
354 *Patrick Pillion Et vs Smarta Navigation Ltd*, Civil Court First Hall, 28/10/2005
Similarly, in *Middle Sea Insurance Plc vs Bianchi & Co (1916) Ltd*, it was held that article 742(2) only applies where the action is pending before the foreign court. If the foreign proceedings have not, as yet been initiated, then article 742(2) does not apply.\(^{355}\)

In stating that ‘the jurisdiction of the courts of civil jurisdiction is not excluded by the fact that a foreign court is seized with the same cause or with a cause connected with it’, this provision empowers a Maltese Court to determine its own jurisdiction despite the fact that another (foreign) court is seized of the same dispute. Here, it is irrelevant whether the Maltese court is the court which is first or second seized of the dispute.

The second part of this provision states that, ‘where a foreign court has a concurrent jurisdiction, the courts may in their discretion, declare defendant to be non-suited or stay proceedings on the ground that if an action were to continue in Malta it would be vexatious, oppressive or unjust to the defendant.’ This essentially means that although the criteria for finding jurisdiction under 742 (1) may have been satisfied, the court has discretion to stay the proceedings or to declare the defendant non-suited, if in the opinion of the court, the proceedings, if allowed to continue in Malta would be vexatious, oppressive or unjust to the defendant. *A contrario senso*, this discretion also implies that if the court finds that the Maltese proceedings are not in fact vexatious, oppressive or unjust to the defendant, then it can decide to allow the continuation of the proceedings despite the fact that another court has concurrent jurisdiction.

Undoubtedly, this section is inspired by English private international law, particularly by the doctrine of *forum conveniens/ forum non conveniens*, which essentially bestows the English Courts with discretion to decide whether to stay or not the proceeding, depending on which is in the opinion of the court the most appropriate forum for the dispute. Under our law, the notion of ‘appropriate forum’ is qualified by the criteria of ‘vexatious, oppressive or unjust’ proceedings. Therefore, the Maltese courts will not decline jurisdiction in favour of the competing forum merely on the ground that the Maltese Court is not the ‘appropriate forum.’ Proceedings will only be stayed or defendant will only be declared non-suited by the Maltese court, if it appears that the proceedings are ‘vexatious, oppressive or unjust’ to the defendant. This test is identical to that applied in *Logan v Bank of Scotland*,\(^{356}\) where it was stated that in order for a stay in proceedings to be granted, the defendant must prove that the proceedings, if allowed to continue, would be vexatious, oppressive or unjust to him or result in an abuse of process. However, the ‘Logan Test’, unlike the Maltese provision, also takes into consideration the injustice which may be caused to the plaintiff by the stay of

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\(^{355}\) *Middle Sea Insurance Plc vs Bianchi & Co (1916) Ltd*, Civil Court First Hall, 27/02/2014

\(^{356}\) *Logan v Bank of Scotland* [1906] 1 KB 141 (CA)
proceedings. Under the English doctrine of *forum conveniens*, it is the stay of proceedings, rather than the actual proceedings, which must be assessed to decide whether to stay or not the proceedings. To the contrary, under our law, it is the actual proceedings, rather than the stay in itself, which must be ‘vexatious, oppressive or unjust’ (to the defendant) in order to grant a stay of proceedings. This means that for the local courts it is irrelevant whether the foreign court is less or more appropriate than the Maltese court for the dispute. The focus is solely on the local proceedings.\(^{357}\) Nevertheless, the Maltese courts have discretion to decide whether to allow the continuation of the proceedings or issue a stay, despite there being another court which is seized of the same cause. Therefore, where the matter falls outside the scope of the Brussels 1 Regulation, the Maltese Courts are not bound to stay the local proceedings just because another Court is seized of the same dispute.

However, the foreign court, in applying its own conflict of law rules, may likewise decide not to stay its proceedings and to allow the continuation of the proceedings brought before it. In the absence of a rule such as that of *lis alibi pendens*, there seems to be no device to effectively safeguard against duplicative proceedings and conflicting judgments, except of course an anti-suit injunction granted to restrain the other party from initiating or continuing the foreign proceedings. Despite being a plausible solution to the problem of duplicative proceedings, anti-suit injunctions have never been sought before our courts.\(^{358}\)

### 4.4- Choice of Court Agreements

Within the ambit of the Brussels 1 (Recast) Regulation, any court other than the court chosen by the parties in a choice of court agreement shall stay its proceedings, until the designated court declares that it has no jurisdiction under the exclusive choice-of-court agreement, This is an exception to the *lis alibi pendens* rule which has been previously

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plagued by abusive litigation tactics.\(^{359}\) On the other hand, when the matter falls outside the scope of the Regulation, the rules of the COCP relating to concurrent proceedings apply.

4.4.1- Choice-of-court Agreements Conferring Jurisdiction to a Foreign Court.

Where the parties have entered into a choice of court agreement conferring jurisdiction to a foreign court, thereby derogating from the provisions of article 742(1), the aforementioned principles with regards to article 742(2) similarly apply. Consequently, the mere existence of a choice-of-court agreement conferring jurisdiction to a foreign court does not automatically abrogate the jurisdiction of the Maltese courts, but the Maltese courts can exercise discretion in deciding whether to decline jurisdiction under such choice-of-court agreement. In spite of this, our courts will generally recognise a choice-of-court agreement conferring jurisdiction to a foreign court in virtue of the principle of freedom of contract and the principle of *pacta sunt servanda*.\(^{360}\)

The Maltese courts will however, only recognise a choice-of-court agreement, provided that such choice is not malicious or improper. In *Barchi vs. D’Amico*, for example, the Maltese courts set aside the agreement conferring jurisdiction to the Courts of Panama as it was evident that such stipulation was made in bad faith.\(^{361}\)

4.4.2- Choice-of-court Agreements Conferring Jurisdiction to a Maltese Court.

With regards to choice-of-court agreements conferring jurisdiction to the Maltese courts, Article 742 (1)(g) states that the Maltese courts shall have jurisdiction over any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the

\(^{359}\) For a more detailed analysis of ‘abusive litigation tactics’ as a consequence to the ‘*lis pendens* rule’ see Chapter 3, Sub Chapter 3.3.

\(^{360}\) *Peter Arrigo Ltd vs Avv. Dr. Christopher Cilia Et*, Civil Court First Hall, 11/12/2003.

\(^{361}\) *Barchi vs D’Amico*, Commercial Court, [1976]; See also *Joseph Attard vs. Avv. Dr. R. A. Cremona et noe*, Court of Appeal, 01/03/1968; *Nutar Dr. Gius. Sammut vs Joseph Preca et noe*, First Hall, Civil Court, 11/08/1969; *Bonello vs Ripard*, Commercial Court [1994].
court. Consequently, a choice-of-court agreement conferring jurisdiction to the Maltese courts is a sufficient basis on which the jurisdiction of the Maltese courts can be found. 362

It follows that, in the event that a litigant pursues litigation in a foreign court in breach of a choice-of-court agreement conferring exclusive jurisdiction to the Maltese courts, it is ostensibly feasible for our courts to issue an anti-suit injunction, in order to restrain the other party from continuing with the foreign proceedings, most particularly, because a Maltese court is bound to enforce a contract which is deemed valid under Maltese law.

4.5- Arbitration Agreements

Arbitration and ancillary proceedings, including proceedings on the validity of an arbitration agreement are excluded from the scope of the Brussels 1 (Recast) Regulation. Consequently, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, each Member State Court is free to decide whether to refer the parties to arbitration, to stay or dismiss the proceedings, or to examine whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with its national law. 363

Under our national law, arbitration is regulated by the Arbitration Act, Chapter 387 of the Laws of Malta, by specific provisions of the COCP, Chap 12 of the Laws of Malta relating to arbitration proceedings and, in accordance with article 55(1) of the Arbitration Act, also by the UNICTRAL Model Law on International Commercial Arbitration (1985).

4.5.1- The Arbitration Act

In the eventuality that a party to a domestic arbitration agreement initiates court proceedings in breach of such agreement, the Arbitration Act stipulates that, notwithstanding any 362 Code of Organization and Civil Procedure, Chapter 12 of the Laws of Malta, Article 742(1)(g)
provision of the COCP, any party to such legal proceedings may at any time before delivering any pleadings or taking other steps in the proceedings, apply to that court to stay the proceedings and the court, unless satisfied that the arbitration agreement has become inoperative or cannot proceed, shall make an order staying the proceedings and shall refer the parties to arbitration. However, where, at the same time that court proceedings have been initiated, arbitration proceedings have been already commenced and are pending before the arbitral tribunal, the arbitral tribunal shall not take any steps in the arbitration until the court decides on the application except in cases where failure to provide a remedy will result in irreparable harm.

The rules governing domestic arbitration agreements are made applicable to international arbitration agreements via article 60 of the same Act, which states that if the parties to an international arbitration agreement have agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, and the parties have not chosen the rules that are to govern the arbitration, then the provisions of Part IV of this Act shall apply.

Furthermore, in accordance with article 38(1) of the Arbitration Act, unless otherwise stipulated in the arbitration agreement, the court may upon the request of any of the parties to the arbitration agreement, issue any of the precautionary acts listed in article 830(1) of the COCP. In addition, an arbitral tribunal may, on the request of any party to the arbitration agreement, order the other party to take such interim measures as it deems necessary. A party may subsequently, request the court for the enforcement of any interim measure ordered by the arbitral tribunal. The court, in such case, retains the power to amend or revoke such orders after hearing the parties and the arbitral tribunal as it deems necessary.

In accordance with the aforementioned provisions of the Arbitration Act, it follows that, as long as the applicant shows a prima facie right to arbitrate, and that he would incur substantial prejudice from not proceeding with the arbitration proceedings such that the issue of a prohibitory injunction is necessary, it is possible for a party to an arbitration

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364 Arbitration Act, Chater 387 of the Laws of Malta, Article 15(3)
365 Ibid, First Schedule, UNCITRAL Model Law, Article 8(1).
366 Ibid Article 15(4)
367 Ibid Article 38(6)
368 Ibid Article 38(7)
agreement to request the court to grant a prohibitory injunction to restrain the pursuit of court litigation in breach of the underlying arbitration agreement.\footnote{ICLG, Malta- International Arbitration 2014, Question 7.4 < http://www.iclg.co.uk/practice-areas/international-arbitration/-international-arbitration-2014/malta> accessed 2nd April 2015.}

\subsection{4.5.2- The COCP}

In the existence of an arbitration agreement between the parties to the dispute, article 742(3) of the COCP, unlike the article preceding it, states that the court \textit{shall} stay its proceedings. However, this provision also states that the mere existence of an arbitration agreement does not exclude the jurisdiction of the Maltese Courts. What this means is that the Maltese Courts retain a residual jurisdiction to monitor and supervise the arbitration proceeding and to ‘give any order of direction.’\footnote{365 Entertainment Ltd vs Poker Ltd and Boss Media AB, Civil Court First Hall, 10/07/2012} In the same vein, article 742(4) provides that the court, in its supervisory role may also, ‘on the demand by any person being a party to an arbitration agreement, […] issue any precautionary act.’

A case on point is \textit{365 Entertainment Ltd vs Poker Ltd and Boss Media AB}. Here, the parties had entered into an arbitration agreement which conferred jurisdiction to the Arbitration Institute of the Stockholm Chamber of Commerce. The court observed that although the jurisdiction of the courts of Malta is not excluded by the fact that there exists between the parties an arbitration agreement, the court is obliged to respect the principle of \textit{pacta sunt servanda} with regards to the arbitration clause, and it is only where there are strong reasons may the court decide to set aside such arbitration clause.\footnote{George Camilleri vs Hugh P. Zammit noe, Court of Appeal, 04/05/1998; See also Albert Muscat and Elaine Pace vs Maltco Lotteries Limited, Civil Court First Hall 21/05/2015} With regards to the supervisory role of the court on the arbitration process, in \textit{George Camilleri vs Hugh P. Zammit noe}, the Court of Appeal held that the legislator intended to ensure that the jurisdiction of the Maltese courts is not excluded by the simple fact that there exists between the parties an arbitration agreement. The legislature wanted to empower the Maltese courts to monitor and supervise on the validity of the arbitration agreement and on the arbitration process and to safeguard its enforceability by issuing any precautionary or executive acts. Consequently, article 742(3) was not intended to dilute the efficacy of arbitration agreements but rather, to empower the courts to regulate their operation.\footnote{George Camilleri vs Hugh P. Zammit noe, Court of Appeal, 04/05/1998} It is therefore possible to conclude that under the aforementioned provisions of the COCP, the court, in its supervisory role over the arbitration process, may similarly issue a prohibitory injunction to restrain the other party from initiating

\begin{itemize}
\item \footnote{365 Entertainment Ltd vs Poker Ltd and Boss Media AB, Civil Court First Hall, 10/07/2012}
\item \footnote{George Camilleri vs Hugh P. Zammit noe, Court of Appeal, 04/05/1998; See also Albert Muscat and Elaine Pace vs Maltco Lotteries Limited, Civil Court First Hall 21/05/2015}
\end{itemize}
court proceedings in breach of an arbitration agreement. Such order will in effect be very similar to an anti-suit injunction.

Consistently, a Maltese court may also grant an injunction to restrain foreign proceedings brought in breach of an arbitration agreement, since, as stated above a Maltese court is bound to enforce a contract which is valid under Maltese law.373

4.6- Conclusion

The above discussion goes a long way towards establishing that a legal basis for the grant of anti-suit injunctions exists under our law of procedure. However, we should not make the mistake of hypothesizing this as giving a green light to our courts to grant anti-suit injunctions. In fact, a similar legal basis can be found in the national laws of even the most anti-suit injunction-opposing of jurisdictions374, yet, said jurisdictions still contest the usage of anti-suit injunctions with vigour. A distinction must be made between the conceptual availability and the practical permissibility of anti-suit injunctions. Any effort to establish that the means for the issuance of anti-suit injunctions are theoretically available would only be of value for a purely academic purpose, if the courts are not willing to put such means into practice. Therefore, any discussion on the permissibility of anti-suit injunctions must necessarily be conducted with due prominence to the effects of anti-suit injunctions on comity and international relations. It is, in fact, within this context, that the usage of anti-suit injunctions is contra-indicated, both in the European judicial sphere375 and amongst Civil Law Jurisdictions.376 Therefore, ultimately, any argument in favour or against the usage of anti-suit injunctions can be pruned to whether the necessity to protect the private rights of individuals should be set aside to confirm with public law considerations or vice-versa.

374 See for example, Swiss Civil Procedure Code, Chapter 5, Section 1, Art. 261, 262
375 Anti-suit injunctions have been perceived as disrupting the ‘mutual trust’ which exists between Member State Courts by the CJEU, in both West Tankers and Turner vs Grovit. See Chapter 3 for a more detailed analysis of the CJEU’s stance on anti-suit injunctions.
376 See Chapter 2 for a more in depth analysis on the ‘civil law arguments’ against the usage of anti-suit injunctions.
Conclusion

The anti-suit injunction is by far one of the most controversial remedies which could be granted by a court. From the very beginning of its development, the English Courts were aware of its implications and intricacies\footnote{See Love v Baker [1665] 1Chan Cas 67, 22 ER 698.} and as the baggage of critique continued to increase, courts of Common law, admittedly limited its availability by increasing the thresholds for its grant but never sought to surrender such tool from their armoury.\footnote{See Thomas Raphael, The Anti-Suit Injunction, (first published 2008, Oxford University Press) 9}

The anti-suit injunction is indispensable for private justice and its grant is therefore warranted under Common law, even if at the expense of public law considerations. In the first chapters, this thesis demonstrated that the hostile approach of Civil Law jurisdictions and the friendliness of Common law jurisdictions towards this remedy sheds light on the intrinsic differences between the two legal systems and that such divergence in perspective on the subject of anti-suit injunctions is perhaps more political than legal. In fact, it is not the usefulness of the remedy which is doubted by its detractors, but its incompatibility with public law considerations of comity and sovereignty and the necessity that one state’s judicial process is left unfettered with by another state’s court.\footnote{See ibid 17-20}

The aim of this thesis was not to provide a comparative study of the two systems of law and their respective perspectives on anti-suit injunctions and similar orders, but to evaluate both the arguments against and in favour of anti-suit injunctions in order to answer the million dollar question revolving around this thesis, namely, whether the ends achieved by the remedy of the anti-suit injunction can ever justify its means. At this stage it is evident that the answer to this question is entirely dependent on whether private justice should be allowed to prevail over public law considerations. The anti-suit injunction, in whatever form and for whatever reason it is granted, will always be
incompatible with some public law consideration and there is no scope for further debate on this issue.\textsuperscript{380}

Therefore, the debate of anti-suit injunction should nowadays be confined to uncovering those situations where the usefulness and necessity of the anti-suit injunction is of such immensity to override public law considerations. At least in these situations, where private justice is of more concern than public law considerations, the granting of anti-suit injunctions should be justified. One of such situations is precisely where an anti-suit injunction is requested to restrain the pursuit of proceedings in breach of a valid arbitration agreement.

It is in this very context that the unavailability of anti-suit injunctions within the European Union caused much uproar. In the third chapter, this thesis evaluated the case-law of the CJEU to demonstrate the stance of the CJEU in respect of anti-suit injunctions and it appeared that due to its strict upheaval of the ‘principle of mutual trust’, it could never embrace such remedy. However, even the principle of ‘mutual trust’, as paramount as it may be to the structure of the European Union, should be allowed to be circumvented in the most peculiar of situations, where an anti-suit injunction is crucial for the attainment of private justice. In \textit{West Tankers},\textsuperscript{381} it was observed that the granting of anti-suit injunctions in aid of an arbitration agreement was prohibited by the CJEU, notwithstanding the fact that such injunction was justified in the light of private law considerations and notwithstanding the fact that the Brussels I Regulation excludes arbitration from its scope of application. The CJEU’s decision in \textit{West Tankers} marked the end of anti-suit injunctions in the EU; yet since then, substantial developments in the EU, which led to the Brussels I (Recast) Regulation have called for the revision of the previous position of the CJEU with regards to anti-suit injunctions in aid of arbitration. This thesis attempted to foresee the future of anti-suit injunctions in the European Union in the light of these new developments. It was hoped that the future of anti-suit injunctions within Europe will be determined in the CJEU’s decision in \textit{Gazprom}. However, the CJEU fell short of addressing the issues raised by the AG in its opinion, most particularly, whether the new Recital 12 permits intra-EU Member State Court anti-suit injunctions in aid of arbitration agreements. Until the CJEU has clarified whether the \textit{West tankers} position should be revisited in the light of Recital 12, it seems that the arguments in favour of anti-suit injunction within Europe remain up for grabs. Considering that anti-suit injunctions were never sought

\textsuperscript{380} Thomas Raphael describes the challenges posed by sovereignty and comity as ‘absolute’ in Thomas Raphael, \textit{The Anti-Suit Injunction}, (Oxford University Press 2008) 15
\textsuperscript{381} C-185/07, \textit{Allianz SpA and Others v West Tankers Inc.} [2009] EUECJ
before the Maltese courts, the Maltese position was even more challenging to ascertain. The ‘hybridity of the Maltese legal system and the influence that English common law has on our private international law makes the Maltese perspective, perhaps even more interesting. Although the Maltese system adopts a similar version of the English remedy of *forum non conveniens*, in that, it similarly allows the courts to decide for themselves whether the Maltese proceedings are vexatious, oppressive or unjust and to order a stay of proceedings accordingly, and although a legal basis evidently exists under Maltese law for the grant of an anti-suit injunction, it is a moot point whether a Maltese court will be willing to grant an anti-suit injunction to restrain a litigant from initiating or continuing foreign proceedings. Ostensibly, however, a possibility exists that a Maltese court will issue an anti-suit injunction to protect a choice-of-court or arbitration agreement, since a Maltese court is bound to enforce a contract which it deems to be valid under Maltese law.
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