

UNIVERSITY OF SOUTHAMPTON
FACULTY OF LAW, ARTS & SOCIAL SCIENCES
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**ACCOMMODATING ANTI – SUIT INJUNCTIONS IN THE BRUSSELS I
REGULATION FRAMEWORK: WHAT ROLE SHOULD THEY PLAY?**

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ABSTRACT

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The principle of anti-suit injunctions has been deeply rooted in the English legal system since the time of division of the English courts and the era of colonisation. Over the years, anti-suit injunctions proved to be the most successful mechanism in safeguarding the English courts' jurisdiction. However, since the ratification of the Brussels Convention 1968, and its updated version Council Regulation 44/2001, an acute jurisdictional problem has surfaced. Due to the nature and underlying philosophy of the Brussels I Regulation, anti-suit injunctions are perceived by Continental courts not as an order *in personam*, but rather as a means of intruding on those courts' sovereignty, and as such anti-suit injunctions were disallowed by the European Court of Justice from operating in the Brussels I Regulation framework.

The purpose of this contribution is to assess whether and how the principle of anti-suit injunctions can be accommodated in the Brussels I Regulation framework thus transforming the principle to a pan-European weapon available to all Member States.

In order to achieve the aim set by this contribution, the Introduction presents the legal problem and discusses what an anti-suit injunction is, its rise to prominence in England and why it is considered such an important weapon in the armoury of international commercial litigation in England. Chapter I focuses on the English common law framework, by providing a discussion of the nature of the English jurisdiction system as well as the requirements and principles applicable for the issuance of an anti-suit injunction under the traditional common law rules. Chapter II examines the availability and use of anti-suit injunctions in Continental legal systems. Chapter III provides a detailed analysis of the Brussels I Regulation framework, by providing original discussion regarding the nature of the Brussels I Regulation jurisdiction system and an analysis of the Brussels I Regulation provisions relevant to this contribution. Chapter IV deals with the ways in which English anti-suit injunctions are perceived on the Continent as well as the fundamental European Court of Justice decision in *Turner v. Grovit* and assess its impact on the law on anti-suit injunctions. Chapter V examines arbitration agreements, providing an original discussion on the issue of whether arbitration is excluded altogether from the Brussels I Regulation framework as well as generating questions on how the Brussels I Regulation can be reformed regarding issues relating to arbitration and anti-suit injunctions. Chapter VI analyses the principle of anti-suit injunctions through the prism of the United States of America and examines whether the American framework should act as a model for Europe. Chapter VII affords a comprehensive and detailed analysis on the ways in which the Brussels I Regulation framework should be reformed, by providing in-text detailed re-drafted Brussels I Regulation provisions incorporating the proposed reform alternatives. Finally, the Conclusion provides a summary of the issues and reform proposals discussed in this contribution.

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PREFACE

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I have endeavoured to state the law as on **1 July 2007**.

INTRODUCTION

For both a common and a civil law lawyer the concept of an injunction is familiar. Both would accurately describe it as a court order directing a party to refrain from acting in a particular manner. Nonetheless, the concept of an anti-suit injunction would cause the civil lawyer to frown, as anti-suit injunctions are traditionally a common law principle. So what is an anti-suit injunction and how was it born? It is the opinion of the present writer that an anti-suit injunction is more accurately described by the following definition, namely, that it is a discretionary *in personam* court order, afforded as an equitable remedy to the defendant, directed to a claimant or a potential claimant restraining the said claimant from commencing or continuing foreign court proceedings¹.

It is evident from this definition that anti-suit injunctions comprise of four interconnected elements. First, an anti-suit injunction is an equitable remedy, in other words the party seeking the injunction must demonstrate that its equitable right not to be sued abroad is breached. Second, an anti-suit injunction is a purely discretionary remedy. Thus, the issuance of such an order rests solely in the discretion of the court, which will issue it whenever it feels fit to do so. Third, an anti-suit injunction is an *in personam* court order and is not directed to the foreign court. Thus the order merely restrains the claimant in the foreign proceedings. The *in personam* nature of anti-suit injunctions is further reinforced by the penalties for breaching them, as its breach is *prima facie* evidence of contempt of court carrying as a penalty a fine or even imprisonment². Finally, an anti-suit injunction has as its purpose to restrain the commencement or continuation of court proceedings. Thus, the order may be issued both for proceedings already commenced and for proceedings threatened to be commenced.

Anti-suit injunctions were traditionally used by English courts to restrain proceedings within the English jurisdiction, yet the expansion of the British Empire saw the expansion of anti-suit injunctions throughout the world³. Although the British Empire was subsequently dissolved, anti-suit injunctions remained in the legal systems of the newly founded states and are now

¹ It has to be noted that the word 'defendant' in the definition means the defendant in the foreign proceedings who is also the claimant in the English proceedings, and 'claimant' means the claimant in the foreign proceedings who is also a defendant in the English proceedings.

² See in particular the House of Lords judgment in *Turner v. Grovit* [2002] I.L.Pr. 28 analysed *infra* in Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

³ See *infra* Chapter I: The English Common Law Framework for a discussion of the roots and nature of anti-suit injunctions.

extensively used, apart from in England, in most Commonwealth countries, Cyprus and the United States of America.

What began in the late 15th century as a mere mechanism to restrain proceedings within the English jurisdiction, owed to the quarrel between the common law courts and the courts of Equity, has now evolved into a prominent weapon in the armoury of commercial litigation in England. The rise of anti-suit injunctions to prominence in England is owed to the nature of the principle as a means of enforcing private law rights⁴. However, the colonial era greatly assisted the cultivation and rise to prominence of anti-suit injunctions. The colonial context offered a fertile testing ground, where the principle for the first time was used in a multi-jurisdictional framework. Thus, the English courts were able to issue anti-suit injunctions to restrain proceedings in the American colonies or India resulting in the development of the principle.

One might expect that the dissolution of the British Empire, and consequential independence of the colonies, would signal the decline of anti-suit injunctions. Nonetheless, the principle not only managed to survive but also gradually reached its zenith in the late 20th century to date as it found more fertile ground, this time in international commercial litigation.

The principle of anti-suit injunctions in the modern era has much wider ambit than meets the eye. The English courts have issued anti-suit injunctions in order to restrain a party from commencing or continuing foreign court proceedings even in cases where the parties have not inserted in their contract an English exclusive jurisdiction or arbitration agreement⁵.

In addition, in the international commerce context parties will frequently choose a forum either to litigate or to arbitrate their dispute should one arise. This practice is evident in the maritime business. The majority of maritime contracts include a clause either in favour of English jurisdiction, in other words an English exclusive court jurisdiction clause, or a clause in favour of London arbitration. Such clauses are present in most maritime documents,

⁴ See *infra* Chapter I: The English Common Law Framework.

⁵ See for example the House of Lords judgment in *Turner v. Grovit* [2002] I.L.Pr. 28 analysed *infra* in Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

including charterparties⁶, bills of lading⁷ and insurance policies⁸. Over the years the English courts have issued anti-suit injunctions in order to enforce those clauses when one of the parties breaches them by commencing foreign court proceedings and therefore manages to seize that foreign court with the dispute. Thus, the modern anti-suit injunction is used as a means of protecting both the jurisdiction of the English courts and the legal and equitable rights of the party asking for the injunction.

The availability and use of anti-suit injunctions by the English courts is also an important contributory factor in the popularity of England as a prominent forum for commercial litigation and arbitration. Anti-suit injunctions offer an alternative to parties who are reluctant to incur expense and inconvenience in a foreign forum and who do not wish to submit to the jurisdiction of the foreign court⁹.

⁶ For example, cl. 43 of the 1987 Shellvoy 5 Voyage Charterparty includes a clause which *inter alia* provides that: “This charter shall be construed and the relations between the parties determined in accordance with the laws of England. Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties hereby agree...”. Clause 43(c) further provides the option for parties to refer their dispute to arbitration according to the Arbitration Act 1996, *Cf.* the 1999 amendment to Shellvoy 5(1987). Another example is the Norgain 89 charterparty which contains a clause under which the parties must refer their dispute to arbitration, having a choice between New York and London. The provision regarding the latter *inter alia* provides that: “Any dispute arising hereunder shall be governed by English law”, *Cf.* Norgain 89, cl. 45. This exact provision is also to be found in the Amwelsh 93 charterparty, *Cf.* Amwelsh 93, cl. 32. The Sheltime 4 time charterparty includes a provision which mirrors the one contained in the Shellvoy 5 voyage charterparty, *Cf.* Sheltime 4 (1984), cl. 41. In addition the New York Produce Exchange 1946 time charterparty includes a provision whereby parties are directed to arbitration in New York, *Cf.* NYPE 1946, cl. 17 which provides that: “That should any dispute arise between Owners and Charterers, this matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.” Note that this provision is frequently amended to London arbitration.

⁷ For example the 1978 Conline bill of lading which includes an exclusive jurisdiction clause in the following terms: “Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein.”, *Cf.* Conlinebill (1978), cl. 3. There are many instances where bills of lading include an arbitration clause which stipulates either that it incorporates or “per” the L.M.A.A. rules. The L.M.A.A. arbitration clause *inter alia* provides that: “This contract is governed by English law and there shall apply to all proceedings under this clause the Terms of the London Maritime Arbitrators Association current at the time when the arbitration proceedings were commenced. All appointees shall be members of the Association”.

⁸ For example Rule 40A of the 2006 Rules of the UK P&I Club provides that: “The Owner hereby submits to the jurisdiction of the High Court of Justice of England in respect of any action brought by the Association to recover sums which the Association may consider to be due to it from the Owner. Without prejudice to the foregoing the Association shall be entitled to commence and maintain in any jurisdiction any action to recover sums which the Association may consider to be due to it from the Owner.” The same set of Rules also provide for arbitration in London - UK P&I Club Rules, Rule 40B-D.

⁹ See also *infra* Chapter I: The English Common Law Framework.

As a general observation, the issuance of anti-suit injunctions by the English courts occurs under two broad types of cases, namely, first, cases where an anti-suit injunction is issued by the English court in order to restrain a party from commencing or continuing proceedings in another European Union Member State court and, second, cases where an anti-suit injunction is issued by the English court in order to restrain a party from commencing or continuing proceedings in a non-Member State court. Jurisdiction issues under the first type of cases are now governed by Regulation 44/2001, or as commonly known the Brussels I Regulation, which replaced the Brussels Convention 1968, whereas in the second type of cases the traditional English common law jurisdiction rules are applied. In the European Union context, the English courts continued their tradition of issuing anti-suit injunctions even after the introduction of the Brussels Convention 1968¹⁰ which, for the first time, set up a comprehensive system under which jurisdiction was allocated between the Member States of, what was then, the European Economic Community¹¹.

The Brussels Convention 1968 was subsequently updated in 2001 by the introduction of the Brussels I Regulation¹², while at the same time the European Economic Community has evolved into a European Union where the majority of Member States share a common currency and aspire to future fuller integration. In a Brussels I Regulation context, the English courts have issued anti-suit injunctions in cases where, although the parties have chosen in their contract a certain forum for litigation or arbitration for the determination of their dispute, one of the parties commences proceedings in another Member State while the other brings proceedings in England seeking to enforce the exclusive jurisdiction or arbitration clause.

¹⁰ Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Text as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland - hereafter referred to as the '1978 Accession Convention' - by the Convention of 25 October 1982 on the accession of the Hellenic Republic - hereafter referred to as the '1982 Accession Convention' - by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic - hereafter referred to as the '1989 Accession Convention' and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden – hereafter referred to as the '1996 Accession Convention'.

¹¹ See *infra* Chapter III: The Brussels I Regulation Framework for a discussion on the underlying philosophy of the Regulation.

¹² Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ L 12, 16.1.2001.

Anti-suit injunctions have also been issued in cases where, although the parties have not specified in their contract the forum, either court or arbitration, for the determination of their dispute, one party commences proceedings in another Member State court whilst the other claims a breach of its equitable right not to be sued abroad. Thus, regardless of the introduction of the Brussels I Regulation, English courts continued to issue anti-suit injunctions restraining a defendant from pursuing proceedings before another Member State court. The era post the introduction of the Brussels I Regulation also found the European Court of Justice adopting a far stricter approach as demonstrated by *Erich Gasser v. MISAT*¹³ and *Turner v. Grovit*¹⁴ where the principle of anti-suit injunctions was effectively blocked from operating within the Brussels I Regulation framework. The impact of those decisions, particularly *Turner*¹⁵, is thus immense as it effectively removed anti-suit injunctions from the English armoury of international commercial litigation in a Brussels I Regulation context.

Nonetheless, these recent developments in the law of anti-suit injunctions in the Brussels I regulation context illustrate that, although a tough approach is adopted by the European Court of Justice towards the permissibility of anti-suit injunctions in the Brussels I Regulation framework, the Regulation is significantly weak in dealing with tactical and vexatious forum shopping. As such the Brussels I Regulation becomes exposed to abuse by parties who wish to engage another party in wasteful and frivolous litigation in two or more Member State courts.

Thus, the purpose of this contribution is to consider and examine the ways in which anti-suit injunctions may be accommodated in the Brussels I Regulation framework via reform with the purpose of strengthening the Regulation framework. In order to be able to make this assessment, this thesis will analyse the law on anti-suit injunctions, consider the reasons why anti-suit injunctions may not currently be issued in the Brussels I Regulation framework as well as the reasons why the value of anti-suit injunctions has been doubted. In addition, the ways in which the principle is treated under some Continental systems will be assessed. The examination will also assess the framework on anti-suit injunctions present under the United States of America system. The United States is taken as a useful model for reform particularly due to the multi-jurisdictional nature of the United States system. This examination will

¹³ Case C-116/02, [2003] E.C.R. I-14693; [2004] 1 Lloyd's Rep. 222.

¹⁴ Case C-159/02, [2004] E.C.R. I-3565; [2004] 2 Lloyd's Rep. 169.

¹⁵ Ibid.

provide important information in order to assess whether anti-suit injunctions are a useful mechanism in resolving jurisdictional conflicts and as such whether and how the principle should be incorporated into the Brussels I Regulation framework via reform. Finally, specific proposals for reforming the Brussels I Regulation will be made.

CHAPTER I: THE ENGLISH COMMON LAW FRAMEWORK

1.1 Introduction

The commencement of the examination of the principle of anti-suit injunctions from the perspective of the traditional common law rules serves the purpose of illustrating two main points. First, this examination will provide an understanding to the reader on the ways in which an anti-suit injunction is issued when the common law rules are applied. Second, this discussion will, in line with the scope of this thesis, provide grounds for comparison of the ways in which the traditional common law approach was altered by the introduction of the Brussels I Regulation as well as the difference in perception of anti-suit injunctions between the English courts and courts on the Continent.

Generally speaking, the common law rules allow more flexibility and discretion to the English courts. The issuance of an anti-suit injunction is in essence perfected through the use of the doctrine of *forum non conveniens*. The common law rules on anti-suit injunctions predate the rules envisaged by the Brussels Convention 1968, and its updated version Regulation 44/2001. Thus, after the introduction of the Brussels Convention 1968 it was preferred to keep the common law rules only for cases where the Brussels Convention 1968 did not apply. This practice has been carried through to the Brussels I Regulation as well¹.

The discussion of the principle of anti-suit injunctions under the common law rules will commence by a brief historical account of the principle. This account is offered in order to trace the roots of the principle which in turn is a useful element of the nature of the principle. A discussion of the philosophy of the English law on jurisdiction regarding anti-suit injunctions will follow and the examination will turn to an analysis of the requirements applicable for the issuance of an anti-suit injunction under the traditional rules. Finally, the principles surrounding the issuance of anti-suit injunctions under the common law rules, as devised by the English courts, will follow.

1.2 The roots of anti-suit injunctions

¹ See *infra* Chapter III: The Brussels I Regulation Framework.

As has already been examined², one of the central elements of anti-suit injunction is that the principle has as its purpose to restrain a party from commencing or continuing court proceedings. The first anti-suit injunctions issued by the English courts had as their purpose the restraint of proceedings within the English jurisdiction and, through the expansion of the British Empire, proceedings were gradually restrained abroad.

One of the first anti-suit injunctions issued was in 1674 in the case of *Blad v. Bamfield*³. The case concerned the issuance of an anti-suit injunction restraining proceedings against a Dane for the seizure of property of an Englishman in Iceland. The case may be considered as an exception to the rule, as in that era the majority of anti-suit injunctions issued were internal. This was due to the disagreement between common law courts and the courts of equity.

A case which accurately describes the row between the different English courts is the 1755 case of *Gascoyne v. Chandler*⁴. The case concerned a will which was contrary to an agreement and an anti-suit injunction was issued by the Court of Chancery restraining proceedings in the Ecclesiastical Court. An injunction was also issued in *Hill v. Hoare*⁵ restraining proceedings at law, as was in *Dinwiddie v. Bailey*⁶. Proceedings before the Admiralty Court were also restrained by the Court of Chancery as demonstrated by *Glascott v. Lang*⁷, where a fraudulently obtained bottomry bond was enough for an anti-suit injunction to be issued restraining proceedings before the Admiralty Court.

The expansion of the British Empire saw the expansion of anti-suit injunctions to the English colonies. One of the first extra-territorial anti-suit injunctions was issued in 1839 in the case of *Bunbury v. Bunbury*⁸, where proceedings instituted in Demerara were restrained. The expansion of the British Empire therefore added the extra-territorial reach of an anti-suit injunction, yet the internal issuance of anti-suit injunctions did not stop. In *Attwood v. Banks*⁹ an anti-suit injunction was issued by the Court of Chancery restraining a party from commencing

² See *supra* the Introduction, at p. 1.

³ (1674) 3 Swans. 605 (App.).

⁴ (1755) 3 Swans 482.

⁵ (1788) 2 Cox 51.

⁶ (1801) 6 Ves Jun 137.

⁷ (1837) 8 Sim 358.

⁸ (1839) 1 Beav. 318.

⁹ (1839) 2 Beav. 192.

proceedings at law under a statute. In addition, in *Wedderburn v. Wedderburn*¹⁰ an anti-suit injunction was issued restraining a party from commencing proceedings in another court in respect of the same matter. Furthermore, in *Duncan v. M'Calmon*¹¹ an anti-suit injunction was issued restraining proceedings before the Admiralty Court in relation to a bottomry bond. Of course, extra-territorial anti-suit injunctions continued to be issued as well as demonstrated by *Bank of Bengal v. Radakissen Mitter*¹² and *Bentwick v. Willink*¹³.

One of the most significant cases in the early law on anti-suit injunctions was *The Carron Iron Company v. McLaren*¹⁴. The significance of this case lies in the fact that it provided an overview of the law on anti-suit injunctions as well as the provision of the first requirements for the issuance of an anti-suit injunction. The first requirement is that the proceedings to be restrained must be vexatious or oppressive, in the words of the Lord Chancellor:

“Where, therefore, pending a litigation here, in which complete relief may be had, a party to the suit institutes proceedings abroad, the Court of Chancery in general considers that act as a vexatious harassing of the opposite party, and restrains the foreign proceedings. This was the ground of the decision in Harrison v. Gurnerg (2 J. and W. 563), and Beckford v. Kemble (1 Sim. and S. 7).”¹⁵

The second requirement is that the anti-suit injunction must serve the ends of justice, in the words of the Lord Chancellor:

“...if a suit instituted abroad appears ill calculated to answer the ends of justice, the Court of Chancery has restrained the foreign action...”¹⁶

The final requirement is that the court will issue an anti-suit injunction in order to serve the purpose of convenience:

“...the Court has interfered, on principles of convenience, to prevent litigation, which it has considered to be either unnecessary, and therefore vexatious, or else ill adapted to secure complete justice.”¹⁷

¹⁰ (1840) 2 Beav. 208.

¹¹ (1841) 3 Beav. 409.

¹² (1842) IV Moore, 141.

¹³ (1842) 2 Hare 1.

¹⁴ (1855) V H.L.C. 416.

¹⁵ Ibid., at p. 437.

¹⁶ Ibid., at p. 438.

¹⁷ Op.Cit.

The case is also important for it provided a uniform principle for the issuance of anti-suit injunctions, namely that if the circumstances of a case are such as would make it the duty of one court in England to restrain a party from instituting proceedings in another court in England, that will also warrant the court in restraining a party regarding proceedings in a foreign court.

The picture therefore in relation to the law on anti-suit injunctions up to the late 1860s was that an English court could issue an anti-suit injunction restraining proceedings both in England and abroad. However, the introduction of the Judicature Acts 1873-1875 brought about the unification of the English courts. That in turn meant that the tension between the English courts dissipated and therefore there was no longer reason for an English court to issue an anti-suit injunction against another English court. Thus, post the introduction of the Judicature Acts anti-suit injunctions were gradually used solely to restrain proceedings in a foreign court.

The case law on the early days of anti-suit injunctions formed the basis for the development of the principle. Over time and to the present day, these requirements were reformulated by the courts allowing the principle to flourish. However, what remained unchanged over the long life of anti-suit injunctions in English law is the nature of the principle as a means of enforcing legal and equitable rights.

1.3 The nature of English law on Jurisdiction

Before assessing the requirements applied by the English courts for the issuance of an anti-suit injunction, it is important to examine the more general issue of the nature of the English law on jurisdiction. Thus, in order to properly assess this issue, considerations such as the philosophy behind the English law on jurisdiction as well as the way in which anti-suit injunctions fit within that system in order to protect legal and equitable rights, must be examined.

The English law on jurisdiction has two very important aspects, namely, first, the characteristics of the parties, which includes issues such as the capacity of a party to take part in English legal proceedings, and, second, the general rules which restrict the jurisdiction of the English courts in international cases, such as the domicile of the parties or the existence of

an exclusive jurisdiction clause in the parties' contract. A further aspect of the English law on jurisdiction is nature of the parties' claims. Thus, English law draws a distinction between claims *in personam*, in other words claims directed against a person, and claims *in rem*, in other words claims against a thing (*res*) such as a vessel.

This distinction between claims *in personam* and claims *in rem* is of extreme importance since they reveal the purpose behind those proceedings. Thus, proceedings *in personam* have as their main purpose to make the defendant do something, such as the payment of damages, or not to do something. It is in this aspect of *in personam* proceedings where anti-suit injunctions fit in, as the order prevents the defendant from commencing or continuing legal proceedings. Proceedings *in rem*, which in their majority are used within the realm of Admiralty law, have as their purpose the satisfaction of a claim. In the commercial sphere such claims may be for unpaid freight or for crew's wages. Therefore, the value of the thing (*res*) will satisfy all claims made against it.

The distinction between claims *in personam* and claims *in rem* also reveals another very important aspect of the English law on jurisdiction, namely the ways in which the English courts establish jurisdiction. In relation to *in personam* claims, jurisdiction is derived by the English courts from three sources, namely, first, international instruments such as the Brussels I Regulation, second, schedule 4 to the Civil Jurisdiction and Judgements Act 1982 and, third, the traditional common law rules. In turn, under the common law rules jurisdiction is established by the English courts either when the defendant submits to the jurisdiction of the court or when the defendant is properly served within the jurisdiction of the court or when the defendant is properly served out of the jurisdiction in accordance with the Civil Procedure Rules, rule 6.20. Regarding claims *in rem*, the English courts establish jurisdiction through the physical presence of the *res* within the jurisdiction of the court.

Therefore the distinction between *in personam* and *in rem* claims illustrates that English law on jurisdiction is centred on the protection and enforcement of legal and equitable rights. The philosophy behind the English law on jurisdiction is to offer protection and enforcement to the parties' rights. This is best illustrated by the way in which the English judiciary approaches questions of jurisdiction and which will be analysed in the next part of this Chapter through an examination of the requirements for the issuance of an anti-suit injunction under the

common law rules¹⁸. Furthermore, by closely examining these requirements one would find that they are centred on the parties, either by an examination of their conduct or issues relating to the appropriateness of the foreign forum in order to serve the interests of the parties.

This general philosophy of protecting and enforcing private law and equitable rights is also inherent in the principle of anti-suit injunctions. The power of the court to issue an anti-suit injunction regarding an *in personam* claim is statutory and is conferred by the Supreme Court Act 1981, in particular Section 37 therein which provides that:

- “(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
- (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.”

This Section is an excellent illustration of the philosophy behind English law on jurisdiction, as it gives in essence a statutory ‘green light’ to the English courts to act by way of injunction in order to protect and enforce legal and equitable rights.

A further element of the English law on jurisdiction, which is present in relation to the granting of anti-suit injunctions and Section 37, is the discretionary power that the court possesses to issue or deny the injunction. As it will be seen later in this Chapter, it is an established principle of the law on anti-suit injunctions that the English court enjoys wide discretion to issue or deny an anti-suit injunction when it feels it is necessary to do so. Section 37 reinforces the discretion of the English courts as it unequivocally states that an English court may issue an anti-suit injunction when it is just and convenient to do so. This broad discretion enjoyed by the English courts was affirmed by the House of Lords in *Donohue v. Armcoc*¹⁹, a case concerning the enforcement by way of an anti-suit injunction of an English exclusive jurisdiction clause, in the following terms:

“If contracting parties agree to give a particular Court exclusive jurisdiction to rule on claims between those parties...the English Court will *ordinarily exercise its discretion*...by restraining the prosecution of proceedings in the non-contractual

¹⁸ See *infra* 1.4.

¹⁹ [2001] UKHL 64; [2002] 1 Lloyd’s Rep. 425. For an analysis of the case see *infra* section 1.4.2.

forum abroad...to secure compliance with the contractual bargain... I use the word 'ordinarily' to recognize that where an exercise of discretion is called for *there can be no absolute or inflexible rule governing that exercise*, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct."²⁰

The discretion enjoyed by the English courts to grant or deny an anti-suit injunction greatly assists the enforcement of the philosophy inherent in the English law on jurisdiction since the court is ready to act by restraining foreign court proceedings in order to enforce and protect the legal and equitable rights of the applicant, subject to the applicant satisfying the requirements developed by the English courts for the issuance of an anti-suit injunction.

The English law on jurisdiction does have inherent safeguards in order to avoid the abuse of anti-suit injunctions. One of the most important safeguards is the doctrine of *forum non conveniens*. A literal interpretation of the words *forum non conveniens* reveals that those words translate to "a forum which is not convenient", in essence meaning "a forum which is not appropriate" for the commencement or continuation of legal proceedings. Thus, the doctrine of *forum non conveniens* states that if the jurisdiction of an English court is properly established, the English court has the power to exercise its discretion to stay its proceedings in favour of a foreign forum when the elements of the doctrine are properly satisfied. If the English court, through its examination of the case before it, concludes that the English forum is the *forum conveniens* and the foreign forum is the *forum non conveniens*, then it has the power to exercise its discretion to issue an anti-suit injunction to restrain those foreign proceedings. If, however, the elements of *forum non conveniens* are satisfied and it is proven that England is the *forum non conveniens*, then the English court will exercise its discretion to stay its proceedings in favour of the foreign more appropriate forum.

The doctrine of *forum non conveniens* was gradually imported²¹ into English law, however, it was in *The Spiliada*²² where the doctrine was formulated in the way it is used by the courts today. In that case, Lord Goff commenced his examination of the case by stating the general principle

²⁰ *Op.Cit.* , at pp. 432-433. Emphasis added.

²¹ For the gradual importation of the doctrine into English law see *McHenry v. Lewis* (1882) 21 Ch. D. 202. See also *Peruvian Guano Co. v. Bockwoldt* (1883) 23 Ch. D. 225; *Hyman v. Helm* (1883) 24 Ch. D. 531; *Logan v. Bank of Scotland* [1906] 1 K.B. 141; *St. Pierre v. South American Stores* [1936] 1 K.B. 382 (CA); *The Atlantic Star* [1972] 2 Lloyd's Rep. 446; *Macshannon v. Rockwave Glass Ltd.* [1978] A.C. 795; *The Abidin Daver* [1984] 1 Lloyd's Rep. 339.

²² *Ibid.*

on the doctrine of *forum non conveniens*, namely that a stay will only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action²³.

His Lordship proceeded to state the elements of the doctrine. The first which he identified is that the burden of proving that the proceedings should be stayed is on the defendant, who in essence has to prove that there is another more appropriate forum. If, however, the court finds that the other forum is *prima facie* more appropriate the burden of proof will shift to the claimant to demonstrate the special circumstances which show that the case has to remain in England. The second element which his Lordship identified was that it is immaterial for the court that the claimant founded the jurisdiction of the English court as of right. If, however, there is no other natural forum, for example in cases where a collision occurs in high seas, then there is no reason for the court to disturb the already established jurisdiction.

His Lordship then proceeded to afford a two-stage test which needs to be satisfied in order for the court to grant a stay. The first stage of the test is to identify all the factors connecting the case with the other forum, named by his Lordship “connecting factors”²⁴. If the court concludes at this point that there is no other available more appropriate forum, then a stay will be refused. If, however, the court concludes that there is another available forum, then it will proceed to the second stage of the test. The second stage of the test includes an examination of all other circumstances surrounding the case. If those circumstances necessitate a stay not be granted then the court will do so²⁵.

His Lordship also added that the court will also look at whether a legitimate personal or

²³ Ibid., at p. 476.

²⁴ His Lordship said: “Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in MacShannon’s case as indicating that justice can be done in the other forum at ‘substantially less inconvenience or expense.’ So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction, and the places where the parties respectively reside or carry on business.”, Ibid., at pp. 477-478.

²⁵ According to Lord Diplock: “If however the court concludes at that stage that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction.”, Ibid., at p. 478.

juridical advantage for the claimant exists, but this will not be a decisive factor in granting a stay, and the court will always give effect to the fundamental principle which is where the case may be tried suitably for the interests of all the parties and the ends of justice²⁶.

The formula created in *The Spiliada* has been used in subsequent decisions²⁷. However, the doctrine was denied operation within the Brussels I Regulation framework by the European Court of Justice ruling in *Andrew Owusu v. Jackson*²⁸. The European Court of Justice, after stressing that the jurisdiction rules contained in the Brussels Convention are not intended to apply only to situations in which there is a real and sufficient link with the working of the internal market, stated that the general principle in Article 2 of the Brussels Convention, namely that the defendant must be sued in his country of domicile²⁹, is that it is also applicable to proceedings involving a Contracting State and a non-Contracting State³⁰. The European Court of Justice held that the doctrine of *forum non conveniens* had no application within the European Union since its application undermines the principle of legal certainty³¹ as well as impairs the uniform application of the Convention rules³². This ruling by the European Court of Justice has the effect of dashing any hopes of the English courts for applying the doctrine of *forum non conveniens* in the Brussels I Regulation framework³³.

²⁶ According to Lord Diplock: “The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried ‘suitably for the interests of all the parties and for the ends of justice.’ Let me consider the application of that principle in relation to advantages which the plaintiff may derive from invoking the English jurisdiction. Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period.”, *Ibid.*, at p. 478.

²⁷ See for example *The Wellamo* [1980] 2 Lloyd’s Rep. 229; *The Vishva Ajay* [1989] 2 Lloyd’s Rep. 558; *Re Harrods (Buenos Aires) Ltd.* [1992] Ch. 72; *The Nile Rhapsody* [1994] 1 Lloyd’s Rep. 382; *Radhakrishna Hospitality v. Eih Ltd.* [1999] 2 Lloyd’s Rep. 249. For the application of the doctrine of *forum non conveniens* and anti-suit injunctions see *The Xing Yang and An Kang Jiang* [1996] 2 Lloyd’s Rep. 217; *Haji-Ioannou v. Frangos* [1999] 2 Lloyd’s Rep. 337; *Caltex Singapore v. BP Shipping* [1996] 1 Lloyd’s Rep. 286; *The Kapitan Shvetsov* [1998] 1 Lloyd’s Rep. 199; *The Herceg Novi and The Ming Galaxy* [1998] 2 Lloyd’s Rep. 454; *Caspian v. Bouygues (sub nom The BOS-400)* [1998] 2 Lloyd’s Rep. 461; *Seismic Shipping Inc. v. Total E&P UK Plc (The Western Regent)* [2005] 2 Lloyd’s Rep. 359.

²⁸ Case C-281/02, [2005] E.C.R. I-1383; [2005] 1 Lloyd’s Rep. 452. The defendants argued that the case had closer links with Jamaica than England, and that the Jamaican courts were a forum with jurisdiction in which the case might be tried more suitably for the interests of all the parties and the ends of justice.

²⁹ See also *infra* Chapter III: The Brussels I Regulation Framework.

³⁰ *Ibid.*, §§ 34-36.

³¹ See also *infra* Chapter III: The Brussels I Regulation Framework.

³² *Ibid.*, at §§ 41-46.

³³ See Adrian Briggs, *The Death of Harrods: Forum Non Conveniens and The European Court*, (2005) 121 L.Q.R. 535; Edwin Peel, *Forum Non Conveniens and European Ideals*, [2005] L.M.C.L.Q. 363; Yvonne Baatz, *English Jurisdiction Clause does Battle with Canadian Legislation Similar to the Hamburg Rules*, [2006] L.M.C.L.Q. 143. See also *Konkola Copper Mines Plc. v. Coromin* [2005] 2 Lloyd’s Rep. 555; Adrian Briggs, *Forum Non Conveniens and ideal Europeans*, [2005] L.M.C.L.Q. 378.

The doctrine of *forum non conveniens* assists the operation of the English law on jurisdiction in relation to the issuance of anti-suit injunctions since, if vexatious and oppressive proceedings are commenced in another forum which is also a *forum non conveniens*, the English court has adequate grounds to restrain those proceedings. As it will be seen in the next part of this Chapter, *forum non conveniens* should not and is not the only determining factor for the issuance of anti-suit injunctions. However, the use of the doctrine in parallel with anti-suit injunctions reveals that English law on jurisdiction is centred on the protection and enforcement of the parties' legal and equitable rights. The discussion will now turn to the examination of the requirements under the traditional rules that need to be satisfied in order for an anti-suit injunction to be issued.

1.4 Anti-suit Injunctions: The Requirements

The second step which an English court will take, after concluding that the foreign forum is a *forum non conveniens*, is to apply the common law rules in order to issue an anti-suit injunction to restrain a party from pursuing those foreign proceedings.

The discussion of the requirements applicable for the issuance of an anti-suit injunction under the common law rules will deal with three broad categories of anti-suit injunction cases namely, cases where the parties have not made an express choice of jurisdiction or arbitration, which can be termed for the purposes of the present discussion as the "no choice of forum" cases, cases involving a breach of an exclusive jurisdiction agreement providing exclusive jurisdiction to the English courts and finally cases involving a breach of an arbitration agreement in favour of London arbitration.

In this context, the question arises whether, in order for a party to be able to make a claim for an anti-suit injunction, the applicant must first exhaust the remedies available in the court first seised, or whether the anti-suit injunction can be granted despite the fact that he has not exhausted the remedies in the court first seised. It is submitted that the answer to this issue is not clear as there are comity implications.

The principle of judicial comity refers to legal reciprocity, the principle that one jurisdiction will extend certain courtesies to other nations, particularly by recognising the validity and effect of their executive, legislative, and judicial acts. The term refers to the idea that courts

should not act in a way that demeans the jurisdiction, laws, or judicial decisions of another country. Part of the presumption of comity is that other nations will reciprocate the courtesy shown to them. As it will be examined in this thesis, the principle of comity has very strong roots in the English common law jurisdiction system, particularly in relation to the issuance of anti-suit injunctions³⁴.

The relevance of comity to the issue in hand is paramount as the following question can be formulated: if an applicant has exhausted the remedies available in the foreign forum, will comity prevent the English court from granting that party the relief of an anti-suit injunction? This issue has been voiced by Leggatt L.J. in *The Angelic Grace*³⁵ in the following manner:

“For my part, I do not contemplate that an Italian Judge would regard it as an interference with comity if the English Courts, having ruled on the scope of the English arbitration clause, then seek to enforce it by restraining the charterers by injunction from trying their luck in duplicated proceedings in the Italian Court. I can think of nothing more patronising than for the English Court to adopt the attitude that if the Italian Court declines jurisdiction, that would meet with the approval of the English Court, whereas if the Italian Court assumed jurisdiction, the English Court would then consider whether at that stage to intervene by injunction. That would be not only invidious but the reverse of comity.”³⁶

The argument therefore is that if the applicant is required to make his application for relief first in the foreign court, the principle of comity would not be violated. Such an approach would acknowledge the interests of the foreign court in the matter. This approach has been adopted by Canadian courts where it is a requirement that the applicant must seek relief from the foreign court first³⁷. This argument, however, has not been followed by the English courts. In particular, Lord Goff in *Airbus v. Patel*³⁸ laid down the general principle that an English court is justified to enjoin a party when England is the natural forum for the determination of the dispute, since the interests of the English court in the matter would be superior to that of the foreign court.

³⁴ See *infra* 1.5.

³⁵ [1995] 1 Lloyd's Rep. 87.

³⁶ *Ibid.*, at p. 95.

³⁷ *Amchem* [1993] 1 S.C.R. 897.

³⁸ [1999] 1 A.C. 119.

There is indication that to require the applicant to exhaust his remedies in the court first seised first is incorrect. In particular, Professor Briggs argues that:

“It is necessary to place limits upon the exercise by an English court of the jurisdiction which it has, and which reflect and respect rights of the foreign court to form its own view of its jurisdiction, and the propriety of its being exercised. But the practical implementation of this principle gives rise to a diversity of possibilities, and to require that recourse first be had to the foreign court, or to demand self-restraint by the English court unless it is the natural forum, are two sufficient, but distinct and cumulative, ways of giving effect to it. It is submitted that it would therefore be a misreading of Airbus Industrie to see it as endorsing the view that application must first be made to the foreign court.”³⁹

The present writer is in agreement with Professor Briggs. It simply does not make sense to require the applicant to seek relief from the foreign court first as, apart from creating the risk of the respondent claiming that issue estoppel arises⁴⁰ by virtue of the foreign court’s determination as well as claiming that the applicant has fully submitted to the jurisdiction of the foreign court⁴¹, the application may fail before the foreign court in any event. In addition, the same can be drawn from the judgment of Leggatt L.J. in *The Angelic Grace*⁴², as the English court will not be demonstrating a respect to the principle of comity if it only intervened by way of anti-suit injunction when the foreign court assumed jurisdiction. Furthermore, another important aspect of this issue is the fact it is a requirement for the issuance of an anti-suit injunction that the applicant must seek the anti-suit injunction before the English courts without delay⁴³, which is of significant importance when considering the issue of time bars which increase the risks for the applicant. Although this issue is not yet clear, it is submitted that the correct approach to adopt, as suggested by Professor Briggs, is not to require the applicant to make the application for relief to the foreign court first.

³⁹ Adrian Briggs, *Anti-Suit Injunctions in a Complex World*, Chapter 12 in *Lex Mercatoria: Essays in Honour of Sir Francis Reynolds*, (2001) LLP: London, at p. 227.

⁴⁰ See in particular *Desert Sun Loan Corp v. Hill* [1996] 2 All ER 847. Despite the risk of an estoppel, there is evidence to suggest that in any event the decision of the foreign court must be respected and consequently it may be of great influence to the English court, cf. *Barclays Bank plc v. Homan* [1993] BCAC 680 and *Societe Nationale Industrie Aerospatiale v. Lee Kui Jak* [1987] A.C. 871.

⁴¹ See in particular *Henry v. Geoprosco International* [1976] Q.B. 726; *Re Dulles (No.2)* [1951] Ch 842.

⁴² Ibid.

⁴³ See for example *infra* 1.4.2. See also *Toepfer v. Cargill* [1998] 1 Lloyd’s Rep. 379.

1.4.1 The “no choice of forum” cases

Under this category fall cases which do not involve a breach of contract, in other words there is neither a breach of an exclusive jurisdiction clause nor an arbitration agreement. There are two broad principles underlying this category. The first is that an English court will grant an anti-suit injunction when the ends of justice require it. The second principle is that when the court considers whether to grant an anti-suit injunction or not it must pay regard to comity and therefore its jurisdiction must be exercised with great caution. The present category of cases is further subdivided into two sub-categories. The first is the “single forum” cases, which includes cases where there is only one foreign court having jurisdiction but the jurisdiction of another foreign court has been invoked, and the “alternative fora” cases, where England is the natural forum and the jurisdiction of the foreign court has been invoked.

One of the first cases under the “single forum” sub-category was the House of Lords decision in *Castanho v. Brown & Root*⁴⁴ where the House of Lords, in upholding the Court of Appeal, held that the requirements for the issuance of an anti-suit injunction under this sub-category are:

“[T]o justify the grant of an injunction the defendants must show: (a) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience and expense, and (b) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction.”⁴⁵

The House of Lords stressed that in doing so the English court must proceed with great caution. It is evident from the House of Lords judgment that the case was decided purely on the basis of *forum non conveniens*.

The House of Lords dealt with the issue again in *British Airways v. Laker Airways*⁴⁶ where Laker commenced proceedings against British Airways in the United States for the protection of their trade interests. British Airways commenced proceedings in England seeking an anti-suit injunction to restrain the United States proceedings. Lord Scarman, who also gave the

⁴⁴ [1981] A.C. 557.

⁴⁵ *Ibid.*, *per* Lord Scarman, at p. 575.

⁴⁶ [1985] A.C. 58.

judgment of the House of Lords in *Castanho*⁴⁷, stressed that anti-suit injunctions should be granted with great caution and only when comity is observed. He then held that, the English court would grant an anti-suit injunction restraining the foreign proceedings only if the bringing of the suit in the foreign court is in the circumstances so unconscionable that in accordance with the principles of a ‘wide and flexible’ equity it can be seen to be an infringement of an equitable right of the applicant. This equitable right not to be sued abroad arises only if the inequity is such that the English court must intervene to prevent injustice⁴⁸. The House of Lords held that an anti-suit injunction should not be issued since Laker’s conduct was not unconscionable and their action could not be justiciable in England.

The position, therefore, under the “single forum” sub-category, as formulated by the authorities, is that an anti-suit injunction will only be granted if the foreign proceedings are so unconscionable depriving the claimant of an equitable right that its just and equitable to issue an anti-suit injunction. The court must, however, proceed with great caution and observe comity in doing so.

The case which dealt with the issuance of an anti-suit injunction under the “alternative fora” sub-category is *Societe Nationale Industries Aerospatiale v. Lee Kui Jak*⁴⁹. In that case, a helicopter manufactured by Aerospatiale, a French company, and owned by an English company, operated and serviced by Bristow Malaysia, a Malaysian company, crashed in Brunei. The deceased, who was a passenger, was killed. He and his family were resident in Brunei. The claimants, the deceased’s widow and administrators of his estate, commenced proceedings in Brunei against the Malaysian company and Aerospatiale, in France against Aerospatiale, and in Texas against Aerospatiale and Bristow Malaysia. The Texas court had jurisdiction over Aerospatiale since the company carried on business there. The French proceedings against Aerospatiale were discontinued, and the claimants’ claim against Bristow Malaysia was settled. Aerospatiale subsequently applied to the Texas court for dismissal of the claimants’ action on the ground of *forum non conveniens*, yet the judge dismissed the application. Furthermore, Aerospatiale applied to the High Court of Negara Brunei Darussalam for an order restraining the plaintiffs from continuing with the Texas proceedings. That application was dismissed and Aerospatiale appealed. The claimants gave undertakings that they would agree to trial by judge

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, at p. 95.

⁴⁹ [1987] A.C. 871.

alone in Texas, and they accepted that on trial in Texas the law of Brunei was applicable as to liability and quantum so that no claim lay against Aerospatiale on the basis of strict liability or for punitive damages. The Court of Appeal of Brunei Darussalam dismissed Aerospatiale's appeal since the court felt that Texas had become the appropriate and natural forum and therefore the anti-suit injunction sought was denied.

In the Privy Council, Lord Goff commenced his examination of the issue through the prism of the doctrine of *forum non conveniens*. In particular, his Lordship considered the question of whether the doctrine of *forum non conveniens* should be the only determining factor for the grant of an anti-suit injunction. His Lordship concluded that it should not⁵⁰, and proceeded to state that the general principle for the grant of an anti-suit injunction in order to restrain foreign proceedings was that the court will only restrain a party from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive.

His Lordship provided a set of reasons, drawn from the over one hundred year old line of cases on anti-suit injunctions. First, the jurisdiction is to be exercised when the ends of justice require it. Second, the anti-suit injunction remains *in personam* and thus it is not directed against the foreign court. Third, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy. Finally, the court must always exercise its jurisdiction with great caution. In addition, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him⁵¹.

His Lordship, after applying these factors to the case, found that Aerospatiale were in the position that, if the claimants were not restrained from continuing their proceedings in Texas, Aerospatiale would be unable to claim against Bristow Malaysia in Texas. Thus, if held liable in Texas, Aerospatiale would have to bring a separate action in Brunei against Bristow Malaysia with the danger of inconsistent conclusions on the issue of liability as well as multiplicity of proceedings. Therefore, his Lordship held that:

"Their Lordships are of the opinion that for the plaintiffs to be permitted to proceed in a forum, Texas, other than the natural forum, Brunei, with that consequence, could indeed lead to serious injustice to S.N.I.A.S., and that the

⁵⁰ Ibid., at pp. 894-896.

⁵¹ Ibid., at pp. 896-897. Emphasis added.

plaintiffs' conduct in continuing with their proceedings in Texas in these circumstances should properly be described as oppressive. Furthermore, no objection to the grant of an injunction to restrain the plaintiffs from continuing with these proceedings can be made by them on the basis of injustice to them, having regard to the undertakings given by S.N.I.A.S. It follows that, in their Lordships' opinion, an injunction should be granted.”⁵²

Therefore, according to the reasoning of Lord Goff, an anti-suit injunction would only be granted to prevent injustice. Injustice in turn would exist if the foreign proceedings are vexatious or oppressive. In *Aerospatiale*⁵³ the Texas proceedings were proven to be vexatious or oppressive but this was neutralised by the claimants' agreement not to pursue punitive damages or strict liability in Texas. However, the claims for contribution and indemnity brought in Brunei, which was the *forum conveniens*, necessitated an anti-suit injunction to prevent the Texas proceedings since, if they became far advance, they would give rise to multiple proceedings.

The two aforesaid sub-categories of cases were reconsidered in 1998 by *Airbus v. Patel*⁵⁴. The case concerned an airplane crash in Bangalore where ninety two people died. The airplane was an Airbus 320 which had been assembled by the plaintiffs Airbus Industrie in Toulouse and exported to India. Among the passengers were two families who were British citizens living in London, of whom four died and four were injured. The English claimants commenced proceedings against Airbus Industrie in Texas, where they were entitled to punitive damages. Airbus Industrie issued a claim in England asking for *inter alia* an anti-suit injunction against the claimants. The issue was whether the claimants should be restrained by an anti-suit injunction from prosecuting the action in Texas on the ground that those proceedings were vexatious and oppressive, as well as whether the English court had jurisdiction to grant an injunction to restrain foreign proceedings when the application was not made for the purpose of protecting proceedings in England.

The House of Lords advanced a test, applicable in both “single forum” and “alternative fora” cases. The test consists of two parts. The first part, which itself consists of two parts, is one

⁵² *Ibid.*, pp. 897-902.

⁵³ *Ibid.*

⁵⁴ [1998] 1 Lloyd's Rep. 631.

general non-rigid principle applicable in all cases, regardless of them being “single forum” or “alternative fora”. Thus, the two parts of the general rule, are, first, that the English court will intervene by way of an injunction when the ends of justice require it and, second, the English court will only issue an injunction when there is a sufficient interest or connection between the action and England for an intervention with the foreign court via an anti-suit injunction to be considered, most commonly known as the comity requirement:

“The broad principle underlying the jurisdiction is that it *is to be exercised when the ends of justice require it*. Generally speaking, this may occur when the foreign proceedings are vexatious or oppressive...But, as was stressed in *Aerospatiale*, *in exercising the jurisdiction regard must be had to comity*, and so the jurisdiction is one which must be exercised with caution.”⁵⁵ (emphasis added)

The second part of the test relates to different approaches in relation to comity. Therefore, the House of Lords formulated different requirements in relation to comity for the “single forum” cases and the “alternative fora” cases⁵⁶. For comity in the “alternative fora” cases, where in England is the natural forum, intervention by way of an anti-suit injunction is justified in order for the English court to protect its jurisdiction. For comity in the “single forum” cases, where there is only one foreign court having jurisdiction but proceedings are brought in another court, the court must ask itself whether it should guard the jurisdiction of the single forum by way of an anti-suit injunction. For this, a two staged test is applied. First, the court will examine whether there is sufficient interest or connection with England. If there is no connection or interest, then the injunction will be refused. If there is connection or interest the court will move on to stage two. Here, it will examine whether the foreign proceedings against which the injunction is sought are vexatious or oppressive. If they are, then an injunction will be granted in order to serve the ends of justice.

The effect of *Airbus v. Patel*⁵⁷ was to clarify the position in relation to the rules applicable for the grant of an anti-suit injunction in the “no choice of forum” category⁵⁸. Nonetheless, *Airbus* did not create any new parts on the test applicable under the “no choice of forum” category of cases. It seems that the judgment of the House of Lords is in line with both *British Airways* and

⁵⁵ *Ibid.*, *per* Lord Goff, at p. 637.

⁵⁶ *Ibid.*, at pp. 640-641.

⁵⁷ *Ibid.*

⁵⁸ See also *Kyrgyz Mobil Ltd. v. Fellowes International Holdings Ltd.* (No.2) [2005] E.W.H.C. 1314.

Aerospatiale. Thus, one may suggest that the test applied in *Airbus* is a tweaking of the *Aerospatiale* test. Despite this, *Airbus* further clarified the position under this category of cases and provided a clear illustration on the test for the issuance of anti-suit injunctions both under the “single forum” and the “alternative fora” cases. Unfortunately, the House of Lords failed to provide a single test applicable under both sub-categories of cases which is owed to the unique nature of each sub-category.

1.4.2 Exclusive Jurisdiction Agreements

One of the first cases which dealt with the issue of exclusive jurisdiction clauses was *The Lisboa*⁵⁹. It is worth mentioning that the case occurred before the Brussels Convention 1968 was in force in the United Kingdom and therefore the Court of Appeal applied the common law rules. The Court of Appeal formulated a test for the grant of an anti-suit injunction in cases of an exclusive jurisdiction clause. The first part of the test is for the court to examine whether the foreign proceedings are vexatious or oppressive, although the court warned that it should exercise caution in granting an injunction⁶⁰. The second part of the test is to examine whether the party seeking the injunction would be adequately protected by an award in damages. If the court finds that the party will not be adequately protected then an injunction will be granted⁶¹.

The issue arose again in *Sohio Supply Co. v. Gatoil (USA) Inc.*⁶², where the Court of Appeal took the view that an anti-suit injunction is a matter of pure discretion of the court. They affirmed the decision in *The Lisboa*⁶³, and added that proceeding in a foreign court in breach of an exclusive jurisdiction clause may be *prima facie* evidence of vexation or oppression⁶⁴.

⁵⁹ [1980] 2 Lloyd's Rep. 546.

⁶⁰ “Although the English Court has jurisdiction to restrain a party to English proceedings from proceeding in a foreign Court, the jurisdiction will be exercised with great caution especially when the defendant to the English proceedings is plaintiff in the foreign proceedings, and the injunction should not normally be granted unless the foreign proceedings are vexatious or oppressive.”, *Ibid.*, *per* Dunn L.J., at p. 551.

⁶¹ “It is always a relevant consideration whether or not the party seeking the injunction will be adequately protected by an award of damages.”, *Ibid.*, *per* Dunn L.J., at p. 551.

⁶² [1989] 1 Lloyd's Rep. 588.

⁶³ *Ibid.*

⁶⁴ “[T]he continuance of foreign proceedings in breach of contract where the contract provides for exclusive English jurisdiction may well in itself be vexatious and oppressive in any given case.”, *Ibid.*, *per* Staughton L.J., at p. 592.

The issue was examined as well in *Continental Bank v. Aeakos Compania Naviera*⁶⁵, where, although the case involved the Brussels I Regulation framework, the Court of Appeal also applied the common law rules in case, the court said, it was wrong in its findings. The Court of Appeal felt that in order for an anti-suit injunction to be issued three conditions should be satisfied. First, in affirming *The Lisboa*⁶⁶, the court must look at whether the party seeking the injunction would be inadequately protected in damages. Second, the foreign proceedings must be vexatious or oppressive. Third, the injunction will be granted unless there is a good reason to deny the injunction. It also has to be stressed that the Court of Appeal took the view that a breach of an exclusive jurisdiction clause is *prima facie* a reason for issuing an injunction since it involves a breach of contract. The Court of Appeal, after applying those conditions, held that it was the paradigm case for the issuance of an anti-suit injunction⁶⁷.

The issue arose again in *A/S D/S Svendborg v. Wansa*⁶⁸ where, the learned judge, Clarke J., held that in cases of a valid exclusive jurisdiction clause the court will issue an anti-suit injunction only when the application for an anti-suit injunction is made promptly and without delay and there exists no good reason to deny the injunction. An example of what constitutes good reason, according to the judge, is the voluntary submission of the parties to the foreign proceedings. Interestingly, the learned judge avoided using the terms “vexatious or oppressive”. The reasoning of the judge was affirmed by the Court of Appeal⁶⁹.

In order to summarise the requirements for the issuance of an anti-suit injunction, as formulated by the aforesaid decisions, in cases where there is a breach of an exclusive jurisdiction clause the court will look at three factors. The first is whether the anti-suit injunction is sought promptly and without delay. Second, whether without an anti-suit injunction the defendant will be deprived of their contractual rights in a situation where

⁶⁵ [1994] 1 Lloyd's Rep. 505, for a detailed discussion of the case see *infra* Chapter III: The Brussels I Regulation Framework.

⁶⁶ *Ibid.*

⁶⁷ “In our view the decisive matter is that the bank applied for the injunction to restrain the appellants’ clear breach of contract. In the circumstances a claim for damages for breach of contract would be a relatively ineffective remedy. An injunction is the only effective remedy for the appellants’ breach of contract. If the injunction is set aside, the appellants will persist in their breach of contract, and the bank’s legal rights as enshrined in the jurisdiction agreements will prove to be valueless. Given the total absence of special countervailing factors, this is the paradigm case for the grant of an injunction restraining a party from acting in breach of an exclusive jurisdiction agreement. In our judgment the continuance of the Greek proceedings amounts to vexatious and oppressive conduct on the part of the appellants. The Judge exercised his discretion properly.”, *Ibid.* at p. 512 *per* Steyn L.J.

⁶⁸ [1996] 2 Lloyd's Rep. 559.

⁶⁹ [1997] 2 Lloyd's Rep. 183.

damages will be an inadequate remedy. Finally, the court will issue an anti-suit injunction if there exists no good reason why the anti-suit injunction should be denied. A fourth factor, which, however, was not mentioned in *Wansa*⁷⁰, is that the foreign proceedings are vexatious or oppressive. Normally, when the court has evidence that the foreign proceedings are vexatious or oppressive, and since the court treats a breach of an exclusive jurisdiction clause as *prima facie* evidence for the issuance of anti-suit injunction, an anti-suit injunction will be issued in order to protect the jurisdiction of the English court and the contractual rights of the defendant⁷¹.

These requirements were reviewed by the House of Lords in the authority under this category of cases *Donohue v. Armco*⁷² which is an excellent illustration of a case where the English courts have denied the issuance of an anti-suit injunction. In that case the defendants were all companies in the Armco group which was a U.S. based corporation. Armco owned via two subsidiaries a group of three insurance companies known as British National Insurance Group (the BNIG). The assets of the insurance group were owned by the third defendants Armco Financial Services International Ltd. (the AFSIL) and Armco Financial Services Europe Ltd. (the AFSEL) which had since been dissolved. The insurance group went into run-off in 1984. In the late 1980s Armco decided to sell off the insurance group and from 1990 Armco investigated selling the group to Armco managers in a management buy-out. In early 1991 negotiations began with two managers, the claimant Mr. Donohue and Mr. Atkins. On the Armco side the negotiations were conducted by two executives Mr. Rossi and Mr. Stinson. Armco alleged that it had been the victim of a scheme to defraud the Armco group that was devised by Mr. Donohue, Mr. Rossi and Mr. Stinson in late 1990. Armco's allegation was that the secret plan of the group of four was that Armco would be fraudulently induced to inject an extra large sum into the insurance group. Armco said that the plan of the group of four was then to buy the insurance group through a Jersey company they owned called Wingfield. As a part of this plan, Armco alleged that the conspirators fraudulently induced Armco to agree to exclusive English jurisdictions clauses in three key contracts for the sale of the shares of the insurance group companies to Wingfield.

⁷⁰ *Ibid.*

⁷¹ See also *Horn Linie & Co. GmbH v. Panamericana Formas e Impresos S.A. (The Hornbay)* [2006] 2 Lloyd's Rep. 44; *Cadre S.A. v. Astra Asigurari S.A.* [2006] 1 Lloyd's Rep. 560; *Dornoch Ltd. v. Mauritius Union Assurance Co. Ltd.* [2006] Lloyd's Rep. I.R. 127; [2005] E.W.H.C. 1887; *Advent Capital Plc v. GN Ellinas Imports-Exports Ltd.* [2005] 2 Lloyd's Rep. 607.

⁷² [2001] UKHL 64; [2002] 1 Lloyd's Rep. 425.

In 1998 Armco brought proceedings in New York to recover the damages that the group claimed to have suffered as a result of the alleged fraud. Messrs. Donohue, Rossi and Stinson denied the conspiracy. They argued that the New York proceedings brought by Armco were vexatious and oppressive. Mr. Donohue and Channel Island Service Holdings Ltd. (the CISHL), a company incorporated by Armco to effect the sale and transfer of the shares in the BNIG, and Wingfield Ltd. argued that the New York proceedings were in breach of the exclusive English jurisdiction clauses contained in one of the transfer agreements and sale and purchase agreements. Mr. Donohue applied for an anti-suit injunction to prevent the defendants from suing him in any forum other than England. Messrs. Rossi and Stinson, the CISHL, Wingfield, International Run-off Services Inc. (IROS), Armco Pacific Ltd. (APL), NPV (Nevis), and International Trustee and Receivership Ltd. (ITRL) applied to be joined as co-claimants in the proceedings for an anti-suit injunction.

The issues for decision were *inter alia*, first, whether the claimants and potential co-claimants should be granted an anti-suit injunction and if so what its scope should be and, second, whether the potential co-claimants should be joined to the anti-suit injunction proceedings.

Their Lordships commenced their examination by assessing first whether the potential co-claimants should be allowed to join Mr. Donohue in the anti-suit injunction proceedings. The court recognised that none of the co-claimants was a party to the agreements in question and therefore could not benefit from the English exclusive jurisdiction clauses therein. As a consequence, in order to assess the issue the court applied the requirements for the issuance of an anti-suit injunction applicable in the “no choice of forum” category of cases⁷³. The court concluded that an anti-suit injunction could not be properly granted in favour of the potential co-claimants and consequently the co-claimants were held not to be allowed to join Mr. Donohue to the anti-suit injunction proceedings.

Their Lordships then turned their attention to the central issue of whether Mr. Donohue should be successful in his claim for an anti-suit injunction. After reviewing a body of authorities⁷⁴ on the issue, the court found that it may decline to grant an anti-suit injunction

⁷³ For an analysis on the requirements applicable in the “no choice of forum” category see *supra* 1.4.1.

⁷⁴ *Evans Marshall and Co. Ltd. v. Bertola S.A. and Another*, [1973] 1 Lloyd's Rep. 453; [1973] 1 W.L.R. 349; *Halifax Overseas Freighters Ltd. v. Rasno Export (The Pine Hill)*, [1958] 2 Lloyd's Rep. 146; *Taunton-*

where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions.

The court recognised that Mr. Donohue had as against the first three Armco appellants a strong *prima facie* right not to be sued elsewhere than in England for claims falling within the scope of the clause, an important fact being that some of the claims made against him in New York did fall within the clause. Allowing Armco to be released from the English exclusive jurisdiction clauses would expose Mr. Donohue to an obvious risk of injustice. This risk did not derive only from the venue but also from the fact that Mr. Donohue was a Singaporean resident as well as that he would incur far greater costs if the case remained in New York. More significant was also the fact that if the case remained in New York Mr. Donohue would be done an obvious injustice as he would now be additionally exposed to the RICO claims. However, their Lordships recognised that there is another side to the coin since all five Armco appellants had a clear *prima facie* right to pursue against Messrs. Rossi and Stinson any claim they choose in any convenient forum where they can find jurisdiction. In addition, APL and NNIC also have a clear *prima facie* right to pursue against Mr. Donohue, Wingfield and CISHL also any claim they choose in any convenient forum where they can find jurisdiction. In all these cases the court found that all appellants had successfully founded jurisdiction in New York and therefore there was no ground upon which an anti-suit injunction could be issued.

Therefore, in performing this balancing act the court found that Mr. Donohue's strong *prima facie* right to be sued in England was evenly matched by the clear *prima facie* right of the Armco companies to pursue their claims in New York. For their Lordships the crucial question was whether the Armco companies could show strong reasons why the Court should displace Mr. Donohue's clear *prima facie* right to be sued in England. In other words, the central question was whether the court should allow, by granting an anti-suit injunction, litigation between the Armco companies on one side and Mr. Donohue and the potential co-claimants on the other to continue partly in England and partly in New York.

Their Lordships felt that the question should be answered in the negative since the ends of justice would not be served if the claims were allowed to continue partially in England and

Collins v. Cromie, [1964] 1 W.L.R. 633; *Citi-March Ltd. v. Neptune Orient Lines Ltd.*, [1997] 1 Lloyd's Rep. 72; [1996] 1 W.L.R. 1367; *Bouygues Offshore S.A. v. Caspian Shipping Co.*, [1998] 2 Lloyd's Rep. 461.

New York. Their Lordships therefore held that the ends of justice would be best served by a single composite trial and the only forum that can provide that was New York. Therefore, Mr. Donohue was denied the anti-suit injunction.

It is worth noting that their Lordships also considered the issue of whether Mr. Donohue should be able to claim damages for breach of contract as a result of the breach of the exclusive jurisdiction clause. In particular, Lord Hobhouse stated that he would be prepared to accept a submission in relation to the recovery of damages for breach of contract by Mr. Donohue, however, his Lordship also added that he would “say no more than this since the position is complex”⁷⁵. Indeed the argument that a party who has been unsuccessful in its claim for an anti-suit injunction before the English courts should be successful for a claim in damages has increasingly gained supporters in recent years as illustrated by the opinion expressed by Professor Briggs⁷⁶. It is submitted, however, that it is the conviction of the present writer that a more preferable position would be to reform⁷⁷ this area of law and resolve that issue instead of resorting to arguments in favour or against the provision of damages⁷⁸.

1.4.3 Arbitration Agreements

The leading decision under this category is *The Angelic Grace*⁷⁹, a case which, although it involved two Member State courts⁸⁰, was decided on common law principles. At first instance⁸¹, Rix J., issued an anti-suit injunction. The learned judge, at first, stated the general principle in the following manner:

“It is common ground that the English Court has jurisdiction to grant injunctions restraining a party from bringing foreign proceedings in breach of an arbitration clause. It is also common ground that there have been repeated authoritative

⁷⁵ *Ibid.*, at p. 439, *per* Lord Hobhouse.

⁷⁶ Adrian Briggs, *The Impact of Recent Judgments of the European Court on English Procedural Law and Practice*, Zeitschrift fur Schweizerisches Recht 124 (2005) II 231-262.

⁷⁷ For reform proposals see *infra* Chapter VII: Reform.

⁷⁸ A position also adopted by Professor Yvonne Baatz *cf.* Yvonne Baatz, *Enforcing English Jurisdiction Clauses in Bills of Lading*, (2006) 18 S.A.C.L.J. 727, at p. 763.

⁷⁹ [1995] 1 Lloyd’s rep. 87. For a detailed discussion of the case see *infra* Chapter V: Arbitration Agreements.

⁸⁰ In brief, the court decided to apply common law principles since, it is believed, that Article 1(2)(d) of the Regulation excludes arbitration in its entirety, and thus the Regulation rules do not apply. For a detailed discussion of the case and the reasoning of the court on the issue of the Regulation see *infra* Chapter V: Arbitration Agreements.

⁸¹ [1994] 1 Lloyd’s Rep. 168.

statements as to the *great caution which should be exercised* before this Court grants such an injunction. Although the injunction is against the litigant, not against the foreign Court, it is nevertheless recognized that as *a matter of judicial comity* this Court should be slow in its discretion to exercise its power to injunct the pursuit of foreign proceedings.”⁸² (emphasis added)

The learned judge thought that the criteria for issuing an anti-suit injunction are, first, that the foreign proceedings are vexatious or oppressive, second, that without the injunction the defendant will be deprived of his contractual rights and, third, the injunction must be sought promptly. The learned judge applied those criteria and concluded that since the Italian proceedings were vexatious an anti-suit injunction was necessary to restrain those proceedings⁸³.

The case subsequently reached the Court of Appeal, and the court upheld the judge’s decision for an injunction to be issued. However, the Court of Appeal removed the requirement that comity and great caution should always be observed when issuing an anti-suit injunction⁸⁴. The Court of Appeal, in ruling that the case before it necessitated the issuance of an anti-suit injunction, re-formulated the requirements for affording an anti-suit injunction. Millett L.J., said that:

⁸² *Ibid.*, at p. 175.

⁸³ “In my judgment I should grant such an injunction in this case, and for the following reasons. There is a risk that, if the Italian proceedings continue, the owners could suffer real prejudice, in the form of a binding judgment on the merits in Italy which would render their rights to arbitration nugatory....Moreover, even if the owners were to be successful in their claim in arbitration, I do not know what difficulties they might face in enforcing such an award against the charterers in Italy pending the determination of the Italian proceedings....[I]t seems to me that much greater damage is done to the interests which that caution and that comity are intended to serve, if this Court adjourns these proceedings to await the outcome of a challenge to the jurisdiction in Italy...and *then* proceeds to issue an injunction. Moreover, that could involve an adjournment of up to two years and a waste of considerable costs on the part of both parties. In the meantime the issue between the parties as to the scope of their English law arbitration clause would have been resolved by this Court...and the charterers would be committed to an arbitration in which their collision claim will be adjudicated before the tribunal of their contractual choice... [I] do not see why I should not conclude that their determination to press on in Italy is vexatious, and in my judgment it is.”, *Ibid.*, at pp. 181-182.

⁸⁴ “In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it where the injunction is sought on the ground of *forum non conveniens* or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. [I]n my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them... I cannot accept the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline.”, *Ibid.*, at p. 96.

"In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, *provided that it is sought promptly and before the foreign proceedings are too far advanced...* The justification for the grant of the injunction in either case is that without it *the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy*. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, *but good reason needs to be shown why it should not be exercised in any given case.*"⁸⁵

In essence the Court of Appeal applied the same requirements as those applied in the category of exclusive jurisdiction clauses. However, the Court of Appeal stressed that, since the issuance of an anti-suit injunction is purely discretionary, the injunction will be granted unless there is a good reason not to grant the order.

These principles were applied in the subsequent decision *XL Insurance v. Owens Corning*⁸⁶. The case concerned an insurance contract and proceedings were brought in Delaware in the United States in breach of a London arbitration clause. Toulson J., applied *The Angelic Grace*⁸⁷ and found that in cases of a breach of an arbitration agreement an anti-suit injunction will be issued unless there is a good reason to deny the injunction. The learned judge thus held *inter alia* that:

"I can see no good reason not to exercise the jurisdiction in this case. I recognise the inconvenience to Owens Corning of not being able to sue all their insurers in the same proceedings, but that is a consequence of having different contracts with them. It is not a good reason for depriving XL of its contractual rights."⁸⁸

The learned judge thus issued an anti-suit injunction restraining the Delaware proceedings. The decision is important since it reveals that the effect of *The Angelic Grace*⁸⁹ is that an injunction in cases of a breach of an arbitration clause will be issued unless there is good

⁸⁵ Ibid., at p. 96.

⁸⁶ [2000] 2 Lloyd's Rep. 500.

⁸⁷ Ibid.

⁸⁸ Ibid., at p.509.

⁸⁹ Ibid.

reason to deny it⁹⁰. Taking into account the wide discretion which the court enjoys in issuing an anti-suit injunction, it is evident that what constitutes good reason to deny the injunction is also a matter of pure discretion of the court.

This wide discretion enjoyed by the court is demonstrated by *The Norseman*⁹¹. In that case, the applicant insurance company applied for an anti-suit injunction to restrain Tunisian proceedings by the respondents as the defendants of a person who had died in an accident whilst returning to the port of Tunis from working on a drilling rig. The respondents had commenced proceedings in the Tunisian courts claiming damages for the death against the owners of the platform, the hull and machinery insurers of the vessel and the P & I insurers of the vessel. The insurance policy contained a London arbitration clause, and the issue *inter alia* was whether an anti-suit injunction should be issued to restrain the Tunisian proceedings. It was held that since there was evidence that the Tunisian proceedings would not be a breach of the arbitration clause the application for an anti-suit injunction should be denied as the applicant had not shown a good arguable case to justify one as well as that the Tunisian proceedings were far advanced.

In addition, in *Albon v. Nazd*⁹², the applicant applied for an injunction restraining the respondent Malaysian company from pursuing arbitration proceedings in Malaysia. The applicant alleged that the underlying agreement between the parties was an oral agreement made in England subject to English law. The respondent alleged that there was a joint venture agreement signed by the parties in Malaysia governed by Malaysian law and containing a provision for arbitration in Malaysia. The applicant contended that his signature on the joint venture agreement had been forged. It was *inter alia* held that the anti-suit injunction sought was necessary to protect the interests of the applicant since the respondent acted in an oppressive and unconscionable manner.

Finally, in *Starlight Shipping*⁹³, the applicant shipowner applied for an anti-suit injunction to restrain proceedings brought by the respondent insurer in the maritime court of Wuhan in

⁹⁰ See also *Markel International Co. Ltd. v. Craft* [2006] E.W.H.C. 3150; *Kallang Shipping S.A. v. AXA Assurances Senegal* [2006] E.W.H.C. 2825; *Goshawk Dedicated Ltd. v. ROP Inc.* [2006] E.W.H.C. 1730.

⁹¹ *Markel International Co Ltd v Craft (The Norseman)* [2006] EWHC 3150 (Comm); [2007] Lloyd's Rep. I.R. 403.

⁹² *Albon (t/a N A Carriage Co) v Naza Motor Trading SDN BHD* [2007] EWHC 1879 (Ch).

⁹³ *Starlight Shipping Co (A company incorporated in the Marshall Islands) v Tai Ping Insurance Co Ltd, Hubei Branch (A company incorporated in China)* [2007] EWHC 1893.

China. The terms of the charterparty included an English law and arbitration clause. A bill of lading had been issued which incorporated the terms of the charter. Proceedings were commenced against the shipowner in the Chinese court. The shipowner commenced proceedings in England alleging that the Chinese proceedings had been commenced in breach of the arbitration clause contained in the bill of lading and that there was no good reason why an anti-suit injunction should not be granted. It was held that an anti-suit injunction should be granted restraining the Chinese proceedings since as a matter of English law, which governed the bill of lading and charterparty contracts, the insurer was clearly bound by the arbitration clause incorporated in the bill. The court added that where contracting parties agreed to refer disputes to arbitration and a claim falling within the scope of the arbitration agreement was made in proceedings elsewhere, the English court would ordinarily restrain the proceedings in the non-contractual forum, unless the party suing in that forum could show strong reasons for proceeding there. No strong reason was demonstrated in the case so as to prevent the grant of an anti-suit injunction.

1.5 The Principles applicable to anti-suit injunctions

The discussion of the case law on the requirements applicable for the issuance of an anti-suit injunction under the common law rules, provides the foundation upon which a discussion regarding the general principles which apply to anti-suit injunctions, which stem from the case law considered, may occur.

Although the case law on anti-suit injunctions regarding the requirements applicable for the issuance of the order was divided and considered under the three main categories of cases, it is evident that not only do those categories overlap but also the case law on exclusive jurisdiction clauses and arbitration agreements is a sub-category of the main, much wider, category of cases where the parties have not made an express choice of forum or arbitration in their contracts. One can therefore confidently draw the conclusion that there can be no rigid categorisation applied. This is in line with the maxim that Equity does not stand still and therefore new problems emerge for which a solution must be found.

The case law on anti-suit injunctions under the common law rules illustrates that the order will be granted when a party's right not to be sued abroad is breached. The position of that party, who issues a claim for an anti-suit injunction, becomes even stronger when that right is

conferred on him contractually either through an exclusive jurisdiction or arbitration clause in favour of the English courts or London arbitration. An English exclusive jurisdiction or arbitration clause essentially contains within it a negative covenant that the parties will not sue abroad. Thus, this contractual promise not to sue abroad necessitates the issuance of an anti-suit injunction unless a strong reason points to the opposite⁹⁴. Therefore, if the clause is valid the English court will enforce the clause by issuing an anti-suit injunction, even if the foreign court will not recognise it as valid⁹⁵.

Furthermore, the case law points to the direction that, although an important factor, the party seeking the injunction does not *per se* have to show that the foreign proceedings are vexatious or oppressive⁹⁶. It will suffice if that party demonstrates that the foreign proceedings are part of “unconscionable” conduct by the other party⁹⁷. As a consequence, *forum non conveniens* grounds alone are not enough to justify the issuance of an anti-suit injunction.

The case law on anti-suit injunctions under the common law rules also reveals that such orders may be a means to advance English public policy. In particular, the anti-suit injunction is seen as means of protecting the judicial process in England and for this reason its status within the English law on jurisdiction is very high. It is evident from the case law under the common law rules that anti-suit injunctions have been issued for the proper administration of justice or for protecting the “ends of justice”. Thus, by elevating the role of anti-suit injunctions as a protector of the English judicial process, elevates the principle itself as a prominent weapon in the armoury of international commercial litigation in England.

One of the most fundamental principles applicable for the issuance of an anti-suit injunction by the English courts is that the court must always observe comity when issuing the injunction. Comity, in law, refers to legal reciprocity; the principle that one jurisdiction will

⁹⁴ *Donohue v. Armco* *Ibid.*, at §§ 24 and 45.

⁹⁵ See for example *Youell v. Kara Mara Shipping* [2000] 1 Lloyd's Rep. 102; *Akai Pty Limited v. People's Insurance Co. Limited* [1998] 1 Lloyd's Rep. 90; *XL Insurance v. Owens Corning* *Ibid.*

⁹⁶ One cannot afford a rigid rule of what constitutes proceedings to be vexatious or oppressive. The case law reveals that this phrase may include proceedings commenced by a contract breaker to persist with a breach of contract, as in *The Angelic Grace* *Ibid.*, proceedings commenced in breach of an arbitration agreement, as in *Toepfer v. Cargill* [1998] 1 Lloyd's Rep. 379, proceedings commenced in order to evade important policies of the English jurisdiction, as in *Estonian Shipping Ltd v. Wansa* [1997] 2 Lloyd's Rep. 183 and *Akai PTY Ltd v. People's Insurance Ltd* [1998] 1 Lloyd's Rep. 90 or, in rare instances, if the proceedings in the foreign court are bound to fail as in *Shell v. Coral* [1999] 2 Lloyd's Rep. 606.

⁹⁷ See *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58; *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" NV* [1987] A.C. 24.

extend certain courtesies to other nations, particularly by recognising the validity and effect of their executive, legislative, and judicial acts. The term refers to the idea that courts should not act in a way that demeans the jurisdiction, laws, or judicial decisions of another country. Part of the presumption of comity is that other nations will reciprocate the courtesy shown to them⁹⁸. In the field of the English law on jurisdiction, comity is seen as a necessary consideration when issuing an anti-suit injunction. The English courts recognise that, although an *in personam* order, an anti-suit injunction has a direct effect on the foreign proceedings and may thus be regarded as an inappropriate intrusion into the sovereignty of the foreign court⁹⁹. Therefore, when the case before the court clearly falls outside the enforcement of a contractual promise, either in relation to choice of jurisdiction or arbitration, the court must exercise great caution when issuing the order.

Another very important principle is that an anti-suit injunction will only be granted against a party who is amenable to the jurisdiction of the English courts, either through presence within the jurisdiction or through service out of jurisdiction according to rule 6.20 of the Civil Procedure Rules. The case of *Donohue v. Armclo*¹⁰⁰ is particularly important in order to illustrate this principle as the parties who were not bound by the exclusive jurisdiction clauses in the contracts, referred to by their Lordships as the potential co-defendants, had no basis for serving the respondents out of jurisdiction to the anti-suit injunction application.

The case law on anti-suit injunctions under the common law rules also reveals that an anti-suit injunction will only be issued if it will be an effective remedy. Therefore, if the court feels that the granting of the anti-suit injunction will be ineffective and useless to the applicant it will not grant it. A good illustration of this principle is *The Tropaioforos (No.2)*¹⁰¹ where the defendant, who had submitted to the jurisdiction of the English court, had concluded an agreement governed by English law which was enforced against him by the insurers. The court felt that an anti-suit injunction should be issued as the only effective remedy since there

⁹⁸ For example in the United States of America many statutes relating to the enforcement of foreign judgments require that the judgments of a particular country will be recognised and enforced by a forum only to the extent that the other country would recognise and enforce the judgments rendered by that forum. This is a prime example that comity entails the notion of reciprocity. This is also evident in the Brussels I Regulation, *see infra* Chapter III: The Brussels I Regulation Framework.

⁹⁹ See for example *Re The Enforcement of An English Anti-Suit Injunction* [1997] I.L.Pr. 320, discussed *infra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

¹⁰⁰ *Ibid.*

¹⁰¹ [1962] 1 Lloyd's Rep. 410.

was a possibility that the order might be effective either because the party would obey it or because the foreign court would give effect to the order.

1.6 Concluding Remarks

The law on anti-suit injunctions under the common law rules, as examined above, is underlined by discretion. It is also evident that the underlying philosophy of the English common law rules on jurisdiction regarding the issuance of an anti-suit injunction is centred on the protection of the parties' rights and the enforcement of their contractual promises. The doctrine of *forum non conveniens* has greatly assisted the English courts in issuing anti-suit injunctions.

The next Chapter will attempt to illustrate the way in which anti-suit injunctions are perceived on the Continent and in particular the issue of whether anti-suit injunctions are available under civil law systems. This examination is particularly important in order to properly assess both the ways in which the English common law rules on anti-suit injunctions were altered by the introduction of the Brussels I Regulation and to illustrate the clash of ideology between the English common law system and the Continental systems.

CHAPTER II: ANTI-SUIT INJUNCTIONS: THE CONTINENTAL APPROACH

2.1 Introduction

The purpose of this Chapter is to analyse and assess the way in which anti-suit injunctions are perceived by courts on the Continent. In particular, the examination will mainly focus on two jurisdictions, namely Germany and Greece, and examples from France and The Netherlands will also be offered. Issues such as whether anti-suit injunctions are available under those Continental systems will be examined as this issue is cardinal for the assessment of the main purpose of this thesis, namely whether the Brussels I Regulation should be reformed in order to accommodate the principle of anti-suit injunctions. The examination in this Chapter will provide a practical example of the public law stance on issues of jurisdiction adopted by Continental courts, which directly conflicts with the private law perception adopted by the English courts¹.

2.2 The Issuance of Anti-Suit Injunctions by Continental Courts

Although the position adopted by Continental courts when asked to enforce an English anti-suit injunction is negative², the principle of anti-suit injunctions is available and has been used by some courts on the Continent. The availability and use of the principle under those systems points to the direction that, not only is it erroneous to argue that the principle is incompatible with civil law systems³ but also that these systems resorted to the use of anti-suit injunctions as the only effective means of restraining vexatious and oppressive proceedings.

Recent developments of the case law on the Continent reveal that anti-suit injunctions have recently been issued by French and Dutch courts. One, therefore, cannot help wondering whether a change of approach has occurred, in other words whether, as the English legal system imported from civil law the doctrine of *forum non conveniens*, Continental courts are gradually importing anti-suit injunctions in their legal systems. In addition, the use of anti-suit

¹ For an analysis of the difference in perception on issue of jurisdiction between English and Continental courts, and the importance of this conflict when superimposed on the Brussels I Regulation framework, see *infra* Chapter III: The Brussels I Regulation Framework.

² See *infra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

³ See Case C-159/02, *Turner v. Grovit* [2004] E.C.R. I-3565; [2004] 2 Lloyd's Rep. 169, analysed *infra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

injunctions by Continental courts is a very powerful argument for the accommodation and use of anti-suit injunctions in the Brussels I Regulation Framework⁴.

The first case to be considered is the decision of the District Court of The Hague in *Medinol v. Cordis*⁵. The case involved a breach of a patent relating to a medical device, namely a coronary stent. Medinol had acquired four European patents for the medical device, one of which was the mother patent and the remaining three were divisional patents. Cordis desired to market its own coronary stents in the Netherlands and Medinol claimed that the Cordis coronary stents infringed Medinol's patents on their own coronary stents.

At first, summary proceedings were commenced by Medinol against Cordis seeking to obtain a *cross-border injunction* preventing Cordis from marketing their own product on the ground that Cordis infringed Medinol's mother patent. Cordis counterclaimed alleging that their own product did not infringe Medinol's patents. Cordis was successful at first instance, yet on appeal the decision was reversed and an injunction preventing Cordis from marketing their product was issued but this injunction had effect only in the Netherlands, in other words it was not cross-border. In the second set of proceedings, Medinol sought further injunctions preventing Cordis from marketing their own product on the ground that Cordis infringed Medinol's three divisional patents. The Court held that since Medinol had already obtained an injunction against Cordis in relation to the mother patent, that injunction also covered the divisional patents. Thus, Medinol could only deploy the divisional patents if the mother patent was declared invalid⁶. Miraculously, on the day of that judgment the European Patent Office Board of Appeal declared Medinol's patent invalid⁷.

Medinol immediately commenced the third set of proceedings, now relying on the divisional patents, alleging the same as in the second set of proceedings. Cordis alleged that the European Patent Office would also find the divisional patents invalid as the mother patent, and counterclaimed seeking an *anti-suit injunction* preventing Medinol from commencing any

⁴ See *infra* Chapter VII: Reform.

⁵ *Medinol v. Cordis et al*, President of the District Court of The Hague, 5 August 2004. The decision is only available in Dutch. For an account on the case in English see <http://www.debrauw.com/NR/rdonlyres/3713B5A4-39E1-41D6-9050-F6AD61C47DB7/0/LegalalertAntisuit.pdf> ; <http://www.bakernet.com/NR/rdonlyres/1A1E6463-0AAC-4960-863A-39B8D866CBFF/0/ELDBJanuary2005Vol17Number1.pdf> and <http://www.commliba.org/pdf/Oct%20Newsletter%20Comm%20L.pdf>.

⁶ Cf. *Medinol v. Cordis et al*, District Court of The Hague, 31 March 2004.

⁷ Cf [2005] E.P.O.R. 16, September 27,2004.

more summary proceedings concerning the three divisional patents pending a decision by the European Patent Office about their validity.

The claim made by Cordis is of utmost importance since an anti-suit injunction had not been issued in the Netherlands before. The Dutch Supreme Court was faced with a claim for an anti-suit injunction in the past⁸, where it ruled against the issuance of an anti-suit injunction. However, despite previous case law to the contrary, the District Court of the Hague held that an anti-suit injunction should be issued preventing Medinol from commencing any new summary proceedings⁹.

It should be noted, and it is of significant importance, that the anti-suit injunction issued by the District Court of the Hague is an internal anti-suit injunction. In other words, Medinol was only prevented from commencing proceedings in the jurisdiction of the Netherlands and it had no effect abroad. Nonetheless, the fact that an anti-suit injunction was issued reveals the infiltration of a common law principle in a Continental legal system and shows that the only remaining weapon against the abuse of process conducted by Medinol was an anti-suit injunction.

An anti-suit injunction was also issued in France in the case of *Banque Worms v. Epoux Brachot*¹⁰. The case concerned insolvency proceedings of Epoux Brachot who were art dealers with a French domicile. Brachot in addition to all of its assets also possessed immovable property in Spain. In the general interest of all creditors the liquidator of Brachot was authorised not to ask for an executor in Spain. Amongst the creditors was Banque Worms which, despite the authorisation given to the liquidator, commenced an action, known in French Law as a *saisie-immobilière*, in Spain in order to seize the Spanish property. Proceedings were therefore brought by the debtors asking the French court to issue an anti-suit injunction

⁸ See *Roche v. Primus*, Supreme Court, 19 December 2003, RVDW 2004/10, JOL 2003,683; *Phillips v. Postech*, Supreme Court, 19 March 2004 (C02/110HR), JOL 2004, 149

⁹ The reasoning behind the issue of an anti-suit injunction by the District Court of The Hague is based on the ground of abuse of process. Article 3:13 of the Dutch Civil Code provides that a right may be abused if it is used for no other purpose than to harm another party or for a different purpose than the one for which the right was afforded. Article 3:15 of the Dutch Civil Code also provides that this rule may be applied outside the domain of the Civil Code. In addition, Article 6:162 of the Dutch Civil Code further provides that an abuse of right may constitute a wrongful act and Article 3:296 provides that a party may commence proceedings in order to prevent a threatening wrongful act. It is therefore the latter provision which gave the ground for the Court to issue the anti-suit injunction, subject to the establishment of an abuse of process.

¹⁰ *Banque Worms c. Epoux Brachot*, Cass. Civ. 1re, 19 Nov 2002, J.C.P. 2002.II,10 201, concl. Sainte-Rose, note Chaillé de Néré, D.2003.797, note Khairallah.

in order to prevent Banque Worms from continuing the Spanish action. The claimants also asked the court for an *astreinte*, in other words special damages by virtue of which the party against whom it is issued may be fined a specific amount per day for not complying with the injunction.

At first instance the debtors claim failed, yet that decision was reversed by the Versailles Court of Appeal which ordered Banque Worms to refrain from any proceedings in Spain, in other words it issued an anti-suit injunction. The case was subsequently appealed to the French Cour de Cassation which issued an anti-suit injunction restraining Banque Worms from continuing the Spanish proceedings.

The *Medinol*¹¹ and *Banque Worms*¹² decisions are prominent examples of the issue of an anti-suit injunction by a civil law court. The question, however, remains whether they demonstrate a civil law acceptance of the principle of anti-suit injunctions.

The view amongst some academics¹³ is that the *Medinol*¹⁴ and *Banque Worms*¹⁵ decisions are evidence of acceptance by the civilian system of the principle of anti-suit injunctions. It is, however, submitted that, although both decisions can be perceived as proof of legal borrowing, one may argue that, although quite similar, there are differences between both anti-suit injunctions from an English anti-suit injunction.

The first anti-suit injunction, that is the one issued in the *Medinol*¹⁶ case, is an internal anti-suit injunction. In other words, Medinol was ordered to refrain from commencing or continuing legal proceedings in the Netherlands and that order did not have extraterritorial reach. As such, the issue of sovereignty did not arise at all since the order did not affect the jurisdiction of another Member State¹⁷. In addition, the reasoning applied by the Dutch Court is of

¹¹ *Ibid.*

¹² *Ibid.*

¹³ See for example, Adrian Briggs, *Anti-Suit Injunctions and Utopian Ideals*, (2004) 120 L.Q.R. 529, where Professor Briggs argues that the *Banque Worms* decision shows acceptance of anti-suit injunctions in Europe.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Even if the case involved an anti-suit injunction restraining proceedings before another Member State court, it is now questionable, in the light of Case C-159/02, *Turner v. Grovit* [2004] E.C.R. I-3565; [2004] 2 Lloyd's Rep. 169, whether the Dutch court would go ahead in issuing the order. For an analysis of *Turner* see *infra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

extreme interest as well. The Dutch Court proceeded down the road of issuing an anti-suit injunction only after it was established by virtue of the relevant provisions of the Dutch Civil Code that an abuse of process had occurred. Therefore, the reasoning behind the issuance of an anti-suit injunction is different from the reasoning applied by the English Courts in a similar scenario. One may accurately describe *Medino*¹⁸ as an excellent illustration that anti-suit injunctions are in fact available in civil law systems, simply on the ground that any type of injunction is available to civil law courts, and therefore their use is not something alien to Continental legal systems¹⁹.

The anti-suit injunction in *Banque Worms*²⁰ necessitates closer examination. The French Cour de Cassation issued an anti-suit injunction restraining Banque Worms from continuing the Spanish proceedings. It is, however, submitted that, although that anti-suit injunction had in fact extra-territorial effect, there is a reason which differentiates that anti-suit injunction from an English anti-suit injunction. The French Cour de Cassation did not in fact issue a pure anti-suit injunction, rather it issued a new breed of injunction in the eyes of English law. The injunction directed to Banque Worms had a dual purpose, namely to restrain Banque Worms from continuing the Spanish proceedings and to freeze the assets in Spain. Therefore such an injunction is a new breed of injunction as it combines an anti-suit injunction with a freezing, or Mareva, injunction. It is therefore not striking that the French anti-suit injunction is in fact a freezing anti-suit injunction, which although under English law is unique under French law an order termed a *référé* is quite common.

What is, however, striking is the reasoning of the French Cour de Cassation when issuing the injunction. In particular, the Court considered the sovereignty issue and concluded that:

“an injunction addressed to the defendant personally to act or refrain from acting, wherever the assets in question are situated, does not fall foul of such jurisdiction limits, as long as it is awarded by the court with legitimate jurisdiction over the merits”²¹

¹⁸ *Ibid.*

¹⁹ See *supra* Chapter III: The Brussels I Regulation Framework, for a detailed examination of this issue.

²⁰ *Ibid.*

²¹ Horatia Muir Watt, *Injunctive Relief In The French Courts: A Case Of Legal Borrowing* [2003] C.L.J. 573, at p. 574.

Apart from “a distinct case of legal borrowing”²², the *Banque Worms*²³ decision reveals for the first time a Continental perspective of a court issuing the anti-suit injunction on the issue of sovereignty²⁴. In other words, one may advance the proposition that the effect of the *Banque Worms*²⁵ decision, apart from an acceptance of the principle of anti-suit injunctions, can also be seen as a declaration that there is no violation of the foreign court’s sovereignty simply on the ground that the order is an order *in personam*²⁶, a view akin to the one expressed by the English courts²⁷.

2.3 Are Anti-Suit Injunctions In Fact Unavailable Under Civil Law Systems?

2.3.1 The Example of Germany

²² Op.Cit.

²³ Ibid.

²⁴ For an analysis of the sovereignty argument *see infra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions. However, post- *Banque Worms*, the Cour de Cassation ruled in *Stolzenberg*, 1ère Chambre civile 30 juin 2004 (Bull. n° 191), that, although the effect of *Turner* is to confirm that anti-suit injunctions violate a state’s sovereignty, the same is not applicable in relation to Mareva injunctions. One could argue that after *Stolzenberg* the *Banque Worms* decision is not clear authority for the embrace of anti-suit injunctions by the French courts. However, it submitted that this argument would be incorrect as the comments made in *Stolzenberg* were *obiter*, as well as the Cour de Cassation merely stated what the European Court of Justice ruled in *Turner*. It is thus questionable whether *Stolzenberg* would negate the effect of *Banque Worms*.

²⁵ Ibid.

²⁶ In addition, there are grounds to believe that should the *Medinol* scenario appear before the French Courts for enforcement, there are valid grounds to enforce such an injunction. In other words, assuming the *Medinol* injunction was extra-territorial and one of the parties sought to enforce it in France, there are grounds to believe that such judgment would be enforceable. Support for this argument can be found in the judgment of the French Cour d’Appel de Paris in *SA Eurosensory v. F.J. Tieman BV and Blind Equipment Europe BV*, Cour d’Appel de Paris, Judgment of 28 January 1994, BIE 1994/111. The case concerned an infringement of a patent for medical cells for the blind. Tienman and BEE obtained an injunction against Eurosensory in the Dutch court of the Hague in order to restrain Eurosensory from counterfeiting Tienman’s patented cells. The injunction was effective worldwide, apart from Japan. Tienman and BEE then commenced proceedings in the French courts in order to enforce the judgment of the Dutch court. At first instance it was held that the Dutch judgment should be enforced in France, together with the injunction. On appeal it was argued by Eurosensory that the French Court should deny the recognition of the Dutch judgment on the grounds of public policy since prohibition orders do not fall within the meaning of *référez* proceedings under French law, and regardless of the latter the case was pending on appeal before the Court of Appeal of the Hague. The French Cour d’Appel de Paris disagreed with these arguments and held that the judgement by the Court of the Hague should be enforced in France. The Court declared that it was against the spirit of the Brussels Convention 1968 to assess the Dutch court’s judgment as it involved an examination of the merits of the case, yet it was only allowed to assess the recognition and enforcement of that judgment. In addition, the Court proceeded to state that a judgement cannot be denied recognition simply on the ground that the foreign proceedings are not *référez* proceedings within the meaning of French law.

²⁷ *See Chapter I: The English Common Law Framework. See also Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.*

The examples of *Medinot*²⁸ and *Banque Worms*²⁹ illustrate the availability of anti-suit injunctions under civil law systems. One may, however, dispute that by simply arguing that both decisions are mere exceptions to the rule. It would be, therefore, quite interesting to examine the availability of anti-suit injunctions under a country with a civil law system, which has in fact been the prominent advocate against anti-suit injunctions, namely Germany³⁰.

Anti-suit injunctions in Germany, although a rarity, are an available remedy³¹. The grounds, however, for granting an anti-suit injunction in Germany differ considerably from those advanced by English Courts. The main reason for this is the absence of equitable remedies under German law³², therefore rendering the application of the Civil Procedure Rules mandatory³³ even where the judges think that the outcome will be unjust³⁴.

The German courts have granted an anti-suit injunction in a case regarding matrimonial proceedings³⁵. The case concerned two German citizens who separated in 1927 and began Latvian divorce proceedings in 1935. Under German law a divorce was only granted on the grounds of guilt and only when the divorce proceedings were brought by the innocent party, whereas under Latvian law a divorce was allowed after the couple completed three years of separation. The German Supreme Court issued an anti-suit injunction against the husband restraining him from continuing the Latvian proceedings. In another matrimonial decision before the Köln Court of Appeal, although an anti-suit injunction was not issued, the wife was awarded damages for an unlawful action commenced by her husband in the Courts of East Germany, which the court considered were commenced solely for the purpose of exposing his wife to imprisonment³⁶. In a late 1990s decision a German trial court, instead of issuing an anti-suit injunction, issued an injunction restraining a German company from submitting documents and giving evidence in ongoing proceedings in Michigan relating to fraud and bribery in connection with shipbuilding contracts³⁷. Although *per se* this was not an anti-suit

²⁸ Ibid.

²⁹ Ibid.

³⁰ It is worth noting that several European legal systems are based on the German legal system. An example of this is Greece, discussed further *infra* at 2.3.2.

³¹ See Markus Lenenbach, *AntiSuit Injunctions In England, Germany and The United States: Their Treatment Under European Civil Procedure and The Hague Convention*, 20 Loy. L.A. Int'l & Comp. L.J. 257.

³² Ibid., at p. 273.

³³ Ibid., at p. 273.

³⁴ Op.Cit.

³⁵ Ibid., at p. 274.

³⁶ Op.Cit.

³⁷ Ibid., at p. 275.

injunction, its effect was the same since the German company's participation in the Michigan proceedings was much limited rendering the injunction issued a direct interference with the Michigan proceedings.

Although rarely issued anti-suit injunctions are therefore available under German law. This availability, however, is limited to extra-territorial proceedings. Hence, an anti-suit injunction is not available under domestic proceedings³⁸. This, however, is irrelevant for the purposes of this discussion as the main issue is to examine the availability of anti-suit injunctions when proceedings are commenced in Germany and in another foreign country and not the position under German domestic litigation. It is very interesting to observe that under German law, the German courts have the power to issue an anti-suit injunction in order to restrain a party from commencing or continuing proceedings in another country. This power stems from the right not to be sued abroad, and involves two types of claims, namely contractual and tortious.

In relation to contractual claims, a right not to be sued abroad arises by virtue either of an exclusive jurisdiction clause or an arbitration agreement. An exclusive jurisdiction clause affording exclusive jurisdiction to the German courts is perceived under German law as a clear indication that all disputes under the contract are intended to be adjudicated before the German courts, hence a party is contractually prohibited from commencing proceedings abroad³⁹. That is because under German law the fact that the parties chose the German courts as competent for the adjudication of their disputes means that the parties adhered to the obligation not to sue abroad. Therefore, if a party establishes that a valid German exclusive jurisdiction clause is in place, the court must restrain the other party by way of an anti-suit injunction from commencing or continuing legal proceedings abroad⁴⁰. The same is applicable in relation to arbitration agreements under which the parties agree to settle their disputes via arbitration in Germany⁴¹. As do the English courts, the German courts too apply limitations to the power to issue anti-suit injunctions namely the comity requirement. Yet, the voluntary choice of Germany as the proper forum, either through an exclusive jurisdiction clause or an arbitration agreement, means that comity becomes less important simply on the ground that

³⁸ *Ibid.*, at p. 276 – 282. Compare with the position in the United States of America discussed *infra* in Chapter VI: Anti-Suit Injunctions in the United States of America.

³⁹ *Ibid.*, at p. 285.

⁴⁰ *Ibid.*, at p. 286. A position akin to the one adopted by the English courts, *see supra* Chapter I: The English Common Law Framework.

⁴¹ *Ibid.*, at pp. 287 – 289. A position akin to the one adopted by the English courts, *see supra* Chapter I: The English Common Law Framework.

the parties have agreed not to bring proceedings abroad⁴². Therefore, the German courts will only assess the contractual validity of the clause under German substantive law, and if it finds that the clause is valid, the contractual duty not to sue abroad will be enforced by way of an anti-suit injunction⁴³. As Lenenman observes:

“German law *explicitly permits* international forum selection and arbitration agreements, which imply their enforceability. *If they did not enforce these agreements, German courts would encourage parties to breach them. Honouring the breach of voluntary agreements will destroy a legal system based upon freedom of contract. Agreements which contain a duty not to sue in a foreign forum are, therefore, enforceable by injunction.* The exception is that the injunction will not be enforced if the recognition and enforcement of the injunction are contrary to the foreign country’s public policy. In that way, international comity is preserved.”⁴⁴

Therefore, the German courts have the power to issue an anti-suit injunction in cases of a breach of an exclusive jurisdiction clause or an arbitration agreement. However, such power is also extended to tortious claims since under German law a party, apart from damages, can claim for an anti-suit injunction for breach of the right not to sue abroad⁴⁵. The tortious claim which gives rise to an anti-suit injunction is breach of the absolute right in a business enterprise, and violation of that right by commencement of proceedings abroad has as a remedy an anti-suit injunction⁴⁶.

The brief examination of German law on the issue of anti-suit injunctions reveals that anti-suit injunctions are not alien to civil law systems. The examination also raises questions as to the hard line adopted by the Düsseldorf Court of Appeal in *Re The Enforcement of An English Anti-*

⁴² *Ibid.*, at p. 290. A position akin to the one adopted by the English courts, save in cases where there is no express choice of forum or arbitration and thus English precedent dictates that comity is paramount, *see supra* Chapter I: The English Common Law Framework.

⁴³ *Ibid.*, at p. 291.

⁴⁴ *Ibid.*, at pp. 291-292. Emphasis Added.

⁴⁵ *Ibid.*, at p. 292.

⁴⁶ *Ibid.*, at p. 292-294. The right to ask for an anti-suit injunction under German law stems from Article 826 of the German Civil Code which states that: “[a] person who wilfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage”. In addition, Article 823(1) states that: “[a] person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other rights of another is bound to compensate him for any damage arising therefrom.” Article 823 requires the infringement of an “absolute right”. Article 823(1) recognises the “right in a business enterprise” as an “absolute right”. Therefore, both Articles form the basis for the issuance of an anti-suit injunction in order to restrain proceedings abroad. German law also allows an anti-suit injunction in cases of breach of contract as a remedy for breaching the tortious duty of good faith.

*Suit Injunction*⁴⁷. In other words, why did the Düsseldorf Court of Appeal heavily criticise the English courts for infringing its sovereignty when the same remedy is available under German law and has been used by German courts in the past? It is submitted that arguments taking advantage of the fact that anti-suit injunctions are rarely issued by German courts are irrelevant, simply because the main ground for not enforcing the anti-suit injunction in *Re The Enforcement of An English Anti-Suit Injunction*⁴⁸ was that the English court did not observe comity, yet the position under German law in the same scenario is that comity becomes a less important factor. After examining the position under German law, the strength of the sovereignty argument becomes considerably weakened, especially if taken in conjunction with the views expressed on the issue by the Cour de Cassation in *Banque Worms*⁴⁹.

The fact that anti-suit injunctions are available under civil law systems may also be used as an argument for the inclusion of the principle of anti-suit injunctions in the Brussels I Regulation framework. In addition, when the reform issue will be considered in the latter part of this thesis⁵⁰, the availability of anti-suit injunctions in civil law systems will be used in order to afford a clear direction that the law should take. The availability of anti-suit injunctions in a civil law system, such as Germany, connotes that common law and civil law systems are less far apart than meets the eye in relation to the principle of anti-suit injunctions despite the absence of equitable remedies in civil law.

2.3.2 The Example of Greece

Greece is another important example of a civil law country which one may look at in order to examine whether anti-suit injunctions are an available remedy. As set out in the above section, anti-suit injunctions are a remedy under German law, although an extremely rare one to be issued. Greece is carefully chosen as an example because the legal system of Greece may be considered a child of German law⁵¹. It is therefore quite interesting to compare the position in

⁴⁷ [1997] I.L.Pr. 320. For an analysis of the case see *infra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

⁴⁸ Op.Cit.

⁴⁹ Ibid.

⁵⁰ See *infra* Chapter VII: Reform.

⁵¹ The Greek legal system was created and established in the post-1821 Revolution era by King Othon, a German citizen placed as King of Greece by the Great Powers of the time. In order to have a proper administration of justice system, Othon brought from Germany legal scholars who in turn set up the post-1821 Revolution Greek legal system. Over the years, and indeed until the present time, German legal

Greece with that of Germany in relation to anti-suit injunctions as the legal connections between the two countries are close.

The position in Greece regarding anti-suit injunctions, however, is different from the position adopted in Germany. The Greek principle which vaguely resembles that of the English anti-suit injunction is the *asfalistiká metra* principle. In order for the reader to comprehend what exactly *asfalistiká metra* is, the direct translation into English is *summary proceedings*, in French *référé*⁵² and in Dutch it is a *kort geding*⁵³. At first sight, definition-wise, *asfalistiká metra* do not look anything like an anti-suit injunction. Thus, one needs to look deeper into the principle and examine its elements.

One may define *asfalistiká metra* as a court order available under Private Law which has as its purpose to secure or maintain a legal situation with the sole purpose of protecting court proceedings. Another way of putting this is that *asfalistiká metra* is a court order which is sought in order to restrain the other party from doing something. This is indeed a very vague definition of *asfalistiká metra*, however, a very realistic one as well. That is because *asfalistiká metra* may include an order to provide warranty, a preliminary ruling, an order to a party not to erect a fence higher than a certain limit, an order to a party not to come close to one's property in the vicinity of one hundred metres, an order to a party not to publicly pronounce the other party's name in the media or even the arrest of a vessel or aircraft⁵⁴ or the repossession of a house⁵⁵ or any type of property⁵⁶. In turn one wonders whether, due to the width of the *asfalistiká metra* principle, anti-suit injunctions also fall within the ambit of the principle.

The *asfalistiká metra* principle is governed by Book Five of the Code of Civil Procedure, in particular Articles 682 to 738. Due to the length of the Articles only the Articles relevant to the discussion in hand will be mentioned. Article 682 affords the power to the courts to issue *asfalistiká metra* in order to maintain a right or factual situation as well as the power to alter or declare null any *asfalistiká metra* issued. In addition, in order for *asfalistiká metra* to be issued the

writings have been treated with great respect by Greek scholars and as such have considerably influenced the evolution and direction of Greek law as a whole.

⁵² See *supra* the discussion of the *Banque Worms* case at 2.3.

⁵³ See *supra* the discussion of the *Medinol* case at 2.3.

⁵⁴ Article 709 and 713 of the Greek Code of Civil Procedure.

⁵⁵ Article 714 of the Greek Code of Civil Procedure.

⁵⁶ Article 707 of the Greek Code of Civil Procedure.

party asking for such measures must, according to Article 688, apply to the court and precisely state the reasons for asking for such measures. Furthermore, according to Article 691 the court may issue interim *asfalistika metra* until it is satisfied that all evidence is properly collected. Article 692 provides that *asfalistika metra* are purely discretionary and under no circumstances are the courts bound to issue *asfalistika metra*. However, Article 695 provides that all *asfalistika metra* are provisional in character and thus not final as well as they do not in any way affect the main litigation. Finally, Article 728 deals with the categories under which interim *asfalistika metra*, under Article 691, may be issued. These categories are monthly divorce contributions, delayed pensions, any form of debts, delayed salaries, damages for work accidents, damages given to the family of a deceased and, finally, any other case which can be heard in a preliminary ruling.

The issue whether an anti-suit injunction falls under the Greek principle of *asfalistika metra* is thus not clear. On the one hand, Greek courts may issue an order to a party to do something or not to do something⁵⁷. In that respect, due to the width and vagueness of the issue that the order may relate to, one may argue that a Greek court may order a party to refrain from commencing or to discontinue foreign proceedings. Up to date an anti-suit injunction has never been issued by the Greek courts, either restraining proceedings abroad or in the Greek jurisdiction. The reason for this is exactly the same as in the case of Germany, namely that the Codes provide for instances like this and therefore it was never necessary for the Courts to apply extreme measures such as an anti-suit injunction. Nonetheless, there is no reason why a Greek court cannot issue an anti-suit injunction as *asfalistika metra* may cover this scenario.

There is, however, one great difference between the principle of *asfalistika metra* and the principle of anti-suit injunctions, namely that the former must and will always be provisional in character. Thus, an *asfalistika metra* order cannot be permanent as anti-suit injunctions can. This provisional character of *asfalistika metra* clarifies the inclusion of the principle under Article 31 of the Regulation as a provisional measure⁵⁸. As such, an *asfalistika metra* order to restrain foreign proceedings would resemble more an *interim* anti-suit injunction than a final anti-suit injunction⁵⁹. It is therefore evident that a party can ask a Greek court for *asfalistika*

⁵⁷ As for example Dutch courts do through a *kort geding*.

⁵⁸ For a detailed discussion of provisional measures see *infra* Chapter III: The Brussels I Regulation Framework.

⁵⁹ Op.Cit.

metra to restrain foreign proceedings, in other words an interim anti-suit injunction, but cannot ask for a final anti-suit injunction as this would directly breach Article 695 of the Code of Civil Procedure.

There is, however, one last and indeed prominent issue regarding the availability of anti-suit injunctions in Greece, namely the issue of constitutionality of anti-suit injunctions. This issue will be examined through a brief examination of how an English anti-suit injunction is perceived by Greek courts. In a recent Greek decision by the Piraeus Court of Appeal⁶⁰, the court set aside the Court of First Instance decision⁶¹ to enforce an English anti-suit injunction⁶². The Piraeus Court of Appeal felt that recognition and enforcement of the London High Court judgment issuing an anti-suit injunction, under Article 34 of the Brussels I Regulation, should be denied on the grounds of public policy. The Court felt that the enforcement of the English anti-suit injunction would violate the Greek Constitution⁶³, in particular Articles 8⁶⁴ and 20⁶⁵, and therefore should not be enforced.

The Piraeus Court of Appeal was bound to apply the principle provided by the Supreme Court of Greece (*Areios Pagos*) in Case 17/1999, a case involving the recognition and enforcement of an American judgment affording punitive damages to the claimant. The Greek Supreme Court, before holding that the American judgment should be recognised and enforced, provided the general principle, namely that a judgment will not be recognised and enforced in Greece if its recognition and enforcement would contradict fundamental political, ethical, social, judicial or economic values which are prominent in the country:

“Due to the operation of Article 905§3, in conjunction with Article 323§5, of the Code of Civil Procedure, in order for a foreign judgment to be recognised and enforced in Greece it must not *inter alia* be contrary to public order. Public order must be given the meaning enshrined in Article 33 of the Civil Code. Thus, the recognition and enforcement of a foreign judgment in Greece is denied when, due to its content, its recognition and enforcement would contradict fundamental

⁶⁰ Piraeus Court of Appeal, Case 110/2004.

⁶¹ Piraeus Court of Appeal, Case 1901/2001.

⁶² Cf. George A. Scorinis, *Greek Enforceability*, Maritime Advocate 2005, 31, p. 36-37.

⁶³ The Constitution of Greece, accessible at: <http://www.parliament.gr/english/politeuma/syntagma.pdf>.

⁶⁴ “No person shall be deprived of the judge assigned to him by law against his will. Judicial committees or extraordinary courts, under any name whatsoever, shall not be constituted.”

⁶⁵ “1. Every person shall be entitled to receive legal protection by the courts and may plead before them his views concerning his rights or interests, as specified by law. 2. The right of a person to a prior hearing also applies in any administrative action or measure adopted at the expense of his rights or interests.”

political, ethical, social, judicial or economic values which are prominent in the country. The mere fact that Greek law ignores the foreign value or provision which is recognised in the foreign country or because there is no relevant Greek rule to the foreign legal system, is not enough to clarify the foreign judgment as contrary to public order. Nonetheless, a foreign judgment is not allowed to be recognised and enforced when, via its recognition and enforcement and due to its contradiction to the aforesaid fundamental values, that judgment will disturb the legal framework prominent in the country.”⁶⁶

The Piraeus Court of Appeal therefore applied that principle to the case and therefore held that:

“ ...This court, evaluating the foreign decision from the standpoint of the constitutionally established for every citizen right to access the Greek courts and the provision of protection by those, concludes that the prohibition imposed by the foreign court is directly contrary to the fundamental ethical, social and judicial values which are prominent throughout the jurisdiction of Greece and thus the aforesaid foreign court decision must be denied recognition and enforcement as contrary to Greek public order.”

The Piraeus Court of Appeal therefore denied recognition of the English judgment and set aside the anti-suit injunction as unconstitutional⁶⁷. The issue which instantly arises is whether it is unconstitutional for a Greek court to issue an anti-suit injunction, as in such a case Articles 8 and 20 of the Constitution would be violated as they are in a case of enforcement of an English anti-suit injunction. It is submitted that the aforesaid is the reason why *asfalistikika metra* are provisional in character and not permanent. In cases of provisional measures, such as *asfalistikika metra*, the parties’ constitutional rights are not violated as the competent court has ordered those measures in order to maintain a factual situation before it. On the other hand, however, *asfalistikika metra* in the form of an English permanent anti-suit injunction would be unconstitutional as such an order would directly violate the right of a party to access to justice as provided for in Article 8.

⁶⁶ *Areios Pagos*, Case 17/1999.

⁶⁷ Cf. Charis Meidanis, *Articles 34, 41 and 45 of Regulation 44/2001, Article 905§2 of the Code of Civil Procedure: The Greek procedural public order in the context of the Brussels Convention and its violation by anti-suit injunctions of the English courts*, Dike International 2005, 831-842.

The position in Greece therefore regarding anti-suit injunctions is that anti-suit injunctions in the form known in England are not issued and are unconstitutional. However, there may be grounds to believe that an interim anti-suit injunction, in the form of *asfalistika metra*, is possible as in such a case there is no violation of the Code of Civil Procedure or the Constitution as in such a case the injunction's aim would be to safeguard ongoing proceedings.

2.4 Conclusion

The examination of the position adopted by the Continental courts presented in this Chapter, demonstrates that the principle of anti-suit injunctions has been used by those courts either to restrain proceedings within their jurisdiction or abroad. Nonetheless, the example of Greece demonstrates that some Continental courts adopt a profoundly negative approach to anti-suit injunctions on the ground of constitutionality alone. This position, together with the rare use of anti-suit injunctions by some countries such as Germany, demonstrates a different approach to issues of jurisdiction from the English courts, which may be seen as a more public law approach. This difference, which will be analysed in another Chapter of this thesis⁶⁸, explains the more conservative use of anti-suit injunctions by Continental courts.

Nonetheless, the very use of the principle by some Continental courts implies the compatibility of the principle with civil law systems. Put another way, Continental courts would not use anti-suit injunctions if it was against the fundamental principles of their respective legal systems to do so. The brief investigation that this Chapter regarding the perception and availability of anti-suit injunctions under some Continental civil law systems, is of extreme importance as it will provide the basis for analysis in subsequent Chapters.

⁶⁸ See *infra* Chapter III: The Brussels I Regulation Framework.

CHAPTER III: THE BRUSSELS I REGULATION FRAMEWORK

3.1 Introduction

The two preceding Chapters examined the way in which the principle of anti-suit injunctions operates under the English common law framework and under some Continental systems. In addition, as already established, there are important differences between the two aforesaid systems which become more acute when transposed into the Brussels I Regulation framework.

The purpose of this Chapter is dual. At first, this Chapter aims to provide an overview of the Brussels I Regulation regime¹. This overview is provided in order for the reader to comprehend the exact rules that the Brussels I Regulation introduced, as well as the rules which this thesis aims to change through proposals for reform. Second, this Chapter aims to go much deeper than a mere overview of the Brussels I regime. As such, issues such as the underlying philosophy of the Brussels I Regulation, the difference between the philosophy on jurisdiction behind common law and civil law systems when brought under the umbrella of Brussels I as well as the nature of the Brussels I Regulation, will be analysed. Thus, this Chapter will provide the basis for the discussion in subsequent Chapters.

3.2 The Underlying Philosophy of the Brussels I Regulation

In order to assess and understand the Regulation, one needs to look at its underlying philosophy. There are two main central issues regarding the underlying philosophy of the Brussels I Regulation, namely, first, the more general aspect of the Regulation as an instrument designed to contribute to European integration and, second, the specific philosophy of the Regulation or, put another way, its purpose and spirit.

The Brussels I Regulation is only a small piece of the large puzzle of European Union Law seeking to provide harmonization of legal rules throughout Europe. The Regulation's predecessor, the Brussels Convention 1968, was the first step taken by the original six

¹ It has to be noted that the Brussels I Regulation may also apply to a case involving a Member State court, or two, and between two non-European Union domiciliaries. In such a case, the Member State court is allowed by virtue of Article 4 to apply its national rules, always subject to Articles 27 and 28 and the rules regarding the recognition and enforcement of judgments, save in cases where Article 22 applies.

Member States of the European Economic Community in the direction of harmonization. The principle of harmonization of legal rules, as a general concept, is central to the proper operation of the European Economic Community. Put another way, without harmonization of legal rules the end product of an internal market would not be feasible. Thus, the Brussels Convention 1968, and the Brussels I Regulation, must be seen as a small yet fundamental piece in the large puzzle of harmonization which in itself belongs to the greater picture of European integration.

In order for the Brussels Convention 1968 to become a reality a prerequisite was that European integration reached a certain level. This is evident from the 'fermentation' of various political theories, such as functionalism and neo-functionalism, that took place in the early 1950s extending to the creation of the EEC and Euratom, which had as a basis various defence treaties created in the post-second world war era.

This political climate led to the slow yet gradual development of European integration which led to the increasing need for harmonization. This need was echoed in Article 220 of the Treaty of Rome, the provision which provided the foundation of the Brussels Convention 1968, in the following way:

"Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals... the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards."

In order to meet this goal, in a note sent to the Member States on 22 October 1959 inviting them to commence negotiations, the Commission of the European Economic Community pointed out that securing legal protection throughout the Community is paramount:

"a true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory,

legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments.”²

The note marked the beginning of the Brussels Convention 1968, since it enabled the Committee of Permanent Representatives to set up a committee of experts. This was done in 1960. The committee, at its 15th meeting in Brussels in 1964, adopted a Preliminary Draft Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Draft was reviewed by the participating Governments for any comment and, in 1966, the draft Convention was finally adopted by the experts.

The very purpose of the Brussels Convention 1968 may be said to be economic. As the note says, a true internal market can only be achieved when the legal framework for affording protection is in place. Without the proper legal framework, the vision of a European Economic Community could not be realised. Jurisdiction, recognition and enforcement of judgments are an integral part of a common market. The scope of the Brussels Convention 1968 according to Jenard:

“governs international legal relationships, applies automatically, and covers all civil and commercial matters, apart from certain exceptions which are exhaustively listed.”³

In addition, according to the Jenard report, the meaning of the term “civil and commercial matters” includes matters which are to be classified as such solely regarding their nature⁴.

² Jenard Report, Official Journal, 1979, N° C 59, at p. 3.

³ Ibid. , at p. 8.

⁴ “The Committee did not specify what is meant by civil and commercial matters, nor did it point to a solution to the problem of classification by determining the law according to which that expression should be interpreted. In this respect it followed the practice of existing conventions. However, it follows from the text of the Convention that civil and commercial matters are to be classified as such according to their nature, and irrespective of the character of the court or tribunal which is seised of the proceedings or which has given judgment. This emerges from Article 1, which provides that the Convention shall apply in civil and commercial matters ‘whatever the nature of the court or tribunal’. The Convention also applies irrespective of whether the proceedings are contentious or non-contentious. It likewise applies to labour law in so far as this is regarded as a civil or commercial matter...The Convention covers civil proceedings brought before criminal courts, both as regards decisions relating to jurisdiction, and also as regards the recognition and enforcement of judgments given by criminal courts in such proceedings...As regards both jurisdiction and recognition and enforcement the Convention affects only civil proceedings of which those courts are seised, and judgments given in such proceedings...The Convention also applies to civil or commercial matters brought before administrative tribunals.” Ibid. , at p. 9.

Jenard drew support for his approach from the Hague Conference on private international law which examined the Convention of 1896⁵.

The purpose behind the creation of the Brussels Convention 1968 was to provide a legal framework under which jurisdiction would be allocated to the competent court and judgments would be recognised and enforced throughout the European Economic Community. This has in turn made possible a European Economic Community since it created a legal framework to facilitate a common internal market. The European Economic Community, as it was then, has now evolved into a European Union altering the nature of the relationship between the Member States, the majority of which now use a common currency. Therefore, the need for a common legal framework in order to regulate jurisdiction, recognition and enforcement of judgments is now even greater. This expansion and further development of the European Union necessitated the update of the Brussels Convention 1968, and therefore Council Regulation (EC) No 44/2001 was introduced. The evolution of the European Economic Community into a European Union and the need for common rules on jurisdiction was recognised in the Preamble to the Regulation:

“The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market.”⁶

The Member States to the Regulation further added that:

“In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable.”⁷

⁵ The Hague Conference stated that : “The expression ‘civil or commercial matters’ is very wide and does not include only those matters which fall within the jurisdiction of civil tribunals and commercial tribunals in countries where administrative tribunals also exist. Otherwise there would be a wholly unjustifiable inequality between the Contracting States: service abroad of judicial instruments could take place on a wider scale for countries which do not have administrative tribunals than for countries which have them. In brief, the Convention is applicable from the moment when private interests become involved . . .” *Ibid.*, at p. 9.

⁶ Council Regulation (EC) 44/2001, Official Journal L 12, 16/01/2001, §1.

⁷ *Ibid.*, at §6.

Therefore, the underlying philosophy of the Brussels I Regulation is to provide a uniform set of rules regarding the rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, thus assisting in furthering European integration and harmonization.

There are two core principles underlying the Brussels I Regulation, namely first, the principle of mutual trust and respect between Member State courts as well as, second, the principle of harmonious administration of justice. The fundamental nature of these principles is declared in the Preamble to the Regulation in the following terms:

“In the interests of the *harmonious administration of justice* it is necessary to minimise the possibility of concurrent proceedings and *to ensure that irreconcilable judgments will not be given in two Member States*. There must be a clear and effective mechanism for resolving cases of *lis pendens* and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously. *Mutual trust in the administration of justice in the Community* justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute. By virtue of *the same principle of mutual trust*, the procedure for making enforceable in one Member State *a judgment given in another must be efficient and rapid...*”⁸ (emphasis added)

The introduction of the Brussels I Regulation in 2001, as well as providing a necessary update to the Brussels Convention 1968, unequivocally declared the principles to be followed in assessing jurisdiction and recognition and enforcement of judgments within the European Union. This type of declaration did not exist in the Brussels Convention 1968, and one is to conclude that what began as a mere economic union has now evolved into a fully integrated economic union with a common political agenda and a view for full political and judicial integration. This need for integration, however, comes at a cost, particularly when one examines the law on anti-suit injunctions, namely the fact that the Brussels I Regulation attempts to synchronize under a common framework two alien legal families, those of common law and civil law.

⁸ Ibid., at §§ 15-17.

The discussion will now turn on the assessment of the nature of the Brussels I Regulation which is useful in highlighting the areas where a conflict exists between the English and the Brussels I Regulation frameworks on jurisdiction.

3.3 The nature of the Brussels I Regulation

The assessment of the nature of the Brussels I Regulation is fundamental in order to understand both the way in which the European Court of Justice interprets the provisions of the Regulation and the areas where a conflict exists between the Regulation and the English jurisdiction framework on the issue of anti-suit injunctions.

As the focus of this thesis is the principle of anti-suit injunctions, the examination of the Brussels I provisions will focus on the articles which give rise to conflict between the English jurisdiction regime and the Brussels I Regulation. Thus, the discussion of the issue will commence by an examination of Article 2 and will continue with an examination of the *lis alibi pendens* rules encompassed in Articles 27 and 28. Finally, a discussion of Article 23, on the issue of exclusive jurisdiction, will follow. Throughout the examination the interpretation of those articles by the European Court of Justice will be afforded.

3.3.1 Article 2 – The Domicile Rule

The provisions of Article 2 encompass the general rule of the Brussels I Regulation, namely that a defendant must be sued in his country of domicile⁹. In particular, Recital 11 of the Brussels I Regulation provides that the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and “jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.” Furthermore Recital 12 provides that in addition to the defendant's domicile, there should be “alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the

⁹ Article 2: “1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. 2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.”

sound administration of justice". From the outset two issues are evident. First, Article 2 refers to a person and, second, the rule applies regardless of the person's nationality.

The Brussels I Regulation does not include the word "defendant" but the word "person". The wording, however, can be interpreted in such a way so that one can clearly infer that "person" means "defendant" when the proceedings in question involve an individual. The Regulation provides assistance as to the issue of which law is to determine whether a person is domiciled in a Member State through Article 59, which provides that the court seised must apply its national law. Therefore, in order for an English court to determine whether an individual is domiciled in the United Kingdom, the court must, by virtue of Article 59, apply English law. English law on the issue is governed by the Civil Jurisdiction and Judgments Order 2001, Schedule I, Paragraph 9 which re-enacts section 41 of the Civil Jurisdiction and Judgments Act 1982, the Act which implemented the Brussels Convention 1968 into English law:

"An individual is domiciled in the United Kingdom if and only if: (a) he is resident in the United Kingdom and (b) the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom."

Article 59 also governs the situation where a person is domiciled in another Member State. In such a case, according to Article 59(2), a court must apply the law of the Member State of the proposed domicile. Therefore, the issue of whether the individual is domiciled in Greece is a matter of Greek law, and so on.

Matters become more complex in the following two scenarios. First, when a company is sued and therefore there is a need to determine the company's domicile. Second, when a *res* is sued in Admiralty proceedings and therefore one needs to determine the domicile of the *res*. Regarding the former, Article 60(1) of the Regulation affords a uniform definition as to where a company is domiciled:

"For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business."

The Regulation provides, in Article 60(2), that the statutory seat of a company in the United Kingdom means the registered office of the company or the place of incorporation or the place under the law of which the formation took place.

The second issue includes cases where the domicile of a *res* must be determined for the purposes of Admiralty proceedings. The traditional English position was that, when proceedings *in rem* are brought against the *res*, the *in rem* proceedings will connect to an action *in personam*, in other words an action against a real person, only when that person enters an appearance before the court thereby becoming a defendant¹⁰. However, for the purposes of Article 2 of the Regulation, the person being sued is not the *res* itself but a person with an interest in the vessel¹¹.

The provisions in Article 2 contain the general rule of the Brussels I Regulation that a defendant must be sued in his country of domicile. However, the Regulation provides for exceptions to this rule in certain circumstances. These exceptions will be examined in turn in this Chapter, yet it has to be noted that, should any of those exceptions be inapplicable, jurisdiction will be conferred on the court of the country in which the defendant is domiciled. Thus, the general rule will apply in order to confer jurisdiction on the court of the defendant's domicile in order to avoid the risk of irreconcilable judgments and to facilitate the administration of justice.

3.3.2 Articles 27-30: *Lis Alibi Pendens* – The Court first seised rule

The *lis alibi pendens* provisions are an exception to the domicile rule contained in Article 2. Articles 27¹² and 28¹³ contain the thrust of the *lis alibi pendens* principle and are of extreme

¹⁰ See *The Indian Grace (No.2)* [1998] A.C. 878, which changed the English position bringing it in line with the European approach.

¹¹ This was established in *The Deichland* [1989] 2 Lloyd's Rep. 113. See also Case C-406/92, *The Tatry sub nom. The Maciej Rataj* [1994] E.C.R. I-5439.

¹² Article 27: “1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member 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. 2. 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.”

¹³ Article 28: “1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings. 2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof. 3. For the purposes of this Article, actions are deemed to be related where they are so closely

importance particularly for the law on anti-suit injunctions. In addition, Article 30¹⁴ provides a yardstick for the cases in which a court is considered to be seised and therefore merits close examination. Thus, the discussion will commence by an examination of Article 27, together with an examination of Article 30. A discussion of Article 28 will finally follow.

3.3.2.1 Article 27

Article 27 requires the court second seised to stay its proceedings in favour of the court first seised subject to the proviso that the proceedings involve the same cause of action and the same parties, until the court first seised decides whether or not it has jurisdiction over the dispute. It is noteworthy that the rule contained in Article 27 is a simple cut and dried rule in that the court second seised does not have any discretion whether to stay its proceedings or not. The absence of discretion in Article 27 can be explained by the fact that the sole aim of Article 27 is to avoid parallel proceedings and conflicting judgments and thus by allowing any discretion to the court second seised would in turn increase the risk of irreconcilable judgments.

The European Court of Justice has repeatedly stressed that Article 27 must be interpreted broadly. This was pointed out by the European Court of Justice for the first time in *Gubish Maschinenfabrik KG v. Palumbo*¹⁵ where, after stressing that the purpose of Article 27 was to avoid parallel proceedings, the European Court of Justice stressed that Article 27 must be interpreted broadly¹⁶. This ruling was affirmed in *Overseas Union Insurance v. New Hampshire Insurance Co.*¹⁷ in the following way:

“Those rules are therefore designed to preclude, in so far as possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in proceedings between the same parties in the State in

connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

¹⁴ Article 30: “For the purposes of this Section, a court shall be deemed to be seised: 1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or 2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.”

¹⁵ Case 144/86, *Gubish Maschinenfabrik KG v. Palumbo*, [1987] E.C.R. 4861.

¹⁶ *Ibid.*, at § 8.

¹⁷ Case C-351/89, *Overseas Union Insurance v. New Hampshire Insurance Co.*, [1991] E.C.R. I-3317.

which recognition is sought. It follows that, in order to achieve those aims, Article 21 must be interpreted broadly so as to cover, in principle, all situations of *lis pendens* before courts in Contracting States, irrespective of the parties' domicile.”¹⁸

The broad interpretation which, according to the European Court of Justice, must be given to Article 27, however, is subject to a twofold proviso, namely that the proceedings in question must, first, involve the same cause of action and, second, the same parties.

The European Court of Justice held in *Gubisch*¹⁹ that the first limb of the proviso in Article 27 must be given an autonomous interpretation²⁰. The European Court of Justice went even further and held that in order for proceedings to involve the same cause of action, it must be established that the proceedings in question have the same cause and object²¹. In the *Gubisch*²² case the action to enforce the contract and the action to rescind it involved the same cause, as well as the same object since the issue of whether the contract was binding had to be determined. The same issue arose in *The Tatry*²³ where the European Court of Justice held that the phrase “cause of action” encompasses the facts and the rule of law relied on as the basis of the action, while the object of the action means the end the action has in view²⁴. Thus, it was held that the action for a declaration of non-liability and the action brought by the cargo owners on the basis of the shipping contracts had the same cause of action.

The second limb of the proviso in Article 27 is that the proceedings must involve the same parties in order for Article 27 to be applicable. If the proceedings involve the same cause of

¹⁸ *Ibid.*, at § 16

¹⁹ *Ibid.*

²⁰ The European Court of Justice said that: “Having regard to the aforesaid objectives of the convention and to the fact that Article 21, instead of referring to the term *lis pendens* as used in the different national legal systems of the contracting states, lays down a number of substantive conditions as components of a definition, it must be concluded that the terms used in Article 21 in order to determine whether a situation of *lis pendens* arises must be regarded as independent.”, *Ibid.*, at § 11.

²¹ The European Court of Justice said that: “It must be observed first of all that according to its wording Article 21 applies where two actions are between the same parties and involve the same cause of action and the same subject-matter; it does not lay down any further conditions. Even though the German version of Article 21 does not expressly distinguish between the terms ‘subject-matter’ and ‘cause of action’, it must be construed in the same manner as the other language versions, all of which make that distinction.”, *Ibid.*, at § 14.

²² *Ibid.*

²³ Case C-406/92, *sub nom. The Maciej Rataj* [1994] E.C.R. I-5439.

²⁴ *Ibid.*, at §§ 37-44. Cf. *The Happy Fellow* [1998] 1 Lloyd's Rep. 13; *Glencore International v. Shell International Trading* [1999] 2 Lloyd's Rep. 692; *Elli Lilly v. Novo Nordisk* [2000] I.L.Pr. 73.

action but not the same parties then Article 27 will not apply. In *The Taty*²⁵ the European Court of Justice held that where proceedings do not involve the same parties, Article 27 does not apply, although Article 28²⁶ may rectify the situation when its conditions are satisfied²⁷.

Article 27 provides a comprehensive rule under which the court second seised must stay its proceedings even in cases where it strongly believes that it has jurisdiction²⁸. The same applies when the court second seised was seised with jurisdiction by virtue of an exclusive jurisdiction clause²⁹. In both scenarios the court second seised must stay its proceedings and wait for the court first seised to rule on its jurisdiction. That is, of course, provided that the court is properly seised within Article 30 of the Regulation.

Article 27 is an excellent illustration of the mutual trust and respect principle that exists throughout the Brussels I Regulation. By requiring the court second seised to stay its proceedings in favour of the court first seised of the dispute, the court second seised in a sense makes a gesture of trust and respect towards the court first seised. Article 27, therefore, provides for judicial cooperation with the sole aim of avoiding conflicting and irreconcilable judgments within the European Union. Article 27, however, has also formed the basis for a clash between the principle of mutual trust and respect and the English jurisdiction approach in enforcing and protecting private law rights³⁰. This clash has been expressed by the prohibition of the principle of anti-suit injunctions in the Brussels I Regulation framework by the European Court of Justice in *Turner v. Grovit*³¹. As this ruling is of fundamental value for this thesis, a separate Chapter in this thesis will be devoted to an analysis of *Turner*.

²⁵ *Ibid.*

²⁶ See *infra* 3.3.2.3 for a discussion of Article 28.

²⁷ The Court therefore said that: "However, Article 22 mitigates that disadvantage. That article allows the second court seised to stay proceedings or to decline jurisdiction on the ground that the actions are related, if the conditions there set out are satisfied. Accordingly...on a proper construction of Article 21 of the Convention, where two actions involve the same cause of action and some but not all of the parties to the second action are the same as the parties to the action commenced earlier in another Contracting State, the second court seised is required to decline jurisdiction only to the extent to which the parties to the proceedings before it are also parties to the action previously commenced it does not prevent the proceedings from continuing between the other parties.", *Ibid*, at §§ 33-35.

²⁸ See Case C-351/89, *Overseas Union Insurance v. New Hampshire Insurance Co.* [1991] E.C.R. I-3317. For a detailed examination of the issue see 3.4.3.

²⁹ See Case C-116/02, *Erich Gasser GmbH v. MISAT Srl* [2003] E.C.R. I-14693; [2004] 1 Lloyd's Rep. 222. For a detailed examination of the issue see 3.4.3.

³⁰ See *supra* Chapter I: The English Common Law Framework.

³¹ Case C-159/02, *Turner v. Grovit* [2004] E.C.R. I-3565; [2004] 2 Lloyd's Rep. 169, analysed *infra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

3.3.2.2 Article 30

The Brussels I Regulation provides for a uniform definition of when a court will be considered as being seised, but this definition is applicable only for the purposes of the *lis alibi pendens* provisions. Article 30 is another alteration made to the Brussels Convention 1968 and is a new development in the Brussels I Regulation. The reason for the change was that problems surfaced due to the absence of a precise definition of when a court will be considered as being seised³².

Under Article 30 a court will be deemed to be seised either when the claim form is issued or when the court is served with the documents and proceedings are lodged. In relation to cases which involve more than one defendant, a dominant problem under the Brussels Convention 1968³³, Article 30 solves the problem by providing that a claim will be pending where the claim form is issued without the need to serve any or all of the defendants.

3.3.2.3 Article 28

Article 28 provides that the court second seised *may* stay its proceedings in favour of the court first seised when related actions are pending in any court of another Member State. The court second seised may also decline jurisdiction if the court first seised has jurisdiction over an action which can be consolidated in an action pending before the court first seised.

In general, related actions are actions which are so closely connected that it is expedient and in the interests of justice to hear them together³⁴. The effect of the *Gubisch*³⁵ decision is to make Article 28 applicable when the proceedings involve the same parties but the cause of action is disputed or vice versa. In addition, in *The Tatry*³⁶ the European Court of Justice held that Article 28's purpose is:

³² See in particular Case 129/83, *Zelger v. Salinitri (No. 2)* [1984] E.C.R. 2397 for an illustration of the problems surfacing with the absence of a uniform definition for when a court will be considered as seised. For the English position on the issue see *Dresser (UK) Ltd. v. Falcongate* [1992] 1 Q.B. 502.

³³ See *Ibid.* *The Tatry; Grupo Torras SA v. Sheikh Fahad Mohamed Al-Sabah* [1995] 1 Lloyd's Rep. 374 and [1996] 1 Lloyd's Rep. 7.

³⁴ See the provisions in Article 28. See also *Alfred Toepfer v. Molino Boschi* [1996] 1 Lloyd's Rep. 510.

³⁵ *Ibid.*

³⁶ *Ibid.*

“[T]o improve coordination of the exercise of judicial functions within the Community and to avoid conflicting and contradictory decisions, even where the separate enforcement of each of them is not precluded.”³⁷

The issue of what exactly is meant by the phrase “related actions” in Article 28 has been dealt with in England in *Sarrio SA v. Kuwait Investment Authority*³⁸ where the Court of Appeal held that Article 28 and what is meant by the term “related actions” must be given a restrictive interpretation³⁹. The House of Lords⁴⁰, however, rejected the restrictive interpretation. Lord Saville, who delivered the judgment of the House, held that a wide interpretation should be given to Article 28, while he applied *The Tatry*⁴¹ and *Gubisch*⁴² to hold that the actions would be related as long as it is expedient to do so in order to avoid irreconcilable judgments⁴³.

Article 28 confers two types of obligations and one power to the court second seised. At first, under Article 28(1), the court second seised may stay its proceedings in favour of the court first seised. Changes were brought by Article 28 of the Regulation to its predecessor in the Brussels Convention 1968. In particular, the textual limitations in Article 28(1) of the Brussels Convention 1968 are removed. The second obligation afforded by Article 28(2) is the dismissal of proceedings by the court second seised for consolidation in the court first seised. It must be stressed that Article 28(2) does not confer jurisdiction on the court first seised, it merely allows in cases where the court first seised has jurisdiction over a claim brought in the court second seised the action may discontinue for consolidation.

The power which is conferred on the court second seised is to stay or discontinue its proceedings⁴⁴. The court has to decide whether to stay or discontinue its proceedings according to the case in hand, but it is its liberty to do so, always with a view to the interests of justice and the avoidance of irreconcilable judgments. Therefore, in *Sarrio*⁴⁵ the House of Lords decided to discontinue the English proceedings for consolidation with the proceedings pending in Spain since their Lordships felt that there was a danger of irreconcilable judgments.

³⁷ *Ibid.*, § 54.

³⁸ [1997] 1 Lloyd’s Rep. 113.

³⁹ *Ibid.*, pp. 121-122, *per* Evans L.J.

⁴⁰ [1999] 1 A.C. 32.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ See *Ibid.*, at pp. 39-41.

⁴⁴ See the Jenard Report, *Ibid.*, at p. 41.

⁴⁵ *Ibid.*

Furthermore, in *JP Morgan*⁴⁶ the English court, being second seised, felt that a stay under Article 28 should not be granted as the court was properly seised by virtue of the parties' agreement.

The nature of Article 28 is more discretionary when compared to Article 27. Article 27 does not provide any discretion to the court second seised yet Article 28 is a rare example of discretion in the Brussels I Regulation. As with Article 27, the court second seised under Article 28 must again demonstrate trust and respect towards the court first seised since, by exercising its discretion to proceed with the case, the court second seised trusts that the court first seised will not issue a conflicting judgment.

3.3.3 Article 23 – The Exclusive Jurisdiction Clause

A special relationship has evolved over the years between Article 23⁴⁷ and anti-suit injunctions. An exclusive jurisdiction clause in a contract has been perceived by English courts as a valid reason to issue an anti-suit injunction in order to defend English jurisdiction. Article 23 is one of the provisions in the Brussels I Regulation which allows derogation from the domicile rule in Article 2 and its purpose is to afford more flexibility to parties in a contract by allowing them to choose the forum they desire. Article 23 is to be found under Section 7 of the Regulation, which bears the title 'Prorogation of Jurisdiction'.

3.3.3.1 Interpretation of Article 23

⁴⁶ *JP Morgan v. Primacom* [2005] 2 All E.R. (Comm.) 764; [2005] 2 Lloyd's Rep. 665.

⁴⁷ Article 23: "1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; or (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. 2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'. 3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction. 4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved. 5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22."

Article 23 has four very important pillars. First, Article 23 provides that the chosen court's jurisdiction shall be exclusive, unless the parties have agreed otherwise. Secondly, in order for Article 23(1) to apply, at least one party must be domiciled in a Member State. Thirdly, there is a need for the parties to have an "agreement". Finally, Article 23 sets out the formalities which need to be satisfied in order for a jurisdiction agreement to be established. Those issues, together with each provision of Article 23, will now be considered in turn.

The first pillar is that Article 23 affords exclusive jurisdiction to the chosen court. This issue is dealt with in detail in another part of this Chapter⁴⁸, thus it suffices to note that the term 'exclusive' used in Article 23 is misleading since the purpose of Article 23 is to exclude jurisdiction of courts which under different circumstances would have had jurisdiction and Article 23 does not deny the recognition of a judgment given in case it is breached⁴⁹. In addition, Article 23 is not considered by the European Court of Justice⁵⁰ as being superior in status to the *lis pendens* provisions encompassed in Articles 27 and 28 and therefore the exclusivity of the exclusive jurisdiction envisaged in Article 23 is much limited.

The second pillar is that, in order for Article 23(1) to apply, at least one of the parties in the contract must be domiciled in a Member State. However, if none of the parties is domiciled in a Member State, Article 23(3) provides that in such a case the courts of the other Member States will have no jurisdiction until the court chosen has declined jurisdiction⁵¹.

The third pillar is the requirement that the parties must have an 'agreement'. Of course, what falls within the ambit of an 'agreement' is a matter for national law. One may dispute the validity or existence of an agreement on procedural grounds and on substantive grounds. The European Court of Justice has interpreted this requirement very strictly. In cases where the

⁴⁸ See *infra* 3.3.3.2.

⁴⁹ For a detailed discussion of this issue, and on the interpretation of Article 23 by the English courts, see *infra* 3.3.3.2.

⁵⁰ See Case C-116/02, *Erich Gasser v. MISAT Srl* [2004] 1 Lloyd's Rep. 222, discussed in detail *infra* in 3.3.3.2.

⁵¹ One may wonder which rule is applied in order to determine the point in time when a party is considered to be domiciled in a Member State. If, for example, one of the parties is domiciled in Spain on the date of the agreement, but is not domiciled in Spain at the time the proceedings are commenced, will Article 23 apply? It seems that Article 23 would apply since at the time of the agreement the party was domiciled in a Member State. Cf. Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments*, 4th ed., (2005), London : LLP. See, however, *Canada Trust Co. v. Stolzenberg (No.2)* [2002] A.C. 1 where it was held that for the purposes of Articles 2 and 6 of the Lugano Convention 1988, domicile needs to be established at the time when proceedings are instituted. See also Jonathan Hill, *International Commercial Disputes In English Courts*, 3rd ed., (2005), Oxford: Hart Publishing.

agreement is disputed on procedural grounds, the European Court of Justice has held that the fact that the agreement lacks some requirements of form under national law does not render the choice of court null and void. In particular, in *Elefanten Schuh v. Jacqmain*⁵² a Belgian Court held that a jurisdiction clause was invalid since it was not written in Flemish, yet the European Court of Justice disagreed with that reasoning⁵³. Furthermore, in *Sanicentral v. Collin*⁵⁴ where a French law, which had the effect of rendering null any agreement on jurisdiction apart from contracts governed by French employment law, was considered by the European Court of Justice as inapplicable and therefore the choice of German law was upheld⁵⁵. Cases where the validity or existence of an agreement is disputed on substantive grounds raise much different considerations. In this category fall cases where a party alleges that the exclusive jurisdiction clause is unenforceable due to misrepresentation or duress. One may thus argue that the contract concluded between the parties is void and therefore the jurisdiction clause in the contract is also void. This approach was dismissed by the European Court of Justice in *Francesco Benincasa v. Dentalkit Srl*⁵⁶. At first, the European Court of Justice stressed that an allegation that a contract is void does not *per se* mean that the contract is actually void, particularly with jurisdiction which only needs a good arguable case in order for it to be established⁵⁷. Secondly, and more importantly, the European Court of Justice held that the choice of court clause is to be considered as severable from the contract which is under dispute⁵⁸.

The question thus arising is whether, since the choice of court clause must be viewed as severable from the contract, an agreement will still be valid, together with the jurisdiction clause, if it was concluded through duress. The European Court of Justice has said that, due to Article 23, a duty is imposed upon it to examine first whether the clause conferring jurisdiction was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated, and that the purpose of the formality requirements imposed by Article 23 is to ensure that consensus between the parties is in fact established⁵⁹. In other

⁵² Case 150/80, [1981] E.C.R. 1671.

⁵³ *Ibid.* , at §§ 25-29.

⁵⁴ Case 25/79, [1979] E.C.R. 3423.

⁵⁵ *Op.Cit.* , §§ 5-6

⁵⁶ Case C-269/95, [1997] E.C.R. I-3767.

⁵⁷ The Court based this on Case 38/82, *Effer v. Kantner* [1982] E.C.R. 825.

⁵⁸ *Ibid.* , at §§ 24-25.

⁵⁹ Case C-378/98, *Coreck Maritime v. Handelsveem* [2000] E.C.R. I-9337, at §13. See also Case 24/76, *Estasis Salotti v. RUWA* [1976] E.C.R. 1831; Case 25/76, *Segoura v. Bonakdarian* [1976] E.C.R. 1851; Case C-106/95, *MSG v. Les Gravieres Rhenanes* [1997] E.C.R. I-911.

words, in order to have an agreement the formalities of Article 23 need to be satisfied which in turn will demonstrate a consensus between the parties. By the same token, an agreement concluded due to duress, misrepresentation and fraud will be considered as valid by the European Court of Justice if that agreement complies with the formalities set out in Article 23. This proposition can be drawn from *Trasporti Castelletti v. Hugo Trumpy*⁶⁰.

English courts prefer to give an autonomous definition of what constitutes an “agreement”. Therefore, in *I.P. Metal v. Ruote O.Z.*⁶¹ it was held that the question in order to determine whether an agreement exists is to see whether the parties truly consented or agreed to the exclusive jurisdiction clause as the clause governing their disputes. Further, in *Dresser (UK) Ltd. v. Falcongate*⁶², the Court of Appeal held that Article 23 would not apply regardless of evidence of consent under English law.

The European Court of Justice has therefore interpreted the term “agreement” as being severable from the contract itself, and thus an agreement as to jurisdiction survives in cases where the existence or validity of a contract is disputed. The court chosen, therefore, will have to decide whether the contract itself is valid and whether it has jurisdiction or whether another Member State court should rule on the dispute.

All this, however, depends on the fourth pillar of Article 23, namely whether the formalities provided for in that article are satisfied. The first formal requirement is that the agreement must be “in writing or evidenced in writing”. The European Court of Justice has not interpreted that requirement consistently in that it switched from a very strict approach in the earlier decisions to a more relaxed approach in more recent decisions. In *Estasis Salotti v. RUWA*⁶³ the European Court of Justice held that the exclusive jurisdiction clause printed on the reverse did not satisfy the requirements of Article 23 since the contract did not expressly refer to the general conditions⁶⁴. The same approach was maintained in the European Court

⁶⁰ Case C-159/97, [1999] E.C.R. I-1597. “[T]he choice of court in a jurisdiction clause *may be assessed only in the light of considerations connected with the requirements laid down by Article 17...*” (emphasis added), at §§ 49-51.

⁶¹ [1994] 2 Lloyd’s Rep. 560.

⁶² [1992] 1 Q.B. 502.

⁶³ Case 24/76, [1976] E.C.R. 1831.

⁶⁴ *Op.Cit.* , at §§ 9-10. See also *7E Communications Ltd v Vertex Antennentechnik GmbH* [2007] EWCA (Civ) 140.

of Justice's ruling in *Galleries Segoura v. Bonakdarian*⁶⁵, where it held that the contract was not an agreement evidenced in writing within the ambit of Article 23 since not both parties accepted that agreement in writing⁶⁶.

The European Court of Justice has in recent years changed its strict approach to the formalities in Article 23 to a more relaxed approach. In *The Tilly Russ*⁶⁷ the European Court of Justice upheld the validity of the clause and its compliance with Article 23 by adopting a more relaxed approach in holding that a jurisdiction clause in a bill of lading would satisfy Article 23 even when it is not signed by the shipper⁶⁸. In *Berghofer v. ASA S.A.*⁶⁹ a contract was concluded between the German claimant and the French defendant, containing a jurisdiction clause which was initially agreed in writing and subsequently amended orally. The European Court of Justice held that an oral agreement could satisfy the formality requirements in Article 23, even where there is no written consent from one of the parties⁷⁰.

It is very interesting to observe that both in *The Tilly Russ*⁷¹ and in *Berghofer*⁷² the European Court of Justice relied on the principle of good faith in order to afford a more relaxed approach to Article 23. This precedence was taken even further in *Powell Duffryn v. Petreit*⁷³ where the European Court of Justice held that a shareholder is deemed to agree to the alteration of a company's statutes, including an exclusive jurisdiction clause therein, merely by being a shareholder⁷⁴.

The scope of what will be considered as an agreement in writing has been extended by the Regulation to include electronic communications which provide a durable record of the agreement. This provision, entailed in Article 23(2), did not exist in the Brussels Convention

⁶⁵ Case 25/76, [1976] E.C.R. 1851. The contract was concluded orally. The 'conditions of sale, delivery and payment' printed on the reverse of this document contained *inter alia* a clause stipulating that all disputes were to be decided exclusively by the German courts. This document was not confirmed by the purchaser.

⁶⁶ Op.Cit., at §8.

⁶⁷ Case 71/83, [1984] E.C.R. 2417.

⁶⁸ Op.Cit., at §§16-18.

⁶⁹ Case 221/84, [1985] E.C.R. 2699.

⁷⁰ Op.Cit., at §§ 14-15. See also *Bols Distilleries BV (t/a Bols Royal Distilleries) v Superior Yacht Services Ltd* [2007] 1 W.L.R. 12.

⁷¹ Ibid.

⁷² Ibid.

⁷³ C-214/89, [1992] E.C.R. I-1745. One of the issues which arose in the case was whether the shareholders were contractually bound by the company's statutes even where they did not know of the existence of the jurisdiction clause or when they opposed the alteration of the company's statutes.

⁷⁴ Op.Cit., at §§16-20 and §§28-29.

1968. Article 23(2) entails facsimile and, a means used particularly in the maritime industry, telex. It also encompasses e-mail, since the message can be stored and printed in order to make a hard copy, but does not include text messages, telephone and voicemail since they provide a temporary record.

The second formal requirement envisaged in Article 23, entailed in Article 23(1)(b), is that an agreement will be valid if there is enough evidence of a previous course of dealing between the parties. Under Article 23(1)(b) there is no requirement that the agreement must be in writing just evidence that there was a previous course of dealing established between the parties. An example of this is *Iveco Fiat v. van Hool*⁷⁵ where the European Court of Justice upheld as valid an agreement containing an exclusive jurisdiction clause which had lapsed and the parties continued to deal with each other⁷⁶.

The third formal requirement in Article 23 is entailed in Article 23(1)(c) which requires an agreement, in order to be valid, to accord with the practices of international trade. This provision was inserted in order to facilitate commercial relations and speed in international trade. As upheld in *Trasporti Castelletti v. Hugo Trumpy*⁷⁷, where it is established that certain commercial practices occur in a branch of international trade to which the parties ought to have been aware of, the jurisdiction agreement is presumed to exist⁷⁸. Therefore, if it is customary in a particular trade to use standard form contracts which the parties do not even read, or recap telexes and practice in that trade dictates that no reply is necessary the parties will be considered as deemed to have consented to have an agreement within the meaning of Article 23.

Article 23 therefore through its four pillars provides a yardstick for identifying whether there is a valid agreement between the parties through the formalities that it sets out⁷⁹. The nature

⁷⁵ Case 313/85, [1986] E.C.R. 3337.

⁷⁶ Op.Cit., at § 9.

⁷⁷ Ibid.

⁷⁸ Ibid. at §29 and §39.

⁷⁹ Article 23 is also applicable to cases which may not be straightforward. At first, under Article 23 it is possible to have a valid exclusive jurisdiction clause allocating jurisdiction to two Member States' courts, *Cf.* Case 23/78, *Meeth v. Glacetal Sarl* [1978] E.C.R. 2133. Furthermore, clauses which identify the court that has jurisdiction by description may also be valid under Article 23 if the wording is precise enough to identify objective factors which will allow the court to determine whether it has jurisdiction, *Cf.* Case C-378/98, *Coreck Maritime v. Handelsveem* [2000] E.C.R. I-9337. However, Article 23 does not cover cases where the parties choose the courts of a non-Member State to rule on their dispute as this is clearly outside the scope of Article 23 and the national rules of procedure of the court seised will govern the issue of jurisdiction *Cf.* the

of Article 23 is to allow parties the freedom to choose a forum for their future disputes and to give to the court chosen jurisdiction in order to determine the parties' litigation. However, the nature, and status, of Article 23 is greatly undermined by the *lis pendens* rule. It is therefore necessary to examine the relationship between Articles 23 and 27.

3.3.3.2 The Relationship between Articles 23 and 27

The relationship between Articles 23 and 27 of the Brussels I Regulation is an issue of extreme importance, particularly for the law on anti-suit injunctions. Parties frequently specify in their contract a particular forum where disputes should be litigated⁸⁰. Problems, however, surface when one of the parties in breach of the exclusive jurisdiction clause commences proceedings in another Member State court, therefore rendering that court first seised under Article 27. English courts traditionally issued anti-suit injunctions in order to enforce the exclusive jurisdiction clause and to protect the jurisdiction of the English courts⁸¹. The ground upon which such injunctions were issued was that the English courts gave supremacy of Article 23 over Article 27. This rule stood unchanged until the European Court of Justice in *Gasser v MISAT*⁸² reversed that by holding Article 27 as supreme over Article 23.

Thus, the problem in this area of law is twofold. At first, the practice of the English courts to issue anti-suit injunctions within the European Union directly conflicts with the provisions of the Brussels I Regulation. Secondly and directly connected to the first point, the interpretation of Article 23 of the Regulation by the English courts has been causing conflict, particularly in cases where another court is seised of the dispute under Article 27 and the *lis alibi pendens* provisions. The English courts have decided on that issue in 1994 in the *Continental Bank*⁸³ decision, which sparked a series of immense criticism.

3.3.3.2.1 The pre-*Gasser* era and the *Continental Bank* decision

Despite the scepticism⁸⁴ of foreign courts towards English anti-suit injunctions, the English courts used to interpret Article 23 as prevailing over Article 27 and therefore allowed the

⁸⁰ Schlosser Report, § 17. Neither does Article 23 cover a non-exclusive jurisdiction clause, *Cf. Kurz v. Stella Musical* [1992] Ch 196; *Gamlestaden v. Casa de Suecia SA* [1994] 1 Lloyd's Rep. 433.

⁸¹ See for example the maritime contracts discussed *supra* in the Introduction at p. 1.

⁸² *See supra* Chapter I: The English Common Law Framework.

⁸³ Case C-116/02, *Erich Gasser GmbH v. MISAT Srl* [2003] E.C.R. I-14993; [2004] 1 Lloyd's Rep. 222.

⁸⁴ [1994] 1 Lloyd's Rep. 505; [1994] 1 W.L.R. 588.

⁸⁵ See *infra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

issuance of an anti-suit injunction, an example being *Kloeckner v. Gatoil*⁸⁵. In addition, in *Denby v. Hellenic Mediterranean Lines*⁸⁶ it was held that Article 23 took precedence over Article 27 in all situations, including cases where the existence of an exclusive jurisdiction clause under Article 23 was in dispute. Both *Kloeckner*⁸⁷ and *Denby*⁸⁸ were later approved by the Court of Appeal in *Continental Bank v Aeakos Compania Naviera SA*⁸⁹. An American Bank with offices in Greece granted a secured loan to the defendants. The loan agreement, governed by English law, contained a jurisdiction agreement under which:

“Each of the borrowers...hereby irrevocably submits to the jurisdiction of the English courts...but the bank reserves the right to proceed under this agreement in the court of any other country claiming or having jurisdiction in respect thereof.”

In its decision, the Court of Appeal assumed that the existence of a jurisdiction clause *per se* precluded a discussion of the *lis pendens* provisions⁹⁰, thus rendering Article 23 mandatory and equating it in status with Article 22⁹¹. The court further held that Article 23 takes precedence over the *lis pendens* provisions⁹². Therefore, it was held that the existence of an English exclusive jurisdiction clause deprived the Greek court of jurisdiction and that a question of stay under Article 27 did not arise. This decision has been followed ever since⁹³ and has caused a great amount of criticism mainly on the ground that by reaching this decision the court intruded in the Greek court’s sovereignty.

⁸⁵ [1990] 1 Lloyd’s Rep. 177, see particularly p. 195 *per* Hirst J.

⁸⁶ [1994] 1 Lloyd’s Rep. 320. It was held that a slip signed by the underwriter constituted an agreement in writing. Further, Article 23 was self-contained in providing certain criteria of whether or not there is exclusive jurisdiction and therefore the English court had exclusive jurisdiction over the claim against the Greek insurers.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ [1994] 1 Lloyd’s Rep. 505.

⁹⁰ Ibid., at p.510.

⁹¹ Op.Cit.

⁹² Ibid., pp 510-511.

⁹³ See for example *The Bergen* [1997] 1 Lloyd’s Rep. 380 where Clarke J. emphasized that he was bound by the *Continental Bank* decision, although at the end he concluded that Article 17 [now 23] did not apply since the English courts had jurisdiction under Article 7 of the Arrest Convention 1952. However, the position has now changed and the *Continental Bank* decision is no longer good authority, *see infra* 3.3.3.2.3. for the discussion of *JP Morgan v. Primacom* [2005] 2 Lloyd’s Rep. 665.

The decision has been heavily criticised by several scholars⁹⁴ and even characterised as “hopelessly wrong”⁹⁵. The academic debate attributes three main reasons why the case was wrongly decided. First, the Court of Appeal based its reasoning on the European Court of Justice’s ruling in *Overseas Union Insurance Ltd. v. New Hampshire Insurance Co.*⁹⁶ where the Court entered a reservation from its declared primacy of Article 27 for a case where the second seised court has exclusive jurisdiction under Article 22⁹⁷. By attributing equal status to Articles 22 and 23, the Court of Appeal erred in its application of the law⁹⁸. Secondly, the Court of Appeal in *Continental*⁹⁹ adopted the view that legal proceedings in England would be less expensive than legal proceedings in Greece and therefore the anti-suit injunction served the purpose of protecting the claimant from wasteful litigation in Greece. However, as Rogerson argues, this approach was incorrect¹⁰⁰. Finally, the Court of Appeal thought it was unnecessary to address the issue of whether the Greek and the English proceedings involved the same

⁹⁴ Andrew S. Bell, *Anti-Suit Injunctions and the Brussels Convention*, (1994) 110 L.Q.R. 204; Adrian Briggs, *Anti-European Teeth for Choice of Court Clauses*, [1994] L.M.C.L.Q. 158; Pippa Rogerson, *English Interference in Greek Affairs*, [1994] C.L.J. 241, at p. 243-244; Regina Asariotis, *Anti-Suit Injunctions for Breach of Choice of Forum Agreement: A critical Review of the English approach*, [2000] Y.B.E.L. 447.

⁹⁵ Adrian Briggs, *Anti-European Teeth for Choice of Court Clauses*, [1994] L.M.C.L.Q. 158, at p. 159

⁹⁶ [1991] ECR 1-3317; [1992] 1 QB 434.

⁹⁷ “without prejudice to the case where the court second seised has exclusive jurisdiction under the Convention and in particular under article 16 thereof, article 21 of the Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seised.” (emphasis added), *Ibid.* , §26, p. 459.

⁹⁸ In particular, the European Court of Justice in its ruling in *Overseas Union* only offered an opinion on the relationship between Articles 22 and 27 and *not* between Articles 23 and 27. Secondly, one cannot infer an intention by the European Court of Justice to have the same reasoning both for Articles 22 and 23 in relation to Article 27 simply because Article 22 is under Section 5 termed “Exclusive Jurisdiction” and Article 23 is under Section 6 termed “Prorogation of jurisdiction”. Hence, Article 23 does not “properly” give exclusive jurisdiction. Thirdly, if the drafters of the Convention and the new Regulation intended Article 23 to have the same effect as Article 22, then they would have included Article 23 in Article 25. Fourthly, Article 35 requires the non-recognition of a judgment issued in violation of Article 22, yet no judgment may be denied recognition on the ground that the court violated Article 23. Finally, and more importantly, the European Court of Justice ruled on the relationship between Articles 23 and 27 in Case 159/97, *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy* [1999] ECR I-1597. The European Court of Justice was asked, in relation to Article 23, “whether the court (other than the chosen court) which has been called upon to assess the validity of the clause may examine the reasons for it, that is to say the intention of the carrier”. The European Court of Justice concluded that: “the choice of court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down by Article 17”, *Op.Cit.* , at § 49. This ruling shows that the court first seised may carry out the examination of the formal requirements in accordance with Article 23. Therefore, the European Court of Justice has in essence rejected the view of the Court of Appeal in *Continental* that only the court designated by the parties may decide on the question of jurisdiction and consequently that Article 23 prevails over Article 27. For an excellent commentary see Yvonne Baatz, *Objective Test of Validity of Jurisdiction clause under the Brussels Convention on Jurisdiction*, [2000] I.T.L.Q. 44, at p. 50.

⁹⁹ *Ibid.*

¹⁰⁰ “Steyn L.J. also seemed much exercised by the argument that the cost to Continental of defending the Greek proceedings would amount to \$120,000. But this seems quite cheap when compared with the costs of an English action. It was at the least impolite and was possibly impolitic of the English court to emphasise this matter.”, Pippa Rogerson, *English Interference in Greek Affairs*, [1994] C.L.J. 241, at p. 243.

parties and the same cause of action under Article 27. However, it is submitted that this approach was incorrect as well¹⁰¹.

The *Continental Bank*¹⁰² decision opened a back door for anti-suit injunctions in the Brussels I Regulation Framework. The impact of the *Continental Bank*¹⁰³ decision is therefore that an English court, although second seised of the dispute, may not follow the *lis alibi pendens* provisions, and thus not wait for the court first seised to decide on jurisdiction, by issuing an anti-suit injunction in essence blocking the proceedings in the court first seised. As a consequence, the Regulation rules are disregarded completely so is the sovereignty of the first seised court. Consequently, it was imperative for the European Court of Justice to decide on this issue, and this opportunity arose in *Erich Gasser v MISAT*¹⁰⁴.

3.3.3.2.2 The *Gasser* decision and its impact

In *Gasser*¹⁰⁵ the European Court of Justice had to decide on an extremely cardinal issue regarding the interpretation of the Brussels Convention 1968, namely whether the court second seised, chosen by the parties by an exclusive jurisdiction clause, may review the jurisdiction of the court first seised.

The case arose through a disagreement between Gasser, whose office was in Austria, and MISAT, whose office was in Italy. For several years the parties to the dispute had a business relationship under which Gasser sold children's clothing to MISAT. MISAT brought proceedings against Gasser in Rome seeking a ruling that the contract had ceased to exist following a disagreement between them. Gasser subsequently brought proceedings before the Austrian Regional Court (*Landesgericht*) Feldkirch in order to obtain payment for outstanding invoices. Gasser submitted that the Austrian Courts had jurisdiction over the case since a pre-printed exclusive jurisdiction clause appeared on all invoices sent to MISAT by Gasser. MISAT contended that under Article 2 of the Brussels Convention the Italian Courts had

¹⁰¹ There are adequate grounds to believe that Article 28 and not Article 27 should be applied in the case, which in turn would avoid the need for an anti-suit injunction. See for example Andrew S. Bell, *Anti-Suit Injunctions and the Brussels Convention*, (1994) 110 L.Q.R. 204. See also Case 144/86, *Gubish Maschinenfabrik KG v. Palumbo* [1987] E.C.R. 4861 and Case C-406/92, *The Tatry sub nom. The Maciej Rataj* [1994] E.C.R. I-5439.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ [2004] 1 Lloyd's Rep. 222.

jurisdiction over the case and added that proceedings had already been commenced before the Tribunale Civile e Penale di Roma.

The Austrian Regional Court subsequently stayed its proceedings pursuant to Article 27 until the jurisdiction of the Italian Court had been established. Gasser appealed against that decision to the Austrian Court of Appeal (*Oberlandesgericht*) claiming that the Regional Court should not stay its proceedings since it had jurisdiction to decide on the case. The Austrian Court of Appeal, after considering the submissions of both parties, confirmed its jurisdiction as the court for performance of the contract although it declared that there was not an agreement conferring exclusive jurisdiction¹⁰⁶. Nonetheless the Austrian Court of Appeal stayed¹⁰⁷ its proceedings and referred a question to the European Court of Justice¹⁰⁸.

The European Court of Justice thus had to consider a question which was particularly important for the English Courts since the relationship of Articles 23 and 27 was at issue. The *Gasser*¹⁰⁹ decision was therefore much anticipated in the United Kingdom which, notably, participated in the proceedings by making submissions in favour of Gasser. It is quite surprising, however, that Advocate General Léger adopted a position closer to the one adopted by the English courts.

Advocate General Léger¹¹⁰ in essence affirmed the Court of Appeal's decision in *Continental Bank*¹¹¹. At first, the Advocate General afforded an overview of the *Overseas Union* case¹¹² and proceeded by posing the question whether Articles 22 and 23 must enjoy the same status when opposed to the *lis pendens* provisions¹¹³. He then proceeded to distinguish his opinion

¹⁰⁶ “A pre-printed jurisdiction clause in invoices which are always used is not sufficient even if, in many cases, no objection is raised over a period of eleven months.”, *Ibid.*, at §24.

¹⁰⁷ “The proceedings are stayed pursuant to s.90a(1) of the Court Organization Act until a preliminary ruling is received from the Court of Justice of the European Communities. After the ruling is received, the proceedings will be resumed by the court of its own motion.”, *Ibid.*, at p. 20 §R2.

¹⁰⁸ “May a court *other than the court first seised*, within the meaning of the first paragraph of art. 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [the Brussels Convention], *review the jurisdiction of the court first seised if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under art. 17 of the Brussels Convention*, or must the agreed second court proceed in accordance with art. 21 of the Brussels Convention *notwithstanding the agreement conferring jurisdiction?*” (emphasis added)

¹⁰⁹ *Ibid.*

¹¹⁰ [2004] I.L.Pr. 7.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, at §49-50.

¹¹³ *Ibid.*, at §53.

from the one expressed by the Commission¹¹⁴ and agreed with Gasser and the United Kingdom Government, as in his view allowing Article 23 as a derogation from Article 27 would increase legal certainty and decrease conflicting judgments in the European Union¹¹⁵.

The Advocate General clarified this view further by adding that there is no reason why the court second seised, under Article 22, should stay its proceedings since the only option for the court first seised is to declare that it has no jurisdiction and thus *lis pendens* does not arise at all¹¹⁶. He added that the *Overseas Union*¹¹⁷ case did not confine derogation from Article 27 only in cases falling under Article 22 and therefore nothing in the *Overseas Union*¹¹⁸ cases indicates that there should not be a derogation under Article 23¹¹⁹. Therefore, in his view that reasoning can be transposed to Article 23, particularly when the wording of that article makes clear that the court or courts designated by the parties shall have exclusive jurisdiction.¹²⁰ He reinforced this argument by adding that Article 23, read in conjunction with Article 24, means that no other court apart from the court chosen by the parties has jurisdiction¹²¹. Moreover, he added, that the effects of Article 23 are therefore similar to those of Article 22. It may therefore seem just as pointless to require the court second seised to stay proceedings when its jurisdiction derives from Article 23, as when it is based on Article 22¹²².

The second argument put forward by Advocate General Léger is that by not allowing any derogation under Article 23 from the *lis pendens* provisions, the effectiveness and legal certainty of Article 23 are endangered¹²³. He clarified this by pointing to the spirit of Article 23, which depends on the consent of the parties, and as such it would be inconceivable to impose a restriction on Article 23¹²⁴. It therefore follows that since Article 23 is intended to designate,

¹¹⁴ *Ibid.*, at §54.

¹¹⁵ “I consider that Article 17 of the Brussels Convention may constitute a derogation from Article 21 thereof. That analysis is based on the following considerations. First, courts designated under an agreement conferring jurisdiction in accordance with Article 17 have jurisdiction which may be described as exclusive. Second, the argument that the court second seised is obliged to comply with the requirements of Article 21 even if it has exclusive jurisdiction under an agreement conferring jurisdiction is such as to undermine the effectiveness of Article 17 and the legal certainty that attaches to it. Third, the risk of irreconcilable decisions can be significantly reduced.”, *Ibid.*, at §57.

¹¹⁶ *Ibid.*, at §59.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, at §58.

¹²⁰ *Ibid.*, at §60.

¹²¹ *Ibid.*, at §60.

¹²² *Ibid.*, at §61.

¹²³ *Ibid.*, at §62.

¹²⁴ *Ibid.*, at §63-64.

clearly and precisely, a court which is to have exclusive jurisdiction, it thus seeks to secure legal certainty by enabling the parties to determine which court will have jurisdiction.¹²⁵ This of course applies when such consensus is established, since in the opposite scenario an exclusive jurisdiction clause does not exist. Therefore if, according to Article 27, the court with exclusive jurisdiction is obliged to stay proceedings, the effectiveness and legal certainty of Article 23 is endangered¹²⁶. This “disturbing consequence”¹²⁷ will in turn lead to “dilatory conduct”¹²⁸ thus going against the spirit of the Regulation which “seeks to unify the rules on jurisdiction of the Contracting States’ courts”¹²⁹. In the Advocate General’s view, the “problem lies primarily in the interpretation”¹³⁰ of the Regulation.

The third argument put forward by Advocate General Léger is that in order to attain development in international commercial relations, companies must be able to trust agreements between them, that extending also to exclusive jurisdiction agreements¹³¹. He added that the economic burden that parties must incur when proceedings are delayed, particularly for small or medium sized companies, and this was not what the drafters of the Brussels Convention and the Regulation desired¹³².

The Advocate General proposed to the Court a solution under which Article 23 may constitute a derogation from Article 27 only where there is no room for any doubt as to the jurisdiction of the court second seised. This solution is advantageous since:

“it takes into account the requirements of international trade and commerce and at the same time makes economic operators aware of their own responsibilities by encouraging them to conclude agreements conferring jurisdiction which do not in fact leave room for any doubt as to their validity and their scope”¹³³

The Advocate General therefore proposed to the Court that Article 27 “must be interpreted as meaning that a court second seised which has exclusive jurisdiction under an agreement conferring jurisdiction may, by way of derogation from that article, give judgment in the case

¹²⁵ Ibid. ,at §65.

¹²⁶ Ibid. ,at §67.

¹²⁷ Ibid. ,at §68.

¹²⁸ Ibid. ,at §69.

¹²⁹ Ibid. ,at §66.

¹³⁰ Ibid. ,at §69.

¹³¹ Ibid. ,at §71.

¹³² Ibid. ,at §71.

¹³³ Ibid. ,at §82.

without waiting for a declaration from the court first seised that it has no jurisdiction where there is no room for any doubt as to the jurisdiction of the court second seised.”¹³⁴

The proposal of Advocate General Léger was not supported by the European Court of Justice. In particular, the Court held that in cases where the court chosen by the parties is second seised, that court must stay its proceedings until the court first seised decides on its jurisdiction¹³⁵. Gasser and the United Kingdom argued that the automatic application of Article 27 would give the claimant an unfair advantage which would enable him, through proceedings in another Member State which are slow, to control the procedure. Therefore, it was submitted that where a claimant commences proceedings in bad faith and where the court first seised has not decided on the issue of jurisdiction within a reasonable time, an exclusive jurisdiction clause under Article 23 should prevail over the *lis pendens* provisions of Article 27. The European Court of Justice was not in favour of this argument since the Regulation contains no provision under which any of its articles cease to apply because of the length of proceedings in another Member State court.¹³⁶ The Court also stressed that Member States must trust each other’s legal systems and judicial institutions¹³⁷. It followed that a ruling such as the one proposed by Gasser and the United Kingdom would defeat the spirit of the Regulation and defeat legal certainty and therefore:

“Article 21 of the Brussels Convention *must* be interpreted as meaning that it *cannot be derogated from* where, in general the duration of the proceedings before the courts of the Contracting State in which the court is first seised is established is excessively long.”¹³⁸ (emphasis added)

In the case of *Gasser*¹³⁹ therefore the European Court of Justice not only declined to afford a prevailing status to Article 23 over Article 27 and therefore the *lis pendens* rule, but also emphatically declined any derogation from Article 27 even in cases where proceedings are

¹³⁴ *Ibid.*, at §83.

¹³⁵ “Article 21 of the Brussels Convention *must* be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction *must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction*” (emphasis added), *Ibid.*, pp. 229-230.

¹³⁶ *Ibid.*, p. 231.

¹³⁷ *Op.Cit.*

¹³⁸ *Ibid.*, p.231.

¹³⁹ *Ibid.*

commenced in bad faith and last excessively long. The impact of *Gasser*¹⁴⁰ in the area of anti-suit injunctions, as well as in English Law in general, is thus immense.

First, the mechanism which the English courts used in order to issue anti-suit injunctions in the Brussels I Regulation framework in cases of a breach of an English exclusive jurisdiction clause is destroyed. In the pre-*Gasser*¹⁴¹ era the English courts, by using Article 23 as a shield, issued an anti-suit injunction relying on an exclusive jurisdiction clause although being second seised. In the post-*Gasser*¹⁴² era, instances such as *Continental Bank*¹⁴³ now stand in a very unfavourable position of occurring again since the European Court of Justice applied a very narrow interpretation to Article 27 and declined any arguments in favour of derogation.

Secondly, the *Gasser*¹⁴⁴ decision had an impact on general English civil procedure as the ruling affected the flexibility of the English legal system. It is a well known fact that the English legal system is much more flexible than its counterparts on the Continent since it lacks codification¹⁴⁵. This “weakness”, as perceived by scholars on the Continent, is an advantage in commercial and business relations since each case is considered independently, by using the doctrine of precedent, and not by strict adherence to the Codes, as practised on the Continent. It follows that the English legal system affords a more flexible solution for the parties in a commercial dispute. In addition, the English legal system is said to be swift in administrating judgments, its judiciary has expertise in various areas of law and for commercial relations it is chosen since it is a neutral forum. These are some of the reasons why parties in commercial contracts choose English law to apply instead of any other legal system¹⁴⁶. Therefore, the English legal system is perceived by most people in the commercial arena as commercially beneficial and adaptable to changes in the commercial field, because it encompasses mechanisms such as anti-suit injunctions. In that sense, the *Gasser*¹⁴⁷ decision

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ For a comparison between the common law and the civil law systems see commentary by Judge Peter J. Messite of the Institute for the Study and Development of Legal Systems (ISDLS) at http://www.isdls.org/legal_systems_101.html. See also 3.4.

¹⁴⁶ For an analysis of the maritime contract clauses see *supra* the Introduction at p. 1.

¹⁴⁷ Ibid.

limits the flexibility of the English legal system within the European Union framework since it removes a strong weapon from the arsenal of English law¹⁴⁸.

Thirdly, the *Gasser*¹⁴⁹ decision had an immense impact on European Union Law, and in particular on the interpretation of the Brussels Convention and the Regulation. It has to be noted that the ruling of the European Court of Justice did not occur due to mere luck. It is submitted that the European Court of Justice patiently waited, longing the chance to deliver a ruling which would weaken anti-suit injunctions within the European Union framework. The reason for this is that the European Court of Justice has repeatedly stressed¹⁵⁰ the importance of judicial cooperation and mutual trust and respect within the framework of the Brussels Convention. The principle of anti-suit injunctions has managed to distort the peaceful waters of the framework afforded by the Brussels Convention and the Regulation and sometimes enrage other courts on the Continent¹⁵¹. Therefore, it is submitted, the European Court of Justice desired to end this anomaly and to provide full application of the Brussels Convention and the Regulation throughout the European Union and thus no derogation from the rules set out in Article 27.

3.3.3.2.3 Has Gasser blocked the future issuance of anti-suit injunctions in the Brussels I Regulation framework?

The decision of the European Court of Justice clarifies the issue of the status of Article 23 when opposed to Article 27. The issue is whether, post-*Gasser*¹⁵², the English courts will be able to issue anti-suit injunctions. There are three general considerations that have to be made in the outset. First, *Gasser*¹⁵³ involved a jurisdictional issue between Italy and Austria, two civil law systems, and not the United Kingdom. Second, the *Gasser*¹⁵⁴ litigation did not involve the issuance of an anti-suit injunction, hence the European Court of Justice did not have to

¹⁴⁸ As well as contributes to the English court system being slowed down. For a discussion of the issue see *infra* Chapter IV: The Impact of *Turer v Grovit* on Anti-Suit Injunctions.

¹⁴⁹ Ibid.

¹⁵⁰ *Powell Duffryn Plc v. Wolfgang Petreit* [1992] I.L.Pr. 300; *Trasporti Castelletti SpA v. Hugo Trumpy SpA* [1999] I.L.Pr. 492; *Union Insurance Ltd v. New Hampshire Insurance Company* [1992] 1 Lloyd's Rep. 204; *Gubisch Maschinenfabrik KG v. Giulio Palumbo* [1987] E.C.R. 4861.

¹⁵¹ An excellent example is the case of *Re The Enforcement of an English Anti-suit Injunction* [1997] I.L.Pr. 320, discussed in Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

consider that issue. Thirdly, although it has been erroneously argued¹⁵⁵ that *Gasser*¹⁵⁶ only applies to the Brussels Convention and not the Regulation, the *Gasser*¹⁵⁷ decision is equally applicable to the interpretation of the Brussels I Regulation¹⁵⁸.

It is apparent that *Gasser*¹⁵⁹ has overruled the decision in *Continental Bank*¹⁶⁰ and has affirmed its ruling in *Overseas Union Insurance*¹⁶¹. The issue remains, however, whether there are ways around the *Gasser*¹⁶² decision. If there are no ways around *Gasser*¹⁶³, then the issue has been completely resolved, yet if the opposite prevails then there could still be a future for anti-suit injunctions within the European Union framework in cases where the court chosen under an exclusive jurisdiction clause is second seised. It is submitted that the effect of *Gasser*¹⁶⁴ is not to rule inapplicable anti-suit injunctions in the Brussels I Regulation framework. This submission can be clarified with the following set of reasons.

The first issue to remember is that *Gasser*¹⁶⁵ was not an anti-suit injunction case, since it involved a dispute between an Austrian and an Italian party over the existence and validity of their contract. The issue was whether the Austrian court should wait for the Italian court to rule on its jurisdiction or whether it should proceed to give judgment on the case due to the existence of an exclusive jurisdiction clause in the invoices affording exclusive jurisdiction to the Austrian courts. There was no anti-suit injunction issued and there was no discussion of anti-suit injunctions during the proceedings. Anti-suit injunctions are only involved *by implication* since the situation which arose in the *Continental Bank*¹⁶⁶ decision, where the English court did grant an anti-suit injunction, was an issue before the European Court of Justice.

The ruling of the European Court of Justice was simple and, it is submitted, correct in that the court second seised had to wait for the court first seised in order to rule on its jurisdiction

¹⁵⁵ Joaquim-J Forner Delaygua, *Choice of Court Clauses: Two recent Developments*, I.C.C.L.R. 2004, 15(9), 288-296.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ See Yvonne Baatz, *Who Decides on Jurisdiction Clauses?*, [2004] L.M.C.L.Q. 25.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

despite the alleged existence of an exclusive jurisdiction clause affording exclusive jurisdiction to the court second seised. Thus, the European Court of Justice simply applied Article 27. This, however, does not mean that the European Court of Justice ruled on the compatibility and effect of anti-suit injunctions in the Brussels I Regulation framework.

It is submitted that the supremacy of Article 27 over Article 23 is a completely different issue from the compatibility of anti-suit injunctions in the Brussels I Regulation framework. In order to clarify this submission, the following example must be given. Suppose that A commences proceedings in Greece and B commences proceedings in England, rendering the English court second seised. The causes of action and the parties are the same in both proceedings. The parties have stipulated in their contract that the English courts have exclusive jurisdiction. Party B also commences proceedings in England asking for an anti-suit injunction in order to restrain A from pursuing the Greek proceedings. The effect of *Gasser*¹⁶⁷ in this scenario is that the English court must wait for the Greek court to rule on its jurisdiction and not that the English court cannot issue an anti-suit injunction. The academic debate on the issue concentrated more on the destruction of the mechanism created by *Continental*¹⁶⁸, than on the *Gasser*¹⁶⁹ ruling itself.

It is submitted that, although the *Continental*¹⁷⁰ mechanism has been destroyed by *Gasser*¹⁷¹, there may still be room for the English courts to issue anti-suit injunctions in cases of a breach of an exclusive jurisdiction agreement. The reason for this is what is termed, and devised, by the present writer as the *depênage* of court proceedings theory. The theory of *depênage* of court proceedings has as its purpose the severability of causes of action. Take the following example: A brings proceedings in Greece in breach of an English exclusive jurisdiction clause claiming that B is liable for breach of contract. B subsequently brings proceedings in England, therefore rendering the English court second seised, in accordance with the exclusive jurisdiction clause, claiming a declaration that he is not liable for breach of contract and seeks an anti-suit injunction in order to restrain the Greek proceedings. According to the *depênage* of court proceedings theory, the declaration that B is not liable for breach of contract and the anti-suit injunction sought as a remedy for B's right not to be sued abroad should be severed

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

into two separate causes of action. Thus, the result is two causes of action, namely the declaration that B is not liable for breach of contract (Cause 1) and B's right not be sued abroad which has as a remedy the anti-suit injunction (Cause 2). Each cause of action must then be looked through the prism of Article 27. Therefore, the result would be that the cause of action in Greece and Cause 1, are the same and involve the same parties. Hence, Article 27 applies and the English court must wait for the Greek court to rule on its jurisdiction, in accordance with the provisions in Article 27 and the *Gasser*¹⁷² ruling. However, in relation to the cause of action in Greece and Cause 2, the result is different since in such a case the object in each cause of action is different, namely that the cause of action in Greece concerns liability for breach of contract and Cause 2 concerns the issue of an *in personam* order against A to prevent him from continuing foreign legal proceedings. Thus, Article 27 is inapplicable. The next step is to apply Article 28 and examine whether the actions are related. It is submitted that Article 28 would be inapplicable since the issues involved in the two causes of action are so far apart as to render them unrelated. In such a case, the English court is free to continue its proceedings only in relation to Cause 2, the anti-suit injunction, and if it wishes it can proceed in issuing an anti-suit injunction.

Support for the *depeçage* of court proceedings theory can be found in *JP Morgan v. Primacom*¹⁷³, a decision which was handed out after the *Gasser*¹⁷⁴ ruling. The claimant, JP Morgan, acted as agent for a number of banks (the SSLs) under a Second Secured Facility Agreement (SSFA) which provided for a term loan facility to the first defendant, PAG. PAG on-lent the sums advanced to it to the second defendant, PMG, a subsidiary of PAG and guarantor of the loan. Both PAG and PMG were German companies. The SSFA was specifically governed by English law and contained an exclusive jurisdiction clause in favor of the courts of England and Wales. PAG failed to make an interest payment under the SSFA, and as a result accountants were engaged to review the defendants' financial position. PAG failed to make another interest payment on the due date.

¹⁷² Ibid.

¹⁷³ *JP Morgan Europe Ltd. v. Primacom AG and Others* [2005] 2 Lloyd's Rep. 665. For a discussion on the *depeçage* of court proceedings theory and the *JP Morgan* decision see Nikiforos Sifakis, *Exclusive jurisdiction clauses - Articles 27 and 28 of the Brussels I Regulation - The "Italian torpedo" - Anti-suit Injunctions*, (2006) 12(5) J.I.M.L. 307.

¹⁷⁴ Ibid.

On 9 December 2004 the defendants issued a press release stating that they had issued proceedings in Mainz. On 22 December 2004 they issued a further press release stating that they had issued proceedings in Frankfurt. From September 2004 press reports and market rumors indicated that the defendants were intending to dispose of two subsidiary companies (collectively Multikabel) without first obtaining the consent of the SSLs. Multikabel were together the defendants' most valuable asset and principal source of cash flow. As a result of concerns over any possible sale of Multikabel, JP Morgan commenced proceedings in England on 23 December 2004 seeking an order preventing disposal of Multikabel without the contractual consent required (the Injunction Proceedings). On 10 January 2005 JP Morgan obtained an interim injunction preventing the defendants from selling Multikabel without the SSLs' consent. JP Morgan subsequently amended the Injunction Proceedings to include a claim for a declaration that the SSLs were entitled to withhold consent to the proposed sale to Multikabel. On 23 February 2005 JP Morgan commenced proceedings in England (the Accountants Proceedings) claiming specific performance of the provisions in the SSFA requiring PAG to provide financial information and documents, in order to obtain a copy of the accountants' preliminary report. On 18 January 2005 JP Morgan commenced proceedings in England (the Declaratory Proceedings) claiming declarations that the provisions in the SSFA relating to the payment of interest were valid, binding and enforceable, and that the notice of default was also valid. In the Mainz proceedings the defendants sought a declaration that German law would disapply English law on the basis that the provisions of the SSFA were unconscionable, immoral and unenforceable as a matter of public policy in Germany. In the Frankfurt proceedings the defendants contended that the interest provisions in the SSFA were unenforceable, and therefore the SSLs were not entitled to terminate the SSFA.

The defendants applied under CPR Part 11 for a stay of the three sets of English proceedings on the basis that the defendants had commenced proceedings in Germany in Mainz and Frankfurt, and that the German courts were the courts first seised of proceedings involving the same cause of action as the three sets of English proceedings. The Court correctly embarked on an examination of whether the three sets of English proceedings and the two sets of German proceedings involved the same parties and the same cause of action under Article 27. Regarding the declaratory English proceedings and the two sets of German proceedings, the Court found that they involved the same parties and the same cause of

action¹⁷⁵ and therefore the declaratory proceedings were stayed¹⁷⁶, by virtue of *Gasser*¹⁷⁷. However, in relation to the Accountants proceedings and the Injunction proceedings, the Court found that they did not involve the same cause of action as in the two sets of German proceedings nor were the actions in those proceedings related, within the meaning of Article 28, in order for them to be heard together¹⁷⁸. The Court therefore held that:

“Primacom’s application for a stay of the Declaratory Proceedings succeeds under Article 27 but its applications for a stay of the Injunction Proceedings and the PwC (Accountants) Proceedings fail, whether under Article 27 or 28. The interim injunctions in the Injunction Proceedings continue until trial or further order herein. The stay of the Declaratory Proceedings against PAG and PMG operates until the Mainz court decides on its own jurisdiction (since both Primacom defendants are parties there) and in the case of PMG also operates until the decision of the Frankfurt court on its jurisdiction (since only PMG and not PAG is party to those proceedings).”¹⁷⁹

The *JP Morgan*¹⁸⁰ decision, in particular the Court’s view regarding the Accountants and Injunction proceedings, is of extreme importance, particularly for supporting the *depeçage* of court proceedings theory. Of course, the case *inter alia* involved an interim injunction and not an anti-suit injunction, yet it is submitted that the decision is equally applicable to anti-suit injunctions. The main reason for this is that when proceedings for an anti-suit injunction are brought, they do not necessarily involve the same cause of action as in the foreign proceedings. One may argue that the *JP Morgan*¹⁸¹ decision may only apply where the proceedings for an anti-suit injunction are brought separately from the proceedings involving the same cause of action as in the foreign proceedings. It is submitted that this argument will fail simply because that is the exact reason for developing the theory of *depeçage* of court proceedings, advanced by the present writer, in the first place.

¹⁷⁵ Ibid., at §§ 43-50. For the proper test in identifying whether the proceedings involve the same parties and the same cause of action, as well as the test for related actions, *see supra* the discussion of Articles 27 and 28 in 3.3.2.

¹⁷⁶ Op.Cit.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid., at §§ 51-68.

¹⁷⁹ Ibid., at §77, *per* Cooke M.J.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

There are, however, two issues which instantly arise by applying the *depeçage* of court proceedings theory, namely, first, whether although by applying this theory the Brussels I Regulation framework is not disturbed, the effectiveness of an anti-suit injunction is destroyed by *Gasser*¹⁸² anyway, and, second, whether the issue of an anti-suit injunction by an English court has been outlawed by *Turner v. Grovit*¹⁸³. Regarding the first issue, it is submitted that the effectiveness of an anti-suit injunction is in fact not disturbed by the *Gasser*¹⁸⁴ ruling. The effectiveness of anti-suit injunctions has been a major issue before the *Gasser*¹⁸⁵ decision, due to the dislike expressed by foreign courts for anti-suit injunctions¹⁸⁶. In particular, in *Re The Enforcement of An English Anti-Suit Injunction*¹⁸⁷, the Düsseldorf Court of Appeal took the view that because the principle of anti-suit injunctions infringes the sovereignty of the German courts, any anti-suit injunction issued by an English court would not, and should not, be enforced in Germany. In addition, in *The Front Comor*¹⁸⁸ Professors La China and Righetti submitted that the Italian Courts' view on anti-suit injunctions is in line with that expressed by the Düsseldorf Court of Appeal in *Re The Enforcement of An English Anti-Suit Injunction*¹⁸⁹ in that the Italian Courts will "regard an injunction as unenforceable and probably as either as neutral or as irrelevant to their jurisdiction",¹⁹⁰.

The second issue, namely whether the effect of *Turner v. Grovit*¹⁹¹ is to outlaw the issuance of an anti-suit injunction in the Brussels I Regulation framework, will be examined in the following Chapter¹⁹². Yet it is worth noting at this point that the impact of *Turner v. Grovit* on anti-suit injunctions is far greater than that of *Gasser*, as *Gasser*¹⁹³ merely clarified the status of Article 23 as opposed to Article 27. To put this argument another way, it does not mean *per se* that by interpreting Article 27 as supreme over Article 23, an English court cannot issue an anti-suit injunction based on *Gasser* alone.

¹⁸² *Ibid.*

¹⁸³ Case C-159/02, [2004] E.C.R. I-3565; [2004] 2 Lloyd's Rep. 169.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ See *infra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

¹⁸⁷ [1997] I.L.Pr. 320.

¹⁸⁸ [2005] 2 Lloyd's Rep. 257.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*, at §44.

¹⁹¹ *Ibid.*

¹⁹² See *infra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

¹⁹³ *Ibid.*

3.3.4 Anti-Suit Injunctions: A Provisional Measure? – Article 31

By Article 31¹⁹⁴ of the Brussels I Regulation a Member State court is allowed to grant provisional or protective measures available under its legal system in order to protect proceedings before it even where another Member State court has jurisdiction¹⁹⁵. Measures which fall under Article 31 are freezing, or *Mareva*, injunctions, interlocutory injunctions and disclosure orders. However, anti-suit injunctions do not fall under Article 31. The purpose of this section therefore is to examine the reasons why anti-suit injunctions are not considered as a provisional measure and assess whether they should.

In order to properly assess the issue, an examination of the meaning of provisional measures, as well as the conditions applied in order for a measure to fall under Article 31, must be examined. The issue of the meaning of provisional measures was examined by the European Court of Justice's judgment in *Van Uden v. Deco Line*¹⁹⁶. The issue was whether an order relating to the payment of debts arising under a contract containing an arbitration agreement, known under Dutch law as a *kort geding*, fell under Article 31 as a provisional measure. The European Court of Justice in answering the question afforded a set of conditions in order for a measure to fall under Article 31.

The European Court of Justice's judgment at first afforded two general rules applicable in all cases. First, in order for Article 31 to apply the dispute must fall within the scope of the Regulation¹⁹⁷ and second, Article 31 cannot be used to bring within the scope of the Regulation measures relating to matters which are excluded in Article 1¹⁹⁸. The European Court of Justice then turned to consider the conditions applied in order to determine whether

¹⁹⁴ Article 31: “Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.”

¹⁹⁵ The position in England used to be that the English court only had jurisdiction to grant provisional measures when it also had jurisdiction over the substantive claim, cf. *Siskina (Owners of cargo lately laden onboard) v. Distos Compania Naviera S.A.* [1979] A.C. 210. However, that position was altered by Section 25 of the Civil Jurisdiction and Judgments Act 1982, and thus the English courts have jurisdiction to grant provisional measures where the substantive proceedings are conducted in another Member State, cf. *Crédit Suisse Fides Trust S.A. v. Cuoghi* [1998] Q.B. 818. This is applicable even in cases where an exclusive jurisdiction clause gives exclusive jurisdiction to the courts of another Member State, cf. L. Collins, *Provisional Measures, The Conflict of Laws and the Brussels Convention* (1981) 1 Y.B.E.L. 249, or when the *lis alibi pendens* provisions operate, cf. *Republic of Haiti v. Duvalier* [1990] 1 Q.B. 202.

¹⁹⁶ Case C-391/95, *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco Line*, [1998] E.C.R. I-7091.

¹⁹⁷ At § 28.

¹⁹⁸ At § 30.

a measure falls under Article 31. The first condition is that the measure, or order, must have as its purpose to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought from the court having jurisdiction over the dispute¹⁹⁹. The second condition is that the measure must be provisional in character; therefore the court handing down the measure must place a time limit on the order²⁰⁰. The final condition is that a real connecting link must exist between the subject matter of the provisional measure and the territorial jurisdiction of the court before which the measure is sought²⁰¹.

The European Court of Justice applied these conditions to the facts of the case and ruled that the *kort geding* ordered by the Dutch court did not fall under Article 31 as a provisional measure. The reasoning behind this ruling is that a *kort geding* does not guarantee to the defendant repayment of the sum ordered in case the claimant is unsuccessful regarding the substance of his claim nor does it relate to specific assets of the defendant located within the jurisdiction of the issuing court²⁰². Furthermore, a claimant could circumvent the Regulation rules by securing interim payment of the contractual consideration in his country of domicile, where those courts would not have jurisdiction, and then recognise and enforce the *kort geding* in the defendant's country²⁰³. The *Van Uden*²⁰⁴ decision was taken a step further by the *JP Morgan v. Primacom*²⁰⁵ decision, where Cooke J. *inter alia* discussed the issue of whether the court should continue the interim injunction as a protective measure under Article 31 in case it granted a stay of the injunction proceedings. The court found that even when a court is second seised, it is still allowed to issue provisional measures. After considering the requirements for issuing provisional measures²⁰⁶, Cooke J. held that he would have ordered the injunction to continue by virtue of Article 31.

In order to assess whether anti-suit injunctions fall under Article 31 the aforesaid conditions have to be applied. It seems that an anti-suit injunction would satisfy the first requirement in *Van Uden*²⁰⁷ as the effect of an anti-suit injunction is to prevent a party from commencing or

¹⁹⁹ At § 37.

²⁰⁰ At § 38.

²⁰¹ At § 40.

²⁰² At § 47.

²⁰³ At § 46.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ See Ibid. *Van Uden*; See also *Motorola Credit Corporation v. Uzan and Others (No.6)* [2003] EWCA Civ 752; [2004] 1 W.L.R. 113.

²⁰⁷ Ibid.

continuing proceedings abroad and consequently a factual or legal situation is safeguarded. The matter is therefore preserved as *res non judicata* and Article 31 would be applicable. Matters become more complicated, however, when the second condition in *Van Uden*²⁰⁸ is applied. One may observe that there are two stages in the process of a party requesting an anti-suit injunction. Usually a party seeking to restrain another will move swiftly to obtain first an interim anti-suit injunction and then commence proceedings in order to ask the court to order the interim anti-suit injunction be transformed to a final anti-suit injunction. The interim anti-suit injunction, in other words an anti-suit injunction which has inherent a time limit, would satisfy the second *Van Uden*²⁰⁹ requirement as it is provisional in character due to the time limit imposed. However, when a final anti-suit injunction is ordered, which does not have any inherent time limits, the second requirement in *Van Uden*²¹⁰ is not satisfied as the final anti-suit injunction is not provisional in character. Finally, the third *Van Uden*²¹¹ requirement is satisfied as the English courts have jurisdiction to issue worldwide provisional measures²¹².

It is therefore evident that the only hurdle in clarifying an anti-suit injunction as a provisional measure under Article 31 is the fact that the order is final and thus it does not have any inherent time limits. One may, however, advance the argument that there is a time limit inherent in an anti-suit injunction in that if the claimant in the foreign proceedings complies with the order then the anti-suit injunction expires. However, that is far from the truth since the anti-suit injunction is an *in personam* order and as such it operates again should the claimant commence another set of proceedings in a foreign court. The theoretical question, however, which instantly arises is whether an anti-suit injunction combined with another order would be capable in satisfying the second *Van Uden*²¹³ requirement. Another way of putting it is to take the example of a virus which mutates into another virus which entails elements of two viruses thus making it stronger. Such a mutation occurred in the *Banque Worms*²¹⁴ decision where the order issued by the French Cour de Cassation was a *saisie conservatoire*, or Mareva

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² In the context of worldwide Mareva injunctions see for example *Republic of Haiti v. Duvalier* [1990] 1 Q.B. 202; *Derby & Co. Ltd. v. Weldon* [1990] Ch 48; *Derby & Co. Ltd. v. Weldon* (Nos 3 & 4) [1990] Ch 65; *Derby & Co. Ltd. v. Weldon* (No 6) [1990] 1 W.L.R. 1139 and D Capper, *The Worldwide Mareva Injunction Marches On* [1991] L.M.C.L.Q. 26.

²¹³ *Ibid.*

²¹⁴ *Banque Worms c. Epoux Brachot*, Cass. Civ. 1re, 19 Nov 2002, J.C.P. 2002.II, 10 201, concl. Sainte-Rose, note Chaillé de Néré, D.2003.797, note Khairallah. For a discussion of the case see *supra* Chapter II: Anti-Suit Injunctions: The Continental Approach.

injunction, which however also had anti-suit injunction elements as it prevented the bank from continuing the Spanish proceedings. Thus, would such a *Mareva* anti-suit injunction be sufficient to satisfy the *Van Uden*²¹⁵ requirements for the purposes of Article 31? The first and third *Van Uden*²¹⁶ requirements would be satisfied by default as both a *Mareva* and an anti-suit injunction satisfy those requirements on their own standing. The crucial determining factor would therefore be the second *Van Uden*²¹⁷ requirement, as the issue is whether, as a mutated virus does, the *Mareva* anti-suit injunction has the inherent time limit of a *Mareva* injunction or whether it has no time limit as an anti-suit injunction.

The purpose of the order issued by the French court was to prevent the creditors from continuing proceedings in Spain in order in turn to prevent them from recovering more than the dividend to be expected from the French administration. It is submitted that this *Mareva* anti-suit injunction would fall under Article 31 and satisfy the second *Van Uden*²¹⁸ requirement as the time limit of the *Mareva* injunction would be the element passing on to the *Mareva* anti-suit injunction whilst the “no time limit” element of an anti-suit injunction would be lost during the mutation process. The reason for this is that the main purpose of the *Mareva* anti-suit injunction was to freeze the Spanish property while its anti-suit element is merely consequential as it would make nonsense to issue such an order if the assets were to be lost through proceedings elsewhere.

Would then a *Banque Worms*²¹⁹ type of *Mareva* anti-suit injunction, which would fall under Article 31, be the answer for commercial parties who often become victims of tactical litigation via the operation of the “Italian torpedo” phenomenon²²⁰? It is submitted that such an injunction would be a good alternative as, through the application of Article 31, the decisions in *Gasser*²²¹ and *Turner*²²² are bypassed and the court can therefore grant it even where it is second seised. On the one hand, such an injunction would be useless for parties such as Mr. Turner whose dispute is purely an employment one. On the other hand, such an injunction could become a very useful tool for parties in the maritime business particularly

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ For a discussion of “Italian Torpedoes” see *infra* Chapter IV: The Impact of *Turner v. Grovit* on Anti-Suit Injunctions.

²²¹ Ibid.

²²² Ibid.

when the party whose conduct is abusive is a shipping company the claimant may ask for the *res* to be arrested thus providing security for his claim²²³.

Arguing in favour of the inclusion of anti-suit injunctions in Article 31 is very difficult, and indeed maybe impossible, due to the application of the European Court of Justice's judgment in *Van Uden*²²⁴. However, it is quite possible that *Banque Worms*²²⁵ type of injunctions would fall under Article 31 thus affording a valuable alternative against tactical litigation.

3.4 The Brussels I Regulation: A clash of Common Law and Civil Law

The two preceding Chapters established that, although anti-suit injunctions are available under some Continental systems, there is a difference in perception of jurisdiction matters between common law and civil law systems. The clash between the two systems becomes more acute when transposed into the Brussels I Regulation framework. It is in this context where the conflict exists and it is therefore necessary to assess this issue.

The examination²²⁶ of the English common law rules for the issuance of an anti-suit injunction reveals a clash of ideology between the English traditional system, where the protection of the parties' rights is paramount, and the Continental systems, where the role of the courts as dispute adjudicators is one of public law. This clash become even more acute when transposed into the Brussels I Regulation framework, and was best described by Lord Goff in the following way:

"This part of the law is concerned with the resolution of clashes between jurisdictions. Two different approaches to the problem have emerged in the world today, one associated with the civil law jurisdictions of continental Europe, and the other with the common law world. Each is the fruit of a distinctive legal history, and also reflects to some extent cultural differences...On the continent of Europe...the essential need was seen to be to avoid any such clash between

²²³ Cf. Section 26 of the Civil Jurisdiction and Judgments Act 1982. In relation to arbitration see Section 11 of the Arbitration Act 1996. See also *The Nordglint* [1988] 1 Q.B. 183; *The Silver Athens (No 2)* [1986] 2 Lloyd's Rep. 583; *The Moschanthy* [1971] 1 Lloyd's Rep. 37; *The Yuta Bondarovkaya* [1988] 2 Lloyd's Rep. 357; *The Havhelt* [1993] 1 Lloyd's Rep. 523.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ For an analysis of the traditional English common law rules see *supra* Chapter I: The English Common Law Framework.

member states of the same community. A system, developed by distinguished scholars, was embodied in the Brussels Convention, under which jurisdiction is allocated on the basis of well-defined rules. This system achieves its purpose, but at a price. The price is rigidity, and rigidity can be productive of injustice. The Judges of this country...have to accept the fact that the practical results are from time to time unwelcome. This is essentially because the primary purpose of the Convention is to ensure that there shall be no clash between the jurisdictions of member states of the Community. In the common law world, the situation is precisely the opposite. There is, so to speak, a jungle of separate, broadly based, jurisdictions all over the world. In England, for example, jurisdiction is founded on the presence of the defendant within the jurisdiction, and in certain specified (but widely drawn) circumstances on a power to serve the defendant with process outside the jurisdiction.”²²⁷

The different nature of the English common law rules, on the one hand, and Continental systems, including the Brussels I Regulation, on the other, is in the centre of the question dealt by this thesis.

From the outset, it is worth noting that the Brussels I Regulation is much closer to civil law systems than common law systems. Of course, this is normal, especially when taking into account that the creators of the Brussels Convention 1968 were in their majority members of the civil law family. As Lord Goff observed, both the Brussels Convention 1968 and the Brussels I Regulation are to be considered as children of civil law²²⁸. Being in the minority, the English courts have gradually faced problems regarding the compatibility of the English jurisdiction system with that of the Brussels Convention 1968. It is very interesting to observe that, as European integration increased so did the conflicts of law between the English and

²²⁷ *Airbus v. Patel* [1998] 1 Lloyd's Rep. 631, *per* Lord Goff at p. 636.

²²⁸ See also *Continental Bank v. Aeakos Compania Naviera* [1994] 1 Lloyd's Rep. 505; [1994] 1 W.L.R. 588 where the Court of Appeal said that: “The genesis of the Convention is the jurisprudence of the civil law rather than the common law. Since the original states were all civil law countries, and the United Kingdom played no role in the drafting of the Brussels Convention, this is hardly surprising. Traditionally, English Courts assert a discretion to enjoin a party by injunction from pursuing foreign legal proceedings in breach of an exclusive jurisdiction clause. The idea that a national Court has discretion in the exercise of its jurisdiction does not generally exist in civilian systems”, *per* Steyn L.J. at p.510. Note that Steyn L.J., as he was then, had a great experience on the civil law system since he practised as an advocate for many years in South Africa.

the European framework on jurisdiction. In this context, the best illustration for the existence of such conflict is the principle of anti-suit injunctions.

This anomaly has been best described by Briggs as a dialogue between chickens and ducks²²⁹. On the one hand, the English approach to jurisdiction is one which sees the issue in terms of private law rights and, on the other hand, the Brussels I Regulation approach which assess the issue from a public law stance since the Regulation is seen as containing instructions to the Member State courts which are beyond the power of the parties²³⁰.

It is submitted that this difference in perception on issues of jurisdiction, particularly in relation to anti-suit injunctions, stems from the central difference between common law and civil law systems. It is, therefore, submitted that the root of the problem is a particular element of English law, namely Equity, which is scarce in civil law legal systems due to the existence of the Codes.

The notion of Equity²³¹ in the way and form known under the English legal system is non-existent under civil law systems. It is submitted that the absence of Equity in civil law systems is the first reason why anti-suit injunctions are absent or scarce in those legal systems which in turn has a result anti-suit injunctions being treated with scepticism.

Although there is a common law existent in the civil law tradition, the common civil law often referred to as the *ius commune*, it is extremely different from the English Common Law. The great difference between the two notions of law is the English principle of Equity²³².

²²⁹ Adrian Briggs, *The Impact of Recent Judgments of the European Court on English Procedural Law and Practice*, Zeitschrift für Schweizerisches Recht 124 (2005) II 231-262.

²³⁰ This is evident from the European Court of Justice decision in Case C-159/02, *Turner v. Grovit* [2004] E.C.R. I-3565; [2004] 2 Lloyd's Rep. 169, analysed *infra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

²³¹ For a historical account on Equity see Jill E. Martin, *Hanbury and Maudsley Modern Equity*, 14th ed., (1993), London: Stevens & Sons. For an excellent and more detailed account on the History of Equity see Spence, *The Equitable Jurisdiction of the Court of Chancery (1846-1849)*; Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery (1890)*; Potter, *Historical Introduction to English Law and its Institutions* (4th ed.); Jones, *the Elizabethan Court of Chancery*; (1965) 81 L.Q.R. 562; (1966) 82 L.Q.R. 215. See also *Heath v. Rydley* (1614) Cro.Jac. 335; *Bromage v. Genning* (1617) 1 Rolle 368; *Throckmorton v. Finch* (1598) Third Institute 124; *Reports of Cases in Chancery*, App. 1, p. 49; 21 E.R. 588; *Pugh v. Heath* (1882) 7 App.Cas. 235.

²³² "In England the rigidity of the Common Law, a system of positive law linked to procedure considerations, made necessary the elaboration of certain rules, called *rules of equity*, intended to complete and correct the Common law. Such a need was never experienced in the Romano-Germanic family and, as a result, its member-countries know nothing of the fundamental English distinction between Common law and Equity.

To a civil lawyer the idea that two parallel branches of law operating at the same time, a strict one, the common law, and a more flexible one, Equity, is simply inconceivable as the Law is supposed to be equitable in the first place. As such, the law, as presented in the Codes, must always have as its element equity in order to qualify as law. One may observe that this perception by civil lawyers is not accurate, as the equity of the law, in other words its inherent justice and fairness, is a whole different thing than Equity as a separate branch of the law. It seems that the English courts use two yardsticks in order to afford a ruling on a case, whereas the civil law system has both inherent in the Codes.

The civil law system developed in such a way as to have a coherent system of rules which would administer procedure and achieve justice. The existence of those rules in the Codes rendered superfluous the development of Equity as a separate branch of law. As such, most equitable remedies known in English law are non-existent in civil law²³³ due to the strict application of the Codes and the absence of wide judicial discretion. The reason why anti-suit injunctions are not, or are scarcely, issued by civil law courts systems is simply because Equity is not existent as a separate branch of law; and without Equity one cannot have equitable remedies. The question which instantly arises is why, taking into account the aforesaid, anti-suit injunctions are present in some civil law systems, like for example Germany and absent in others, such as Greece.

The legal systems of Europe can be divided into two broad categories, namely the Romano-Germanic family which is greatly affected by Roman Law and the Common Law family to which England belongs to. As each family of law evolved different legal concepts and principles were applied. In addition, there are several variations between legal systems in the same family. Thus, one examining whether anti-suit injunctions are available under the Romano-Germanic family must look at each legal system of that family separately and assess the issue. Nonetheless, there are certain basic principles which are common in all Romano-Germanic family members which point towards the way in which the Law is perceived. It is submitted that it is this very difference between the two legal families, including the variations between members of each family, that render this phenomenon the second reason why anti-

The idea of a strict law which is not “equitable” ran counter to the very idea of law as conceived by the universities; such a law could clearly not be suggested as a model.”, Jill E. Martin, *Hanbury and Maudsley Modern Equity*, 14th ed., (1993), London: Stevens & Sons.

²³³ Although some are, as for example specific performance: see the Dutch Civil code Article 3:296 BW.

suit injunctions are absent or scarce in those legal systems which in turn has resulted in anti-suit injunctions being treated with scepticism.

In comparing the two legal families, regarding anti-suit injunctions, one has to examine the way in which the Law as a concept is perceived. This in turn necessitates an examination of the methodology under which the law is administered and the way in which its organs interpret it. Those issues will now be examined in turn.

The methodology under which the law is administered is different in civil law countries as compared to common law countries. In civil law countries the methodology used in order to administer the law is through the Codes and the legislation passed through Parliament. The Codes make provision for all aspects of litigation which must be followed by lawyers and judges alike. In addition, judges are bound to apply the law, in other words the legislation applicable to the case in hand and must always observe proper application of the Constitution. As such, a civil law judge is not a lawmaker, he is simply an interpreter of the law. For example, in the French civil law tradition, a judge does not make new law; he or she merely interprets the intention of 'the legislator'. The role of interpretation is traditionally approached more conservatively in civil law jurisdictions than in common law jurisdictions. When the law fails to deal with a situation, doctrinal writers and not judges call for legislative reform, though these legal scholars sometimes influence judicial decision making. Civil law judges also refer to the interpretation of codal provisions and they look for an underlying rationale not only in the particular text, but its relationship to the whole structure of the code as an organizing structure that reflects order in a civil society. The role of the judiciary in a civil law system, therefore, when assessing issues of jurisdiction is one of public law.

In contrast, in common law countries legislation, or as referred to in England statutes, comes second, since its purpose is only to correct the work of judicial decisions, as the doctrine of precedent is the rule applicable. A judge therefore in a common law system is a lawmaker as his decision will directly impact the law. A lower court judge cannot disregard a House of Lords judgment simply because any judgment by the House of Lords takes precedence over all lower court judgments. In essence, there is a strict hierarchy which must be followed by lower court judges and that ensures uniformity in the law. The law thus can only be changed when the House of Lords decide so, and their decision must be applied by all other judges in

lower courts. This is alien to a civil law judge, as the doctrine of precedent, although taken into account, is not a principle to be strictly followed. The two legal families have therefore two different methodologies in administering the law.

The interpretation of the law by its organs, in other words the courts, is also different. A civil law judge has much less discretion compared to a common law judge since he or she must strictly apply the codes and the legislation without varying the law. On the contrary a common law judge has much wider discretion to apply and interpret the law in a different way, especially higher court judges.

This discretion extends to the provision of remedies. Therefore, a civil law judge simply cannot issue an anti-suit injunction if the Codes and the legislation do not allow an anti-suit injunction to be issued. And even if he was allowed, if by issuing it there would be a breach of the Constitution the judge will simply avoid issuing it. However, a common law judge can apply and interpret the common law and issue, as something extra, an equitable remedy. It is therefore much easier for a common law judge to issue an anti-suit injunction. In addition, since a Code of Civil Procedure or a written Constitution is absent from the English legal system, a common law judge enjoys wider freedom in imposing injunctions or affording remedies.

This different perception of the law, therefore, brings the two legal families on a head to head collision on the issue of anti-suit injunctions. The civil law judge is simply far more restrained than the common law judge both in issuing anti-suit injunctions and enforcing foreign anti-suit injunctions. In addition, the civil law judge does not need anti-suit injunctions as the Codes, legislation and the Constitution act as safeguards protecting the jurisdiction of the court. That is the reason why anti-suit injunctions may on the one hand be available by law under a legal system, like Germany, and on the other not to be used as it is superfluous²³⁴. Finally, and more importantly, in a civil law system an anti-suit injunction must be available by law whereas in common law systems the remedy is available in Equity. Thus the base on which the jurisdiction is exercised is different. The absence of codification and of a written Constitution in English law necessitates the use of anti-suit injunctions as in the absence of the former, English jurisdiction becomes vulnerable to attack and displacement.

²³⁴ See *supra* Chapter II: Anti-Suit Injunctions: The Continental Approach.

It is quite surprising²³⁵, therefore, to observe that despite these differences, the original Member States of the Brussels Convention 1968 managed to agree on a common system regarding jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The argument has been advanced by Briggs²³⁶ that the original Member States were simply oblivious to the amount of conflict that would be caused between the English and the European jurisdiction regimes over forty years after the introduction of the Brussels Convention 1968. Consequently, in his opinion, the United Kingdom government which entered into negotiations for the creation of the 1968 Convention committed a grave error in not insisting on a much more favourable approach for the English jurisdiction rules in the 1968 Convention context.

Although this argument legally does have merit, in that the creators of the Brussels Convention 1968 could not have predicted what would happen forty years on particularly when the level of European integration at that time was minimal compared to the present time, politically the United Kingdom did not have much choice on the issue. The story of the Brussels Convention 1968, and subsequently the Brussels I Regulation, would be written in a completely different way if the majority of Member States were of common law tradition. However, this was not the case and this allowed civil law to force its way into the European jurisdiction regime. A good illustration of this is the *lis alibi pendens* rule which is a mirror image of the *lis alibi pendens* provisions (*Rechtshängigkeit*) of the German Civil Code²³⁷. Therefore, in the context of anti-suit injunctions, it is not entirely surprising that there is a conflict between the English and the Brussels I Regulation jurisdiction regimes as the Brussels I Regulation regime is a by-product of civil law with which the English jurisdiction regime has a conflict in the first place. As such, European Court of Justice decisions such as *Owusu*²³⁸ or *Turner v. Grovit*²³⁹ are not surprising either as the philosophy behind those decisions is completely different from the philosophy applied by the English jurisdiction regime.

It is submitted that this fundamental fact has been ignored by some English scholars leading to blinkered legal writing which adopt only an English stance on the issue and avoid seeing the

²³⁵ Not surprising initially, as the United Kingdom acceded to the Brussels Convention 1968 in 1978.

²³⁶ Ibid.

²³⁷ See Brice Dickson, *The Reform of Private International Law in the Federal Republic of Germany*, [1985] 34 I.C.L.Q. 231.

²³⁸ Case C-281/02, *Andrew Owusu v. Jackson* [2005] E.C.R. I-1383; [2005] 1 Lloyd's Rep. 452.

²³⁹ Case C-159/02, *Turner v. Grovit* [2004] E.C.R. I-3565; [2004] 2 Lloyd's Rep. 169, analysed *infra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

bigger picture which, in this case, is the influence that civil law tradition has had on the Brussels I Regulation²⁴⁰. Thus, it is further submitted, the fact that anti-suit injunctions are available under some civil law jurisdictions²⁴¹ does not *per se* justify the use of anti-suit injunctions by the English courts in the Brussels I Regulation framework. What it justifies, however, is the reform of the Brussels I Regulation to accommodate the principle of anti-suit injunctions in the Brussels I Regulation framework²⁴².

The conflict of philosophy between the English jurisdiction regime and its European counterpart is central both in assessing the problematic areas and in creating reform proposals for the Brussels I Regulation. Such analysis will be conducted in the following Chapters of this thesis.

3.5 Conclusions

The Brussels I Regulation framework sought to provide a common harmonized framework of rules on jurisdiction and the recognition and enforcement of judgments. This task, however, has greatly been affected by the conflict caused between the Brussels I Regulation and the English common law framework on jurisdiction. The main reason for the occurrence of this conflict, as examined in this Chapter, is owed to the difference in philosophy between the English common law system, which assesses matters of jurisdiction in terms of private law rights, and the more public law focus of civil law systems, to which the Brussels I Regulation is more akin. The discussion further established that this difference is owed to a different perception of the law, as legal branches such as Equity are nonexistent in civil law systems.

The nature of the Brussels I Regulation also gives effect to the philosophy underlying the Brussels I Regulation, with which the English law on jurisdiction conflicts. This conflict is greatly illustrated by the use of the principle of anti-suit injunctions by the English courts. Decisions such as *Continental Bank* demonstrate the difference of philosophy behind the two systems. The case is a prime example of the determination of the English courts to enforce and protect private law rights, as Article 23 was given superior status as opposed to Article 27. In other words, the Court of Appeal interpreted the Brussels jurisdiction framework by

²⁴⁰ See for example, Adrian Briggs, *Anti-Suit Injunctions and Utopian Ideals*, (2004) 120 L.Q.R. 529 where Professor Briggs argues that the *Banque Worms* decision shows acceptance of anti-suit injunctions in Europe.

²⁴¹ See *supra* Chapter II: Anti-Suit Injunctions: The Continental Approach.

²⁴² For reform proposals see *infra* Chapter VII: Reform.

applying the English common law philosophy of enforcing private law rights; that is why it made sense to the Court of Appeal for Article 23 to prevail over Article 27.

The *Gasser* decision is an expression of the exact opposite, namely of a more public law approach to issues of jurisdiction. By interpreting Article 27 as supreme over Article 23 the European Court of Justice in essence gave primary status to mutual trust and respect between Member States than private law agreements. The *Gasser* decision, however, clarified the relationship between Articles 23 and 27, as well as overruled the *Continental Bank* decision therefore making it harder, but not impossible, for English courts to issue anti-suit injunctions. Post-*Gasser*²⁴³, the need to seize the chosen court first increased dramatically²⁴⁴.

²⁴³ Ibid.

²⁴⁴ Up to date, *Gasser* has only been applied in *JP Morgan Europe Ltd. v. Primacom AG* [2005] 2 Lloyd's Rep. 665 and *Bank of Tokyo-Mitsubishi Ltd. v. Baskan Gida Sanayi Ve Pazarlama AS* [2004] 2 Lloyd's Rep. 395. However, up to date, *Gasser* has also been interpreted and applied by the English Courts in arbitration cases. For a discussion on how the *Gasser* decision has been applied in cases regarding arbitration, see *infra* Chapter V: Arbitration Agreements.

CHAPTER IV: THE IMPACT OF TURNER V GROVIT ON ANTI-SUIT INJUNCTIONS

4.1 Introduction

The European Court of Justice ruling in *Turner v. Grovit*¹ is of paramount importance for the discussion of the issue tackled in this thesis. Due to its fundamental nature, a separate Chapter is devoted to the *Turner* ruling as the case may be considered as the authority on anti-suit injunctions in the Brussels I Regulation framework. One can accurately brand *Turner* as a “no choice of forum” case, in other words cases where the parties have not made an express choice of jurisdiction or arbitration in their contracts. However, after the *Turner* ruling was delivered, the academic community in England felt that the impact of the decision is far greater than meets the eye as the reach of *Turner* goes far beyond the “no choice of forum” cases and into exclusive jurisdiction clauses and arbitration agreements.

In order to properly assess the issues posed by *Turner*, it is necessary first to examine the way in which English anti-suit injunctions are perceived by courts on the Continent. This issue is of cardinal importance, especially when assessing *Turner*, as the examination will reveal the stance adopted by Continental courts which may have influenced the *Turner* ruling. The examination will proceed to thoroughly examine and assess the *Turner* decision and to provide argumentation as whether the decision is correct or was wrongly decided. The discussion will then turn to examine the issue of the impact of the *Turner* decision and assess whether a different approach should be adopted in the future. Thus, the issue of compatibility between anti-suit injunctions and the Brussels I Regulation will be thoroughly examined and the scholarly views, as well as the views of the present writer, will be elaborately presented.

4.2 The perception of English Anti-Suit Injunctions by Continental Courts

It has already been established in another part of this thesis², that English courts will exercise their discretion to restrain a person from pursuing or continuing foreign court proceedings. The party which is successful before the English court in its claim for an anti-suit injunction will then proceed to inform and seek to enforce the anti-suit injunction before the foreign court. It is at this point when one can accurately see the way in which anti-suit injunctions are

¹ Case C-159/02, [2004] E.C.R. I-3565; [2004] 2 Lloyd's Rep. 169.

² See *supra* Chapter I: The English Common Law Framework.

perceived by the foreign court before which such injunction is sought to be enforced. The common view held amongst many Continental courts is that English anti-suit injunctions should not be enforced as such orders are a direct infringement of their sovereignty. This is known as the sovereignty issue.

The sovereignty issue is one of the most important arguments advanced by Continental courts against the enforcement of English anti-suit injunctions. A prime example of this is the case of *Re The Enforcement of An English Anti-Suit Injunction*³. Proceedings were brought before the Düsseldorf Regional Court of Appeal. The claimant sought to enforce an anti-suit injunction obtained in the Commercial Court in London against the defendant, by virtue of the Hague Convention⁴. The Düsseldorf Regional Court of Appeal, in very strong language, refused to enforce the anti-suit injunction, as well as condemned it altogether as a principle, on the ground that such an injunction infringed the German courts' sovereignty:

“[S]uch injunctions constitute an *infringement of the jurisdiction of Germany* because the *German courts alone decide*, in accordance with the procedural laws governing them and in accordance with existing international agreements, *whether they are competent* to adjudicate on a matter or whether they must respect the jurisdiction of another domestic or a foreign court (including arbitration courts). Furthermore, *foreign courts cannot issue instructions* as to whether and, if so, to what extent (in relation to time-limits and issues) a German court can and may take action in a particular case.”⁵

(emphasis added)

In addition, the Düsseldorf Regional Court of Appeal stressed that, although an anti-suit injunction is perceived under the Anglo-Saxon concept of justice as an *in personam* order, such an injunction is also indirectly an order to the German courts.

The Court gave three basic reasons for its decision. First, the principle of the co-operation of the parties, a principle deeply rooted in German procedural law, is violated by an English anti-suit injunction simply because one party is ordered not to co-operate thus bringing the

³ [1997] I.L.Pr. 320.

⁴ The Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil And Commercial Matters 1965.

⁵ Ibid. , at §14.

German proceedings to a standstill⁶. Second, the sovereignty of the German courts is infringed by an anti-suit injunction since the rights of the parties are infringed. The Court explained that both parties have a safeguarded right under German procedural law and the German Basic Law to make applications and enter an appearance in order to make submissions. An anti-suit injunction, therefore, by preventing one party from doing so also prevents the German courts from conducting their work properly and thus this constitutes an infringement of the sovereignty of the German courts⁷. Third, an anti-suit injunction infringes the German courts' sovereignty on ground that it is an order purporting to prohibit certain proceedings before the German courts thus violating the principle of free access to the German courts. Therefore, since the principle of free access to the German courts is an expression of the German courts' sovereignty, an anti-suit injunction violates that principle and in turn violates the German courts' sovereignty⁸. Therefore, for the aforesaid reasons, the Düsseldorf Regional Court of Appeal refused to enforce the anti-suit injunction issued by the Commercial Court in London. However, what is more important is the fact that the Düsseldorf Regional Court of Appeal also condemned the principle of anti-suit injunctions as a whole:

“[I]t must be observed that *the sole purpose of antisuit injunctions* (whatever form they take and to whomsoever they are addressed) *is to safeguard the alleged jurisdiction of the foreign court* (in the present case, the London Court of International Arbitration) *and therefore their very object is to interfere with the jurisdiction of the German courts*, which themselves claim the right and have the obligation *exclusively* to determine whether they have jurisdiction in any particular case.”⁹

The negative stance adopted by the German court on the issue of the enforcement of English anti-suit injunctions reveals the seriousness of the sovereignty issue as well as the way in which Courts on the Continent perceive the principle of anti-suit injunctions as a whole¹⁰. Further evidence of support for this approach can be found in the submissions made by Professors La

⁶ *Ibid.*, at §16.

⁷ *Ibid.*, at §17.

⁸ *Ibid.*, at §18.

⁹ *Ibid.*, at §19. Emphasis Added.

¹⁰ Compare with the position adopted by the Canada Federal Court of Appeal in *OT Africa Line Ltd v. Magic Sportswear Corp* [2007] 1 Lloyd's Rep. 85, where the Canadian court did not feel that an English anti-suit injunction constituted a breach of its sovereignty. The court ignored the English anti-suit injunction and considered the issue of *forum non conveniens de novo* merely because of a procedural irregularity. See also Yvonne Baatz, *An English Exclusive Jurisdiction Clause Does Battle with Canadian Legislation similar to the Hamburg Rules*, [2006] L.M.C.L.Q. 143.

China and Righetti in *The Front Comor*¹¹. Professor La China afforded a set of reasons for supporting his argument that the Italian Courts would regard an anti-suit injunction as infringement of their sovereignty. First, Professor La China provided an extract from the Düsseldorf Regional Court of Appeal judgment in *Re The Enforcement of An English Anti-Suit Injunction*¹² in order to demonstrate that the Italian Courts share exactly the same view as the German Courts. In addition, as Mr. Justice Colman observed, the Düsseldorf Regional Court of Appeal judgment “reflects the substance of a view widely held amongst European commercial judges”¹³. Second, Professor La China said that Italian Courts would disregard an anti-suit injunction on the ground that enforcing such an injunction would be against the legal rights given to Italian corporations by the Italian Constitution¹⁴. Third, Professor La China submitted that Italian Courts would disregard an anti-suit injunction because enforcing it would be against the ethos of the Brussels I Regulation, simply because it being issued breaches the principle of mutual respect and trust between all Member States expressed in the Regulation¹⁵. Professor Righetti agreed with Professor La China and added that the Italian Courts would regard an anti-suit injunction as completely irrelevant to their jurisdiction and would simply ignore it¹⁶. The views of the two Professors are best summarised by Mr Justice Colman who said that:

“The effect of this evidence is, in my judgment, that *the Italian courts would simply ignore an anti-suit injunction and would go on to decide the issue whether to stay the proceedings on the grounds of the arbitration clause*. In other words, *they would not treat it as having any effect on their own jurisdiction to determine the point*. It is thus *implicit that an anti-suit injunction would be regarded as an ineffective attempt to anticipate the issue in the Italian proceedings which could be ignored.*”¹⁷

The two examples on the position that Continental Courts take on anti-suit injunctions, however expressed ranging from the strong language used by the Germans to the more “relaxed” Mediterranean approach used by the Italians, as Mr. Justice Colman observed depict the common position held throughout Europe that an anti-suit injunction issued by an

¹¹ [2005] 2 Lloyd’s Rep. 257. For an analysis of the case see *infra* Chapter V: Arbitration Agreements.

¹² Ibid.

¹³ Ibid., at §43.

¹⁴ Ibid., at §43.

¹⁵ Ibid., at §43. For a discussion of the principle of mutual trust and respect see *supra* Chapter III: The Brussels I Regulation Framework.

¹⁶ Ibid., at §44.

¹⁷ Ibid., at §45. Emphasis Added.

English court against a party will not be enforced in any Court on the Continent as it is seen as a direct infringement of its sovereignty and contrary to the underlying philosophy of the Brussels I Regulation¹⁸.

4.3 The *Turner* Ruling

This section will thoroughly examine the *Turner v. Grovit*¹⁹ litigation. The discussion will begin by providing a detailed account of the facts of the case together with the decision at first instance. A discussion of the Court of Appeal decision will follow which is of particular importance since the reasons for the grant of an anti-suit injunction were provided. Furthermore, a discussion of the House of Lords decision will occur which reviewed the law on anti-suit injunctions and the cases where a grant is permissible. Then, the opinion of Advocate General Ruiz-Jarabo Colomer, which greatly resembles the position adopted by courts on the Continent on the principle of anti-suit injunctions presented in the above section, will follow. This will tie in with a detailed discussion of the European Court of Justice ruling and the reasons for not permitting the issuance of anti-suit injunctions in the “no choice of forum” cases.

4.3.1 *Turner v. Grovit* – The Beginnings

4.3.1.1 The facts and the Hearing at First Instance

The facts of *Turner v. Grovit*²⁰ are complex and therefore a detailed account is needed in order to conceptualise what exactly occurred. The defendant, Mr. Grovit, was the owner of Harada and C.S.A., which are part of the Chequepoint group of companies. C.S.A. was incorporated in Spain and carries on business there. In April 1990 the plaintiff, Mr. Turner, commenced full-time employment with a company called China Security Ltd., which was taken over in April 1991 by Chequepoint U.K. Ltd. In December 1997 Chequepoint U.K. Ltd. was taken

¹⁸ Further confirmation that Continental courts adopt a negative stance towards the enforcement of English anti-suit injunctions can also be found in the speech of Sir Antony Clarke M.R. *The Differing Approach to Commercial Litigation in the European Court of Justice and the courts of England and Wales*, delivered at the Institute of Advanced Legal Studies on the 23rd of February 2006, accessible at http://www.judiciary.gov.uk/publications_media/speeches/2006/sp230206.htm. The example of Greece is also of vital importance to illustrate this point, *see supra* Chapter II: Anti-Suit Injunctions: The Continental Approach.

¹⁹ Ibid.

²⁰ Ibid.

over by Harada, an Irish offshore company which had been incorporated as part of the Chequepoint group.

Mr. Turner was employed from the beginning as group solicitor. Clause 3 of his original contract provided that he was to be based in London or 'as you may be directed'. In October 1997 he moved at his own request to the group's Madrid office. He was sent a letter from Chequepoint explaining the terms of his relocation. The plaintiff signed the copy and acknowledged receipt. In February 1998 the plaintiff sent a fax to Mr. Grovit resigning his employment²¹. In February 1998 without warning he left the office where he was working in Madrid. In March 1998 the plaintiff commenced proceedings in the employment tribunal in London claiming against Harada compensation for unfair dismissal and damages for wrongful dismissal. His case was that he had been constructively dismissed as he alleged in his application form to the tribunal that he had been: 'instructed to justify and defend the withholding by my employer and its predecessor Chequepoint U.K. Ltd. trading as Chequepoint U.K., of employees' P.A.Y.E. and national insurance contributions in the U.K. and their equivalents in the Netherlands, and their use without the employees' consent to fund my employer's business, which was in extreme financial difficulties.'

Harada contested the employment tribunal's jurisdiction since Mr. Turner worked for Harada outside the United Kingdom and accordingly he did not have a right to make a claim to the employment tribunal. Three days after Mr. Turner had commenced the employment tribunal proceedings C.S.A. sent him a letter terminating his employment.

The tribunal conducted a preliminary hearing at which it decided in September 1998 that it possessed jurisdiction, and by virtue of section 196(2) of the Employment Rights Act 1996, the plaintiff did not ordinarily work outside Great Britain since his relocation was only temporary and the plaintiff was ultimately expected to return to London. Regarding the wrongful dismissal claim, the tribunal held that by virtue of Article 5 of the Brussels Convention the English courts had jurisdiction to entertain the claim since Harada had a registered office in the United Kingdom, where its central management and control was

²¹ The fax stated: "I regret that because executing and defending certain commercial decisions have caused me overwhelming personal conflict I have decided to give notice of termination of my contract of employment."

exercised. Harada appealed to the Employment Appeal Tribunal which held that the plaintiff had been unfairly and wrongfully dismissed.

In October 1998 C.S.A. issued proceedings against the plaintiff in the Court of First Instance in the Spanish capital Madrid. It alleged that there was a contract of service between the plaintiff and itself and claimed damages estimated at £400,000-£500,000 for breach of contract. In its statement of claim C.S.A. alleged the existence of a contract between itself and the plaintiff, since the plaintiff signed and returned the acknowledgement form. The Spanish proceedings were served on the plaintiff. The plaintiff did not appear to respond to the proceedings in Madrid. Rather in December 1998 he issued a writ claiming an anti-suit injunction to restrain Mr. Grovit and Harada from procuring C.S.A. to continue, and to restrain C.S.A. itself from continuing, the action in the Madrid court. He also sought an anti-suit injunction to restrain the defendants from commencing or procuring the commencement of any other proceedings against him outside England and Wales.

In December 1998 the matter came before Pumfrey J. who, at a preliminary hearing, made an order for an anti-suit injunction²². On the plaintiff's application the issue arose again before Mr. Donaldson Q.C.²³ as a motion by order on 24 February 1999. The learned judge held that it was inconsistent with the principles of the Brussels Convention for an English court to be asked to decide pre-emptively whether a foreign court had jurisdiction, under its own rules of jurisdiction, to entertain proceedings commenced in that court, regardless of whether the issue concerned the jurisdiction under Article 5(1)²⁴, or the denial or postponement of jurisdiction

²² "The proceedings in Spain were started, it will be observed, after the decision of the industrial tribunal, at which the representatives of the respondent, Harada Ltd, left the tribunal during the hearing. Mr. Turner says that this is an example of a manner of conducting proceedings which is entirely characteristic of companies under the control of Mr. Grovit. He says that the Spanish claim is effectively an abuse of process designed to place him under financial pressure by making him defend himself in Spain in proceedings in which he is obliged to employ a local lawyer, that in fact the proceedings are baseless and that this is normal conduct for the Chequepoint companies. Accordingly, he says the Chequepoint companies concerned in these proceedings should be restrained from carrying on the Spanish proceedings and that Mr. Grovit ought to be restrained from making them do so."

²³ [1999] 1 All E.R. (Comm) 455.

²⁴ Article 5(1) provides that: "A person domiciled in a Member State may, in another Member State, be sued: (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question; (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered;
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;
- (c) if subparagraph (b) does not apply then subparagraph (a) applies"

under Articles 27 and 28²⁵. The learned judge maintained the view that it was for the Spanish court to rule on its jurisdiction and not the English court²⁶ while stressing that whilst Article 27 had to be overridden where a party sought, in breach of a binding exclusive jurisdiction clause under Article 23, to seize a foreign forum, there was no exclusive jurisdiction clause in favour of the English courts in the case in hand and therefore *Continental Bank NA v Aeakos Compania Naviera SA*²⁷ had to be distinguished²⁸.

The plaintiff had argued before the learned judge that there was no judicial advantage in bringing the claim in Spain rather than in England, and therefore the claim in Spain was commenced in bad faith in order to institute proceedings which are vexatious and oppressive. The learned judge, however, disagreed²⁹ with that submission and therefore set aside the anti-suit injunction granted by Pumfrey J., subject to a stay on the order for discharge.

4.3.1.2 The Decision in the Court of Appeal

The plaintiff subsequently appealed the decision of Donaldson Q.C. to the Court of Appeal and sought an anti-suit injunction in order to restrain the Spanish proceedings. The reader has to keep in mind a very important point of fact. That is that when Pumfrey J. issued an anti-suit injunction the defendant discontinued the Spanish proceedings. However, at the time between the decision of Donaldson Q.C. and the hearing at the Court of Appeal, the defendants had re-lodged proceedings in Spain. According to the Court of Appeal, in particular Laws L.J., the defendants, by way of forgery, translated a letter sent by the plaintiff to one of his ex-colleagues into Spanish under which they based that the plaintiff had submitted to the jurisdiction of the Spanish courts³⁰. Therefore, at the time of the hearing in the Court of Appeal two sets of proceedings were in progress, first the English proceedings and secondly the Spanish proceedings.

²⁵ For a discussion on Articles 27 and 28 see *supra* Chapter III: The Brussels I Regulation Framework.

²⁶ *Ibid.*, §19, at pp.450-451.

²⁷ [1994] 1 Lloyd's Rep. 505; [1994] 1 W.L.R. 588. See *supra* Chapter III: The Brussels I Regulation Framework.

²⁸ *Ibid.*, §§22-26, at pp. 451-452.

²⁹ “No court can decline a jurisdiction assigned to it by the Convention on the ground that there is a more appropriate parallel jurisdiction in another Convention state...[In the world] of the Brussels Convention all permitted jurisdictions are ex hypothesi appropriate, and none superior to another (save for cases of exclusive jurisdiction such as article 17). For the same reasons it would be wrong for a court by injunction to prevent a claimant from proceeding in any other forum also permitted to him by the Convention.”, *Ibid.*, § 26, p. 452.

³⁰ [2000] Q.B. 345, at pp. 359-361.

The Court of Appeal in its judgment³¹ sought to answer two extremely important questions. First, whether an abuse of process on the part of the defendant had occurred, therefore constituting the Spanish proceedings as vexatious and oppressive. Second, whether the industrial tribunal hearings meant that the English court were first seised of the dispute, under Article 21 of the Brussels Convention, thus affording exclusive jurisdiction to the English courts.

The Court of Appeal at first declared its power³² to issue anti-suit injunctions when it has evidence that proceedings are commenced abroad in a vexatious and oppressive manner³³. After citing several authorities³⁴ the Court of Appeal declared that the commencement of multiple proceedings constitutes a category of abuse. Interestingly, the court stressed that the power to issue anti-suit injunctions is in force regardless of whether those proceedings are commenced within the framework of the Brussels I Regulation or outside³⁵.

The Court of Appeal proceeded in considering four reasons which satisfied its opinion that the case in hand was one where an abuse of process had occurred. First, the Spanish proceedings were launched by C.S.A. within a month of the ruling of the employment tribunal and at the same time Harada filed its appeal to the Employment Appeal Tribunal.

Second, C.S.A. deliberately failed to inform the Spanish court of the tribunal's ruling, thus in the court's opinion if the proceedings in Madrid were brought in good faith C.S.A. would have made clear to the court that there was an existing ruling by the English tribunal which concerned the same cause of action. The court added that C.S.A's application to the Spanish court was "seriously misleading"³⁶. The court also based this on the fact that certain documents, an affidavit by Mr.Grovit, were produced showing that the Spanish court was

³¹ [2000] Q.B. 345.

³² See The Supreme Court Practice 1999, vol. 1, p.352, § 18/19/18.

³³ Ibid. , at p. 357.

³⁴ *Ashmore v. British Coal Corporation* [1990] 2 Q.B. 338; *Yat Tung Investment Co. Ltd. v. Dao Heng Bank* [1975] A.C. 581; *Lonrho Plc. v. Fayed (No.5)* [1993] 1 W.L.R. 1489.

³⁵ "The court's power to protect its own process by the grant of an anti-suit injunction is not in my judgment confined, in the Brussels Convention context, to a case where the English court or tribunal has established jurisdiction under article 21, or plainly possesses exclusive jurisdiction as for instance under article 17. If it were so confined, it would not be a general power to prevent abuse of process at all: it would be a restricted power exercisable only to protect or vindicate the Brussels Convention rules as to jurisdiction." Ibid. , at p. 358. Although his Lordship did not accept a submission made by counsel that the Brussels Convention in Article 24 provides grounds for the issuance of anti-suit injunction.

³⁶ Ibid. , at p. 359.

satisfied as to its own jurisdiction and insisted that the proceedings before it go ahead, yet there was no document from the court itself. The Court of Appeal felt "entirely unpersuaded"³⁷ as to the view the Spanish court had expressed as to the jurisdiction issue. In addition, the Court of Appeal revealed that the defendant's solicitor wrote to the court stating that the Spanish court had been made aware by the plaintiff himself of the tribunal's decision, as well as the jurisdiction issue, and yet the Spanish court had determined that it possessed jurisdiction. The Court of Appeal added that the plaintiff's response to the Spanish claim was to deny submitting to the jurisdiction of the Spanish court. The court further added that the Spanish proceedings were commenced on the basis of a forged document which the defendant's translated into Spanish, taken from a letter sent by the plaintiff to one of his ex-colleagues. The Court of Appeal explained that although the plaintiff had not asked his ex-colleague to have the letter sent to Spain, the opposite was in fact done.

Third, in the court's opinion C.S.A. built a case in Spain which depended on the Spanish court being satisfied that the contract of employment between the plaintiff and the defendant had survived. The document showing this, in the court's opinion, in fact showed the exact opposite in that the contract had actually been terminated³⁸. Fourth, according to the Court of Appeal, Mr. Grovit was the guiding mind, controller and ultimate owner of Harada and C.S.A. therefore he was the orchestrating mind behind the commenced of the Spanish proceedings³⁹.

The court therefore found that it was clear that the two sets of proceedings involved the same cause of action and that was done with the knowledge of Mr. Grovit. That was further enforced by the fact that no one on the defendant's behalf had gone on oath to claim the existence of a contract between the plaintiff and C.S.A.

The Court of Appeal, therefore, based the aforesaid four reasons concluded that:

"On the question of abuse of process, it is to my mind plain beyond the possibility of argument that the Spanish proceedings were launched in bad faith in order to vex the plaintiff in his pursuit of the application before the employment tribunal here... The documents lead to the ineluctable conclusion that, as I have said, the Spanish proceedings were intended and

³⁷ Op.Cit.

³⁸ Ibid. , at p. 361.

³⁹ Op.Cit.

intended only to oppress the plaintiff and as such fall to be condemned as abusive as a matter of elementary principle.”⁴⁰ (emphasis added)

The Court of Appeal after establishing that an abuse of process had in fact taken place, proceeded to consider the issue of exclusive jurisdiction. The Court of Appeal therefore proceeded to examine whether the tribunal was the court first seised within the meaning of Article 27, and whether the Spanish proceedings involved the same cause of action and the same parties within the meaning of that Article. That would mean according to the Court of Appeal’s analysis that the Spanish court would be obliged by Article 27 to decline jurisdiction.

In order to consider whether the proceedings involved the same cause of action between the same parties the court reviewed earlier authorities on the issue⁴¹. The Court recognised that both the English and the Spanish proceedings are concerned with the plaintiff’s contract of employment, and in particular the circumstances of its termination and therefore are concerned with the same cause of action, being in the case in hand the same contractual relationship. The Court of Appeal proceeded to examine whether the proceedings involving same cause of action also involved the same parties. The court recognised that Harada and C.S.A. are separate legal entities. Yet the court declared that:

“Here the argument overlaps with that relating to abuse: the deployment of C.S.A., a Spanish company, as claimant in Madrid is nothing but a device to confer putative jurisdiction on the Spanish court.”⁴²

The Court of Appeal further reinforced that point by stressing, referring to authority⁴³, that the issue of identity of parties, in the context of Article 27, is to be regarded pragmatically, just as is that of identity of cause of action. The Court of Appeal held that the Spanish proceedings involved the same cause of action and the same parties as those of the English proceedings. Therefore, the tribunal was first seised within the meaning of Article 27. The Court of Appeal therefore held that:

⁴⁰ *Ibid.*, p. 362, *per* Laws L.J.

⁴¹ Case 144/86, *Gubisch Maschinenfabrik K.G. v. Palumbo* [1987] E.C.R. 4861; *Airbus Industrie G.I.E. v. Patel* [1999] 1 A.C. 119.

⁴² *Ibid.*, p. 363.

⁴³ Case C-351/96, *Drouot Assurances S.A. v. Consolidated Metallurgical Industries (C.M.I. Industrial Sites)* [1998] E.C.R. I-3075; [1999] Q.B. 497.

“For all the reasons I have given I would allow this appeal. I wish to emphasise that *the reinstatement of injunctive relief in favour of the plaintiff entails not the slightest disrespect to the Spanish court*. It is of course elementary that there is no question of our requiring that court to do or refrain from anything. *I consider that the grant of relief would underpin and support the proper application of the Brussels Convention, to which, it goes without saying, the Spanish courts are as loyal as are those of this jurisdiction.*”⁴⁴ (emphasis added)

An anti-suit injunction was thus issued by the Court of Appeal in order to restrain the Spanish proceedings. That decision has been subsequently received both criticism and acceptance by the academic community⁴⁵. The ruling in the Court of Appeal was subsequently appealed to the House of Lords which delivered a very important judgment reviewing the law on anti-suit injunctions.

4.3.1.3 The Decision in the House of Lords

Their Lordships had to consider an extremely important case which raised compatibility issues between the Brussels I Regulation and anti-suit injunctions. The judgment of the House of Lords was delivered by Lord Hobhouse with whom the rest of their Lordships agreed⁴⁶. The defendants made three submissions to the House of Lords. At first, it was submitted that the power of an English court to issue an anti-suit injunction to restrain proceedings in foreign jurisdictions covered by the Brussels Convention does not exist due to the ratification of the Convention by the United Kingdom and its incorporation into English law by the Civil Jurisdiction and Judgements Act 1982. Secondly, it was submitted that the issuance of an anti-suit injunction on the ground of abuse of process is inconsistent with the Brussels Convention. Thirdly, it was submitted that the same applies in respect of any anti-suit injunction made on the ground that continuation of the foreign proceedings would be contrary to Article 21 (now Article 27). Lord Hobhouse explained that the first two

⁴⁴ *Ibid.*, p. 364, *per* Laws L.J.

⁴⁵ On the one hand, Harris criticised that decision and attributed its incorrectness to the distortion in the law created by the *Continental Bank* decision. Cf. Jonathan Harris, *Use and Abuse of the Brussels Convention*, (1999) 115 LQR 576. On the other hand Hartley, while being in agreement with Harris, concluded that: “If the bringing of the foreign action is abusive or against good conscience, the English court should still be able to grant an appropriate remedy. It is hoped that our European partners will understand this. After all, antisuit injunctions are not granted only where English litigants are the victims of injustice: the beneficiaries could equally well be companies and individuals from Continental countries.” Cf. Trevor C. Hartley, *Anti-Suit Injunctions And The Brussels Jurisdiction and Judgments Convention*, (2000) 49 I.C.L.Q. 166.

⁴⁶ The rest of their Lordships were Lord Nichols, Lord Hoffman, Lord Millet and Lord Scott.

submissions raise the necessity for a reference to the European Court of Justice. Therefore, his Lordship explained that the question of interpretation referred to the European Court of Justice was therefore asked in terms of the ability of the English courts to issue anti-suit injunctions on the ground of abuse of process.

His Lordship commenced his examination of the issues by affording a short historical overview of the principle of anti-suit injunctions⁴⁷. His Lordship then proceeded to consider the position of English law regarding anti-suit injunctions within the Regulation framework. He disagreed with the use of the term anti-suit injunction and opted for the more polite term restraining order⁴⁸. His Lordship then turned his attention to examine the grounds for issuing an anti-suit injunction⁴⁹, by referring to earlier authorities⁵⁰, and, although his Lordship felt in favour of issuing anti-suit injunctions within the Brussels I Regulation framework, he stressed that when issuing an anti-suit injunction the English court must always attach high importance to international comity⁵¹.

His Lordship then turned to consider the issue of compatibility between the Brussels Convention 1968 and English law on anti-suit injunctions. His Lordship was of the opinion that Section 8 of the Brussels Convention, under which the *lis alibi pendens* provisions are, does not create an inconsistency with English law. His Lordship believed that the basic object of Section 8 is to avoid irreconcilable judgments and since under English law an anti-suit

⁴⁷ For a historical account on the principle of anti-suit injunctions *see supra* Chapter I: The English Common Law Framework.

⁴⁸ [2002] I.L.Pr. 28, at § 23.

⁴⁹ “Restraining orders come into the picture at an earlier stage and involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction. English law makes these distinctions. Indeed, the typical situation in which a restraining order is made is one where the foreign court has or is willing to assume jurisdiction; if this were not so, no restraining order would be necessary and none should be granted.”, *Ibid.*, § 26.

⁵⁰ *Société Nationale Industrielle Aerospatiale (SNIA) v. Lee Kui Jak* [1987] A.C. 871; *British Airways v. Laker Airways* [1985] A.C. 58; *Fort Dodge v. AKZO Nobel* [1998] F.S.R. 222; *Castanho v. Brown & Root* [1981] A.C. 557; *Spiliada Maritime v. Cansulex (The Spiliada)* [1987] A.C. 460. His Lordship referred exclusively to authorities regarding the English Common Law Framework, *see supra* Chapter I: The English Common Law Framework.

⁵¹ *Ibid.*, § 28. His Lordship also conveniently summarised the grounds for issuing an anti-suit injunction in the case in hand as follows: “Therefore, to summarise, the essential features which made it proper, under English law, for the Court of Appeal to exercise its power to make the order in the present case are: (a) The applicant is a party to existing legal proceedings in this country; (b) The defendants have in bad faith commenced and propose to prosecute proceedings against the applicant in another jurisdiction for the purpose of frustrating or obstructing the proceedings in this country; (c) The court considers that it is necessary in order to protect the legitimate interest of the applicant in the English proceedings to grant the applicant a restraining order against the defendants. The order applies only to the defendants before the English court. It does not require the English court to make any finding as to the jurisdiction of the foreign court.” (emphasis added), *Ibid.*, at § 29.

injunction will be only granted in order to aid proceedings pending in England, the grant of an anti-suit injunction *in personam* in support of those proceedings is not inconsistent with the Brussels Convention⁵².

His Lordship considered the defendant's submission that the power to grant an anti-suit injunction is inconsistent with the Brussels Convention since an anti-suit injunction is inconsistent with foreign court's competence to decide on its own jurisdiction. His Lordship stressed that this would be true if the anti-suit injunction was directed to the foreign court and not to the party whose conduct was questionable. In his view, the anti-suit injunction is not addressed to the foreign court and does not bind it since it does not involve a decision upon its jurisdiction and added that the proceedings in Madrid were commenced in bad faith and the anti-suit injunction was issued for that reason and not because the Spanish court was a *forum non conveniens*. He therefore concluded that in fact an anti-suit injunction assists the Brussels I Regulation framework in avoiding irreconcilable judgments and is appropriate for the case in hand⁵³.

The defendant further submitted that the granting of an anti-suit injunction on the ground of obstructing in bad faith existing English proceedings was inconsistent with the Brussels Convention and that the claim of the plaintiff was already being sued in Spain, therefore the appropriate forum was Spain. His Lordship dismissed that argument on the ground that it misstates the law. The English courts, in his opinion, are the appropriate courts to consider the significance of the defendant's conduct and to protect the English proceedings, and not the Spanish courts⁵⁴.

A further argument advanced by the defendant was that the *Continental Bank*⁵⁵ decision was incorrect. His Lordship thought it was not necessary to decide on the correctness of that

⁵² "It is *only if* the grant of the restraining order has been preceded by a breach by the English court of Article 21 or, say, Article 16, that the grant of the restraining order would be objectionable under the Convention and that would be because the earlier steps taken would conflict with the Convention, and not because of any inherent inconsistency arising from the restraining order itself." (emphasis added), *Ibid.*, at § 33.

⁵³ "In so far as a purpose of the Convention is to limit the risk of irreconcilable judgments, the use of restraining orders by the English courts is effective to achieve or aid this result. (It has achieved it in this case: the probability of irreconcilable judgments has been avoided.) It does so by granting a remedy which does not attack the jurisdiction of the foreign court. It bases the grant of that remedy upon a ground which does not involve a denial of the jurisdiction of the foreign court. It achieves a result intended by the Convention in a manner which is consistent with the Convention.", *Ibid.*, at § 36.

⁵⁴ *Ibid.*, at § 37.

⁵⁵ *Ibid.*

decision. His Lordship thought that if the question of interpretation was for the House of Lords alone he would have dismissed the appeal⁵⁶. However, since that was not possible, the House of Lords referred the following question to the European Court of Justice for interpretation:

“Is it inconsistent with the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968 (subsequently acceded to by the United Kingdom) for the courts of the United Kingdom to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts?”⁵⁷ (emphasis added)

As will be seen in the following sections the analysis afforded by the House of Lords raised considerable criticism on the part of the Advocate General and the European Court of Justice. One is left wondering why the House of Lords simply dismissed the ruling of Donaldson Q.C.⁵⁸ which, it is submitted, was correct⁵⁹.

⁵⁶ *Ibid.*, § 39.

⁵⁷ *Ibid.*, § 21.

⁵⁸ *Ibid.*

⁵⁹ It could be argued that the *Turner* litigation should not have reached the European Court of Justice in the first place, as the House of Lords should have applied Article 28 and not Article 27 in resolving the case. It is submitted that Article 27 was inapplicable since the parties were not the same in the English and Spanish proceedings. The English proceedings involved Mr. Turner and Harada, whereas the Spanish proceedings involved C.S.A. and Mr. Turner. It is a well established principle of Company Law that each company is to be treated as a separate legal entity, or legal person. The principle that a company is a separate legal person was established in *Salomon v. Salomon & Co* [1897] A.C. 22. In order to disregard the separate legal personality of a company and attribute liability to its directors, the courts have the power to lift the corporate veil *cf. Re Darby* [1911] 1 K.B. 95; *Gilford Motor Co. v. Horne* [1933] Ch 935; *Smith Stone and Knight Ltd. v. Birmingham Corporation* [1939] 4 All E.R. 116; *Re A Company* [1985] B.C.L.C. 333; *Adams v. Cape Industries Plc.* [1990] Ch 443. Thus, being separate legal persons, Harada and C.S.A. constitute different parties. In addition, the Regulation dictates in Article 59 that in order to determine whether a party is domiciled in a Member State, the court seised must apply its internal law and in relation to companies, in Article 60, for the purposes of the Brussels I Regulation the issue of the place of domicile of the company is the place where the company has its statutory seat or central administration or principal place of business. The English courts, therefore, should not have applied Article 27 but Article 28 and examine whether the actions in the English and Spanish proceedings were related in order for them to be heard together, *Cf. Thalia Kruger, The Anti-Suit Injunction in the European Judicial Space: Turner v. Grovit* (2004) 53 I.C.L.Q. 1030. The action in the English proceedings, between Mr. Turner and Harada, involved constructive and unfair dismissal, whereas the action in the Spanish proceedings, between C.S.A. and Mr. Turner, involved breach of contract. Article 28 dictates that any court other than the court first seised may stay its proceedings and the first seised court may hear related actions, *Cf. Case C-406/92, The Owners of the cargo lately laden on board the ship 'Tatry' v. The Owners of the ship 'Maciej Rataj'* [1994] E.C.R. 5439; *sub nom. The Maciej Rataj* [1995] 1 Lloyd's Rep. 302. In that case only one party was involved in proceedings in The Netherlands whereas all the other parties were involved in proceedings in The Netherlands and in England. The European Court of Justice ruled that the parties were not identical, thus rendering the *lis pendens* provisions ineffective,

4.3.2 *Turner v. Grovit* – The Opinion of the Advocate General

The Advocate General Ruiz-Jarabo Colomer had to deal with an extremely important question which needed a ruling from the European Court of Justice in order “to dispel all doubt as to the validity in the light of the Brussels Convention of what are commonly known as anti-suit injunctions.”⁶⁰ After reviewing the facts, the English domestic law position and the views expressed by the House of Lords, the Advocate General turned to examine the question of compatibility. The defendants were assisted by the German and Italian governments and the Commission while Mr. Turner was assisted by the United Kingdom government.

The defendant submitted that anti-suit injunctions are not compatible with the spirit of the Regulation while the plaintiff argued the exact opposite. The Advocate General cited the House of Lords in stating the proposition that the injunction is not directed to the foreign court but to the party acting in bad faith and then proceeded, in very strong language, to criticise the plaintiff’s argument:

“The arguments against compatibility with the Convention put forward in the course of these preliminary proceedings stem from the idea that one of the pillars of that international instrument is the reciprocal trust established between the various national legal systems, upon which the English restraining orders would seem to cast doubt. That view seems to me to be decisive. *European judicial cooperation, in which the Convention represents an important landmark, is imbued with the concept of mutual trust, which presupposes that each State recognises the capacity of the other legal systems to contribute independently, but harmoniously, to attainment of the stated objectives of integration. No superior authorities have been created to exercise control, beyond the interpretative role accorded to the Court of Justice; still less has authority been given to the authorities of a particular State to arrogate to themselves the power to resolve the difficulties which the European initiative itself seeks to deal with.* It would be contrary to that spirit for a judicial authority in Member States to be able, even if

and therefore both proceedings could continue. See also Case C-351/96, *Drouot Assurances v. Consolidated Metallurgical Industries and others* [1998] E.C.R. I-3075, where the European Court of Justice ruled that an insurer and the insured parties could be regarded as the same parties for the purposes of the *lis pendens* provisions if their interests were identical and inextricable.

⁶⁰ [2004] 1 Lloyd’s Rep. 216, at p. 217.

only indirectly, to have an impact on the jurisdiction of the Court of another Contracting State to hear a given case.”⁶¹ (emphasis added)

The Advocate General stressed that a further feature of the principle of mutual trust is the fact that jurisdiction issues are dealt with in accordance with uniform rules, while at the same time each judicial body throughout the European Union is equal with its counterparts. Consequently, the Advocate General did not feel persuaded by the plaintiff's submission that nothing in the Regulation expressly prohibits the issuance of an anti-suit injunction and criticised with particularly strong language the practice of the English courts since he felt that the principle of anti-suit injunctions is incompatible with civil law systems:

“The Convention seeks to provide a comprehensive system, for which reason it is appropriate to ask ourselves whether a measure which has an impact on its field of application is compatible with the common rules which it establishes. *The question must be answered in the negative. A comparative review shows that only legal systems within the common-law tradition allow such orders. An imbalance of this kind goes against the scheme of the Convention, which does not incorporate any mechanism capable of resolving a conflict between a restraining order from an English Court, prompted by the abusive nature of the foreign proceedings, and a possibly conflicting assessment which the Spanish Court might arrive at. It is difficult to accept that a State which issues an injunction of this kind could unilaterally attribute to the jurisdiction which it is protecting an exclusive character. If all European Courts arrogated such a power to themselves, chaos would ensue. If that power were exercised only by English Courts, they would be taking it upon themselves to exercise a distributive function which the Brussels Convention entrusts to less flexible, but more objective, criteria, which it imposes on everyone in the same way.*”⁶² (emphasis added)

He proceeded to consider a submission made by the United Kingdom that the anti-suit injunction issued was not concerned with the jurisdiction of the Spanish Court but was addressed to the party which commenced proceedings with the sole object of frustrating the English action. The Advocate General agreed with that analysis. Nevertheless, he stressed that

⁶¹ *Ibid.*, pp. 219-220.

⁶² *Ibid.*, p. 220. However, *see supra* Chapter II: Anti-Suit Injunctions: The Continental Approach for proof that anti-suit injunctions are in fact available and have been used in some European civil law systems and are thus compatible with those systems. *See also* Chapter VI: Anti-Suit Injunctions in the United States of America and in particular the discussion on anti-suit injunctions in the state of Louisiana for availability and use of anti-suit injunctions in civil law jurisdictions.

it is undeniable that since a litigant is prohibited from pursuing an action before another Member State court, the latter court is deprived of jurisdiction to deal with the case, having as the end result the direct interference with that court's unfettered jurisdictional authority. Therefore, the Advocate General thought that if a claimant is deprived of the opportunity to pursue his action in another Member State court there is interference with the jurisdiction of the foreign judge since he is not permitted to hear or decide the case.

The Advocate General drew an analogy between the effects of an anti-suit injunction and those produced by application of the doctrine of *forum non conveniens*⁶³. He thought that in both cases a decision is made not to hear actions which have been brought in an inappropriate forum, since when assessing whether an anti-suit injunction should be issued the English court makes an assessment of the appropriateness of bringing an action before a specific judicial authority. This, according to the Advocate General, is fundamentally against the spirit and purpose of the Regulation. The Advocate General therefore believed that the issuance of an anti-suit injunction within the Regulation framework serves no purpose whatsoever⁶⁴.

More significantly, the Advocate General emphasised that it is true that anti-suit injunctions are part of procedural law and therefore are not covered by the Regulation. In his opinion, although Member States have the freedom to organise domestic proceedings in their own way, that does not mean that they must not make sure that those provisions do not run counter to the philosophy of the Regulation. In other words, the Advocate General emphasised that the legislative autonomy available to Member States in procedural matters is always subject to limits deriving from respect for the general scheme of the Regulation. The Advocate General, therefore, made the following proposition to the European Court of Justice:

“In view of the foregoing considerations, I suggest that the Court of Justice give the *following answer* to the question referred to it by the House of Lords: *The Convention of Sept. 27, 1968 on jurisdiction and the enforcement of judgments in civil and*

⁶³ For a discussion on the doctrine of *forum non conveniens* see *supra* Chapter I: The English Common Law Framework.

⁶⁴ “Moreover, the system of mutual recognition of decisions given in the Contracting States without the need for recourse to any procedure whatsoever, provided for in art. 26 of the Convention, although subject to the exception relating to public policy (art. 27(1)), expressly excludes the question of jurisdiction from the scope of the latter (art. 28), so that the paradoxical situation could arise whereby a judge who had issued an anti-suit injunction might be obliged to grant an order for enforcement of a judgment delivered in spite of his having expressly imposed a prohibition. The English Court, at some time or another, must verify the jurisdiction of the foreign court before issuing the restraining order, and that clearly goes against the letter, spirit and purpose of the Brussels Convention.”, *Ibid.*, p. 221.

commercial matters must be interpreted as precluding the judicial authorities of a Contracting State from issuing orders to litigants restraining them from commencing or continuing proceedings before judicial authorities of other Contracting States.”⁶⁵ (emphasis added)

It is therefore correct to argue that the Advocate General’s opinion “frowns on the long-established English jurisdiction and practice.”⁶⁶ Although his opinion does not bind the European Court of Justice, as will be seen in the following section, it was highly influential.

4.3.3 *Turner v. Grovit* – The Ruling of the European Court of Justice

The European Court of Justice had to consider an extremely important issue and provided a comprehensive ruling on the issue. The supreme court of the European Union⁶⁷ first afforded an account of the facts of the case⁶⁸ and the question referred to it by the House of Lords⁶⁹. The court then turned to examine the submissions made in favour of the claimant and of the defendant. The defendant⁷⁰ submitted that the issuance of an anti-suit injunction is incompatible with the Brussels Convention. The defendant clarified this by submitting that the Brussels Convention provides a complete set of rules on jurisdiction and that, although each Member State court is entitled to rule only as to its own jurisdiction under those rules it is not entitled to rule as to the jurisdiction of another Member State court. Therefore, the defendant submitted that the effect of an anti-suit injunction is that the issuing court assumes exclusive jurisdiction and the court of another Member State is deprived of any opportunity of examining its own jurisdiction, thereby negating the principle of mutual cooperation underlying the Brussels Convention.

The claimant⁷¹ submitted that the question referred by the House of Lords to the European Court of Justice only concerns anti-suit injunctions issued to tackle an abuse of process,

⁶⁵ *Op.Cit.*

⁶⁶ D. Rhidian Thomas *Case Comment* (2004) 10(2) J.I.M.L. 134, at p. 135.

⁶⁷ The panel of judges who ruled on the case was: President V. Skouris, P. Jann (Rapporteur), Judge Timmermans, Judge Gulmann, Judge Cunha Rodrigues, Judge Rosas, Judge La Pergola, Judge Puissochet, Judge Schintgen, Judge Colneric and Judge Von Bahr. There was not an English Judge in the panel of judges. For a discussion of that issue and scholar’s arguments against that practice *see infra* 4.4.

⁶⁸ For an account of the facts *see supra* 4.3.1.1.

⁶⁹ For an account of the question referred to the European Court of Justice by the House of Lords and the issues surrounding the case *see supra* 4.3.1.3.

⁷⁰ The defendant was assisted in the proceedings by the German and Italian Governments and the Commission.

⁷¹ The claimant was assisted by the United Kingdom Government.

addressed to defendants who are acting in bad faith and with the intention of frustrating proceedings before an English Court. Thus, in the claimant's view, since the anti-suit injunction has as its aim to protect the integrity of the English proceedings, only the English Court is in a position to decide whether the defendant's conduct undermines or threatens the integrity of the English proceedings. In addition, the claimant submitted that the anti-suit injunction at issue in the case in hand did not involve any assessment of the jurisdiction of the Spanish court and therefore it should be regarded as a procedural measure. The claimant reinforced that submission by adding that, due to European Court of Justice authority⁷², there is no limitation imposed by the Brussels Convention on procedural measures which may be adopted by a court of a Member State, provided that that court has jurisdiction under the Brussels Convention over the substance of the case. Finally, the claimant submitted that the grant of an anti-suit injunction in fact contributes to attaining the objective of the Brussels Convention, which is to minimise the risk of conflicting judgments while avoiding multiple proceedings.

The European Court of Justice, at first, emphasised the spirit of the Brussels Convention, namely that it is based on the trust of all Member States' legal systems and therefore it has enabled a compulsory system of jurisdiction to be established, which all the courts within the ambit of the Brussels Convention are required to respect, without the need for Member States to apply their domestic rules on recognition and enforcement of judgments⁷³. Therefore, due to the principle of mutual trust all the Member States' courts have the right to interpret and apply the provisions of the Brussels Convention with the same authority⁷⁴. The European Court of Justice thus held that the Brussels Convention does not permit the jurisdiction of a court to be reviewed by a court in another Member State⁷⁵. The court thus in a very strong language criticised the practice of the English courts to issue anti-suit injunctions, in holding that:

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

⁷² Case C-391/95, *Van Uden Maritime v. Deco Line* [1998] E.C.R. I-7091.

⁷³ Case C-116/02, *Gasser v. MISAT Srl.* [2003] E.C.R. I-14693; [2004] 1 Lloyd's Rep. 222.

⁷⁴ Case C-351/89 *Overseas Union Insurance v. New Hampshire Insurance* [1991] E.C.R. I-3317.

⁷⁵ Op.Cit.

which, as such, is incompatible with the system of the Convention. Notwithstanding the explanations given...such interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum State. In so far as the conduct for which the defendant is criticised consists in recourse to the jurisdiction of the court of another Member State, the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member State. Such an assessment *runs counter to the principle of mutual trust* which... underpins the Convention and prohibits a court, except in special circumstances which are not applicable in this case, from reviewing the jurisdiction of the court of another Member State.”⁷⁶ (emphasis added)

The European Court of Justice, however, went further and considered the hypothetical scenario of regarding the anti-suit injunction as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the English court and therefore as being a matter of domestic law alone. The court gave particular emphasis that this argument is plainly wrong since it reminded the United Kingdom government that the application of national procedural rules may not impair the effectiveness of the Brussels Convention⁷⁷. The European Court of Justice felt that the grant of an anti-suit injunction in fact has the effect of limiting the application of the rules on jurisdiction laid down by the Brussels Convention. The court went even further in trashing the claimant’s submissions by profoundly dismissing the argument that the grant of an anti-suit injunction in fact contributes to attainment of the objective of the Brussels Convention by minimising the risk of conflicting judgments and multiple proceedings⁷⁸. The European Court of Justice provided two reasons for its disagreement:

“First, recourse to such measures *renders ineffective the specific mechanisms provided for by the Convention for cases of lis alibi pendens and of related actions.* Second, it is liable to give rise to situations involving conflicts for which the Convention contains no rules. The possibility cannot be excluded that, even if an injunction had been issued in one Contracting State, a decision might nevertheless be given by a court of another Contracting state. Similarly, the

⁷⁶ *Ibid.* , at p. 172-173, §§ 27-28.

⁷⁷ Case C-365/88, *Hagen* [1990] E.C.R. I-1845.

⁷⁸ That argument has been widely used both by scholars and courts in the United Kingdom. An example is the House of Lords judgment in *Turner v. Grovit*, see *supra* 4.3.1.3.

possibility cannot be excluded that the courts of two Contracting States that allowed such measures might issue contradictory injunctions.”⁷⁹ (emphasis added)

The importance of this quote is fundamental for the understanding of the reasoning behind the European Court of Justice ruling. By declaring that the principle of anti-suit injunctions renders ineffective the *lis pendens* mechanism, the European Court of Justice effectively declared anti-suit injunctions as responsible for the impairment on the proper operation of European Union Law. One of the most important principles of European Union Law is the principle of *effet utile*⁸⁰. Under this principle, every Member State court must ensure that the application of national law does not impair the effectiveness of European Union Law⁸¹. The European Court of Justice said in *Van Schijndel*⁸² that:

“...whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure must, where appropriate, be taken into consideration.”⁸³

Thus, for the European Court of Justice in *Turner*, the issuance of an anti-suit injunction by an English court means a lack of applicability of the Brussels I Regulation and as such a direct infringement of the *effet utile* principle.

The European Court of Justice, therefore, based on the aforesaid reasons afforded the following ruling:

“the Convention is to be interpreted as *precluding the grant of an injunction* whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another

⁷⁹ *Ibid.*, p. 173, § 30.

⁸⁰ Case C-365/88, *Kongress Agentur Hagen GmbH v. Zeehage BV* [1990] E.C.R. I-1845.

⁸¹ Case C-312/93, *Peterbrook, Van Campenhout & Cie. v. Belgian State* [1995] E.C.R. I-4599.

⁸² Cases C-430-431/93, *Van Schijndel & Van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] E.C.R. I-4705.

⁸³ *Ibid.*, at § 19.

Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.”⁸⁴ (emphasis added)

That ruling was perceived by some as an immense blow to the principle of anti-suit injunctions within the Brussels I Regulation framework, and as will be seen in this Chapter its impact may be far greater.

4.4 *Turner v. Grovit* – The Impact of the Decision on Anti-Suit Injunctions

The European Court of Justice’s ruling in *Turner v. Grovit*⁸⁵ has indisputably been long awaited by scholars both in the United Kingdom and on the Continent⁸⁶. One may observe that scholars, post-*Turner*⁸⁷, are divided in two categories as to the impact of the ruling. In the first category are the Euro-sceptics, those who felt that the decision was not a correct one and felt interference from Brussels in the English legal system. The second category can be labelled the Euro-aficionado category, consisting of those who felt that the decision was a welcome one that actually assists in European integration.

The Euro-aficionados claim that the decision is a welcome one. In particular, Jackson considers that *Turner v. Grovit*⁸⁸ is a lesson “not to continue to seek ways to limit the Convention but to face up to it and implement it.”⁸⁹ The impact of the European Court of Justice ruling according to Jackson will be felt in the field of arbitration agreements and he felt that there is “an arguable need to change position”⁹⁰ since in his opinion *Turner v. Grovit*⁹¹ provides “not only the directions in regard to the Brussels regime but guidance as to principles to be followed when acting as part of any Convention regime”.⁹²

⁸⁴ Ibid., p. 173, § 31.

⁸⁵ Ibid.

⁸⁶ See for example A. Briggs and P. Rees *Civil Jurisdiction and Judgments*, 4th ed., (2005), London: LLP; J Wilson *Anti-suit Injunctions*, [1997] J.B.L. 424; TC Hartley *Anti-suit Injunctions and the Brussels Jurisdiction and Judgments Convention* (2000) I.C.L.Q. 166; C Ambrose *Can Anti-Suit Injunctions Survive European Community Law?*, (2003) I.C.L.Q. 401; JP Verheul *Waat de antisuit injunction naar het continent over?*, Nederlands Internationaal Privaatrecht (1989) 7(1) 221.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ David Jackson, *Jurisdiction in Europe: English law still holding out*, S&T.L.I. (2004), 4(4), 4-6, at p. 6.

⁹⁰ Op.Cit.

⁹¹ Ibid.

⁹² Ibid., at p. 6.

The Euro-sceptics claim that the decision is not a welcome one and challenged its validity. There are two approaches to the European Court of Justice's decision under this category, namely a moderate one and a more dismissive one. The moderate approach is expressed by Dickinson⁹³ who recognised the wrongful issuance of an anti-suit injunction in *Turner*.

“[I]t is submitted that the English courts had stepped beyond regulating the proceedings before the Employment Tribunal and into forbidden territory. The only ‘process’ directly affected was the continuation of proceedings before the Spanish court and, even if the existence of the Spanish proceedings made the conduct of the English proceedings more costly or difficult, the Employment Tribunal could have expressed its disapproval by way of a costs order”.⁹⁴

Dickinson's criticism of *Turner*⁹⁵, however, stems from his proposition that the European Court of Justice's ruling allows tactical litigation. He bases this argument on the fact that, although the European Court of Justice speaks of mutual trust between the Member States' courts, in essence those courts are not that trustworthy after all. The European Commission prepared in 2003 a monitoring report⁹⁶ for the States who have recently acceded to the European Union⁹⁷. The report expresses particularly serious concerns regarding the nature, independence, legitimacy and swiftness of court proceedings in those countries. In particular the report states:

“*Cyprus*: The length of court proceedings gives grounds for concern, in particular in civil matters, where it takes an average of three years at first instance until a judgment is issued. The appeals procedure consumes another 12 to 15 months....*Czech Republic*: A key area for further improvement remains the reduction in length of court proceedings...*Lithuania*: As acknowledged by the Lithuanian authorities, corruption remains a source of concern, in particular in the customs, public procurement, traffic police and health sectors as well in the judiciary...*Poland*: In general the level of public trust in the efficiency and fairness of the judicial system remains low and the perception of corruption by the public is high...Corruption is perceived to be increasing from an already relatively high

⁹³ Andrew Dickinson, *A Charter for Tactical Litigation in Europe?*, [2004] L.M.C.L.Q. 273, at pp. 276-277.

⁹⁴ Op.Cit.

⁹⁵ Ibid.

⁹⁶ Accessible at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0675en01.pdf .

⁹⁷ Those are Czech Republic, Cyprus, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia.

level in Poland. It is considered to affect all spheres of public life. There has been very little progress in combating corruption, and the existing perception has been borne out in various high profile corruption cases recently....*Slovakia*: The length of proceedings, in particular in civil and commercial cases, remains problematic...The level of public trust in the efficiency and fairness of the judicial system remains low...There is a continuously high public and professional perception of widespread corruption in Slovakia, and tackling it should be a priority. The most affected areas appear to be the health care sector, education, the police and the judiciary...*Slovenia*: According to Government figures, the average duration of court cases is 13 months; however, for civil cases in the county courts, it is 22 months and for criminal cases in county courts 20 months....*Malta*: Only a few cases of alleged bribery have been brought to court in Malta, although some of them have been serious. However, the public perception is that corruption is more widespread than these few cases would show. Indeed, a recent corruption case, which led to the resignation of a chief justice and a judge has affected the way in which citizens perceive the legal system...”⁹⁸

It is worth mentioning what the European Commission has reported in its 2004 Strategy Paper⁹⁹ regarding the accession of Bulgaria and Romania in 2008. The Commission expresses great concerns regarding the judiciary and raised issues of corruption in both countries:

“*Bulgaria*: Building on important reforms of the judiciary system achieved in recent years, there have been positive developments with regard to the recruitment and appointment of judges. Still, certain key parts of the reform of the judiciary remain to be adopted. The complexity and efficiency of the penal structures, in particular in the pre-trial phase, is a matter of concern. Strong efforts will be necessary to foster Bulgaria’s capacity to prosecute organised crime and corruption, which involves further reforms in the structures of the judiciary and of the police. Bulgaria has implemented several measures in the fight against corruption, but it remains a problem. Renewed efforts are needed, including tackling high level corruption. *Romania*: Efforts to improve the policy-making and legislative process should continue. Further efforts are also needed to strengthen local and regional

⁹⁸ Ibid.

⁹⁹ COM (2004) 657, accessible at http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0657en01.pdf.

governance with a view to ensuring proper implementation of the *acquis* at those levels. The management of court cases and the quality of judgments needs to improve. Official surveys confirm the possibility for the executive to influence the outcome of judicial proceedings. However, organisational and legislative changes introduced in Romania's judicial system should help to make it more independent and efficient...Corruption in Romania continues to be serious and widespread. Romania's anti-corruption legislation is generally well developed, but its ability to curb corruption will depend on the effective implementation of the law. In particular, additional efforts are required to ensure the independence, effectiveness and accountability of the National Anti-Corruption Prosecution Office. It should concentrate its resources on investigating high-level corruption.”¹⁰⁰

One cannot help having doubts regarding the spirit of judicial cooperation and mutual trust within the European Union. As illustrated the newly acceded states have a long way to go in ensuring swiftness of proceedings and legitimate judiciary. This, as the 2004 European Union Commission Strategic Report shows, applies as well to States which have begun the entry procedure to the European Union, and recently the green light was also given to Turkey, a country with very serious problems particularly regarding the legitimacy and soundness of the judiciary as well as extreme irregularities in its legal system¹⁰¹. That is why Dickinson is in the moderate Euro-sceptic fraction and that is why he concludes that:

“Although these matters should not be a cause of complacency among the 15 ‘original’ Member States, whose judicial systems admittedly have not been subject to the same scrutiny and do not have the same impetus for reform, it does at the very least suggest that the principle of mutual trust is fragile and that the phenomenon of tactical litigation within the EU should be very carefully monitored with a view of taking steps, if necessary, to combat abusive practices.”¹⁰²

¹⁰⁰ Op.Cit.

¹⁰¹ A European Union Commission Report on Turkey is accessible at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0656en01.pdf.

¹⁰² Ibid. , at p. 278.

The other fraction of Euro-sceptics is those who completely dismissed the *Turner* decision, one of those being, surprisingly, Briggs¹⁰³ who concluded¹⁰⁴ in very strong language, that the European Court of Justice's decision is plainly wrong and its effect was to destroy anti-suit injunctions. The decision sparked immense scholarly debate on whether the decision is correct or not, yet all agree that the effect of *Turner* is that:

“Anti-suit injunctions granted by English courts restraining parties from pursuing proceedings before other EU courts had been fiercely criticised and will now no longer be granted.”¹⁰⁵

The present writer is more in agreement with the views expressed by Jackson. It is true that, as Briggs observed¹⁰⁶, no English judge was sitting in the European Court of Justice. That, however, is not a valid argument simply because hundreds of cases regarding a Member State have been decided without a judge from that Member State sitting in the European Court of Justice. Neither does the fact that an English judge was not sitting in the European Court of Justice mean that the Court would not reach an impartial decision and that the presence of an English judge would necessarily save anti-suit injunctions or safeguard the fairness of the proceedings. Secondly, the fact that the principle of granting an anti-suit injunction was, as alleged by Briggs¹⁰⁷, approved by a French court does not bind the European Court of Justice in any way of form to approve the issuance of anti-suit injunctions as in the same way the fact that English courts have been issuing anti-suit injunctions for the past hundreds of years. Member States' domestic law simply does not bind the European Court of Justice. If it did bind the European Court of Justice, anti-suit injunctions would have been expelled from the European Union framework many years ago¹⁰⁸. Thirdly, the European Court of Justice correctly identified that although an anti-suit injunction may be an order *in personam* it also involves an examination of the Member State court's jurisdiction which is contrary to the underlying philosophy of the Brussels I Regulation.

¹⁰³ Adrian Briggs, *Anti-Suit Injunctions and Utopian Ideals*, (2004) 120 L.Q.R. 529.

¹⁰⁴ Op.Cit. , at p. 533.

¹⁰⁵ Miranda Karali and David Holloway, *Anti-Suit farewell to EU*, M.R.I. (2004), 18(6), 6-7, at p. 7.

¹⁰⁶ Ibid. , at pp. 530-531.

¹⁰⁷ Ibid. , at pp. 530-531. For a discussion of anti-suit injunctions on the Continent, *see supra* Chapter II: Anti-Suit Injunctions: The Continental Approach.

¹⁰⁸ *See* the decision of the Düsseldorf Obersandesgericht in *Re The Enforcement of an English Anti-Suit Injunction* [1997] I.L.Pr. 320 discussed in 4.2.

The arguments submitted by Dickinson are considered by the present writer to be more reasonable and thus merit more attention. It is very true that the *Turner*¹⁰⁹ decision may become a tool for tactical litigation in cases where no contractual forum has been chosen by the parties, particularly in the light, as Dickinson observed, of the 2003 European Commission Monitoring Report and, as the present writer observed, the 2004 European Commission Strategy Paper. Both documents reveal extreme irregularities in the field of civil proceedings as well as serious corruption issues. Therefore, it is valid for one to wonder how the European Court of Justice may deliver a blank cheque as to the trust and respect between all Member States' legal systems, particularly when those are affected by serious irregularities often relating to corruption. There is, however, a twofold counter-argument to that. At first, the fact that there are problems with some Member States' legal systems does not mean *per se* that there is a need for anti-suit injunctions. The European Court of Justice pointed out that all Member States' courts are equal, yet anti-suit injunctions affect that balance since the English court is perceived as assuming more power than it should by treating other Member States' courts as inferior. Second, it must be borne in mind that a state by signing and ratifying a Convention assumes responsibilities towards the other signatory states. One cannot help thinking why did the United Kingdom ratify the Brussels Convention and why did it assume responsibility towards the other Member States when it cannot properly fulfil those responsibilities, when through its legal system it does not apply the rules of the Convention which it wilfully acceded to and ratified. The ruling of the European Court of Justice was underlined by the principles of mutual cooperation and respect between Member States. These are the basic ingredients of the Brussels I Regulation since without those ingredients there could not be mutual recognition and enforcement of judgments.

The scholarly debate agrees that anti-suit injunctions can no longer be issued in cases where there is no contractual choice of forum. However, one wonders whether that also applies to other categories, in other words whether the scope of the *Turner*¹¹⁰ decision may have a broader impact than meets the eye.

According to Jackson, the *Turner*¹¹¹ decision has a wider implication if seen together with *Gasser*¹¹². He argues that the impact of those decisions will be immense on arbitration

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

agreements¹¹³ as well¹¹⁴. Dickinson believes that the impact of the *Turner*¹¹⁵ decision is dual and immense. First, in his opinion, Mareva injunctions will be also affected by *Turner*¹¹⁶. Secondly, Dickinson believes that post-*Turner* the assessment of the appropriateness of proceedings, whether they are abusive or not, is purely a matter of jurisdiction.

The dominant view is therefore that the European Court of Justice dismissed the principle of anti-suit injunction in areas where no contractual forum is chosen, and maybe its ruling, as Jackson¹¹⁷ suggested, affected other areas such as arbitration. The Euro-sceptics, lead by Briggs¹¹⁸, expressed their disagreement mainly on the ground that parties in a commercial relationship would be in a sense blackmailed by strategic litigation commenced in another Member State. The issue thus arises of the options left to commercial parties in order to avoid such litigation. Karali and Holloway suggest a twofold solution to that problem:

“(a) The parties can agree a liquidated damages clause in the contract in respect of any breach of the exclusive jurisdiction clause. However, they must make sure that such a clause will be enforceable in the relevant jurisdiction. In the UK, such a clause would in principle be enforceable. (b) The parties can agree to submit any disputes to arbitration, as matters relating to arbitration are expressly excluded from the ambit of the Regulation...”¹¹⁹

This approach, however, does not entirely solve the problem, as perceived by some, caused by *Turner*¹²⁰. At first, no solution is provided for parties who have not contractually made a choice of forum. Secondly, although arbitration is widely used in the maritime industry, the existence of an arbitration agreement does not *per se* mean that an anti-suit injunction will be issued since the arbitration category raises serious issues of compatibility with the Brussels I Regulation in relation to anti-suit injunctions¹²¹.

¹¹² *Ibid.* For a discussion of the case *see supra* Chapter III: The Brussels I Regulation Framework.

¹¹³ For a discussion on arbitration agreements *see infra* Chapter V: Arbitration Agreements.

¹¹⁴ *Ibid.*, p.6.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, pp. 275-276.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, p. 7.

¹²⁰ *Ibid.*

¹²¹ *See infra* Chapter V: Arbitration Agreements.

4.5 **Turner v. Grovit – Practical Considerations**

This section will attempt to assess the practical implications of the *Turner*¹²² ruling. Therefore, two main issues will be assessed, namely, first whether there are grounds for the English courts upon which the *Turner*¹²³ ruling may not be applied and followed and, second, whether there are any limits to the *Turner*¹²⁴ ruling or whether *Turner*¹²⁵ stands as a general condemnation of anti-suit injunctions, therefore, extending its application to exclusive jurisdiction clauses and arbitration agreements.

4.5.1 Are there grounds for not applying the *Turner* ruling?

As the issuance of an anti-suit injunction in the Brussels I Regulation framework has been outlawed by the *Turner*¹²⁶ ruling, this section will seek to provide arguments in order for the English courts to get around *Turner*¹²⁷ and therefore be able to issue anti-suit injunctions. Two main arguments will be advanced, namely, first, whether the English courts may buy valuable time by making a further reference for a fresh interpretation of the issue by the European Court of Justice under Article 234 of the EC Treaty and, second, whether the use of an anti-suit injunction may be justified as deeply rooted into English law and therefore immune from *Turner*¹²⁸, an argument termed by the present writer as the *German bananas* argument.

4.5.1.1 A fresh interpretation under Article 234?

Before embarking on a discussion of the issue, one has to remember that, although the European Court of Justice is the supreme court of the European Union, it is only an interpretation court and not an appeal court which can reverse national courts' judgments. Therefore, the purpose of the European Court of Justice is to provide an interpretation of European Union rules, including Regulations, to the national courts. The interpretation by the European Court of Justice is binding on national courts, in that when a similar case comes before the national court the court must apply the interpretation of the rule given by the European Court of Justice. This interpretation process is effected through a reference made to

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

the European Court of Justice under Article 234 of the EC Treaty by the highest national court of each Member State. This reference is usually in the form of a question, which the European Court of Justice will answer. The European Court of Justice, however, has no power to rule on the merits of the case, in other words to reverse the highest national court, and it usually answers the question referred to it by the national court and nothing further.

In order to examine the issue properly, the reader's memory must be refreshed in relation to the question referred to the European Court of Justice by the House of Lords in *Turner v. Grovit*¹²⁹. The question was the following:

*“Is it inconsistent with the Convention...for the courts of the United Kingdom to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts?”*¹³⁰ (emphasis added)

The European Court of Justice answered this question in the following manner:

*“[T]he answer to be given to the national court must be that the Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.”*¹³¹ (emphasis added)

One may accurately observe that the question referred to the European Court of Justice by the House of Lords is a completely different one from the one answered by the European Court of Justice. The European Court of Justice in its answer made a general statement on anti-suit injunctions and added the clarification “even where” to include cases where proceedings are commenced in bad faith. The European Court of Justice did not answer the exact question referred to it by the House of Lords. It is submitted that this was done deliberately in order to clarify the position and the way in which anti-suit injunctions are, and should be, perceived on the Continent. Of course, the judgment issued by the European Court of Justice condemns the principle of anti-suit injunctions, outlawing them throughout

¹²⁹ *Ibid.*

¹³⁰ [2002] I.L.Pr. 28, at § 21.

¹³¹ *Ibid.*, p. 173, § 31.

the Community. In addition, the European Court of Justice has the power not to answer the exact question referred but to answer a more generic question which includes the question referred.

Yet, the question whether that judgment should be accepted by the English courts remains. It is of course a well established principle that the judgments of the European Court of Justice are binding both the national court which made the reference to the European Court of Justice¹³², and on any other national court considering the same point of European Law. However, taking into account the legal debate which spurred after the *Turner*¹³³, it is submitted that there is one way, theoretically, for the English courts not to apply the ruling in *Turner*¹³⁴.

This submission is based on the principle enshrined in Article 234 of the EC Treaty¹³⁵. Article 234 allows a national court to make a further reference to the European Court of Justice if it has difficulties understanding or applying the ruling, as well as request a fresh interpretation of the issue by the European Court of Justice¹³⁶. Whilst the question of interpretation is pending, the national court can avoid in applying the ruling made by the European Court of Justice. The question thus arising is whether the English courts have grounds to make a further reference to the European Court of Justice for a clarification of its ruling on *Turner*¹³⁷. It is submitted that there is a ground for this, namely the “*even where*” phrase in the European Court of Justice’s judgment. The further clarification reference would include clarification on the issue of whether the bad faith element is essential and whether all cases are *prima facie* excluded or only a list of certain cases. This proposition by the present writer will fulfil two main objectives namely, first, a proper clarification or even a list of instances where an anti-suit injunction is prohibited and, second, since a national court is not obliged to apply the

¹³² Case C-29/68, *Milch – Fet – und Eierkontur v. HZA* [1969] E.C.R. 165; [1969] C.M.L.R. 390 .

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Article 234 states that: “The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”

¹³⁶ Joined cases C-28 and C-30/62, *Da Costa en Schaake NV v. Nederlandse Belastingadministratie* [1963] E.C.R. 31; [1963] C.M.L.R. 224 .

¹³⁷ Ibid.

judgment while clarification is pending, buy more time for the English courts, time very valuable especially for reform¹³⁸.

4.5.1.2 German Bananas?

Although awkwardly termed, the German Bananas argument, devised by the present writer, may be used in order to justify the issuance of an anti-suit injunction in the Brussels I Regulation framework, thereby by-passing the *Turner*¹³⁹ ruling. The argument stems from the notorious *German Bananas*¹⁴⁰ case. Although the purpose of this section is not *per se* to examine the case in detail, a brief overview will be given in order for the reader to comprehend the issues. Then, the argument in relation to anti-suit injunctions will be advanced and analysed.

The case arose due to the introduction of EC Regulation 404/93, which establishes a common organisation, or a single market, of the market in bananas. On the one hand, the Regulation sets up a system of assistance to African Caribbean and Pacific banana producers, attached to French, Spanish and Portuguese importers. On the other hand, it establishes quotas and tariffs for third country bananas, established in Central America and owned by U.S. growers. The measures are aimed at restricting the importation of third country bananas, and market share in the European Union. One of the most prominent customers of these growers were German importers and distributors, who had enjoyed a regime of tariff-free imports prior to the Regulation. Under the regime of EC Regulation 404/93, quotas of bananas from third countries entitled to preferential treatment under the Regulation were allocated to importers based on prior sales. Imports outside these quotas were subjected to prohibitive tariffs. Many German importers were hit hard by the Regulation, with some facing bankruptcy whilst banana prices in Germany soared. Atlanta, one of these importers, initiated legal proceedings by bringing an action under Article 173 of the E.C. Treaty before the European Court of Justice for a declaration that certain provisions of the Regulation were void, but failed for lack of standing.¹⁴¹ The case came back to the German Constitutional Court which in a very strong judgment doubted the principle of primacy of EU Law over national law. The case then went back to the European Court of Justice, this time as a referral

¹³⁸ See *infra* Chapter VII: Reform.

¹³⁹ Ibid.

¹⁴⁰ Case C-465/93, *Atlanta Fruchthandelsgesellschaft mbH and others v. Bundesamt für Ernährung und Forstwirtschaft* [1995] E.C.R. I-3761; [1996] 1 C.M.L.R. 575.

¹⁴¹ Ibid.

under Article 177¹⁴² of the E.C. Treaty¹⁴³. The European Court of Justice held that Regulation 404/93 to be valid in a case involving an action of annulment brought by the German government against the Regulation under Article 173¹⁴⁴ of the E.C. Treaty. In essence, the European Court of Justice interpreted the Regulation in such a way as to allow Atlanta to continue trading thus not violating its constitutional rights. Nonetheless, the importance of the German bananas argument lies in the judgment of the German Constitutional Court since the principle of primacy of EU Law over national law was heavily criticised.

The issue before the German Constitutional Court was whether the Regulation, and hence European Union Law, would take precedence over German Law where European Union Law violates basic German fundamental rights. The rights in question were Article 12, regarding the freedom to pursue trade or business, Article 14, regarding the right to property, and Article 19(4) relating to the protection of fundamental rights before a court of law. The German Constitutional court held that it has jurisdiction to review secondary European Union Law¹⁴⁵ in order to protect the fundamental rights of German citizens when secondary European Union Law impinges on fundamental German Constitutional rights. In other words, the judgment of the German Constitutional Court is an act of defiance on the fundamental principle of supremacy of European Union Law over national law¹⁴⁶.

How do anti-suit injunctions, however, fit in to the *German Bananas*¹⁴⁷ saga? The *German Bananas*¹⁴⁸ case may be used in order to justify the issuance of anti-suit injunctions in the European Union. The outcome of the case was that if a European Regulation violates fundamental rights the court has jurisdiction to enforce those rights and not apply the

¹⁴² Now Article 234 E.C.

¹⁴³ Case C-104/97, *Atlanta Fruchthandelsgesellschaft mbH and others v. Council of the European Union* [1999] E.C.R. I-6983; [2001] 1 C.M.L.R. 20.

¹⁴⁴ Now Article 230 E.C.

¹⁴⁵ This includes Regulations.

¹⁴⁶ For an analysis of the *German Bananas Case* see Roman Kwiecien, *The Primacy of European Union Law Over National Law Under the Constitutional Treaty*, 6 German Law Journal, No.11; Norbert Reich, *Judge-made 'Europe à La Carte': Some remarks on Recent Conflicts Between European and German Constitutional Law Provoked by the Banana Litigation*, accessible at: <http://www.ejil.org/journal/Vol7/No1/art6.pdf>; Miriam Aziz, *Sovereignty Lost, Sovereignty Regained? Some Reflections on the Bundesverfassungsgericht's Bananas Judgment*, accessible at: <http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/FileStore/ConWEBFiles/FiletoUpload.5312.en.pdf>. See also Paul Craig & Grainne de Burca, *EU Law: Text, Cases and Materials*, 4th ed., (2007), London: OUP, Chapters 7 and 8.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

Regulation. Thus, by applying the principles derived from the *German Bananas*¹⁴⁹ case, one may argue that the English courts may have grounds not to apply Regulation 44/2001 in order to protect the rights of a party to enforce an exclusive jurisdiction or arbitration clause in a contract freely entered into, a breach of which carries as a remedy an anti-suit injunction. Since the United Kingdom does not have a Constitution in the form known on the Continent, in other words a written one, one has to look at the common law in order to determine which rights are considered as fundamental under English law. It is submitted that there are two types of rights arising under English law which clarify as fundamental rights for the purposes of this argument.

The first type of right which may be considered as fundamental under English law is the right of a party not to be sued abroad. This type of right arises in Equity and carries as a remedy for its breach an anti-suit injunction. In order for the German bananas argument to work, one needs to establish that the right of a party not to be sued abroad is deeply rooted into English law. It is submitted that it is. The long line of cases regarding anti-suit injunctions trace back many centuries; the first reported case being in the year 1674¹⁵⁰. The majority of those cases arose in Equity and was owed to the quarrel between the courts of Equity and the common law courts. It is therefore submitted that due to the long history of the principle, there is sufficient evidence to suggest that the principle is deeply rooted into English law, which in turn clarifies it under the German bananas argument.

However, even if one does not accept that the equitable right of a party not to be sued abroad suffices to clarify that right as deeply rooted into English law, one may advance the second argument which relates to English Contract Law. Thus, the argument goes, the right of a party to freely enter into a contract is so fundamental and so deeply rooted into English law which clarifies that right as valid for the purposes of the German bananas argument. Evidence of the fundamental nature that freedom of contract enjoys in English law can be found in any contract law textbook, an example being McKendrick's book where he states the following in relation to the fundamental basis of English contract law:

"The classical theory is the will theory. Closely associated with *laissez-faire* philosophy, this theory attributes contractual obligations to the will of the parties. The law of contract is perceived as a set of power-conferring rules which enable

¹⁴⁹ *Ibid.*

¹⁵⁰ For the roots of anti-suit injunctions *see supra* Chapter I: The English Common Law Framework.

individuals to enter into agreements of their own choice on their own terms. Freedom of contract and sanctity of contract are the dominant ideologies. Parties should be as free as possible to make agreements on their own terms without the interference of the courts or Parliament and their agreements should be respected, upheld and enforced by the courts.”¹⁵¹

Therefore, the common law principle of freedom of contract is a principle so deeply rooted into English law that has as a consequence a right to freely enter into a contract, which if breached, carries as a remedy an anti-suit injunction. The English courts would consequently be allowed to enjoin a party who commenced proceedings in another Member State court in order to enforce that right. It is therefore submitted that taking the English Contract Law approach would work under the *German Bananas*¹⁵² case, thus justifying the issuance of an anti-suit injunction in the Brussels I Regulation framework even post-*Turner*¹⁵³.

The underlying philosophy of the English common law rules on jurisdiction is also by itself evidence of the fundamental nature of the principle of freedom of contract. As already examined¹⁵⁴, English law on jurisdiction is centred around the enforcement and protection of contractual agreements freely negotiated and entered into. This philosophy of enforcing private law rights is closely connected to the fundamental English principle of freedom of contract. A good illustration of this connection is the House of Lords judgment in *Donohue v. Armcoc*¹⁵⁵. Although their Lordships did not issue an anti-suit injunction in that case, they did point out in their judgment that in principle the fact that the parties had entered into an agreement was so important as to necessitate the enforcement of the agreement. Similarly, in the House of Lords decision in *Turner*¹⁵⁶, Lord Hobhouse, who provided a useful historical account of the principle of anti-suit injunctions, stressed the importance of enforcing private law rights arising from freely entered agreements. His Lordship stressed that an anti-suit injunction is necessary in order to prevent a party acting “unconscionably” from violating the right of a party not to be sued abroad. In turn, that right not to be sued abroad, apart from arising in Equity, also arises contractually by virtue of a contractual arbitration or exclusive

¹⁵¹ Ewan McKendrick, *Contract Law*, 7th ed., (2007), Basingstoke: Palgrave Macmillan, at p. 3.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ See *supra* Chapter I: The English Common Law Framework.

¹⁵⁵ [2001] UKHL 64, discussed in detail *supra* Chapter I: The English Common Law Framework.

¹⁵⁶ Ibid.

jurisdiction clause. Thus, the high status of contractual agreements, enshrined in the underlying philosophy of the English common law on jurisdiction, is in itself a valid reason to justify the right of freedom of contract as deeply rooted into English law, thereby rendering the German bananas argument applicable.

There are two further, general considerations which may be advanced in relation to the German bananas argument. First, one may argue that the *German Bananas*¹⁵⁷ case is also useful for interpreting the Brussels I Regulation, as the fundamental right of freedom of contract is greatly limited by the application of the *lis alibi pendens* provisions. As such, *Gasser*'s interpretation of Articles 27 and 28 as supreme over Article 23 would in turn breach that fundamental right since the party's contractual right is not respected and enforced. Second, it is evident that in the *German Bananas*¹⁵⁸ case the European Court of Justice adopted an interpretation of the bananas Regulation in order to avoid infringing a German fundamental right. This therefore demonstrates that national courts may be able to put pressure on the European Court of Justice in order for it to interpret European Union Law in a way which does not infringe national law fundamental rights. Consequently, the English courts may follow the same tactic in order to succeed in allowing anti-suit injunction in the Brussels I Regulation framework through an application for a fresh interpretation of the issue by the European Court of Justice. In order, however, for the *German Bananas*¹⁵⁹ argument to succeed the House of Lords must adopt a strong position and be determined to keep anti-suit injunctions in the Brussels I Regulation framework¹⁶⁰.

The aforesaid proposition in using the *German Bananas*¹⁶¹ case in order to justify the issuance of anti-suit injunctions has merit and applicability. It is further submitted that a party to a contract, which is breached by another party through the commencement of proceedings in another Member State, may claim damages against the State. The position used to be that a party may claim damages for breach of Community law against a Member State¹⁶². However,

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ It is submitted that such position will be adopted as demonstrated by the judgment of Lord Hobhouse in *Turner v. Grovit* [2002] I.L.Pr. 28. For an analysis *see supra* 4.3.1.3.

¹⁶¹ *Ibid.*

¹⁶² See joined Cases C-46/93 & C-48/93 *Brasserie du Pêcheur & Factortame III* [1996] E.C.R. I-1029; [1996] 1 CMLR 889; See also Case C-479/93, *Francovich v. Italy*, [1995] E.C.R. I-3843; [1997] 2 B.C.L.C. 203; [1996] I.R.L.R. 355. See also Paul Craig & Grainne de Burca, *EU Law: Text, Cases and Materials*, 4th ed., (2007), London: OUP, chapter 10.

this principle has been further advanced and developed by the European Court of Justice's decision in *Kobler*¹⁶³. The *Kobler*¹⁶⁴ case establishes that an individual may claim damages against a Member State when European Union Law violates its rights, as well as against a supreme court of a Member State. It is therefore submitted that a party may claim damages against the United Kingdom government on the grounds that its right of freedom of contract as well as its right not to be sued abroad is violated both by the application of the Regulation and the removal of anti-suit injunctions from applying in the Brussels I Regulation framework via *Turner*¹⁶⁵ or *Gasser*¹⁶⁶.

The German Bananas argument in favour of anti-suit injunctions is alien to a common law lawyer as it is based purely on civil law methodology. Nonetheless, it provides a workable solution in order to salvage the use of anti-suit injunctions in the Brussels I Regulation framework.

4.5.2 The Limits of *Turner*?

The second issue is whether one may suggest that the ruling of the European Court of Justice in *Turner v. Grovit*¹⁶⁷ can only be limited to the "no choice of forum" cases. It is submitted that the application of *Turner v. Grovit*¹⁶⁸, whether wide or strict, depends on the interpretation of the European Court of Justice's ruling. The European Court of Justice answered the precise question referred to it by the House of Lords in very general terms. The effect of this ruling therefore depends on the interpretation of this general ruling. One may argue that by affording this general statement the European Court of Justice desired to outlaw anti-suit injunctions in the European Union in general. Equally, though, one may argue that the European Court of Justice afforded a principle under which no anti-suit injunction is permissible when there is no express choice of jurisdiction by the parties and parallel proceedings are commenced in two Member States *even where* one set of proceedings is

¹⁶³ Case C-224/01, *Kobler v. Austria*, [2003] E.C.R. I-10239; [2004] 2 W.L.R. 976; [2004] Q.B. 848.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

commenced in bad faith¹⁶⁹. Due to the general nature of the European Court of Justice, both aforesaid scenarios will now be considered in turn.

If the first of the aforesaid statements is taken as correct, as the majority of scholars have argued, then *Turner v. Grovit*¹⁷⁰ has a wider impact than the “no choice of forum” cases. The result is that the Brussels I Regulation is to be interpreted as precluding anti-suit injunctions in general *even where* the foreign proceedings are commenced in bad faith. This total prohibition, however, has a much wider impact than meets the eye.

The issue here is whether *Turner v. Grovit*¹⁷¹ can be combined with *Gasser*¹⁷² in order to prohibit anti-suit injunctions in the exclusive jurisdiction agreements category as well. It is submitted that, assuming that *Turner*¹⁷³ has a wide application, the combination of those two decisions is lethal for anti-suit injunctions in the exclusive jurisdiction agreements category. The reason for this is that the European Court of Justice in its judgment considered that the principle of anti-suit injunctions as a whole is contrary to the Community principle of mutual trust and as such violates the sovereignty of the foreign court. The effect is that even where an anti-suit injunction is issued in cases of an exclusive jurisdiction agreement, *Turner*¹⁷⁴ renders such an injunction *per se* against the Brussels I Regulation framework. The position would be the same even where the *depeçage* of court proceedings theory, advocated by the present writer in this thesis¹⁷⁵, is applicable since in that scenario, despite the fact that the *Gasser*¹⁷⁶ ruling is not disturbed, *Turner*¹⁷⁷ acts as a buffer against anti-suit injunctions. Even the extreme scenario of the English court being first seised and issuing an anti-suit injunction against the second seised court would fall under *Turner*¹⁷⁸.

¹⁶⁹ One could also advance the argument that the European Court of Justice in *Turner* was wrong in its approach as the centre of barring anti-suit injunctions in Europe was the issue of incompatibility of anti-suit injunctions with civil law systems. This argument was advanced by the Advocate-General Ruiz-Jarabo Colomer and affirmed by the European Court of Justice. However, *see supra* Chapter II: Anti-Suit Injunctions: The Continental Approach for proof that anti-suit injunctions are in fact available and have been used in some European civil law systems and are thus compatible with those systems. *See also* Chapter VI: Anti-Suit Injunctions in the United States of America and in particular the discussion on anti-suit injunctions in the state of Louisiana for availability and use of anti-suit injunctions in civil law jurisdictions.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ *See supra* Chapter III: The Brussels I Regulation Framework.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

It is submitted that the impact of *Turner*¹⁷⁹ can be widened even more in the field of enforcing a foreign judgment, in other words whether the foreign court proceedings are vexatious or oppressive even where a party has obtained a judgment from the foreign court. In *Tavoulareas v. Tsavliris*¹⁸⁰ the issues *inter alia* were whether the judgment obtained by Tsavliris in Greece could be used in order to criticise Tsavliris for his conduct and that of the Greek proceedings and whether the conduct by Tsavliris could be relied on in order to set aside a judgment given by the English court. Relying on *Turner v. Grovit*¹⁸¹, Andrew Smith M.J. said that it would be contrary to the *Turner*¹⁸² decision, and the principle of mutual trust, to assess the abusive conduct of a party through an assessment of the appropriateness of bringing proceedings before the Greek court¹⁸³. Counsel for Tavoulareas had submitted that the pursuit of the Greek proceedings was an abuse. Andrew Smith M.J. disagreed with that submission due to what he felt was disallowed by *Turner*¹⁸⁴. The learned judge took that a step further by adding that it is contrary to *Turner*¹⁸⁵ to say that Tsavliris is disallowed to deploy the Greek judgment under Article 33 of the Regulation, and by criticising his conduct Tavoulareas imposed a condition on Tsavliris, and implicitly on the Greek court, which is disallowed by *Turner*¹⁸⁶ since it runs counter to the principle of mutual trust. Therefore, the learned judge concluded that by assessing whether the English judgment should be set aside, he would implicitly be assessing the appropriateness of the Greek proceedings which was disallowed¹⁸⁷ by *Turner*¹⁸⁸.

One may, however, interpret *Turner*¹⁸⁹ as strictly limited to the “no choice of forum” cases. If that interpretation of *Turner*¹⁹⁰ is applied the result is that *Turner*¹⁹¹ does not have the far reach examined above. On the contrary, if such interpretation is applied, the *Turner*¹⁹² ruling has application only in the “no choice of forum” cases. Even if *Turner*¹⁹³ is combined with

¹⁷⁹ *Ibid.*

¹⁸⁰ *Peter Tavoulareas v. George Tsavliris, Andrew Tsavliris* [2006] I.L.Pr. 14; [2006] 1 All E.R. (Comm) 109.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*, at §44.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*, at §§ 45-46.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

*Gasser*¹⁹⁴, *Turner*¹⁹⁵ is easily distinguishable due to its strict application to the “no choice of forum” cases. As a result, and by using the *depeçage* of court proceedings theory¹⁹⁶, the ground for issuing an anti-suit injunction in the exclusive jurisdiction clauses category is open for the English court.

Since, therefore, the *Turner*¹⁹⁷ ruling can be read both ways, that it is why there is ground for further clarification by European Court of Justice ruling under Article 234. It is further submitted that by assuming that the *Turner*¹⁹⁸ judgment has a wide effect, the academic community, as well as the judiciary¹⁹⁹, committed a fundamental error. Of course, the need for further clarification by the European Court of Justice has been indirectly expressed by Sir Anthony Clarke M.R. in the following terms:

“I hope that the ECJ will bear some of these considerations in mind when deciding future questions of this kind”²⁰⁰

It is submitted that even if the *Turner*²⁰¹ ruling was referred back to the European Court of Justice for clarification the European Court of Justice would rule in favour of the wide interpretation of the *Turner*²⁰² ruling since the academic debate in England has already assumed that *Turner*²⁰³ has a wide interpretation. Nonetheless, a reference for further clarification by the European Court of Justice could buy very valuable time for the English courts in order to reform this area of law and maybe attempt to make it compatible with European Union law²⁰⁴, as well as have a clear statement by the European Court of Justice as to which categories of anti-suit injunctions the *Turner*²⁰⁵ ruling applies to.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ See *supra* Chapter III: The Brussels I Regulation Framework.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ See the speech at the Institute of Advanced Legal Studies, London on the 23rd of February 2006, by Sir Anthony Clarke M.R., *The Differing Approach to Commercial Litigation in the European Court of Justice and the courts of England and Wales*, accessible at <http://www.dca.gov.uk/judicial/speeches/2006/sp060223.htm>.

²⁰⁰ Op.Cit.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ See *infra* Chapter VII: Reform.

²⁰⁵ Ibid.

There is one other aspect of the combination of *Turner*²⁰⁶ and *Gasser*²⁰⁷ which is of extreme importance. This argument can be termed the “Italian torpedo” argument and may be seen as an expansion of Dickinson’s argument²⁰⁸ regarding the importance for the use of anti-suit injunctions in the Brussels I Regulation. The combination of *Gasser*²⁰⁹ and *Turner*²¹⁰ effectively bars the English court from issuing an anti-suit injunction in the Brussels I Regulation framework. The question which arises is whether, instead of resolving a problem, the *Gasser*²¹¹ and *Turner*²¹² combination creates a new one. It is submitted that by not allowing the English courts to issue anti-suit injunctions in the Brussels I Regulation framework, the *Gasser*²¹³ and *Turner*²¹⁴ rulings effectively allow “Italian torpedoes” to operate throughout Europe.

In order for one to comprehend the “Italian Torpedo” phenomenon, one has to examine its origins. The “Italian Torpedo” phenomenon originates from the Law of Intellectual Property, more particularly from patent infringement. The introduction of the Brussels Convention 1968 allowed a party to litigate the question of a patent infringement before a court of another Member State. Although the validity of a patent was an issue justiciable only before the national court where the patent was registered, the question of infringement of a patent was justiciable before any national court. A good example could be the fact that under Article 2 of the Brussels Convention 1968 a Greek defendant could be sued in Greece not only for an infringement of a Greek patent but also for an infringement of an Italian, French or German patent. In addition, under Article 5(3) of the Brussels Convention 1968 a party could also be sued where the damage occurred, in other words a Greek party could be sued in Germany for the infringement of a Greek patent. Finally, under Article 6(1) of the Brussels Convention 1968 a co-defendant may be sued before the courts of the Member State where the other co-defendant is domiciled. Therefore two or more Member State courts may be seised with the question of infringement of a patent. Of course, the Brussels Convention 1968 and its updated version Council Regulation 44/2001, through the *lis alibi pendens* provisions seek to rectify the problem of jurisdiction.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ See *supra* 4.4.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

One may wonder what exactly an “Italian Torpedo” is. As mentioned above, the first “Italian Torpedoes” were ‘launched’ within the territorial waters of Intellectual Property Law. The best definition of what an “Italian Torpedo” is was afforded by the Italian Professor and lawyer Mario Franzosi who may be considered an authority on the issue of “Italian Torpedoes”. In order to explain and define the “Italian Torpedo” phenomenon Franzosi drew an analogy with a convoy of vessels in time of war. He said:

“As a consequence...the speed of the slowest ship is the speed of the convoy. If a national ship is considered a European ship, the speed of the various other ships is the speed of the first one.”²¹⁵

Thus, as the slowest vessel in a convoy affects the speed of all other vessels, proceedings brought before a Member State court which has a very slow system of administering justice affects the speed of proceedings brought before another Member State court which may be inherently fast. In other words, due to the application of the *lis alibi pendens* provisions, courts such as the Italian, which are traditionally slow in the speed of their proceedings, will affect the speed of proceedings in traditionally swift courts such as the English courts.

This deceleration of court proceedings is commonly known as the “Italian Torpedo” phenomenon. One question which instantly arises is the relationship between “Italian Torpedoes” and the law on anti-suit injunctions. As mentioned above “Italian Torpedoes” were ‘launched’ within the territorial waters of Intellectual Property Law²¹⁶. The mechanism under which they were ‘launched’ was simple, namely proceedings would commence in a Member State whose court proceedings were slow, say Italy, on the ground of infringement of a patent in England. Then, another set of proceedings would commence in England for the same cause of action and between the same parties. This would trigger the operation of the *lis alibi pendens* provisions and thus the English court being second would have to wait for the Italian court to rule on its jurisdiction, a process which may take up to more than five years. Traditionally, however, a party who was dragged through this long and expensive process could ask the English court for the remedy of an anti-suit injunction.

²¹⁵ Mario Franzosi, *Worldwide Patent Litigation and the Italian Torpedo*, E.I.P.R., 1997, 7, also accessible at <http://www.franzosi.com/view.asp>.

²¹⁶ See for example Mario Franzosi, *Italy: Patents – Cross Boarder declaraton of non-infringment – Italian Torpedo – German Torpedo*, Case Comment on *Novamont v. Biotech* (Unreported, April 20, 2000), E.I.P.R. 2000, 22(10) N142; Mario Franzosi, *Italy: Patents – Jurisdiction*, Case Comment on *BL Macchine Automatiche SpA v. Windmoiier & Hoischer KG* [2004] I.L.Pr. 19 (It Cass (I)), E.I.P.R. 2004, 26(9), N155.

The impact of the *Gasser*²¹⁷ and *Turner*²¹⁸ decisions is to lift the availability of this remedy from a party and to impose a strict application of the *lis alibi pendens* provisions, or to put it another way using the aforesaid example, the party which commenced the English proceedings second will have to wait for five or more years for the Italian courts to determine only the issue of jurisdiction. The impact of *Gasser*²¹⁹ and *Turner*²²⁰, however, is far greater than this since by disallowing anti-suit injunctions those decisions allowed “Italian Torpedoes” to threaten the English legal system. In other words, “Italian Torpedoes” are no longer confined within the ‘territorial waters’ of Intellectual Property Law²²¹ but now they can be ‘launched’ in any type of claim. Therefore, *Gasser*²²² and *Turner*²²³ in a sense lifted the veil of anti-suit injunctions which protected England from “Italian Torpedoes”. As such, “Italian Torpedoes”, although a harmful consequence, become a reality for the uniform application of the *lis alibi pendens* provisions and the principle of mutual trust between Member State courts.

A recent example is *JP Morgan v. Primacom*²²⁴ where Cooke J. was bound to apply the European Court of Justice’s ruling in *Gasser*²²⁵. The *JP Morgan*²²⁶ decision, due to the application of *Gasser*²²⁷, encourages forum shopping since its effect is that debtors that wish to avoid their obligations under a loan facility are allowed to commence proceedings in another Member State in breach of an exclusive jurisdiction clause purely on the basis of causing delay and frustrating proceedings, unfortunately commenced second by the other party, in England. In that respect, an anti-suit injunction could negate the effect of forum shopping as the forum shopper, that being in the *JP Morgan*²²⁸ litigation Primacom, would face legal consequences in England for its conduct. The *JP Morgan*²²⁹ decision highlights the necessity for Member States to deal with the issue of “Italian torpedoes” through a revision of the Regulation, as the risk for tactical litigation in the European Union is ever increasing with the Regulation lacking

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ It seems that “Italian Torpedoes” will not disappear from the field of Intellectual Property Law, *see* Mario Franzosi, *Torpedoes Are Here To Stay*, accessible at <http://www.franzosi.com/view.asp>.

²²² Ibid.

²²³ Ibid.

²²⁴ [2005] 2 Lloyd’s Rep. 665. For an analysis of the decision *see supra* Chapter III: The Brussels I Regulation Framework. *See also* Nikiforos Sifakis, *Exclusive jurisdiction clauses - Articles 27 and 28 of the Brussels I Regulation - The “Italian torpedo” - Anti-suit Injunctions*, (2006) 12(5) J.I.M.L. 307.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Ibid.

protection for a party which has to withstand the infringement of an exclusive jurisdiction clause by the other party which commences foreign proceedings in bad faith.

4.6 Conclusions

The European Court of Justice decision in *Turner v. Grovit*²³⁰ is centred around the mutual trust and respect principle underlying the Brussels I Regulation. Although methods around *Turner*²³¹ were suggested in this Chapter, the impact of *Turner*²³² on the law on anti-suit injunctions is immense as the ruling effectively bars the English courts from issuing anti-suit injunctions in order to restrain proceedings in another Member State court, even in cases of a breach of an exclusive jurisdiction clause.

One may correctly remark that *Turner*²³³ is an expression of the philosophy underlying the Brussels I Regulation. In particular, the Advocate General and the European Court of Justice found it inconceivable that a Member State court is free to restrain proceedings in another Member State court with the sole purpose of protecting and enforcing private law rights. Thus, *Turner*²³⁴ is a perfect illustration of the more public law approach adopted by civil law systems on issues of jurisdiction.

Although this Chapter presented arguments doubting the correctness of *Turner*²³⁵, the ruling stands and has thus affected the discretion of the English courts in issuing anti-suit injunctions in the Brussels I Regulation framework. However, the *Turner*²³⁶ ruling further increased the doubts as to the effectiveness of the Brussels I Regulation in combating vexatious forum shopping, as illustrated by the “Italian torpedoes”, thereby increasing the need for reform. The discussion in the next Chapter involves an examination of anti-suit injunctions in relation to arbitration agreements, a category which, it is submitted, raises doubts as to the application of *Turner*²³⁷ purely on the basis of the unique nature of arbitration agreements and whether such agreements fall within the scope of the Brussels I Regulation.

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Ibid.

CHAPTER V: ARBITRATION AGREEMENTS

5.1 Introduction

Arbitration agreements are considered separately in this thesis due to their unique nature, especially in relation to the question of anti-suit injunctions. In particular, arbitration is excluded from the scope of the Brussels I Regulation due to the operation of Article 1§2(d) which provides that:

“This Regulation shall not apply to:
....(d) arbitration”

This exclusion effectively allows a party to an arbitration agreement to breach it by commencing proceedings in another Member State court, therefore, rendering that court first seised as well as being able to get a judgment which in turn by virtue of the Brussels I Regulation can be recognised and enforced in the European Union¹. Normally the other party to the arbitration agreement will seek to enforce it and will therefore commence proceedings in the English courts seeking the appointment of an arbitrator by virtue of the Arbitration Act 1996 and an anti-suit injunction in order to enjoin the other party from continuing its proceedings in another Member State court.

Although *prima facie* one can argue that by virtue of Article 1§2(d) arbitration is altogether clearly excluded from the scope of the Brussels I Regulation, as it will be seen in this Chapter, there are reasons for doubting this exclusion. In turn this means that should arbitration not be excluded from the Regulation, the issuance of an anti-suit injunction in cases where proceedings are commenced in another Member State in breach of an arbitration agreement, directly conflicts with the *lis alibi pendens* provisions in Articles 27 and 28. The legal and academic opinions are divided on this issue.

Arbitration is considered to be an extremely effective means of dispute resolution. Resolution of a dispute via arbitration is conferred contractually, in that the parties must agree to arbitrate. Although arbitration may be conceived as a modern and trendy means of dispute

¹ See Articles 32-56 of the Brussels I Regulation. See also *Phillip Alexander Securities and Futures Limited v. Bamberger, Theele, Kefer, Riedel, Franz and Gilhaus* [1997] I.L.Pr. 73; *The Heidberg* [1994] 2 Lloyd's Rep. 287 discussed *infra* at 5.3; Case C-391/95, *Van Uden Maritime v. Deco Line* [1998] E.C.R. I-7091; [1999] I.L.Pr. 73.

resolution, it has been in use for thousands of years. In particular, maritime arbitration took place at the time of the oral laws of *lex maritima*, the Rôles of Oléron around 1,200 A.D. and the Consulato del Mare used in the Mediterranean². Arbitration is very popular in building contracts and some insurance contracts³ yet charterparties take the lion's share. There are two major *fori* which are established globally as centres for arbitration, namely London and New York. Arbitration is thus very important both for the English legal market and the global commercial market.

The reasons why parties choose arbitration vary, yet six reasons can be distinguished as the most prominent. First, arbitration is considered to be a swift way of dispute resolution in that a case does not have to queue together with all the cases that are to be tried before a national court since the parties in essence appoint the judges of their choice privately. Second, arbitration is seen as a cheap alternative of dispute resolution since each party agrees with the arbitrator or arbitrators a certain fee as remuneration. Third, arbitration is considered as a very flexible procedure simply because the parties have the freedom to decide on procedural issues. Therefore, the parties may decide not to appoint barristers to argue the case before the arbitrators and decide the case by relying merely on the documents. This is mainly chosen by parties who want to cut down the costs of the procedure. Fourth, arbitrators may be commercial men with vast experience in their field. This therefore provides the parties with the security that a just and fair decision will be reached. Fifth, arbitration is a fully confidential procedure, and therefore the parties may agree to hold the arbitration proceedings privately without access from the public. This is particularly important for businesses since their trade secrets will not be publicly known. The arbitration award is also confidential. However, parties have the freedom to allow publication of the decision and the award. Finally, there is a legal framework behind arbitration in order to ensure that the arbitrator's award will be enforceable⁴.

The purpose of this Chapter is, therefore, to present the arguments, both scholarly and legal, for and against the recognition of arbitration as indirectly being covered by the Brussels I

² For an excellent account on arbitration in Mediaeval times see John H. Pryor, *Business Contracts of Mediaeval Provence*, Pontifical Institute of Mediaeval Studies, Toronto, 1981, pp. 198-203. Pryor presents evidence of recorded arbitral decisions of Marseille dating around 1248 A.D.

³ An example of this are the P&I Club Rules. For an example *see infra* 5.3 for the provisions of the Through Transport Mutual Insurance Association Eurasia considered in *The Hari Bhum* decision.

⁴ For an analysis on the high status of arbitration and the reasons for it being chosen by commercial parties, *see* Robert Merkin, *Arbitration Law* (2004), London: LLP.

Regulation and to present the views of the present writer on this issue. This issue is of cardinal importance since, if arbitration is altogether excluded from the scope of the Regulation, the English courts would be allowed to issue an anti-suit injunction restraining proceedings before another Member State court in breach of an arbitration agreement. The discussion in this Chapter will also serve the purpose of highlighting any inadequacies in the Brussels I Regulation in relation to dealing with arbitration agreements and will thus provide valuable food for thought when the reform proposals later in this thesis are formed.

5.2 The Scope of the Arbitration exclusion

The issue of whether arbitration is excluded altogether from the scope of the Brussels I Regulation is of extreme importance, since if arbitration is excluded then an anti-suit injunction issued by an English court restraining proceedings commenced before a Member State court in breach of an arbitration agreement would be permissible. There have been two views on this issue which will be discussed in turn. The first advocates that the exclusion afforded in Article 1§2(d) is absolute, whereas the second advocates that the exclusion is limited only to arbitration proceedings and arbitration awards.

Before the birth of the Brussels Convention 1968 and the Regulation, the European Union provided a mandate in Article 220 of the Treaty of Rome, under which Member States should enter into negotiations in order to secure “the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts and tribunals and of *arbitration awards*”⁵. When negotiating the Brussels Convention 1968, Member States agreed to exclude arbitration in Article 1§2(4), now under the Regulation Article 1§2(d), since most Member States had already ratified the 1958 New York Convention which dealt with recognition and enforcement of arbitral awards. It was, therefore, thought that in order to avoid a conflict it was unnecessary for the Brussels Convention to deal with arbitration⁶. The advocates of the complete exclusion view, therefore, base their argument on the negotiations stage and on their view that arbitration is unequivocally excluded under Article 1.

⁵ Jenard Report, Official Journal, 1979, N° C 59, p. 3.

⁶ Jenard Report, Official Journal, 1979, N° C 59, p.13.

This view was the dominant view until *Marc Rich & Co. A.G. v. Societa Italiana P.A. (The Atlantic Emperor)*⁷. The case involved the purchase of oil by a Swiss company from the defendant Italian company. A telex was sent to the defendants by the claimants which *inter alia* contained a London arbitration clause. The defendants did not reply to the telex. The cargo was subsequently found contaminated. The defendants served a writ in the Italian Courts seeking a declaration that they were not liable, and on the same day, the plaintiffs commenced arbitration proceedings in London. A few months later proceedings were commenced before the English Courts for the appointment of an arbitrator by virtue of the Arbitration Act 1950, section 10. The plaintiffs obtained leave to serve the defendants out of jurisdiction under Order 73, rule 7(1) of the Rules of the Supreme Court (now Civil Procedure Rules). The defendants subsequently disputed the existence of an arbitration agreement and requested the service out of jurisdiction to be set aside. They further argued that the existence and validity of an arbitration clause was not part of the exclusion of Article 1§2(4), now Article 1§2(d) under the Regulation, and therefore the Brussels Convention 1968 applied thus bringing into effect all its provisions, including the *lis alibi pendens* provisions in Articles 21 and 22. As a result, it was argued, the Italian Court was first seised of the case and thus having priority over the English Courts. The claimants contested this claim by affording the complete exclusion view, in other words that under Article 1§2(4) of the Brussels Convention, now Article 1§2(d) of the Regulation, arbitration was unequivocally excluded and therefore there was no obligation for the English Court to stay its proceedings.

At first instance⁸ it was held by Hirst J. that the word 'arbitration' was wide enough to cover all aspects of an arbitration agreement, including the existence and validity of an arbitration agreement. The learned judge then went on to consider the putative law⁹, in other words whether the contract was by virtue of its terms or by implication governed by English law, and whether service out of jurisdiction should be exercised by virtue of the *forum non conveniens* principle¹⁰. He concluded in favour of English jurisdiction. On appeal in the Court of Appeal¹¹ Hirst J.'s ruling was considered to be correct, yet it was contended that a decision on this issue was not easy and required an interpretation of Article 1. For this reason the Court of Appeal

⁷ Case C-190/89, *Marc Rich & Co. A.G. v. Societa Italiana P.A. (The Atlantic Emperor)* [1992] 1 Lloyd's Rep. 342.

⁸ [1989] E.C.C. 198. See also Peter Kaye, *The Judgments Convention and Arbitration: Mutual Spheres of Influence*, (1991) 7 Arbitration International 289.

⁹ *The Parouth* [1982] 2 Lloyd's Rep. 351.

¹⁰ *The Spiliada* [1987] A.C. 460. See also *supra* Chapter I: The English Common Law Framework.

¹¹ [1989] 1 Lloyd's Rep. 554.

exercised its power under Article 2(2) of the 1971 Interpretation Protocol and referred a question for interpretation to the European Court of Justice¹².

Due to the uniqueness of the case the European Court of Justice¹³ heard submissions made in favour of the claimants by the French, German and United Kingdom governments and in favour of the defendants by the Commission, the Italian government, Professor Schlosser and Monsieur Jenard. It was thus a case of immense importance since the drafters of the Schlosser Report¹⁴ and the Jenard Report¹⁵ were making submissions supporting the view of the defendants that Article 1§2(4) of the Brussels Convention, now Article 1§2(d), does not exclude arbitration in its entirety.

Professor Schlosser diverted from his initial view in the Schlosser Report and submitted that all court proceedings regarding arbitration, including issues about the existence and validity of an arbitration clause, should be governed by the Brussels Convention, now the Regulation. He clarified his departure from his original views by affording a set of reasons. First, since arbitration has become a major means of commercial dispute resolution its effectiveness would be jeopardised as well as free movement of court judgments regarding arbitration. Second, it would be contrary to the spirit of Article 220 of the Treaty of Rome and the principle of simplification of formalities under that article to exclude arbitration in its entirety. Third, at the time of drafting the Brussels Convention most Member States were already part of the 1958 New York Convention and a special European Union Convention, called the Strasbourg Convention on a Uniform Law of Arbitration was in preparation which was hoped to fill in the gaps left by the Brussels Convention relating to arbitration, yet that Convention failed since it was only ratified by Belgium. Third, Schlosser took the example of Denmark, which does not have any laws regarding recognition outside the Convention, to illustrate the

¹² “1. Does the exception in Article 1(4) of the Convention extend (a) to any litigation or judgments and, if so, (b) to litigation or judgments where the initial existence of an arbitration agreement is in issue?

2. If the present dispute falls within the Convention and not within the exception to the Convention, whether the buyers can nevertheless establish jurisdiction in England pursuant to (a) Article 5(1) of the Convention, and/or (b) Article 17 of the Convention.

3. If the buyers are otherwise able to establish jurisdiction in England than under paragraph 2 above, whether (a) the Court must decline jurisdiction or should stay its proceedings under Article 21 of the Convention or, alternatively, (b) whether the Court should stay its proceedings under Article 22 of the Convention, on the grounds that the Italian court was first seised.”, *Op.Cit.*, pp. 555-556.

¹³ Case C-190/89, [1991] E.C.R. I-3855; [1992] 1 Lloyd’s Rep. 342. See also Peter Kaye, *The EEC and Arbitration: The Unsettled Wake of the Atlantic Emperor*, (1993) 9 Arbitration International 27.

¹⁴ O.J. 1979, N°. C59/71.

¹⁵ Ibid.

point that should the Convention be inapplicable a great gap regarding free movement of dispute resolution instruments would be left open. Fourth, after citing bankruptcy¹⁶, direct effect of directives¹⁷, fishery policy¹⁸ and nationality discrimination¹⁹ case law, Professor Schlosser drew an analogy in order to clarify the point that Article 1§2(4), now Article 1§2(d) under the Regulation, should be construed so as to give effect to the policy underlying Article 220 of the Treaty of Rome.

Monsieur Jenard preferred a more restrictive approach to the issue and advocated in favour of a purposive interpretation of the arbitration exclusion. He too stressed the importance in giving effect to the policy underlying Article 220 of the Treaty of Rome and recognised that during negotiations on the accession of the United Kingdom everyone recognised that problems as to the arbitration exclusion may arise. He further added that when the issue of existence and validity of an arbitration clause arises it becomes merely incidental to the main issue of the dispute which is not excluded from the Convention and therefore the Convention jurisdiction principles should be applicable. Jenard went further and discussed cases where the main issue of the dispute is arbitral existence. He concluded that, due to the principle laid down in *Effer v. Kantner*²⁰, the Convention's aim was to prevent multiple proceedings and conflicting judgments and therefore the second seised court should regard the Convention as being applicable to the issue to the effect that that court has the power to stay its proceedings or decline jurisdiction pursuant to Articles 21 and 22, now Articles 27 and 28 of the Regulation. Therefore he applied his reasoning in *The Atlantic Emperor*²¹ and concluded that the Italian courts were first seised of the dispute and part of those proceedings concerned the incidental question of arbitral existence, whereas the proceedings before the court second seised, the English court, had as its principal issue arbitral existence. Nonetheless, he concluded, the English court should decline or stay its proceedings pursuant to Articles 21 and 22, now Article 27 and 28 under the Regulation, in favour of the Italian court. As a result, should the Italian court find the arbitration agreement to be valid the parties would be ordered to go to arbitration and should the Italian court find the arbitration agreement to be invalid

¹⁶ *Gourdain v. Nadler* Case 133/78 [1979] E.C.R. 773 ; *De Cavel v. De Cavel* Case 143/78 [1979] E.C.R. 1055 .

¹⁷ *Verbond van Nederlandse Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen* Case 51/76 [1977] E.C.R. 113,

¹⁸ *Commissioners v. The UK* Case 32/79 [1981] E.C.R. 1045 .

¹⁹ *Sotqui v. Deutsche Bundespost* Case 152/73 [1974] E.C.R. 153; *Boussac St Frères S.A. v. Gerstenmeier* Case 22/80 [1984] E.C.R. 3427 .

²⁰ Case 38/81 [1982] E.C.R. 825.

²¹ Ibid.

then it would proceed to rule on the merits and that judgment would then have to be recognised and enforced throughout the Member States.

The European Court of Justice, after considering the submissions made by the parties, pointed out that regarding question 1(a)²², it was true that Article 220 of the Treaty of Rome referred both to court judgments and arbitration awards yet that this did not mean that the Convention should give effect to a wide application of the principle in Article 220. The European Court of Justice further stressed that Member States in excluding arbitration intended to exclude arbitration in its entirety²³. The European Court of Justice, drawing support from the Schlosser Report²⁴ and the Evrigenis/Kerameus Report²⁵, added that the exclusion in Article 1§2(4) of the Brussels Convention, now Article 1§2(d), covered litigation concerning the appointment of an arbitrator²⁶.

Regarding question 1(b)²⁷, the European Court of Justice observed that a preliminary issue which may fall within the scope of the Brussels Convention does not justify its application if the subject-matter of the dispute falls outside the scope of the Brussels Convention²⁸. The European Court of Justice observed that it would be contrary to the principle of legal certainty to vary the application of the arbitration exception. Therefore, the European Court of Justice held that:

“It follows that...the fact that a preliminary issue relates to the existence or validity of the arbitration agreement *does not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator*. Consequently, the reply must be that *art. 1(4) of the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national Court concerning the*

²² See *supra* note 12.

²³ *Ibid.*, §18.

²⁴ *Ibid.*

²⁵ O.J. 1986 N° C298/1.

²⁶ “It must be pointed out that the appointment of an arbitrator by a national Court is a measure adopted by the State as part of the process of setting arbitration proceedings in motion. Such a measure therefore comes within the sphere of arbitration and is thus covered by the exclusion contained in art. 1(4) of the Convention. That interpretation is not affected by the fact that the international agreements in question have not been signed by all the Member States and do not cover all aspects of arbitration, in particular the procedure for the appointment of arbitrators.”, *Ibid.*, §§ 19-20.

²⁷ See *supra* note 12.

²⁸ “In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the Court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.”, *Ibid.*, §26.

appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.”²⁹ (emphasis added)

The European Court of Justice further held that “in view of the answer given to the first question, the second and third questions do not call for a reply.”³⁰

5.3 The application of *The Atlantic Emperor*

Although an arbitration clause may be a valid arbitration clause by virtue of the Arbitration Act 1996 or validly incorporated in the parties’ contract³¹, a party may contest the jurisdiction of the English court and the validity of the arbitration clause and commence proceedings in another Member State court. In such a case, the English court will issue an anti-suit injunction in order to enforce the arbitration clause and protect the rights of the party seeking the injunction.

The ruling of the European Court of Justice in *The Atlantic Emperor*³² caused mixed opinions amongst legal scholars³³. Nonetheless, that ruling was followed, and its impact was felt, in the earliest authority regarding the issuance of anti-suit injunctions in cases of an arbitration agreement, namely *The Angelic Grace*³⁴. In that case, which involved a collision³⁵, the claimants, a Panamanian company and owners of the Angelic Grace, let to the Italian charterers the

²⁹ *Ibid.*, §§ 28-29.

³⁰ *Ibid.*, §30.

³¹ For requirements for a valid arbitration clause *see* in particular the Arbitration Act 1996 ss. 5 and 6. For valid incorporation of an arbitration clause from a charterparty into a bill of lading *see* *The Rena K* [1978] 1 Lloyd’s Rep. 545. See also *The Garbis* [1982] 2 Lloyd’s Rep. 283; *The Emmanuel Colocotronis* (No.2) [1982] 1 Lloyd’s Rep. 286; *The Varennna* [1983] 2 Lloyd’s Rep. 592; *The Miramar* [1984] 2 Lloyd’s Rep. 12; *The Nai Matteini* [1988] 1 Lloyd’s Rep. 45; *The Oinoussin Pride* [1991] 1 Lloyd’s Rep. 126; *The Coral* [1993] 1 Lloyd’s Rep. 1; *The Nerano* [1996] 1 Lloyd’s Rep. 1; *The Indian Reliance* [1997] 1 Lloyd’s Rep. 52.; *The Ikariada* [1999] 2 All E.R. 257; *The Delos* [2001] 1 Lloyd’s Rep. 703; *The Epsilon Rosa* [2003] 2 Lloyd’s Rep. 286.

³² *Ibid.*

³³ *See infra* at 5.4.

³⁴ *Aggeliki Charis Compania Maritima SA v. Pagnan* [1995] 1 Lloyd’s Rep. 87.

³⁵ The charterers nominated Chioggia as a discharge port and called for discharge into The Clodia, an unpowered open ‘floating elevator’, which they owned. The two vessels were moored alongside each other in order to discharge, when during bad weather conditions in December, 1992 the master of the Angelic Grace thought it best to move her position. During the manoeuvre the mooring lines either parted or were released from The Clodia and as a result a collision occurred damaging both vessels.

vessel for the carriage of grain from Rio Grande to two safe ports on the Italian Adriatic. The charterparty contained an amended Centrocon London arbitration clause³⁶.

The owners obtained leave *ex parte* to serve an originating summons on the charterers in Italy claiming a declaration that all the claims arising out of the incident would be properly solved by arbitration in London and that the charterers should be restrained from commencing proceedings elsewhere than in London via arbitration. The owners subsequently commenced arbitration proceedings and the charterers commenced proceedings in Venice. The issue for the decision was therefore whether the arbitration proceedings in London were within the arbitration clause and whether an anti-suit injunction should be granted restraining the charterers from continuing their proceedings in Italy. The Court of Appeal decided that the arbitration clause was valid and binding on both parties and therefore were in favour of granting an anti-suit injunction to restrain the Italian proceedings. Millett L.J. thought that the anti-suit injunction would not offend the Italian court³⁷.

The decision of the Court of Appeal in *The Angelic Grace*³⁸ was subsequently considered in *Toepfer International GmbH v. Société Cargill France*³⁹, where the claimants applied for an anti-suit injunction restraining the French proceedings and restraining the defendants from commencing any further proceedings. The defendants submitted that the English Courts should not entertain the claim because the cause of action in these proceedings was the same as that in the French Court and the French Court was first seised so that under Article 27 of the Regulation the proceedings should be stayed. The plaintiffs argued that, as under Article 1§2(d) the Regulation was inapplicable to the proceedings, Article 27 had no application.

Colman J. held that, due to *The Atlantic Emperor*⁴⁰, arbitration is excluded altogether from the Regulation⁴¹ and therefore there was no reason to discuss whether Article 27 applied⁴². The

³⁶ The clause *inter alia* provided that: "All disputes from time to time arising out of this contract shall...be referred to the arbitrament of two Arbitrators carrying on business in London."

³⁷ "The Courts in countries like Italy, which is a party to the Brussels and Lugano Conventions as well as the New York Convention, are accustomed to the concept that they may be under a duty to decline jurisdiction in a particular case because of the existence of an exclusive jurisdiction or arbitration clause. *I cannot accept the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline.*" (emphasis added), *Ibid.* , at p. 96.

³⁸ Ibid.

³⁹ [1997] 2 Lloyd's Rep. 98.

⁴⁰ Ibid.

learned judge therefore held that the case was one where an anti-suit injunction should be issued. The case was subsequently appealed and the Court of Appeal⁴³, although agreed that the exclusion in Article 1§2(d) had the effect of excluding arbitration in its entirety and therefore there was no issue of application of the *lis pendens* provision in Articles 27 and 28⁴⁴, felt that the European Court of Justice should have the final say as to the practice of issuing anti-suit injunctions in cases of breach of an arbitration agreement. The Court of Appeal referred a question⁴⁵ for interpretation to the European Court of Justice, which sought to resolve in essence whether anti-suit injunctions in cases of a breach of an arbitration agreement were permissible in the Brussels I Regulation framework. The hopes of those who eagerly anticipated the European Court of Justice's decision were shattered when the parties made an out of court settlement and as a result the European Court of Justice did not rule on the issue.

In *The Heidberg*⁴⁶ the issue *inter alia* was whether the French judgment obtained in breach of an arbitration agreement should be recognised in England. Judge Diamond Q.C. at first felt that the central issue was whether the French judgment should be denied recognition on the ground that the matter is excluded by Article 1§2(d). He examined *The Atlantic Emperor*⁴⁷ and concluded that arbitration is altogether excluded from the Regulation. However, the learned judge after examining the relevant Regulation Articles and the Schlosser Report concluded that by virtue of Article 33 a judgment must be recognised even if given in breach of an arbitration agreement since the foreign judgment on the substance of the dispute cannot be

⁴¹ “The underlying function of Art. 1.4 is thus to be taken as the exclusion from the jurisdictional regime of the Convention of such proceedings before domestic Courts as involve a subject-matter falling within the ambit of application of international conventions on arbitrations, such as the New York Convention.” (emphasis added), *Ibid.*, at p. 103.

⁴² “In view of my conclusion that the effect of Art. 1.4 is to exclude these proceedings from the operation of the Convention it is unnecessary to consider the argument that by reason of Art. 21 the English Court must stay these proceedings because they involve the same cause of action between the same parties as that before the French Court.” (emphasis added), *Ibid.*, at p. 105.

⁴³ [1998] 1 Lloyd's Rep. 379.

⁴⁴ *Op.Cit.*, pp. 383-388.

⁴⁵ “1. Does the exception in art. 1.4 of the Brussels Convention extend to proceedings commenced before the English Courts seeking: (a) a declaration that the commencement and continuation of proceedings before a French Court constitutes a breach of an arbitration agreement; (b) an injunction restraining the appellants from continuing the proceedings before the French Court, or instituting any further proceedings before any other Court, in breach of the arbitration agreement? If not, 2. Do such proceedings constitute the same cause of action as a challenge to the jurisdiction of the French Court founded on the same arbitration agreement, so as to require the English Court to stay the proceedings pursuant to art. 21 of the Convention?” (emphasis added), *Ibid.*, at p. 388.

⁴⁶ [1994] 2 Lloyd's Rep. 287.

⁴⁷ *Ibid.*

said to concern arbitration. More important, however, are the general comments made by the learned judge regarding whether the issue of validity of an arbitration clause should fall within the ambit of the Brussels regime:

“There are in my view solid practical and policy reasons for holding that decisions as to the validity of an arbitration agreement fall generally within the ambit of the Brussels Convention. The chief advantage of so holding is that any Court which has jurisdiction over the substantive dispute under the Convention may be required to rule on whether a valid arbitration agreement exists and, if so, to refer the case to arbitration by virtue of Art. II par. 3 of the 1958 New York Convention and, if such decisions are not to be binding in other Contracting States under the Brussels Convention, then there is nothing to prevent a disappointed party from seeking to obtain a different and more favourable judgment in another Contracting State, nor if the Court of one State decides in favour of the validity of an arbitration agreement and the Court of a different Contracting State decides against it, for there to ensue a ‘race’ between the parties to see which can first obtain an award or judgment in different jurisdictions, nor to prevent or resolve a potential conflict between an award and a judgment once obtained. If decisions as to the validity of an arbitration agreement are not excluded...then, as such judgments would have to be recognized in other Contracting States, this could be expected to prevent most if not all of these conflicts.”⁴⁸

The issue was revisited in *The Ivan Zagubanski*⁴⁹, where proceedings were brought by the cargo interests in the Court of Marseilles and in the Varna Regional Court. The claimants applied for an anti-suit injunction restraining the defendants, from pursuing Court proceedings in Marseilles or elsewhere. The claimants argued that the cargo interests were bound by the arbitration clauses in the bills of lading to refer any disputes to arbitration in London. They further claimed a declaration as to the validity of the clause and submitted that the clause gave the English Court jurisdiction over the defendants to grant anti-suit injunctions by virtue of the Civil Procedure Rules Part 6.20(5)(c). The cargo interests contended that the claims made by the shipowners fell within the scope of the Regulation and submitted that the cargo

⁴⁸ *Ibid.*, at pp. 300-301.

⁴⁹ [2002] 1 Lloyd’s Rep. 106. The case involved 13 bills of lading on the Congenbill form. Each incorporated the terms and conditions of the charterparty including the arbitration clause which provided: “Arbitration in London, English Law to apply as per LMAA Rules”.

interests must be sued in the Courts where they were domiciled and no special jurisdiction of the convention could be invoked. The cargo interests also challenged the principle that an English Court could grant an anti-suit injunction against a party that was domiciled in a Regulation Member State. The issues for the decision were, first, whether the claims were within the arbitration exclusion in Article 1§2(d) of the Regulation, second, whether the English Court should refuse in principle to grant an anti-suit injunction because it was contrary to the spirit of the Regulation and, third, whether the English Court should grant an anti-suit injunction as a matter of discretion.

The learned judge, Aikens J., strictly followed earlier authorities on the issue. Regarding the first issue, he applied the decision of the European Court of Justice in *The Atlantic Emperor*⁵⁰ and ruled that arbitration is excluded in its entirety from the Regulation⁵¹. He then proceeded to distinguish Judge Diamond Q.C.'s decision in *The Heidberg*⁵² on the grounds that "Judge Diamond dealt with the point more generally"⁵³ and that "Judge Diamond's conclusion on the scope of Article 1(4) is contrary to the tenor"⁵⁴ of *The Atlantic Emperor*⁵⁵. Regarding the second issue, the learned judge concluded that it was not contrary to the Regulation to issue an anti-suit injunction⁵⁶. Thus, the learned judge proceeded to rule in favour of granting an anti-suit injunction⁵⁷ and disregarded the two final issues concerning Articles 5(1) and 24 of the Brussels Convention on the basis that the "proceedings are outside the scope of the Brussels Convention because they fall within the arbitration exception in Article 1(4)"⁵⁸.

The issue arose again in *The Hari Bhum*⁵⁹ where a container of garments was shipped at Calcutta for carriage to Moscow. The container arrived at Kotka, Finland and Borneo Maritime O.Y., an associated company of the carrier incorporated in Finland, issued a CMR waybill for the carriage of the container by road from Kotka to Moscow. However, the container did not reach Moscow, having been lost somewhere in the course of its journey

⁵⁰ Ibid.

⁵¹ Ibid., p. 118 and p. 122.

⁵² Ibid.

⁵³ Ibid., at p. 119.

⁵⁴ Op.Cit.

⁵⁵ Ibid.

⁵⁶ "One of those [principles] must be that the English Court has jurisdiction to grant an anti-suit injunction to restrain proceedings that are taking place in the Court of a Brussels Convention country in breach of an agreement on the forum for dispute resolution.", Ibid., p. 124.

⁵⁷ Ibid., p. 126.

⁵⁸ Op.Cit.

⁵⁹ [2004] 1 Lloyd's Rep. 206.

through Russia. The goods were insured against loss or damage in transit by New India. Borneo Maritime Ltd. and Borneo Maritime O.Y. were insured by a P & I club, the Through Transport Mutual Insurance Association Eurasia. The Club rules *inter alia* contained the following provision: “If any difference or dispute shall arise between you (or any other person) and the Association out of or in connection with any insurance provided by the Association or any application for or an offer of insurance, it shall be referred to arbitration in London.” New India commenced proceedings against the Club in Finland by applying to the District Court of Kotka for the issue of a writ in respect of its claim for the loss of the container and a writ was issued which was served on the Club in England. The Club contested the jurisdiction of the District Court of Kotka and issued an arbitration claim form in England seeking a declaration that New India was bound to pursue any claim in arbitration, and an anti-suit injunction to restrain it from pursuing its claim in Kotka. Gross J. gave the Club permission to serve the claim form on New India out of the jurisdiction. New India applied for the order for service out of the jurisdiction to be set aside or for the English proceedings to be stayed. The District Court of Kotka rejected the Club’s application since under Article 10 of the Regulation claims against insurers might be brought in the Courts of the country where the harmful event occurred. The learned judge, Moore-Bick M.J., granted an anti-suit injunction restraining the Finnish proceedings on the basis that arbitration is excluded in its entirety. As in *The Heidberg*⁶⁰ and *The Ivan Zagubanski*⁶¹, the learned judge applied the rules for the issuance of an anti-suit injunction in cases of an exclusive jurisdiction agreement⁶² in cases of an arbitration agreement⁶³. The learned judge concluded that the issuance of an anti-suit injunction was permissible under those rules and granted the injunction.

The case subsequently reached the Court of Appeal⁶⁴, where their Lordships reviewed the law on anti-suit injunctions in relation to arbitration agreements providing an excellent illustration of the conflicts issue arising in this area of law. Their Lordships first turned their examination to the following two issues, namely whether the English proceedings by virtue of the *lis pendens* rule should be stayed in favour of the Finnish proceedings and whether arbitration is excluded in its entirety from the Regulation under Article 1§2(d). Regarding the first issue, their

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² See *The Angelic Grace* [1995] 1 Lloyd’s Rep. 87 and *Donohue v. Armco* [2002] 1 Lloyd’s Rep. 425. See also *supra* Chapter III: The Brussels I Regulation Framework.

⁶³ For a commentary of whether the practice of equating exclusive jurisdiction agreements with arbitration agreements is correct see *infra* 5.6.

⁶⁴ [2005] 1 Lloyd’s Rep. 67; [2004] EWCA (Civ) 1598.

Lordships examined *The Atlantic Emperor*⁶⁵ and initially underlined the importance of the submissions made by Monsieur Jenard when the case was before the European Court of Justice⁶⁶ and noted that “there was some force in that approach”⁶⁷. However, the Court of Appeal found more support in the arguments put forward by Advocate General Darmon⁶⁸ and the judgment of the European Court of Justice⁶⁹. Counsel for the defendant submitted that one cannot infer from *The Atlantic Emperor*⁷⁰ that the *lis pendens* provisions do not apply since the European Court of Justice did not deal with the issue and, more importantly, this would be inconsistent with the European Court of Justice’s ruling in *Gasser*⁷¹. The Court of Appeal rejected this submission since in their view it is open for the court second seised to examine whether the arbitration exception applies, and therefore the trial judge was not bound to stay the proceedings in favour of the Finnish court⁷².

Their Lordships then turned to examine the issue whether arbitration is excluded in its entirety from the Regulation by virtue of Article 1§2(d). Their Lordships admitted the difficulty this issue presents them with since they “considered referring a number of questions to the ECJ because this appeal seems to us to raise some issues which are at least arguably not *actes clairs*.⁷³ However, due to the revision of the EC Treaty, under revised Article 177, now Article 68, only the House of Lords have the right to refer a question of interpretation to the European Court of Justice. As a consequence, their Lordships proceeded to resolve the issue, being obliged to do so, yet this illustrates that the Court of Appeal was uncertain as to the correct answer to the issue. Their Lordships found support in the judgment of Aikens J. in *The Ivan Zagubanski*⁷⁴ and fully approved the judge’s reasoning by holding that they “entirely agree with that analysis and cannot improve upon it.”⁷⁵ Their Lordships proceeded, by reviewing

⁶⁵ Ibid.

⁶⁶ At §§ 27-28.

⁶⁷ At § 29.

⁶⁸ At § 29.

⁶⁹ At §§ 30-32.

⁷⁰ Ibid.

⁷¹ Ibid. For a detailed discussion *see supra* Chapter III: The Brussels I Regulation Framework.

⁷² Ibid., at § 37.

⁷³ At § 39.

⁷⁴ Ibid.

⁷⁵ At § 44.

past decisions⁷⁶, to state that the correct test applicable in order to resolve the issue is to examine whether the principal focus of the proceedings is arbitration⁷⁷.

The Court of Appeal, however, due to its uncertainty on the issue and not being able to refer a question of interpretation to the European Court of Justice, did not categorically take the view, as happened in previous cases, that since arbitration is excluded altogether from the Regulation there are no conflicts issues, rather the Court of Appeal recognised the problem by stating that:

“The fact that arbitration is excluded from the Convention *means that from time to time there are likely to be conflicting judgments in different member states and it is therefore possible that questions of recognition and enforcement of conflicting judgments may arise in the future* in a case like this. In our opinion such questions are best left for decision when and if they arise.”⁷⁸ (emphasis added)

The Court of Appeal then turned to examine the issue of whether the granting of an anti-suit injunction by the judge at first instance was correct or not. Their Lordships, after reviewing the case law on exclusive jurisdiction clauses, recognised that “almost identical principles have been applied in the case of arbitration clauses”⁷⁹. Their Lordships proceeded to examine the European Court of Justice’s decision in *Turner v. Grovit*⁸⁰, and distinguished it, as well as *Gasser*⁸¹, on the ground that both concerned proceedings focused on a subject matter within the ambit of the Regulation⁸².

The Court of Appeal, therefore, held that the law is that when proceedings are commenced in a Member State in breach of an arbitration agreement, due to the European Court of Justice’s

⁷⁶ *The Atlantic Emperor* Ibid.; *The Heidberg* Ibid.; *The Ivan Zagubanski* Ibid.; *The Xing Su Hai* [1995] 2 Lloyd’s Rep. 15; *The Lake Avery* [1997] 1 Lloyd’s Rep. 540.

⁷⁷ Ibid. , at §§ 47-48.

⁷⁸ At § 51.

⁷⁹ At § 69.

⁸⁰ Case C-159/02, [2004] 2 Lloyd’s Rep. 169. *See supra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions, for a detailed discussion of the case.

⁸¹ Ibid. For a discussion of the case *see supra* Chapter III: The Brussels I Regulation Framework.

⁸² “as we see it, this case is different from Turner v Grovit and indeed Gasser in a very important respect. In both Turner v Grovit and Gasser both sets of proceedings were what may be called Convention proceedings...In a case where two parties to a contract which includes an arbitration clause bring proceedings in different contracting states and there is an issue as to whether one of those sets of proceedings is within the arbitration exception and thus outside the Convention, we have already expressed our view that the court in which that dispute arises has jurisdiction to determine that dispute and that Articles 27 and 28 do not apply to them. If that were wrong, the same principles would apply as in Gasser and no injunction could be granted.”, Ibid. , at §§ 82-83.

decision in the *Atlantic Emperor*⁸³, an injunction restraining the claimant is permissible⁸⁴. This opened the door to the Court of Appeal in applying Lord Millett's reasoning in *The Angelic Grace*⁸⁵ and concluded that they "see no reason why the principles in *The Angelic Grace*⁸⁶ should not continue to apply to the circumstances in which claimants may be restrained from bringing proceedings in courts of non-contracting states in breach of agreements to arbitrate."⁸⁷ That conclusion was seen by the Court of Appeal as being consistent with the European Court of Justice's decision in *Turner v. Grovit*⁸⁸.

The Court of Appeal, however, recognised that New India did not commence the Finnish proceedings in breach of contract⁸⁹ and therefore held that the anti-suit injunction should be set aside, and interestingly observed, regarding the Finnish Court, that "it is always a strong step to take to prevent a person from commencing proceedings in the courts of a contracting state which has jurisdiction to entertain them"⁹⁰. This, it is submitted, is in line with the uncertainty expressed at the beginning of the Court of Appeal judgment and its recognition that should a referral of a preliminary question to the European Court of Justice be allowed the Court of Appeal would prefer to take that route.

5.4 The effect of *The Atlantic Emperor* on Anti-Suit Injunctions

The decision of the European Court of Justice in *The Atlantic Emperor*⁹¹ opened the door for the English courts to issue anti-suit injunctions in cases of arbitration agreements within the European Union. The ruling of the European Court of Justice allowed the English courts to treat arbitration as falling outside the scope of the Regulation thus allowing more leeway in deciding whether an anti-suit injunction should be granted. However, it is submitted, *The Atlantic Emperor*⁹² did not completely rule that the Brussels I Regulation was inapplicable in cases of an arbitration agreement.

⁸³ Ibid.

⁸⁴ At § 84.

⁸⁵ [1994] 1 Lloyd's Rep. 168 and [1995] 1 Lloyd's Rep. 87. See §§ 87-89.

⁸⁶ Ibid.

⁸⁷ At § 89. See also § 90.

⁸⁸ Ibid. At § 91.

⁸⁹ Ibid., at §§ 95-97.

⁹⁰ At § 95.

⁹¹ Ibid.

⁹² Ibid.

The European Court of Justice was asked to give a ruling only on three very specific questions, and in fact only answered the first in the following way:

“Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court *concerning* the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.”⁹³

One can observe that the ruling given by the European Court of Justice is very specific and concentrated on the appointment of an arbitrator when proceedings before a national court have as a preliminary issue the existence or validity of an arbitration clause. In addition, one may observe from the Jenard Report that at the time of creation of the Brussels Convention a European Convention on Arbitration was in the process of preparation⁹⁴. Thus, arbitration was only excluded because another Convention was in preparation in order to deal with the issue. That Convention was subsequently ratified only by Belgium and therefore did not become the law in every state in the European Union. The view of Jenard is further reinforced by two very important reasons. First, Jenard gave a written submission to the European Court of Justice when *The Atlantic Emperor*⁹⁵ was tried. As it has already been mentioned, he retreated from his original view expressed in the Jenard Report because the European Convention on Arbitration failed. He thus submitted that the European Court of Justice should not rule that arbitration is altogether excluded from the Brussels I Regulation. Second, all matters excluded by Article 1 are substantive matters merely excluded due to their non-economic nature, whereas arbitration is not homogeneous with those matters⁹⁶. One therefore may conclude that arbitration was not intended to be excluded altogether from the Regulation. What the Member States desired to exclude was only issues regarding the appointment of an arbitrator, the existence or validity of an arbitration agreement and in general issues of that nature which can easily be dealt by the application of a Member States’ national law⁹⁷.

⁹³ *Ibid.*, p. 257.

⁹⁴ “Moreover, the Council of Europe has prepared a European Convention providing a uniform law on arbitration, and this will probably be accompanied by a Protocol which will facilitate the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention. This is why it seemed preferable to exclude arbitration.”, *Ibid.*, p. 13.

⁹⁵ *Ibid.*

⁹⁶ Cf. Bernard Audit, *Arbitration and the Brussels Convention*, (1993) 9 Arb. Int. 1.

⁹⁷ According to the Schlosser Report: “Nor, of course does the Convention prevent national legislation from invalidating arbitration agreements affecting disputes for which exclusive jurisdiction exists under national law or pursuant to the 1968 Convention. The 1968 Convention does not cover court proceedings which are ancillary to arbitration proceedings, for example the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time limit for making awards or the obtaining of a preliminary ruling

This, however, does not mean that when proceedings are commenced in one Member State and there is an agreement to arbitrate in another thus causing a conflict, the Regulation does not apply. It is therefore submitted that the view of the English courts, that the Regulation is altogether inapplicable to arbitration, is incorrect since it is inconceivable to imagine that throughout the European Union a judgment of a Member State court may be denied recognition in the United Kingdom merely because arbitration was amongst the issues in dispute. That is why Judge Diamond Q.C.'s judgment and reasoning in *The Heidberg*⁹⁸ is correct. Instead of simply disregarding the Brussels Convention the learned judge applied the Brussels Convention and concluded that the French judgment should be recognised in England. The learned judge, it is submitted, also followed the spirit of both the New York Convention 1958 and the Brussels Convention namely that the practice of non-recognition of judgments impedes the free circulation of judgments and arbitration awards.

One may observe that another difficulty in the law, illustrated by *The Atlantic Emperor*⁹⁹, is that the United Kingdom has not ratified the 1961 Geneva Convention¹⁰⁰. The Geneva Convention Article VI(1) deals with the point in time when a party is considered to have waived the arbitration clause, which assists the court first seised particularly in cases where the court first seised is, quite naturally, unaware of the existence of an arbitration agreement.

Further support for the view that the Brussels I Regulation does not exclude arbitration in its entirety can be found in the Council of the European Union Report on National Case Law on

on questions of substance as provided for under English law in the procedure known as statement of a special case (Section 21 of the Arbitration Act 1950). In the same way a judgment determining whether an arbitration agreement is valid or not, or because it is invalid ordering the parties not to continue the arbitration proceedings, is not covered by the 1968 Convention. Nor does the 1968 Convention cover proceedings and decisions concerning applications for the revocation, amendment recognition and enforcement of arbitration awards. This also applies to court decisions incorporating arbitration awards - a common method of recognition under United Kingdom law. If an arbitration award is revoked and the revoking court or another national court itself decides the subject matter in dispute, the 1968 Convention is applicable.", *Ibid.* , p. 92.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ In particular, Article VI(1) of the Geneva Convention 1961 is of extreme importance. The Article reads as follows: "A plea as to the jurisdiction of the Court made before the Court seized by either party to the arbitration agreement, on the basis of the fact that an arbitration agreement exists shall, under penalty of estoppel, be presented by the respondent before or at the same time as the presentation of his substantial defence, depending upon whether the law of the Court seized regards the plea as one of procedure or one of substance." See also Dominique T. Hatcher, *Recognition and Enforcement of Judgments on the Existence and Validity of an Arbitration Clause under the Brussels Convention*, (1997) 13 Arb. Int. 33.

the Lugano Convention¹⁰¹. The Lugano Convention contains in Article 1§2(d) a provision identical to the Regulation regarding the exclusion of arbitration. After citing *The Atlantic Emperor*¹⁰² and stressing that there are many different views regarding the exclusion of arbitration from the Regulation, the report provided as an example a French Cour de Cassation decision, involving the dismissal of an employee whose contract provided for arbitration in Lausanne, to illustrate the point that the Lugano Convention was applicable¹⁰³.

It is indisputable that the law in this area has been surrounded with doubt. The issue, however, of whether or not arbitration is altogether excluded from the Brussels I Regulation is cardinal since, should arbitration fall within the ambit of the Regulation, the issuance of anti-suit injunctions by the English Courts is contrary to the spirit of the Regulation. Two arguments may be advanced, the first in favour and the second against anti-suit injunctions. The former view advocates for a total exclusion since the exclusion in the Brussels I Regulation serves as a purpose to avoid interference with matters covered by the 1958 New York Convention on Arbitration¹⁰⁴. The latter view, advocated by the present writer, is that although the law in this area is surrounded with uncertainty and needs clarification from the European Court of Justice, taking the Jenard and Schlosser reports into account as well as the written submissions by the scholars in *The Atlantic Emperor*¹⁰⁵ litigation, arbitration was *only* excluded under two main conditions.

¹⁰¹ Council of the European Union, *Third Report on National Case Law on the Lugano Convention*, by Cecilia Renfors, Frans van der Velden and Rolf Wagner, 15 November 2001, SN 4502/01.

¹⁰² Ibid.

¹⁰³ “In a decision of 4 May 1999 the French Cour de cassation (*Piquet v. Sacinter*) had to consider whether an arbitration clause in an individual contract of employment excluded the applicability of the Lugano Convention. A Belgian engineer had entered into an individual contract of employment with a Swiss company, the work to be carried out in France. The contract provided that in case of dispute it would be subject to arbitration in Lausanne and governed by the ‘concordat suisse sur l’arbitrage’. The engineer was dismissed. He then sued the Swiss company for payment of damages, based on unjustified dismissal in the Labour Court at the place where he carried out his work. The Labour Court declared that it did not have jurisdiction. On appeal the Court of Appeal confirmed the Labour Court’s decision. It based its decision on two grounds: A. according to its Article 1, 2nd para. (4) the Lugano Convention is not applicable to arbitration, and B. being a valid arbitration clause according to Swiss law, which is applicable to the contract, this clause excludes the application of French labour protection provisions. *The French Cour de cassation held that the Lugano Convention was applicable. In a concise judgment it stated that the arbitration clause could not be raised against an employee who in conformity with the applicable law has taken his former employer to the French competent courts and that by applying Article 5 (1) of this Convention the French courts had jurisdiction to decide on the matter.*” (emphasis added)

¹⁰⁴ See Clare Ambrose, *Can Anti-Suit Injunctions Survive European Community Law?* (2003) 52 I.C.L.Q., 401.

¹⁰⁵ Ibid.

The first condition is that the Member States to the Regulation should deal with preliminary arbitration issues, such as the appointment of an arbitrator, by applying their national law which in effect is the law ratifying the New York Convention on arbitration. This in effect allowed the application of both the New York Convention and the Regulation throughout the European Union without the danger of having a conflict. The *Atlantic Emperor*¹⁰⁶ decision is a prime example of this. The second condition is that the Member States to the Regulation would also ratify the European Convention on Arbitration. This Convention was designed to fill in the gaps left by the 1958 New York Convention in order to have a uniform arbitration law throughout the European Union without having a conflict with the Regulation. Should one of the two aforesaid conditions not be satisfied, an immense gap is left open which affects the stable Regulation framework.

That is exactly what happened, since the European Convention on Arbitration failed. Therefore, there is a need for the Regulation provisions to take effect in order to solicit the smooth recognition and enforcement of judgments throughout the European Union. In addition, this will prevent the issuance of anti-suit injunctions since, due to the application of the Regulation, a certain framework is set out and must be followed by all Member State courts. There is of course a disadvantage, namely that a party may completely disregard his contractual obligation to arbitrate and obtain a judgment from a Member State court which in turn has to be recognised and enforced. However, having in mind that all Member States are also parties to the 1958 New York Convention, there will be little deviation in the rules applied by a Member State court in order to adjudicate on the dispute.

Another issue which arises is the importance of time. A party desiring to rely on an arbitration clause must swiftly apply to the court for the appointment of an arbitrator under section 18 of the Arbitration Act 1996, when the other party disputes the validity of the arbitration agreement. An accurate illustration of this is *The Lapad*¹⁰⁷, a case involving both civil and

¹⁰⁶ *Ibid.*

¹⁰⁷ [2004] 2 Lloyd's Rep. 109. The claimants entered into a contract with the defendant for the carriage of a crane from Gijon to Aviles in Spain. The contract was on the terms of a 'Conlinebooking' booking note with additional clauses. A clause printed on the reverse of the booking note provided for all disputes arising under it to be decided in London according to English law and an additional typed clause provided for any dispute arising under it to be referred to arbitration in London. The crane was loaded on board The Lapad and a bill of lading was issued recording that the cargo had been shipped on deck without liability for loss or damage howsoever caused. The vessel reached Aviles but in the course of discharge the crane toppled from the deck of the vessel into the harbour. The crane driver was killed and another vessel damaged. A judicial investigation was subsequently commenced in Aviles in accordance with Spanish criminal procedures,

criminal liability, where under Spanish criminal procedures if the proceedings ended in a criminal trial, the Judge would also have jurisdiction to determine civil claims against anyone found to have committed a relevant criminal offence. The claimants swiftly issued proceedings in the Admiralty Court seeking declarations that they were not liable to the defendant in respect of loss or damage sustained as a result of the accident. The judge, Moore-Bick, held that an arbitrator should be appointed since the owners had not yet submitted to the jurisdiction of the Spanish courts for the purpose of enabling civil claims to be brought and it was not clear whether the Spanish court would not stay its proceedings in favour of arbitration. The English court was fortunate since the Spanish civil proceedings had not been commenced, yet a problem would arise should the Spanish civil proceedings be in fact commenced without the Spanish court declining jurisdiction and with arbitration proceedings pending in England, for this raises issues as to the enforceability of the hypothetical Spanish judgment or London arbitration award throughout the Member States of the Regulation particularly when the two jurisdictions make inconsistent findings. The decision in *The Lapad*¹⁰⁸ can therefore be used as a yardstick for the proposition that a party relying on an arbitration clause, when the other party disputes its validity, must act swiftly in applying to the court for the appointment of an arbitrator.

The decision in *The Lapad*¹⁰⁹ also reveals two interconnected issues. The first is the advantage the English common law system has, as opposed to its civil law counterparts, in that the proceedings in England are much swifter than the proceedings on the Continent¹¹⁰. As a result, the claimant in *The Lapad*¹¹¹ was able to acquire an order from the English court for the

according to which if the proceedings ended in a criminal trial, the Judge would also have jurisdiction to determine civil claims against anyone found to have committed a relevant criminal offence. The claimants swiftly issued proceedings in the Admiralty Court seeking declarations that they were not liable to the defendant in respect of loss or damage sustained as a result of the accident. At that stage the claimants were under the impression that their relationship with the defendant was governed by the bill of lading which stated on its face that it incorporated all the terms and conditions of the booking note. The defendant applied for an order setting aside service or alternatively staying the proceedings on the grounds that the Court did not have jurisdiction to entertain the claim. The basis of the application was that the general words in the bill of lading were not apt to incorporate the English jurisdiction clause in the booking note, and that the Spanish court was already seised of the same issues. The claimants' solicitors wrote to the defendant's solicitors asking the defendant to join the claimant in the appointment of an arbitrator, otherwise the claimant would make an application to the Court under section 18 of the Arbitration Act 1996. The defendant's solicitors replied saying that they did not consider that there was any valid arbitration agreement. That led the claimants to issue an arbitration claim form in the Commercial Court under s. 18 of the Arbitration Act, 1996 applying for the appointment of an arbitrator.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ See also *supra* Chapter II: Anti-Suit Injunctions: The Continental Approach.

¹¹¹ Ibid.

appointment of an arbitrator before the Spanish court could examine the civil claim and accept or decline jurisdiction. The second issue is that, due to this swiftness of the English legal system, the arbitration agreement may be used by one party as a means of blocking proceedings in another Member State which may indeed have jurisdiction over the case. If one is to draw an analogy between exclusive jurisdiction clauses and arbitration agreements, one will observe that the English courts have treated the commencement of proceedings in another Member State as vexatious or oppressive and have thus issued an anti-suit injunction to block the other proceedings. Thus, one may wonder whether the very existence of an arbitration agreement, regardless of its validity, may be the means of commencing vexatious or oppressive proceedings in England since the fact that the English court has given a judgment as to the appointment of an arbitrator means that the English court has assumed jurisdiction on the case which in turn means that should the parties disagree with the findings of the arbitrator the court which would claim to be competent to decide on the merits of the case would be the English court.

In other words, one may observe that the arbitration agreement is used in order to bring the case within the English 'boxing ring'. That proposition seems to be correct in the light of *The Lapad*¹¹² decision which the present writer is in agreement with, yet it is submitted that the English court was not the proper court to take that decision. Thus, although the decision that the parties should be referred to arbitration was correct, the court taking that decision should have been the Spanish and not the English court. In order to conceptualise this, one should remember that should the Spanish proceedings be advanced the case law shows that an English court would issue an anti-suit injunction. Spanish domestic law in *The Lapad*¹¹³ dictated that although a criminal trial would be held that trial would decide both the criminal and the civil claim. Consequently, the Spanish court would have jurisdiction to entertain the civil claim and, since Spain is a contracting party to the 1958 New York Convention on Arbitration, by virtue of Article II, it would direct the parties to arbitration in London should there be a valid arbitration clause, the validity of which the Spanish court would have to decide. Instead, the English court deprived the Spanish court of that right and circumvented the whole procedure, when, if acting properly, it should decline jurisdiction in favour of the Spanish court. One may argue that this was the end result anyway and therefore no harm is done. The answer to this would be in the negative for the following reasons. First, in order for the English court to

¹¹² Ibid.

¹¹³ Ibid.

decide whether a valid arbitration clause exists it has to look at the merits of the case and consequently it assumed jurisdiction. Secondly, the decision of the English court to rule on the case completely disregards Spanish domestic law and procedure. Thirdly, one wonders, since the end result would be the same, why did the English court intervene in the first place?

The law of anti-suit injunctions in the area of arbitration agreements is unclear and complex. The European Court of Justice in *The Atlantic Emperor*¹¹⁴ ruled out the application of the Convention in preliminary issues regarding arbitration. The English courts therefore have more flexibility in issuing anti-suit injunctions since the Brussels I Regulation rules are not an obstacle. However, this blank cheque given to the English courts in issuing anti-suit injunctions in the Brussels I Regulation framework may be under threat by *The Front Comor* litigation.

5.5 The *Front Comor* Litigation

5.5.1 The Decision

The issue of whether an English court is allowed to enjoin a party from commencing or continuing proceedings in another Member State court in breach of an arbitration agreement recently arose again in *The Front Comor*¹¹⁵. The case is of fundamental importance as it reached the House of Lords who referred a question to the European Court of Justice seeking to establish whether arbitration is excluded altogether from the scope of the Brussels I Regulation. The House of Lords effectively asked the European Court of Justice whether or not an English court is allowed to issue an anti-suit injunction to restrain a party from proceeding in another Member State court in case of a breach of an arbitration agreement.

The defendants had insured Erg Petroli SpA (ERG) who were the owners of an oil refinery in Syracuse. ERG were also charterers of the Front Comor. The claimants were the owners of the vessel. In August 2000 the vessel collided with an oil jetty at the ERG refinery and caused a great deal of damage. The jetty was put out of operation. ERG suffered losses not only in respect of repair costs, but also by reason of disruption of refinery operations and liabilities to pay demurrage to third parties. The defendants paid to ERG a total of €15,587 under the

¹¹⁴ *Ibid.*

¹¹⁵ *West Tankers Inc. v. Ras Riunione Andriatica di Sicurtà (The Front Comor)* [2005] 2 Lloyd's Rep. 257; [2005] E.W.H.C. 454 (Comm).

policies. The charterparty contained *inter alia* an arbitration agreement which provided as follows: “Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitrations there in force before a board of three persons, consisting of one arbitrator to be appointed by the owners, one the charterer and one by the two so chosen.” The place specified in Part I was London. In August 2000 ERG commenced arbitration proceedings against the claimants in London. In addition, the defendants had commenced court proceedings against the owners in the Tribunale di Syracuse in Sicily, claiming the amount they paid to ERG by relying on their rights of subrogation under Article 1916 of the Italian Civil Code. The defendants therefore applied to the English court to set aside the anti-suit injunction granted by Gross J.

The case is of cardinal importance since, together with *The Hari Bhum*¹¹⁶ which was referred to in the court’s judgment, the argument was put forward by counsel that the European Court of Justice’s judgments in *Gasser*¹¹⁷ and *Turner*¹¹⁸ prohibited the grant of an anti-suit injunction. In particular, it was submitted by counsel for the defendants that *The Hari Bhum*¹¹⁹ was wrongly decided and that therefore the Syracuse Court proceedings fall within the scope of the Regulation, that the arbitration exception in Article 1§2(d) of the Regulation does not apply and that the application of *Turner*¹²⁰ has the effect of rendering as contrary to principle for the English court to assume jurisdiction to determine whether the defendants should continue to pursue the Syracuse proceedings.

The learned judge, Colman J., heard evidence on behalf of the defendants from the Italian professors Righetti and La China who submitted that should an injunction be granted, the Italian courts’ policy is to disregard such injunctions. After considering *The Angelic Grace*¹²¹, the learned judge observed that the provisions of the Regulation did not apply as the matter was expressly excluded in Article 1§2(d)¹²². The learned judge, after applying the Court of Appeal’s

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² “At least as regards those anti-suit injunctions granted in respect of breach of jurisdiction clauses, and therefore within the ambit of Regulation 44/2001, this approach is no longer permissible following the decision in Turner v. Grovit. However, the reasoning in that decision is inapplicable to anti-suit injunctions

reasoning in *The Hari Bhum*¹²³, concluded that the fact that a foreign court may disregard the injunction is not a valid reason not to grant it¹²⁴. The learned judge concluded that the case in hand necessitated an anti-suit injunction and therefore he rejected the application to set aside the injunction granted by Gross J and held that the anti-suit injunction should be made permanent since by refusing to arbitrate the insurers breached the Owner's equitable rights and thus the Owners had to be protected by way of an anti-suit injunction¹²⁵.

The case was subsequently leapfrogged to the House of Lords¹²⁶ where their Lordships referred a question¹²⁷ for interpretation to the European Court of Justice. Their Lordships, reviewed *Gasser*¹²⁸ and *Turner*¹²⁹ in order to illustrate the point that anti-suit injunctions are no longer available under the exclusive jurisdiction clause and "no choice of forum" categories¹³⁰. However, their Lordships distinguished arbitration agreements on the ground that arbitration is excluded altogether from the scope of the Regulation, by virtue of Article 1(2)§d as well as the European Court of Justice rulings in *The Atlantic Emperor*¹³¹ and *Van Uden*¹³². Nonetheless, their Lordships recognised that arbitration is a problematic category since:

in respect of cases involving breach of arbitration agreements which fall outside the scope of that Regulation (Through Transport Case).", *Ibid.*, at § 48.

¹²³ *Ibid.*

¹²⁴ *Ibid.*, §§ 50-51.

¹²⁵ "The fact that the subrogated insurer would not commit an actionable breach of contract vis-à-vis the debtor by commencing the court proceeding would in such circumstances be in principle irrelevant... Accordingly, I conclude that, if, as I have held, the ambit of the subject-matter of the transfer by subrogation is to be determined by English Law, the insurers were bound to pursue subrogated claims against the Owners by arbitration. Their insistence on proceeding in the Italian courts would be inconsistent with the equitable rights of the Owners under the arbitration agreement to have a claim against them in tort referred to arbitration. In principle, therefore, the anti-suit injunction would be an appropriate remedy unless strong cause were shown to the contrary....They have thereby acted and they continue to act inconsistently with the Owners' equitable rights and, although that conduct may not amount to an actionable breach of the agreement to arbitrate, it gives rise to a right of protection by way of injunctive relief under English Law which governs the agreement to arbitrate. The right to be protected against a breach of an agreement to arbitrate is to be enforced unless strong reasons are shown to the contrary, see *Donohue v. Armco Inc.*", *Ibid.*, §§ 68-73. See also Jonathan Hill, *Anti suit Injunctions and Arbitration*, [2006] L.M.C.L.Q. 166.

¹²⁶ [2007] UKHL 4.

¹²⁷ "Is it consistent with EC Regulation 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?", *Ibid.*, at § 23.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Op.Cit.*, at § 9-11. For an analysis on the law on anti-suit injunctions under the exclusive jurisdiction clause category see *supra* Chapter III: The Brussels I Regulation Framework. For an analysis on anti-suit injunctions under the "no choice of forum" category see *supra* Chapter IV: The Impact of *Turner v. Grovit* on Anti-Suit Injunctions.

¹³¹ *Ibid.*

¹³² Case C-391/95, *Van Uden Maritime v. Deco Line* [1998] E.C.R. I-7091; [1999] I.L.Pr. 73.

“There is no set of uniform Community rules which Member States can or must trust each other to apply. While it is true that all Member States adhere to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which article 71 of the Regulation declares to be unaffected) the Convention is not a Community instrument and does not create a system for the allocation of jurisdiction comparable with the Regulation.”¹³³

Their Lordships felt that, due to the distinct nature of arbitration agreements compared to exclusive jurisdiction clauses, the dispute before them fell outside the ambit of the Brussels I Regulation¹³⁴ thus enabling the court to issue an anti-suit injunction should it feel that the remedy would be necessary.

Their Lordships further reinforced this argument by affording a set of reasons. First, it was argued that extending the application of the Regulation to matters not covered by the Regulation goes beyond the reasoning¹³⁵ in *Gasser*¹³⁶ and *Turner*¹³⁷. Thus, their Lordships felt that should the Regulation be extended, orders such as the one issued by the French Cour de Cassation in *Banque Worms*¹³⁸ would also fall within the ambit of the Regulation¹³⁹.

Second, the extension of the application of the Regulation to arbitration agreements ignores the practical realities of commerce. In particular, it was stressed that parties choose arbitration in order to avoid litigation, and as such, the court system¹⁴⁰. In that respect, their Lordships felt that the courts must support the intention of the parties to arbitrate and therefore issue an anti-suit injunction in order to give effect to that intention¹⁴¹. In their Lordships view, an anti-suit injunction issued to restrain a party from commencing or continuing legal proceedings in another Member State promotes legal certainty and reduces conflict between the arbitration award and the judgment of a national court¹⁴².

¹³³ *Ibid.*, at § 12.

¹³⁴ *Ibid.*, at § 14.

¹³⁵ *Ibid.*, at § 15.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Banque Worms c. Epoux Brachot*, Cass. Civ. 1re, 19 Nov 2002, J.C.P. 2002.II, 10 201, concl. Sainte-Rose, note Chaillé de Néré, D.2003.797, note Khairallah. For an analysis of the case see *supra* Chapter II: Anti-Suit Injunctions: The Continental Approach.

¹³⁹ *Ibid.*, at § 16.

¹⁴⁰ *Ibid.*, at § 17.

¹⁴¹ *Ibid.*, at § 18.

¹⁴² *Ibid.*, at § 19.

Finally, their Lordships advanced the argument that, by not allowing a national court to give effect to the arbitration agreement by issuing measures available under its legal system, in the case of England anti-suit injunctions, apart from negating any advantages that the seat of arbitration has to offer, further undermines the competency of arbitrators to deal with a dispute¹⁴³. As a consequence, not allowing the English courts to issue anti-suit injunctions in cases of a breach of an arbitration agreement would greatly affect commerce within the European Union as parties would prefer to choose to arbitrate in other forums, such as New York, where a breach of an arbitration clause would be remedied by way of an anti-suit injunction¹⁴⁴.

The decision of the House of Lords in *The Front Comor*¹⁴⁵ is therefore of extreme importance since it continues the traditional approach of issuing anti-suit injunctions in the Brussels I Regulation framework in cases of a breach of an arbitration agreement even where one party threatens or has commenced proceedings in another Member State court¹⁴⁶. In addition, the decision comes in direct contradiction with the hypothesis, advanced by some academics¹⁴⁷, that due to *Gasser*¹⁴⁸ and *Turner*¹⁴⁹ the grant of an anti-suit injunction in cases of a breach of an arbitration agreement is very unlikely to occur, since the House of Lords explicitly distinguished those cases as not applicable to arbitration agreements. Nonetheless, as the future of anti-suit injunctions in cases of a breach of an arbitration agreement is now in the hands of the European Court of Justice, it is necessary to assess the future impact of such a decision.

5.5.2 The Future Impact of *The Front Comor*

Although the European Court of Justice has not yet ruled on the questions referred, *The Front Comor*¹⁵⁰ will undoubtedly have a great impact both on English law and the London

¹⁴³ Ibid., at § 20.

¹⁴⁴ Ibid., at § 21.

¹⁴⁵ Ibid.

¹⁴⁶ See also Case Comment, *Arbitration - Reference to the European Court of Justice - Whether an Injunction to Restrain Parties to an Arbitration Agreement from Instituting or Continuing Proceedings in the Courts of Other Member States is an Indirect Interference with Council Regulation (EC) No 44/2001*, S.T.L. 2007, Mar, 5-6.

¹⁴⁷ See David Jackson, *Jurisdiction in Europe: English Law still holding out*, S&T.L.I. (2004), 4(4), 4-6.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

commercial market¹⁵¹. One may advance two main arguments regarding the way in which the European Court of Justice is going to rule on the case. These arguments, together with their impact, will now be analysed in turn.

However, before embarking upon a discussion on the ways in which the European Court of Justice is more likely to rule, one must focus on the reasoning behind the question referred to the European Court of Justice by the House of Lords. In particular, it is noteworthy that the reasoning behind the preservation of anti-suit injunctions in cases of a breach of an arbitration agreement in the European Union is based more on economic than legal arguments. The centre of the House of Lords judgment is that by allowing anti-suit injunctions to be issued in case of a breach of an arbitration agreement the European Court of Justice will not only protect the London market but also preserve the worldwide command of London arbitration for the benefit of the European Union.

Taking into account the reasoning behind the House of Lords reference, one may advance the argument that the European Court of Justice is going to protect the enforcement of London arbitration clauses by the English courts by allowing anti-suit injunctions. This argument has merit, especially when considering *The Atlantic Emperor*¹⁵² and the arbitration exclusion issue. The European Court of Justice therefore is likely not to deviate from its interpretation of Article 1§2(d) of the Regulation. This result would be desirable for the London market and will thus be welcomed by the English courts.

However, it is submitted, almost twenty years have passed since *The Atlantic Emperor*¹⁵³ was decided and throughout this time not only has the level of integration of European Member States increased but also the European Court of Justice has taken a more active stance on the way in which it interprets the Brussels Convention 1968 and the Brussels I Regulation. An accurate demonstration of this is the *Gasser*¹⁵⁴ and *Turner*¹⁵⁵ rulings delivered in 2004. Although

¹⁵¹ See Martin Illmer and Ingrid Naumann, *Yet Another Blow: Anti-suit Injunctions in Support of Arbitration Agreements within the European Union*, Int. A.L.R. 2007, 10(5), 147-159.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

one may isolate the *Gasser*¹⁵⁶ ruling as only applicable to exclusive jurisdiction clauses, the *Turner*¹⁵⁷ ruling presents greater problems.

The main issue is the reach of the *Turner*¹⁵⁸ ruling¹⁵⁹. In other words, is the *Turner*¹⁶⁰ ruling limited to cases where an anti-suit injunction is issued restraining proceedings in another Member State court when the parties have not chosen a forum for litigation or arbitration, or does it extend to all cases where an anti-suit injunction is issued restraining proceedings in another Member State court? This argument has been put before the English court both in *The Hari Bhum*¹⁶¹ and *The Front Comor*¹⁶² and in both cases the court felt that since arbitration is excluded from the ambit of the Brussels I Regulation, the *Turner*¹⁶³ ruling is inapplicable. It is submitted, however, that this is merely the opinion of the English courts and not the European Court of Justice.

The reason for which one may suspect that the European Court of Justice in *The Front Comor*¹⁶⁴ may adopt the position in *Turner*¹⁶⁵ is the comments made by the European Court of Justice in the *Turner*¹⁶⁶ ruling regarding the principle of anti-suit injunctions as a whole. In particular, the European Court of Justice stated in *Turner* that:

“First, recourse to such measures *renders ineffective the specific mechanisms provided for by the Convention for cases of *lis alibi pendens* and of related actions*. Second, it is liable to *give rise to situations involving conflicts for which the Convention contains no rules*. The possibility *cannot be excluded that, even if an injunction had been issued in one Contracting State, a decision might nevertheless be given by a court of another Contracting state*. Similarly, the possibility *cannot be*

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ For a discussion on the reach of the *Turner* ruling see *supra* Chapter IV: The Impact of *Turner v. Grotvit* on Anti-Suit Injunctions. See also Nikiforos Sifakis, *Exclusive Jurisdiction Clauses - Articles 27 and 28 of the Brussels I Regulation - The “Italian torpedo” - Anti-suit Injunctions*, (2006) 12(5) J.I.M.L. 307.

¹⁶⁰ Ibid.

¹⁶¹ Ibid. For an analysis of the *Hari Bhum* decision see also Case Analysis, *Anti-suit Relief: Foreign Proceedings Disregarding an Arbitration Clause*, Arb. L.M. 2007, May, 1-3; Louise Merrett, *To What Extent Does an Agreement to Arbitrate Exclude the Brussels Regulation?*, [2005] C.L.J. 308; Audley Sheppard, *Anti-suit Injunctions in Support of Arbitration*, Int. A.L.R. 2005, 8(2), N20-21; Jonathan Harris, *Arbitration Clauses and the Restraint of Proceedings in Another Member State of the European Union*, [2005] L.M.C.L.Q. 159.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

excluded that the courts of two Contracting States that allowed such measures might issue contradictory injunctions. Consequently...the Convention is to be interpreted as precluding the grant of an injunction... even where that party is acting in bad faith with a view to frustrating the existing proceedings.”¹⁶⁷

One may therefore perceive the *Turner*¹⁶⁸ ruling as a condemnation of the principle of anti-suit injunctions at the highest European level. Should this interpretation as to the reach of *Turner*¹⁶⁹ be correct, this would in turn mean that the European Court of Justice in *The Front Comor*¹⁷⁰ may apply this ruling in order to bar the issuance of an anti-suit injunction restraining proceedings in another Member State court.

Further evidence that the European Court of Justice in *The Front Comor*¹⁷¹ may adopt a stance akin to *Turner* can be drawn from *The Heidberg*¹⁷² where Judge Diamond Q.C. held that, save in cases where it is a preliminary issue in appointing the arbitrator, the validity of an arbitration clause which falls within the Regulation is to be decided by the court first seised, according to *lis alibi pendens*, and recognised under Article 33 thus allowing the courts of the Member State chosen as the seat of the arbitration free to appoint the arbitrators and supervise the arbitration proceedings. In other words, although arbitration is excluded from the Regulation when parallel court proceedings are commenced in two Member State courts the *lis alibi pendens* provisions must apply in order for the court first seised to decide on the validity of the arbitration clause. This argument is also in line with the submissions¹⁷³ made by Professor Schlosser and Monsieur Jenard in *The Atlantic Emperor*¹⁷⁴. It is worth noting that according to section 30 of the Arbitration Act 1996 the competent body of deciding whether the arbitrators have jurisdiction over the dispute is the arbitral tribunal¹⁷⁵. It is submitted, however, that

¹⁶⁷*Ibid.*, p. 173, §§ 30-31. Emphasis Added.

¹⁶⁸*Ibid.*

¹⁶⁹*Ibid.*

¹⁷⁰*Ibid.*

¹⁷¹*Ibid.*

¹⁷²*Ibid.*

¹⁷³ See *supra* 5.2.

¹⁷⁴*Ibid.*

¹⁷⁵ Section 30 provides that: “Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to:

(a) whether there is a valid arbitration agreement,
 (b) whether the tribunal is properly constituted, and
 (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.
 (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.”

section 30, although providing an ideal picture, does not properly depict what happens in practice. When a party breaches an arbitration clause and commences proceedings in another Member State, say for example the party's domicile, the other party normally commences court proceedings in order to enforce the clause, have the court appoint an arbitrator and restrain the foreign court proceedings by asking for an anti-suit injunction. Therefore, the matter of the validity of the arbitration clause does in fact become an issue in court litigation in cases of a breach of the clause. As a consequence, therefore, in practice the arbitration tribunal is not always the one deciding on the validity of the clause as in many circumstances it is the court which has decided on the validity of the clause and subsequently directed the parties to arbitration¹⁷⁶.

As a consequence, these submissions combined with *The Heidberg*¹⁷⁷ and *Turner*¹⁷⁸, may provide the adequate grounds upon which the European Court of Justice may disallow anti-suit injunctions in *The Front Comor*¹⁷⁹.

It is submitted that if the European Court of Justice opts for the *Turner*¹⁸⁰ approach¹⁸¹, and therefore bars the issuance of an anti-suit injunction restraining proceedings commenced in another Member State court in breach of a London arbitration agreement, the result would be catastrophic for the London commercial market as well as the popularity of London arbitration clauses in commercial contracts. Should the European Court of Justice remove anti-suit injunctions from the arsenal of the English courts, parties to a commercial contract may choose to avoid London arbitration in favour of forums which enforce arbitration agreements by issuing anti-suit injunctions¹⁸². Such a forum is New York.

¹⁷⁶ It is submitted that the best way to tackle this problem is through reform. For reform proposal see *infra* Chapter VII: Reform, particularly 7.3.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ A view also adopted by Trukhtanov: "The ECJ is likely to be unpersuaded by the policy considerations relied on in the House of Lords and will probably be keen to dispose of the objections to the applicability of the Regulation in order to enforce the overarching "mutual trust" principle and further restrict the powers of English judges that affront their continental brethren. Barring a sudden change of heart by the ECJ, West Tankers is likely to be the last time an injunction was issued to protect English arbitration proceedings against a party invoking the jurisdiction of a court of another Member State in breach of the agreement to arbitrate.", Alexander Trukhtanov, *Anti-Suit Injunctions in Support of Arbitration - Is the ECJ About to Take Away the English Court's Powers?*, Int. A.L.R. 2007, 10(4), 136-138, at p. 138.

¹⁸² Gary Born and Wendy Miles, *Ten Years On*, Legal Bus. 2007, 174(May) Supp (Arbitration Report 2007), 4-8.

Assuming that the European Court of Justice in *The Front Comor*¹⁸³ will bar the English courts from issuing anti-suit injunctions in cases of a breach of an arbitration clause, the advantages of choosing New York as a forum for arbitration will be immense for commercial parties.

New York is one of the largest forums for arbitration worldwide thus providing parties with assurance that their dispute will be determined by commercially experienced arbitrators. However, what will be very appealing for choosing New York for arbitration post-*The Front Comor*¹⁸⁴ is the availability and extensive use of anti-suit injunctions by the New York courts in order to enforce a breached arbitration agreement¹⁸⁵. Furthermore, the extensive use of anti-suit injunctions by the New York courts has as a consequence a highly developed legal precedence which, combined with the experience of the New York judiciary together with the swiftness of New York civil procedure, will act as a magnet for commercial dispute resolution. The removal of anti-suit injunctions in relation to arbitration agreements from the arsenal of English law may also have the effect of negating the current disadvantages of New York arbitration, the most important ones being the limited experience of New York arbitrators compared to English arbitrators as well as the familiarity that the commercial world has with London arbitration.

It is therefore submitted that the threat posed to the command of London arbitration as a global dispute resolution centre is real, together with its successor namely New York. One of the first things commercial parties desire is to have the assurance that the arbitration agreements in their contracts will be enforced and that the courts will afford them the necessary protection so that they will avoid being engaged in wasteful litigation elsewhere. Should the European Court of Justice bar anti-suit injunctions in *The Front Comor*¹⁸⁶, the English courts will be unable to offer such protection and therefore commercial parties will prefer New York arbitration.

The economic impact of such a shift would be devastating for the London, as well as the European, commercial market. Apart from the decline in actual arbitration in London, a

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ For a detailed account on the availability and use of anti-suit injunctions in the United States see *infra* Chapter VI: Anti-Suit Injunctions in the United States of America. See also Nikiforos Sifakis, *Anti-Suit Injunctions in the European Union: A necessary mechanism in resolving jurisdictional conflicts?* (2007) 13 J.I.M.L. 100.

¹⁸⁶ Ibid.

decline will occur on capital spent throughout the legal profession, ranging from court fees to solicitor's or barrister's fees and may result in a change in commercial practice as to forum and arbitration choice.

Taking the aforesaid into account, one may be very troubled regarding the risk that the House of Lords took by referring a question to the European Court of Justice. It is submitted that the reference made to the European Court of Justice was made at the wrong time. Of course, one may argue that the chances of the European Court of Justice not applying *The Atlantic Emperor*¹⁸⁷ are low and thus the risk of the aforesaid occurring is also low. However, it is submitted, that the same was believed in relation to exclusive jurisdiction clauses and yet the European Court of Justice issued the *Gasser* ruling which effectively destroyed the ground upon which an anti-suit injunction was issued under this category. Thus, it is submitted, instead of making such reference the proper route to take would be to press for reforming the Brussels I Regulation. In particular, the Brussels I Regulation is inadequate to deal with arbitration or arbitration proceedings and the same applies to the 1958 New York Convention. It is therefore necessary either for the Brussels I Regulation to be reformed in such a way as to include and deal with arbitration or the creation of an Arbitration Regulation which will deal with the issue of jurisdiction in relation to arbitration proceedings¹⁸⁸. The need for reform is pressing especially when taking into account the economic implications both for the London market but also, more importantly, for the European Union market.

5.6 Other Peripheral Issues

The law on anti-suit injunctions in relation to arbitration agreements is distinct from cases involving an exclusive jurisdiction agreement or where there is no express choice of forum by the parties in that the position is, subject to the future European Court of Justice decision in *The Front Comor*¹⁸⁹, that arbitration is excluded altogether from the Brussels I Regulation, by virtue of Article 1(2)§d. Thus the issue of a conflict between the principle of anti-suit injunctions and the Brussels I Regulation does not arise. The way in which an anti-suit injunction is issued in the arbitration agreements category is simple, namely the court uses the exclusion in Article 1(2)§d to exit the Brussels I Regulation rules and applies the traditional

¹⁸⁷ *Ibid.*

¹⁸⁸ For reform proposals see *infra* Chapter VII: Reform.

¹⁸⁹ *Ibid.*

common law rules. Although the opposite has been suggested¹⁹⁰, this methodology is so far untouched by *Turner*¹⁹¹ as established by the House of Lords in *The Front Comor*¹⁹², where *Turner*¹⁹³ was distinguished due to the non-application of the Regulation. The position under this category is crystal clear; or so it seems since the following peripheral issues necessitate an examination. The first issue is whether the *Owusu v. Jackson*¹⁹⁴ ruling limits the power of the English courts to issue an anti-suit injunction in cases of an arbitration agreement. The second issue is whether the process used by the English courts in issuing the anti-suit injunction is questionable. These issues will now be considered in turn.

As mentioned above, the English court by virtue of Article 1(2)§d “gets out” of the Regulation and applies common law principles in order to issue an anti-suit injunction. The first step for the English court is to apply the doctrine of *forum non conveniens* in order to assess whether the foreign forum is the appropriate forum or whether England should be the forum of the case¹⁹⁵. The second step is to apply the rules developed in the case law regarding the issuing of an anti-suit injunction. It is submitted, however, that due to the European Court of Justice’s ruling in *Owusu*¹⁹⁶ this examination by the English court is not allowed. In other words, since *forum non conveniens* is not allowed, does that consequently mean that the English court is blocked from proceeding to step two and apply the rules for issuing an anti-suit injunction?

¹⁹⁰ See David Jackson, *Jurisdiction in Europe: English Law still Holding Out* S&T.L.I. (2004), 4(4), 4-6. For analysis on Jackson’s view, see *supra* Chapter IV: The Impact of *Turner v. Grovit* on Anti-Suit Injunctions.

¹⁹¹ Ibid.

¹⁹² [2007] UKHL 4. See also the First Instance decision [2005] 2 Lloyd’s Rep. 257.

¹⁹³ Ibid.

¹⁹⁴ Case 281/02, *Andrew Owusu v. Jackson*, [2005] E.C.R. I-1383; [2005] 1 Lloyd’s Rep. 452. The case involved an injury that a British domiciliary sustained while on holiday, which he booked through an English travel agency, in Jamaica. The defendants argued that the case had closer links with Jamaica than England, and that the Jamaican courts were a forum with jurisdiction in which the case might be tried more suitably for the interests of all the parties and the ends of justice. The issue before the European Court of Justice was whether the doctrine of *forum non conveniens* had application in the Brussels I Regulation framework. The European Court of Justice held that it had not, as the doctrine undermined the rules laid in the Brussels Convention 1968 and subsequently the Brussels I Regulation. Therefore, the English courts were barred from applying the doctrine of *forum non conveniens* in the Brussels I Regulation framework. Cf. Adrian Briggs, *The Death of Harrods: Forum Non Conveniens and The European Court*, (2005) 121 L.Q.R. 535; Edwin Peel, *Forum Non Conveniens and European ideals*, [2005] L.M.C.L.Q. 363, at p. 372; Yvonne Baatz, *English Jurisdiction Clause does Battle with Canadian Legislation Similar to the Hamburg Rules*, [2006] L.M.C.L.Q. 143. See also *Konkola Copper Mines Plc. v. Coromin* [2005] 2 Lloyd’s Rep. 555.

¹⁹⁵ For the doctrine of *forum non conveniens* see *supra* Chapter I: The English Common Law- Framework.

¹⁹⁶ Ibid.

The answer depends upon the issue of whether *forum non conveniens* is a determining factor in the process of issuing anti-suit injunction. It is submitted that there has been English case law pointing to the direction that *forum non conveniens* is not to be regarded as the determining factor. In particular, Lord Goff in *Societe Nationale Industries Aerospatiale v. Lee Kui Jak*¹⁹⁷ said that:

“the long line of English cases concerned with injunctions restraining foreign proceedings still provides useful guidance on the circumstances in which such injunctions may be granted; though of course the law on the subject is in a continuous state of development. They are further of the opinion that the fact that the Scottish principle of *forum non conveniens* has now been adopted in England and is applicable in cases of stay of proceedings provides no good reason for departing from those principles”¹⁹⁸

The same approach was adopted in *The Front Comor*¹⁹⁹ where Colman J. said that:

“The authorities, such as The Angelic Grace and The Jay Bola leave it in no doubt that strong cause is not normally to be provided by *forum non conveniens* considerations alone.”²⁰⁰

The aforesaid position points to the direction that *forum non conveniens* should not be *the only* consideration that a court must take into account in issuing an anti-suit injunction. This, however, does not mean that *forum non conveniens* is not *one of* the considerations that the English court will apply in order to issue an anti-suit injunction. It is submitted therefore that the effect of *Owusu*²⁰¹ is to remove one very important consideration that a court will apply in order to issue an anti-suit injunction in cases of a breach of an arbitration agreement. Thus, should a case arise involving a breach of an arbitration agreement with courts of two Member States seised, the English court cannot use *forum non conveniens* and can only use the common law principles on anti-suit injunctions²⁰² in order to issue an anti-suit injunction.

¹⁹⁷ [1987] A.C. 871. For a discussion of the case *see supra* Chapter I: The English Common Law Framework.

¹⁹⁸ Ibid., at p. 896.

¹⁹⁹ Ibid.

²⁰⁰ Ibid., at § 72.

²⁰¹ Ibid.

²⁰² For an analysis on the common law rules in relation to the issuing of an anti-suit injunction *see supra* Chapter I: The English Common Law Framework.

The issue of whether the process used by the English courts to issue an anti-suit injunction in cases of a breach of an arbitration agreement is questionable is a more serious issue which merits close examination. This issue stems from the fact that arbitration agreements are treated by the English courts as being the same as exclusive jurisdiction agreements. The dicta which created this principle can be traced to Millet L.J.'s judgment in *The Angelic Grace*²⁰³ where he said:

"I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in *Continental Bank*. The justification for the grant of the injunction in either case is that without it *the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy.*"²⁰⁴

This dicta has been followed in subsequent decisions²⁰⁵, and it is now a well established principle that the rules for issuing an anti-suit injunction in case of a breach of an arbitration agreement are the same as the rules in relation to exclusive jurisdiction clauses. It is submitted that this process used by the English courts is questionable on the ground of the difference between those agreements, and therefore they should not be treated as the same by the courts.

The purpose of an exclusive jurisdiction agreement is different from the purpose of an arbitration agreement. The former has as its purpose the choice of the forum where the parties wish to litigate their dispute, whereas the latter's purpose is to choose the place where the parties wish to conduct their arbitration proceedings. Although a very popular means of dispute resolution, arbitration is not the same as a court procedure, and therefore it should not be treated *per se* as the same. The fact that arbitration is not the same as court procedure is further reinforced by the exclusion of arbitration in Article 1(2)§d of the Brussels I Regulation. In addition, Article 1 (1) strictly refers to a court or tribunal and not to arbitration proceedings.

²⁰³ [1995] 1 Lloyd's Rep. 87.

²⁰⁴ *Ibid.*, at p.92. Emphasis Added.

²⁰⁵ See for example, *The Heidberg* [1994] 2 Lloyd's Rep. 287, *XL Insurance v. Owens Corning* [2000] 2 Lloyd's Rep. 500, *Donohue v. Amco* [2002] 1 Lloyd's Rep. 425, *The Ivan Zagubanski* [2002] 1 Lloyd's Rep. 106, *The Hari Bhum* [2004] 1 Lloyd's Rep. 206; [2004] EWCA (Civ) 1598, *The Front Comor* [2007] UKHL 4; [2005] 2 Lloyd's Rep. 257; [2005] EWHC 454 (Comm).

One may also observe that an arbitration agreement is not *per se* the same as an exclusive jurisdiction clause because the parties may choose a different forum to litigate and a different to arbitrate. Thus, for example, the parties may choose that “the courts of Greece shall have exclusive jurisdiction over the determination of any dispute” as well as provide that “any disputes shall be referred to arbitration in London”. If we are to apply the dicta by Millett L.J., should a party commence proceedings in Greece, an anti-suit injunction will be issued against that party to defend its jurisdiction for breaching the London arbitration clause. Applying, however, the correct approach, in other words that the exclusive jurisdiction clause is different from the arbitration agreement, would mean that the Greek court, being rightly seised with the case by virtue of the exclusive jurisdiction clause, should direct the parties to arbitration in London, by virtue of the arbitration agreement²⁰⁶. Should the parties not resolve their dispute in arbitration and wish to litigate, the courts of Greece are the courts which should have jurisdiction over their dispute. The case law²⁰⁷, however, points to a different direction, namely that should the parties wish to litigate, the English court would have jurisdiction to adjudicate on their dispute. Added to this is the fact that the court has the power to issue an anti-suit injunction in order to restrain the Greek proceedings. It is submitted that this process applied by the English courts is flawed and merits revision since, as demonstrated by the case law, they assume exclusive jurisdiction without being given any by the parties in the first place.

This approach can lead to arguments for the inclusion of arbitration in the Brussels I Regulation framework and therefore the prohibition of anti-suit injunctions in cases of an arbitration agreement. One may accurately argue that since arbitration agreements are treated as exclusive jurisdiction agreements, then the *Gasser*²⁰⁸ and *Turner*²⁰⁹ rulings are applicable to arbitration agreements as well. The distinction of *Gasser*²¹⁰ and *Turner*²¹¹ as not applicable, in cases such as *The Hari Bhum*²¹² or *The Front Comor*²¹³, taking this line of argument, is also wrong due to the dicta of Millett L.J. and the precedence created by that dicta. To put this argument another way, an anti-suit injunction issued in breach of an arbitration agreement by the

²⁰⁶ As well as the 1958 New York Convention on Arbitration that has been ratified by all European Union Member States. For the list of States that have ratified the 1958 Convention Cf. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

²⁰⁷ See *The Nerano* [1996] 1 Lloyd's Rep. 1.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid.*

English court falls under the Brussels I Regulation and is therefore prohibited by *Gasser*²¹⁴ and *Turner*²¹⁵. Further reinforcement for this argument may also be found on the submissions made by Schlosser and Jenard in *The Atlantic Emperor*²¹⁶. Their view was the only matter excluded by Article 1(2)§d is merely incidental issues, such as the existence or validity of an arbitration clause, and not the subject matter of the proceedings which would fall under the Regulation. This approach has found support in *The Hari Bhum*²¹⁷, which was reluctantly decided by the Court of Appeal because it could not refer a question for interpretation to the European Court of Justice. *The Hari Bhum*²¹⁸ judgment can also be used for the proposition that if the Court of Appeal thought that the dicta created by *The Angelic Grace*²¹⁹ was correct it would not even consider referring a question to the European Court of Justice.

It is submitted that the total exclusion approach needs reconsideration. It is simply illogical for the Brussels I Regulation to allow parallel proceedings within the European Union. In order to illustrate this, suppose that party A commences proceedings against party B in Greece in breach of an arbitration agreement. Party B then seeks the enforcement of the arbitration clause, thus asking the English court to appoint an arbitrator, and also an anti-suit injunction to restrain the Greek proceedings. Should the Greek court disregard the anti-suit injunction, which is very likely to happen, and issues judgment, and the English court issues a conflicting judgment, should the Regulation apply to prevent this situation from occurring?

It is submitted that the Brussels I Regulation should be applicable due to two main reasons. The first, and more difficult argument to advance²²⁰, is the principle contained in Article 71 of the Regulation which allows specialist Conventions to apply. The specialist Convention for the purposes of this argument is the 1958 New York Convention on Arbitration. Although in Articles I(1)²²¹ and Article III²²² the Convention provides for the recognition and enforcement

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ Case C-190/89, *Marc Rich & Co. v. Societa Italiana Impianti P.A. (The Atlantic Emperor)* [1991] E.C.R. I-3855; [1992] 1 Lloyd's Rep. 342.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ Due to the exclusion of arbitration by virtue of Article 1(2)§d of the Regulation and the European Court of Justice's ruling in *The Atlantic Emperor*.

²²¹ "This Convention shall apply to the recognition and enforcement of arbitral awards *made in the territory of a State other than the State where the recognition and enforcement of such awards are sought*, and arising out of differences between persons, whether physical or legal" (emphasis added)

of arbitral awards, the 1958 New York Convention lacks *lis alibi pendens* provisions. The principle contained in Article 71 of the Regulation is if the Convention relied upon under Article 71 lacks *lis alibi pendens* provisions then the Regulation *lis alibi pendens* provisions, entailed in Articles 27 and 28, will operate in order to rectify the situation. In turn, taking the example above, by virtue of Article 27 and the *Gasser*²²³ ruling, the Greek court being first seised would have to rule on its jurisdiction and the English court, being second seised, would have to wait for that assessment. Consequently, taking the *Turner*²²⁴ ruling into account, the anti-suit injunction issued by the English court against the Greek proceedings would be void. Contrary to *The Angelic Grace*²²⁵ and the subsequent decisions, therefore, the Regulation would, indirectly, be applicable.

The second reason is the European Court of Justice's decision in *Owusu*²²⁶. The case concerned the interpretation of Article 2, yet the European Court of Justice considered *obiter* Article 27²²⁷, and in particular agreed with the comments made by Advocate General Léger. Advocate General Léger concluded that:

“In other words, whilst it is clear from their wording that the Convention rules on *lis pendens* and related actions or recognition and enforcement of judgments apply in relations between different Contracting States, provided that they concern proceedings pending before courts of different Contracting States or judgments delivered by courts of a Contracting State with a view to recognition and enforcement thereof in another Contracting State, the fact nevertheless remains that the disputes with which the proceedings or decisions in question are concerned may be purely internal or be international, involving a Contracting State and a non-Contracting State, and not always two Contracting States.”²²⁸

²²² “Each Contracting State shall *recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles*. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.” (emphasis added)

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid., at §§ 28-29.

²²⁸ Case C-281/02, *Owusu v. Jackson* [2005] E.C.R. I-1383; [2005] 1 Lloyd's Rep. 452, at pp. 146-152.

The European Court of Justice agreed with this comment by Advocate General Léger²²⁹. Although only an *obiter* comment, what can be inferred both from the opinion of Advocate General Léger and the judgment of the European Court of Justice is the proposition that when proceedings regarding arbitration are pending before the English courts and a court of another Member State, the English courts cannot use the doctrine of *forum non conveniens* to resolve the issue of jurisdiction. They have to use the *lis alibi pendens* provisions of the Brussels I Regulation. Therefore, it is submitted, that the Regulation does apply regardless of whether the English proceedings are concerned with arbitration. In essence, what the *Owusu*²³⁰ judgment did was to replace the doctrine of *forum non conveniens* with the more acceptable Community principle of *lis alibi pendens* within the European Union. Consequently, the English court has to apply *lis alibi pendens* instead of *forum non conveniens* in cases where an anti-suit injunction is sought for breach of an arbitration agreement in order to restrain proceedings in another Member State. As such, the Regulation, together with the European Court of Justice's case law, applies and thus the issuing of an anti-suit injunction is questionable.

The uncertainty over the inclusion of arbitration within the ambit of the Brussels I Regulation is owed to the interpretation of the dicta by Millett L.J. by subsequent decisions. However, there seems to be much validity to the argument advanced for the indirect inclusion of arbitration, taking into account the agreement with this view by the Court of Appeal in *The Hari Bhum*²³¹. This area of law necessitates clarification by the European Court of Justice, which hopefully will occur in *The Front Comor*, particularly the question whether the Regulation applies when parallel proceedings are commenced in two Member States, as well as reform²³².

5.7 Conclusion

The discussion of the law on anti-suit injunctions in relation to arbitration agreements has established that due to the European Court of Justice decision in *The Atlantic Emperor* the English courts use this exit route out of the Brussels I Regulation in order to issue anti-suit injunctions restraining proceedings in another Member State court in breach of an arbitration agreement. Although the impact of *The Atlantic Emperor* is to allow English courts to engage in

²²⁹ *Ibid.*, at §§ 28-29.

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² For reform proposals *see infra* Chapter VII: Reform.

this practice, this Chapter provided arguments in favour of the inclusion of arbitration in the Brussels I Regulation.

It must be remembered, however, that the Brussels I Regulation is abused by the party breaching the arbitration agreement. It is that party which in effect commences the operation of the *lis alibi pendens* provisions, by seizing a Member State court first with the dispute. Having in mind the philosophy underlying the English common law rules on jurisdiction and therefore the importance of protecting and enforcing private law rights, it is not surprising that the English courts use anti-suit injunctions to enforce breached arbitration agreements.

This practice, however, may be under immense threat as the European Court of Justice decision in *The Front Comor*, which will undoubtedly map the boundaries of the applicability of the principle of anti-suit injunctions in Europe as well as the boundaries of applicability of the mutual trust and respect principle which, according to the European Court of Justice in *Turner*, is fundamental for the proper operation of the Brussels I Regulation. Having in mind the discussion in previous Chapters, and especially the *Turner* ruling, it seems that in *The Front Comor* the mutual trust and respect principle will outmuscle the common law philosophy of enforcing private law rights and thus conquer the last remaining fortress of anti-suit injunctions in Europe, that of arbitration agreements.

Regardless of the future European Court of Justice *Front Comor* ruling, the discussion in this Chapter highlighted the inadequacy of the Brussels I Regulation in dealing with arbitration proceedings, especially cases where a party in breach of the agreement commences tactical litigation in another Member State. This fundamental problem will not be resolved by the European Court of Justice in *The Front Comor*, and it is submitted the only option is to reform the Brussels I Regulation²³³. It is further submitted that the need for reform is pressing, as the future impact of *The Front Comor* will be devastating on commercial practice and the command of London arbitration as a global forum.

²³³ For reform proposals *see infra* Chapter VII: Reform.

CHAPTER VI: ANTI - SUIT INJUNCTIONS IN THE UNITED STATES OF AMERICA

6.1 Introduction

The discussion in this thesis so far has established that the non-permissibility of anti-suit injunctions in the Brussels I Regulation framework is mainly owed to the difference in philosophy and nature between the English common law framework, on the one hand, and the civil law framework, to which the Brussels I Regulation belongs, on the other. In order to properly assess the issue tackled in this thesis, it is submitted that it is necessary to examine whether anti-suit injunctions can operate within a highly integrated multi-jurisdiction framework. For this reason, the discussion will turn to an examination of the example of the United States of America, where anti-suit injunctions are widely used. The central issue is to determine whether the present anti-suit injunction framework in the United States can act as a model for the European Brussels I Regulation framework. Thus, the purpose of this Chapter is to provide useful information on the ways in which anti-suit injunctions can be accommodated in the Brussels I Regulation framework, an issue examined in detail in the following Chapter.

The United States of America is an extremely important example for one to consider on the issue of anti-suit injunctions. The United States of America is carefully chosen as a suggested model since the European Union resembles the United States of America in that it is a union of many sovereign jurisdictions. Of course, the level of unity in the United States is far greater as it is a Federal union of states, comprising one country¹. Although the European Union has not, and may not ever, attain this high level of unity, it is submitted that on the law on anti-suit injunctions the American model can still be applied in Europe. Put another way, Europeans can have the American anti-suit injunction framework without a need for full unity in a Federal sense. A further reason for taking the United States as a model is the fact that the United States being more advanced economically and commercially has had to grapple with the difficulties presented to Europe at a much earlier time. Thus, the United States of America is a prime example of the use of anti-suit injunctions in a multi-jurisdiction framework over a

¹ However, the United States of America jurisdiction system does not have a harmonized set of rules of jurisdiction as its European counterpart. For an analysis of this issue *see infra* 6.4.

long period of time, which can act as tested model, as anti-suit injunctions have been used successfully throughout the history of American law.

6.2 A Brief Outline Of The American Legal System

For a common law lawyer the American legal system is like a distant cousin; for a civil law lawyer too². The peculiarity of the American legal system is that it combines the civil and common law systems into one. However, the roots of American law are to be found in the English common law, as most of the current United States was an English colony. American Independence, centred on the dislike of English rule and everything it represented, brought about a wind of change which favoured American law being transformed into a civil law system. Many states underwent a codification period and several states prohibited the citation of English decisions.

By the 18th century, however, the civil law wind of change had ceased to blow and as a consequence the common law triumphed. That is however not without a cost, namely the peculiarity of American law as opposed to the English common law. Half a century of Romano-Germanic influence considerably altered American law and turned it into a hybrid combining common law with civil law principles. Some states, such as Louisiana, were not affected by the reinstatement of the common law and developed a purely civil law system. Nonetheless, as a whole states' law greatly resembled the English common law since the general concept of the law, the principal legal divisions and concepts of the legal rule were the same as those under the English common law. Thus, American law developed legal categories such as Equity, torts and trusts.

There are, however, several fundamental differences between American Law and the English common law which render the American legal system, although part of the larger common law family, a distinct legal system. These differences also render the American legal system distinct in the development and application of the law on anti-suit injunctions, and will now be considered in turn.

² For a more detailed account on American Law see Grant Gillmore, *The Ages of American Law*, (1977) New Haven: Yale Press University; P.S. Atiyah, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions*, (1987) Oxford: Clarendon Press; Rene David and John Brierley, *Major Legal Systems in the World Today*, 3rd ed., (1993) London: Stevens.

The first fundamental difference between the American and English legal systems is the existence, and distinction, between state and federal law. As the United States of America is a large federation of states, each state is a separate jurisdiction with a separate legal system. As such, not only the laws of each state are different but also the legislative and administration branch is different. Thus, each state has its own legislative body which legislates for the jurisdiction, each state has its separate judiciary which applies the law of the state and each state has its own civil procedure rules. Over all states' law is federal law which is administered through the federal courts. The peculiarity of the United States on this level compared with other federations is that American federal courts do not merely exist at the apex of court hierarchy but in certain matters, provided for by federal law and the American Constitution, can be seised as first instance courts. Federal courts can thus be seised of a case when the American Constitution or a Congress statute has recognised their jurisdiction. Nonetheless a party may still resort to its state court rather than the federal courts as the jurisdiction of the federal courts is not exclusive, and therefore the party may resort only to the United States Supreme Court for a final decision on appeal level and only when the case raises a fundamental issue under the Constitution or a federal statute.

The second fundamental difference between American and English law is the existence of a written Constitution. For Americans the Constitution represents far more than a mere political charter, it represents a social contract which the nation was founded on. The Constitution therefore apart from spelling out the organisation of the country's institutions, fixes the limits of the federal power regarding the citizens and the states as well as guarantees the natural rights of citizens. As such, the American Constitution is very different from English constitutional law, especially after taking into account that judicial review of the constitutionality of legislation, an unknown principle in England, is available³.

The third fundamental difference between American and English law is the treatment of the doctrine of precedence. Under English law the doctrine of precedence is a fundamental lawmaking mechanism under which judges are bound to follow legal rules and principles already stated in individual cases by other judges. On the contrary, in the United States the similar rule is the doctrine of *stare decisis* (let the decision stand) which however does not operate in the same way as the English principle. The doctrine is used as a flexible mechanism

³ Judicial review of legislation is only available in England in relation to European Union law and the European Convention on Human Rights 1950 ratified in England by the Human Rights Act 1998.

sometimes providing flexibility and sometimes stability. Furthermore, a fundamental difference between the two doctrines is that in the United States the Supreme Court and the Supreme Courts of all different states are not bound to observe their decisions and are free to reverse previous judicial practice. In addition, as each state is considered as a separate jurisdiction, the doctrine of *stare decisis* only operates within the boundaries of the state's court structure and legislation. The same is applicable to federal courts when applying the law of a particular state.

The fourth fundamental difference between American and English law is codification. This fourth element of American law marks it apart from English law and closer to civil law. Codification in the United States occurred on two levels, namely state level and federal level. The majority of the states have undergone codification and thus most states have codes such as a Code of Civil Procedure or a Civil Code. Nonetheless, these codes should not be confused with Romano-Germanic style of codes. These codes resemble more a collection of judge-made legal rules rather than an explanation in a systematic fashion of rules of law. In contrast, however, the mere existence of codes suggests that a civil law methodology in collecting legal principles has been applied alongside the common law system which takes precedence over the codes. The only exception is the state of Louisiana which deploys a pure civil law system, thus codes in the Romano-Germanic sense are used. Codification, however, also exists on federal level. Codification on a federal level has afforded a set of legal collections commonly called Revised Laws or Consolidated Laws as well as the United States Code (U.S.C.). The U.S.C although termed as a code is far from a code in the Romano-Germanic sense. Rather, it is a collection of federal statutes organised in alphabetical order and not a restatement of the common law.

The American legal system, although a member of the common law family, has distinct elements which serve both to distinguish the American system as a unique system and to clarify the great influence of civil law in the development of the American system. Those elements are particularly important for the law on anti-suit injunctions and clarify the American legal system as a model in this area of law.

6.3 Anti-Suit Injunctions in the United States of America

The aforesaid established the peculiarity of the American legal system as opposed to the English legal system. There are, however, two questions of extreme importance which need to be examined. First, whether those peculiarities rendering different the American from the English legal system as a whole, also render American anti-suit injunctions different from English anti-suit injunctions. Second, and more importantly, where does the power to issue an anti-suit injunction stem from and how do anti-suit injunctions operate both on a state and a federal level. These issues will be examined in turn in this section, beginning with the latter question which will be examined through the prisms of a state and federal level.

6.3.1 Anti-Suit Injunctions on a State level

The use of anti-suit injunctions in the United States is a common phenomenon. Since the purpose of this part is not *per se* to state the American law on anti-suit injunctions but to establish the use of anti-suit injunctions and assess the grounds on which they are founded, three examples of different American states will be considered for those purposes. It is, however, worth mentioning some inter-state principles applicable.

At first, anti-suit injunctions in the United States are permissible⁴ and not unconstitutional⁵ and even used intra-state⁶ in extraordinary circumstances⁷. The power to issue anti-suit injunctions extends to litigation in equity as well as to actions at law⁸, especially in cases where the issuance of the injunction is necessary to protect the rights of the parties⁹ and to prevent injustice¹⁰.

⁴ *Tripati v. Beaman*, 878 F.2d 351 (10th Cir. 1989); *Maryland Com'n on Human Rights Relations v. Downey Communications Inc.*, 110 Md. App. 493, 678 A.2d 55 (1996).

⁵ *Pavilonis v. King*, 626 F.2d 1075 (1st Cir. 1980).

⁶ In other words, the higher court in state X restrains proceedings in the lower courts of state X. *See Adams, Harkness & Hill Inc. v. Northeast realty Corp.*, 361 Mass. 552, 281 N.E.2d 262, 54 A.L.R. 3d 673 (1972); *Marsh v. Foremost Ins. Co.*, 451 Mich. 62, 544 N.W.2d 646 (1996); *Ex Parte Evans*, 939 S.W.2d 142 (Tex. 1997).

⁷ *Orwick v. City of Seattle*, 103 Wash. 2d 249, 692 P.2d 793 (1984). *See also McGothlin v. Kliebert*, 672 S.W.2d 231 (Tex. 1984).

⁸ *Stebler v. Riverside Heights Orange Growers' Association*, 214 F. 500 (C.C.A. 9th Cir. 1914); *Trees v. Glenn*, 319 Pa. 487, 181 A. 579, 102 A.L.R. 304 (1935).

⁹ *Porter v. Robert Porter & Sons, Inc.*, 68 N.M. 97, 359 P.2d 134 (1961); *Erie R. Co. v. Ramsey*, 45 N.Y. 637.

¹⁰ *Trees v. Glenn*, 319 Pa. 487, 181 A. 579, 102 A.L.R. 304 (1935); *Erie R. Co. v. Ramsey*, 45 N.Y. 637.

A court has subject matter jurisdiction to issue an injunction, if necessary, to protect its proceedings¹¹. Thus, a claimant who repeatedly institutes proceedings in both state and federal courts seeking the same relief will be issued a permanent injunction by a federal court in order to bar that claimant from commencing further proceedings¹². However, the court must be asked by the defendant to issue the anti-suit injunction¹³ although the court may issue an injunction based on the party's conduct¹⁴.

A party seeking an anti-suit injunction from a federal court must show that he does not have an adequate remedy at law¹⁵ or that the available remedy is inappropriate¹⁶, and that he will suffer irreparable harm if the court denies the injunction¹⁷. Similarly, a party seeking an anti-suit injunction before a state court, the court must weigh whether the claimant has an adequate remedy at law¹⁸ and so will suffer an irreparable injury or harm¹⁹ and consider whether granting an injunction is in the public interest²⁰. Although multiple proceedings *per se* are not a common reason for the issuance of an anti-suit injunction²¹, in contrast with

¹¹ *State-Record Co., Inc. v. State*, 332 S.C. 346, 504 S.E.2d 592, 27 Media L. Rep. (BNA) 1193 (1998)

¹² *Lacks v. Fahmi*, 623 F.2d 254 (2d Cir. 1980)

¹³ *Pavlonis v. King*, 626 F.2d 1075 (1st Cir. 1980); *In re Oliver*, 682 F.2d 443 (3d Cir. 1982).

¹⁴ *Harrelson v. U. S.*, 613 F.2d 114 (5th Cir. 1980).

¹⁵ *Northern California Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306, 105 S. Ct. 459, 83 L. Ed. 2d 388 (1984)

¹⁶ *Carlos v. Santos*, 123 F.3d 61 (2d Cir. 1997)

¹⁷ *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 79 A.L.R. Fed. 1 (7th Cir. 1984). The basis of injunctive relief in the federal courts has always been irreparable harm and the inadequacy of legal remedies, *cf. Fox Valley Harvestore, Inc. v. A. O. Smith Harvestore Products, Inc.*, 545 F.2d 1096 (7th Cir. 1976). Compare with European Union law on interim relief, *cf. Case C-143/88 and C-92/89 Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* [1991] E.C.R. I-415.

¹⁸ *Wilson v. Pulaski Association of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221, 122 Ed. Law Rep. 334, 157 L.R.R.M. (BNA) 2060 (1997); *Sergeant Bluff-Luton School Dist. v. City of Sioux City*, 562 N.W.2d 154 (Iowa 1997); *Cyprus Mountain Coal Corp. v. Brewer*, 828 S.W.2d 642 (Ky. 1992); *Central States Foundation v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999); *Hill v. Community of Damien of Molokai*, 121 N.M. 353, 911 P.2d 861, 14 A.D.D. 667 (1996); *Fodor v. First National Supermarkets, Inc.*, 63 Ohio St. 3d 489, 589 N.E.2d 17 (1992); *Maritans GP Inc. v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 602 A.2d 1277 (1992); *Ward v. City of Pawtucket Police Dept.*, 639 A.2d 1379, 64 Fair Empl. Prac. Cas. (BNA) 1053 (R.I. 1994); *City of Bluefield v. Taylor*, 179 W. Va. 6, 365 S.E.2d 51, 45 Ed. Law Rep. 360 (1987).

¹⁹ *Chunchula Energy Corp. v. Ciba-Geigy Corp.*, 503 So. 2d 1211 (Ala. 1987); *Wilson v. Pulaski Association of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221, 122 Ed. Law Rep. 334, 157 L.R.R.M. (BNA) 2060 (1997); *Fiese v. Sitorius*, 247 Neb. 227, 526 N.W.2d 86 (1995); *Unifirst Corp. v. City of Nashua*, 130 N.H. 11, 533 A.2d 372, 26 Env't. Rep. Cas. (BNA) 1998 (1987); *Medical Arts Clinic, P.C. v. Franciscan Initiatives, Inc.*, 531 N.W.2d 289 (N.D. 1995); *Weiss v. Pedersen*, 933 P.2d 495 (Wyo. 1997).

²⁰ *Dible v. City of Lafayette*, 713 N.E.2d 269 (Ind. 1999).

²¹ The reason for this is that the doctrines of *res judicata* and collateral estoppel are adequate safeguards to protect defendants against repetitious litigation, rendering in the majority of cases an anti-suit injunction unnecessary.

England, a court still has the power to restrain parties who are abusing the court system²². Yet, a court will not restrain proceedings merely to prevent multiple proceedings, without regard to other considerations²³.

The grounds on which an anti-suit injunction is issued in the United States greatly resemble those under English law²⁴. Thus, in order for an anti-suit injunction to be issued the proceedings, either foreign or intra-US, must be vexatious, frivolous or oppressive²⁵, and the anti-suit injunction must be issued in order to protect the jurisdiction of the issuing court. However, on the latter issue there is a different view adopted in the United States as opposed to England. When proceedings are brought in courts of different state jurisdictions, or based on different causes of action or between different parties, an anti-suit injunction may only restrain the second action pending in the second state, provided there is some ground for equitable relief other than the mere fact of the two proceedings pending²⁶. An anti-suit injunction will be issued since it is required to protect the jurisdiction of the court over the subject matter of the proceedings pending before it²⁷, but the prosecution of the later action will not be restrained if it does not prevent the determination of the issues and the administration of the rights and remedies involved in the first action²⁸. The most common

²² *Equator Min. & Smelting Co. v. Hall*, 106 U.S. 86, 1 S. Ct. 128, 27 L. Ed. 114 (1882); *Harrelson v. U. S.*, 613 F.2d 114 (5th Cir. 1980); *Stearns v. Los Angeles City School Dist.*, 244 Cal. App. 2d 696, 53 Cal. Rptr. 482, 21 A.L.R.3d 164 (1st Dist. 1966); *Benedict v. Hall Mfg. Co.*, 211 Iowa 1312, 236 N.W. 92 (1931); *John Hancock Mut. Life Ins. Co. v. Fiorilla*, 83 N.J. Super. 151, 199 A.2d 65 (Ch. Div. 1964); *Trees v. Glenn*, 319 Pa. 487, 181 A. 579, 102 A.L.R. 304 (1935); *University of Texas v. Morris*, 162 Tex. 60, 344 S.W.2d 426 (1961).

²³ *Maryland Com'n on Human Relations v. Downey Communications, Inc.*, 110 Md. App. 493, 678 A.2d 55 (1996).

²⁴ See *supra* Chapter I: The English Common Law Framework.

²⁵ *Board of County Commissioners of Morgan County v. Winslow*, 706 P.2d 792 (Colo. 1985); *Bridgeport Hydraulic Co. v. Pearson*, 139 Conn. 186, 91 A.2d 778 (1952); *Pittam v. Maynard*, 103 Idaho 177, 646 P.2d 419 (1982); *Bowman v. Lake County Public Bldg. Commission*, 31 Ill. 2d 575, 203 N.E.2d 129 (1964); *Nolette v. O'Neil*, 679 A.2d 1084 (Me. 1996); *Favorite v. Minneapolis St. Ry. Co.*, 253 Minn. 136, 91 N.W.2d 459 (1958); *Nuttelman v. Julch*, 228 Neb. 750, 424 N.W.2d 333 (1988); *John Hancock Mut. Life Ins. Co. v. Fiorilla*, 83 N.J. Super. 151, 199 A.2d 65 (Ch. Div. 1964); *Laursen v. Lowe*, 50 Ohio App. 103, 3 Ohio Op. 478, 19 Ohio L. Abs. 193, 197 N.E. 597 (9th Dist. Summit County 1935); *Ramantanin v. Poulos*, 240 S.C. 13, 124 S.E.2d 611 (1962); *Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161 (Tex. 1986); *Cofield v. Alabama Public Service Com'n*, 936 F.2d 512 (11th Cir. 1991). An anti-suit injunction must be granted when an abuse of the judicial process occurs, cf. *Huber v. Franklin County Community School Corp. Bd. of Trustees*, 507 N.E.2d 233, 39 Ed. Law Rep. 275 (Ind. 1987).

²⁶ *McClelland v. Rose*, 247 F. 721 (C.C.A. 5th Cir. 1918); *Ambursen Hydraulic Const. Co. v. Northern Contracting Co.*, 140 Ga. 1, 78 S.E. 340 (1913); *Oates v. Morningside College*, 217 Iowa 1059, 252 N.W. 783, 91 A.L.R. 563 (1934).

²⁷ *Hinton v. Seaboard Air Line R. Co.*, 170 F.2d 892 (4th Cir. 1948); *State v. Fredlock*, 52 W. Va. 232, 43 S.E. 153 (1903).

²⁸ *Mutual Life Ins. Co. of New York v. Brune's Assignee*, 96 U.S. 588, 24 L. Ed. 737 (1877).

ground for the issuance of an anti-suit injunction is forum shopping²⁹. Some states, however, may still not issue an anti-suit injunction merely on forum shopping grounds as the injunction may be contrary to the state's public policy³⁰.

The power to issue anti-suit injunctions, however, does have a certain limitation, namely comity. Comity, as also understood under English law, requires that courts exercise the power to restrain foreign proceedings cautiously, and only in special circumstances³¹. Thus, an anti-suit injunction restraining a party from commencing concurrent proceedings in two states with jurisdiction over the matter is a serious matter and must be properly justified, as proper respect for the courts of the other state must be paid, as well as the prevention of the risk that the other court may reply by way of counter-anti-suit injunction³². Therefore, only in extraordinary cases, in other words those in which it is needed to prevent a manifest wrong and injustice is the remedy available³³. Although the doctrine of *forum non conveniens* is a doctrine enshrined into American law³⁴, it should not be *per se* the determining factor for the grant of an anti-suit injunction, yet some courts do consider *forum non conveniens* grounds as proper grounds for issuing an anti-suit injunction³⁵. Thus, in order to observe comity the issuing court, in exercising its discretion³⁶, will only issue an anti-suit injunction for the proper administration of justice³⁷. In addition, the principle of comity in American law draws a very

²⁹ *Standard Oil Co. of Louisiana v. Reddick*, 202 Ark. 393, 150 S.W.2d 612 (1941); *Hartford Acc. & Indem. Co. v. Bernblum*, 122 Conn. 583, 191 A. 542 (1937); *Oates v. Morningside College*, 217 Iowa 1059, 252 N.W. 783, 91 A.L.R. 563 (1934); *Delaware, L. & W. R. Co. v. Ashelman*, 300 Pa. 291, 150 A. 475, 69 A.L.R. 588 (1930). The fact that the laws of one state may be more favourable than the laws of another is not a proper ground for the issuance of an anti-suit injunction, *Cf. New Orleans Brewing Co. v. Cahall*, 188 La. 749, 178 So. 339, 115 A.L.R. 231 (1937).

³⁰ *Pfaff v. Chrysler Corp.*, 155 Ill. 2d 35, 182 Ill. Dec. 627, 610 N.E.2d 51 (1992).

³¹ *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649 (Tex. 1996).

³² Under some circumstances a court may not only refuse to recognise a foreign injunction against an action before it, but may grant a counter-anti-suit injunction to prevent a party from enforcing the foreign injunction. See *Leet v. Union Pac. R. Co.*, 144 P.2d 64 (Cal. App. 2d Dist. 1943); *James v. Grand Trunk Western R. Co.*, 14 Ill. 2d 356, 152 N.E.2d 858, 74 A.L.R.2d 814 (1958); *Peterson v. Chicago, B. & Q. Ry. Co.*, 187 Minn. 228, 244 N.W. 823 (1932). There is authority, however, that a court of one state does not have the power to restrain the enforcement of a foreign anti-suit injunction, *Cf. State ex rel. New York, C. & St. L. R. Co. v. Nortoni*, 331 Mo. 764, 55 S.W.2d 272, 85 A.L.R. 1345 (1932).

³³ *Auerbach v. Frank*, 685 A.2d 404 (D.C. 1996); *Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161 (Tex. 1986).

³⁴ See for example, Op.Cit.

³⁵ *Glitsch, Inc. v. Harbert Const. Co., a Division of Harbert Intern., Inc.*, 628 So. 2d 401 (Ala. 1993)

³⁶ *Philp v. Macri*, 261 F.2d 945, 75 A.L.R.2d 523 (9th Cir. 1958); *McWhorter v. Williams*, 228 Ala. 632, 155 So. 309 (1934).

³⁷ *Weaver v. Alabama Great Southern R. Co.*, 200 Ala. 432, 76 So. 364 (1917); *State v. District Court, Hennepin County*, 140 Minn. 494, 168 N.W. 589, 1 A.L.R. 145 (1918); *Delaware, L. & W. R. Co. v. Ashelman*, 300 Pa. 291, 150 A. 475, 69 A.L.R. 588 (1930); *Chicago, M. & St. P. Ry. Co. v. McGinley*, 175 Wis. 565, 185 N.W. 218 (1921). An example being cases where it is clear that the other state action was brought with the intent to harass the claimant, *Cf. Auerbach*, Ibid., note 33.

important distinction between the restraint of proceedings to be commenced and the restraint of pending proceedings. For the latter type of case, comity requires that a court will not issue an anti-suit injunction in order to restrain proceedings already commenced in another jurisdiction when the foreign court has jurisdiction of the subject matter of the dispute and over both parties³⁸. Thus, in cases of restraining proceedings already commenced, comity requirements are stringent and comity should prevail among sovereign states³⁹, unless it is established that a manifest wrong or injustice will occur should the anti-suit injunction not be issued⁴⁰.

The power to restrain parties from proceeding in another forum is founded in Equity on any party within the court's jurisdiction. Thus, the remedy of an anti-suit injunction is an *in personam* remedy and is not based on any right of a court to interfere with a court of another state⁴¹. Therefore, a court may only issue an anti-suit injunction when it has personal jurisdiction over the party either due to domicile⁴² or due to the party's submission to the court's jurisdiction⁴³.

Anti-suit injunctions, however, can be denied recognition by the receiving court. There is no violation of the Constitution's Full Faith and Credit Clause⁴⁴ or the rules of comity, as the injunction is an *in personam* order⁴⁵. Therefore, the receiving court may still proceed with the

³⁸ *State ex rel. New York, C. & St. L. R. Co. v. Norton*, 331 Mo. 764, 55 S.W.2d 272, 85 A.L.R. 1345 (1932).

³⁹ *Cole v. Cunningham*, 133 U.S. 107, 10 S. Ct. 269, 33 L. Ed. 538 (1890); *Brunzell Const. Co., Inc., of Nev. v. Harrah's Club*, 81 Nev. 414, 404 P.2d 902 (1965).

⁴⁰ *Freick v. Hinkly*, 122 Minn. 24, 141 N.W. 1096 (1913); *Guggenheim v. Wahl*, 203 N.Y. 390, 96 N.E. 726 (1911).

⁴¹ *Baltimore & O. R. Co. v. Halchak*, 71 F. Supp. 224 (W.D. Pa. 1947); *Pfaff v. Chrysler Corp.*, 155 Ill. 2d 35, 182 Ill. Dec. 627, 610 N.E.2d 51 (1992); *Oates v. Morningside College*, 217 Iowa 1059, 252 N.W. 783, 91 A.L.R. 563 (1934); *Maryland Com'n on Human Relations v. Downey Communications, Inc.*, 110 Md. App. 493, 678 A.2d 55 (1996); *Poole v. Mississippi Publishers Corp.*, 208 Miss. 364, 44 So. 2d 467 (1950); *Johnson v. Johnson*, 146 Misc. 93, 261 N.Y.S. 523 (Sup. Ct. 1933); *Childress v. Johnson Motor Lines*, 235 N.C. 522, 70 S.E.2d 558 (1952); *New York, C. & St. L. R. Co. v. Matzinger*, 136 Ohio St. 271, 16 Ohio Op. 375, 25 N.E.2d 349 (1940); *U. S. Fire Ins. Co. v. Fleenor*, 179 Va. 268, 18 S.E.2d 901 (1942).

⁴² *Crawley v. Bauchens*, 57 Ill. 2d 360, 312 N.E.2d 236 (1974); See also *Mangum v. State's Attorney for Baltimore City*, 275 Md. 450, 341 A.2d 786 (1975).

⁴³ *Advest Inc. v. Wachtel*, 235 Conn. 559, 668 A.2d 367 (1995).

⁴⁴ For a discussion of the Clause, see *infra* 6.4.1.

⁴⁵ *James v. Grand Trunk Western R. Co.*, 14 Ill. 2d 356, 152 N.E.2d 858, 74 A.L.R.2d 814 (1958); *Union Pac. R. Co. v. Rule*, 155 Minn. 302, 193 N.W. 161 (1923).

case despite the injunction⁴⁶ or the fact that the claimant may be in contempt of the issuing court⁴⁷.

A common law lawyer may indeed identify that American law on anti-suit injunctions has many common principles with its English counterpart. Of course there are differences between the two systems, mainly owed to the separate ways which each system took in the era post-American Independence. The discussion will now turn and focus on three American jurisdictions, namely Louisiana, California and Texas, and examine the grounds upon which an anti-suit injunction is issued, in other words the legal basis upon which such an order is permissible. The example of Louisiana is taken first as it is the only purely civil law jurisdiction in the United States.

6.3.1.1 Louisiana

Louisiana is an extremely important example since not only it is a purely civil law system but also anti-suit injunctions are common. Although the purpose of this section is not to state the law on Louisiana anti-suit injunctions, the reader should be aware that anti-suit injunctions are available, have been issued numerous times and have developed considerably⁴⁸. The purpose

⁴⁶ *Kleinschmidt v. Kleinschmidt*, 343 Ill. App. 539, 99 N.E.2d 623 (2d Dist. 1951).

⁴⁷ *Standard Oil Co. of Louisiana v. Reddick*, 202 Ark. 393, 150 S.W.2d 612 (1941); *Hall v. Milligan*, 221 Ala. 233, 128 So. 438, 69 A.L.R. 618 (1930); *Kleinschmidt v. Kleinschmidt*, 343 Ill. App. 539, 99 N.E.2d 623 (2d Dist. 1951).

⁴⁸ See for example: *Arkansas-Louisiana Pipe Line Co. v. Coverdale*, 158 So. 640, La., 1935; *Baird v. Brown*, 28 La. Ann. 842, La., 1876; *Baptiste v. Southall*, 100 So. 674, La., 1923; *Barrow v. Cazeaux*, 5 La. 72, La., 1833; *Bushnell v. Brown's Heirs*, 3 Mart. (N.S.) 449, La., 1825; *Butchers' Benev. Ass'n v. Cutler*, 26 La. Ann. 500, La., 1874; *Cajun Elec. Power Co-op., Inc. v. Triton Coal Co.*, 590 So.2d 813, La. App. 4 Cir., 1991; *Casanave v. Spear*, 23 La. Ann. 519, La., 1871; *Chaffe v. DuBose*, 36 La. Ann. 257, La., 1884; *City of Shreveport v. Flournoy*, 26 La. Ann. 709, La., 1874; *Commercial Soap Works v. F.A. Lambert Co.*, 21 So. 639, La., 1897; *Davis v. Millaudon*, 14 La. Ann. 868, La., 1859; *de Nunez v. Bartels*, 727 So.2d 463, La. App. 1 Cir., 1998; *Devron v. First Municipality*, 4 La. Ann. 11, La., 1849; *Dupre v. Schering-Plough Health Care Products, Inc.*, 656 So.2d 786, La. App. 3 Cir., 1995; *Foret v. Terrebonne Ltd.*, 631 So.2d 103, La. App. 5 Cir., 1994; *Franek v. Brewster*, 76 So. 187, La., 1915; *Hall v. Corporation of Bastrop*, 11 La. Ann. 603, La., 1856; *Hall v. Egelly*, 35 La. Ann. 312, La., 1883; *Hernandez v. Star Master Shipping Corp.*, 653 So.2d 1318, La. App. 1 Cir., 1995; *Hudson v. Dangerfield*, 2 La. 63, La., 1830; *In re F. H. Koretke Brass & Mfg. Co.*, 196 So. 917, La., 1940; *Jenkins v. Felton*, 9 Rob. (LA) 200, La., 1844; *Johnston v. Hickey*, 4 La. 283, La., 1832; *Josephson v. Powers*, 46 So. 44, La., 1908; *Karst v. Ward-Steinman*, 469 So.2d 440, La. App. 3 Cir., 1985; *Kremp v. Dorsey*, 12 Teiss. 266, La. App., 1915; *Kuhn v. Beard*, 92 So. 52, La., 1922; *Lancaster v. Dunn*, 95 So. 385, La., 1922; *Lannes v. Courge*, 31 La. Ann. 74, La., 1879; *Lenfants Caterers, Inc. v. Firemen's Charitable and Benev. Ass'n of New Orleans*, 386 So.2d 1053, La. App. 4 Cir., 1980; *Martin v. Martin*, 39, 631 La. App. 2 Cir. 5/18/05, La. App. 2 Cir., 2005; *McLean v. Carroll*, 6 Rob. (LA) 43, La., 1843; *Megget v. Lynch*, 8 La. Ann. 6, La., 1853; *Mihalogiannakis v. Jones*, 563 So.2d 306, La. App. 4 Cir., 1990; *Missouri Pac. Ry. Co. v. Harden*, 105 So. 2, La., 1925; *Morgan v. Whitesides' Curator*, 14 La. 277, La., 1840; *Muller v. Landry*, 170 So.2d 922, La. App. 3 Cir., 1965; *New Orleans Brewing Co. v. Cahall*, 178 So. 339, La., 1937; *Norton v. Crescent City Ice Mfg. Co.*, 146 So. 753, La. App. Orleans, 1933; *Reynaud v. Uncle Sam Planting & Mfg. Co.*,

of this section is to examine the basis on which an anti-suit injunction is issued, in other words to examine the basis from which the power of the court to issue anti-suit injunctions stems.

As Louisiana is a civil law system, one has to look at the Codes in order to examine the basis on which anti-suit injunctions are issued, in particular the Code of Civil Procedure. Nonetheless, one may observe from the outset that Louisiana has adopted a system which is more akin to Council Regulation 44/2001, however, that does not mean that anti-suit injunctions are not in use in Louisiana.

The State of Louisiana Code of Civil Procedure in Article 123 makes provision for the use of the doctrine of *forum non conveniens*⁴⁹. In particular, a court has the power to transfer a case to another court in the State of Louisiana or to dismiss the case if another forum outside the State of Louisiana is more convenient for the determination of the dispute, provided that the defendant files a waiver of any defence regarding the suit in Louisiana.

83 So. 688,La.,1919;*Robertson v. Emerson*, 26 La. Ann. 351;La.,1874;S.J. v. S.M., 550 So.2d 918,La.App.2.Cir.,1989;*Schumert-Warfield-Buja v. Buie*, 87 So. 726,La.,1921;*State ex rel. Denegre v. Judge of Second District Court*, Man.Unrep.Cas. 388,La.,1880;*State ex rel. Woods v. State*, 731 So.2d 873, La.,1999;*State v. Rightor*, 2 So. 385,La.,1887;*Succession of Ziifle*, 441 So.2d 266,La.App. 5 Cir.,1983;*Terrebonne Parish Police Jury v. Kelly*, 428 So.2d 1092, La.App. 1 Cir.,1983; *Thompson v. Crow*, 3 La.App. 158,La.App. 2 Cir.,1925; *W. E. Parks Lumber Co., Inc. v. Ronald A. Coco, Inc.*, 297 So.2d 925,La.App.1.Cir.,1974; *Walker v. Cucullu*, 15 La. Ann. 689, La.,1860; *Weems v. Ventress*, 14 La. Ann. 267, La.,1859.

⁴⁹ “Art. 123. Forum non conveniens: A. For the convenience of the parties and the witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article. B. Upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated upon acts or omissions originating outside the territorial boundaries of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. C. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription that has matured since the commencement of the action in Louisiana, provided that a suit on the same cause of action or on any cause of action arising out of the same transaction or occurrence is commenced in a court of competent jurisdiction in an appropriate foreign forum within sixty days from the rendition of the judgment of dismissal. Such waiver shall be null and of no effect if such suit is not filed within this sixty-day period. The court may further condition the judgment of dismissal to allow for reinstatement of the same cause of action in the same forum in the event a suit on the same cause of action or on any cause of action arising out of the same transaction or occurrence is commenced in an appropriate foreign forum within sixty days after the rendition of the judgment of dismissal and such foreign forum is unable to assume jurisdiction over the parties or does not recognize such cause of action or any cause of action arising out of the same transaction or occurrence.” Added by Acts 1970, No. 294, §1; Acts 1988, No. 818, §1, eff. July 18, 1988; Acts 1999, No. 536, §1, eff. June 30, 1999.

One may also observe that the Code of Civil Procedure makes provision for *lis alibi pendens*, which peacefully co-exists in the Code with the doctrine of *forum non conveniens*⁵⁰. The *lis alibi pendens* Articles in the Louisiana Code of Civil procedure are to be found in Articles 531-532. The lawmaker wisely made a distinction for the purposes of *lis pendens* between Intra-Louisiana and Extra-Louisiana litigation.

Article 531⁵¹ deals with *lis pendens* in Intra-Louisiana litigation and provides that when two or more sets of proceedings, involving the same parties and the same causes of action, are pending before the courts of Louisiana the court has the power to dismiss the first set of proceedings, subject to Article 925. Article 925⁵² affords a non-exclusive list of cases under which a Louisiana court may dismiss proceedings before it, including the cases of *lis pendens*, improper forum and the court's lack of jurisdiction over the defendant or the subject matter of the dispute.

Article 532⁵³ deals with *lis pendens* regarding Extra-Louisiana litigation and provides that when proceedings pending in another state, either foreign or within the United States, and

⁵⁰ Contrary to the position in Europe, where *forum non conveniens* has been disallowed in the Brussels I Regulation framework as incompatible, *see supra* Chapter I: The English Common Law Framework for a discussion on *forum non conveniens*.

⁵¹ Article 531 - Suits pending in Louisiana court or courts: "When two or more suits are pending in a Louisiana court or courts on the same transaction or occurrence, between the same parties in the same capacities, the defendant may have all but the first suit dismissed by excepting thereto as provided in Article 925. When the defendant does not so except, the plaintiff may continue the prosecution of any of the suits, but the first final judgment rendered shall be conclusive of all." Acts 1990, No. 521, §2, eff. Jan. 1, 1991.

⁵² Article 925 - Objections raised by declinatory exception; waiver:

A. The objections which may be raised through the declinatory exception include but are not limited to the following:

- (1) Insufficiency of citation.
- (2) Insufficiency of service of process, including failure to request service of citation on the defendant within the time prescribed by Article 1201(C).
- (3) Lis pendens.
- (4) Improper venue.
- (5) The court's lack of jurisdiction over the person of the defendant.
- (6) The court's lack of jurisdiction over the subject matter of the action.

B. When two or more of these objections are pleaded in the declinatory exception, they need not be pleaded in the alternative or in any particular order.

C. All objections which may be raised through the declinatory exception, except the court's lack of jurisdiction over the subject matter of the action, are waived unless pleaded therein." Acts 1990, No. 521, §2, eff. Jan. 1, 1991; Acts 1997, No. 578, §1; Acts 2006, No. 750, §1.

⁵³ Article 532 - Suits pending in Louisiana and federal or foreign court: "When a suit is brought in a Louisiana court while another is pending in a court of another state or of the United States on the same transaction or occurrence, between the same parties in the same capacities, on motion of the defendant or on its own motion, the court may stay all proceedings in the second suit until the first has been discontinued or final judgment has been rendered." Acts 1990, No. 521, §2, eff. Jan. 1, 1991.

proceedings are commenced in Louisiana, the court has the power to stay its proceedings⁵⁴ until the first set of proceedings are either discontinued or final judgment is afforded.

With the use of *forum non conveniens* and *lis alibi pendens*, the Louisiana lawmakers achieved a workable mechanism in resolving jurisdictional conflicts. The two doctrines also serve another important purpose, namely they act as safeguards against the issuance of an anti-suit injunction. However, that is not to say that anti-suit injunctions are not available in Louisiana; far from it, yet the lawmakers were wise enough to put the necessary safeguards in place in order for the court not to resort to extremes such as anti-suit injunctions⁵⁵.

The power of the Louisiana courts to issue injunctions, including anti-suit injunctions or otherwise termed restraining orders, is entailed in Article 3601 of the Louisiana Code of Civil Procedure. Article 3601⁵⁶ provides that an injunction shall be issued where irreparable injury, loss, or damage may otherwise result to the applicant. The phrase in Article 3601 “irreparable injury” has been interpreted by the Louisiana courts as a ground for issuing an anti-suit injunction, thus rendering anti-suit injunctions as part of Article 3601⁵⁷. It is therefore established that by virtue of Article 3601 the courts of Louisiana have the power to issue an anti-suit injunction restraining proceedings in another forum⁵⁸.

⁵⁴ The provision greatly resembles Article 27 of Council Regulation 44/2001, *see supra* Chapter III: The Brussels I Regulation Framework.

⁵⁵ A position more akin to the one adopted in Continental Europe, discussed in detail *supra* Chapter II: Anti-Suit Injunctions: The Continental Approach.

⁵⁶ Article 360 - Injunction, grounds for issuance; preliminary injunction; temporary restraining order: “**A.** An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law; provided, however, that no court shall have jurisdiction to issue, or cause to be issued, any temporary restraining order, preliminary injunction, or permanent injunction against any state department, board, or agency, or any officer, administrator, or head thereof, or any officer of the state of Louisiana in any suit involving the expenditure of public funds under any statute or law of this state to compel the expenditure of state funds when the director of such department, board, or agency or the governor shall certify that the expenditure of such funds would have the effect of creating a deficit in the funds of said agency or be in violation of the requirements placed upon the expenditure of such funds by the legislature. **B.** No court shall issue a temporary restraining order in cases where the issuance shall stay or enjoin the enforcement of a child support order when the Department of Social Services is providing services, except for good cause shown by written reasons made a part of the record. **C.** During the pendency of an action for an injunction the court may issue a temporary restraining order, a preliminary injunction, or both, except in cases where prohibited, in accordance with the provisions of this Chapter. **D.** Except as otherwise provided by law, an application for injunctive relief shall be by petition.” Amended by Acts 1969, No. 34, §2; Acts 2004, No. 765, §1, eff. July 6, 2004.

⁵⁷ *See Dupre v. Schering-Plough Health Care Products, Inc.*, 656 So.2d 786, La.App. 3 Cir.,1995; *See also Greenberg v. Burglass*, 254 La. 1019, 229 So.2d 83 (1969); *West v. Winnsboro*, 211 So.2d 665 (La. 1967).

⁵⁸ In *Dupre v. Schering-Plough Health Care Products, Inc.*, 656 So.2d 786, La.App. 3 Cir.,1995 the Court of Appeal of Louisiana, Third Circuit admitted that: “The cases where anti-suit injunctions have issued all involved situations where the original suit was filed in Louisiana and the other party sought to obtain a judgment from another jurisdiction. This case is just the opposite.” (at p. 788) The Court of Appeal of

In order for the anti-suit injunction to be effective, the order must precisely describe the act restrained and shall be effective from the time the restrained party receives actual knowledge of the order either by personal service or otherwise⁵⁹. Furthermore, when a temporary restraining order, or interim anti-suit injunction, is granted the hearing for a preliminary injunction is assigned at the earliest possible time⁶⁰, subject to Article 3602. In particular, Article 3602⁶¹ requires the party wishing to obtain a preliminary injunction to give notice to the other party in order to have an opportunity to attend the hearing. Nonetheless, parties applying for an injunction must be cautious as Article 3608⁶² allows the restrained party to obtain damages against the party who applied for the injunction in case of a wrongful issuance of such an injunction.

Although anti-suit injunctions are available in Louisiana, and have been issued numerous times, the courts of Louisiana are reluctant to order anti-suit injunctions unless there is no other option. In particular, the safeguards in place include codified versions of the doctrines of *forum non conveniens* and *lis alibi pendens*, thus ensuring that Louisiana courts will only issue anti-suit injunctions in circumstances of extreme importance. Nonetheless, the major

Louisiana, Third Circuit proceeded to hold that the proceedings should be stayed until the Tennessee State Court ruled on its jurisdiction. Apart from illustrating the Court of Appeal's basis for judgment, the above quote also illustrates the fact that Louisiana courts are reluctant to issue anti-suit injunctions when they are second seised, but very happy to issue them when they are first seised. The reason behind this is that, although anti-suit injunctions are an available remedy, the operation of Articles 531-532 of the Code of Civil Procedure, act as a safeguard in order to prevent the court from resorting to extreme measures such as an anti-suit injunction. However, the reader should not be deceived as Article 3601 expressly allows Louisiana courts to issue anti-suit injunctions in all types of cases, *see also* note 47 for examples of cases where anti-suit injunctions have been issued.

⁵⁹ Article 3605 - Content and scope of injunction or restraining order: "An order granting either a preliminary or a final injunction or a temporary restraining order shall describe in reasonable detail, and not by mere reference to the petition or other documents, the act or acts sought to be restrained. The order shall be effective against the parties restrained, their officers, agents, employees, and counsel, and those persons in active concert or participation with them, from the time they receive actual knowledge of the order by personal service or otherwise."

⁶⁰ Article 3606 - Temporary restraining order; hearing on preliminary injunction: "When a temporary restraining order is granted, the application for a preliminary injunction shall be assigned for hearing at the earliest possible time, subject to Article 3602, and shall take precedence over all matters except older matters of the same character. The party who obtains a temporary restraining order shall proceed with the application for a preliminary injunction when it comes on for hearing. Upon his failure to do so, the court shall dissolve the temporary restraining order."

⁶¹ Article 3602 - Preliminary injunction; notice; hearing: "A preliminary injunction shall not issue unless notice is given to the adverse party and an opportunity had for a hearing. An application for a preliminary injunction shall be assigned for hearing not less than two nor more than ten days after service of the notice."

⁶² Article 3608 - Damages for wrongful issuance of temporary restraining order or preliminary injunction: "The court may allow damages for the wrongful issuance of a temporary restraining order or preliminary injunction on a motion to dissolve or on a reconventional demand. Attorney's fees for the services rendered in connection with the dissolution of a restraining order or preliminary injunction may be included as an element of damages whether the restraining order or preliminary injunction is dissolved on motion or after trial on the merits."

difference between Louisiana and European Civil law systems on the issue is that anti-suit injunctions are included in the Code of Civil Procedure. Louisiana is therefore a real life example of a purely civil law system which is codified and uses anti-suit injunctions, which refutes any arguments that anti-suit injunctions are incompatible with a civil law system⁶³.

6.3.1.2 California

The example of California will assist the discussion in examining the basis for the issuance of an anti-suit injunction in a common law jurisdiction with civil law elements. The reader should be aware that California has undergone codification, including the area of civil procedure, yet this type of codification should not be confused with the Romano-Germanic type of codification *per se*. Although in California there is a Civil Code⁶⁴ and a Code of Civil Procedure, these Codes are not strictly applied, as for example in France, in judicial decisions; rather the Codes, together with the doctrine of precedence, are used to assist the Court in reaching a decision and are seen as a collection of judge-made legal rules.

Anti-suit injunctions in California are very common, have been extensively used and developed over the years⁶⁵. The question thus arising is where the courts of California draw

⁶³ See in particular Advocate General Ruiz-Jarabo Colomer's opinion in *Turner v. Grovit* and grounds for proposing that anti-suit injunctions are incompatible with civil law systems, discussed in detail *supra* Chapter IV: The Impact of *Turner v. Grovit* on Anti-Suit Injunctions.

⁶⁴ See for example M.E. Harrison, *The First Half-Century of the California Civil Code*, 10 Cal. Law Rev., p. 185 (1922).

⁶⁵ See for example: *Adams v. Andross*, 20 P. 26, Cal., 1888; *Aldrich v. Transcontinental Land & Water Co.*, 281 P.2d 362, Cal. App., 1955; *Andrisani v. Hoodack*, 11 Cal. Rptr. 2d 511, Cal. App. 2 Dist., 1992; *Anthony v. Dunlap*, 8 Cal. 2d, Cal., 1857; *Associated Plumbing Contractors of Marin, Sonoma and Mendocino Counties, Inc. v. F. W. Spencer & Son, Inc.*, 28 Cal. Rptr. 425, Cal. App. 1 Dist., 1963; *Atchison, T. & S.F. Ry. Co. v. Smith*, 183 P. 824, Cal. App., 1919; *Barquis v. Merchants Collection Assn.*, 496 P.2d 817, Cal., 1972; *Bartholomew v. Bartholomew*, 132 P.2d 297, Cal. App. 2 Dist., 1942; *Bravo v. Ismaj*, 120 Cal. Rptr. 2d 879, Cal. App. 4 Dist., 2002; *Brewer v. King*, 293 P.2d 126, Cal. App. 2 Dist., 1956; *Brunzell Const. Co., Inc., of Nev. v. Harrah's Club*, 62 Cal. Rptr. 505, Cal. App. 2 Dist., 1967; *California State Council of Carpenters v. Superior Court*, 89 Cal. Rptr. 625, Cal. App. 4 Dist., 1970; *California Thorn Cordage v. Diller*, 9 P.2d 594, Cal. App., 1932; *Chipman v. Hibbard*, 8 Cal. 268, Cal., 1857; *Dennis v. Overholtzer*, 307 P.2d 1012, Cal. App., 1957; *Donato v. Board of Barber Examiners of State of Cal.*, 133 P.2d 490, Cal. App. 2 Dist., 1943; *Ely v. Frisbie*, 17 Cal. 250, Cal., 1861; *Engels v. Lubeck*, 4 Cal. 31, Cal., 1854; *Engleman v. Superior Court of Fresno County*, 288 P. 723, Cal. App. 4 Dist., 1930; *Financial Indem. Co. v. Superior Court In and For Los Angeles County*, 289 P.2d 233, Cal. 1955; *Glade v. Glade*, 45 Cal. Rptr. 2d 695, Cal. App. 2 Dist., 1995; *Golden Gate Tile Co. v. Superior Court of California City & County of San Francisco*, 114 P. 978, Cal., 1911; *Gorham v. Toomey*, 9 Cal. 77, Cal., 1858; *Gregory v. Diggs*, 45 P. 261, Cal., 1896; *Hibernia Sav. & Loan Soc. v. Robinson*, 88 P. 720, Cal., 1907; *Hicks v. Michael*, 15 Cal. 107, Cal., 1860; *In re Luckett*, 283 Cal. Rptr. 312, Cal. App. 4 Dist., 1991; *In re Mayellen Apartments*, 285 P.2d 943, Cal. App. 2 Dist., 1955; *In re Natural Gas Anti-Trust Cases I*, 39 Cal. Rptr. 3d 909, Cal. App. 4 Dist., 2006; *In re Shieh*, 21 Cal. Rptr. 2d 886, Cal. App. 2 Dist., 1993; *In re Whitaker*, 8 Cal. Rptr. 2d 249, Cal. App. 1 Dist., 1992; *Jackson v. Norton*, 6 Cal. 187, Cal., 1856; *James King of Wm. v. Hall*, 5 Cal. 82, Cal., 1855; *Johnson v. Sun Realty Co.*, 32 P.2d

the power from to issue anti-suit injunctions. In order to examine this question, one must refer to the California Civil Code and Code of Civil Procedure.

The California Civil Code s. 3402 allows the court to grant preventive relief by way of injunction either provisional or final. The following section clarifies that final injunctions are governed by the provisions of the Civil Code whereas provisional injunctions are governed by ss. 525-534 of the Code of Civil Procedure. Regarding final injunctions, the California Civil Code allows a court to issue an anti-suit injunction in s. 3422⁶⁶. That provision, in particular s.3422(3) affords the power to the court to issue an anti-suit injunction only in order to prevent multiple proceedings. There are, however, limitations to the power of the court to issue anti-suit injunctions and those are detailed in s. 3423⁶⁷. In particular s. 3423(a) provides that an anti-suit injunction cannot be granted to stay proceedings pending at the commencement of the action in which the injunction is sought, unless the injunction is

393,Cal.App. 1 Dist.,1934;*Kaloutsis v. Maltos*, 71 P.2d 68,Cal.,1937;*Knowles v. Inches*, 12 Cal. 212,Cal.,1859;*Larue v. Friedman*, 49 Cal. 278,Cal.,1874;*Lezama v. Justice Court*, 235 Cal.Rptr. 238,Cal.App.1.Dist.,1987;*Lincoln v. Superior Court of Madera County*, 124 P.2d 179,Cal.App. 3 Dist.,1942;*Mir v. Pomona Valley Hosp. Medical Center*, ,Cal.App.2.Dist.,2003;*Muller v. Muller*, 23 Cal.Rptr. 900,Cal.App. 1 Dist.,1962;P.2d 233, Cal.,1955;*Pacific Indem. Co. v. Superior Court In and For City and County of San Francisco*, 54 Cal.Rptr. 470, Cal.App.1.Dist.,1966;*Phelan v. Smith*, 8 Cal. 520,Cal.,1857;*Phillips v. Clifford F. Reid, Inc.*, 39 P.2d 512,Cal.App.,1934;*Pioneer Truck Co. v. Clark*, 186 P. 839,Cal.App.,1919;*Prader v. Purkett*, 13 Cal. 588,Cal.,1859;*Reay v. Butler*, 11 P. 463,Cal.,1886;*Revalk v. Kraemer*, 8 Cal. 66,Cal.,1857;*Richards v. Kirkpatrick*, 53 Cal. 433,Cal.,1879;*Rickett v. Johnson*, 8 Cal. 34,Cal.,1857;*Rynsburger v. Dairymen's Fertilizer Co-op., Inc.*, 72 Cal.Rptr. 102,Cal.App. 4 Dist.,1968;*Smith v. Silvey*, 197 Cal.Rptr. 15,Cal.App. 2 Dist.,1983;*Smith v. Sparrow*, 13 Cal. 596,Cal.,1859;*Smith v. Walter E. Heller & Co., Inc.*, 147 Cal.Rptr. 1,Cal.App. 1 Dist.,1978;*Southern Pac. Co. v. Robinson*, 64 P. 572,Cal.,1901;*Spreckels v. Hawaiian Commercial & Sugar Co.*, 49 P. 353, Cal.,1897; *Taliaferro v. Industrial Indem. Co.*, 280 P.2d 114,Cal.App.,1955;*Title Ins. & Trust Co. v. California Development Co.*, 152 P. 542,Cal.,1915;*Uhlfelder v. Levy*, 9 Cal. 607,Cal.,1858;*Verdier v. Verdier*, 22 Cal.Rptr. 93,Cal.App. 1 Dist.,1962;*Waymire v. San Francisco & S.M. Ry. Co.*, 44 P. 1086,Cal.,1896;*Wellborn v. Wellborn*, 155 P.2d 95,Cal.App. 2 Dist.,1945;*Wells, Fargo & Co. v. Coleman*, 53 Cal. 416,Cal.,1879;*Wolfgram v. Wells Fargo Bank*, 61 Cal.Rptr.2d 694,Cal.App.3.Dist.,1997.

⁶⁶ Section 3422: “Except where otherwise provided by this Title, a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant: 1. Where pecuniary compensation would not afford adequate relief; 2. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; 3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or, 4. Where the obligation arises from a trust.”(emphasis added)

⁶⁷ Section 3423: “An injunction may not be granted: (a) To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless this restraint is necessary to prevent a multiplicity of proceedings. (b) To stay proceedings in a court of the United States. (c) To stay proceedings in another state upon a judgment of a court of that state. (d) To prevent the execution of a public statute, by officers of the law, for the public benefit. (e) To prevent the breach of a contract the performance of which would not be specifically enforced, other than a contract in writing for the rendition of personal services from one to another where the promised service is of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, and where the compensation for the personal services is as follows... (f) To prevent the exercise of a public or private office, in a lawful manner, by the person in possession. (g) To prevent a legislative act by a municipal corporation.” (emphasis added)

necessary to prevent multiple proceedings. Moreover, s. 3423(b) provides that an anti-suit injunction may not be granted in order to stay proceedings in a United States court and s. 3423(c) provides that an anti-suit injunction may not be granted in order to stay proceedings in another state upon judgment of a court of that state. Thus, the power of the court to grant an anti-suit injunction is limited only in cases where multiple proceedings are to be prevented. In essence, under s. 3423(a) the applicant for an anti-suit injunction must show that in case the injunction will not be granted to prevent the other party from continuing the other set of proceedings, he will suffer damage or injury or that he will receive improper remedies in the other set of proceedings⁶⁸. In order to have a claim the applicant must merely demonstrate that at the time of applying for the anti-suit injunction, there is another set of proceedings pending⁶⁹.

Provisional anti-suit injunctions are governed by ss. 525-534 of the California Code of Civil Procedure. In particular, s. 526⁷⁰ deals with cases in which an injunction may be issued and *inter alia* provides that an injunction may be issued when, first, irreparable injury will be done to one of the parties, second, the rights of the party are or are threatened to be violated by the

⁶⁸ See *Phillips v. Clifford F. Reid, Inc.*, 39 P.2d 512, Cal.App., 1934, where the court held that in order for an anti-suit injunction to be issued the party applying for such an injunction must show that the grant of the injunction would prevent multiplicity of proceedings, or that any damage or injury would result if injunction should not be granted, or that the remedies pursued in actions sought to be restrained were improper.

⁶⁹ See *Prader v. Purkett*, 13 Cal. 588, Cal., 1859, where it was held that pendency of proceedings between the parties at the time of application for an anti-suit injunction is sufficient to give court jurisdiction to issue such an order.

⁷⁰ Section 526: “(a) An injunction *may be granted* in the following cases: (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually. (2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action. (3) When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual. (4) When pecuniary compensation would not afford adequate relief. (5) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. (6) Where the restraint is necessary to prevent a multiplicity of judicial proceedings. (7) Where the obligation arises from a trust. (b) An injunction *cannot be granted* in the following cases: (1) To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless the restraint is necessary to prevent a multiplicity of proceedings. (2) To stay proceedings in a court of the United States. (3) To stay proceedings in another state upon a judgment of a court of that state. (4) To prevent the execution of a public statute by officers of the law for the public benefit. (5) To prevent the breach of a contract the performance of which would not be specifically enforced, other than a contract in writing for the rendition of personal services from one to another where the promised service is of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, and where the compensation for the personal services is as follows... (6) To prevent the exercise of a public or private office, in a lawful manner, by the person in possession. (7) To prevent a legislative act by a municipal corporation.” (emphasis added)

other party and, finally, to prevent multiple proceedings. Furthermore, s. 526 also deals with cases where an injunction may not be issued. In particular, s. 526, mirroring s. 3423 of the California Civil Code, *inter alia*, first, provides that an anti-suit injunction cannot be granted to stay proceedings pending at the commencement of the action in which the injunction is sought unless the injunction is necessary to prevent multiple proceedings, in other words proceedings involving the same parties and the same cause of action, second, provides that an anti-suit injunction may not be granted in order to stay proceedings in a United States court and, finally, provides that an anti-suit injunction may not be granted in order to stay proceedings in another state upon judgment of a court of that state. In addition, s. 527⁷¹ deals with the instances when a preliminary injunction may be issued and provides that notice must be given to the party to be enjoined.

A great element of the California legal system, entailed in the California Civil Code and applicable to both final and provisional injunctions, is the right of the party or the court of its own motion to restrain a party if that party is considered as a “vexatious litigant”. In particular, s. 391⁷² defines a vexatious litigant *inter alia* as a party who commences proceedings with the sole purpose of causing delay and frustrating the proceedings before the courts of California. In order to prevent a vexatious litigant from abusing the court system, the

⁷¹ Section 527: “(a) *A preliminary injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. No preliminary injunction shall be granted without notice to the opposing party.* (b) A temporary restraining order or a preliminary injunction, or both, may be granted in a class action, in which one or more of the parties sues or defends for the benefit of numerous parties upon the same grounds as in other actions, whether or not the class has been certified. (c) *No temporary restraining order shall be granted without notice to the opposing party, unless both of the following requirements are satisfied:...*”(emphasis added)

⁷² Section 391: “As used in this title, the following terms have the following meanings:...**(b)** “*Vexatious litigant*” means a person who does any of the following: (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in *propria persona* at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing. (2) *After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.* (3) *In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.* (4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence....” (emphasis added)

California Code of Civil Procedure in s. 391.1⁷³ requires such litigant to provide security in order to minimise the risk of that party abusing the system.

More important, however, is the fact that under California law a vexatious litigant may be restrained from commencing any further proceedings either by motion of a party or by the court's own motion. This provision, contained in s. 391.7⁷⁴ of the California Code of Civil Procedure is a very powerful counter-forum shopping mechanism. Thus, a party may ask the court, upon providing proof that the other party is a vexatious litigant, to issue an anti-suit injunction to prevent any further proceedings from being commenced. Even more important, however, is the fact that the court itself, without any motion from the party, may issue an anti-suit injunction if it feels that the other party is abusing the system.

Although a limited mechanism, anti-suit injunctions in California are a very powerful tool against multiple proceedings. In the absence of any *lis pendens* provisions, the California lawmakers wisely used anti-suit injunctions to remedy multiple proceedings. However, anti-suit injunctions in California are more than a mechanism against multiple proceedings; they are a fully operational counter-forum shopping mechanism. The principle of the vexatious litigant entailed in the Code of Civil Procedure ensures that a party may not abuse the system. In addition, should a party be a vexatious litigant, within the meaning of the Code, that party is greatly limited from commencing further proceedings, and even if it does, it has to do so by first obtaining the consent of the court, in addition to the provision of security. Thus, this mechanism affords adequate safeguards in order to prevent a party from abusing the system.

6.3.1.3 Texas

⁷³ Section 391.1: "In any litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant."

⁷⁴ Section 391.7: "(a) *In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefilings order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. Disobedience of the order by a vexatious litigant may be punished as a contempt of court.* (b) The presiding judge shall permit the filing of that litigation *only if it appears* that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3..."(emphasis added)

The final American jurisdiction which will be examined under this part is Texas, where anti-suit injunctions are extensively used and developed⁷⁵. Although a purely common law jurisdiction, Texas has its own rules of Civil Procedure which are contained in the Texas Civil Practice and Remedies Code (TCPBC).

The TCPBC makes special provision for injunctions in Chapter 65. In particular, s. 65.011⁷⁶ governs the grounds upon which an injunction, including an anti-suit injunction, may be

⁷⁵ See for example: *American Alliance Ins. Co. v. Frito-Lay, Inc.*, 788 S.W.2d 152, Tex.App.Dallas, 1990; *American Intern. Specialty Lines Ins. Co. v. Triton Energy Ltd.*, 52 S.W.3d 337, Tex.App.Dallas, 2001; *Armstrong v. Steppes Apartments, Ltd.*, 2001 WL 755104, Tex.App.Fort.Worth, 2001; *Autonation, Inc. v. Hatfield*, 23 IER Cases 1309, Tex.App.Houston.14.Dist., 2005; *Barr v. Thompson*, 350 S.W.2d 36, Tex.Civ.App.-Dallas, 1961; *Blume v. J.I. Case Threshing Mach. Co.*, 225 S.W. 831, Tex.Civ.App., 1920; *Blythe v. Deaton*, 48 Tex. 198, Tex., 1877; *Bodine v. Webb*, 992 S.W.2d 672, Tex.App.Austin, 1999; *Boman v. Gibbs*, 443 S.W.2d 267, Tex.Civ.App.-Amarillo, 1969; *Brand v. Eubank*, 81 S.W.2d 1023, Tex.Civ.App., 1935; *Brickell v. Wilson Syndicate Trust*, 36 S.W.2d 542, Tex.Civ.App., 1931; *Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161, Tex., 1986; *City of Houston v. Kunze*, 258 S.W.2d 226, Tex.Civ.App.-Fort Worth, 1953; *Cleveland v. Ward*, 285 S.W. 1063, Tex., 1926; *Dickerson v. Hopkins*, 288 S.W. 1103, Tex.Civ.App., 1926; *Espada Garrido v. Iglesias de Espada*, 785 S.W.2d 888, Tex.App.-El Paso, 1990; *Ex parte Browne*, 543 S.W.2d 82, Tex., 1976; *Forum Ins. Co. v. Bristol-Myers Squibb Co.*, 929 S.W.2d 114, Tex.App.Beaumont, 1996; *Gannon v. Payne*, 695 S.W.2d 741, Tex.App.Dallas, 1985; *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649, Tex., 1996; *Hayes v. Bone*, 69 S.W.2d 180, Tex.Civ.App., 1934; *Herzog Services, Inc. v. Kansas City Southern R. Co.*, 2002 WL 1991174, Tex.App.Beaumont, 2002; *Home Nat. Bank of Cleburne v. Wilson*, 265 S.W. 732, Tex.Civ.App.Dallas, 1924; *Housing Authority of City of El Paso v. Yepez*, 790 S.W.2d 730, Tex.App.-El Paso, 1990; *Howell v. Texas Workers' Compensation Com'n*, Tex.App.Austin, 2004; *In re Estate of Dilasky*, 972 S.W.2d 763, Tex.App.-Corpus Christi, 1998; *Johnson v. Avery*, 414 S.W.2d 441, Tex., 1966; *Lederle v. United Services Auto. Ass'n*, 394 S.W.2d 31, Tex.Civ.App.Waco, 1965; *London Market Insurers v. American Home Assur. Co.*, Tex.App.Corpus.Christi, 2003; *Lyle v. Collier*, 62 S.W.2d 1112, Tex.Civ.App., 1933; *Manufacturers' Hanover Trust Co. v. Kingston Investors Corp.*, 819 S.W.2d 607, Tex.App.-Hous. (1 Dist.), 1991; *Marketshare Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908, Tex.App.Dallas, 2006; *Moton v. Hull*, 13 S.W. 849, Tex., 1890; *Nelson v. Lamm*, 147 S.W. 664, Tex.Civ.App., 1912; *Nguyen v. Intertex, Inc.*, 2002 WL 1822382, Tex.App.Houston.14.Dist., 2002; *Owens-Illinois, Inc. v. Webb*, 809 S.W.2d 899, Tex.App.Texarkana, 1991; *Pavey v. McFarland*, 234 S.W. 591, Tex.Civ.App., 1921; *PPG Industries, Inc. v. Continental Oil Co.*, 492 S.W.2d 297, Tex.Civ.App.-Hous. (1 Dist.), 1973; *Prairie Oil & Gas Co. v. State*, 214 S.W. 363, Tex.Civ.App., 1919; *Richards v. Mena*, 820 S.W.2d 371, Tex., 1991; *Richardson v. Kent*, 21 S.W.2d 72, Tex.Civ.App., 1929; *Ridgway v. Missouri-Kansas-Texas R. Co. of Tex.*, 204 S.W.2d 411, Tex.Civ.App.Fort.Worth, 1947; *Sanders v. Blockbuster, Inc.*, 2003 WL 23208333, Tex.App.Beaumont, 2004; *Story v. Story*, 176 S.W.2d 925, Tex., 1944; *Total Minatome Corp. v. Santa Fe Minerals, Inc.*, 851 S.W.2d 336, Tex.App.-Dallas, 1993; *Transcontinental Gas Pipe Line Corp. v. American Nat. Petroleum Co.*, 763 S.W.2d 809, Tex.App.Texarkana, 1988; *Twin City Co. v. Birchfield*, 228 S.W. 616, Tex.Civ.App., 1921; *Wade v. Crump*, 173 S.W. 538, Tex.Civ.App., 1915; *Wells Fargo & Co. v. Guilheim*, 169 S.W. 1053, Tex.Civ.App., 1914; *Wheelis v. Wheelis*, 226 S.W.2d 224, Tex.Civ.App.-Fort Worth, 1950; *Wm. Cameron & Co. v. Abbott*, 258 S.W. 562, Tex.Civ.App., 1924.

⁷⁶ Section 65.011 - GROUNDS GENERALLY: "A writ of injunction may be granted if: (1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant; (2) a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual; (3) the applicant is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions; (4) a cloud would be placed on the title of real property being sold under an execution against a party having no interest in the real property subject to execution at the time of sale, irrespective of any remedy at law; or (5) irreparable injury to real or

issued. The Texas courts are allowed to restrain proceedings in another court when the equitable rights of the applicant are violated and thus the issuance of the anti-suit injunction is necessary to avoid irreparable injury done to the applicant.

The courts of equity have the power to issue anti-suit injunctions in order to prevent a party from commencing or continuing proceedings in another state, including a sister state⁷⁷, and such an injunction is not directed against the court of the other state but acts *in personam* against the person enjoined⁷⁸. The right of a party to an anti-suit injunction against sister state proceedings is the same as in restraining proceedings pending in court of another county of the state of Texas⁷⁹. The Texas court is vested with both the authority and duty to enforce and to protect its orders and decrees, which includes the issuance of an anti-suit injunction to prevent the commencement of proceedings involving identical causes of action in a foreign court⁸⁰. The decision to issue an anti-suit injunction is based purely on the discretion of the court⁸¹ and the party seeking an anti-suit injunction must show that clear equity entitles him to the injunction⁸²; therefore, he must also establish that the potential for an irreparable miscarriage of justice exists⁸³.

The granting of an anti-suit injunction to restrain proceedings in a court of another state depends upon specific circumstances, as to whether equitable considerations in favour of granting it overbalance the legal right of the party to bring his action in the sister state⁸⁴. In general, an anti-suit injunction is appropriate in four instances, namely, first, to address a

personal property is threatened, irrespective of any remedy at law." Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 167, Sec. 3.17, eff. Sept. 1, 1987. (emphasis added)

⁷⁷ *Marketshare Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908, Tex.App.Dallas,2006; *American Intern. Specialty Lines Ins. Co. v. Triton Energy Ltd.*, 52 S.W.3d 337, Tex.App.Dallas,2001; *Manufacturers' Hanover Trust Co. v. Kingston Investors Corp.*, 819 S.W.2d 607, Tex.App.-Hous. (1 Dist.),1991; *Transcontinental Gas Pipe Line Corp. v. American Nat. Petroleum Co.*, 763 S.W.2d 809, Tex.App.Texarkana,1988; *Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161, Tex.,1986.

⁷⁸ *Barr v. Thompson*, 350 S.W.2d 36, Tex.Civ.App.-Dallas,1961.

⁷⁹ *Brand v. Eubank*, 81 S.W.2d 1023, Tex.Civ.App.,1935.

⁸⁰ *Sanders v. Blockbuster, Inc.*, 2003 WL 23208333, Tex.App.Beaumont,2004.

⁸¹ *Fleming v. Ahumada*, 2006 WL 1360094, Tex.App.Corpus.Christi,2006; *London Market Insurers v. American Home Assur. Co.*, 2003 WL 61290, Tex.App.Corpus.Christi,2003.

⁸² *Autonation, Inc. v. Hatfield*, 23 IER Cases 1309, Tex.App.Houston.14.Dist.,2005; *AVCO Corp. v. Interstate Southwest, Ltd.*, 2004 WL 944528, Tex.App.Houston.14.Dist.,2004; *Reliant Energy, Inc. v. Gonzalez*, 2003 WL 1961839, Tex.App.Houston.1.Dist.,2003; *American Intern. Specialty Lines Ins. Co. v. Triton Energy Ltd.*, 52 S.W.3d 337, Tex.App.Dallas,2001.

⁸³ *Marketshare Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908 Tex.App.Dallas,2006; *London Market Insurers v. American Home A. Co.*, 2003 WL 61290, Tex.App.Corpus.Christi,2003; *PPG Industries, Inc. v. Continental Oil Co.*, 492 S.W.2d 297, Tex.Civ.App.-Hous (1 Dist.),1973.

⁸⁴ *Barr v. Thompson*, 350 S.W.2d 36, Tex.Civ.App.-Dallas,1961.

threat to the court's jurisdiction, second, to prevent the evasion of important public policy, third, to prevent multiple proceedings, or finally, to protect a party from vexatious or harassing litigation⁸⁵. However, a single parallel proceeding in a foreign forum does not constitute multiple proceedings and cannot, by itself, justify the issuance of an anti-suit injunction, nor does it constitute clear equity⁸⁶. Moreover, neither can the additional expense of litigation, nor the possibility of conflicting rulings⁸⁷. There is, however, a limitation to the power to issue an anti-suit injunction, namely the principle of comity. Thus, an anti-suit injunction should be employed sparingly and carefully⁸⁸, and only in compelling and very special circumstances⁸⁹.

The law on anti-suit injunctions in Texas greatly resembles the position under English law. The usage of anti-suit injunctions in Texas, combined with the usage of the doctrine of *forum non conveniens*⁹⁰, is an adequate mechanism against forum shopping and the prevention of multiple proceedings.

6.3.2 Anti-Suit Injunctions on a Federal level

The above part established that anti-suit injunctions are in use in the United States. In particular, each state, being a separate jurisdiction, has its own rules in order to administer anti-suit injunctions. Thus, on a state level, each state applies its own rules in order to issue an anti-suit injunction to restrain proceedings in another sister state. This part will consider the

⁸⁵ *London Market Insurers v. American Home A. Co.*, 2003 WL 61290, Tex.App.Corpus.Christi,2003; *Tri-State Pipe and Equipment, Inc. v. Southern Mut. Ins. Co.*, 8 S.W.3d 394, Tex.App.Texarkana,1999.

⁸⁶ *Marketshare Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908, Tex.App.Dallas,2006; *Autonation, Inc. v. Hatfield*, 23 IER Cases 1309, Tex.App.Houston.14.Dist.,2005; *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649, Tex.,1996.

⁸⁷ *Total Minatome Corp. v. Santa Fe Minerals, Inc.*, 851 S.W.2d 336, Tex.App.-Dallas,1993.

⁸⁸ *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 887, Tex.App.Houston.14.Dist.,2000; *Tri-State Pipe and Equipment, Inc. v. Southern Mut. Ins. Co.*, 8 S.W.3d 394, Tex.App.Texarkana,1999; *Forum Ins. Co. v. Bristol-Myers Squibb Co.*, 929 S.W.2d 114, Tex.App.Beaumont,1996; *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649, Tex.,1996.

⁸⁹ *Nguyen v. Intertex, Inc.*, 2002 WL 1822382, Tex.App.Houston.14.Dist.,2002; *American Intern. Specialty Lines Ins. Co. v. Triton Energy Ltd.*, 52 S.W.3d 337, Tex.App.Dallas,2001; *Total Minatome Corp. v. Santa Fe Minerals, Inc.*, 851 S.W.2d 336, Tex.App.-Dallas,1993; *Manufacturers' Hanover Trust Co. v. Kingston Investors Corp.*, 819 S.W.2d 607, Tex.App.-Hous. (1 Dist.),1991; *American Alliance Ins. Co. v. Frito-Lay, Inc.*, 788 S.W.2d 152, Tex.App.Dallas,1990; *Espada Garrido v. Iglesias de Espada*, 785 S.W.2d 888, Tex.App.-El Paso,1990; *Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161 Tex.,1986.

⁹⁰ See for example: *Sarieddine v. Moussa*, 820 S.W.2d 837, Tex.App.Dallas,1991; *Flaiz v. Moore*, 359 S.W.2d 872, Tex.,1962; *Forcum-Dean Co. v. Missouri Pac. R. Co.*, 341 S.W.2d 464, Tex.Civ.App.San.Antonio,1960; *Baker v. Bell Helicopter Textron, Inc.*, 985 S.W.2d 272, Tex.App.Fort.Worth,1999.

issue of anti-suit injunctions in the United States from another perspective, namely the relationship between federal and state courts.

There are two main issues which instantly arise in examining this issue, namely, first, whether a state court can issue an anti-suit injunction against a federal court and, second, whether a federal court may issue an anti-suit injunction against a state court. These issues will now be examined in turn.

Regarding the former issue, the answer is in the negative as the American court structure is such which disallows any inferior court from depriving jurisdiction from a superior court. In particular, under the American system, the state courts do not have the power to issue anti-suit injunctions against federal courts⁹¹, especially when the actions are within the jurisdiction of the federal courts⁹². The state courts cannot restrain *in personam* proceedings in a federal court even in cases where the state court has given judgment on the issue⁹³ or when the federal proceedings are a continuation of vexatious litigation⁹⁴. However, in *in rem* proceedings the state court can issue an anti-suit injunction against a federal court only if it is first seised and it has jurisdiction over the parties and the *res*⁹⁵. Yet, if the federal court is first seised and is the first court to acquire jurisdiction over the parties and the *res*, the state court cannot issue an anti-suit injunction against the federal court⁹⁶.

The second issue, namely whether a federal court may issue an anti-suit injunction to restrain proceedings in a state court, is a more complex issue and requires more attention. As a general rule a federal court is allowed to issue an anti-suit injunction in order to restrain proceedings before a state court. The power, and its limits, are contained in the Anti-Injunction Act which

⁹¹ *Prout v. Starr*, 188 U.S. 537, 23 S. Ct. 398, 47 L. Ed. 584 (1903).

⁹² *Baltimore & O. R. Co. v. Kepner*, 314 U.S. 44, 62 S. Ct. 6, 86 L. Ed. 28, 136 A.L.R. 1222 (1941). See also *Gazis v. John S. Latsis (USA) Inc.*, 729 F. Supp. 979, 1990 A.M.C. 1410 (S.D.N.Y. 1990) and *Capital Currency Exchange, N.V. v. National Westminster Bank PLC*, 155 F.3d 603 (2d Cir. 1998).

⁹³ *Donovan v. City of Dallas*, 377 U.S. 408, 84 S. Ct. 1579, 12 L. Ed. 2d 409 (1964); 379 U.S. 871, 85 S. Ct. 14, 13 L. Ed. 2d 77 (1964); 384 S.W.2d 724 (Tex. Civ. App. Dallas 1964). See also *Roodveldt v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 585 F. Supp. 770 (E.D. Pa. 1984); *Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998); *Murakami v. E.L. DuPont De Nemours and Co.*, 191 F.3d 460 (9th Cir. 1999); *Koehring Co. v. Hyde Const. Co.*, 253 Miss. 675, 178 So. 2d 857 (1965).

⁹⁴ Op.Cit.

⁹⁵ *Kline v. Burke Const. Co.*, 260 U.S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A.L.R. 1077 (1922); *In re Dawley*, 99 Vt. 306, 131 A. 847 (1926). See also *Bethke v. Grayburg Oil Co.*, 89 F.2d 536 (C.C.A. 5th Cir. 1937); *Propper v. Clark*, 337 U.S. 472, 69 S. Ct. 1333, 93 L. Ed. 1480 (1949); *Barnett v. Baltimore & O. R. Co.*, 119 Ohio App. 329, 27 Ohio Op. 2d 400, 200 N.E.2d 473 (6th Dist. Huron County 1963).

⁹⁶ *Beardslee v. Ingraham*, 183 N.Y. 411, 76 N.E. 476 (1906).

originally formed Section 5 of the Judiciary Act 1793 and is now to be found at § 2283 of the United States Code. It provides that:

“A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorised by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”⁹⁷

The Anti-Injunction Act⁹⁸ expressly authorises the federal courts to issue an anti-suit injunction against state proceedings in three circumstances, namely, first, when an Act of Congress allows it, second, when it is necessary to protect its jurisdiction and, third, to protect or effectuate its judgments. Before examining these three elements, some general remarks will be made regarding the construction of the Anti-Injunction Act in order for the reader to fully comprehend its effect.

The Anti-Injunction Act is not jurisdictional but is a statutory enactment of the principle of comity⁹⁹. The purpose behind the Anti-Injunction Act, now 28 U.S.C. §2283, is to prevent friction between the state and federal courts which arises from the restraint of state judicial proceedings by a federal court¹⁰⁰. Thus, the Anti-Injunction Act was enacted to limit federal injunctions of state court proceedings in ordinary litigation between litigants to situations necessary to avoid unseemly conflict between state and federal courts¹⁰¹, as well as to promote

⁹⁷ 28 U.S.C. § 2283.

⁹⁸ For a commentary on the Anti-Injunction Act, see: *Abstention preemption: How the federal courts have opened the door to the eradication of “Our Federalism”*, Comment, 99 Nw. U. L. Rev. 1355 (2005); Edward F. Sherman, *Antisuit injunction and notice of intervention and preclusion: Complementary devices to prevent duplicative litigation*, 1995 B.Y.U.L.Rev. 925; Barry Friedman, *Different dialogue: The Supreme Court, Congress and federal jurisdiction*, 85 Nw.U.L.Rev. 1 (1990); Gene R. Shreve, *Preclusion and federal choice of law*, 64 Tex.L.Rev. 1209 (1986); Donald L. Doernberg, *What’s wrong with this picture?: Rule interpleader, the Anti-Injunction Act, In Personam jurisdiction, and M.C. Escher*, 67 U.Colo.L.Rev. 551 (1996).

⁹⁹ *Machesky v. Bizzell*, C.A.5 (Miss.) 1969, 414 F.2d 283. See also *Shaw v. Garrison*, D.C.La.1971, 328 F.Supp. 390; *Hartke v. Roudebush*, D.C.Ind.1970, 321 F.Supp. 1370; *Baines v. City of Danville*, Va., C.A.4 (Va.) 1964, 337 F.2d 579; *U.S. v. State of Washington*, W.D.Wash.1978, 459 F.Supp. 1020; *Landry v. Daley*, N.D.Ill.1967, 280 F.Supp. 929.

¹⁰⁰ See *Vendo Co. v. Lektro-Vend Corp.*, U.S.III.1977, 97 S.Ct. 2881, 433 U.S. 623, 53 L.Ed.2d 1009, per Mr. Justice Rehnquist; *N. L. R. B. v. Nash-Finch Co.*, U.S.Neb.1971, 92 S.Ct. 373, 404 U.S. 138, 30 L.Ed.2d 328. See also, *Brown v. Wright*, C.C.A.W.Va.1943, 137 F.2d 484; *Leiter Minerals, Inc. v. U.S.*, U.S.La.1957, 77 S.Ct. 287, 352 U.S. 220, 1 L.Ed.2d 267; *Lektro-Vend Corp. v. Vendo Co.*, C.A.7 (Ill.) 1976, 545 F.2d 1050; *Euge v. Smith*, C.A.8 (Mo.) 1969, 418 F.2d 1296; *Holcomb v. Aetna Life Ins. Co.*, C.A.Okl.1955, 228 F.2d 75; *Pacific Telephone & Telegraph Co. v. Star Pub. Co.*, D.C.Wash.1924, 2 F.2d 151; *Cole v. Graybeal*, D.C.Va.1970, 313 F.Supp. 48; *Sobol v. Perez*, D.C.La.1968, 289 F.Supp. 392; *Mackay v. Nesbett*, D.C.Alaska 1968, 285 F.Supp. 498; *Henson v. Hoth*, D.C.Colo.1966, 258 F.Supp. 33.

¹⁰¹ *Signal Properties, Inc. v. Farha*, C.A.5 (Tex.) 1973, 482 F.2d 1136; *Government Guarantee Fund of Republic of Finland v. Hyatt Corp.*, D.Virgin Islands 1997, 955 F.Supp. 441.

comity¹⁰². Furthermore, apart from minimising friction between state and federal law, the Anti-Injunction Act's purpose is to ensure effectiveness and the supremacy of federal law¹⁰³. As such, the Anti-Injunction Act has been used to prevent the use of federal jurisdiction for the purpose of staying or interfering with proceedings currently pending in a state court¹⁰⁴ or to prevent re-litigation in a state court of matters which have already been decided by a federal court¹⁰⁵. The policy behind the Anti-Injunction Act is to prohibit the restraint of state court proceedings except in those situations where the real or potential conflict threatens the very authority of the federal court¹⁰⁶. Under the Anti-Injunction Act the power to issue anti-suit injunctions to restrain state court proceedings rests exclusively in federal courts under federal statute¹⁰⁷, and thus the law governing 28 U.S.C. §2283 is Federal law¹⁰⁸.

As a general rule, 28 U.S.C. §2283 must be given a strict interpretation¹⁰⁹ and should not be expanded by statutory construction¹¹⁰. Thus, the plain language of the section means what it says and constitutes positive direction by Congress which the federal district courts should obey¹¹¹. The strict interpretation rule also applies to the exceptions entailed in 28 U.S.C. §2283, and therefore the exceptions are narrow and cannot be extended by statute¹¹².

The Anti-Injunction Act merely carves out an exception to the federal courts' broad injunctive powers, rather than authorising an exclusion of class of injunctions¹¹³, and is applicable only when a Federal Court grants an anti-suit injunction against a state court¹¹⁴. In order for an

¹⁰² *Euge v. Smith*, C.A.8 (Mo.) 1969, 418 F.2d 1296.

¹⁰³ *Northwest Airlines, Inc. v. Astraea Aviation Services, Inc.*, D.Minn.1996, 930 F.Supp. 1317.

¹⁰⁴ *Drexler v. Walters*, D.C.Minn.1968, 290 F.Supp. 150.

¹⁰⁵ *Necchi Sewing Mach. Sales Corp. v. Carl*, S.D.N.Y.1966, 260 F.Supp. 665.

¹⁰⁶ *Vernitron Corp. v. Benjamin*, C.A.2 (N.Y.) 1971, 440 F.2d 105.

¹⁰⁷ *T. Smith & Son, Inc. v. Williams*, C.A.5 (La.) 1960, 275 F.2d 397.

¹⁰⁸ *Greyhound Corp. v. Leadman*, E.D.Ky.1953, 112 F.Supp. 237.

¹⁰⁹ *Carter v. Ogden Corp.*, C.A.5 (La.) 1975, 524 F.2d 74; *International Association of Machinists and Aerospace Workers v. Nix*, C.A.5 (Ga.) 1975, 512 F.2d 125; *Lamb Enterprises Inc. v. Kiroff*, C.A.6 (Ohio) 1977, 549 F.2d 1052; *Signal Properties, Inc. v. Farha*, C.A.5 (Tex.) 1973, 482 F.2d 1136; *Honey v. Goodman*, C.A.6 (Ky.) 1970, 432 F.2d 333.

¹¹⁰ *Hayward v. Clay*, D.C.S.C.1977, 456 F.Supp. 1156; *Ferrer Delgado v. Sylvia de Jesus*, D.C.Puerto Rico 1976, 440 F.Supp. 979; *Eitel v. Faircloth*, S.D.Fla.1970, 311 F.Supp. 1160.

¹¹¹ *Cameron v. Johnson*, S.D.Miss.1966, 262 F.Supp. 873, 88 S.Ct. 1335, 390 U.S. 611, 20 L.Ed.2d 182.

¹¹² *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, U.S.1970, 90 S.Ct. 1739, 398 U.S. 281, 26 L.Ed.2d 234; *Casa Marie, Inc. v. Superior Court of Puerto Rico for Dist. of Arecibo*, C.A.1 (Puerto Rico) 1993, 988 F.2d 252; *Total Plan Services, Inc. v. Texas Retailers Association, Inc.*, C.A.5 (Tex.) 1991, 925 F.2d 142; *Bluefield Community Hosp., Inc. v. Anzulewicz*, C.A.4 (W.Va.) 1984, 737 F.2d 405; *Alton Box Bd. Co. v. Esprit De Corp.*, C.A.9 (Cal.) 1982, 682 F.2d 1267; *T. Smith & Son, Inc. v. Williams*, C.A.5 (La.) 1960, 275 F.2d 397; *Greater Continental Corp. v. Schechter*, S.D.N.Y.1969, 304 F.Supp. 325.

¹¹³ *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, C.A.11 (Fla.) 1993, 985 F.2d 1067.

¹¹⁴ *U.S. Steel Corp. Plan for Employee Ins. Benefits v. Musisko*, C.A.3 (Pa.) 1989, 885 F.2d 1170.

anti-suit injunction to be issued under the Anti-Injunction Act a two-stage test is applied¹¹⁵. First, it must be determined whether the action falls within the ambit of 28 U.S.C. §2283. If it is established that it does, the anti-suit injunction cannot be issued regardless of the facts of the case. If the Act is not applicable or if the case falls within the exceptions entailed in 28 U.S.C. §2283, the court will move to the second stage of the test and consider the merits of the injunction request.

As with all anti-suit injunctions, Federal anti-suit injunctions are purely discretionary. However, there is a limit to the court's discretion as it does not have the inherent power to ignore the limitations listed in the Anti-Injunction Act and to restrain state court proceedings merely because those proceedings interfere with a protected federal right or invade an area pre-empted by federal law, even when the interference is clear¹¹⁶. The discretionary power, and its limits, of the federal court extends to an order to stay state court proceedings, where in such a case the court must weigh the factors both in favour and against the issuance of a stay¹¹⁷. A Federal Court will grant an anti-suit injunction only when it is convinced that an asserted federal right cannot be preserved except by the granting of an anti-suit injunction¹¹⁸. The Anti-Injunction Act, now 28 U.S.C. §2283, contains three exceptions under which a Federal court may issue an anti-suit injunction restraining proceedings in a State court. These three exceptions will now be considered in turn.

The first exception contained in 28 U.S.C. §2283 is the “except as expressly authorised by Act of Congress” exception, in other words when an Act of Congress expressly permits a Federal court to enjoin a state court. The phrase “expressly authorised” has not been interpreted as requiring federal law to contain an express reference to the Anti-Injunction Act or to expressly authorise an anti-suit injunction to restrain state court proceedings. Rather, it must create a specific and unique federal right or remedy, enforceable in a federal court of equity, which could be frustrated if the federal courts were not empowered to enjoin the state court proceedings¹¹⁹. In order to determine whether an Act of Congress falls within this exception, the test to apply is whether the act creating a federal right or remedy enforceable in a federal

¹¹⁵ *Bonser v. State of N.J.*, D.C.N.J.1985, 605 F.Supp. 1227.

¹¹⁶ *Piper v. Portnoff Law Associates*, E.D.Pa.2003, 262 F.Supp.2d 520.

¹¹⁷ *U.S. v. State of Michigan*, W.D.Mich.1980, 508 F.Supp. 480.

¹¹⁸ *U.S. v. Leiter Minerals*, E.D.La.1954, 127 F.Supp. 439; 224 F.2d 381.

¹¹⁹ *Mitchum v. Foster*, 407 U.S. 225, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972). See also *Daniel Boone Area School Dist. v. Lehman Bros., Inc.*, W.D.Pa.2002, 187 F.Supp.2d 414.

court of equity can be given its intended scope only by a stay of the state court proceedings¹²⁰. Among the federal statutes which expressly authorise the stay of state court proceedings are, first, the Federal Impleader Act¹²¹, second, the Bankruptcy Act¹²², and finally the Civil Rights Act¹²³. However, simply because an action involves a statute which in general terms permits an injunction does not *per se* mean that the statute falls within the “expressly authorised” exception of 28 U.S.C. §2283¹²⁴.

The second exception contained in the Anti-Injunction Act is to allow a Federal court to issue an anti-suit injunction restraining state court proceedings in any case where it is necessary in aid of its jurisdiction. In order to fall within this exception, the requested anti-suit injunction must not only be related to the District Court’s jurisdiction, but be necessary in the aid of it¹²⁵. The jurisdiction must already have attached, and so the exception cannot be invoked if the District Court’s jurisdiction is nonexistent¹²⁶. Thus, the existence of parallel state tort actions against other alleged tortfeasors involved in the same oil spill did not interfere with or impair the court’s jurisdiction in limitation proceeding brought by a vessel owner, in order to justify the issuance of an anti-suit injunction under the second exception in the Anti-Injunction Act¹²⁷.

The third, and final, exception contained in the Anti-Injunction Act is that a Federal court may issue an anti-suit injunction restraining state court proceedings in order to protect or effectuate its judgments, commonly known as the re-litigation exception. Thus, a Federal Court may issue an anti-suit injunction restraining state court proceedings which threaten to re-litigate matters that are the subject of a final federal judgment¹²⁸. However, a federal anti-

¹²⁰ *Op.Cit. See also Employers Resource Management Co., Inc. v. Shannon*, 65 F.3d 1126, 19 Employee Benefits Cas. (BNA) 1982 (4th Cir. 1995).

¹²¹ 28 USC §§ 1355, 2361.

¹²² 11 USC §§ 105(a), 362(a).

¹²³ 42 USC § 1983.

¹²⁴ *Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co.*, 418 F.2d 387 (5th Cir. 1969).

¹²⁵ *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 90 S. Ct. 1739, 26 L. Ed. 2d 234, 74 L.R.R.M. (BNA) 2321, 63 Lab. Cas. (CCH) ¶10931 (1970). The exception applies only when an injunction is necessary to prevent a state court from so interfering with the federal court’s consideration or disposition of a case as to seriously impair the federal court’s flexibility and authority to decide that case. Cf. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998); *TransSouth Financial Corp. v. Bell*, 149 F.3d 1292 (11th Cir. 1998).

¹²⁶ *Amalgamated Clothing Workers of America v. Richman Bros.*, 348 U.S. 511, 75 S. Ct. 452, 99 L. Ed. 600, 71 Ohio L. Abs. 177, 35 L.R.R.M. (BNA) 2682, 27 Lab. Cas. (CCH) ¶69080 (1955).

¹²⁷ *In re Complaint of River City Towing Services, Inc.*, 199 F. Supp. 2d 495 (E.D. La. 2002).

¹²⁸ *Fauci v. Hannon*, 275 F.2d 234, 60-1 U.S. Tax Cas. (CCH) ¶9293, 5 A.F.T.R.2d (P-H) ¶846 (1st Cir. 1960); *Walter E. Heller & Co., Inc. v. Cox*, 379 F. Supp. 299 (S.D.N.Y. 1974); *Crews v. Radio 1330, Inc.*,

suit injunction is not proper when the factors in the state case are only indirectly related to those in the federal case¹²⁹. The court will only grant the anti-suit injunction upon application by a party who has an interest in the judgment¹³⁰. However, merely identifying the issue in the one case as the same issue as in another does not by itself entitle a party to an anti-suit injunction under the re-litigation exception¹³¹. The re-litigation exception is limited to cases where the state court has not yet ruled on the merits of the *res judicata* issue. Once the state court has finally rejected a claim of *res judicata*, then the United States Constitution's Full Faith and Credit Clause¹³² becomes applicable and the federal courts must turn to state law to determine the preclusive effect of the state court's decision¹³³.

The final step that the Federal court takes after it is established that the anti-suit injunction falls within one of the three exceptions entailed in the Anti-Injunction Act, is to apply the All Writs Act¹³⁴ which empowers all federal courts to issue all writs necessary and appropriate to aid their jurisdiction¹³⁵. The All Writs Act provides positive authority for the federal courts to

435 F. Supp. 1002 (N.D. Ohio 1977). An essential condition for applying the re-litigation exception is that the claims or issues before the state court, under which the federal injunction is issued, have actually been decided by the federal court. *Cf. Texas Commerce Bank Nat. Ass'n v. State of Fla.*, 138 F.3d 179 (5th Cir. 1998); *Hatcher v. Avis Rent-A-Car System, Inc.*, 152 F.3d 540, 1998 FED App. 244P (6th Cir. 1998). If the claims or issues before the state court have been decided by a federal court, then the federal court bases the anti-suit injunction on the doctrines of *res judicata* or collateral estoppel. *Res judicata* is a common law doctrine meant to bar re-litigation of cases between the same parties in court. Once a final judgment has been handed down, subsequent judges who are confronted with a case that is identical to or substantially the same as the earlier one will apply *res judicata* to preserve the effect of the first judgment. This is to prevent injustice to the parties of a case supposedly finished, but perhaps mostly to avoid unnecessary waste of resources in the court system. *Res judicata* does not only prevent future judgments from contradicting earlier ones, but also prevents them from multiplying judgments, so a prevailing claimant could not recover damages from the defendant twice for the same injury. For anti-suit injunctions and *res judicata* see *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971); *Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hosp.*, 185 F.3d 154 (3d Cir. 1999). Collateral estoppel, also sometimes known as issue preclusion, is a common law estoppel doctrine that prevents a person from re-litigating an issue. Simply put, "once a court has decided an issue of fact or law necessary to its judgment, that decision ... preclude[s] re-litigation of the issue in a suit on a different cause of action involving a party to the first case." *San Remo Hotel v. San Francisco*, 543 U.S. 1032, 125 S.Ct. 685 (Mem) U.S., 2004. This is for the prevention of legal harassment and to prevent the abuse of legal resources. For anti-suit injunctions and collateral estoppel see *Samuel C. Ennis & Co., Inc. v. Woodmar Realty Co.*, 542 F.2d 45 (7th Cir. 1976); *Matter of L & S Industries, Inc.*, 989 F.2d 929, Bankr. L. Rep. (CCH) ¶75197 (7th Cir. 1993).

¹²⁹ *State of Okl. ex rel. Wilson v. Blankenship*, 447 F.2d 687 (10th Cir. 1971); 405 U.S. 918, 92 S. Ct. 942, 30 L. Ed. 2d 787 (1972).

¹³⁰ *U. S. v. Kuehn*, 562 F.2d 427 (7th Cir. 1977).

¹³¹ *Amwest Mortg. Corp. v. Grady*, 925 F.2d 1162, 18 Fed. R. Serv. 3d (LCP) 1331 (9th Cir. 1991).

¹³² For a discussion of the Full Faith and Credit Clause see *infra* 6.4.1.

¹³³ *Londono-Rivera v. Virginia*, 155 F. Supp. 2d 551 (E.D. Va. 2001).

¹³⁴ 28 USC § 1651.

¹³⁵ 28 USC § 1651(a).

issue injunctions against state court proceedings¹³⁶. Under the Act¹³⁷, the federal courts have the authority to prevent a party by way of anti-suit injunction from future filing of appeals when that party has a history of abuse of the court system¹³⁸, or require that party to obtain court permission before filing an action¹³⁹ or issue an anti-suit injunction against that party if it is established that the party abuses the court system by harassing its opponents¹⁴⁰.

The principle of anti-suit injunctions on a United States Federal level is greatly advanced. The Anti-Injunction Act ensures that two cardinal principles remain intact, namely the sovereignty of each state court and the supremacy of Federal law.

6.3.3 The Issuance of International Anti-Suit Injunctions in the United States of America

The discussion of the issue of anti-suit injunctions in the United States would lack completeness if the American system for international anti-suit injunctions was not discussed. Thus, this section will concentrate on the issuance of international anti-suit injunctions by the American Federal courts. It has to be noted that this discussion is provided in order to complete the picture of the United States anti-suit injunction system, and not for the purposes of reforming the Brussels I Regulation framework¹⁴¹. Since the discussion in this section concentrates on international anti-suit injunctions the discussion will focus on federal cases as

¹³⁶ *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 134 F.3d 133 (3d Cir. 1998).

¹³⁷ For Anti-Injunction Act and the All Writs Act see *U.S. v. Mason Tenders Dist. Council of Greater New York*, S.D.N.Y.2002, 205 F.Supp.2d 183; *Brown v. Gilmore*, 533 U.S. 1301, 122 S. Ct. 1, 150 L. Ed. 2d 782 (2001); *In re Egri*, 68 Fed. Appx. 249 (2d Cir. 2003); *U.S. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, AFL-CIO, 266 F.3d 45 (2d Cir. 2001); *Canady v. Allstate Ins. Co.*, 282 F.3d 1005 (8th Cir. 2002); *Sandpiper Village Condominium Association, Inc. v. Louisiana-Pacific Corp.*, 428 F.3d 831 (9th Cir. 2005); *Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065 (11th Cir. 2001); *Almurbati v. Bush*, 366 F. Supp. 2d 72 (D.D.C. 2005); *In re Application of the U.S. for an Order (1) Authorizing the Use of a Pen Register and a Trap and Trace Device*, 396 F. Supp. 2d 294 (E.D. N.Y. 2005); *Oneida Indian Nat. of New York v. Madison County*, 376 F. Supp. 2d 280 (N.D. N.Y. 2005); *U.S. v. Mason Tenders Dist. Council of Greater New York*, 205 F. Supp. 2d 183 (S.D. N.Y. 2002); *Neick v. City of Beavercreek*, 255 F. Supp. 2d 773 (S.D. Ohio 2003); *In re Louisiana-Pacific Inner Seal Siding Litigation*, 234 F. Supp. 2d 1170 (D. Or. 2002); *U.S. v. Abdelhadi*, 327 F. Supp. 2d 587 (E.D. Va. 2004).

¹³⁸ *Brow v. Farrelly*, 994 F.2d 1027 (3d Cir. 1993); *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227 (10th Cir. 1998). A federal court has the responsibility to prevent single litigants from unnecessarily encroaching on the judicial machinery needed by others, *Cf. Procup v. Strickland*, 792 F.2d 1069 (11th Cir. 1986).

¹³⁹ *Ketchum v. Cruz*, 961 F.2d 916 (10th Cir. 1992); *Urban v. United Nations*, 768 F.2d 1497 (D.C. Cir. 1985).

¹⁴⁰ *Tripati v. Beaman*, 878 F.2d 351 (10th Cir. 1989).

¹⁴¹ See Chapter VII: Reform. The proposed American reform model only concerns the United States internal anti-suit injunctions system and not the international anti-suit injunctions system discussed in this section.

the interpretation of exclusive jurisdiction and arbitration clauses is solely controlled by federal and not state law¹⁴².

Before embarking on a discussion of the most recent case law on the issue, two observations must be made from the outset. At first, the treatment of exclusive jurisdiction clauses, or known in America as forum selection clauses, is the same as with arbitration clauses. In *Paramedics v. GE Medical*¹⁴³ the United States Court of Appeals, Second Circuit has held that a breach of an arbitration clause is a paradigm case for the issuance of an anti-suit injunction. This precedence was brought into the sphere of exclusive jurisdiction clauses by the United States Court of Appeals, Ninth Circuit decision in *Gallo v. Andina*¹⁴⁴ where the court affirmed and applied the *Paramedics*¹⁴⁵ decision to provide the principle that a breach of an exclusive jurisdiction clause necessitates the issuance of an anti-suit injunction. Second, the American legal precedence shows that exclusive jurisdiction and arbitration clauses are treated very seriously and bear great weight, a position more akin to the English legal precedence. An example of the importance of such clauses is provided by the decision of the Supreme Court of the United States in *Scherk v. Alberto-Culver*¹⁴⁶. The court *inter alia* observed that:

“A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.”¹⁴⁷

The *Gallo*¹⁴⁸ case added that “protecting contractual devices that provide such indispensable, essential functions within international trade justifies the imposition of an anti-suit injunction.”¹⁴⁹

¹⁴² See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30-32, 108 S.Ct. 2239, 2244-45, 101 L.Ed.2d 22 (1988); See also *Villar v. Crowley Maritime Corp.* 780 F.Supp. 1467 (S.D. Tex. 1992).

¹⁴³ *Paramedics Electromedicina Comercial, Ltda. v. GE Medical Systems Information Technologies Inc.* 369 F.3d 645 (2nd Cir. 2004).

¹⁴⁴ *E. & J. Gallo Winery v. Andina Licores S.A.* 446 F.3d 984 (9th Cir. 2006).

¹⁴⁵ Ibid.

¹⁴⁶ *Fritz Scherk v. Alberto-Culver Company* 417 U.S. 506, 94 S.Ct. 2449.

¹⁴⁷ Ibid. , at pp. 2455-2456.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid. , at p. 993.

The main question to tackle in this section is how an international anti-suit injunction case involving an exclusive jurisdiction or arbitration agreement would be decided in the United States differently from an exclusive jurisdiction or arbitration agreement case under the Brussels I Regulation. In order to properly conduct the comparison it is submitted that the hypothesis should be the same. Thus, the examination presupposes that the parties have a contract containing either an exclusive jurisdiction or arbitration clause and one party commences proceedings first in a forum different from the one chosen whilst the other commences proceedings in the chosen forum seeking to enforce the clause and restrain the proceedings commenced first.

It is submitted that it is uncertain whether an anti-suit injunction would be issued in an exclusive jurisdiction or arbitration clause case such as *Gasser* or *The Front Comor*, as the answer depends on the Federal Court Circuit before which the case is heard¹⁵⁰. The reason for this is due to the division of approach on the issue between the Circuits. There are two main camps, advocating two different approaches in relation to the test, and hence the willingness, to issue an anti-suit injunction¹⁵¹.

The first approach, adopted by the D.C., Second and Sixth Circuits, is the so-called restrictive approach, under which the preservation of international comity is paramount. Thus, under this approach an anti-suit injunction may only be issued when it is necessary to protect the forum court's jurisdiction over the matter at issue or to protect important public policies of the United States. The leading case adopting the restrictive approach is *Laker Airways*¹⁵². In that case, the district court enjoined American and other non-British defendants from seeking relief in English courts as an attempt to evade United States antitrust laws. Upholding the

¹⁵⁰ It is worth mentioning a few words on the United States division of courts. The 94 U.S. judicial districts are organised into 12 regional circuits, each of which has a United States Court of Appeals. The following states belong to the following circuits: First Circuit: ME, NH, MA, RI, PR, Second Circuit: VT, NY, CT, Third Circuit: PA, NJ, DE, VI, Fourth Circuit: WV, VA, MD, NC, SC, Fifth Circuit: TX, LA, MS, Sixth Circuit: MI, OH, KY, TN, Seventh Circuit: WI, IL, IN, Eighth Circuit: ND, SD, NE, MN, IA, MO, AR, Ninth Circuit: WA, OR, ID, MT, CA, NV, AZ, AK, MP, GU, HI, Tenth Circuit: WY, UT, CO, KS, OK, NM, Eleventh Circuit: FL, GA, AL, Twelfth Circuit: DC (FED). A Court of Appeals hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies. In addition, the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialised cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal Claims. Finally, the highest court in the United States is the Supreme Court of the United States.

¹⁵¹ See Chapters by Meeson and Tetley in Martin Davies, ed., *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, (2005), The Hague: Kluwer Law International.

¹⁵² *Laker Airways Ltd. v. Sabena* 731 F.2d 909 (D.C. Cir. 1984).

injunction, the D.C. Circuit found that the antitrust laws clearly applied to the conduct underlying the claims. The court found that an anti-suit injunction was “*imperative* to preserve the court’s jurisdiction.”¹⁵³ Thus, although the D.C. Circuit affirmed the lower court, it adopted a higher standard than the Fifth, Seventh and Ninth Circuits for issuing foreign anti-suit injunctions. Because the foreign action directly infringed the jurisdiction of the United States courts, the injunction was appropriate. Adopting the reasoning from *Laker Airways*¹⁵⁴, the Second Circuit reversed an anti-suit injunction in *China Trade*¹⁵⁵. This admiralty action involved a contract between China Trade, an importer, and a Korean shipper for the shipping of soybeans from the U.S. to China. The Korean vessel ran aground and ruined China Trade’s soybean cargo. China Trade sued in U.S. district court for its losses, and the parties began discovery. Before trial, the Korean shipper filed suit in South Korea seeking the equivalent of a declaratory injunction to avoid liability. China Trade moved in the district court for an anti-suit injunction against the Korean shipper. Finding identical parties and issues in both actions, and considering factors of vexatiousness and expense, the district court permanently enjoined the shipper from prosecution of the Korean action. The Second Circuit reversed. Addressing jurisdictional concerns, the court found that the Korean court had attempted neither to enjoin nor usurp the district court’s jurisdiction over the matter. Regarding policy concerns, the court found no evidence that the Korean shipper sought to evade any important public policy of the United States courts. The court held that an injunction is not appropriate merely to prevent a party from seeking slight advantages in substantive or procedural law in a foreign court. Moreover, the possibility that a U.S. judgment might be unenforceable in the Korean court was only speculation. Thus, the Second Circuit held that enjoining the foreign suit was unjustified. As these cases show, courts adopting the restrictive approach issue anti-suit injunctions sparingly.

The second approach, adopted by the Fifth, Seventh and Ninth Circuits, is the so-called liberal approach, under which comity is not an important factor. Rather, the court focuses on whether the foreign proceedings are vexatious and duplicative. As such, the mere existence of parallel proceedings, involving the same parties and the same cause of action, generally suffices to justify the issuance of an anti-suit injunction. Generally, courts in these circuits grant anti-suit injunctions if a duplication of parties and issues exists between a suit in the

¹⁵³ *Ibid.*, at p. 956, emphasis added.

¹⁵⁴ *Ibid.*

¹⁵⁵ *China Trade & Dev. Corp. v. M.V. Choong Yong* 837 F.2d 33 (2nd Cir. 1987).

forum court and a foreign suit. While not excluding considerations of international comity, this standard focuses on the “potentially vexatious nature” of concurrent foreign litigation¹⁵⁶. Among the circuits following this approach, *Seattle Totems*¹⁵⁷ is a leading case. There, the Ninth Circuit affirmed an anti-suit injunction granted against the defendant, the National hockey League. The NHL had sought to file a suit involving the same breach of contract claim in Canadian courts as the case in the district court. The NHL admitted that under Federal Law their contract claim would constitute a compulsory counterclaim in the U.S. antitrust suit. Canadian law, however, did not require the defendant to assert a compulsory counterclaim. The Ninth Circuit affirmed the district court’s anti-suit injunction. In reaching its holding, the Ninth Circuit adopted factors set forth by the Fifth Circuit in *Bremen*¹⁵⁸. The court stated that:

“foreign litigation may be enjoined when it would (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing courts [sic] *in rem* or quasi *in rem* jurisdiction, or (4) where the proceedings prejudice other equitable considerations.”¹⁵⁹

In reaching its decision, the Ninth Circuit considered factors from *forum non conveniens* doctrine such as convenience to the parties and witnesses, the efficient administration of justice, and the potential prejudice to one party¹⁶⁰.

The *Seattle Totems*¹⁶¹ court relied, in part, on *Bremen*¹⁶², which involved a contract to tow a drilling barge from Louisiana to Italy. The contract contained a forum selection clause requiring the litigation in London of any disputes. After the barge was damaged en route in the Gulf of Mexico, the tug boat sought refuge in Tampa Bay. The barge owner, a Delaware corporation, sued in the Middle District of Florida. The defendant tug owner, a German corporation, moved to stay the district court action, and filed suit in London for breach of the towage contract. On the barge owner’s motion, the district court enjoined the tug owner from proceeding in London on the ground that, as the proceedings involved a limitation claim, the case was more connected with the United States court and therefore the existence of an

¹⁵⁶ Cf. *Kaepa v. Achilles*, 76 F.3d 624 (5th Cir.1996).

¹⁵⁷ *Seattle Totems Hockey Club, Inc. v. National Hockey League* 652 F.2d 852 (9th Cir. 1981).

¹⁵⁸ *Zapata Off-shore Company v. M/S Bremen and Underweser Reederei, GmbH* 428 F.2d 888 (5th Cir. 1970).

¹⁵⁹ Ibid. , at p. 855.

¹⁶⁰ Ibid. , at p. 856.

¹⁶¹ Ibid.

¹⁶² Ibid.

English exclusive jurisdiction clause could not displace the jurisdiction of the United States court, especially when it was first seised. The Fifth Circuit affirmed, viewing the English action as a counterclaim from the pending district court action. The court stated that:

“allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in ‘inequitable hardship’ and tend to frustrate and delay the speedy and efficient determination of the cause.”¹⁶³

Thus, the Fifth Circuit also analysed the issue through the lens of *forum non conveniens* doctrine. Outlining the circumstances which would permit a court to enjoin a party from prosecuting a foreign action, the Fifth Circuit listed the four factors later adopted by the Ninth Circuit.

The aforesaid analysis of the two approaches adopted by the United States Court Circuits reveals that it is uncertain whether an exclusive jurisdiction clause case, such as *Gasser*¹⁶⁴, or arbitration clause case, such as *The Front Comor*¹⁶⁵, would be one where an anti-suit injunction would definitely be issued. The hypothesis here is to apply the United States criteria for the issuance of an international anti-suit injunction to cases such as *Gasser* and *The Front Comor*. However, it must be noted that the aforesaid United States international anti-suit injunction cases are not to be seen as direct analogies of *Gasser* and *The Front Comor* and consequently, for the purposes of the discussion, what is important is the criteria drawn from the United States cases on international anti-suit injunctions and not the facts of each case. The question thus arising is which approach is to be preferred, or at least which approach seems to be the dominant one. This question is important as it will in turn reveal whether there is a deviation of approach by the American system on the issue.

It is submitted that, although not conclusive, there is some evidence to suggest that the dominant approach is the liberal approach. As mentioned above, the restrictive approach has been adopted by the Twelfth (DC), Second and Sixth Circuit while the liberal approach by the Fifth, Seventh and Ninth Circuit. Should one examine the jurisdictions under each Circuit one would find that the number of States belonging to the Circuits adopting the liberal approach is far greater than for those adopting the restrictive approach. There is, however, another reason

¹⁶³ *Ibid.*, at p. 896.

¹⁶⁴ [2003] E.C.R. I-14693; [2004] 1 Lloyd’s Rep. 222; [2004] I.L.Pr. 7. For an analysis of the case *see supra* Chapter III: The Brussels I Regulation Framework.

¹⁶⁵ [2005] 2 Lloyd’s Rep. 257; [2007] UKHL 4. For an analysis of the case *see supra* Chapter V: Arbitration Agreements.

why the liberal approach is to be preferred. Recently, in September 2006, the Florida District court which belongs to the Eleventh Circuit, a Circuit which had not in the past addressed the issue, adopted the liberal approach in the *Canon*¹⁶⁶ case. In ordering an anti-suit injunction restraining Lantech, the court considered both approaches and concluded in favour of the liberal approach. The reasons for adopting this approach are twofold. First, the court found great weight in another Eleventh Circuit court decision, delivered by the Middle District Court of Alabama, where the court refused to grant an anti-suit injunction based on the restrictive approach¹⁶⁷. Second, the court considered Fifth Circuit case law and the *Bremen*¹⁶⁸ case and concluded that:

“This Court finds that it is bound by Unterweser to follow the liberal approach, given the existence of the forum selection clause. The Court further finds that the suit by Lantech frustrates the policy of the United States courts of enforcing forum selection clauses.”

The *Canon*¹⁶⁹ decision, although not a decision by the Court of Appeals of the Eleventh Circuit, is a very powerful addition to the existing precedents in that Circuit in favour of the liberal approach.

Nonetheless, there has also been evidence suggesting that the restrictive approach is to be preferred as a court belonging to another Circuit which had not in the past addressed the issue, the Third Circuit, opted for that approach in the *GE*¹⁷⁰ case. In this arbitration case, the District Court of Pennsylvania considered both approaches. The court applied the restrictive approach as it felt bound by the Court of Appeals, Third Circuit decision in *Bauxites*¹⁷¹ where, although the case was not concerned *per se* with the issue, the court explicitly rejected the liberal approach and implied that more regard must be paid to the principle of comity¹⁷².

¹⁶⁶ *Canon Latin America Inc. v. Lantech (CR)*, S.A. 453 F. Supp.2d 1357. In that case, a manufacturer brought an action against a distributor, seeking a declaratory judgment as to choice of law and forum provision of the parties' distribution agreement and an anti-suit injunction enjoining the parties from litigating in Costa Rica, and alleging claims for breach of contract, open account, account stated, and unjust enrichment. The manufacturer moved for a preliminary injunction enjoining the distributor from taking any action in furtherance of its proceeding against manufacturer in Costa Rica.

¹⁶⁷ See *Mutual Service Casualty Co. v. Frit Industries, Inc.* 805 F.Supp. 919 (M.D. Ala. 1992).

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ *General Electric Company v. Deutz AG* 129 F.Supp.2d 776 (W.D.P. 2000).

¹⁷¹ *Campagnie des Bauxites de Guinée v. Insurance Company of North America* 651 F.2d 877 (3rd Cir. 1981).

¹⁷² Ibid., at p. 887.

It is, therefore, not clear whether the liberal or restrictive approach is the dominant approach adopted in the United States in cases involving the issuance of an international anti-suit injunction. It is evident from the case law that when a case reaches a Circuit which dominantly applies either approach, the preferred approach by that Circuit will be applied. When, however, a case is heard in a Circuit which has not addressed the issue, the courts of that Circuit will review both approaches and opt for the best one to resolve the dispute in hand. Thus, it is far better to consider the question of how differently would an exclusive jurisdiction or arbitration clause case be decided by the United States courts under both approaches.

Supposing that the liberal approach is the dominant one¹⁷³, how different would the result be if the *Gasser*¹⁷⁴ or *The Front Comor*¹⁷⁵ case was heard in the United States from the result reached by the European Court of Justice in *Gasser*¹⁷⁶ or the English court in *The Front Comor*¹⁷⁷? It is submitted that, if *Gasser*¹⁷⁸ was heard in America, the difference between the European Court of Justice decision would be immense. At first, by adopting the liberal approach the American courts would issue an anti-suit injunction, since it is the policy of the United States Courts to enforce exclusive jurisdiction clauses. Second, the answer to the question of who decides on the validity of the exclusive jurisdiction clause is also different. In *Gasser*¹⁷⁹ the approach taken by the European Court of Justice is that the court first seised must be the one deciding on the validity of the clause by applying the condition laid in Article 23. A United States court, however, would issue an anti-suit injunction as in its opinion the question of validity is to be decided by the court chosen and not necessarily the court first seised, by applying federal law. In relation to *The Front Comor*¹⁸⁰, the result would be the same if the liberal approach was applied as in both instances an anti-suit injunction would be issued to enforce the clause.

If, however, one supposes that the restrictive approach is the dominant one, it is submitted that, although under this approach comity bears far greater weight, an anti-suit injunction

¹⁷³ It is worth mentioning that all three American jurisdictions examined in this Chapter, namely Louisiana, California and Texas belong to Circuits in favour of the liberal approach.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

would be issued in the *Gasser*¹⁸¹ scenario. An anti-suit injunction is only issued under this approach when it is necessary to protect the forum court's jurisdiction over the matter at issue or to protect important United States public policies¹⁸². In relation to the latter requirement, it has been held that important United States public policies include the United States policy favouring the enforcement of exclusive jurisdiction and arbitration clauses¹⁸³. It is therefore submitted that even if *Gasser*¹⁸⁴ appeared before a restrictive approach Circuit, although the court would be more careful in issuing anti-suit injunctions for reasons of comity, an anti-suit injunction would be issued in the end as the non-enforcement of the exclusive jurisdiction clause by the court would run contrary to United States public policy. It seems that the same result would be reached in *The Front Comor*¹⁸⁵ scenario, as again the anti-suit injunction would serve the purpose of enforcing United States policy.

One may draw the conclusion from the aforesaid that the liberal approach is the same as the one adopted by the English courts, and thus the law of the two systems is the same on this issue. It is submitted that such a conclusion is wrong, as it does not mean that because exclusive jurisdiction or arbitration clauses enjoy the same status in England and the United States the law on anti-suit injunctions is the same. As it will be seen in another part of this Chapter¹⁸⁶, the United States have developed a far more advanced mechanism encompassing different jurisdictional tools than England, rendering it a far better system on the issue¹⁸⁷. In addition, the United States courts, even the ones applying the liberal approach, treat comity far

¹⁸¹ *Ibid.*

¹⁸² See *Ibid. Laker Airways and China Trade.*

¹⁸³ See *Farell Lines Inc. v. Columbus Cello-Poly Corp.* 32 F.Supp.2d 118 (S.D.N.Y. 1997).

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ See *infra* 6.4.

¹⁸⁷ An example here is the Transfer of Cases principle. In *Tommy Fleming v. Patricio Ahumada*, 193 S.W.3d 704, which involved proceedings brought by a client against his attorney, it was *inter alia* argued that due to the existence of an exclusive jurisdiction clause in the parties' settlement agreement in favour of the courts of Bexar County, Texas, the case should be transferred to the courts of that County from the courts of Cameron County, Texas where the case was heard. Although, the claimant was unsuccessful in his request, the case, together with numerous others on the issue, illustrate the importance of the Transfer of Cases principle. The reader must be careful in understanding that the Transfer of Cases principle is only available within the United States, from one County or jurisdiction to another, and not from a court of another country to a court of the United States. This was *inter alia* established in the *E & J Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984 (9th Cir. 2006), where the court said: "We have great difficulty with the district court's solution that Gallo's proper remedy to enforce the forum selection clause was to 'petition to the court where the action was brought for change of venue.' This proposal was both erroneous and perplexing, as it is a legal impossibility to transfer venue from an Ecuadorian court to a California court." *Ibid.*, at p. 993. The Transfer of Cases principle is discussed in this Chapter at 6.4.1, and is important, in relation to reforming the European system.

more seriously than the English courts have, an example being the *Continental Bank*¹⁸⁸ and *Turner*¹⁸⁹ decisions. It is therefore legal nonsense to treat the two systems as being the same on the law on anti-suit injunctions merely on the ground that both favour exclusive jurisdiction clauses.

It is further submitted that the restrictive approach deviates from the one adopted by the English courts. The reason for this is the regard given to comity and in particular they way in which anti-suit injunctions are perceived by American courts. Although both systems recognise that an anti-suit injunction is an *in personam* order, American courts also recognise that such an order greatly impairs the foreign court's jurisdiction. In particular, in a recent arbitration United States Court of Appeal, Second Circuit decision the court recognised that "an anti-suit injunction, though directed at litigants, effectively restricts the jurisdiction of the court of a foreign sovereign."¹⁹⁰ This approach directly contradicts the approach adopted by English courts, evident from the judgment of Lord Hobhouse in *Turner*¹⁹¹ or the judgment of Lord Millett in *The Angelic Grace*¹⁹². On the other hand, the restrictive approach is closer to the European approach on the issue, in particular the *Re The Enforcement of an English Anti-Suit Injunction*¹⁹³ and the *Turner*¹⁹⁴ decisions, as in both judgments the issue of sovereignty was paramount as is under the restrictive approach.

It is, therefore, evident that American courts, regardless of the approach applied, would as a general rule be more careful in issuing an anti-suit injunction, and under the restrictive approach much more careful, than the English courts. The reader must understand that the aforesaid account on the approaches applied by the United States courts is only applicable in cases of an international, or as known in the United States foreign, anti-suit injunction. As the purpose of this Chapter is to examine the American system for the purposes of reforming the European, the brief discussion on international anti-suit injunctions was afforded for the

¹⁸⁸ [1994] 1 Lloyd's Rep. 505. For an analysis of the case *see supra* Chapter III: The Brussels I Regulation Framework.

¹⁸⁹ [2002] I.L.Pr. 28; [2004] E.C.R. I-3565; [2004] 2 Lloyd's Rep. 169. For an analysis of the case *see supra* Chapter IV: The Impact of *Turner v. Grovit* on Anti-Suit Injunctions.

¹⁹⁰ *See LAIF X SPRL v. Axtel, S.A. de C.V.* 390 F.3d 194 (2nd Cir. 2004), at p. 199.

¹⁹¹ *Ibid.* In other words that an anti-suit injunction strictly remains *in personam* and does not in any way impair the foreign court's jurisdiction.

¹⁹² [1995] 1 Lloyd's Rep. 87. Where, in his famous judgment, the comity requirement was both doubted and removed, *see supra* Chapter I: The English Common Law Framework.

¹⁹³ [1997] I.L.Pr. 320. For an analysis of the case *see supra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

¹⁹⁴ *Ibid.*

purposes of completing the picture on the American system. Internal anti-suit injunctions, in other words, anti-suit injunctions issued between different States or Counties of the United States are governed by the laws and principles of each jurisdiction subject to the Federal rules, such as the ones discussed earlier in this Chapter. Thus, the present writer proposes that one alternative for reform is to adopt, or bring closer the European framework to, the American internal anti-suit injunction system¹⁹⁵.

6.4 The United States of America: An example for the European Union? – The Nature of the United States Jurisdiction System

The above discussion on the law on anti-suit injunctions in the United States has revealed an advanced system under which anti-suit injunctions are used in an effective yet cautious manner. The question thus arising is whether this system can act as a model for the European Union. The issue of the ways in which such a model can be introduced in Europe as well as the principles of the American law on anti-suit injunctions which may be introduced in Europe, will be discussed in another part of this contribution¹⁹⁶.

In order to assess whether the United States system on anti-suit injunctions may be a desirable alternative for the Brussels I Regulation framework, the key issue is to examine whether the nature of the United States jurisdiction framework is fundamentally different from the Brussels I Regulation framework. Before tackling this issue head to head, a discussion of certain elements in the United States jurisdiction system must be offered first in order to highlight the difference between the two jurisdiction systems. The discussion in this section will then proceed to compare the nature of the United States and the Brussels I Regulation jurisdiction frameworks.

6.4.1 The Elements of American Law

This part, although not *per se* directly connected with anti-suit injunctions, will greatly assist the discussion on the ways in which the Brussels I Regulation may be reformed. The American legal system has certain elements which may be of extreme significance should the American

¹⁹⁵ For the ways in which such reform, termed by the present writer as the American Reform model, can be attained *see infra* Chapter VII: Reform.

¹⁹⁶ *See infra* Chapter VII: Reform.

model be applied in Europe. These elements, in particular, comprise of, first, the principle of transfer of cases and, second, the Federal Constitution's Full Faith and Credit Clause.

Under American Federal Law a Federal district court has the power to transfer a case which deals with a civil or commercial matter to any other Federal district court of the United States if it thinks proper to do so. The power to transfer a case is afforded by 28 U.S.C. §1404¹⁹⁷, in particular § 1404a, which can be perceived as a statutory enactment of the doctrine of *forum non conveniens*¹⁹⁸.

Prior to the adoption of 28 U.S.C. §1404, a federal court had no power to transfer an action to a more convenient forum, and under the common law doctrine of *forum non conveniens* as it existed, the only possible remedy was dismissal, which required a defendant to demonstrate he suffered overriding inconvenience if the litigation continued in the forum chosen by the claimant¹⁹⁹. Thus, although 28 U.S.C. §1404 finds its roots in the doctrine of *forum non conveniens*²⁰⁰, it was designed to embody and modify the doctrine of *forum non conveniens*²⁰¹, thus it

¹⁹⁷ 28 U.S.C. § 1404 - Change of venue: "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer. (c) A district court may order any civil action to be tried at any place within the division in which it is pending."

¹⁹⁸ For a commentary on 28 U.S.C. § 1404 and *forum non conveniens* see: Linda S. Mullenix, *Another choice of forum, another choice of law: Consensual adjudicatory procedure in federal court*, 57 Fordham L.Rev. 291 (1988); Lawrence W. Newman and Michael Burrows, *Changes to the Federal Rules of Civil Procedure*, 211 N.Y.L.J. 3 (Jan. 31, 1994); Robert E. Bartkus, *Court upholds forum-selection clauses*, 123 N.J.L.J. 102 (1989); Peter G. McAllen, *Deference to the plaintiff in forum non conveniens*, 13 S.Ill.U.L.J. 191 (Winter 1989); *International forum non conveniens: "Section 1404.5"-A proposal in the interest of sovereignty, comity, and individual justice*, 45 Am.U.L.Rev. 415 (1995); Martin Davies, *Time to change the federal forum non conveniens analysis*, 77 Tul.L.Rev. 309 (2002); Robert A. Ragazzo, *Transfer and choice of federal law: The appellate model*, 93 Mich.L.Rev. 703 (1995); David Crump, *Twilight zone of the Erie doctrine: Is there really a different choice of equitable remedies in the "court a block away"?*, 1991 Wis.L.Rev. 1233.

¹⁹⁹ *Brown v. Woodring*, M.D.Pa.1959, 174 F.Supp. 640. See also *Sohns v. Dahl*, W.D.Va.1975, 392 F.Supp. 1208.

²⁰⁰ *Blackwell v. Vance Trucking Co.*, E.D.S.C.1956, 139 F.Supp. 103. See also *Chicago R.I. & P.R. Co. v. Igoe*, C.A.7, 1954, 212 F.2d 378; *Schoen v. Mountain Producers Corp.*, C.A.Del.1948, 170 F.2d 707; *Le Clair v. Shell Oil Co.*, D.C.Ill.1960, 183 F.Supp. 255; *Rhodes v. Barnett (No. 1)*, D.C.N.Y.1953, 117 F.Supp. 312; *Petroleum Financial Corp. v. Stone*, D.C.N.Y.1953, 116 F.Supp. 426; *Silbert v. Nu-Car Carriers, Inc.*, D.C.N.Y.1953, 111 F.Supp. 357; *Maloney v. New York, N.H. & H.R. Co.*, D.C.N.Y.1949, 88 F.Supp. 568; *Levenson v. Little*, D.C.N.Y.1949, 81 F.Supp. 513; *Pascarella v. New York Cent. R. Co.*, D.C.N.Y.1948, 81 F.Supp. 95; *Atlantic Coast Line R Co. v. Pope*, 1952, 71 S.E.2d 243, 209 Ga. 187.

²⁰¹ *A. J. Industries, Inc. v. U. S. Dist. Court for Central Dist. of California*, C.A.9 (Cal.) 1974, 503 F.2d 384.

is not a codification of the doctrine²⁰² but a revision²⁰³. As such, 28 U.S.C. §1404 supersedes the common law doctrine of *forum non conveniens* insofar as transfer to another federal district court is possible²⁰⁴, yet as a measure is less drastic than dismissal under the former doctrine²⁰⁵. There are, however, limitations to 28 U.S.C. §1404, namely that it does not apply in cases where the more convenient forum is not a United States district court. In such a case, almost always involving foreign countries, the common law doctrine of *forum non conveniens* governs²⁰⁶. Although 28 U.S.C. §1404 has, in effect, codified and replaced the doctrine of *forum non conveniens* for federal courts whenever a more convenient forum is a United States district court, the doctrine is formally established in federal law, and the courts have the inherent power to refuse jurisdiction of cases which are not within this section and which should have been brought in a foreign jurisdiction rather than in the United States²⁰⁷.

The purpose behind 28 U.S.C. §1404 is to prevent waste of time, energy, and money and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense²⁰⁸. By enacting 28 U.S.C. §1404 the Congress intended to permit the courts to grant transfers upon lesser showing of inconvenience than was needed for dismissal under doctrine of *forum non conveniens* which previously governed transfers²⁰⁹. In particular, the purpose of 28 U.S.C. §1404a is to grant broadly the power of transfer for convenience of the parties and witnesses in the interest of justice, whether dismissal under doctrine of *forum non conveniens* would have been appropriate or not²¹⁰ and to afford relief to a defendant by placing him on equal footing

²⁰² *Anschell v. Sackheim*, D.C.N.J.1956, 145 F.Supp. 447. See also *St. Joe Paper Co. v. Mullins Mfg. Corp.*, D.C.Ohio 1970, 311 F.Supp. 165.

²⁰³ *Cain v. Bowater's Newfoundland Pulp & Paper Mills*, E.D.Pa.1954, 127 F.Supp. 949.

²⁰⁴ *Cowan v. Ford Motor Co.*, C.A.5 (Miss.) 1983, 713 F.2d 100.

²⁰⁵ *Aircraft Marine Products, Inc. v. Burndy Engineering Co.*, S.D.Cal.1951, 96 F.Supp. 588, 89 U.S.P.Q. 45.

²⁰⁶ *Capital Currency Exchange, N.V. v. National Westminster Bank PLC*, C.A.2 (N.Y.) 1998, 155 F.3d 603.

See also *Harrison v. Capivary, Inc.*, E.D.Mo.1971, 334 F.Supp. 1141; *Horovitz v. Renault, Inc.*, S.D.N.Y.1958, 162 F.Supp. 344; *Dow v. Jones*, D.Md.2002, 232 F.Supp.2d 491; *Accordia Northeast, Inc. v. Thesaurus Intern. Asset Fund, N.V.*, S.D.N.Y.2002, 205 F.Supp.2d 176.

²⁰⁷ *Vanity Fair Mills, Inc. v. T. Eaton Co.*, C.A.2 (N.Y.) 1956, 234 F.2d 633, 109 U.S.P.Q. 438.

²⁰⁸ *Van Dusen v. Barrack*, U.S.Pa.1964, 84 S.Ct. 805, 376 U.S. 612, 11 L.Ed.2d 945. See also: *Continental Grain Co. v. The FBL-585*, La.1960, 80 S.Ct. 1470, 364 U.S. 19, 4 L.Ed.2d 1540; *All States Freight v. Modarelli*, C.A.N.J.1952, 196 F.2d 1010; *Jacobs v. Lancaster*, W.D.Okla.1981, 526 F.Supp. 767; *Hoster v. Monongahela Steel Corp.*, W.D.Okla.1980, 492 F.Supp. 1249; *National Sur. Corp. v. Robert M. Barton Corp.*, D.C.Okl.1979, 484 F.Supp. 222; *ROC, Inc. v. Progress Drillers, Inc.*, D.C.Okl.1979, 481 F.Supp. 147; *Cunningham v. Cunningham*, D.C.Ill.1979, 477 F.Supp. 632; *Northwest Animal Hospital, Inc. v. Earnhardt*, D.C.Okl.1977, 452 F.Supp. 191; *Fluor Corp. v. Pullman, Inc.*, D.C.Okl.1977, 446 F.Supp. 777; *Pope v. Missouri Pac. R. Co.*, D.C.Okl.1978, 446 F.Supp. 447; *DeLay & Daniels, Inc. v. Allen M. Campbell Co., General Contractors, Inc.*, D.C.S.C.1976, 71 F.R.D. 368.

²⁰⁹ *Saleh v. Titan Corp.*, S.D.Cal.2005, 361 F.Supp.2d 1152.

²¹⁰ *Norwood v. Kirkpatrick*, U.S.Pa.1955, 75 S.Ct. 544, 349 U.S. 29, 99 L.Ed. 789. See also: *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, C.A.Va.1949, 177 F.2d 360; *Ragsdale v. Price*, D.C.Tenn.1960, 185 F.Supp.

with the claimant in the selection of forum²¹¹. Thus, 28 U.S.C. §1404a was designed to remedy the evils of forum shopping²¹². It must be noted that 28 U.S.C. §1404a depends on judicial discretion²¹³, thus transfer is not mandatory but only in a proper case²¹⁴. The phrase “any civil action” in 28 U.S.C. §1404a embraces within its scope all civil actions²¹⁵, including proceedings in admiralty as well as to ordinary civil actions²¹⁶. In addition, the phrase covers admiralty actions *in rem* as well as to those *in personam*²¹⁷.

The second element of American Law which requires examination for the purposes of the discussion of the issue of anti-suit injunctions in the United States of America is the American Constitution’s Full Faith and Credit Clause²¹⁸. The Full Faith and Credit Clause²¹⁹ provides for each state of the United States to give full faith and credit to all public acts, records and judicial proceedings of every sister state.

The creators of the American Constitution intended this clause to help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same

263; *Early & Daniel Co. v. Wedgefield, Inc.*, D.C.N.C.1958, 164 F.Supp. 414; *Clayton v. Swift & Co.*, D.C.N.C.1956, 137 F.Supp. 219; *Cain v. Bowater's Newfoundland Pulp & Paper Mills*, D.C.Pa.1954, 127 F.Supp. 949.

²¹¹ *Trader v. Pope & Talbot, Inc.*, E.D.Pa.1961, 190 F.Supp. 282. See also *Barnhart v. John B. Rogers Producing Co.*, D.C.Ohio 1949, 86 F.Supp. 595.

²¹² *Torres v. the S. S. Rosario*, S.D.N.Y.1954, 125 F.Supp. 496.

²¹³ *New York, C. & St. L. R. Co. v. Vardaman*, C.A.8 (Mo.) 1950, 181 F.2d 769.

²¹⁴ *Le Clair v. Shell Oil Co.*, S.D.Ill.1960, 183 F.Supp. 255, 126 U.S.P.Q. 115.

²¹⁵ *U. S. v. Swift & Co.*, D.C.D.C.1958, 158 F.Supp. 551.

²¹⁶ *Cessna Aircraft Co. v. Brown*, C.A.10 (Kan.) 1965, 348 F.2d 689. See also: *Hercules Co. v. S.S. Aramis*, D.C.La.1964, 226 F.Supp. 599; *Medich v. American Oil Co.*, D.C.Pa.1959, 177 F.Supp. 682; *Coleman v. Stockard S.S. Corp.*, D.C.Pa.1958, 172 F.Supp. 366; *Higgins v. California Tanker Co.*, D.C.Del.1958, 166 F.Supp. 42; *Kinsman Transit Co. v. Dunham Towing & Wrecking Co.*, D.C.Ohio 1954, 122 F.Supp. 911; *Petition of Backman*, D.C.Del.1954, 122 F.Supp. 896; *Paco Tankers, Inc. v. Atlantic Land & Imp. Co.*, D.C.Fla.1952, 108 F.Supp. 406; *Arrowhead Co. v. The Aimee Lykes*, D.C.N.Y.1950, 101 F.Supp. 895; *LeMee v. Streckfus Steamers, Inc.*, D.C.Mo.1951, 96 F.Supp. 270; *St. Paul Fire & Marine Ins. Co. v. American Mail Line*, D.C.N.Y.1950, 94 F.Supp. 28.

²¹⁷ *Torres v. the S. S. Rosario*, S.D.N.Y.1954, 125 F.Supp. 496; *National Tea Co. v. The Marseille*, D.C.N.Y.1956, 142 F.Supp. 415.

²¹⁸ For a commentary on the Full Faith and Credit Clause see: Gene R. Shreve, *Choice of law and the forgiving Constitution*, 71 Ind.L.J. 271 (1996); Roger H. Transgrud, *Federal common law of personal jurisdiction*, 57 Geo.Wash.L.Rev. 849 (1989); Honorable Mr. Justice W.M.C. Gumrow, *Full faith and credit in three federations*, 46 S.C.L.Rev. 979 (1995); Ralph U. Whitten, *Full faith and credit for dummies*, 38 Creighton L. Rev. 465 (2005); Ruth B. Ginsburg, *Judgments in search of full faith and credit: the last in time rule for conflicting judgments*, 82 Harv.L.Rev. 98 (1969); Frederic L. Kirgis, Jr., *The roles of due process and full faith and credit in choice of law*, 62 Cornell L.Rev. 94 (1976); James R. Pielemeier, *Why we should worry about full faith and credit to laws?*, 60 S.Cal.L.Rev. 1299 (1987).

²¹⁹ “Article IV, Section 1: Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”

faith and credit in sister states as they have in the original forum²²⁰. The function of the full faith and credit clause is to resolve controversies where the states' policies differ²²¹. Hence, the purpose of the clause was to establish throughout the federal system the principle that once judgment is afforded in a litigation, that judgment shall be as conclusive of the rights of the parties in every other court as in the original forum, so that a cause of action merged in a judgment in one state is likewise merged in every other state²²². One of the most important functions of the clause was to avoid re-litigation in other states of adjudicated issues, while leaving to the law of the forum state the application of predetermined facts to a new problem²²³. In addition, the purpose of the clause was to preserve the rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states²²⁴.

However, the importance of the Full Faith and Credit Clause is far greater than meets the eye, as under the clause the local doctrines of *res judicata* and collateral estoppel²²⁵ become a part of national jurisprudence and are therefore federal questions within the jurisdiction of the Supreme Court²²⁶. Thus, what has been adjudicated in one state is *res judicata* to the same extent in every other state²²⁷. In other words, the court of one state has to give the judgment of another state at least the *res judicata* effect which judgment would be given in that other state²²⁸. Thus, the concept of full faith and credit carries a state judgment across state lines and

²²⁰ *Johnson v. Muelberger*, U.S.N.Y.1951, 71 S.Ct. 474, 340 U.S. 581, 95 L.Ed. 552. See also: *Hughes v. Fetter*, Wis.1951, 71 S.Ct. 980, 341 U.S. 609, 95 L.Ed. 1212; *Sherrer v. Sherrer*, Mass.1948, 68 S.Ct. 1087, 1097, 334 U.S. 343, 92 L.Ed. 1429; *Order of United Commercial Travelers of America v. Wolfe*, S.D.1947, 67 S.Ct. 1355, 331 U.S. 586, 91 L.Ed. 1687; *Williams v. State of North Carolina*, N.C.1942, 63 S.Ct. 207, 317 U.S. 287, 87 L.Ed. 279; *Porter v. Wilson*, C.A.Ariz.1969, 419 F.2d 254; *Pearson v. Northeast Airlines, Inc.*, C.A.N.Y.1962, 307 F.2d 131.

²²¹ *Morris v. Jones*, U.S.Ill.1947, 67 S.Ct. 451, 329 U.S. 545, 91 L.Ed. 488.

²²² *Magnolia Petroleum Co. v. Hunt*, U.S.La.1943, 64 S.Ct. 208, 320 U.S. 430, 88 L.Ed. 149.

²²³ *Sutton v. Leib*, U.S.Ill.1952, 72 S.Ct. 398, 342 U.S. 402, 96 L.Ed. 448. See also: *White v. Thomas*, C.A.5 (Tex.) 1981, 660 F.2d 680; *Wise v. Berman*, D.C.Fla.1967, 282 F.Supp. 282; *Oldham v. McRoberts*, 1964, 249 N.Y.S.2d 780, 21 A.D.2d 23; 206 N.E.2d 358, 15 N.Y.2d 891, 258 N.Y.S.2d 424.

²²⁴ *Pacific Employers Ins. Co. v. Industrial Accident Commission of State of California*, U.S.Cal.1939, 59 S.Ct. 629, 306 U.S. 493, 83 L.Ed. 940. See also: *Pink v. A.A.A. Highway Express*, 1941, 62 S.Ct. 241, 314 U.S. 201, 86 L.Ed. 152; *The Florida Bar v. Wilkes*, Fla.1965, 179 So.2d 193.

²²⁵ For a definition of *res judicata* and collateral estoppel see *supra* note 128.

²²⁶ *Durfee v. Duke*, U.S.Mo.1963, 84 S.Ct. 242, 375 U.S. 106, 11 L.Ed.2d 186; *Riley v. New York Trust Co.*, Del.1942, 62 S.Ct. 608, 315 U.S. 343, 86 L.Ed. 885.

²²⁷ *Magnolia Petroleum Co. v. Hunt*, U.S.La.1943, 64 S.Ct. 208, 320 U.S. 430, 88 L.Ed. 149; 64 S.Ct. 483, 321 U.S. 801, 88 L.Ed. 1088; *Lynne Carol Fashions, Inc. v. Cranston Print Works Co.*, C.A.Pa.1972, 453 F.2d 1177.

²²⁸ *In re Attorney Discipline Matter*, C.A.8 (Mo.) 1996, 98 F.3d 1082; *Semler v. Psychiatric Institute of Washington, D. C., Inc.*, C.A.D.C.1978, 575 F.2d 922, 188 U.S.App.D.C. 41; *City of Philadelphia v. Stadler*, 1978, 395 A.2d 1300, 164 N.J.Super. 281; 413 A.2d 996, 173 N.J.Super. 235; 101 S.Ct. 1702, 450 U.S. 997,

into a federal court. If a party wins a final, valid judgment on the merits in a state court, and the losing party initiates proceedings in a federal court on the same claim against the same party or parties the doctrine of *res judicata* is implemented by the Full Faith and Credit Clause²²⁹. Hence, where one or both proceedings against the same defendants or different defendants who have close significant relationship between successive defendants are brought under the federal jurisdiction, the collateral estoppel and *res judicata* doctrines of the forum states become applicable due to the operation of the Full Faith and Credit Clause²³⁰.

6.4.2 The nature of the United States jurisdiction system

The answer to the question whether the United States jurisdiction system can act as a model for the Brussels I Regulation framework is entailed in the issue of whether the United States jurisdiction system is fundamentally different from the Brussels I Regulation framework. This issue will provide the answer as to whether, and to what extent, can United States law be transposed into the European Union²³¹.

From the outset the United States presents similarities with the European Union. Both jurisdiction frameworks have as their aim a common system for the allocation of jurisdiction in civil and commercial matters. However, one may argue that the United States of America has a far greater lever of union than the European Union, in that the former is an independent sovereign nation whereas the latter is not a fully integrated union of states. From this observation, one expects therefore the jurisdiction frameworks of the two to reflect that difference in the level of unity. It is submitted, however, that should one cast a close look at the European Union one would find that in reality the European Union is far more integrated than the United States on issues of jurisdiction.

The Brussels I Regulation framework provides for a fully harmonised set of rules of jurisdiction, coupled with the *lis alibi pendens* rule, mutual recognition and enforcement of judgments and the mutual trust and respect principle with the sole aim of closer integration and co-operation between Member State courts. The Member State courts must ensure that

⁶⁸ L.Ed.2d 198; *Osborne v. Osborne*, 1974, 207 S.E.2d 875, 215 Va. 205; *Abernathy v. Chambers*, Tenn.1972, 482 S.W.2d 129; *Tolley v. Wilson*, 1947, 205 S.W.2d 177, 212 Ark. 163.

²²⁹ *Cyclops Corp. v. Fischbach & Moore, Inc.*, W.D.Pa.1976, 71 F.R.D. 616.

²³⁰ *Gambocz v. Yelencsics*, C.A.3 (N.J.) 1972, 468 F.2d 837.

²³¹ This issue will be analysed *infra* in Chapter VII: Reform.

the operation of the Brussels I Regulation is not affected by their national rules on jurisdiction and that primacy of European Union legislation, including Regulations, over national law is fully observed. Thus, resort to measures such as anti-suit injunctions is not permissible due to the fact that such measures distort the Brussels I Regulation system²³².

The United States of America, by comparison, do not have the same system in place in order to ensure the proper administration of jurisdiction. Rather, in the United States Federal law takes precedence over States' law and the issuance of an anti-suit injunction is only permitted in certain circumstances. How then, one wonders, does the United States jurisdiction system ensure the proper administration of jurisdiction, coupled with the use of anti-suit injunctions, without distorting the Federal system and attaining a low level of conflicts?

It is submitted that the answer is to be found in the American Constitution, and more specifically in the Full Faith and Credit Clause. One may accurately remark that the Clause does share some similarities with the Brussels I Regulation principle of mutual trust and respect. Both the Clause and the principle of mutual trust and respect deal with the relationship between states under a common framework. Thus, the common element of the two is that they adopt a public law approach.

In the United States the Full Faith and Credit Clause requires each State to give full faith and credit to all public acts, records and judicial proceedings of every sister state. Thus, judgments issued in one State have the same faith and credit in every sister State as they have in the original forum. The implication of that is, not only must all States demonstrate mutual trust and respect but also they must protect and enforce each others' law. That is why the concept of Full Faith and Credit carries a state judgment across state lines and into a federal court. It is true that the Brussels I Regulation does have an embedded mechanism of mutual recognition and enforcement of judgments, however, the crucial difference with the Full Faith and Credit Clause is that under the Brussels I Regulation a judgement may be denied recognition and enforcement on the ground of public policy. In addition, since under the Clause a judgment is carried across State lines, court decisions from sister States may be used by a court in order to rule on a case, something alien under the Brussels I Regulation. Therefore, the importance of the Clause is not only in relation to the significance to be given to judgments within the

²³² See *supra* Chapter IV: The Impact of *Turner v. Grovit* on Anti-Suit Injunctions.

federation but also in relation to conflicting laws of the several competent states, as its role is to maintain the equilibrium and ensure uniformity of the law in the United States.

As already examined, the European Court of Justice in *Turner*²³³ unequivocally declared the fundamental nature of the principle of mutual trust and respect by ruling that an anti-suit injunction violates that principle on the ground that the court first seised under Article 27 of the Brussels I Regulation is not allowed to assess whether it has jurisdiction when an anti-suit injunction is issued by the court second seised. By comparison, in the United States an anti-suit injunction does not infringe the Full Faith and Credit Clause and the order is therefore allowed. The crucial difference between the Clause and the Brussels I Regulation is the way in which an anti-suit injunction is treated. Under the Clause, the anti-suit injunction is treated as merely an order *in personam* which has nothing to do with the relationship between each State of the Union. Consequently the order remains in the private law terrain. Under the Brussels I Regulation, an anti-suit injunction is perceived as an order to the foreign court which therefore transfers the order to the public law terrain.

One may therefore assume that the nature of the Clause is akin to the position adopted under the English common law framework. It is submitted, however, that such an assumption is incorrect. The English law element closest to the American Full Faith and Credit Clause, particularly regarding anti-suit injunctions, is the principle of comity. Under the United States system on jurisdiction the difference between the two principles is clear. Full Faith and Credit is an explicit constitutionally-based provision involving relationships only among the states, whereas comity is based not on a constitutional provision, but on concepts such as harmony, accommodation, policy, and compatibility, in either an interstate context or one involving other nations²³⁴. It is therefore incorrect in principle to suggest that the Clause is the same or closely associated with the English common law principle of comity.

It is therefore submitted that, the nature of the United States system on jurisdiction is unique. Although one may correctly identify elements from the Brussels I Regulation or the English common law, this does not *per se* render the United States system as the same with either the Brussels I Regulation or the English common law frameworks. It is further submitted that the unique nature of the United States system on jurisdiction is owed to the quasi-common law

²³³ *Ibid.*

²³⁴ *Morrison v. Budget Rent A Car Systems, Inc.*, 230 A.D.2d 253, 657 N.Y.S.2d 721 (2d Dep't 1997).

quasi-civil law philosophy behind the United States law on jurisdiction which distinguishes it from the English common law and the Brussels I frameworks. In other words, the examination of the nature of the United States of America jurisdiction system reveals that a civil law-common law combination is adopted; the public law philosophy of civil law systems expressed by the principle of mutual trust and respect, inherent in the Full Faith and Credit Clause, peacefully coexists with the common law philosophy of enforcing private law rights expressed by the issuance of anti-suit injunctions as well as the importance given to exclusive jurisdiction and arbitration clauses.

Therefore, it is submitted that since the Full Faith and Credit Clause has inherent the principle of mutual trust and respect and since anti-suit injunctions manage to operate smoothly in parallel with the more stringent nature, compared to mutual trust and respect, of the Clause, the use of anti-suit injunctions and the principle of mutual trust and respect can operate smoothly within the Brussels I Regulation framework. Put another way, since the mutual trust and respect principle is an integral part of the Full Faith and Credit Clause and anti-suit injunctions are issued without violating the Clause, the nature of the United States system on jurisdiction indicates that mutual trust and respect and anti-suit injunctions can live together under the Brussels I Regulation.

6.5 Conclusion

The position adopted in the United States in relation to the issuance of anti-suit injunctions reveals that the principle is treated as an effective mechanism in resolving jurisdictional conflicts. The availability of anti-suit injunctions on a State level, particularly in the State of Louisiana, shows that anti-suit injunctions are neither incompatible with civil law systems nor with the *lis alibi pendens* rule. The use of anti-suit injunctions on Federal level also reveals the important status that anti-suit injunctions enjoy in the United States jurisdiction system. The way in which anti-suit injunctions are deployed on a Federal level, however, also illustrate the importance of imposing adequate safeguards in order to avoid a disturbance of the jurisdiction framework and to properly use anti-suit injunctions.

The examination of two significant elements of the United States system on jurisdiction, namely the Full Faith and Credit Clause and the Transfer of Cases principle, are of extreme use both to highlight the effectiveness and to illustrate the nature of the United States system

on jurisdiction. In particular, the examination of the nature of the United States system on jurisdiction provides significant evidence for supporting the argument that anti-suit injunctions can be accommodated in the Brussels I Regulation framework without the principle violating the mutual trust and respect principle. As such, the United States model becomes an important candidate for properly reforming the Brussels I Regulation.

The discussion will now turn in the next Chapter on the issue of the ways which the Brussels I Regulation may be reformed in order to accommodate anti-suit injunctions. Thus, as part of this examination the extent which United States law on jurisdiction can be transposed to the Brussels I Regulation will be assessed.

CHAPTER VII: REFORM

7.1 Introduction

Three main broad conclusions can be drawn from the discussion of the principle of anti-suit injunctions so far in this thesis. First, the Brussels I Regulation Framework is inadequate to deal with tactical forum shoppers¹ conducting an abuse of rights. The removal of anti-suit injunctions from the arsenal of the English courts post-*Gasser* and *Turner* allows litigants to abuse the civil procedure system, an example being “Italian Torpedoes”. Second, although a different philosophy underlies common law and civil law systems, the availability and use of anti-suit injunctions by the civil law systems examined in this thesis connotes the compatibility of the principle of anti-suit injunctions with those systems. Third, the examination of the law on anti-suit injunctions in the internal United States system suggests that the United States internal system may be a successful candidate for reforming the Brussels I Regulation in order to accommodate anti-suit injunctions.

Taking into account the aforesaid, this Chapter will seek to provide an answer to the question posed by this thesis namely, how anti-suit injunctions can be accommodated in the Brussels I Regulation framework. It is worth noting that by Article 73 of the Regulation, no later than five years after its entry into force the Commission must present to the European Parliament, Council and the Economic and Social Committee a report on the application of the Regulation and make any necessary proposals for reform. The process of producing the report has already commenced and is currently at the stage of receiving and assessing questionnaires as the University of Heidelberg has been asked to head Study JLS/C4/2005/03 by the EU Commission, concerning the application of the Regulation². Furthermore, the British Institute of International and Comparative Law (BIICL) has already produced a report for the study³.

¹ The term tactical forum shopper is used by the present writer for parties who commence proceedings in a Member State court, most commonly in one where the court system is slow, with the sole purpose of deliberately frustrating and delaying proceedings brought before another Member State court. This clarification is needed as the reader must comprehend that forum shopping *per se* is not improper. A good example is the passage from *Owners of the Atlantic Star v Owners of the Bona Spes (The Atlantic Star)* [1972] 2 Lloyd's Rep. 446, where Lord Denning M.R. *inter alia* said: “You may call this ‘forum shopping’ if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.”, at p. 630.

² Cf. <http://www.ipr.uni-heidelberg.de/studie2/index.htm> .

³ Members of the BIICL can access the report via: http://www.biicl.org/report_england_&_wales/.

The purpose of this Chapter is to conduct a detailed examination regarding the reform of this area of law. In order to achieve this aim this Chapter will provide two main reform alternatives. First, the discussion will attempt to provide solutions for reforming this area of law by examining the issue through the prism of the United States of America, where anti-suit injunctions are used by many jurisdictions and operate smoothly under the United States Federal Legal System. Second, the final part of this Chapter will provide reform proposals for reforming the Brussels I Regulation articles.

7.2 Option A: The American Model

It is submitted that the first alternative for reforming the Brussels I Regulation framework is to use the United States of America internal anti-suit injunction system as a model. As already established in another part of this thesis⁴, although there is a difference in the nature of the United States system compared to Brussels I, in that one may accurately argue that in a sense the European system provides a greater level of unification in terms of the jurisdiction rules, the use of anti-suit injunctions coupled with the Full Faith and Credit Clause, which entails the Brussels I principle of mutual trust and respect, provide adequate evidence that mutual trust and respect and anti-suit injunctions may peacefully coexist in the Brussels I Regulation framework. The question which arises in turn is to what extent elements of the United States system can be transplanted into the Brussels I Regulation framework.

It is submitted that there are two main sub-models emerging from the examination of the United States system which may be useful for reforming the Brussels I Regulation framework, namely, first, the Federal Model and, second, the Louisiana model. The Louisiana model is carefully chosen, since as already established⁵, Louisiana is a civil law jurisdiction which manages to effectively use anti-suit injunctions in combination with a *lis alibi pendens* rule and may therefore be considered as being much closer to the Brussels I Regulation system.

The first proposed sub-model under the American model for reform in the European Union Regulation framework is the Federal model. As already examined⁶, the Federal system on anti-suit injunctions in the United States has operated smoothly and separately from the states'

⁴ See *supra* Chapter VI: Anti-Suit Injunctions in the United States of America.

⁵ Op.Cit.

⁶ Ibid.

laws on anti-suit injunctions as well as cautiously in relation to sovereignty issues⁷. It is therefore submitted that taking the Federal model option will ensure the use of anti-suit injunctions as well as the respect of sovereignty of all Member States.

One may accurately observe that there are three important pillars ensuring the stability of the American Federal system on anti-suit injunctions. These are, first, the Anti-Injunction Act, second, the transfer of cases principle and third the Full Faith and Credit Clause. These three pillars, although the two later are not directly connected to anti-suit injunctions *per se*, overlap and interact with each other in order to provide a solution to jurisdictional conflicts.

It is submitted that should those principles be imported into the Brussels I Regulation framework, the Regulation framework which currently is inadequate, would be significantly strengthened. At first, importing a provision similar to the Anti-Injunction Act would mean that anti-suit injunctions would be an available weapon in the European arsenal, however, permissible only under certain circumstances. The European Court of Justice in *Turner v. Grovit*⁸ expressed its opposition to the use of anti-suit injunctions in the European Union as they would render ineffective the *lis alibi pendens* mechanism. The present writer is in agreement with this view *only* in relation to the anarchic use of anti-suit injunctions in Europe. Put another way, the policy behind the European Court of Justice's decision was to discourage Member States, who under their unique legal systems have extraordinary weapons such as anti-suit injunctions, to use them in such a way as to impair the Brussels I Regulation framework. This line of thinking is, it is submitted, correct. However, the European Court of Justice's judgment did not bar the introduction of a set anti-suit injunction system in the European Union, as a pan-European weapon available under European legislation.

The introduction of European legislation similar to the United States Federal Anti-Injunction Act, or a similar provision as a new article in an amended Brussels I Regulation, would, it is submitted, assist rather than impair the *lis alibi pendens* provisions of the Regulation. The reason for this can be found in the case law, an example being the *JP Morgan*⁹ case, and more

⁷ The sovereignty issue is particularly important for Continental systems, *see supra* Chapter II: Anti-Suit Injunctions: The Continental Approach.

⁸ Case C-159/02, [2004] E.C.R. I-3565; [2004] 2 Lloyd's Rep. 169. For a discussion of the case *see supra* Chapter IV: The Impact of *Turner v. Grovit* on Anti-Suit Injunctions.

⁹ [2005] EWHC 508; [2005] 2 Lloyd's Rep. 665; [2006] I.L.Pr. 11.

particularly the “Italian Torpedo” phenomenon¹⁰. The intentions of litigants who commenced proceedings in a country where proceedings are slow are not always good. Forum shopping is a plague¹¹ which needs to be controlled by taking proper measures, and the *lis alibi pendens* provisions simply do not deal with forum shopping as they only deal with the allocation of jurisdiction. The Brussels I Regulation thus lacks an anti-forum shopping mechanism, which can be found in anti-suit injunctions.

By introducing European legislation similar to the Anti-Injunction Act would afford an immense weapon to courts across the Continent against forum shopping. For example, such a provision would allow a Belgian court chosen by the parties by virtue of an exclusive jurisdiction clause to enjoin a party who commences proceedings in Romania merely because the court proceedings there take a long time or because that party relies on the not so transparent nature of the Romanian judiciary¹², thus affording the Belgian courts the weapon to protect the suffering party from further waste of money, time and valuable resources¹³. A pre-requisite, however, for such a provision would be to provide a uniform definition on the meaning of a vexatious litigant, which would in turn allow the provision to be centred on a common mechanism in combating forum shopping.

Although not a necessity, it is submitted that the American transfer of cases principle is an additional important provision which should be imported into the Brussels I Regulation framework. As explained in another part of this contribution¹⁴, the European Court of Justice

¹⁰ For a discussion on the *JP Morgan v. Primacom* decision *see supra* Chapter III: The Brussels I Regulation Framework and for a discussion of “Italian Torpedoes” *see supra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions. *See also infra* 7.3 for the use of the Community doctrine of abuse of rights.

¹¹ That is tactical vexatious-forum shopping, as forum shopping *per se* is not improper *cf. note 1*.

¹² For a discussion of the issue of transparency of the judiciary, particularly in relation to the new E.U. Member States, *see supra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

¹³ A European Anti-Injunction Act, or a similar provision, could be drafted in the following terms:

“A court of a Member State may not grant an injunction to stay proceedings in another Member State court except in the following circumstances:

1. as expressly authorised by the provisions of this Regulation, or
2. to protect or effectuate its judgments, or
3. where necessary in aid of its jurisdiction against vexatious litigants. For the purposes of this Article “Vexatious litigant” means a person who does any of the following: (a) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in *propria persona* at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing, or, (b) In any litigation, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.”

¹⁴ For a brief discussion on the *Owusu v. Jackson* decision and its impact *see supra* Chapter I: The English Common Law Framework.

in its *Owusu*¹⁵ ruling barred the doctrine of *forum non conveniens* from the Brussels I Regulation framework. The American transfer of cases principle, however, is distinct from the doctrine of *forum non conveniens* as it allows the court to transfer the case to a more competent court rather than merely decline jurisdiction.

If the mutual respect principle, underlined by the European Court of Justice as the fundamental cornerstone of the Brussels I Regulation¹⁶, exists in reality and not only in theory there is no reason why an intra-European Union transfer of cases would not be possible. Such a provision, of course would be limited to matters falling within the Brussels I Regulation framework. Nonetheless, an Italian court would be able to transfer a case to the more appropriate forum, say Greece, affording parties a swifter system as there would not be a need for the parties to re-file in the more appropriate forum. Thus, such a provision would have a great impact as it would negate the effect of time bars. Such a provision would also serve the paramount purpose of combating forum shopping, as it would make it an obligation of the court before which proceedings are commenced, to transfer the case to the more appropriate forum. Thus, a tactical forum shopper would find it extremely difficult to keep the case before the forum which he desires, and even if he does succeed in that, the anti-suit injunction provision would make his life even harder as he would have to establish that he is not a vexatious litigant.

The final consideration under the Federal model is to examine whether the Full Faith and Credit Clause of the American Constitution could be a further reinforcement of the Brussels I Regulation framework¹⁷. This consideration is of fundamental importance since, in essence, it presents the following, far greater, issue. The mutual trust and respect principle is already part of the Brussels I Regulation; the question now is whether the Brussels I Regulation needs the more increased reach of the Full Faith and Credit Clause. As already examined, the Full Faith and Credit Clause has inherent the principle of mutual trust and respect, yet it has more than that, namely a *res judicata* and collateral estoppel effect. In turn, this means that the Clause ensures equilibrium between all the American States as well as uniformity of the law in the United States. This makes perfect sense if seen from the prism of the United States, as the aim

¹⁵ Case C-281/02, [2005] E.C.R. I-1383; [2005] 1 Lloyd's Rep. 452.

¹⁶ For a discussion on the underlying philosophy of the Brussels I Regulation *see supra* Chapter III: The Brussels I Regulation Framework.

¹⁷ For an analysis of the Full Faith and Credit Clause *see supra* Chapter VI: Anti-Suit Injunctions in the United States of America.

is to have uniformity within the country. However, if seen through the prism of the Brussels I Regulation, a provision similar to the Full Faith and Credit Clause would have the effect of abolishing the need for an *exequatur*, consequently there will be no need for a Member State to check whether it must recognise and enforce a judgment by another Member State anymore. The greater issue is, therefore, given the doubts expressed over the reality of the mutual trust and respect principle¹⁸, whether this is desirable. Of course, one may dismiss the argument simply by claiming that the new European Union Member States' civil procedure systems are not trustworthy and thus the *res judicata* and collateral estoppel effect of the Clause should be limited or removed if transposed to the Brussels I Regulation framework. Thus, it could be suggested that such effect should only be allowed when the European Union has reached a level of much higher integration than at present.

It is submitted, however, that a provision which has the *res judicata* and collateral estoppel effect of the Full Faith and Credit Clause would be a useful mechanism in empowering the Brussels I Regulation. In particular, one may observe that the nature of the Full Faith and Credit Clause is in line with the underlying philosophy of the Brussels I Regulation. The Brussels I Regulation must be seen as only a small brick in the wall of European integration. Since the current climate in Europe is in favour of higher integration and enlargement¹⁹, a provision having the *res judicata* and collateral estoppel effect of the Full Faith and Credit Clause would greatly assist in achieving this goal. A provision with the *res judicata* and collateral estoppel effect of the Full Faith and Credit Clause would mean that a judgment would be carried across the borders, as well as the creation of a common European jurisprudence. In addition, similarly as in the case of *lis alibi pendens* in the Brussels I Regulation, *res judicata* and collateral estoppel is also significant in combating tactical forum shopping as a party would be barred from re-litigating the same issue and against the same party before a court of another Member State, thus preventing wasted judicial resources. The adoption of such a provision would, however, provide the obligation to all other Member State courts to give *res judicata* effect to a Member State's court as they would in their own. The adoption of a provision similar to the American Full Faith and Credit clause would, therefore, greatly assist the Brussels I Regulation framework. The desirability of such a provision, however, greatly

¹⁸ See *supra* Chapter IV: The Impact of *Turner v. Grovit* on Anti-Suit Injunctions for an analysis of the doubts expressed over the mutual trust and respect principle particularly in relation to the new European Member States for which concerns have been expressed over the transparency of their civil procedure system.

¹⁹ See for example the European Union website at: http://europa.eu/pol/enlarg/index_en.htm.

depends on the level of integration that the European Member States wish to achieve, an issue which is beyond the scope of this thesis.

The Louisiana model is the second sub-model for reform under the American model. This option is afforded as a more moderate solution, especially for those who base their argument against anti-suit injunctions on the vast differences between civil and common law systems²⁰. The Louisiana sub-model has been selected as Louisiana is a civil law jurisdiction, which employs anti-suit injunctions successfully and smoothly.

Taking Louisiana as a model in reforming the Brussels I Regulation would mean that the Brussels I Regulation would combine the principles of *forum non conveniens*, *lis alibi pendens*, transfer of cases and anti-suit injunctions in one mechanism. It is submitted that Louisiana is the answer to those who argue against the inclusion of anti-suit injunctions in a civil law system. Should Louisiana be taken as a model for reforming the Brussels I Regulation, a provision similar to Article 3601 of the Louisiana Code of Civil Procedure²¹ would be necessary. Thus, an anti-suit injunction would be permissible only if there is a danger for irreparable harm or injury to be caused to the claimant if the anti-suit injunction is not issued. This in turn would mean that if a similar provision is inserted in the Brussels I Regulation, that provision would be used as a last resort, as happens in Louisiana. The use of the Louisiana model is more of a compromise solution, especially after taking into account that the majority of Member States of the Brussels I Regulation are civil law systems.

It is indisputable that the Brussels I Regulation framework is inadequate in combating tactical forum shopping. The American Federal sub-model can provide solutions to many problems that the Brussels I Regulation has created, especially the introduction of a similar provision to the Anti-Injunction Act. It is, however, the conviction of the present writer that the American Federal model represents a very good alternative which properly balances the sovereignty issues, the use of *lis alibi pendens* with the use of anti-suit injunctions and an advanced form of *forum non conveniens*, a balance which proves wrong those who argue against coexistence of

²⁰ See for example the opinion of Advocate General Ruiz-Jarabo Colomer in *Turner* discussed *supra* in Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions. Although, as already established in Chapter II: Anti-Suit Injunctions: The Continental Approach, despite the differences between civil law and common law systems, anti-suit injunctions are not incompatible with civil law systems.

²¹ For a discussion on the Louisiana system, including Article 3601 of the Louisiana Code of Civil Procedure see *supra* Chapter VI: Anti-Suit Injunctions in the United States of America.

those principles under a common jurisdictional framework. Equally, the Louisiana sub-model is also a valuable candidate in reforming the Brussels I Regulation, especially after taking into account the peaceful co-existence of anti-suit injunctions with *lis alibi pendens*.

The adoption of any of the two suggested sub-models under the American model does depend upon the resolve of Member States to proceed to a highly integrated European Union. However, the scope of this thesis does not cover a discussion of the issue whether, or not, the European Union should become more integrated. Thus, the discussion will now turn to briefly assess whether the American model is feasible.

From the outset, one may observe that the European Union has some significant differences with the United States of America. Although a similar concept is applied in both Unions, in other words the fact that many separate jurisdictions are united in a certain form and extent, the United States of America is a union in the sense of one country whereas the European Union has not yet attained this high level of unity. The consequence of this is that issues of common jurisprudence, the uniformity of the judiciary and the legislative process are far more *attainable* in the United States simply on the ground of level unity. That assertion does take away the more unified nature of jurisdiction rules that European system has attained²². It is submitted that the American reform model is feasible in the present form of the European Union, without the need for transforming the European Union into a European Federal Union, subject to the resolve of all Member States to proceed in that direction²³. It is further submitted that the benefits of introducing the American reform model are great.

The reader should remember from another part of this contribution that anti-suit injunctions are available in some European jurisdictions whilst not available in others²⁴. Why then should the Continental systems embrace anti-suit injunctions as part of their system, indirectly imposed on them by Brussels? As examined in another part of this contribution²⁵, there are many differences between the European legal systems. However, it is submitted, that those

²² For a comparison between the nature of the United States system on jurisdiction and the nature of the Brussels I Regulation *see supra* Chapter VI: Anti-Suit Injunctions in the United States of America.

²³ Although the current tenure in political theory, particularly in relation to theories of European integration, is that a United States of Europe is feasible, *Cf.* for example Dobson and Weale, *Chapter 8: Governance and Legitimacy*, in Bomberg and Stubb, eds., (2006), *The European Union: How does it work?*, O.U.P. :Oxford.

²⁴ For a discussion on the availability of anti-suit injunctions in other European legal systems *see supra* Chapter II: Anti-Suit Injunctions: The Continental Approach.

²⁵ For a discussion on the differences between European legal systems *see supra* Chapter III: The Brussels I Regulation Framework.

differences are not a valid reason to decline the American reform model. It is further submitted that the benefits for European Member States from the implementation of the American reform model will be great as the Brussels I Regulation system does not currently protect their court systems from abuse and forum shopping. As such, introducing the more moderate model on anti-suit injunctions of the United States, rather than the anarchic English model, succeeds in hitting two birds with one stone; the *lis alibi pendens* provisions are given a superior status and a mechanism against forum shopping is in place.

In relation to the transfer of cases principle, again the European Member States would be greatly benefited as the underlying philosophy of the Brussels I Regulation²⁶, namely to provide a system for the sound operation of the internal market and to unify the rules of conflict of jurisdiction in civil and commercial matters, would be achieved in practice and not just in theory. The Brussels I Regulation itself is an indication of the resolve of Member States to unify their conflict rules and therefore the principle of transfer of cases would greatly assist that resolve to be attained. Of course, a central administrative pan-European body would be necessary in order to ensure the swiftness of the transfer of cases.

Regarding the introduction of *res judicata* and collateral estoppel in the Brussels I Regulation system, as mentioned above, in theory such reform would be very welcome, yet it greatly depends on the resolve of Member States to proceed to the direction of full integration, an issue beyond the scope of this thesis.

Whether the Federal or Louisiana models are adopted or not or whether pieces of those models are adopted or not, one thing remains certain, namely that the Brussels I Regulation is in need of considerable reform especially in providing a counter-tactical forum shopping mechanism. A successfully proven mechanism against forum shopping, in turn, is the principle of anti-suit injunctions²⁷. And the region where anti-suit injunctions have been successfully used in balance with civil law principles is the United States of America. It is strongly suggested that, although by importing the American system on anti-suit injunctions, Europe may sacrifice a lot in return, that sacrifice will bear fruits. In addition, taking into

²⁶ For a discussion on the underlying philosophy of the Brussels I Regulation *see supra* Chapter III: The Brussels I Regulation Framework.

²⁷ This proved to be the case on Continental Europe as established *supra* by Chapter II: Anti-Suit Injunctions: The Continental Approach.

account the European vision of further integration, as well as the necessity of a more effective internal market, the American reform model is the prominent candidate in order to afford a secure and stable framework.

How then can the American reform model be attained? Or, put differently, which are the ways in which such reform may be introduced? It is submitted that the American reform model can be introduced in the Brussels I Regulation framework by applying three main methods, namely, first, the Restatement method, second, the United States Code method and, finally, the Regulation revision method.

The American Restatement of the Law is in essence a systematic explanation of the American Common law, undertaken by the American Law Institute. The aim of the American Restatements is to organise and explain areas of law by proving solutions which should be accepted by the American courts. Thus, there are Restatements for Contracts, Agency, Conflict of Laws, Torts, and Judgements and so on. There are two types of American Restatements, namely the Restatement in the Courts which provide judicial decisions in which an article of the Restatement has been cited and the State Annotations which provide to what extent the Restatement rules are followed in each state. In addition, there are Supplements to each Restatement which provide clarifications and corrections to the original Restatements. Although not a Code *per se*, a Restatement succeeds in providing a systematic exposition of American law in the form of a Code. Nonetheless, as the Restatements are not Codes in the Continental sense, they are only used to assist courts in solving legal problems. However, what the Restatements achieve is to direct American law towards a common direction resulting in less deviation in state courts' decisions.

The importance of the American Restatements lies in the fact that, although Restatements are not binding authority in and of themselves, they are highly persuasive because they are formulated over several years with extensive input from law professors, practicing lawyers, and judges. When properly done, they reflect the consensus of the American legal community as to what the law is and what it should become.

It is submitted therefore that introducing a European Restatement on Jurisdiction and Judgements, incorporating the American principles on anti-suit injunctions, could be the first

option in introducing the American reform model in Europe. One may accurately argue that the Restatements in the American sense concern judge-made law whereas the Brussels I Regulation case law is different as it concerns the interpretation of a 'statutory' regime. Thus, one may argue, there can be no Restatement of the law in a Brussels I Regulation context. Although this argument is correct, the proposal to introduce the American reform model via the Restatements method will assist the *commencement* of a fruitful dialogue between European legal systems in reaching a common point. Thus, common rules in the different legal systems would be discovered and developed, with the sole aim of overcoming the barriers separating those legal systems. Thus, the Restatements method is not *per se* a direct way of introducing the American reform model but a way in which European professors, lawyers and judges will engage in a fruitful dialogue in order to assess the ways in which the Brussels I Regulation framework may be reformed to include the American reform model²⁸.

The second proposed method in introducing the American reform model, and indeed a more desirable one, is to adopt the United States Code method and thus provide a uniform set of jurisdiction rules on international jurisdiction. It is submitted that this type of reform considerably reinforces the issue of jurisdiction in the European Union as for the first time a common set of detailed rules will be afforded.

Although it is believed that a European Civil Code is very feasible²⁹, the present writer is of the opinion that introducing the American reform model via a European Civil Code is not a necessity and thus a European Judgments Code would suffice to tackle the problems discussed in this contribution.

The introduction of a Judgments Code, or a similar one to that effect is, it is submitted, the most desirable way of introducing the American reform model in Europe. It is further submitted that such type of Code is feasible, taking into account that a European Civil Code,

²⁸ In December 1923, Benjamin Cardozo, a well known American jurist, explained the importance of the Restatements in a lecture at Yale Law School: "When, finally, it goes out under the name and with the sanction of the Institute, after all this testing and retesting, it will be something less than a code and something more than a treatise. It will be invested with unique authority, not to command, but to persuade. It will embody a composite thought and speak a composite voice. Universities and bench and bar will have had a part in its creation. I have great faith in the power of such a restatement to unify our law.", Benjamin N. Cardozo, *The Growth of the Law* (1924), New Haven: Yale University Press, at p. 9.

²⁹ See A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron and M. Veldman, eds., *Towards a European Civil Code*, 3rd ed., (2004), Nijmegen: Ars Aequi Libri.

being much harder to introduce, is also feasible³⁰. The desirability of such a Code is not only owed to the fact that in drafting the Code the European Member States will engage in a dialogue and reach a level of consensus, but also the fact that such a Code will provide a secure, uniform and above all binding set of rules in resolving jurisdictional conflicts. Consequently, the American reform model may become part of this Code which in turn would lead to a European acceptance of those principles. Another factor which supports a European Judgments Code in the form of the U.S.C. is the format of the U.S.C. itself. As the U.S.C. is a federal code and not merely a state code, it is a real life example of a Code both being comprised with and balancing the many differences existent in American States' legal systems.

The third and final proposed method of introducing the American reform model in the European Union is by the familiar Council Regulation method. Under this method, the Brussels I Regulation would need to be significantly reformed so as to include the American reform model proposals. The Regulation reform method would ensure the proper incorporation of the proposed reform, however, it is submitted that it is only a compromise solution. Compared to a uniform Code on the issue, the Regulation lacks the security a Code affords as Member States are allowed to contract out of certain Regulation provisions by way of reservations. Furthermore, the amount of detail entailed in a Code is far greater than that in a Regulation, and thus a Code would address the reform issue more appropriately. Nonetheless, a Regulation is still an adequate means of introducing the American reform model, and has an advantage over a Code, namely that a lesser level of consensus and compromise is needed in order to attain it. It is further submitted that a reformed Regulation, coupled with a Restatement on Judgments, would afford greater security and authority than each text on its own.

7.3 Option B: The European Regulation Model

This method of reforming the Brussels I Regulation contains proposals for reform which may be attained without the influence of the American reform model discussed above. Thus, under this model the main concept is to alter the Brussels I Regulation provisions in order to accommodate anti-suit injunctions and thus strengthen the Brussels I Regulation framework.

³⁰ Op.Cit.

The model is centred on three interconnected pillars for reform. The first pillar is the adoption of Advocate General Léger's approach in *Gasser*, the second pillar is the inclusion of arbitration agreements and the third pillar is the introduction of a brand new anti-suit injunction provision. These pillars will now be analysed.

The first pillar in essence adopts the opinion of Advocate General Léger in *Gasser*³¹. Thus, the significant change under the proposed model is the prevailing status of Article 23 over Article 27, as it is moved to Section 6 of the Brussels I Regulation. The reason for this change is to reverse the *Gasser*³² decision. Whilst *Gasser*³³ is correct in theory, in practice it afforded a very appealing forum shopping mechanism to tactical forum shoppers. In addition, *Gasser*³⁴ greatly restricted the exclusivity of exclusive jurisdiction clauses, which coupled with the ban of anti-suit injunctions in *Turner*, created a haven for tactical forum shoppers. The move of Article 23 to Section 6 of the Brussels I Regulation also ensures that it will be covered by Article 35 regarding recognition and enforcement. This reform proposal is in line with the position adopted by the Hague Conference on Private International Law in its 2005 Convention on Choice of Court Agreements³⁵.

One may argue that the change made is not considerable, as the position does not alter at all. It is submitted that this is wrong. As the law stands the fact that an exclusive jurisdiction clause is in place does not matter so much as a party can get another court seised, yet even if

³¹ [2003] E.C.R. I-14693; [2004] 1 Lloyd's Rep. 222. For a discussion of the case *see supra* Chapter III: The Brussels I Regulation Framework.

³² Ibid.

³³ Op.Cit.

³⁴ Ibid.

³⁵ The 2005 Convention on Choice of Court Agreements provides that: **Article 5 - Jurisdiction of the chosen court:** “ **1.** The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State. **2.** A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State. **3.** The preceding paragraphs shall not affect rules **-a)** on jurisdiction related to subject matter or to the value of the claim; **b)** on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.” **Article 6 - Obligations of a court not chosen:** “A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless **- a)** the agreement is null and void under the law of the State of the chosen court; **b)** a party lacked the capacity to conclude the agreement under the law of the State of the court seised; **c)** giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised; **d)** for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or **e)** the chosen court has decided not to hear the case.” The Hague Conference on Private International Law Convention of 30 June 2005 on Choice of Court Agreements is accessible at: http://www.hcch.net/index_en.php?act=conventions.text&cid=98 .

this happens, that court must apply the requirements in Article 23 in order to rule on the validity of the exclusive jurisdiction clause. By introducing this proposed approach, however, the court chosen is the one to decide on the validity of the clause, which in turn makes things easier as the case will remain in forum if the clause is declared valid. Thus, the everyday litigator is not affected by the change, but the tactical forum shopper has now a great problem as he will not be able to seize a court simply to frustrate proceedings before the chosen court.

A further change brought by the first pillar of the proposed approach is the inclusion of Article 23 to Article 25, in the following manner:

Article 25

Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22 *or Article 23*, it shall declare of its own motion that it has no jurisdiction.

The inclusion of Article 23 within the scope of Article 25 reinforces the aim of the first pillar of the proposed reform, in ensuring the exclusivity of exclusive jurisdiction clauses.

Under this pillar a further significant change is brought by amending Articles 27 and 28, in the following way:

Article 27

1. *Subject to Article 23*, where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member 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.

...

Article 28

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings, *unless an action is pending before a Member State court on which jurisdiction is conferred by an exclusive jurisdiction agreement under Article 23. In such a case, any court other than the chosen court must decline jurisdiction.*

The *lis alibi pendens* provisions are now made subject to Article 23 thus ensuring the supremacy of Article 23 over Articles 27 and 28. Another reason for making such a change is to ensure the proper operation of the internal market. It has already been examined in another part of this contribution, in particular the comments made by Advocate General Léger in *Gasser*³⁶, rendering Article 27 as supreme over Article 23 significantly impacts the operation of the internal market simply on the ground that exclusive jurisdiction agreements do not provide the necessary level of security to parties in a contract, which may allow the occurrence of tactical forum shopping. Therefore, the proposed amendment is in line with the opinion of Advocate General Léger.

The second pillar of the proposed reform is the inclusion of arbitration in the Brussels I Regulation. The clarification in the proposed reform is that the Brussels I Regulation will only apply to proceedings involving the validity of an arbitration agreement. Thus, the following proposals are made:

Article 1

...

2. The Regulation shall not apply to:

...

(d) *arbitration, subject to Article 1a.*

ARBITRATION

Article 1a

1. *This Regulation shall apply to proceedings where the validity of the arbitration agreement is in question.*
2. *The validity of an arbitration agreement shall be determined in the following circumstances:*
 - a. *when the parties have chosen a forum of arbitration, by the Member State courts of that forum chosen by the parties or*
 - b. *when the parties have not chosen a forum, by the court first seized pursuant to Articles 27 and 28.*

³⁶ [2004] I.L.Pr. 7.

3. In cases of a valid arbitration agreement, the Member State court which adjudicated the issue must direct the parties to arbitration by virtue of the arbitration agreement.

The addition of proposed Article 1a has as its purpose to resolve and fill the gap left by *The Atlantic Emperor*³⁷ decision. Thus, Article 1(2)§d is altered and made subject to Article 1a(1) which provides that the Brussels I Regulation applies to proceedings involving the validity of an arbitration agreement. The provision envisages two types of scenario. First, when the parties have specified in the contract that their disputes shall be referred to arbitration in a particular place, say London, Article 1a(2)(a) provides that the Member State courts of that place, in our example England, shall have jurisdiction to rule on the validity of the arbitration clause. This provision is necessary although one may attack it as problematic. In particular, one may argue that the whole point of arbitration is not to go to court. That is the reason why under the Arbitration Act 1996, section 30 the competent body to decide on the validity of the arbitration clause is the arbitration tribunal. However, as it has already been established, section 30, although providing an ideal picture, does not properly depict what happens in practice³⁸.

It is submitted therefore that Article 1a(2)(a) depicts reality and in essence allows the court of the place chosen or alleged to be chosen to decide on the validity of the clause. Further support for such a provision may be found in the 1958 New York Convention on Arbitration, in particular Article II (3) which provides that:

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

(emphasis added)

Therefore the 1958 New York Convention envisages a scenario where the validity of the arbitration agreement is disputed and clearly provides that in case of such dispute it will be the court which will decide on the validity of the arbitration agreement and the one directing the

³⁷ Case C-190/89 [1991] E.C.R. I-3855; [1992] 1 Lloyd's Rep. 342. For a discussion of the case *see supra* Chapter V: Arbitration Agreements.

³⁸ *See supra* Chapter V: Arbitration Agreements, in particular 5.5.2.

parties to arbitration. Article II (3), however, does not state which court will decide the issue of validity, it merely refers to the court seised of the action. Article 1a(2)(a) therefore exists to fill in this gap and provide that the courts of the place chosen or alleged to be chosen for arbitration should decide the validity of the arbitration clause or uphold the decision of the arbitrators.

There are, however, certain instances where the parties merely agree to go to arbitration but do not actually determine where the arbitration will take place. Therefore, Article 1a(2)(b) provides that when the parties have not determined the forum of the arbitration, the court first seised will determine the validity of the arbitration agreement.

The third, and most important, pillar of the proposed reform is the inclusion of anti-suit injunctions in the Brussels I Regulation framework. The principle thus becomes a pan-European weapon which may be used by any Member State court in combating tactical forum shopping. It is submitted that the new anti-suit injunction article should be included under Section 10 of the Brussels I Regulation and it is proposed that it should take the following form:

Article 31a

- 1. A Member State court shall not issue an anti-suit injunction in order to restrain a party from commencing or pursuing proceedings brought before a court of another Member State. Such measure shall only be granted, with full regard to the principles of mutual trust and respect and sovereignty, and subject to the Community doctrine of abuse of rights, in any of the following circumstances:*
 - a. Where there is clear evidence that should the anti-suit injunction not be granted, the applicant party for such an injunction would suffer irreparable harm, injury and expenses.*
 - b. Where the issuing court is a court chosen by the parties pursuant to Article 23 and a court second seised pursuant Articles 27 and 28 herein, and the receiving court is a court first seised pursuant to Articles 27 and 28 herein, subject to the provision of clear evidence pursuant to Article 31a (a) above.*

2. *The provisions of this Article shall only apply where the proceedings before the receiving court do not exceed a period of two years, and the party seeking an anti-suit injunction from the issuing court does so without delay. Where proceedings before the receiving court are too far advanced, thus exceeding the period of two years, any Member State court is barred from issuing an anti-suit injunction to restrain proceedings before that court. In such a case, the *lis alibi pendens* provisions in Articles 27 and 28 herein shall apply.*

3. *Where the receiving court is a court first seised pursuant to Articles 27 and 28 herein, upon the issuance of an anti-suit injunction, the receiving court must stay its proceedings in favour of the issuing court. Should, however, the issuing court decline jurisdiction, the receiving court may resume its proceedings.*

4. *Pursuant to the principle of mutual trust and respect underlying this Regulation, any receiving court must recognise and enforce an anti-suit injunction properly issued pursuant to the requirements provided for in this Article by the issuing court, in order to assist that court in assuming jurisdiction.*

5. *Upon the determination of the dispute and final judgment, the anti-suit injunction issued by the issuing court shall expire.*

Anti-suit injunctions are introduced under the proposed reform model in order to make provision for cases where a party commences proceedings in a foreign court in bad faith and to combat tactical forum shoppers conducting an abuse of rights.

Article 31a provides that an anti-suit injunction may not be issued except in certain circumstances and with due regard to the principles of mutual trust and respect and sovereignty. In addition, anti-suit injunctions are fully limited only to cases where an abuse of rights, under the Community meaning of the doctrine, occurs and must be issued with extreme caution³⁹.

³⁹ The proposal of rendering the proposed anti-suit injunction article subject to the Community doctrine of abuse of rights reflects the European Court of Justice's reasoning in Case C-365/88, *Kongress Agentur Hagen GmbH v. Zeehaghe BV* [1990] E.C.R. I-1845, in that the Brussels I Regulation regime in principle does not have an impact on the Member States' civil procedure except where the effectiveness of the

The use of anti-suit injunctions under this reform proposal is made subject to the European Union Law doctrine of abuse of rights⁴⁰. Thus, the anti-suit injunction provision is limited only to cases where a party abuses the system by commencing proceedings in a Member State court and the determination of whether a party commits an abuse of rights must be determined, by virtue of the doctrine, on a case by case basis⁴¹.

Under the doctrine of abuse of rights, Community law must not be used in an improper or fraudulent manner. The doctrine applies, apart from the rights entailed in the EC Treaty, to rights entailed in secondary European Union Law, including Regulations⁴². In addition, not only Member States but also European Union institutions must ensure the application of the doctrine when Community rights are abused.

The European Court of Justice has formulated a number of interpretations of what constitutes an “abuse of rights” which can be drawn from its wide legal precedent relating to taxation and free movement of persons cases. The first interpretation of what may count as “abuse” for the purposes of the doctrine is a situation where a party tries to circumvent national law. The European Court of Justice has clarified this as dependant on the nature of the rules which are circumvented. Thus, it is the nature of the rules which a party seeks to avoid which determines whether there is an abuse or not⁴³. Another interpretation afforded to the term “abuse” relates to cases where a party seeks to benefit from their legislation. Thus, cases where a person enters and resides for a short period of time in a European Union Member State solely for enjoying the social benefits provided by that State will be committing an abuse of rights⁴⁴.

Finally, the European Court of Justice has also provided a much wider interpretation of what may constitute an “abuse”. A person may be committing an abuse of rights when the

Brussels I Regulation would be undermined. For a discussion on the principle of effectiveness (*effet utile*) see *supra* Chapter IV: The Impact of *Turner v. Grovit* on Anti-Suit Injunctions.

⁴⁰ For a detailed examination of the doctrine of abuse of rights see the opinion of Advocate General Poiares Maduro in Case C-255/02, *Halifax plc and others v. Commissioners of Customs and Excise*, [2006] E.C.R. I-1609; Karsten Engsig Sørensen, *Abuse of Rights in Community Law: A Principle of Substance or merely Rhetoric?*, (2006) 43 CMLRev. 423-459. For the origins of the doctrine in Community law see Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaal-nijverheid*, [1974] E.C.R. 1299.

⁴¹ Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, [1999] E.C.R. I-3069.

⁴² See for example Case C-45/90, *Alberto Paletta v. Brennet AG (Paletta I)*, [1999] E.C.R. I-3423.

⁴³ *Centros*, *Ibid.*

⁴⁴ Case 39/86, *Sylvie Lair v. Universität Hannover*, [1988] E.C.R. 3161.

objective pursued by the exercise of that right is contrary to the objective of a Community provision⁴⁵. Thus, under this broad interpretation, there must be very clear indications, and not a mere assumption, that the purpose pursued would be contrary to that aimed by the Community provision. The European Court of Justice has afforded a set of two conditions⁴⁶ that need to be satisfied in order to establish the existence of an “abuse” under the wide interpretation. First, the objective circumstances must indicate that the purpose of the provisions has not been achieved. Second, the person must intend to obtain an advantage from Community law by creating artificially the conditions laid down in the provision. Consequently, if a party commences various sets of proceedings in one or numerous Member State courts with the sole purpose and aim of frustrating a set of proceedings before another Member State court, thus engaging the other party in wasteful litigation, commonly known as an “Italian Torpedo”, the conduct of that party would be clarified as an abuse of rights under the broad interpretation.

Under Article 31a(1)(a) an anti-suit injunction may only be granted where without the injunction the applicant party will suffer irreparable harm and injury. The court allowed to issue the anti-suit injunction may be a court second seised which has been chosen through an exclusive jurisdiction clause, under Article 31a(1)(b). That court however is limited in using the remedy only to cases where there is an abuse of rights; if there is no abuse of rights then a Member State court is barred from issuing an anti-suit injunction. It is worth noting that in Article 31a(1)(b) the phrase ‘receiving court’ means the court asked to enforce an anti-suit injunction. What is of fundamental importance in Article 31a(1) is that anti-suit injunctions become available to all Member States to issue, yet available only in limited circumstances. Therefore, the principle is transformed from an English weapon to a pan-European one.

In order to guard the principle of sovereignty adequately, there are additional safeguards entailed in Article 31a. Thus, even if a case falls under Article 31a(1), if the proceedings in the first seised court are too far advanced, under Article 31a(2), the second seised court is barred from issuing an anti-suit injunction. The proposed provision does include a clear time limit of two years. Therefore, after that period has lapsed proceedings are to be treated as too far advanced and therefore the second seised court is barred from issuing an anti-suit injunction. Thus, in such a case the Brussels I Regulation reverts to its current position, namely that

⁴⁵ Case 110/99, *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas*, [2000] E.C.R. I-11569.

⁴⁶ Op.Cit. , §§ 52-53.

Articles 27 and 28 apply. The reasoning behind this provision is that a party seeking the anti-suit injunction must do so promptly, as alternatively if the party refrain from seeking the anti-suit injunction promptly its conduct may demonstrate that it does not wish to enjoin the other party⁴⁷. Thus, the provision in Article 31a(2) foresees this scenario by providing that in such a case the normal *lis pendens* rule applies.

In addition Article 31a(4) provides that the court receiving an anti-suit injunction must enforce it in order to assist the issuing court in assuming jurisdiction. Consequently, Article 31a(4) in effect provides for the recognition and enforcement of anti-suit injunctions in the European Union. This provision is in place to ensure the proper operation of anti-suit injunction within the community⁴⁸. In addition, the provision in effect reverses *Re The Enforcement of an English Anti-Suit Injunction*⁴⁹ as well as the submission made by Professors Righetti and La China in *The Front Comor*⁵⁰, in the sense that anti-suit injunctions now become fully recognisable and enforceable throughout the European Union.

Finally, Article 31a is under Section 10 titled Provisional including protective measures. Thus, in order to ensure the provisional character attributed to the European anti-suit injunctions envisaged in Article 31a, Article 31a(5) provides that when the dispute is determined and judgment afforded on the issue an anti-suit injunction issued by a Member State court shall expire.

7.4 Conclusion

The two proposed models for reform ensure the availability and use of anti-suit injunctions in the Brussels I Regulation framework. On the one hand, the proposed American model achieves the aim of equilibrium between the *lis alibi pendens* provisions and anti-suit

⁴⁷ See also the Court of Appeal decision in *The Hari Bhum* [2005] 1 Lloyd's Rep. 67, discussed *supra* in Chapter V: Arbitration Agreements, where the court denied the anti-suit injunction because the Finnish proceedings were too far advanced. In the court's view the anti-suit injunction would be of no use to the applicant at such a late stage of the Finnish proceedings.

⁴⁸ The provision in Article 31a(4) is presented in this thesis under Article 31a in order for the reader to have a complete picture of the proposed model. If that provision were to be adopted, since it deals with the recognition and enforcement of anti-suit injunctions, the proper place of such a provision would be under the recognition and enforcement section of the Brussels I Regulation.

⁴⁹ [1997] I.L.Pr. 320. For a discussion on *Re The Enforcement of an English Anti-Suit Injunction* and the sovereignty issue, see *supra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

⁵⁰ [2005] 2 Lloyd's Rep. 257. For an analysis of the case see *supra* Chapter V: Arbitration Agreements. For an examination of the submissions made by Professors La China and Righetti see *supra* Chapter IV: The Impact of *Turner v Grovit* on Anti-Suit Injunctions.

injunctions, coupled with the use of the transfer of cases principle. On the other hand, the proposed Brussels I Regulation model combines the opinion of Advocate General Léger in *Gasser*, by providing exclusive jurisdiction to the chosen court, as well as to the chosen place of arbitration with the availability of anti-suit injunctions only in cases where there is an abuse of rights.

The proposed availability and use of anti-suit injunctions in the Brussels I Regulation framework ensures that principle plays a significant and leading role within the Regulation. In particular, by allowing all Member State courts to issue the order, always subject to the safeguards in place, the system envisaged by the proposed reform proposals significantly modernises the Brussels I Regulation. Parties who wish to abuse the system enshrined in the Brussels I Regulation will now find it extremely difficult to drag another party through years of wasteful and draining litigation. Despite the aim of strengthening the Brussels I Regulation, the proposed system strikes a necessary balance in rendering the principle available only under certain circumstances and under precise safeguards.

The two proposed models ensure that the principle of anti-suit injunctions, an extremely effective means of preventing jurisdictional conflicts, is embraced on a European Union level thus assisting the Brussels I Regulation in becoming more robust, stable and effective.

CONCLUSION

The principle of anti-suit injunctions has greatly advanced since its birth in the late 15th century. What began as a predominantly internal jurisdictional tool has now evolved into an extremely effective jurisdictional tool deeply rooted in several legal systems across the globe. It is the conviction of the present writer that the principle of anti-suit injunctions may have an even greater future if incorporated into the Brussels I Regulation system.

The examination of anti-suit injunctions established that the principle was disallowed from operating in Europe, in cases of an exclusive jurisdiction clause and cases where the parties did not make an express choice of forum, as it impaired the smooth operation of the Brussels I Regulation framework. The examination further established that one can confidently argue that there were policy reasons behind *Gasser*¹ and *Turner*². The majority of European legal systems, being of civil law background, treated anti-suit injunctions with great antipathy, especially the courts of those Member States which felt that anti-suit injunctions were directed at them, as perfectly illustrated by *Re The Enforcement of An English Anti-Suit Injunction*³ as well as the submissions made by Professors Righetti and La China in *The Front Comor*⁴. The *Gasser*⁵ and *Turner*⁶ rulings must therefore be seen as an extension of this “anti” anti-suit injunction climate that predominates across Europe, this time though expressed at the highest European level.

This “anti” anti-suit injunction climate, however, can be perceived as somehow ironic. The centre of both decisions, particularly *Turner*⁷, was the issue of incompatibility of anti-suit injunctions with civil law systems. However, as the examination established, anti-suit injunctions are not incompatible with civil law systems as the remedy is available in some Continental civil law systems and in many instances has been used to restrain proceedings

¹ [2004] E.C.R. I-3565; [2004] 2 Lloyd's Rep. 169. For an analysis of the case *see supra* Chapter IV: The Impact of *Turner v. Grovit* on Anti-Suit Injunctions.

² [2003] E.C.R. I-14693; [2004] 1 Lloyd's Rep. 222; [2004] I.L.Pr. 7. For an analysis of the case *see supra* Chapter III: The Brussels I Regulation Framework.

³ [1997] I.L.Pr. 320. For an analysis of the case *see supra* Chapter IV: The Impact of *Turner v. Grovit* on Anti-Suit Injunctions.

⁴ *West Tankers Inc. v. Ras Riunione Andriatica di Sicurtà (The Front Comor)* [2005] E.W.H.C. 454 (Comm); [2005] 2 Lloyd's Rep. 257; *See also* [2007] UKHL 4. For an analysis of the case *see supra* Chapter V: Arbitration Agreements and Chapter IV: The Impact of *Turner v. Grovit* on Anti-Suit Injunctions.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

either internal or extra-territorial, the majority of cases occurring in the Member States who are the very critics of anti-suit injunctions. The availability and use of anti-suit injunctions on the Continent proves the point that by issuing an anti-suit injunction, Continental courts either exhausted the use of all other measures provided under national law and the Codes or their national law and the Codes proved inadequate to deal with the situation, thereby being forced to resort to the use of anti-suit injunctions. As such, the common law principle of anti-suit injunctions proved to be the only effective alternative in combating tactical vexatious litigation.

One may observe that the Brussels I Regulation framework is inadequate. In particular, the Regulation lacks any counter-forum shopping provisions. It is commonly known within the legal community that the European Member States' legal systems have many differences between them, even the ones belonging to the civil law family. These differences combined with civil procedure bureaucracy create a haven for tactical vexatious forum shoppers⁸ who wish to abuse the system, as accurately illustrated by the example of the "Italian Torpedo" phenomenon. The Brussels I Regulation framework, combined with the *Gasser*⁹ decision, provides protection for vexatious forum shoppers since under *Gasser*¹⁰ the court second seised must stay its proceedings in favour of the court first seised, even if it is chosen by the parties by virtue of an exclusive jurisdiction clause. It must also be noted that by encouraging vexatious forum shoppers, the Brussels I Regulation not only harms the suffering parties but also Member States who traditionally have a swift court system, such as England, as their civil procedure system is slowed down by the slower Member States. Consequently, it is the inadequacy of the Brussels I Regulation that currently renders anti-suit injunctions incompatible with its framework and not the principle of anti-suit injunctions itself.

The examination of the position that the United States of America adopts towards anti-suit injunctions may act as a model for the European Union. The examination of the law on anti-suit injunctions in the United States of America, whether state, inter-state or federal, reveals that by embracing anti-suit injunctions, and allowing the principle to smoothly cooperate with principles such as *lis alibi pendens* or *forum non conveniens*, creates a strong and proper framework

⁸ For a definition of the term vexatious forum shopper as used by the present writer see *supra* Chapter VII: Reform, note 1.

⁹ Ibid.

¹⁰ Ibid.

under which a balance is kept between the prevention of vexatious forum shopping and abuse of rights and the limitation of abuse of anti-suit injunctions by the courts. Furthermore, the use of anti-suit injunctions in the state of Louisiana establishes that anti-suit injunctions are neither incompatible with *lis alibi pendens* nor with a civil law system as a whole.

By combining, therefore, the results of the examination of anti-suit injunctions under English, Continental and United States law, as well as the interpretation of the Brussels I Regulation and the way in which anti-suit injunctions are perceived by the European Court of Justice, one may draw the following conclusions.

First, although anti-suit injunctions are neither incompatible with civil law systems nor with *lis alibi pendens*, the operation of the principle in the Brussels I Regulation framework has presented problems in the operation of the Regulation. In that respect, the European Court of Justice was correct in disallowing the principle from operating within the Brussels I Regulation framework.

Second, the example of the United States of America establishes that the problem of incompatibility presented in Europe under the Brussels I Regulation framework is solely owed to the Regulation and not to the principle of anti-suit injunctions. Thus, as the Regulation is inadequate in dealing with tactical vexatious forum shoppers abusing the system it is a logical consequence that it will be incompatible with anti-suit injunctions. This conclusion is contrary to the centre of the European Court of Justice judgment in *Turner*¹¹, yet the evidence presented by this contribution suggests that it is a correct one.

Third, the peculiarities presented under the arbitration agreements category highlight the necessity of reforming the Brussels I Regulation or the creation of a new Regulation dealing with arbitration. As arbitration remains the last standing fortress of anti-suit injunctions in Europe, it is oxymora for the European Court of Justice to condemn anti-suit injunctions as a principle incompatible with the Regulation framework in *Turner*¹² and to effectively allow anti-suit injunctions under the arbitration agreements category. It is therefore a necessity to reform the Brussels I Regulation in relation to arbitration agreements as the risk of parallel proceedings and irreconcilable judgments would be minimised.

¹¹ Ibid.

¹² Ibid.

Fourth, although the principle of anti-suit injunctions was disallowed by the European Court of Justice, it does not mean that the principle cannot be used as a pan-European weapon against an abuse of rights by being incorporated in the Brussels I Regulation. This is further reinforced both by the use and availability of anti-suit injunctions under some Continental systems as well as by the examination of the United States of America.

Finally, as the necessity of reforming the Brussels I Regulation is ever increasing not only in relation to arbitration agreements and exclusive jurisdiction clauses but also in cases where there is no express choice of forum or arbitration, the most workable model for such reform can be found in the United States of America since it is a pragmatic example of the proper use of anti-suit injunctions.

In view of the inadequacy the Brussels I Regulation framework presents, the time seems to have come when Europe must choose between the mediocre Brussels I Regulation system or the creation of a far advanced one. The former does not require much, apart from patience and tolerance. The latter, however, requires sacrifices by all Member States in order to reach an agreement and compromise on the new system. Thus, the way forward for reforming the Brussels I Regulation is to include anti-suit injunctions as an integral part of the Brussels I Regulation, subject to the Community doctrine of abuse of rights, thus providing an extremely useful jurisdictional tool to all Member State courts. The future role of anti-suit injunctions envisaged by this contribution is for the principle to become an integral part of the Brussels I Regulation transforming it from an inadequate means of protecting parties from abuse of rights to a robust mechanism providing a secure framework for the allocation of jurisdiction in civil and commercial matters.

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