of a debt. On the other hand, claims in respect of different parts of the one debt may well be proper. Subject to the apparent ban on double counting, it should also be proper in some cases to admit an assignor's claim to vote in respect of an assigned part of a debt – notwithstanding the reasoning in *Kapoor*. Such an assignor remains a "creditor" in any ordinary sense. He may propose to vote according to the assignee's wishes. The assignee could procure an injunction to prevent him from doing otherwise: *Howden v Cock* (1915) 20 C.L.R. 201, 210–211, 229. The rules of assignment are relevant to whether the assignee of part of a debt is entitled to vote at a creditors' meeting but only as the backdrop against which the statutory voting provisions operate.

P. G. TURNER

ANTI-SUIT INJUNCTIONS – COMITY REDUX?

IT is easy to take anti-suit injunctions for granted. They have become legitimised by familiarity, so often do English courts restrain claimants from suing abroad where foreign proceedings would be unjust to the defendant. The courts have also done much to build the conceptual defences of such relief. Most significantly, in *Airbus Industrie v Patel* [1999] 1 A.C. 119, Lord Goff parried a potentially decisive objection to restraining foreign proceedings. Such relief need entail no disrespect to the foreign court, and so complies with the principle of comity, provided that the English court has an "interest in, or connection with" the substantive dispute (typically because the injunction is ancillary to pending English proceedings). But the *Airbus* principle is problematic. Is it a necessary or sufficient condition for compliance with comity? Is there more to comity than jurisdictional connection? If so, what does comity require? And what of the Supreme Court of Canada's earlier decision in *Amchem v Workers Compensation Board* (1993) 102 D.L.R. (4th) 96, which promotes a stronger conception of comity in which foreign proceedings should be restrained only if the foreign court's jurisdiction is exorbitant? Such uncertainties recur in the English authorities. Some courts regard comity as more than jurisdictional connection, if only to signal caution in granting relief. And others apparently favour the narrower Canadian approach: *Highland Crusader LP v Deutsche Bank AG* [2009] EWCA Civ 725.

The problem of comity's role arose again in *Star Reefers Pool Inc v JFC Group Co.Ltd.* [2012] EWCA Civ 14, with potentially important consequences. *Star Reefers* concerned disputed guarantees given by JFC, a Russian charterer, to Star, a Cayman ship owner. JFC began the inevitable battle for venue by seeking a declaration in Russian

proceedings that the guarantees were invalid under Russian law. Star replied by suing on the guarantees in England under English law, whereby JFC had no arguable defence to the claim for payment, and sought an injunction restraining the Russian proceedings. The Court of Appeal, in a judgment given by Rix L.J., overturned Teare J.'s decision to grant the injunction. The English court was the natural forum for the dispute, supplying the necessary jurisdictional interest. But the Russian proceedings were not inherently vexatious, given that JFC had never contemplated litigating in England, and had a legitimate interest in invoking Russian law before a Russian court. Nor was there evidence of bad faith.

The decision is unsurprising on the facts. JFC had legitimately advanced an arguable claim in its home court, never having submitted to the English court's jurisdiction. By doing so under Russian law it merely exploited uncertainty as to the identity of the applicable law, which had not been agreed. True, it did so first, without warning. Its pre-emptive strike was also tactically shrewd, and potentially decisive. Not only did the Russian proceedings promise a better outcome, but the declaration JFC sought was doubtless intended to preclude enforcement in Russia of any judgment Star might obtain in English proceedings, making Star's claim pointless. But such defensive forum-shopping is not inherently vexatious or oppressive, as *Star Reefers* importantly affirms. Anti-suit injunctions are intended to prevent injustice, not the tactical manoeuvring which animates cross-border litigation.

But *Star Reefers* is more than a case where trial judge and appeal court differed on the facts. The decision may limit the power to restrain foreign proceedings in three respects:

First, it can no longer be argued (as once seemed possible) that invoking in a foreign court a law different from that which an English court would apply is inherently unconscionable. At least this cannot be argued where this involves no evasion of a contractually agreed applicable law (*cf. Shell v Coral Oil Co Ltd.* [1999] 1 Lloyd's Rep. 72). For Rix L.J., a claimant has a legitimate interest in advancing such arguments as might be available in the foreign court (provided they are not bound to fail), at least where the identity of the applicable law is uncertain. This conclusion is practically significant, given how often litigants commence foreign proceedings (typically in their home court) with the object of displacing the law applicable in English proceedings (often by invoking local mandatory rules or public policy). It also establishes a distinction between restraining foreign proceedings and challenging an English court's jurisdiction. Where a stay is sought on *forum conveniens* grounds (or service outside the jurisdiction challenged) a court will exercise jurisdiction, rather than deny the claimant

redress anywhere, if the claimant faces defeat abroad because the alternative forum would apply a different law: *Dornoch Ltd. v Mauritius Union Assurance Ltd.* [2006] Lloyd's Rep. I.R. 127. To accept jurisdiction because a claimant in English proceedings would otherwise be denied redress differs, however, from saying that a claimant in foreign proceedings acts unconscionably by invoking local law.

Secondly, *Star Reefers* reasserts the Court of Appeal's power to police the grant of anti-suit injunctions by lower courts. It is often assumed, and was argued in *Star Reefers*, that a trial judge's determination of whether foreign proceedings are vexatious or oppressive is effectively an unreviewable exercise of discretion. But for Rix L.J. it concerns the application of legal principles, going to whether grounds exist for granting relief, and thus subject to appellate review.

Thirdly, Rix L.J.'s approach positions comity at the heart of the enquiry, providing a further ground for challenging the grant of relief. This was achieved by emphasising the court's residual discretion in such cases. Establishing a ground for relief is but the prelude to a distinct process whereby the court must decide whether to exercise its discretion to grant the injunction, with the result that relief might be denied even if the conduct of the claimant abroad is unconscionable. Courts clearly have discretion to consider the potential injustice of restraining such a claimant, and the applicant's own conduct, given the equitable nature of such relief: *SNI Aérospatiale v Lee Kui Jak* [1987] A.C. 871 (PC). And courts often nod towards comity (without elaboration) to justify caution in such cases. But Rix L.J.'s approach formalises comity's role as a required consideration at the discretionary stage.

This is significant in principle. Contrary to what is often supposed, comity not injustice may be the overriding consideration. And a failure to comply with comity at the discretionary stage is now highlighted as a ground for appeal. But what does this mean in practice? What does it mean where a court already has the necessary "interest or connection" in the case, as required by *Airbus*? When does "caution" warrant denying relief? There is no analysis in *Star Reefers*. But Rix L.J. concluded that the English proceedings would very likely be completed before those in Russia, making an injunction unnecessary even if the Russian proceedings had been vexatious. Comity hardly justifies restraining foreign proceedings unless necessity so requires.

How comity may influence the exercise of a court's discretion is also evident from the existing case law. Comity may inhibit relief if the foreign court can stay its proceedings on *forum conveniens* grounds, because then its jurisdiction is not exorbitant, in principle entitling it to exclusive control over which cases it hears and preventing the English court from intervening (a point explained in *Amchem*). Alternatively, relief may be denied by reason of comity if targeted at an issue which

the foreign court can more appropriately address. For example, an applicant is not required to exhaust its remedies in the foreign court before seeking an injunction (by challenging the foreign court's jurisdiction, or seeking a stay or dismissal). But such considerations may affect the exercise of the court's discretion: *Amoco (UK) v British American Offshore Ltd.* [1999] 2 Lloyd's Rep. 772. Again, it may be proper to wait for a decision by the foreign court. Where, for example, one party obtains an order from an English court limiting its damages to the other it is for the foreign judge to determine the English order's effect, not for the English court to prevent it from doing so by restraining the foreign proceedings: *Seismic Shipping Inc. v Total plc* [2005] EWCA Civ 985.

The ingredients for this approach to comity are not new. The discretion to deny relief is required by equitable principles. But the role and distinctness of the discretionary stage has now been sharply defined. And, if comity is often invoked (none too precisely), its role as a mandatory consideration in exercising discretion has now been clearly articulated. Importantly, moreover, Rix L.J.'s approach assumes that *Airbus* imposes a necessary not sufficient condition for compliance with comity. It can no longer be said that comity is respected merely because a court has the requisite jurisdictional interest. This is far from the non-intervention required by *Amchem*. But Rix L.J.'s observation that granting such relief risks accusations of "egoistic paternalism" may set the tone for the future. And, as *Star Reefers* suggests, the focus may have shifted from traditional concerns – identifying the grounds for granting relief, justifying the court's interest – to how comity regulates a court's discretion.

RICHARD FENTIMAN

MEDICALLY ASSISTED PROCREATION: THIS MARGIN NEEDS TO BE APPRECIATED

ON 3 November 2011, the Grand Chamber of the European Court of Human Rights somewhat surprisingly overturned the Chamber decision of 1 April 2010 in *S.H. and others v Austria* (Application no. 57813/00, (2011) 52 E.H.R.R. 6). In the case, two married couples claimed the right to access to specific medically assisted procreation techniques which Austrian law denied to them. Even though this denial meant that the applicants could not have children to which at least one of them was genetically related, the Grand Chamber held that there was no violation of the right to respect for private and family life in Article 8 ECHR and no prohibited discrimination (Article 14 in