CHOICE OF LAW AND ANTI-SUIT INJUNCTIONS: RELOCATING COMITY

Abstract English private international law generally gives a potential role, where appropriate, to foreign law, by allowing for the application of choice of law rules to determine its relevance. Yet in the context of anti-suit injunctions granted otherwise than in aid of a contractual right not to be sued, choice of law is conspicuously absent. In those cases, courts simply apply the *lex fori* without paying any regard to foreign law, although the notion of comity is taken into account in the final decision on whether to grant anti-suit relief. Clearer identification of the grounds for granting such relief should limit application of the *lex fori* to instances where the anti-suit injunction serves as a form of ancillary relief to protect the judicial processes of the forum, and in which comity plays no role. In all other cases, which ultimately concern private justice between the parties, comity is best understood as an expression of justice in cases involving foreign elements, and better reflected through choice of law rules, which might lead to the application of foreign law. This approach is preferable to invoking comity as a consideration relating to the manner in which the court regulates the grant of anti-suit relief, because courts tend to bestow rights, which parties may not otherwise have, under the cloak of comity. Understanding comity as the catalyst for taking account of foreign law assuages concerns about interfering with foreign courts, acts as a deterrent to remedy shopping, and provides greater certainty as regards the vindication of rights. The case for widening the application of choice of law in this context does not depend on Rome II, but if the principle is accepted, courts must follow the process which it specifies.

Keywords: anti-suit injunction, choice of law, comity, equity, lex fori, private international law, Rome II.

I. INTRODUCTION

Amidst the consternation following the purging by the Court of Justice of the European Union (CJEU) of the anti-suit injunction, it is important to remember for whom the bell tolled.[1] Despite inventive attempts to suggest otherwise, the remedy remains a powerful device for parties engaged in litigation involving the rest of the

[1] Case C-159/02 *Turner v Grovit* [2004] ECR I–3565; Case C-185/07 *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc* [2009] ECR I-663. It is now clear that the revised Brussels I Regulation, which will apply from 20 January 2015, will not resuscitate the anti-suit injunction in litigation and arbitration taking place within the EU.

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world.[2] It is timely, therefore, to explore unresolved issues. One such matter is the formulation of the test for the grant of a non-contractual anti-suit injunction,[3] including whether it is necessary to demonstrate the existence of a right not to be sued before the injunction is granted.[4] This issue triggers a potential choice of law question to which courts have remained (perhaps wilfully) blind. Choice of law is applied to determine the proper law of a contractual right not to be sued, for example in relation to the validity and interpretation of a choice of court or arbitration agreement.[5] The argument that choice of law ought to be relevant for anti-suit injunctions granted to protect either a legal or equitable right[6] has been raised previously.[7] Still, English courts persist in their bland application of the *lex fori* in the non-contractual context. Recent cases grappling with non-contractual anti-suit injunctions, including the question as to when it is appropriate for the court to protect its own processes from interference, prompt a reconsideration of this issue.[8]

Examinations of the jurisprudence on anti-suit injunctions invariably involve reflections on the role of comity, which is frequently referred to as a factor in the decision to grant or refuse anti-suit relief. Those expressing strong views against widening the application of choice of law to non-contractual anti-suit injunctions have not indicated why treating comity as a factor to be taken into account in the ultimate decision is preferable to relocating comity by treating it as the catalyst for applying choice of law rules.[9] There is also a view that, even if choice of law is given a wider application, considerations of comity should remain.[10] Both the role and function of comity, and the relationship between comity and choice of law, deserve scrutiny.

It is fair to say, particularly in the light of the current state of the law, that one might be less than sanguine about the prospect of courts abandoning their reliance on the *lex fori* in favour of a wider application of choice of law. One reason for this pessimism is that advocating a choice of law approach to injunctive relief might be thought to betray a misunderstanding of the nature of equitable injunctive relief itself. It is therefore necessary to begin the analysis by looking at the foundations of the anti-suit injunction,

[2] The argument that European law should be applied by analogy to anti-suit injunctions granted in respect of proceedings before non-EU courts has been given short shrift. See eg *Shashoua v Sharma* [2009] EWHC 957 (Comm), [2009] 2 All ER (Comm) 477 [35]–[39]; *Midgulf International Ltd v Group Chimique Tunisien* [2010] EWCA Civ 66, [2010] 2 Lloyd's Rep 543 [67]–[69].

[3] That is, an anti-suit injunction granted otherwise than in aid of a contractual right not to be sued.

[4] *Masri v Consolidated Contractors International (UK) Ltd (No 3)* [2008] EWCA Civ 625, [2009] QB 503.

[5] *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA Civ 710, [2006] 1 All ER (Comm) 32 [73]; *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, [2013] 1 WLR 302.

[6] As will become evident, the common law and equity division ought only be considered relevant after English law is determined to be applicable.

[7] A Briggs, 'Anti-Suit Injunctions: a Pause for Thought' [1997] LMCLQ 90.

[8] *Masri* (n 4); *Royal Bank Of Scotland Plc v Hicks* [2010] EWHC 2579 (Ch) (*Liverpool (No 1)*); *Royal Bank Of Scotland Plc v Hicks* [2011] EWHC 287 (Ch) (*Liverpool (No 2)*); *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14, [2012] 2 All ER (Comm) 225.

[9] J Harris, 'Anti-Suit Injunctions: A Home Comfort?' [1997] LMCLQ 413; J Fawcett, J Carruthers, and Sir Peter North, *Cheshire, North & Fawcett: Private International Law* (14th edn, OUP 2008) 459–60. See also T Raphael, *The Anti-Suit Injunction* (OUP 2008) [3.12].

[10] TM Yeo, *Choice of Law for Equitable Doctrines* (OUP 2004) [4.51], [4.76].

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which in turn raises six key arguments. First, the current categorization of grounds for granting anti-suit relief, including the question, and relevance, of the right not to be sued, reveals a significant divergence in judicial opinion. Second, a classification of anti-suit injunctions which distinguishes between those which are granted as a form of ancillary relief to protect the judicial processes of the forum, and those granted in respect of private justice between the parties and the vindication of their rights, provides greater clarity than the existing categorizations. Third, the difficulty of defining comity, compounded by the difficulty of courts relying on comity to regulate their own discretion, provides the rationale for viewing comity simply as an expression of justice in cases involving foreign elements, which justifies the application of choice of law rules. Fourth, recalling the traditional exclusion of choice of law from equitable doctrines, the case for or against a wider application of choice of law boils down to a policy decision over the appropriate role of foreign law. Fifth, objections to widening the application of choice of law in the anti-suit injunction context are mere echoes of objections levelled against choice of law as a whole. Finally, if it is accepted that the relevance of foreign law ought to be considered where it is appropriate to do so, the formulation of choice of law rules is unnecessary, because English courts must follow the process set out in Rome II.

II. THE ANTI-SUIT INJUNCTION

A. Structure

1. Categorization of grounds for an award

In England, the power to grant an injunction is statutory and is provided for in all cases where it is 'just and convenient'.[11] It has been held that personal jurisdiction over the respondent is required,[12] but there is no precondition that in order to award an anti-suit injunction the applicant needs to demonstrate a legal or equitable right not to be sued.[13] The courts have drawn distinctions between different categories of anti-suit injunctions and have emphasized that these are non-exhaustive.[14] In the non-contractual context, the roles of vexation, oppression and unconscionability have been in a state of flux. At times, vexation and oppression have been seen as the primary test for the grant of an anti-suit injunction[15] whilst, at others, it has been unconscionability.[16] Courts today seem to prefer Lord Goff's test of vexation and oppression, outlined in the seminal case *Aérospatiale*.[17] However, they have not clarified whether a legal or equitable right not to be sued is to be considered as a separate category distinct from vexation or oppression, while these concepts have on occasion themselves been subsumed within that of unconscionability.[18] It seems possible that the conflation

[11] Senior Courts Act 1981, s 37(1).

[12] *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749 [19].

[13] *Fourie v Le Roux* [2007] UKHL 1, [2007] 1 WLR 320 [30].

[14] *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871 (PC) 893–97.

[15] ibid 871; *Hyman v Helm* (1883) LR 24 Ch D 531 (CA) 537–42.

[16] *British Airways Board v Laker Airways Ltd* [1985] AC 58, 95; *Turner v Grovit* [2001] UKHL 65, [2002] 1 WLR 107 [23]–[25].

[17] *Aérospatiale* (n 14) 896–97; see eg *Elektrim SA v Vivendi Holdings 1 Corp* [2008] EWCA Civ 1178, [2009] 2 All ER (Comm) 213 [82]–[83]; *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725, [2010] 1 WLR 1023 [50].

[18] *Masri* (n 4) [45].

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of these concepts is one explanation why there are inconsistencies between the cases and courts do not always agree on the basic categorization of the grounds for an award.

One category which is relatively settled is that granted in aid of a contractual right not to be sued in a foreign jurisdiction, that is, where there is a valid and binding agreement which is applicable to the proceedings in question and there is no strong reason not to enforce it.[19] The other categories remain less well demarcated. Looking at the authorities as a whole, there are a number of approaches. One approach is simply to see a single alternative category, this being where the bringing of proceedings is unconscionable.[20] Another, more nuanced, approach is to break this down into a number of categories: where there is an equitable right not to be sued; if it is otherwise unconscionable for the proceedings to be brought; or if the injunction is necessary to protect the court's jurisdiction.[21] Others take a different approach altogether, and focus on what 'the ends of justice' require.[22] The discrepancies between these approaches, and the divergence in judicial opinion, invites reflection on whether these differences are merely semantic, or whether they suggest that something is amiss.

2. *The question of rights*

One manifestation of these difficulties concerns the question of rights. The lack of a precondition that an injunction must enforce a right does not mean that the existence of a right is irrelevant. The question of rights is pivotal in any choice of law analysis, because determining whether a right exists might raise a potential choice of law question.[23] In the context of anti-suit injunctions, there is a related question of whether the notions of unconscionability, vexation and oppression are distinct from a non-contractual right not to be sued, or are terms used to express the existence of such a right.[24] The argument that an anti-suit injunction may be granted in situations where there has been an infringement of an applicant's equitable rights has been labelled as a fiction, on the basis that equitable rights are remedial and not substantive in nature.

[19] *Donohue* (n 12). However, there has been some recent uncertainty concerning the requirement that England be the 'natural forum', and the appropriateness of injunctive relief in some instances. See further A Briggs and P Rees, *Civil Jurisdiction and Judgments* (5th edn, Informa 2009) [5.41]–[5.42].

[20] The Court of Appeal has interpreted *Turner* (n 16) as setting out these two categories: *Sabah Shipyard (Pakistan) Ltd v Pakistan* [2002] EWCA Civ 1643, [2003] 2 Lloyd's Rep 571 [39]–[40]; *OT Africa Line* (n 5) [63]. See also Fawcett, Carruthers, and North (n 9) 458.

[21] Lord Collins of Mapesbury (ed), *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) [12-080]–[12-082]. A similar approach is adopted in Briggs and Rees (n 19) [5.43]–[5.48]. Jonathan Hill and Adeline Chong draw a similar, but more limited, categorization between legal/equitable rights, and unconscionability: *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (4th edn, Hart Publishing 2010) [11.2.1].

[22] R Fentiman, *International Commercial Litigation* (OUP 2010) [15.26]–[15.30]; Raphael (n 9) [4.15]–[4.16].

[23] A Briggs, 'Anti-Suit Injunctions in a Complex World' in F Rose (ed), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (LLP Professional Publishing 2000) 219, 243.

[24] Briggs, 'Pause for Thought' (n 7) 92.

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On this view, infringing an equitable right is seen merely as a legal conclusion drawn from the finding of unconscionable conduct,[25] and so should not lead to the invention of an 'essentially fictitious substantive right'.[26]

The Court of Appeal confronted this issue in *Masri*. The central question in that case was whether the Court had jurisdiction to grant an anti-suit injunction in order to restrain foreign English judgment debtors, who were resisting payment, from relitigating in the Yemen matters which had already been determined by the English court.[27] In considering the question of rights, Collins LJ[28] placed reliance on the distinction drawn by the courts between alternative and single forum cases. In alternative forum cases it is thought that a claim may be brought either in England or in another forum and an injunction may be granted 'as the ends of justice require', particularly where pursuing the relevant proceedings would be vexatious or oppressive.[29] In single forum cases it is thought that the other forum is the only place in which proceedings may be brought and so an injunction may only be granted in order to restrain the unconscionable pursuit of foreign proceedings.[30] In *Masri*, an alternative forum case, Collins LJ held that no relevant equitable right was required, but he went on to say, *obiter*, that a legal or equitable right 'based on unconscionable conduct' would be required in a single forum case.[31]

The attractiveness of this approach must be considered in the light of its context. Collins LJ adopted this distinction when deciding whether a claim for an anti-suit injunction required a separate cause of action for the purposes of the rule for service out.[32] There is some concern that if there is no substantive equitable right, this might impact on the court's power to serve out claims for final anti-suit injunctions.[33] It has been suggested that because recognition of a substantive equitable right would raise choice of law 'problems', it is the reconciliation of 'competing imperatives' that should decide the issue.[34] But surely it has never been the case that the existence of rights is determined by questions of practicality, particularly as regards amendments to the Civil Procedure Rules (CPR) or the challenging issues posed by choice of law. Rights are empty if they can be created or defeated by pragmatism, and doing so permits a distasteful form of judicial realpolitik to determine the outcome of difficult legal questions. Whilst it may be more readily accepted that, in the absence of an exclusive jurisdiction agreement or other 'special factor', a party has no right to be sued in

[25] Fentiman (n 22) [15.23(ii)].
[26] Raphael (n 9) [3.12].
[27] *Masri* (n 4) [1]–[7].
[28] Longman LJ and Sir Anthony Clarke MR agreeing.
[29] *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (HL) 134–37.
[30] ibid 137–38. Whilst differing circumstances may exist as regards the number of jurisdictions in which proceedings might be commenced, it is not apparent why this should result in different outcomes to otherwise identical applications for anti-suit relief. These rules also favour the respondent to the anti-suit application where he points to the sole court in which he claims he might win: see further A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) 102.
[31] *Masri* (n 4) [44].
[32] Collins LJ was considering the rules for service out under the then existing CPR r 6.20, which has since been replaced by CPR r 6.36 and CPR Practice Direction 6B [3.1].
[33] CJS Knight, 'The Continued Rise (And Future Fall?) of the Anti-Suit Injunction' (2009) 20 KCLJ 137, 140–41; Raphael (n 9) [3.11]. Raphael submits that these concerns apply with equal force under the new wording of the CPR: T Raphael, *The Anti-Suit Injunction: Updating Supplement* (OUP 2010) [18.12].
[34] Raphael (n 9) [3.08].

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a particular forum,[35] this does not rule out the possibility that a party might have a right not to be sued in a particular forum.

B. Classification

The identification of the grounds on which an anti-suit injunction may be awarded is essential in order to answer an important question: what exactly is it that an anti-suit injunction is seeking to prevent and protect? It is argued here that distinguishing between cases which involve the protection of the judicial processes of the forum and those which involve private justice between the parties and the vindication of their rights potentially leads to greater clarity and more palatable outcomes.[36] The judgments in *Liverpool (No 1)*,[37] *Liverpool (No 2)*,[38] *Masri*, and *Star Reefers*[39]—all in which the courts struggled to identify the rationale for granting an anti-suit injunction—highlight that the failure to reach consensus on this is unsatisfactory, and illustrate the ambiguity of the status quo. These cases, however, also indicate the potential of the classification proposed here to overcome the jurisprudential impasse.

1. Protection of the judicial processes of the forum

Liverpool (No 1) concerned a high-profile series of disputes arising from a takeover of Liverpool Football Club. This included two applications, heard concurrently, for a mandatory injunction to restore the composition of two entities which operated the Club and for an interim injunction to prevent the completion of the Club's sale. It was considered necessary to seek the mandatory relief before a full trial because continuing uncertainty over the Club's value as a result of the alleged wrongful reconstitution of the board of the two entities had the potential to jeopardize the sale.[40] Floyd J considered the sale to be a decision for the properly constituted restored board of the entities and so granted the mandatory injunction and refused the interim injunction.[41]

In order to give effect to the mandatory injunction, on the day of judgment the Club's then owners were required to deliver signed unanimous shareholder consents to the solicitors acting for the parties pursuing the takeover.[42] Just 15 minutes after delivering the consents, the owners commenced proceedings in Texas, which included an application for interim relief which, in substance, was to the same effect as that refused by Floyd J.[43] The Texas court received an 'impoverished description' of the English proceedings, including the omission of any mention to the application for and refusal of interim relief in England.[44] The intention to present a clearly well prepared petition to the Texas court had never been mentioned to the English court.[45] To be sure, this was nothing other than a shameful attempt to deprive the successful parties to the English litigation of the fruits of that success. Floyd J had no hesitation in granting an anti-suit

[35] *Trafigura Beheer BV v Kookmin Bank Co* [2006] EWHC 1921 (Comm), [2007] 1 Lloyd's Rep 669 [44].
[36] Yeo (n 10) [4.75].
[37] (n 8).
[38] ibid.
[39] ibid.
[40] *Royal Bank of Scotland Plc v Hicks* [2010] EWHC 2568 (Ch) [22]–[36].
[41] ibid [36], [48].
[42] The application involved several parties and financial agreements, but this simplification of the facts is sufficient for present purposes.
[43] *Liverpool (No 1)* (n 8) [5], [8].
[44] ibid [14].
[45] ibid [7], [25].

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injunction the very next day in order to restrain what he characterized as the 'unconscionable conduct' of the bringing of the Texas proceedings.[46]

Some four months later, in *Liverpool (No 2)* an application for discharge of the anti-suit injunction was refused. Floyd J said that the injunction had been granted on the basis of 'the unconscionable conduct of the former owners *in seeking to undermine the English proceedings*',[47] but he then went on to say that 'the court intervenes not because of the existence of any enforceable right, but because the commencement or continuation of proceedings in the foreign jurisdiction would be unconscionable or vexatious or oppressive'.[48] This implies that the court was concerned to prevent its own proceedings from being undermined, but it is not obvious why this is only a concern if a party's conduct is unconscionable or vexatious or oppressive. Surely Floyd J did not mean to suggest that bringing the proceedings in Texas was 'unconscionable or vexatious or oppressive' as against the court itself.[49] If that is not what Floyd J is suggesting, and he rejects the claim that the other party has a right to be protected from such conduct, it is difficult to discern the ground on which the injunction was granted. On these scandalous facts, there can be little doubt that something had to be done, and that Floyd J instinctively reached the right decision. Yet the miscellany of reasons given by Floyd J illustrates the muddled methodology employed by the courts. In broader terms, it indicates the need to distinguish between protection of the court's processes on the one hand and private justice between parties on the other, even if the two intersect.

It seems that the role of the anti-suit injunction within the framework of principles of English civil procedure has been largely overlooked.[50] That said, a connection has been drawn with anti-suit injunctions issued to protect overseas assets over which an English court is exercising jurisdiction in administration, bankruptcy, or winding-up proceedings,[51] and it has been suggested that the anti-suit injunction plays a role in protecting the integrity of the judicial process and the due administration of justice.[52] English courts have been criticized for failing to pay sufficient heed to the inherent jurisdiction of the court to prevent the abuse of its processes by granting anti-suit injunctions.[53] It must be recalled, however, that the power to grant an injunction in England is statutory. Furthermore, it must also be recalled that such protection is distinct from

[46] ibid [29].

[47] *Liverpool (No 2)* (n 8) (emphasis added).

[48] ibid [61]. In *Hospira UK Ltd v Eli Lilly & Company* [2008] EWHC 1862 [9] Floyd J said *obiter* that the court's power to grant an anti-suit injunction stems from its inherent jurisdiction and relied on authorities relating to vexatious litigants to support this proposition. With respect, this is erroneous, because there are clear differences between vexatious litigants and vexation in the anti-suit injunction context: Raphael (n 9) [6.19].

[49] cf *Bank of Tokyo Ltd v Karoon* [1987] AC 45 (CA) 69.

[50] One commentator suggests that anti-suit injunctions are concerned with jurisdiction and fall to be governed by private international law: A Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (2nd edn, Sweet & Maxwell 2006) [9.4]. Another simply suggests they are a method to protect parties from abuse of process: N Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (OUP 2003) [16.27].

[51] See eg *Harms Offshore AHT Taurus GmbH & Co KG v Bloom* [2009] EWCA Civ 632, [2010] Ch 187 [26]–[27].

[52] S Gee, *Commercial Injunctions* (5th edn, Sweet & Maxwell 2004) [14.026].

[53] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [93]–[95]. In *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 390–92, the majority of the High Court of Australia recognized the inherent jurisdiction of Australian courts to do so.

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abuse of process,[54] despite misuse of the term abuse of process as a synonym for unconscionability,[55] or the suggestion that an injunction to restrain proceedings on the basis of vexation and oppression is derived from the duty to guard against such abuse.[56] In the context of foreign proceedings, there can be no abuse of process: the English court's process is not being abused in the foreign proceedings, and it is not for the English court to decide for the foreign court that its procedures are being abused.[57] Perhaps understandably, there is a perennial danger of abusing the abuse of process jurisdiction,[58] by unnecessarily crossing the line between an abuse of process and a mere procedural irregularity.[59] If courts are to be dissuaded from relying on the abuse of process jurisdiction when protecting their processes from interference, it becomes necessary to consider what justifications might instead be relied upon.

As a starting point, there appears to be a distinction between interferences with the engaged processes of the forum, and attacks on judgments. Where the forum's processes remain engaged, such as in administration, bankruptcy, or winding-up proceedings, or where interim but not final relief has been granted, or where an appeal is pending, it is easier to appreciate why courts might consider foreign proceedings to be interfering with their processes.[60] Courts must 'hold the fort' whilst dispensing justice to the parties before them. In other situations, where the court's processes are no longer engaged, the need to do so is less apparent and the link between this situation and the recognition and enforcement of foreign judgments becomes relevant.

As foreign judgments have no direct effect in England, it is to be expected that English judgments would not have automatic direct effect elsewhere. It is unconvincing to argue that attacks on English judgments in other jurisdictions interfere with the processes, as opposed to the judgments, of English courts. It is one thing to relitigate issues for which judgment has already been given. It is quite another for an English court to grant interim relief, only for a party immediately to act in defiance of that relief. As such, the Texas proceedings in *Liverpool (No 1)* might seem more invidious than the attack on the English judgment in *Masri*, where the anti-suit injunction was granted to prevent interference with a judgment handed down to parties who had submitted to English jurisdiction. *Masri* has been criticized for seeing the bringing of the foreign proceedings as a 'public wrong' against the Court's authority.[61] Contrast this to the situation in *Liverpool (No 1)*, where continuation of the Texas proceedings would have made a mockery of the English interim relief granted in circumstances where the processes of the English Court remained engaged. In reality, English judgments are

[54] Abuse of process allows the courts to prevent misuse of procedure in a way which would be manifestly unfair to a party, or would otherwise bring the administration of justice into disrepute, where such misuse would be contrary to the public interest and the relevant matters do not fall under cause of action estoppel or issue estoppel: *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 (HL); *Hunter v Chief Constable of West Midlands* [1982] AC 529 (HL).

[55] *Johnson v Gore Wood & Co* [2002] 2 AC 1, 120.

[56] *Turner v Grovit* [2000] QB 345 (CA) 357–58.

[57] Incorrect use of the term abuse of process might represent a malapropism from cross-applying language on stays of proceedings to the anti-suit injunction context: Raphael (n 9) [4.32].

[58] JA Jolowicz, 'Abuse of the Process of the Court: Handle With Care' (1990) 43 CLP 77, 90–3.

[59] Andrews (n 50) [16.09].

[60] The failure to fully rationalize the law on anti-suit injunctions in the insolvency context has been lamented: L Chan Ho, 'Anti-Suit Injunctions in Cross-Border Insolvency: A Restatement' (2003) 52 ICLQ 697, 725–35.

[61] A Briggs, 'Enforcing and Reinforcing an English Judgment' [2008] LMCLQ 421, 425.

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often attacked in recognition and enforcement proceedings elsewhere, but that does not mean that the court must go on the offensive to protect the judgments it has handed down.

Therefore, it seems apparent that there is a distinction between an anti-suit injunction granted to protect continuing proceedings, including interim relief and judgments on appeal, and an anti-suit injunction granted to prevent an attack on a final judgment.[62] An anti-suit injunction granted to protect the processes of the forum is not granted to enforce the public policy of the forum. Rather, when the processes of the forum remain engaged, the grant of an anti-suit injunction may rightfully be said to be based on the ground of protecting the forum's judicial processes. Where there has already been a final judgment, the grounds on which such protection is warranted are flimsy. This does not, however, preclude an application for anti-suit relief based on other grounds, which will be considered below.

2. Vindication of private rights

Such grounds appear in those cases which concern private justice between the parties where the vindication of private rights is at stake. *Star Reefers* illustrates that the role of rights in the anti-suit injunction jurisprudence has not been satisfactorily resolved. In that case, a Russian company, which had chartered a vessel, brought proceedings in Russia for a declaration that it was not bound under two guarantees which a Cayman Islands incorporated shipowner, acting through a Cypriot company, intended to rely on in English proceedings following a failed attempt to arbitrate in London.[63] This was a tactical decision, taken by the charterers instead of taking part in the arbitration or waiting to resist enforcement of any arbitral award in Russia.[64] At first instance, Teare J continued an anti-suit injunction[65] on the basis that the Russian proceedings were vexatious and oppressive because they had been commenced with a view to frustrate the determination of the dispute in England,[66] compounded by an inherently weak case in Russian law.[67]

The Court of Appeal overturned this decision and discharged the injunction. Rix LJ[68] said that the 'essential question' before the Court was whether the Russian proceedings were vexatious or oppressive.[69] Reaching an answer to this question was not a discretionary exercise, 'but a matter on which there is, in theory, a right or wrong answer'.[70] This answer would reflect 'an evaluative judgment'[71] of what 'count(s) as unacceptable behaviour in the sphere of international litigation',[72] to be reached by following a two-stage test.[73] The first stage involves making this evaluative judgment. It is only if the court finds that there has been unacceptable behaviour that the second stage arises, which includes 'the important matter of comity' and the discretionary decision whether to grant the injunction.[74] Despite this confident description, towards

[62] This includes attack on a final injunction, following the grant of which (although subject to engagement of appellate mechanisms) the processes of the forum no longer remain engaged.
[63] *Star Reefers* (n 8) [4]–[21].
[64] ibid [34].
[65] Which had been granted by Clarke J on 15 October 2010 (unreported): ibid [14]–[15].
[66] *Star Reefers Pool Inc v JFC Group Co Ltd* [2010] EWHC 3003 (Comm) [19].
[67] ibid [20]–[25].
[68] Sullivan LJ and Lewison LJ agreeing.
[69] *Star Reefers* (n 8) [2].
[70] ibid.
[71] ibid.
[72] ibid [3].
[73] Rix LJ said this test did not apply to single forum cases, because these are 'exceptional in nature': ibid [30].
[74] ibid [2].

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the end of the judgment, Rix LJ offers a very different account, saying that protection of the court's jurisdiction and its processes, including the integrity of its judgments, 'is exactly what the purpose of an anti-suit injunction is'.[75] Such protection seems distinguishable from the prevention of 'unacceptable behaviour in the sphere of international litigation'.[76] Either Rix LJ is saying that it is never a question of private justice between the parties, and it is always a question of protecting the judicial processes of the forum or, with respect, there appears to be a contradiction within the judgment (although one which might be viewed sympathetically, given the state of the jurisprudence).

This search for international standards suggests that Rix LJ was uncomfortable with an English court imposing its own standards on others by way of application of English law. To mitigate such concerns, why not apply choice of law analysis to decide which law should determine any such standards? It is not the case that there is some norm of private international law which domestic courts ought to apply to decide questions of vexation or oppression. Whilst transnational litigation may have an international flavour, it does not follow that the rights are or ought to be governed by some overarching, all-encompassing transnational litigation standard,[77] or system-transcendent notion.[78] If English courts are to decide the content of alleged system-transcendent notions on behalf of other legal systems, this might encourage remedy shopping, reminiscent of the days when English courts welcomed forum shoppers with open arms.[79] Of course, English courts now embrace the doctrine of *forum conveniens* to prevent forum shopping,[80] which might explain why Rix LJ appeared hesitant to apply English law without qualification.

The reason foreign law may be relevant is because different legal systems may have differing views of what is acceptable or unacceptable behaviour. In *Star Reefers*, it seemed clear on the expert evidence that a Russian court applying Russian private international law would be bound to apply Russian law to the interpretation of the guarantees.[81] If Rix LJ did not consider that the strengths or weaknesses of the case under Russian law should be determined at this stage by an English court,[82] and was concerned that English courts should avoid 'egoistic paternalism' by injuncting foreign proceedings,[83] it is all the more curious why it remained acceptable for the English court to determine as a matter of English law whether to countenance the continuation of

[75] ibid [42]. This is also very different to the account Rix LJ gives in *Glencore International AG v Metro Trading International Inc (No 3)* [2002] EWCA Civ 528, [2002] 2 All ER (Comm) 1 [42]–[43].

[76] *Star Reefers* (n 8) [42].

[77] Even if transnational public policy is slowly emerging, which not everyone accepts, such policy would appear to be limited to certain rules of public international law and universal principles of morality and justice: A Chong, 'Transnational Public Policy in Civil and Commercial Matters' (2012) 128 LQR 88.

[78] Raphael speaks of the need for a 'system-transcendent reason' to make it appropriate for English courts to intervene when the laws of a foreign jurisdiction would invalidate an exclusive choice of court clause, suggesting a possible candidate for this rationale to be the principle of freedom of contract: Raphael (n 9) [1.30]. But he also acknowledges that identification of system-transcendent justifications is imperfect, because English courts are still imposing their view of transcendence: ibid [8.21]. The idea of system-transcendence thereby falls away rather abruptly.

[79] *Atlantic Star (Owners) v Bona Spes (Owners) (The Atlantic Star)* [1973] QB 364 (CA) 382.

[80] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL).

[81] *Star Reefers* (n 8) [22].

[82] ibid [31].

[83] ibid [39].

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those Russian proceedings. English proceedings had not been commenced at or before the time the Russian proceedings were commenced, so the situation was not one in which foreign proceedings had been issued in the face of ongoing English proceedings, from which one of the parties was seeking to extricate itself.[84] This contrasts with the position in *Masri*, where the Court saw before it a 'classic case of vexation and oppression', where the offending party was seeking to relitigate the merits of a case which they had lost in England.[85] The situation in *Star Reefers* was rather different: the English court's processes were not yet engaged. The Court was not interested to protect the processes of the forum;[86] the case was limited to an issue of private justice between the parties.

The issue of private justice necessarily engages the question of the vindication of private rights. On one view, the court is not protecting any substantive equitable right when granting an anti-suit injunction, but is simply exercising an equitable power.[87] Even so, we are left with a void: what exactly is an anti-suit injunction seeking to protect? Put simply, if it is not granted to protect the forum's processes, it must be protecting the right of a party—quite aside from whether that right would be seen under English law as legal or equitable. Rather than fall back on protecting the court's processes, as occurred in *Masri*, courts would be well advised to consider the law from which a party's rights stem, and whether the vindication of any such rights means that protection of a party is warranted. This is the missing element in *Star Reefers*. Before exploring how courts might do this, another piece of the anti-suit injunction puzzle, which has become increasingly prominent, requires attention.

III. COMITY

The role of comity in anti-suit injunctions is of great significance, particularly since it has been emphasized that comity alone might preclude the grant of injunctive relief in some circumstances.[88] English courts attach 'high importance' to the term comity,[89] which partly explains why they so often repeat their 'ritual incantation' that great caution is required before an anti-suit injunction is granted.[90] Yet it is often not apparent precisely what comity means, or whether considerations of comity actually add anything of real value to the issues facing the courts. We have moved well beyond the days of 'sophistry' and the pretence that the *in personam* nature of an injunction defeats an allegation that it amounts to an interference with a foreign court.[91] For the most part, it is now acknowledged and accepted that an injunction does amount to an indirect interference.[92] Still, courts continue to litter their judgments with suggestions they are taking the notion of comity into account, only often to press ahead, apply the *lex fori*, and grant the injunction despite having made (or, perhaps, because they have made) these confessions. And even so, English courts still occasionally apply English law with trepidation, as evidenced by Rix LJ's

[84] ibid [37].
[85] *Masri* (n 4) [95].
[86] ibid [40].
[87] Raphael (n 9) [3.11].
[88] *Patel* (n 29) 133–34.
[89] *Turner* (n 16) [28].
[90] *The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA) 96.
[91] T C Hartley, 'Comity and the Use of Antisuit Injunctions in International Litigation' (1987) AmJCompL 487, 506.
[92] *Laker* (n 16) 95; *Patel* (n 29) 138.

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search for international standards in *Star Reefers*. The precise impact of comity remains elusive.

Liverpool (No 2) contains a typical example of a fleeting reference to comity and the ambiguous impact which this has. In granting the injunction, Floyd J said that his 'very general words had to be qualified by considerations of comity',[93] referring to Hoffmann J's remark that the foreign judge was 'usually the best person to decide whether in his own court he should accept or decline jurisdiction, stay proceedings or allow them to continue'.[94] Floyd J did not, however, explain the qualifying impact of comity. This is not unusual and is illustrative of the manner in which courts are liable to bandy around the term as if its meaning is well settled and its relevance not in doubt; or, perhaps, it is used to deflect criticism and provide judges with some comfort. The origins of comity and the proper role of the courts in relation to its exercise both merit attention, especially in light of the vociferous objections raised against it by some commentators.[95]

A. The Definition of Comity

At the risk of indulging in another ritual incantation, it is difficult to avoid turning to the definition promulgated in *Hilton v Guyot*[96] which has gained traction in both the United States[97] and other common law jurisdictions,[98] and has been referred to in England.[99] In *Hilton*, the majority of the Supreme Court of the United States supported the view that

> 'Comity', in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[100]

On this view, comity defines the acceptability of the sovereign acts of other legal systems. As is customarily the case with clichéd refrains, the context in which this statement was made is sometimes neglected. As it happens, *Hilton* represented a restatement of, and significant shift in, the focus of comity, and has given rise to an inconsistency between judicial and academic approaches to the notion.[101]

[93] *Liverpool (No 2)* (n 8) [61].
[94] *Barclays Bank Plc v Homan* [1993] BCLC 680, 687.
[95] Dr Mann viewed comity as 'so elusive and imprecise a term as to render its use unhelpful and confusing', with a 'deplorable influence . . . liable to produce false analogies and unacceptable results': FA Mann, *Foreign Affairs in English Courts* (OUP 1986) 136, 149. For similar criticisms, see JG Collier, *Conflict of Laws* (3rd edn, CUP 2003) 379; Fawcett, Carruthers and North (n 9) 5.
[96] 159 US 113 (1895).
[97] It is said to be the most commonly cited statement of comity in US law: JR Paul, 'Comity in International Law' (1991) 32 HarvIntlLJ 40, 44.
[98] *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, 1096 (Supreme Court of Canada); *CSR v Cigna* (n 53) 395–96 (High Court of Australia).
[99] *In re Johnson* [1903] 1 Ch 821 (Ch) 829 appears to accept the statement as authoritative. Following a long hiatus, the next reported reference to *Hilton*, whilst not criticizing this definition, suggests that it does not represent English law: *Homan* (n 94) 703.
[100] *Hilton* (n 96) 163–64.
[101] L Collins, 'Comity in Modern Private International Law' in J Fawcett (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (OUP 2002) 91–95.

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This inconsistency centres on the problem that comity has never been conclusively defined. Without intending to reduce the significance of great works through brief mention, nor to enter into the debate concerning which conflict of laws theories are truly predicated on comity, it is worth highlighting that references to comity appeared well before *Hilton*, showing that comity is not a recent creation, and that the historical (although perhaps antiquated) context is germane. Tellingly, centuries after the term first appeared, it remains unclear precisely what it means. The idea of *comitas et facilitas* appears in the works of Plautus and Cicero,[102] well before the notion of *comitas* rose to prominence through the works of Paul Voet.[103] It has been suggested that Ulrich Huber's establishment of the *conflictus legum* as an area focussed on sovereign interests should be seen as the beginning of the modern comity story,[104] but this might equally be seen as giving comity a different emphasis. Further, it may well be that Justice Joseph Story should be credited with introducing comity to the American jurisprudence,[105] but once more, he should not be seen as the founder of comity. Reasonable minds may differ on which conflict of laws theories support the notion of comity, because it will depend on the definition which comity is given. In this respect, history ought not to be rewritten nor the blurred origins of comity ignored, since they show that one continuity has been uncertainty, because it has never really been clear what comity is, or what, if anything, it requires.

It is fair to say, and with no disrespect to the few who have made valuable contributions, that English jurisprudence on comity remains a poor cousin of its American counterpart. This might have resulted in part from Dicey's disdain for the concept—he considered the assertion that recognizing or enforcing foreign law depended upon comity was 'a singular specimen of confusion of thought produced by laxity of language'.[106] Around that time, John Westlake suggested that English commentators and judges had 'freely borrowed' the term from Voet and Huber, but thought it was doubtful whether the term was used 'in a sense independent of justice'.[107] Nowadays, *Dicey, Morris and Collins* explains comity 'as a tool for applying or re-shaping the rules of the conflict of laws',[108] and not as an explanation for those rules.[109]

In applying those rules, English courts have on occasion seen deference as the true basis of comity. For example, Collins LJ in *Masri* said that '[i]nternational comity dictates a need for judicial deference in the international context'.[110] It is not apparent exactly what 'international comity' might be, just as it is unclear whether 'comity of nations'[111] and 'judicial comity'[112] are distinct from or mere embellishments of the original term. In any event, if the focus should be on judicial deference then the Canadian approach, under which pre-emptive strikes on foreign courts are

[102] M Gutzwiller, *Geschichte des Internationalprivatrechts* (Helbing & Lichtenhahn 1977) 137.
[103] ibid 136.
[104] DE Childress, 'Comity as Conflict: Resituating International Comity as Conflict of Laws' (2010) 44 UCDavisLRev 1, 19.
[105] ibid 23.
[106] A V Dicey, *The Conflict of Laws* (1st edn, Sweet & Maxwell 1896) 10.
[107] J Westlake, *A Treatise on Private International Law: With Principal Reference to its practice in England* (4th edn, Norman Bentwich 1905) 21–2.
[108] Collins, *Dicey, Morris and Collins* (n 21) [1-009].
[109] ibid [1-008]–[1-017].
[110] *Masri* (n 4) [16].
[111] See eg *Kuwait Airways Corp v Iraqi Airways Corp* [2002] UKHL 19, [2002] 2 AC 883 [138].
[112] See eg *The Abidin Daver* [1984] AC 398, 411 (HL).

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impermissible, might appear preferable. Before a Canadian court will entertain an application for an anti-suit injunction, an applicant must demonstrate that it has sought a stay or other termination of the foreign proceedings in the foreign court and that it has been unsuccessful in that application.[113] A Canadian court then engages in what, quite frankly, resembles a tit-for-tat exercise. The court must respect decisions made by foreign courts which conform to Canadian conceptions of *forum conveniens*; but if the foreign court has not done so, this is perceived as inequitable, and '[t]he foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the basis of comity' (ie, an anti-suit injunction may be granted).[114] Whilst some may see the priority afforded to furthering the doctrine of *forum conveniens* as admirable, the strike-back mentality is markedly less so. A stark reminder of the law of unintended consequences, this approach paves the way for a showdown between the courts concerned and makes it all the more obvious when a Canadian court is, in effect, reprimanding the foreign court for its assumption of jurisdiction. Of course, the other casualties are the parties themselves, suffering as they are shuttled between the courts, probably at great expense and diminishing their appetite for litigation.

The Canadian approach to comity illustrates the potential pitfalls of viewing comity as a principle of politeness and deference. The attempt to focus on deference has resulted in an unprincipled approach. Such an understanding of comity might be behind the idea that 'comity involves self restraint in refraining from making an order on a matter which more properly appertains to the jurisdiction of a foreign state'.[115] But even so, regardless of whether comity is grounded in Canadian deference, or in the *Hilton* focus on sovereign interests, or in some other formulation, it remains unclear what comity requires in a particular case. The introduction of comity has spread like a 'virus',[116] resulting in unpredictability as it strays into notions of deference and a judicial unwillingness to do anything which might cause offence to foreign courts. At the same time, the failure to appreciate the historical definitional difficulties has led to broad acceptance of the notion without sufficient reflection on why it is even relevant.

B. Judicial Discretion

On top of these troubles is the added difficulty of judicial discretion. If comity is to be relied on as a factor in judicial decisions, it is hard to decide what that requires. In *Star Reefers*, Rix LJ clearly articulated the role of comity as a mandatory consideration in the manner in which a court regulates its own discretion.[117] In circumstances where comity is given some vague, overarching definition, there is a danger that it might give courts a 'discretion unregulated by general principles'.[118] In *Hilton*, the majority of the Supreme Court of the United States said it was their 'judicial duty to know and to declare … the comity of [their] own country'.[119] What the Supreme Court and countless other commentators and judges all have in common is that they fail to provide guidance on

[113] *Amchem Products Inc v British Colombia (Workers' Compensation Board)* [1993] 1 SCR 897 [51]. [114] ibid [53]–[56].
[115] *Edgard Elias Joujou v Munib Masri* [2011] EWCA Civ 746 [55].
[116] Gutzwiller (n 102) 136.
[117] R Fentiman, 'Anti-Suit Injunctions: Comity Redux?' (2012) CLJ 273, 275–6.
[118] *Loucks v Standard Oil Co*, 120 NE 198 (NY 1918) 201–02.
[119] *Hilton* (n 96) 168.

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how to ascertain, administer, or apply comity. Perhaps this is because it is always going to be very difficult for the judiciary to do so. It might even be said that such decisions fall outside the judicial function.[120] Fortunately, it is not necessary to delve into such quandaries. Instead, the focus ought to be on the argument that reliance on any notion of comity as a consideration in the manner in which a court regulates its own discretion is inherently problematic, not only because what comity requires is uncertain, but also because an overemphasis on comity might stand in the way of the vindication of private rights, and bestow rights on parties which they do not actually have.

This argument has significant force in the anti-suit injunction context. Even in the context of contractual anti-suit injunctions, there still appears to be some judicial appetite for the claim that concerns of comity might be a 'strong reason' not to enforce a choice of court or arbitration agreement between parties.[121] That said, such agreements have also had the effect of reducing the impact of comity, which has been accorded a 'smaller role'[122] or a role of 'reduced importance',[123] on the basis that they mitigate the demands of comity.[124] It is also clear that comity is deemed to be of particular significance in the non-contractual context. In *Deutsche Bank AG v Highland Crusader Offshore Partners LP*,[125] Toulson LJ[126] held that '[t]he stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention'.[127] In *Star Reefers*, Rix LJ went further and said that in cases where allegations of vexatious conduct are weak, 'the considerations of comity become of especial importance'.[128] It is difficult to accept that the strength of the case relating to improper conduct should alter the weight to be placed on comity, or that the presence of certain factors should mitigate the demands of comity, whatever those might be. If the suggestion is that a foreign court, in deciding whether it is offended, will analyse the strength of the case regarding the alleged improper conduct in proceedings having been brought before it, then this demonstrates that offence should not be relevant, because it is particularly unclear what standards an English court might adopt when deciding whether a foreign court would be offended.[129] If the suggestion includes, or alternatively is, that where the case of improper conduct is so weak that the English court can decide the matter for the foreign court, this again raises the question as to why the alleged impropriety in the bringing of the foreign proceedings should be decided by reference to English law. This approach also fails to distinguish cases where the foreign court has been seized and that court might consider it necessary to act to protect its processes and grant the injunction as a form of ancillary relief. Furthermore, the definitional dilemma remains.

[120] *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331, 363; *Habib v Commonwealth* (2010) 183 FCR 62, 77.

[121] *Donohue* (n 12) [24].

[122] *OT Africa Line* (n 5) [32].

[123] *Joint Stock Asset Management Company v BNP Paribas SA* [2012] EWCA Civ 644 [68].

[124] ibid [66].

[125] See (n 17).

[126] Goldring and Carnwath LJJ agreeing.

[127] ibid [50].

[128] *Star Reefers* (n 8) [40].

[129] This brings to mind the second strand of the principle of non-justiciability, namely that in cases involving issues of interest to foreign states, courts should abstain from adjudication where to do otherwise would cause 'embarrassment' to the forum's executive: *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888, 938. As Lord Greene MR once said, 'the fear of the embarrassment of the Executive [is not] a very attractive basis upon which to build a rule of . . . law': *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Co* [1939] 2 KB 544, 552. The same might be said in respect of the idea of causing offence to a foreign judiciary.

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The distinction between alternative and single forum cases has also been seen as having an impact on the role of comity.[130] As a general rule, Lord Goff said whilst comity meant that an English court would require there to be a sufficient interest in or connection with the case in order to justify indirect interference with the foreign court, this would operate differently in the two categories.[131] He said that in alternative forum cases, it was necessary to consider whether England was the natural forum for the resolution of the dispute;[132] in single forum cases, however, a sufficient connection with England would need to be established (for example, by the relevant transactions having a connection with England, or where the policies of the English forum required protection).[133] What really ought to be asked is whether the fate of comity in anti-suit injunctions should depend on the drawing of such artificial distinctions. It is argued here that it need not be. Comity, seen simply as a notion grounded in the need to dispense justice in cases involving foreign elements, is better reflected in the anti-suit injunction context by allowing choice of law rules to give a potential role, where appropriate, to foreign law.

IV. CHOICE OF LAW

A. The Rationale for Choice of Law

Notwithstanding the contemporary fixation on questions of jurisdiction, choice of law remains the true foundation of the conflict of laws. As Lord Nicholls put it:

> The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the forum court.[134]

Understood this way, the notion of comity might be used to explain the existence of choice of law rules, which are intended to ensure that cases are decided justly and with reference to the appropriate law. Choice of law in the non-contractual context refers to choice of law by the court, not by the parties. This distinction is important, since these forms of choice are different, with the former being a default option available in the absence of choice by the parties.[135] When courts apply foreign law, they do so because that is what choice of law rules tell them to do.[136]

1. Choice of law and comity

Comity, when viewed as an expression of justice in cases involving foreign elements, has a valuable role to play by increasing tolerance to foreign law and diminishing parochialism.[137] One component of comity might be to limit the application of the

[130] See (nn 28–30) and surrounding text.
[131] *Patel* (n 29) 138.
[132] ibid 138–139.
[133] ibid 139.
[134] *Kuwait Airways* (n 111) [15].
[135] Briggs, *Agreements on Jurisdiction* (n 30) [2.20]. On the argument that contractual choice of law clauses are promissory terms, see ibid [11.45]–[11.58]. For rejection of that argument in favour of the view that such clauses are merely declaratory of the parties' intention, see *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 [41]–[53].
[136] Although parties must have pleaded and proven the foreign law.
[137] D McClean and K Beevers, *Morris: The Conflict of Laws* (7th edn, Sweet & Maxwell 2009) [21-008].

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lex fori in favour of foreign law where it is relevant. Refusing to apply foreign law in cases where it is relevant is discordant with comity.[138] In *Star Reefers*, Rix LJ said that 'English judges could not set themselves up as examining magistrates to decide whether a foreign court had a case fit for trial'.[139] Rather than decline to grant an anti-suit injunction without investigating the merits of the applicant's case, a choice of law analysis can be deployed without infringing comity, because it is not a deferential notion. Instead, comity can be invoked to explain why that choice of law question is asked in the first place.

As compared to the invocation of comity, choice of law is a less controversial tool for establishing the relevance and applicability of foreign law. For Brainerd Currie, choice of law was 'an empty and bloodless thing', which 'proclaims the state's indifference to the result of the litigation', rather than declaring an overriding public policy.[140] Whilst it may be true that the state is, or should be, indifferent to the result of the litigation[141]—and for that reason choice of law is apolitical—choice of law might also be seen as having the lifeblood of comity flowing through it. For even Currie acknowledged that choice of law is a 'mild, tentative and self-denying policy', an imposition by the state of restraint upon its sovereignty so 'that the result of a case will not depend capriciously upon where it happens to be brought'.[142] Litigants' expectations ought not be frustrated by the unnecessary application of the *lex fori*.[143] The function of a choice of law rule permits the invocation of foreign law to assist the court to shape a remedy for the case in question.[144]

There has been a decline in the use of comity in the application of the act of state doctrine and an increase in reliance on choice of law. Some have argued that several of the earlier cases involving application of the act of state doctrine, which tended to include tortious actions or title to movables, would have been decided in the same way if courts had applied choice of law analysis instead.[145] Whilst the act of state doctrine was said to serve comity, English courts are increasingly turning to application of choice of law analysis over reliance on that doctrine.[146] Therefore, relocating comity in the anti-suit injunction jurisprudence to make room for more established conflict of laws methods would not be exceptional.

Although comity should not play a different role in the non-contractual context, it may have come to do so because the absence of choice of law analysis might mean that courts feel they are impinging on the sovereignty of other jurisdictions. Rix LJ's search for international standards in *Star Reefers* indicates as much. The now infamous statement of the Oberlandesgericht Düsseldorf that an English court's grant of an anti-suit injunction infringed German sovereignty was made in a case in which the injunction had been granted to protect the alleged exclusive jurisdiction of the London

[138] J Kerwin, 'A Choice of Law Approach for International Antisuit Injunctions' (2003) 81 TexasLRev 927, 935.

[139] *Star Reefers* (n 8) [31].

[140] B Currie, *Selected Essays on the Conflict of Laws* (Duke University Press 1963) 52.

[141] For present purposes, these propositions are examined outside Currie's governmental interests analysis.

[142] Currie (n 140) 52–3.

[143] *McKain v R W Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, 23, 50.

[144] ibid 57–58.

[145] Fawcett, Carruthers, and North (n 9) 118; Mann (n 95) 167.

[146] cf *Lucasfilm Limited v Ainsworth* [2011] UKSC 39, [2012] 1 AC 208 [69]–[86] and the discussion about whether the conflict of laws rules as regards tortious conduct abroad have undermined the older decisions. See also R Garnett, 'Foreign States in Australian Courts' (2005) 29 MULR 704, 717–18.

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Court of International Arbitration.[147] No doubt the protests of the Oberlandesgericht Düsseldorf would have been even more vocal if the case had concerned a non-contractual anti-suit injunction. But the role of comity is not to encourage deference to foreign courts. Rather, it is to ensure the implementation and application of tests dealing justly with the disposal of foreign elements.

The application of choice of law rules in the context of both contractual and non-contractual anti-suit injunctions should not require courts, in addition, to take into account allegations of indirect interference with foreign courts. In *Patel*, the case which initially provoked the argument on the relevance of choice of law,[148] the Indian court had made it clear that the conduct of the respondent, in bringing proceedings in Texas, was wrongful under Indian law.[149] Instead of refusing to grant relief because such conduct was not seen to infringe English law (mainly because England was not seen as the natural forum), the establishment of a wrong under Indian law may have led the English court to consider that an anti-suit injunction was the most appropriate remedy.[150] Applying choice of law would have accommodated any notions of comity. Moreover, even if comity is mistakenly viewed as a deferential notion, it would have been the application of Indian (and not English) law which had indirectly interfered with the Texas court. Hence, when courts have grounds to vindicate a contractual or non-contractual right, there is no room for deference and no need to proceed with caution.

2. Choice of law and equity

The narrow application of choice of law might also be traced to the hangover from the historical exclusion of choice of law from equitable doctrines. The treatment of equitable doctrines and remedies has presented challenges for choice of law, which, until recently, have been largely overlooked.[151] This is not the place to explore the complex relationship in detail. Broadly speaking, at one end of the spectrum equity traditionalists argue that when the court's equitable jurisdiction is invoked choice of law is not involved—so equity is applied without choice of law analysis.[152] This view is circumscribed by the possibility that foreign law may still be taken into consideration in the exercise of the court's discretion.[153] At the other end of the spectrum is the view that equitable doctrines themselves should be subject to choice of law analysis; that the equitable principles of the forum should be applied only if the forum's choice of law rules identify the *lex fori* as the *lex causae*.[154] Subscribing to this latter view raises a choice of law question, which according to the former view is unnecessary.

In the first substantial analysis of this area, Professor Tiong Min Yeo outlines three possible frameworks for analysing choice of law for equitable doctrines. The first is that equity has its own choice of law rules.[155] The second is that there is a single

[147] *Re Enforcement of an English Anti-Suit Injunction* [1997] ILPr 320 [13].

[148] Briggs, 'Pause for Thought' (n 7).

[149] *Patel* (n 29) 127–8.

[150] The Bangalore City Civil Court did not enjoy international jurisdiction over all respondents, so the final anti-suit injunction it had granted was not entirely effective: ibid 140.

[151] L Barnard, 'Choice of Law in Equitable Wrongs: A Comparative Analysis' [1992] CLJ 474 was a start, but did not consider anti-suit injunctions.

[152] See eg *Paramasivam v Flynn* (1998) 90 FCR 489 (Full Crt) 503.

[153] ibid.

[154] Yeo (n 10); R Garnett, *Substance and Procedure in Private International Law* (OUP 2012) [4.57], [4.63].

[155] Yeo (n 10) [2.10]–[2.12].

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choice-of-law system, but one which has distinct categories for equitable doctrines.[156] The third, which Professor Yeo favours, is that the division of common law and equity is only relevant after English law has been determined as the applicable law by choice of law rules.[157] The key argument supporting this latter framework is that drawing a distinction between legal and equitable wrongs perpetuates a domestic law distinction,[158] which is only relevant if choice of law analysis has identified that an issue should be determined by a legal system which draws that distinction.[159] The process of characterization is to bring together functionally similar issues, irrespective of historical origins or domestic classification.[160]

There has been a recent shift from the monotonous application of the *lex fori* to subjecting equitable claims to choice of law analysis, achieved by identification of the closest established category of characterization.[161] This mirrors the developments in choice of law in tort, where application of the *lex fori* to a foreign tort[162] was almost entirely displaced by statute creating a presumption of the application of the *lex loci delicti*.[163] These developments have increased the likelihood of the selection of foreign law as the *lex causae*.[164] An issue is not to be classified as procedural simply because it has the capacity to interfere with English notions of equity. Whilst some may prefer to have their equitable anti-suit 'pudding' first, the automatic invocation of equitable jurisdiction reverses the accepted order of analysis of a conflict of laws issue. This is an indulgence which is incompatible with the contemporary treatment of equitable doctrines in choice of law and ought no longer be condoned.[165]

B. Objections to Choice of Law

Some may contend that widening the scope of choice of law presents the greater threat to the anti-suit injunction's future, and will reject the thesis advanced with little, if any, hesitation. Aside from arguments concerning the nature of equitable injunctive relief, they might point to three key potential difficulties. In considering the strength of these objections, it ought to be kept in mind that selective application of choice of law, based on criticisms which might be levelled at choice of law as a whole, would represent an anomalous approach and unjustifiably normalize an exception.

First, warnings may be sounded that applying choice of law to non-contractual anti-suit injunctions would create 'unreasonable demands'[166] for a trial judge facing 'combat conditions'.[167] The reinforcement of procedural barriers might seem to stop the case for

[156] ibid [2.13]–[2.18].

[157] ibid [2.19]–[2.30].

[158] A Briggs, 'Decisions of British Courts Involving Questions of Private International Law' (2001) 72 BYIL 437, 443.

[159] Yeo (n 10) [2.19]–[2.20].

[160] ibid [2.19].

[161] See eg *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm); Collins, *Dicey, Morris and Collins* (n 21) [34-084]–[34-085].

[162] *Phillips v Eyre* (1870) LR 6 QB 1.

[163] Private International Law (Miscellaneous Provisions) Act 1995, section 11. This excludes defamation (section 13), and is subject to displacement (section 12).

[164] Garnett, *Substance and Procedure* (n 154) [3.27].

[165] Gummow J concedes that '[t]he hostile reaction in Europe to the anti-suit injunction . . . may indicate dangers of the universalist assumptions made by English equity': WMC Gummow, 'Foreword' in Yeo (n 10) vi.

[166] DF Cavers, *The Choice-of-Law Process* (University of Michigan Press 1965) 269.

[167] Similar criticisms were directed at Cavers following his argument for changes to the choice of law approach in the US: ibid 268.

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expansion of choice of law in its tracks, particularly in relation to *ex parte* applications where there might be no time to find an expert witness to plead foreign law as fact. But if the appearance of foreign law is not so inconvenient as to preclude the pleading and proof of foreign law in relation to contractual anti-suit injunctions, or indeed to any other case, this would seem to impose an unjustifiably different standard for non-contractual anti-suit injunctions. Allowing flimsy procedural barriers to compromise uniformity of outcome is to be discouraged.

A second objection might be that since the pleading and proving of foreign law is in the hands of the parties, that which ultimately determines the application of foreign law is outside the court's control and so widening choice of law would be futile. The failure of a party to plead or prove foreign law, or to establish it sufficiently, might result in the issue being referred back to the *lex fori*, which might be applied by default.[168] Yet in Australia and Canada, some courts have dismissed claims for failure to prove a constituent element of the case and rejected the presumption of the applicability of the *lex fori*.[169] This threat might be a method of smoking out a party's resistance to foreign law, by inducing a party to plead and prove foreign law when they otherwise simply would not do so for tactical reasons.[170] Under such an approach, care would need to be taken to ensure that parties are not punished for failing to ascertain difficult foreign laws, and so it may be necessary for the requirement to be circumscribed by the imposition of a test resembling reasonable efforts. The legislature might even consider intervention to enact legislation requiring courts to refer matters to the foreign court for it to determine.[171] The point is that parties should be given the opportunity to plead and prove foreign law where it is relevant. The risk that some litigants may fail to do so should not result in the blanket denial of the opportunity for all litigants.

Finally, an argument might be raised that it would be unattractive for applicants to be given yet more choice of choice of law. An applicant for an anti-suit injunction would probably plead his case as falling within as many categories as possible in order to advance his claim on the 'most advantageous' basis.[172] The accumulation of causes of action has been identified as 'leading to a menu of choice of choice of law rules',[173] whereby claimants, in circumstances where there is only one alleged breach of duty, are permitted 'to have several bites of the choice of law cherry', and defendants are given no right to characterize.[174] Once more, even if this is considered to be a valid criticism of choice of law, there is no reason why the problem of accumulation is any more acute here than in other areas of choice of law. Concerns that this will lead to comparing the quality of two or more laws are tenuous. The application of the law selected after characterization and choice of law is a separate matter, and following that selection the work of the conflicts process is done and has come to an end.[175]

[168] *Parker v TUI UK Ltd* [2009] EWCA Civ 1261 [22]–[23].

[169] *Damberg v Damberg* (2001) 52 NSWLR 492, 522; *The Ship 'Mercury Bell' v Amosin* (1986) 27 DLR (4th) 641, 650–52.

[170] cf Cavers (n 166) 273.

[171] In New South Wales, the Supreme Court rules have been amended to allow for this (with the consent of parties) and specific memoranda have been agreed with the courts of New York and Singapore: Supreme Court Act 1970 (NSW) section 125; Uniform Civil Procedure Rules 2005 (NSW) rr 6.42–6.45; JJ Spigelman, 'Proof of Foreign Law by Reference to the Foreign Court' (2011) 127 LQR 208, 214–16.

[172] *Coupland v Arabian Gulf Oil Co* [1983] 1 WLR 1136 (CA) 1153.

[173] A Briggs, 'Choice of Choice of Law' [2003] LMCLQ 12, 15.

[174] ibid.

[175] ibid 31.

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C. Choice of Law Rules

1. Rome I and Rome II

If no workable choice of law rule is identifiable, then it might be undesirable to interfere with the status quo. The natural forum requirement would then represent the most rational extant alternative to choice of law—a surrogate form of choice of law rule.[176] However, if the relevance of choice of law is accepted, it necessarily follows that there is a situation 'involving a conflict of laws', which triggers the application of Rome II.[177] The case for widening the application of choice of law in the non-contractual context does not necessarily depend on Rome II, but if the principle is accepted, courts must follow the process it specifies.

In cases 'involving a conflict of laws' in respect of contractual obligations,[178] there is no question that the first port of call is Rome I, application of which does not depend upon any prior application of the domestic law on characterization.[179] Arbitration agreements and agreements on choice of court are expressly excluded from Rome I,[180] although since such agreements might be viewed as being different from the contractual promise itself, choice of law for the contractual right may not be excluded from Rome I after all.[181] If they are not seen as different, then there is no bar to the application of common law choice of law rules to the grant of contractual anti-suit injunctions. The existing choice of law rule, directing its inquiry towards the proper law of the obligation,[182] remains entirely sensible.

Now, if it is accepted that Rome I must be considered before any application of the common law conflict of laws in the context of contractual anti-suit injunctions, it follows that the same must go for Rome II in many, but not all, non-contractual contexts.[183] Viewing a non-contractual anti-suit injunction as the exercise 'of an equitable power framed in statutory form' might make it 'easier' to suggest that the injunction is a procedural matter 'with the result that no choice of law difficulties arise'.[184] The issue, however, is not how to make life easier, but is a question of principle. Allowing a right to masquerade as a remedy, simply in order to make life less onerous, not only goes against the trend towards narrowing the range of issues classified as procedural;[185] it represents a less than principled approach.

Before Rome II, two possible choice of law rules for non-contractual anti-suit injunctions were mooted. The first possibility is the application of the law of the place where the wrong was committed,[186] on the basis that concepts of vexation and oppression might be seen as analogous to the equitable wrong of wrongful litigation,[187] or to the delict of abuse of rights.[188] On this approach, an obligation not to sue would only be found to exist if that is the effect of the wrong under the foreign law. The second possibility is the application of the law which has the closest connection to the claim,

[176] Briggs and Rees (n 19) [5.43].
[177] Rome II art 1(1).
[178] Rome I art 1(1).
[179] *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825 [43].
[180] Rome I art 1(2)(e).
[181] Briggs, *Agreements on Jurisdiction* (n 30) [4.08].
[182] *OT Africa Line* (n 5) [73].
[183] As is explored below, injunctions granted to protect the processes of the forum do not fall within the scope of Rome I.
[184] Raphael (n 9) [4.08].
[185] Garnett, *Substance and Procedure* (n 154) [4.63].
[186] Briggs, 'Pause for Thought' (n 7) 93–94; Briggs, 'Complex World' (n 23) 242–43.
[187] Briggs, 'Pause for Thought' (n 7) 93–94.
[188] Yeo (n 10) [8.87].

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which might also be phrased as the law with the 'closest and most real connection'.[189] It is notable that Rome II incorporates elements of both suggestions.

If the existence of substantive rights is recognized, it cannot be said that choice of law in respect of those rights is excluded from the scope of Rome II on the basis that the anti-suit injunction is a 'protective measure' falling with Article 31.[190] Instead, the right not to be sued reflects precisely the sort of '''fault'' based remedial concept',[191] which Rome II is intended to capture under the broad definition of tort/delict contained in Article 4(1). There is an issue concerning the connecting factor of 'damage' in Article 4 (1),[192] because the applicable law is that of the country in which the damage occurs, irrespective of where the event, or indirect consequences of the event, that gave rise to that damage occurred. In the context of wrongful litigation, this seems to point away from the forum and towards the place of the 'immediate effect' of the conduct in bringing proceedings.[193] That said, if proceedings are pending between the same parties in the forum at the time of the commencement of the foreign proceedings, the parties may be said to be in a 'pre-existing relationship', which then triggers the applicability of the *lex fori* by reason of Article 4(3). This is similar to the result of applying the law which has the closest connection to the claim. Finally, Rome II seems also to apply to 'single forum' cases, because the remedy in question is said only to be found in the foreign court.[194]

As Rome II is now in force, arguments levelled against the content of suggested choice of law rules must fall on deaf ears. Fears that applying the law of the place where the wrong was committed, or the law which has the closest connection to the claim, might 'wreak havoc' by leading to the application of the law of the place where proceedings were being brought (and the alleged likelihood that this would 'mean that no relevant ''wrong'' had been committed')[195] are predicated on a refusal to accept the relevance of foreign law. Further, where foreign law is selected as the applicable law, and under that foreign law no right has been breached nor wrong committed, allowing that conclusion to stand is preferable to the manipulation of comity in order to allow courts to bestow rights and duties on parties which they may not have. As such, if the application of choice of law is accepted in principle, the mandatory application of Rome II is not entirely regrettable.

2. The lex fori

Rome II may nevertheless remain inapplicable in some non-contractual contexts, because the grant of an anti-suit injunction to protect the judicial processes of the forum might be considered to be a form of ancillary relief. If choice of law does not apply to ancillary measures, then the *lex fori* applies by default.[196] When protecting the processes of the court in circumstances where those processes remain engaged, an anti-suit injunction is not granted to vindicate any substantive right, but to assist the

[189] Briggs, 'Pause for Thought' (n 7) 94.
[190] Rome II art 1(3). See also Raphael (n 9) [4.09].
[191] *Turner* (n 16) [24].
[192] A Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (OUP 2010) [4.109]–[4.111].
[193] ibid [4.36]–[4.45], [4.109].
[194] ibid [4.110]–[4.111]. See also *Masri* (n 4) [56].
[195] Raphael (n 9) [4.07].
[196] A Briggs, 'Conflict of Laws and Commercial Remedies' in A Burrows and E Peel (eds), *Commercial Remedies: Current Issues and Problems* (6th edn, OUP 2003) 284–86.

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regulation of the course of the trial.[197] Even if an ancillary measure is seen as vindicating a right arising from the engagement of those processes, it is not a remedy for the breach of a contractual or non-contractual obligation, so the measure does not fall within the scope of Rome I or Rome II.[198] This conclusion might be criticized as drawing an impractical distinction between the provisional vindication of a substantive right as against the vindication of a right arising from the trial process.[199] The response to this criticism is that there is no room to argue that a choice of law problem arises, because the context here is purely procedural and does not concern rights. When the English court acts to protect its processes, it is for English law to determine the scope and necessity of that protection,[200] and the injunction is merely a form of ancillary relief.

Australian and Canadian courts have reappraised the approach to classifying issues as procedural or substantive in order to narrow the scope of matters to those which truly pertain to procedure.[201] As with taking a wide approach to procedure and slavish adherence to the notion *lex fori regit processum*, taking a wide definition of cases which concern protection of the processes of the forum tends to compromise uniformity of outcome.[202] It might also encourage remedy shopping. Instead, an 'enlightened' *lex fori* should limit its own application to circumstances where it is absolutely essential that it be applied unopposed.[203] Protection of the judicial processes of the forum is one such circumstance. In all other circumstances, there does not appear to be any need for the court to protect its processes from a party's conduct. Whilst applying the *lex fori* unopposed might appear inconsistent with the arguments for widening the application of choice of law, focusing on a narrower category of cases which are truly considered to engage the need for the court to protect its processes ultimately means it is likely that a far greater number of cases will be subject to choice of law analysis. *Liverpool (No 1)* is a clear example of the court legitimately acting to protect its processes, because those processes remained engaged. In *Masri* the court's processes were no longer engaged, and in *Star Reefers* they never had been engaged, so choice of law would have been relevant in both of these instances.

3. *Form of relief*

A remedy granted to vindicate a private right is a 'measure designed to prevent or terminate injury or damage', falling within Article 15(d) of Rome II and thus is governed by the law of the obligation.[204] The remedy sought must simply be 'within the limits conferred by the forum's procedural law',[205] which in England is the statutory power to grant an injunction. It is also possible that damages may be a more appropriate remedy, if that is what the law of the obligation would point towards, but this remains

[197] ibid 285.
[198] A Rushworth, 'Remedies and International Private Law' (D Phil Thesis, University of Oxford 2010) [7.68].
[199] ibid [7.69].
[200] Garnett, *Substance and Procedure* (n 154) [4.63].
[201] *Pfeiffer v Rogerson* (2000) 203 CLR 503 [97], [133]; *Tolofson v Jensen* (1994) 120 DLR (4th) 289, 321. See further Garnett, *Substance and Procedure* (n 154) [2.17]–[2.50].
[202] Garnett, *Substance and Procedure* (n 154) [2.08].
[203] O Kahn-Freund, *General Problems of Private International Law* (Sijthoff 1976) 227–31.
[204] Garnett, *Substance and Procedure* (n 154) [10.16].
[205] Rome II art 15(d).

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subject to the forum's procedural limits.[206] The result is that, even after the choice of law process has come to an end, if foreign law has been selected by that process, then that foreign law remains a relevant consideration in tailoring a remedy, or considering the appropriateness of damages, for the case in question.

V. CONCLUSION

The main obstacle to widening the application of choice of law to non-contractual anti-suit injunctions is resistance to narrowing the application of the *lex fori* where there is a risk that foreign law might be selected over it. Aside from this resistance and the embryonic state of the relationship between choice of law and equitable doctrines, one explanation for the absence of choice of law in the non-contractual context has been the failure to narrow the grounds on which courts may act to protect their processes and grant an anti-suit injunction as a form of ancillary relief. Drawing a clearer distinction between such relief and cases concerning private rights confirms the role which should be played by Rome II viz. non-contractual rights. The attempts to promote comity by applying the *lex fori*, while paying lip service to comity, have done the anti-suit injunction more harm than good, as evidenced by the CJEU's pejorative view of the remedy. Applying Rome II to give a potential role to foreign law better reflects the notion of comity as it ought to be understood, as an expression of justice in cases involving foreign elements. Narrow application of choice of law is also inconsistent with the narrowing of the default application of the *lex fori*. Worse still, the status quo strengthens perceptions of England as a haven for remedy shoppers.

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[206] R Plender and M Wilderspin, *The European Private International Law of Obligations* (3rd edn, Sweet & Maxwell 2009) [14.036]–[14.047].

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