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Rethinking the scope of anti-suit injunctions

*Dr Filip Šaranović **

ABSTRACT

This paper argues that the current scope of English anti-suit injunctions risks illegitimate exercise of extraterritorial jurisdiction and should be recalibrated through two underused lenses: (i) lessons from worldwide freezing injunctions and (ii) philosophical accounts of private international law. It distinguishes the anti-suit injunction's 'substantive scope' (whether an equitable ground exists) from its 'international scope' (whether England has legitimate regulatory authority in the light of competing foreign interests). Building on the principle of 'equity equality', the paper reframes anti-suit injunctions as procedural devices aimed at maintaining a level playing field in international litigation. It critiques recent English case law for unnecessarily expanding the scope of relief and sidelining the principle of comity. It proposes tighter, theory-grounded 'checks and balances': the use of the concept of 'subject-matter jurisdiction', insisting on the enforceability of relief as an essential pre-condition, and strengthening protection for respondents through fortified cross-undertakings in damages. The paper calls for an international systemic approach to delimiting the international scope of anti-suit injunctions.

Keywords: Conflict of laws, anti-suit injunction, freezing injunction, principle of comity, subject-matter jurisdiction, justice pluralism

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1 Introduction

In commercial transactions, the protection of party autonomy afforded by anti-suit injunctions is one of the key attractions for entering into an exclusive jurisdiction agreement in favour of English or Singaporean courts, or alternatively a London or Singapore-seated arbitration. Nevertheless, the frequency of reported English judgments on anti-suit injunctions in the last two years should encourage both academics and practitioners to think about the legitimate scope of anti-suit injunctions.¹ Compared with other types of equitable injunctive relief, anti-suit injunctions have attracted greater controversy because their indirect interference with the adjudicatory jurisdiction of other states is more pronounced.² This paper will explore the overarching research question of whether the current scope of anti-suit injunctions entails any illegitimate exercise of extraterritorial jurisdiction by the English courts. This question has been considered, directly or indirectly, by numerous authors in the past.³ This paper differs in two main respects. First, it draws upon the author's research on the legitimate boundaries of worldwide freezing orders.⁴ Indeed, one of the objectives of this paper is to demonstrate that, despite their differences, analysis of the scope of worldwide freezing orders provides useful lessons for anti-suit injunctions. Second, this paper draws upon some of the academic literature on the philosophical foundations of private international law. It deliberately seeks to avoid a purely doctrinal approach to the research question.

This paper will seek to show that the answer to the research question depends on one's view of ostensibly basic yet fundamental questions. First, what is the true purpose of anti-suit injunctions? Second, what is the true purpose of private international law? The first question makes it necessary to consider the extent to which (if any) the scope of anti-suit injunctions

¹ See, inter alia, *Boluda Towage Rotterdam BV v Elise Tanschiffahrt KG* [2024] EWHC 1329 (Admlty); *UniCredit Bank v RusChemAlliance LLC* [2024] UKSC 30, [2025] AC 117; *UniCredit Bank v RusChemAlliance LLC* [2025] EWCA Civ 99, [2025] 1 WLR 2321; *MSC Mediterranean Shipping Co SA v InterGlobal Technologies Ltd* [2025] EWHC 1464 (Comm); *Star Hydro Power v National Transmission and Despatch Co* [2025] EWCA Civ 928.

² For comparisons with freezing injunctions and Norwich Pharmacal orders, see Filip Šaranović, *Freezing Injunctions in Private International Law* (Cambridge University Press, 2022) ch 7.

³ See, inter alia, Richard Fentiman, *International Commercial Litigation* (2nd edn, Oxford University Press 2015) ch 16; Thomas Raphael KC, *The Anti-Suit Injunction* (2nd edn, Oxford University Press 2019); Justice Belinda Ang Saw Ean, 'Anti-Suit Injunctions in Maritime Disputes: A Trend that Threatens to be Out of Control?', CML Working Paper Series, No 21/03, December 2021 <<https://law.nus.edu.sg/cml/publications/>>.

⁴ F Saranovic, 'Jurisdiction and Freezing Injunctions: a Reassessment' (2019) 68 ICLQ 639.

ought to be shaped by factors outside the realms of private international law. A selection of recent English cases will be used to illustrate the argument that the current scope of anti-suit injunctions ought to be restricted to provide greater protection against encroachment upon the regulatory authority of the foreign courts.

2 The current scope of anti-suit injunctions: the analytical tools

2.1 Substantive scope vs international scope

Any discussion of the scope of injunctive relief is more precise if we distinguish between the injunction's substantive and international scope.⁵ Substantive scope is a useful label to enable us to neatly separate the question of whether, in a given case, the nature of the respondent's conduct merits the need for an order restraining foreign proceedings. In other words, the substantive scope is determined by the ability to find an 'equitable ground' for granting relief.⁶ For example, one equitable ground for granting relief is relitigation in the foreign court of a legal issue which had already been determined by the English court.⁷

The international scope concerns the requirements for establishing the court's power to regulate the respondent's conduct in a cross-border context. It involves analysis of the possibility that a foreign court may also have an interest in regulating the respondent's conduct, either on an exclusive or non-exclusive basis. Whether the English court or the foreign court (or both) has regulatory authority in relation to the respondent's conduct of proceedings should be viewed as a higher-order question in comparison to whether the application for the injunction meets the jurisdictional requirements under English law. The question of regulatory authority transcends national law and public policy. It is concerned with an international allocation of adjudicatory jurisdiction, legislative jurisdiction, and enforcement jurisdiction in accordance with certain values.⁸ Understandably, there is

⁵ On the use of this distinction in the context of freezing injunctions, see F Saranovic, 'Rethinking the Scope of Freezing Injunctions' (2018) 37(3) CQJ 383.

⁶ On the importance of the distinction between grounds (in equity) for granting an anti-suit injunction and the jurisdiction of the English court, see generally Fentiman (n 3).

⁷ See, for example, *Masri v Consolidated Contractors International (UK) Ltd (No 3)* [2008] EWCA Civ 625, [2009] QB 503; *Royal Bank of Scotland Plc v Hicks* [2011] EWHC 287 (Ch).

⁸ On the distinction between adjudicatory, legislative, and enforcement jurisdiction, see AT Von Mehren and DT Trautman, 'Jurisdiction to Adjudicate: A Suggested Analysis' (1966) 79 Harv L Rev 1121.

disagreement among commentators on both private and public international law about what these values should be and their order of priority.⁹

2.2 Existence vs exercise of the court's jurisdiction

The presence of any foreign element (such as a foreign respondent) inevitably raises several distinct yet interrelated questions. Does the court have a valid foundation for jurisdiction to grant the relief? We can label this the issue of the *existence* of jurisdiction to grant the injunction. If the court does have jurisdiction, should it exercise its jurisdiction as a matter of discretion? We can label this as the 'discretionary stage' or the issue of *exercise* of jurisdiction to distinguish it from the preceding question relating to the existence of jurisdiction.¹⁰ As far as anti-suit injunctions are concerned, the need for the discretionary stage is rooted, *inter alia*, in the equitable origins of injunctive relief in English law.¹¹ Moreover, whenever an English court needs to determine a question of adjudicatory jurisdiction as a matter of common law,¹² the doctrine of *forum (non) conveniens* comes into play.¹³ The content and scope of the discretionary stage can have a knock-on effect on the international scope of anti-suit injunctions. While the application of the principle of comity has either been ignored completely or treated as part of the discretionary stage,¹⁴ it is suggested that the courts should consider whether comity could play a more prominent and effective role by being treated as a matter of *existence* rather than *exercise* of the court's jurisdiction.

⁹ Ralf Michaels, 'Private International Law and the Question of Universal Values', in Franco Ferrari and DP Fernández Arroyo (eds), *Private International Law: Contemporary Challenges and Continuing Relevance* (Edward Elgar Publishing 2019) ch 5. The identification of these values will be addressed below when dealing with the purpose of private international law.

¹⁰ On the distinction between existence and exercise of jurisdiction, see Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press 2009).

¹¹ The discretionary stage is also mandatory as a result of s 37(1) of the Senior Courts Act 1981 which provides that the High Court 'may [...] grant an injunction [...] in all cases in which it appears to the court to be just and convenient to do so'.

¹² There is no room for discretion in cases falling under the scope of certain international conventions (e.g., where an English court has jurisdiction pursuant to Art 5 of the Hague Convention on Choice of Court Agreements 2005).

¹³ See, generally, Ardavan Arzandeh, *Forum (Non) Conveniens in England: Past, Present, and Future* (Hart Publishing 2018).

¹⁴ See, for example, the Court of Appeal's judgment in *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14, [2012] 1 Lloyd's Rep 376, where Rix LJ emphasised the importance of comity at the discretionary stage. By contrast, the first instance judgment of Teare J in the same case completely ignored considerations of comity: *Star Reefers Pool Inc v JFC Group Co Ltd* [2010] EWHC 3003 (Comm).

2.3 Categorisation of anti-suit injunctions: a quest for clarity

There is no consensus among academic commentators on the categorisation of anti-suit injunctions. The absence of consensus may reflect differing views about the legitimate scope of anti-suit injunctions. The English courts are also highly reluctant to adopt any rigid categories because, in their view, this would be inherently incompatible with the anti-suit injunction's core equitable characteristic that its exercise should be flexible and adapt to any circumstances when the 'ends of justice' require it.¹⁵ In *Castanho v Brown & Root (UK) Ltd*,¹⁶ the House of Lords famously underlined the broad scope of relief by stating that 'the injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice'.¹⁷ Nevertheless, the recent cases seem to confirm that some judges in the English courts are prepared to treat contractual anti-suit injunctions as a distinct category.¹⁸ Contractual anti-suit injunctions usually refer to orders issued to restrain foreign proceedings brought in breach of an exclusive jurisdiction agreement or an arbitration agreement. The landmark case on contractual anti-suit injunctions was *Donohue v Armco*,¹⁹ where Lord Bingham stated that:

If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum.²⁰

¹⁵ *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871 (PC). On the need for flexibility and the evolving scope of equitable injunctions, see *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24, [2023] AC 389.

¹⁶ [1981] AC 557 (HL).

¹⁷ *Ibid*, 573.

¹⁸ See, for example, the judgment of Foxton J in *JP Morgan Securities Plc v VTB Bank PJSC* [2025] EWHC 1368 (Comm).

¹⁹ *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 Lloyd's Rep 425.

²⁰ *Ibid*, [24].

Significantly, anti-suit injunctions extend further than the so-called ‘contractual cases’ and include, *inter alia*, cases where foreign proceedings are deemed to be ‘vexatious or oppressive’. For example, a court may grant an anti-suit injunction if the procedural law applicable in the foreign proceedings would prejudice the applicant to such an extent that it would amount to a denial of access to justice.²¹ When discussing the scope of anti-suit injunctions, it is convenient to refer to ‘non-contractual anti-suit injunctions’ for any cases which do not involve a breach of an exclusive jurisdiction or arbitration agreement.²² At the same time, categorisation of relief as ‘non-contractual’ runs into potential difficulties and may create confusion because the English courts have recently used the following three categories: ‘wholly contractual’, ‘quasi-contractual’ and ‘vexatious and oppressive’.²³ In a maritime context, a classic example of a quasi-contractual anti-suit injunction is an order used to restrain a third party (such as a victim of marine pollution) who is making a direct action claim against a Protection & Indemnity (P&I) Club allegedly in breach of an exclusive jurisdiction or arbitration agreement between the shipowner and the Club.²⁴

According to Fentiman, anti-suit injunction cases falling within the vexatious and oppressive category could be explained as involving a breach of the applicant’s procedural rights.²⁵ This is in contrast to wholly contractual cases (and potentially quasi-contractual cases) where there is a breach of the applicant’s substantive (contractual) rights. In my view, this distinction between substantive and procedural rights could be useful when considering the legitimate boundaries of relief. It raises the question of whether the rules of private international law respond differently to conflicts of procedural rules than to conflicts of substantive law. If such conflicts ought to be treated differently,²⁶ then a case can be made for differences in the

²¹ *Société Nationale Industrielle Aérospatiale* (n 15).

²² On the broad range of cases falling within the category of non-contractual anti-suit injunctions, see Raphael (n 3).

²³ *JP Morgan Securities Plc* (n 18).

²⁴ See, for example, *QBE Europe SA/NV v Generali Espana de Seguros y Reaseguros* [2022] EWHC 2062 (Comm), [2022] 2 Lloyd’s Rep 481. For a detailed examination of the scope of quasi-contractual anti-suit injunctions see Ang (n 3).

²⁵ Fentiman (n 3).

²⁶ For an argument that the conflict of procedural rules is ‘a second order conflict’ in comparison to the conflict of substantive laws, see HL Buxbaum, ‘Territory, Territoriality, and the Resolution of Jurisdictional Conflict’ (2009) 57 Am J Comp L 631, 644.

international scope of anti-suit injunctions depending on whether we are dealing with the applicant's substantive or procedural rights.

2.4 Equipage equality and the purpose of anti-suit injunctions

Given the availability of relief in wholly contractual, quasi-contractual, vexatious and oppressive categories, it is clear that the purpose of an anti-suit injunction is not limited to the protection of party autonomy. It would also be too narrow to describe the purpose of relief as preventing an 'abuse of process of the court'.²⁷ A respondent can be restrained even in circumstances where foreign proceedings are not inherently illegitimate. Even if we were to adopt the usual, broad-brush explanation from the case law that anti-suit injunctions are designed to prevent injustice,²⁸ it leaves us with the difficult question of identifying the injustice at which the injunction is directed against. By way of an attempt to clarify the purpose of anti-suit injunctions (and then inform our discussion about what their scope should be), an analogy can be made with freezing injunctions. It has been demonstrated that the theoretical foundations of freezing injunctions lie in the principle of 'equipage equality'.²⁹ This principle holds that rules of civil procedure should be designed to ensure, as far as practicable, that parties are equally equipped to engage in adversarial litigation.³⁰ Although the principle of equipage equality has its origins in the North American literature on civil procedure, it should not be seen as unique to the United States. One of the 'overriding objectives' of the English Civil Procedure Rules is stated as 'ensuring that the parties are on an equal footing'.³¹

As all types of equitable injunctions are an integral part of civil procedure in common law jurisdictions, the principle of equipage equality should be seen as underpinning anti-suit injunctions. In other words, just like freezing injunctions, the primary purpose of anti-suit relief ought to be seen as establishing a level playing field in international litigation. It is

²⁷ T Hartley, 'Comity and the Use of Antisuit Injunctions in International Litigation' (1987) 35 Am J Comp L 487, 490.

²⁸ *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (HL), 133; *Amchem Products Inc v British Columbia (Workers Compensation Board)* (1993) 102 DLR (4th) 96 (Sup Ct Can), 119.

²⁹ Saranovic (n 2) ch 3.

³⁰ WB Rubenstein, 'The Concept of Equality in Civil Procedure' (2002) 23 Cardozo LR 1865, 1867-1868. See also JL Mashaw, 'The Supreme Court Due Process Calculus for Administrative Adjudication in *Matthews v. Eldridge*: Three Factors in Search of a Theory of Value' (1976) 44 U Chi L Rev 28; JL Mashaw, 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 BU L Rev 885.

³¹ The English Civil Procedure Rules, Part 1, r.1.1(2)(a).

submitted that one of the main benefits of adopting this perspective is for the English courts to finally move away from a predominantly one-dimensional focus on the conduct of the respondent. The importance of equipage equality in the context of high-value international commercial litigation is that equitable injunctions can be deployed as a tactical weapon to front-load and inflate the costs of litigation.³²

The overly narrow focus of the English courts on identifying the unjust element in the respondent's conduct was evident in Teare J's decision to continue the injunction in respect of Russian proceedings in *Star Reefers*.³³ The applicants were shipowners, and the underlying dispute was about the validity of the contract of guarantee with the respondent Russian company. The alleged contract of guarantee did not contain any provisions on jurisdiction and governing law. Teare J treated the Russian respondent's conduct as vexatious and oppressive in circumstances where: (i) there was no breach of a exclusive jurisdiction or arbitration agreement; (ii) the foreign proceedings were commenced first by the respondent; (iii) the respondent had a legitimate juridical advantage in seeking to litigate in the Russian court; and (iv) the respondent had not submitted to the English court's jurisdiction. Teare J's decision was overturned by the Court of Appeal, with Rix LJ famously stating that the English court's readiness to grant an injunction in such circumstances amounted to 'egoistic paternalism'.³⁴ The Court of Appeal sent a strong message to the lower courts to exercise greater care to avoid unjustified interference with the jurisdiction of foreign courts. It was clear from the guidance of the Court of Appeal that Teare J had failed to make a clear distinction between the requirements concerned with the *substantive* scope and those concerned with the *international* scope of relief. Even where the court is persuaded that the applicant satisfied one of the equitable grounds for granting relief, that is not the end of the matter. The first instance judgment ignored the need to go through the requirements (such as the principle of comity) arising under the discretionary stage.

The Court of Appeal's judgment in *Star Reefers*³⁵ is a rare example of the appellate courts taking positive action to prevent the illegitimate exercise of extraterritorial jurisdiction. The

³² R Fentiman, 'Theory and Practice in International Commercial Litigation' (2012) 2 Int'l J of Procedural Law 235.

³³ Above (n 14).

³⁴ Ibid, [39].

³⁵ Above (n 14).

guidance provided by Rix LJ on separating the substantive and international issues is consistent with the anti-suit injunction's underlying purpose of establishing a level playing field in international litigation. There was nothing inherently illegitimate about the commencement of Russian proceedings, and the applicant shipowner failed to protect itself from the risk of multiple proceedings. Anti-suit injunctions should not be granted to provide assistance to those who make a bad bargain and subsequently make an attempt to deprive the respondent of a legitimate advantage in the foreign court. It is submitted, however, that the more recent developments in the English case law, such as the Supreme Court's decision in *Unicredit Bank*,³⁶ suggest that the guidance from *Star Reefers* has not prevented further expansion of the scope of anti-suit injunctions.

2.5 Checks and balances: a cross-undertaking in damages

An anti-suit injunction should not simply be viewed as an important remedy to protect an applicant from a respondent's unscrupulous conduct in the foreign court. It is equally important to ensure that there are checks and balances on applicants' ability to put illegitimate pressure on respondents with the aim of settling the case on a favourable basis.³⁷ These checks and balances are especially (but not exclusively) important in the non-contractual category because they involve a higher risk of unmeritorious applications. Where an interim (as opposed to a final) injunction is sought, one form of protection for respondents is the cross-undertaking in damages. Considering that applicants for an anti-suit injunction are frequently foreign parties, the courts should insist on fortification of the cross-undertaking as a precondition of any application for an anti-suit injunction. Such fortification becomes crucial in cases where the applicant does not have sufficient assets within the court's jurisdiction.³⁸ The experience from freezing injunction cases suggests that the courts should retain some, albeit very limited, degree of discretion on whether to dispense with the requirement for fortification. When an opportunity arises for the English courts to consider a default requirement for fortification, caution needs to be exercised before endorsing the

³⁶ Above (n 1).

³⁷ Steven Gee, *Commercial Injunctions* (7th edn, Sweet and Maxwell 2022) [12-035].

³⁸ See F.14.3 of *The Commercial Court Guide, The Business and Property Courts of England & Wales* 11th edn (HM Courts & Tribunal Service 2022, rev July 2023). For similar discussion on the importance of balancing the rights of the parties in the context of freezing injunctions see AAS Zuckerman, 'Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies' (1993) 109 LQR 432.

broad approach enunciated in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd*³⁹ that ‘justice, convenience and fairness might well justify an injunction even where the cross-undertaking is frail’.⁴⁰ A hypothetical example can illustrate the potential difficulty of a strict requirement to fortify a cross-undertaking in damages. What if the applicant is a state-appointed receiver of an insolvent foreign company seeking to obtain injunctive relief against a former company director? The receiver has a good arguable case that the former director misappropriated the company’s assets. The former director has deliberately commenced proceedings in a foreign court solely to create delay and inflate costs. A state-appointed receiver of a foreign company is likely to face difficulties in fortifying the cross-undertaking even if the application for an injunction is not motivated by tactical considerations.

3 Private international law and the international scope of anti-suit injunctions

3.1 The benefits of a theoretical approach

The reason for exploring the purpose of private international law is to gain deeper insight into the legitimate scope of anti-suit injunctions. There is no doubt that, historically, the English courts have been proactive in imposing requirements to alleviate concerns about the extraterritorial reach of anti-suit injunctions. Perhaps the most prominent example is the judgment of the House of Lords in *Airbus Industrie GIE v Patel*.⁴¹ The case concerned an application by Airbus to restrain proceedings in Texas in circumstances where the only connection with England and Wales was that the respondents were British citizens, the relatives of the victims of an aircraft crash in India. Lord Goff introduced a novel requirement by stating that:⁴²

[A]s a general rule, before an anti-suit injunction can properly be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction in cases of the kind under consideration ..., comity requires that the English forum should have

³⁹ [1973] QB 609 (CA).

⁴⁰ Ibid, 626.

⁴¹ Above (n 28).

⁴² Ibid, 138.

a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails.

Lord Goff's requirement of a sufficient interest or connection with the English court's territorial jurisdiction remains an important mechanism to reduce the possibility of illegitimate exercise of extraterritorial jurisdiction. It is suggested, however, that by taking a closer look at the purpose of private international law and drawing upon the lessons from freezing injunctions, the courts can go much further in promoting equipage equality and preventing illegitimate encroachment on the regulatory authority of foreign courts.

3.2 Plurality of values and the relevance of (public) international law

Historically, the most popular 'school of thought' has been the so-called 'national school' that private international law represents a set of rules which form part of national law and whose purpose is to avoid injustice and inconvenience that would result from subjecting cases with foreign elements to the same treatment as purely domestic disputes.⁴³ The national school rejects the 'internationalist school' view that public international law provides an external foundation for private international law.⁴⁴ The internationalist school is consistent with the seminal work of Mann.⁴⁵ He described the roots of jurisdictional law in territorial sovereignty and stated that:

All States have introduced rules of private international law and, indeed, a strong body of opinion asserts that every country is under a duty to have rules of private international law, that it would be a breach of an international duty if the *lex fori* applied in all circumstances.⁴⁶

⁴³ Michael Bogdan, *Private International Law as Component of the Law of the Forum* (Hague Academy of International Law 2012) 41.

⁴⁴ AL Strauss, 'Beyond National Law: The Neglected Role of International Law of Personal Jurisdiction in Domestic Courts' (1995) 36 Harv Int'l LJ 373.

⁴⁵ See Gerhard Dannemann, 'Jurisdiction and Private International Law: FA Mann's *Unvollendete?*' in Jason Allen and Gerhard Dannemann (eds), *FA Mann: The Lawyers and His Legacy* (Oxford University Press 2024) ch 6. See also FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 Recueil des Cours 1, 146; FA Mann, 'The Doctrine of Jurisdiction Revisited after Twenty Years' (1984-III) 186 Recueil des Cours 19 (reproduced in FA Mann, *Further Studies in International Law* (Clarendon Press 1990) ch 1).

⁴⁶ Ibid.

From my perspective, the debate about the relevance of public international law has been resolved by Mills's groundbreaking work on the confluence of public and private international law.⁴⁷ Mills effectively adopts a hybrid view, 'the international systemic perspective', that private international law is a system of international ordering administered by national courts.⁴⁸ This means that private international law is concerned with a multilateral set of rules relating to the justness of international legal ordering. Further support for a similar view that national legal systems should incorporate 'system-transcendant' principles about appropriate tolerance for the choices of other normative and political communities can be dated back to the important work of Singer in the United States.⁴⁹ Singer strongly argued that a legal system should refrain from adopting conflict of law rules that have the sole objective of promoting the goals of its national substantive laws. It is submitted that the international systemic approach represents the most convincing view of the purpose of private international law and its close relationship with public international law.

In my view, and with the benefit of the most recent literature on the philosophical foundations of private international law,⁵⁰ Mills' international systemic perspective could be utilised to develop what I would describe as 'the pluralist approach'. This approach would share Mills' promotion of 'justice pluralism' and subsidiarity as important values influencing the allocation of regulatory authority. It accepts Mills' main premise that public international law plays an important role in shaping the rules of private international law. The main departure from the international system perspective would be that the pluralist approach adopts a hierarchical system of values. Preservation of the diversity of national laws (both substantive and procedural) would sit at the top of the hierarchy. A strict adtoherence of the pluralist approach could, from one perspective, entail recognising that an anti-suit injunction is inherently incompatible with the primary purpose of private international law.

⁴⁷ Mills (n 10).

⁴⁸ Ibid, 5-6. See also A Mills, 'Rethinking Jurisdiction in International Law' (2014) 84(1) BYBIL 187, 188.

⁴⁹ JW Singer, 'Real Conflicts' (1989) 69 BU L Rev 1. My inspiration to use the term 'system transcendant' to describe principles from public international law (which can be applied in a top-down manner to inform the allocation of regulatory authority) comes from Thomas Raphael's discussion of 'the conflict of conflicts': see Raphael (n 3) ch 8.

⁵⁰ Roxana Banu, Michael S Green, and Ralf Michaels (eds), *Philosophical Foundations of Private International Law* (Oxford University Press 2024).

Some support for the pluralist approach could be found in Michaels's argument that private international law exists because the legal world is irreducibly plural: multiple substantive laws diverge yet continuously interact, creating conflicts that demand resolution.⁵¹ He emphasises that plurality operates on two levels. First, there is the familiar plurality of substantive laws. Second, and more destabilising, there is the plurality of conflict-of-laws regimes themselves: because private international law is mostly national law, each state decides conflicts from its own perspective, so the same cross-border case can be treated differently in different fora (including 'renvoi' scenarios). The result is that private international law cannot fully 'solve' legal multiplicity because the conflict reappears at a higher level. Michaels opines that plurality is not a defect to be eliminated but instead a condition enabling freedom and communication.⁵²

Whether we adopt the international systemic perspective or the pluralist approach, it is abundantly clear that the *international* limits of the English court's power to restrain a party by means of an anti-suit injunction cannot be established by exclusive reference to national law. To rely exclusively on national law would also amount to a complete conflation of the substantive and international scope of anti-suit injunctions. In the recent English case law on anti-suit injunctions, the most prominent example being the Supreme Court's judgment in *Unicredit Bank*,⁵³ there is no evidence of any serious attempt to reject the sharp distinction between private and public international law. That distinction is associated with the national school of thought, which, in my view, should be confined to the dustbin of history.

3.3 Concrete steps towards the international systemic approach: the case law

A further example of an outdated perspective (and a reflection of the influence of the national school) is that the in personam operation of anti-suit injunctions constitutes a valid justification for relying on personal jurisdiction over a respondent as the only mechanism to restrict the international scope of relief. The rejection of personal jurisdiction as a sufficient

⁵¹ Ralf Michaels, 'Private International Law and the Legal Pluriverse', *ibid*, ch 12.

⁵² Ralf Michaels, 'Private International Law and the Question of Universal Values' in Ferrari and Fernández Arroyo (n 9) ch 5.

⁵³ Above (n 1).

restriction was sealed by the Court of Appeal in *Masri*,⁵⁴ where Lawrence Collins LJ stated as follows:

[T]he mere fact that an order is *in personam* and is directed towards someone who is subject to the personal jurisdiction of the English court does not exclude the possibility that the making of the order would be contrary to international law or comity, and outside the subject matter jurisdiction of the English court.

This important passage from Lawrence Collins LJ represents the closest point we have reached in judicial recognition of the relevance of public international law principles as an external (or top-down) control over the exercise of extraterritorial jurisdiction. Lawrence Collins LJ opened the door to the adoption of the international systemic approach to private international law.

In the context of worldwide freezing injunctions, the application of Lawrence Collins LJ's guidance from *Masri* influenced some judges in the lower courts to take a visibly more restricted approach to the exercise of extraterritorial jurisdiction. The best example of this was Gloster J's judgment in *The Mahakam*.⁵⁵ In that case, the claimant shipowners obtained an arbitration award against the charterers (Heritage), a Panamanian company and a summary judgment against the guarantors (HIT), an Indonesian company. Heritage and HIT were part of the same group of companies as HSTPL, a Singaporean company. The claimant had no cause of action against HSTPL. Nevertheless, the claimant sought a *worldwide* freezing injunction against HSTPL in respect of the full amount of the judgment debt and the award against HIT and Heritage, respectively. Drawing upon the words of Lawrence Collins LJ in *Masri v Consolidated Contractors International (UK) Ltd (No 2)*,⁵⁶ Gloster J concluded that there was no 'subject matter jurisdiction' to grant relief in respect of HSTPL's foreign assets because of the absence of a sufficient connection with England.⁵⁷ The outcome was that the Commercial Court granted an injunction restricted to any assets within the court's territorial jurisdiction. It is important to note that, on the facts, HSTPL had submitted to the jurisdiction of the English court by failing to challenge the court's jurisdiction. Although the English court had personal jurisdiction over HSTPL (and a freezing injunction is generally regarded as

⁵⁴ *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2008] EWCA Civ 303, [2009] QB 450 [35].

⁵⁵ *Parbulk II AS v PT Humpuss (The Mahakam)* [2011] EWHC 3143 (Comm), [2011] 2 CLC 988.

⁵⁶ Above (n 54).

⁵⁷ *Ibid*, [95].

operating *in personam*), Gloster J was not prepared to exercise extraterritorial jurisdiction and to interfere with the regulatory authority of Singapore and other states in which HSTPL maintained its assets.

It is suggested that the English courts should impose some restrictions on the scope of anti-suit injunctions by implementing Lawrence Collins LJ's guidance from *Masri* and drawing upon the judgment of Gloster J in *The Mahakam*. Looking at the recent case law, however, there is no evidence that the English courts have utilised the concept of subject-matter jurisdiction to restrict the scope of anti-suit injunctions. In fact, the UK Supreme Court's recent decision in *Unicredit*⁵⁸ demonstrates that English courts are keen to expand the scope of extraterritorial injunctive relief. In *Unicredit*, the factual background was the construction of LNG and gas processing plants in Russia. RusChem agreed to pay, in stages, approximately €10 billion, including advance payments of around €2 billion to two German companies. RusChem made the advance payments to the contractor. Performance bonds issued by the applicant (UniCredit Bank) were payable on demand. These bonds were subject to English governing law, and Paris-seated ICC arbitration. RusChem made demands on UniCredit Bank for payment under the bonds. UniCredit refused to pay on the grounds that the payment was prohibited under EU sanctions. RusChem initiated proceedings against UniCredit before the Arbitrazh Court of St Petersburg and the Leningrad Region in Russia, seeking payment of €448 million under the bonds. UniCredit Bank applied for an anti-suit injunction restraining RusChem from continuing the Russian proceedings. The Supreme Court upheld the English courts' jurisdiction to grant a final anti-suit injunction restraining RusChem's Russian proceedings, notwithstanding that the parties' arbitration seat was Paris.

In my view, the Supreme Court in *Unicredit* could have discharged the injunction on the basis that the English court did not have subject matter jurisdiction because the French courts had supervisory jurisdiction over ICC arbitration seated in Paris. In a just system of international ordering, authority to grant equitable relief in support of French-seated arbitration should be properly allocated to the French courts rather than to the English courts. Support for such allocation of regulatory authority is found in s 1 of the Arbitration Act 2025,⁵⁹ which

⁵⁸ Above (n 1).

⁵⁹ C 4.

established a new statutory default rule that the law of the arbitration agreement is the law of the seat of arbitration, unless the parties expressly agree otherwise. This removes the previous common law presumption that the law of the main contract governed the arbitration agreement. Despite some important factual differences with *Star Reefers*⁶⁰ (the presence of the arbitration and governing law clauses), the English courts' liberal approach to the scope of an anti-suit injunction in *Unicredit Bank* could be seen as a regrettable example of what Rix LJ described as 'egoistic paternalism'.

3.4 The role of the principle of comity: a useful restriction?

We have already seen that Lawrence Collins LJ, in *Masri*,⁶¹ made reference to comity in urging the lower courts to adopt a more cautious approach to the international scope of equitable injunctions. Practitioners would probably try to point out that the need to consider comity indicates that the courts are already taking sufficient measures to identify and eliminate any exorbitant exercise of jurisdiction. Whether comity is a sufficient and useful restriction on the international scope of relief requires a closer examination of its own scope and interpretation by the English courts.

The mainstream view, encapsulated in *Dicey*, appears to be that contractual anti-suit injunctions do not involve any infringement of comity.⁶² It appears that any indirect interference with the sovereignty of foreign states is considered legitimate, given the superior status of the principle of party autonomy in private international law.⁶³ Even on the assumption that the mainstream view is correct, the exact boundaries of contractual anti-suit injunctions (and the cases in which the principle of party autonomy trumps comity) are open to debate. In *QBE Europe*,⁶⁴ Foxton J took the view that, as far as considerations of comity are concerned, the quasi-contractual anti-suit injunctions should be treated in the same manner as the wholly contractual injunctions. He stated that '[comity] is of little or no weight under

⁶⁰ Above (n 14).

⁶¹ Above (n 1).

⁶² Lawrence Collins and Jonathan Harris (gen eds), *Dicey, Morris & Collins on The Conflict of Laws* (16th edn, Sweet & Maxwell 2022) [12-152].

⁶³ *Enka Insaat ve Sanayi AS v OOO 'Insurance Company Chubb'* [2020] UKSC 38, [2020] 1 WLR 4117 [184]; *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725, [2010] 1 WLR 1023 [50].

⁶⁴ Above (n 26).

the *Angelic Grace*⁶⁵ framework ... which I am satisfied applies here. That is equally the case when ASI relief is sought on a quasi-contractual basis'.⁶⁶ Reliance was placed on *The Yusuf Cepnioglu*,⁶⁷ another case involving a quasi-contractual injunction sought by a P&I Club to restrain direct action proceedings in the Turkish courts. In that case, Longmore LJ explained the rationale for dispensing with comity by observing that 'invocation of comity in cases of this kind is not particularly apposite because it is never clear which country should give way to which'.⁶⁸ The problem described by Longmore LJ is what Raphael has referred to as 'the conflict of conflicts'.⁶⁹ In my view, the only way to reconcile such conflicts is to step back from the national law conceptions of justice and adopt an international systemic approach to the purpose of private international law. Such an approach promotes the values of justice, pluralism, and subsidiarity. When we combine these two values with the anti-suit injunction's purpose of ensuring a level playing field in international litigation, we conclude that the English court should not have interfered with the jurisdiction of the Turkish courts on the facts of *The Yusuf Cepnioglu*. To borrow the language of Rix LJ from *Star Reefers*,⁷⁰ the respondent had a legitimate juridical advantage in the Turkish courts. Putting aside these arguments in favour of a more restricted scope of relief, the current position under English law (in the light of *The Yusuf Cepnioglu* and *QBE Europe*⁷¹) is that in both *wholly* contractual and *quasi*-contractual categories, it is not necessary for the English courts to examine whether an anti-suit injunction would infringe the principle of comity. This is despite the fact that one of the rationales behind the principle of comity is to assist the courts in difficult cases involving a conflict of conflicts.⁷² I would argue that this is precisely the risk associated with adopting the mainstream view that comity is a dispensable requirement in certain categories of anti-suit injunction cases.

⁶⁵ *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87 (CA).

⁶⁶ Above (n 26), [69].

⁶⁷ *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat VE Ticaret AS (The Yusuf Cepnioglu)* [2016] EWCA Civ 386, [2016] 1 Lloyd's Rep 641.

⁶⁸ *Ibid*, [34].

⁶⁹ Raphael (n 3).

⁷⁰ Above (n 14).

⁷¹ Above (n 24).

⁷² DE Childress III, 'Comity as Conflict: Resituating International Comity as Conflict of Laws' (2010) 44 UC Davis L Rev 11.

As soon as the categories of relief become blurred and the courts begin to assimilate them, the checks and balances on the scope of relief are undermined, and the risk of the illegitimate exercise of extraterritorial jurisdiction increases. One possible solution is to recognise that compliance with comity is a precondition for the *existence* (rather than the *exercise*) of jurisdiction to grant the relief, regardless of the court's categorisation of the injunction. Would this ensure that the English courts always take sufficient account of the interests of foreign states? It is suggested that elevating comity to a mandatory, non-discretionary requirement would not bring us much closer to aligning the scope of anti-suit injunctions with the international systemic approach. The main reason is that there is no universally accepted definition of what compliance with comity actually entails.⁷³

The mainstream view about the irrelevance of comity in wholly contractual cases (or perhaps more accurately, its automatic compliance) gives rise to the difficult question of whether the scope of anti-suit injunctions should be restricted to cases involving the enforcement of exclusive jurisdiction and arbitration agreements. In cross-border maritime disputes, anti-suit injunctions have been predominantly sought from the English courts in cases involving alleged breaches of exclusive jurisdiction or arbitration agreements.⁷⁴ This is hardly surprising, given that standard form charterparties and bills of lading, which are the most frequent sources of maritime disputes, almost invariably contain either an arbitration agreement or an exclusive jurisdiction agreement. A recent maritime case involving conflicting anti-suit injunctions and issues of comity was *MSC Mediterranean Shipping Co SA v Interglobal Technologies Ltd*.⁷⁵ In this case, the dispute arose from MSC's carriage of containers from China to Nigeria under MSC bills of lading. The bills contained an exclusive jurisdiction agreement (High Court in London) and an English governing law clause. The procedural background to the case involved multiple sets of proceedings in England and Nigeria. Proceedings were first commenced by Interglobal in Nigeria for, *inter alia*, punitive damages. These proceedings were continued despite an anti-suit injunction granted by Dias J in favour of MSC. The respondent Nigerian company, Interglobal, also arrested the MSC Tasmania in Nigeria in November 2024. MSC was

⁷³ F Saranovic, 'Extraterritorial Injunctions in International Litigation' (2020) 6 *Lloyds' Shipping and Trade Law* 4. See also JR Paul, 'Comity in International Law' (1991) 32 *Harv Int'l LJ* 1.

⁷⁴ Yvonne Baatz, 'English Jurisdiction Clauses in Marine Cargo Insurance and Direct Actions against Cargo Liability Insurers', in Charles Mitchell and Stephen Waterson (eds), *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (Hart Publishing 2020) ch 5.

⁷⁵ Above (n 1).

ultimately required to tender a US\$10 million bank guarantee to secure the vessel's release, which occurred in late January 2025. In February 2025, Interglobal brought a further set of proceedings in Nigeria seeking an anti-suit injunction against MSC to restrain the English proceedings. Bryan J then heard an application by MSC for an interim anti-anti suit injunction from the English court. MSC was successful in obtaining the anti-anti suit injunction against Interglobal on the basis that, applying *Donohue v Armco*,⁷⁶ this was a straightforward contractual injunction and the respondent failed to persuade the court that there were strong reasons not to grant an injunction.

In my view, from a practical perspective, whether the English anti-anti suit injunction in *Interglobal* will prove to be a useful weapon in the hands of the applicant will ultimately depend on 1) whether Interglobal has any assets within the reach of the enforcement powers of the English court; and 2) whether MSC has any substantial assets in Nigeria against which Interglobal could enforce their Nigerian anti-suit injunction. There is no doubt that the outcome of MSC's application in England is definitely attractive in reinforcing the principle of party autonomy. However, if the English courts were willing to make a shift towards the international systemic perspective, greater care would be taken to deter the practice of conflicting anti-suit injunctions in future cases. This is because the current approach in contractual anti-suit cases is overly focused on doing justice between the parties. Wider, systemic considerations (together with the seemingly dispensable principle of comity) demand taking into account the potential long-term disadvantages of 'adding more fuel to the fire' by granting a conflicting anti-suit injunction. In cases such as *Interglobal*, this involves pausing to consider that the first anti-suit injunction granted by Dias J did not yield any positive result in seeking to establish a level playing field. In such circumstances, should the resources of the English courts be wasted on yet another anti-suit injunction against a recalcitrant respondent? Perhaps the answer to this question is that, once again, a useful lesson can be extracted from the case law on worldwide freezing injunctions.

There are several high-profile cases in which the English courts have relied heavily on the effectiveness or enforceability of the injunction as a key criterion for delimiting the scope of

⁷⁶ Above (n 19).

relief.⁷⁷ A controversial example is the Court of Appeal's decision to grant a *worldwide* freezing injunction in support of *foreign* substantive proceedings solely on the basis of the respondent's assets being located in England.⁷⁸ More importantly, in the landmark judgment of the Privy Council in *Broad Idea International Ltd*,⁷⁹ the so-called 'enforcement principle' was presented as the single most important justification for expanding the boundaries of freezing injunctions:

[T]he enforcement principle justifies the grant of a freezing injunction where it is needed to ensure that assets against which a judgment could be enforced remain available to satisfy the judgment. It has been pointed out that this principle can in an expanded form apply to any conduct which would diminish the value of assets against which a judgment could potentially be enforced, even if that conduct does not involve dealing with those assets directly [...]

There seems no reason in principle why the expanded form of the enforcement principle should not be applied in an appropriate case to assets held by a non-cause of action defendant.

It was the Privy Council's emphasis on the enforcement principle as the only real limit of freezing injunctions under common law, which influenced Sir Geoffrey Vos (who gave a minority judgment) to describe the judgment of the majority as a 'ground-breaking exposition of the law of injunctions'.⁸⁰ In light of the sheer importance of the enforcement principle for freezing injunctions, it is absolutely imperative, in my view, for the English courts to ensure that anti-suit injunctions are only granted in cases where the applicant can demonstrate that such relief would be enforceable and effective. After all, imposing the enforceability as a precondition for all applications would be consistent with the equitable maxim that 'equity does not act in vain'.

⁷⁷ See, inter alia, *Motorola v Uzan (No 2)* [2003] EWCA Civ 752, [2004] 1 WLR 113; *JSC BTA Bank v Mukhtar Ablyazov* [2013] EWCA Civ 928, [2014] 1 WLR 1414; *Broad Idea International Ltd* (n 15).

⁷⁸ *Motorola*, *ibid.*

⁷⁹ Above (n 15) [110]-[111].

⁸⁰ *Ibid.*, [221].

4 Conclusions

This paper has sought to provoke novel avenues of thinking about the scope of anti-suit injunctions by drawing upon two largely untapped sources: i) the academic literature on the philosophical foundations of private international law; and ii) the primary and secondary sources on the substantive and international scope of freezing injunctions. The discussion will hopefully inspire a sense of optimism that the English courts can find solid theoretical foundations for imposing restrictions on the scope of relief and refrain from any temptation for egoistic paternalism. The underlying reason for such temptation is that the current approach of the courts is predominantly focused on finding a just outcome in the individual case without sufficient regard for the international systemic implications. Any new restrictions justified by reference to jurisdictional theory and the experience from freezing injunctions should not be regarded as a sign of weakness in response to the growing number of anti-anti-suit injunctions from foreign courts.