Anti-suit injunctions – beyond comity

This short article considers a theme emerging from Trevor Hartley's writing on the topic of anti-suit injunctions—the significance of the existence of an international treaty that regulates the circumstances in which the States concerned may or must assert, and may or must decline, jurisdiction with respect to the subject matter of the dispute. It examines, in particular, recent case law extending the reach of the European Union's prohibition on anti-suit injunctions within the Brussels I regime, and the place of anti-suit injunctions within the framework of the Hague Choice of Court Convention.

Trevor Hartley – anti-suit injunctions – treaties and international instruments – Brussels I regime – "quasi anti-suit injunctions" – Hague Choice of Court Convention

A. Introduction

Trevor Hartley's writing on the topic of anti-suit injunctions is (as one would expect) nuanced and insightful. If a consistent approach can be identified, it is one of wary receptiveness. While starting from the position that the injunction "is an interference with the foreign court which by its very nature runs counter to the idea of comity", Trevor has always accepted that "in some circumstances the need for an injunction is so overwhelming that comity must give way". [1] He nonetheless acknowledges that, even if there is a demonstrably strong *prima facie* reason to act, "the basic objection" to anti-suit injunctions is that the court where the proceedings are taking place is the "natural forum" to decide questions concerning the

1 "Comity and the Use of Antisuit Injunctions in International Litigation", (1987) 35 *American Journal of Comparative Law* 487, 506.

appropriateness of a party's conduct in initiating or pursuing litigation" there.[2] This led Trevor to suggest, in a survey prepared for the American Journal of Comparative Law in 1987, that an anti-suit injunction "should not be granted on any ground on which the foreign court could on a proper showing be expected itself to dismiss the proceedings", provided that two conditions are satisfied—first, the relevant law and policy of the foreign court must be substantially similar to that of the forum and, secondly, there must be no reason to doubt that the requirements of natural justice would be observed in the foreign proceedings.[3]

While agreeing with Trevor's basic premises, my own view is warier and less receptive to the anti-suit injunction as part of the institutional framework in the conflict of laws. Differences, even significant differences, in the procedural or substantive rules applied by the foreign court to decide the question of jurisdiction or the merits of the dispute should not form an element in the reasoning that leads an English court to interfere with the foreign court's legitimate exercise of its functions within its own constitutional order. Instead, an interference of this kind is justified only if, first, there is a sufficient legal reason to grant the injunction and, secondly, there is cogent evidence of a likelihood that the foreign proceedings will violate the forum's fundamental principles of natural or substantial justice.[4] As Mr Justice Hoffmann put it:[5]

> [T]he normal assumption is that an English court has no superiority over a foreign court in deciding what justice between the parties requires …

A fresh dimension is added when the States to which the issuing and targeted courts belong are parties to an international treaty that regulates the circumstances in which they may or must assert, and may or must decline, jurisdiction with respect to the subject matter of the dispute.[6] Here the bonds that hold the two legal systems together are stronger than the all-purpose adhesive marketed under the "comity" brand. As instrumentalities of their respective States, the courts must not only follow the treaty-based rules to the extent they have become

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[2] *Ibid*, 506-507.

[3] *Ibid*, 509. Six years later, the Supreme Court of Canada took a remarkably similar view (see *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897).

[4] For more detailed examination of these questions, see Andrew Dickinson, 'Taming Anti-suit Injunctions', ch 4 in Andrew Dickinson and Edwin Peel (eds), *A Conflict of Laws Companion—Essays in Honour of Adrian Briggs* (Oxford University Press, 2021), esp 83-86.

[5] *Barclays Bank plc v Homan* [1992] BCC 757, 762.

[6] See *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30, [2024] 3 WLR 659 [79] (Lord Leggatt).

part of municipal law, but must also heed the possible consequences (including, but not limited to, engaging their home State's international legal responsibility) if the grant of an anti-suit injunction would contradict or impair the effectiveness of the treaty.

Trevor has always been superbly well-qualified to examine this dimension, in view of his expertise in the substantive and private international law of the European Union (the context in which this question has been most frequently discussed) and his status as one of the rapporteurs on the 2005 Hague Choice of Court Convention.[7] The next section briefly surveys his writing on the topic. The following sections consider how this analysis may bear on questions that remain controversial today.

B. Trevor Hartley on anti-suit injunctions within treaty frameworks

The account begins, in 2000, with a casenote[8] on the Court of Appeal's decision in *Turner v Grovit*[9] to grant an injunction to restrain proceedings before a Spanish court on the ground that they were an abuse of process. Trevor described the case as involving "[a] fundamental clash of values which could affect the very foundations of the Brussels Convention".[10] He doubted whether antisuit injunctions "could genuinely be said to impair the effectiveness of the Convention" while acknowledging the force of the argument that "they run counter to one of its underlying principles—that the courts of all Contracting States are equal and that one court should not interfere with the jurisdiction of another".[11] In his view, this raised the question "whether the institutional value of harmony between courts should prevail over the more personal value of justice in the individual case"?[12] He thought it "impossible to predict" the choice that the European Court of Justice would make if it were asked to decide the point, opining that "the justice of the case is so strongly in favour of the injunction that it is hard to believe the European Court would not be influenced by it".[13]

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[7] With Masato Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements, Explanatory Report*, available at https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf ('Hartley-Dogauchi Report').

[8] "Antisuit Injunctions and the Brussels Jurisdiction and Judgments Convention" (2000) 49 *International and Comparative Law Quarterly* 166.

[9] [2000] QB 345.

[10] *Ibid*, 166.

[11] *Ibid*, 168.

[12] *Ibid*, 170.

[13] *Ibid*.

The answer to Trevor's question arrived promptly. In *Turner v Grovit*, the House of Lords[14] decided to refer to the European Court the question

> whether the Convention precludes the grant of an injunction by which a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court in another Contracting State even where that party is acting in bad faith in order to frustrate the existing proceedings.

Despite Lord Hobhouse's best efforts to defend the English practice,[15] the European Court answered that question affirmatively.[16] The central plank in its analysis was that

> [i]t is inherent in that principle of mutual trust that, within the scope of the [Brussels] Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them.[17]

Additionally, in the Court's view, the grant of an anti-suit injunction interfered with, and involved an impermissible review of, another Member State court's jurisdiction, and impaired the effectiveness of the Convention by rendering ineffective the specific *lis pendens* mechanisms and increasing the risk of irreconcilable judgments.[18]

Trevor examined this decision alongside the two other notorious decisions of the time: *Erich Gasser Gmbh v Misat Srl*[19] and *Owusu v Jackson*[20] in his provocatively titled *International and Comparative Law Quarterly* article, "The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws". His first reaction was hostile:[21]

> Again 'system' prevails over practicality. Protecting the interests of States prevails over justice to individuals. Thanks to the European Court, bad-faith litigants can now go about their businesses without fear of antisuit injunctions, at least as long as they do not stray beyond the confines of the European Union.

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[14] [2001] UKHL 65, [2002] ICR 94.

[15] *Ibid*, esp at [30]-[40].

[16] Case C-159/02, [2004] ECR I-3565.

[17] *Ibid*, [25].

[18] *Ibid*, [27], [28], [30].

[19] Case C-116/02, [2003] ECR I-14693.

[20] Case C-281/02, [2005] ECR I-1383.

[21] (2005) 54 *International and Comparative Law Quarterly* 813, 822

As time passed, however, it seems that Trevor's view of the decision in *Turner* became more favourable (as, I admit, did my own[22]). The tone had softened when his monograph *Choice of Court Agreements under the European and International Instruments*, was published in 2013.[23] Here, he acknowledged that "one can see why the CJEU gave the decision it did" while lamenting that "the banning of antisuit injunctions opens up the possibility that unscrupulous litigants might bring abusive proceedings with impunity in another Member State".[24]

In 2009, in *Allianz Spa v West Tankers Inc*, the European Court had reiterated its reasoning in *Turner*, extending it to the case of proceedings brought in breach of an arbitration agreement.[25] Writing in 2015, after the Court of Justice had affirmed the *Allianz* decision in the course of deciding that the Brussels I Regulation did not preclude the grant of an anti-suit order by an arbitral tribunal with its seat in a Member State,[26] Trevor expressed the view that the Court had "found the right balance" in its jurisprudence on the basis that "in *West Tankers* a decision permitting the English courts to grant an anti-suit injunction would have had a devastating effect on the Italian proceedings".[27]

In the first edition of his work, *Civil Jurisdiction and Judgments in Europe*, published in 2017,[28] Trevor formulated the argument in favour of the European Court's decisions in *Turner* and *Allianz* in the following way:[29]

> If a court in one Member State orders a party not to bring (or not to continue) proceedings before the courts of another Member State, it is interfering in a matter that should be decided by the latter courts. Since the penalties imposed by the English courts for disobedience to such an injunction are so severe that no party is likely to disobey, the court whose jurisdiction is in dispute will never be able to decide the matter for itself.

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[22] cf "A Charter for Tactical Litigation in Europe?" [2004] *Lloyds Maritime and Commercial Law Quarterly* 273.

[23] Oxford University Press.

[24] *Ibid*, [10.26].

[25] Case C-185/07, [2009] ECR I-663.

[26] Case C-536/13, *Gazprom v Lietuvos Respublika* [2015] EU:C:2015:316.

[27] "Antisuit Injunctions in Support of Arbitration: *West Tankers* Still Afloat" (2015) 64 International and Comparative Law Quarterly 965, 971

[28] Oxford University Press.

[29] *Ibid*, [21.52]; also 2nd edn, Oxford University Press, 2023, [21.52].

Finally, in his recent commentary on the landmark decision of the House of Lords in *SNI Aerospatiale v Lee*,[30] Trevor suggests that "it is doubtful whether it is ever proper for one court to sit in judgment on another court and decide—*however reasonably*—that the latter court should not hear a case", adding that "[t]his was the reason why the CJEU decided to outlaw anti-suit injunctions in the European Union when they are directed against proceedings in the courts of Member States which come within the scope of the Brussels I Regulation". He reinforces the point by observing that

> [i]t is a principle of EU law that all Member States and their institutions are to be regarded as equal [and] it necessarily follows that each court should be able to decide for itself, without interference from the courts of another Member State, whether it has jurisdiction under EU law to hear a case.[31]

C. Beyond anti-suit injunctions – awards of damages for breach of dispute resolution proceedings

The reach of the decision in *Turner* has recently been further extended by the European Court in *Charles Taylor Adjusting v Starlight Shipping Co*[32] to cover what the Court (unhelpfully) characterised as a "quasi" anti-suit injunction, that is to say an order that does not directly prohibit a foreign claimant from continuing proceedings before the courts of a Member State but instead requires the payment of a sum of money on account of damages in respect of the (contractually wrongful) act of commencing proceedings, and which in effect serves as a deterrent to the continuation of those proceedings because (a) the final amount of the judgment debtor's liability will increase and will not be fixed for as long as the proceedings continue, and (b) the order is accompanied by the threat of sanctions for non-compliance with it and related orders.[33]

Without the benefit of Trevor's views on this decision, we can only speculate as to what he might make of it. It is, however, suggested that the decision was both inevitable and in accordance with the principles that Trevor had identified as being established by the

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[30] [1987] AC 871 (PC).

[31] Ch 12, in William Day and Louise Merrett (eds*), Landmark Cases in Private International Law* (Hart, 2023), at 282. See also *Civil Jurisdiction and Judgments in Europe*, (2nd edn, Oxford University Press, 2023), [21.54]-[21.55], referring to *Gazprom* (n 26), [33].

[32] Case C-590/21, [2023] EU:C:2023:633.

[33] *Ibid*, [26]-[27].

European Court in its earlier decisions.[34] In *Turner*, the Court had already emphasised that it is necessary to look beyond the form of the order and to consider its effect upon the functioning of the rules and mechanisms provided for by the Brussels I regime.[35] Both the conventional anti-suit injunction scrutinised in *Turner* and the interim payment order at issue in *Charles Taylor Adjusting* were measures that were tantamount to a writ of prohibition issued against another Member State court, striking at its power to determine whether it has, and should exercise, jurisdiction to determine a dispute. Measures of these kinds impair the effectiveness of the Regulation, restrict individual access to justice, and offend the principle of sincere cooperation embodied in the Treaties.[36] On this view, the European Court's decision is both unsurprising and understandable.

Although *Charles Taylor Adjusting* involved an interim payment order made while the Greek proceedings were continuing (and which had the specific features that the Court identified as being characteristic of a "quasi" anti-suit injunction[37]), a final award of damages incorporating the amount of any judgment given in favour of the party pursuing proceedings in a Member State in alleged breach of a dispute resolution agreement would have been no less problematic. Within the framework of EU law,[38] three main objections to a final award of this kind can be identified.[39] First, whether proceedings have been brought or not, the spectre of a legal liability for the act of bringing proceedings serves as a practical deterrent to continuation of those proceedings by the foreign claimant. Secondly, a party who obtains an award of damages can deploy it to raise a plea of set-off when the foreign claimant seeks to enforce a Member State judgment given in its favour in England or elsewhere. Insofar as that set-off plea is sustained (as it likely would be under English law by a plea of legal or cross-

[34] Section B above.

[35] *Turner* (n 16), [28]-[30].

[36] Treaty on European Union, Art 4(3).

[37] Text to n 33.

[38] Obviously, this framework is now of very limited significance for the UK, being applicable only with respect to proceedings commenced prior to the implementation date (31 December 2020).

[39] These three specific objections were not addressed by the Court of Appeal in *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2014] EWCA Civ 1010, [2014] 2 Lloyd's Rep 544 in rejecting the EU law challenge to an award of damages. At an earlier stage of the litigation, in the Supreme Court, Lord Neuberger had acknowledged that an award of damages of this kind would neutralise, at least in commercial terms, the benefit of a Greek judgment, but did not think that this gave rise to a logical inconsistency (*The Alexandros T* [2013] UKSC 70, [2014] 1 All ER 590, [132]). The Supreme Court was addressing a different issue, concerning the effect of the Regulation's *lis pendens* provisions.

judgment set-off[40]), it neutralises the Member State judgment, and thereby impedes the free movement of judgments within the European Union. Wherever the foreign claimant seeks to enforce its judgment, the damages award shadows it and can be then used to nullify its legal effect by cancelling the judgment debtor's liability. Thirdly, in some instances, the foreign claimant who has secured a fruitless judgment on the underlying cause of action (because it is matched by the award of damages granted in favour of the foreign defendant) may be left without any means of redress by proceeding *in accordance with the dispute resolution agreement* in the underlying contract. This is the apparent result of the European Court's decision in *De Wolf v Harry Cox BV*, which precludes the bringing of a second claim before the court of another Member State based on the same cause of action.[41] If that rule is applied to a claimant who has already brought proceedings in a Member State court other than that designated in a choice of court agreement, and who has secured a judgment in its favour which is neutralised by a countervailing damages award, EU law does not seem to accommodate the possibility of a second set of proceedings on the same cause of action before the chosen court. It remains to be seen whether, in the post-Brexit landscape, the European Court will further extend this line of case law to cover a final award of this kind, although a decision to that effect would now be of very limited significance for litigants in the UK courts.

D. Anti-suit injunctions and the Hague Convention on Choice of Court Agreements

Turning to the 2005 Hague Convention, Trevor has expressed the view that the Convention "neither prohibits nor requires" anti-suit injunctions. He points out that anti-suit injunctions were discussed in the negotiations, but "there was never any consensus that they would be prohibited".[42]

There is no express provision in the Convention that addresses this question, and no specific guidance is given in the Hartley-Dogauchi Report.[43] Although Article 7 provides that

[40] See *Fearns v Anglo-Dutch Paint & Chemical Co Ltd* [2010] EWHC 2366 (Ch), [2011] 1 WLR 366, [13]-[16], [36]-[38].

[41] Case 42/76, [1976] ECR 1759.

[42] *Choice of Court Agreements under the European and International Instruments* (n 23), [10.30].

[43] For earlier discussion on the topic, see Mukarrum Ahmed and Paul Beaumont, "Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of Brexit" (2017) 13 *Journal of Private International Law* 386, 397-398, with reference to Hague Conference, *Proceedings of the Twentieth Session, 14 to 30 June 2015*, 623-624.

"interim measures of protection are not governed by this Convention", this provision is to be understood in context as being concerned with the power of Contracting State courts to grant measures that preserve the factual or legal situation pending the determination of the substance of the dispute by a court exercising jurisdiction in accordance with the Convention.[44] By contrast, an anti-suit injunction issued by a court of one Contracting State to restrain proceedings before the court of another Contracting State seeks to bring those proceedings to an end, may be issued even though there are no substantive proceedings on foot in the designated court in which a judgment may be given, and may be permanent (final) rather than temporary.

If the anti-suit injunction targets proceedings before a Contracting State designated in an exclusive choice of court agreement (for example, on the basis that the foreign claimant is acting vexatiously or presenting a fraudulent claim), its intended and likely practical effect is to render the choice of court agreement ineffective and to prevent the designated court from exercising the jurisdiction conferred on it by Article 5. Although cases of this kind are likely to be rare, this would undoubtedly impair the effectiveness of the Convention.[45]

If, instead, the injunction is founded on a contractual obligation which the issuing court considers to be embodied in the choice of court agreement and targets proceedings before the court of a Contracting State other than that of the chosen court, its intended and likely effect will be to bring those proceedings to an end before the non-designated

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The limited discussion of the topic is inconclusive, and not supported by either the final text of the Convention or the Hartley-Dogauchi Report (n 7). Significantly, specific references to anti-suit injunctions in the Explanatory Reports of Professors Hartley and Dogauchi on the Preliminary Draft Convention on Exclusive Choice of Court Agreements (Preliminary Document No 25, March, 2004, [101]-[102]; Preliminary Document No 26, December 2004), [121], [130], were left out of the final version of the report (cf, in particular, Hartley-Dogauchi Report (n 7), [160]).

[44] Hartley-Dogauchi Report (n 7), [160], referring to measures to temporary measures to protect a party pending judgment in the chosen court or to facilitate enforcement, freezing orders, interim injunctions to restrain wrongful acts, and orders for the production of evidence (cf Preliminary Document No 25, above, [101]-[102]; Preliminary Document No 26, above, [130], which had referred to anti-suit injunctions). See also *Choice of Court Agreements under the European and International Instruments* (n 23), [10.29]. cf *UniCredit Bank GmbH v RusChemAlliance LLC* (n 6), [86]-[92], with respect to arbitration, and in a different context, *Motacus Constructions Ltd v Paolo Castelli SpA* [2021] EWHC 356 (TCC), [2021] Bus LR 717, [56]-[59].

[45] See Ahmed and Beaumont (n 43), 399; Hague Conference, Proceedings of the Twentieth Session, 14 to 30 June 2015, [77]-[81]. On the principle of effectiveness in treaty interpretation, see Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008), ch 11.

Contracting State court has had the opportunity to consider the effect of the choice of court agreement under the Convention. In this case, the injunction, if successful in its objective, would override the careful balance struck by the Convention's framers,[46] by enabling the court of one Contracting State, which may not be seised of proceedings on the substance, to arrogate to itself a role that the treaty (through Article 6) vests in the court of another Contracting State, which *is* seised of substantive proceedings. Article 6 requires the Contracting State court that is seised of substantive proceedings to determine whether its international obligation to stay or dismiss proceedings is engaged, or whether the case falls within one of the exceptions set forth in sub-paragraphs (a)-(e).[47] The anti-suit injunction, by design, renders that provision redundant, and interferes with the performance by the non-designated Contracting State of its treaty obligation as well as with its liberty to adjudicate in the cases specifically set out in sub-paragraphs (a)-(e). The argument that this impairs the effectiveness of the Convention is not to be taken lightly.

The counter-argument, that an anti-suit injunction issued in these circumstances is in conformity with the letter and spirit of the Choice of Court Convention, starts from the proposition that the principal aim of the convention is to make choice of court agreements "as effective as possible".[48] As the purpose of an anti-suit injunction is to also to enhance the effectiveness of choice of court agreements, by holding the parties to their contractual obligations,[49] the beguilingly simple argument that follows from this is that the injunction supports, rather than contradicts, the effectiveness of the Convention.

There is little doubt, if the existing body of case law is a reliable guide, that the English courts would favour this counter-argument if the point were to be put before them. Their apparently unshakeable faith in anti-suit injunctions can be seen from their treatment of similar arguments of treaty incompatibility in the context of the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards.[50] The gist of their reasoning in

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[46] Hartley-Dogauchi Report (n 7), [1]-[4].

[47] *Ibid*, [4], [146]-[148].

[48] *Ibid*, [1].

[49] *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749, [24] (Lord Bingham).

[50] *The Angelic Grace* [1995] 1 Lloyd's Rep 87, 96 (Millett J); *West Tankers Inc v Ras Riunione Adriatica Di Sicurta Spa* [2005] EWHC 454 (Comm), [2005] 2 Lloyd's Rep 257, [47]-[58] (Colman J) and [2007] UKHL 4, [2007] 1 All ER (Comm) 794, [6] (Lord Hoffmann); *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] EWCA Civ 574, [2020] Bus L R 1668, [65]; *UniCredit Bank GmbH v RusChemAlliance LLC* (n 6), [68]-[70], [79]-[80], [85] (Lord Leggatt). cf *Toepfer v. Societe Cargill* [1998] 1 Lloyd's Rep 379, 386

these cases is that "considerations of comity have little, if any, role to play" when the anti-suit injunction is granted in support of an arbitration agreement,[51] because States that are parties to the New York Convention "are accustomed to the concept that they may be under a duty to decline jurisdiction in a particular case because of the existence of an … arbitration clause" and would not, therefore, be "offended by the grant of an injunction".[52]

Unfortunately, this way of thinking falls into the trap of treating comity as a matter of judicial collegiality or *amour propre* rather than envisaging it in terms of due respect for the legitimate exercise of adjudicatory authority by a court (here, the court of a State in which the UK is in treaty relations) that is equal in status and (ostensibly at least) pursuing the same object of furthering the interests of justice.[53] Moreover, it is, with respect, a false step in logic to proceed from the (legitimate[54]) assumption that a foreign court is willing to comply with the international obligation, owed by the State of which it forms part, to suepend or dismiss proceedings that fall within the scope of an arbitration agreement (or a choice of court agreement), to the conclusion that the existence of that obligation legitimises a court of a different State, which is not seised of the proceedings which engage that international obligation, to make an order that has the effect of depriving the foreign court of the opportunity to apply the treaty when proceedings are brought before it. Both Article 2(3) of the New York Convention and Article 6 of the Hague Convention specifically vest authority in the court seised of proceedings to consider the effect of the dispute resolution agreement in relation to those proceedings. Both explicitly recognise that there are circumstances in which, notwithstanding the submission that the proceedings fall within the scope of an arbitration or choice of court agreement, they are at liberty to refuse to order a stay. As the Hartley-Dogauchi Report explicitly acknowledges, "[i]t is generally agreed that there could be situations, usually of an exceptional nature, in which the desirability of giving effect to a

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(Phillips LJ).

[51] *UniCredit Bank GmbH v RusChemAlliance LLC* (n 6), [96].

[52] *The Angelic Grace* (n 50), 96, cited with approval in *UniCredit Bank GmbH v RusChemAlliance LLC*) (n 6) [96].

[53] *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, [2016] 1 WLR 2231, [132] (Christopher Clarke LJ); Dickinson (n 4), 83-84.

[54] The hue of the argument is very different if there is cogent evidence that the foreign court is disabled (for example, by local legislation) from giving effect to the international obligation, or that it disregards that obligation in practice. *UniCredit Bank GmbH v RusChemAlliance LLC* (n 6) is a good example of this type of case (see *ibid*, [6], [70], [80]).

choice of court agreement might be overridden by other considerations".[55] The qualified terms in which the duty to decline jurisdiction is expressed reflect, in each case, the nuanced approach that the framers of these treaties took to the goal of promoting the effectiveness of dispute resolution agreements. Judges should openly acknowledge that an anti-suit injunction granted in these circumstances is liable to interfere with this legitimate exercise of judicial authority by a foreign judicial authority, and disturbs the balance that the framers of the Convention had carefully struck "between flexibility and certainty".[56] On this view, both the international legal framework, and comity more generally, supply cogent reasons to exercise restraint in granting an anti-suit injunction in the context of the Hague Convention (as well as the New York Convention). These considerations provide a counter-current to arguments founded on considerations of interpersonal justice, and public policy, that favour giving effect to the parties' agreement.[57] It would be better if this juxtaposition were openly acknowledged, and addressed head on by the English courts, rather than being denied or brushed under the carpet.

For the avoidance of doubt, it is not argued here that the terms of the Hague Convention (or the New York Convention) remove the power to grant an anti-suit injunction in an appropriate case,[58] analogously to the conclusion reached by the Court of Justice of the European Union with respect to the Brussels I regime based on the European Union's hard-edged principle of mutual trust.[59] Instead, the central thrust of the argument is that, contrary to the supposition evidenced in the existing body of English case law, the terms of the Conventions do not support the grant of an injunction in circumstances where proceedings are pending in the court of another Contracting State; indeed, to the contrary, they offer a powerful reason for the exercise of judicial restraint to enforce contractual obligations in circumstances where the foreign court has observed the terms of the treaty (even if the English court disagrees with its conclusion) or there is no reason to believe that it will do so when asked to stay the proceedings. In this context, comity is reinforced by the mutual bond established by the treaty between the two nations that establishes a framework for their individual exercises of adjudicatory authority. It would nonetheless remain open to the English courts, having considered these arguments, to choose to prioritise the principle that

[55] Hartley-Dogauchi Report (n 7), [2].

[56] *Ibid*.

[57] Dickinson (n 4), 84-86.

[58] Such as *UniCredit Bank GmbH v RusChemAlliance LLC* (see n 54 above).

[59] cf text to nn 14-18 above.

private agreements should be observed and to declare that considerations of international comity must give way to interpersonal justice, but they should not persist in the pretence that the two walk hand in hand and should openly recognise that there is a choice to be made.

Finally, even if Trevor would not agree with that way of looking at things, I hope that he would agree that Mr Justice Bryan stepped well beyond the bounds of legal plausibility when he held that Articles 3, 5 and 6 of the Convention, in combination, conferred what he described as a "public law right" not to be sued before a court of a Contracting State other than that of court designated in an exclusive choice of court agreement.[60] Even if a right of this character is capable of founding an application for an anti-suit injunction,[61] whether such a right exists in a particular case must (as with cases of breach of statutory duty more generally) depend on the terms of the statute relied on, in this case s 3D and Sch F of the Civil Jurisdiction and Judgments Act 1982. Neither Article 3 (which defines the key term "exclusive choice of court agreement") nor Article 5 (which regulates the jurisdiction of the designated court without purporting to confer "exclusive jurisdiction"[62]) nor Article 6 (which is addressed solely to the non-designated court) warrants the conclusion that this legislation creates a statutory right, capable of being protected by an injunction granted by an English court acting as the court designated in a choice of court agreement to which the Hague Convention applies, to restrain proceedings brought before a court in another Contracting State.

E. Conclusion

The institution of an anti-suit injunction continues to throw up controversial issues. They have become more complex as the world and the ways in which legal systems interact with one another have evolved over time. It is a good thing that Trevor Hartley has been willing to serve as one of our principal guides, highlighting the trade-offs involved in choosing between unilateralism and multilateralism. It is a pleasure to be able to contribute to this special issue in his honour.

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[60] *Clearlake Shipping Pte Ltd v Xiang Da Marine Pte Ltd* [2019] EWHC 1536 (Comm), esp [55]-[60], relying on earlier authority in the context of the Brussels I Regulation (*Samengo-Turner v J & H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, [2007] 2 All ER (Comm) 813; *Petter v EMC Europe Ltd* [2015] EWCA Civ 828, [2016] ILPr 51).

[61] See *Clearlake Shipping Pte Ltd v Xiang Da Marine Pte Ltd* (n 60), [58]-[60], but cf, more generally, *Gouriet v Union of Post Office Workers* [1978] AC 435; Dickinson (n 4), 102-104.

[62] cf *Clearlake Shipping Pte Ltd v Xiang Da Marine Pte Ltd* (n 60), [55].