Let Go of that Case - British Anti-Suit Injunctions against Brussels Convention Members

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Let Go of That Case! British Anti-Suit Injunctions against Brussels Convention Members

Maura E. Wilson†

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Introduction

A student of European history studies a Europe divided.¹ From Spain and
England vying for supremacy over the seas, to France and Germany’s seem-
ingly endless border wars, Europe’s history is a bellicose one, with nations
fiercely protective of their own territory, language, customs, and ideas.²
But since the destruction caused by World War II, a new generation of
European nations strive for the benefits of more cooperation and less dis-
sent.³ An increasingly united Europe gains more power and importance in

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1997. Many thanks to Professor Kevin Clermont for his helpful comments.

1. When starting a story, recall the wise advice of the King of Hearts: “The White
Rabbit put on his spectacles. ‘Where shall I begin, please your Majesty?’ he asked.
‘Begin at the beginning,’ the King said gravely, ‘and go on ‘til you come to the end: then
stop.’” LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND ch. XI (1865). Begin here.
2. See JOHN REDWOOD, STARS AND STRIFE: THE COMING CONFLICTS BETWEEN THE USA
3. See ANDREW DUFF, REFORMING THE EUROPEAN UNION ix (1997). Over the years,
the European Union has brought the great benefits of peace and prosperity to its mem-
ber states and citizens. It has restored democratic values in Europe. It has built a cus-
world arenas. The Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters ("Brussels Convention" or the Convention) is a key part of the continued European integration. The Convention concerns jurisdiction and enforcement of judicial decisions within the signatory states. The key to the Convention is that the signatories are considered a single judicial system. Indeed, "discrimination and mistrust toward a foreign court violate the spirit of the Convention." The decisions of a member state are fully enforceable in any other member state with extremely limited, perfunctory review.

The United Kingdom is a signatory to the Brussels Convention. Separate from Europe geographically, historically, and ideologically, the British often seem of two minds about a united Europe. They do not want to be left out of the benefits of cooperation, but they are reluctant about the necessary abdication of a measure of sovereignty that such cooperation demands. For example, while on January 1, 2002 most of Europe gave up its Liras and Francs for the common currency of the Euro, the United Kingdom held fast to its Pound. This British two-mindedness about the European Union is clearly evident when examining the United Kingdom's approach to the Brussels Convention.

A late signatory to the Convention, Britain remains a reluctant partner, uncomfortable about the role of the European Court of Justice in British law making, especially in areas where the European Court of Justice...
maintains power greater than that of the United Kingdom's highest courts.\textsuperscript{13} While the letter of the Brussels Convention is generally followed in British courts, literal interpretations of the Convention allow the British courts to violate the spirit of the document and frustrate its purpose, while ostensibly following its dictates.\textsuperscript{14}

This Note examines the British courts' use of anti-suit injunctions against other signatories of the Brussels Convention, and how this tool exemplifies the British inconsistency between integrating into the European Union and maintaining a distinct British quality separate from the rest of Europe. Part I provides the background of the Brussels Convention and anti-suit injunctions, including when and why anti-suit injunctions are used by the British courts. Part II explains more fully why British use of anti-suit injunctions may be at odds with the Brussels Convention. Part III argues that the use of anti-suit injunctions in the narrow context of enforcing forum selection clauses is useful to maintain the integrity of international contracts. Finally, Part IV examines how the British approach to anti-suit injunctions illustrates Britain's delicate balancing of British qualities and European qualities.

I. The Brussels Convention and Anti-Suit Injunctions

A. What is the Brussels Convention?

The Brussels Convention is "[t]he first international instrument to regulate broadly jurisdiction to adjudicate in the international sense."\textsuperscript{15} The Council of the European Union adopted it as a regulation in December 2000, making it the official law for the Member States of the European Union.\textsuperscript{16} The Council noted some of the general goals of the Convention stating:

Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.\textsuperscript{17}

The Convention addresses both the "jurisdiction of courts in actions brought in contracting states against persons—natural or judicial—domi-
iled in other contracting states" as well as "the recognition and enforcement of judgments rendered in other contracting states." The key principle for conferring jurisdiction under the Convention is domicile, while other ways to confer jurisdiction, including performance of a contract or tort, are also available.

One of the most important aspects of the Brussels Convention is that the drafters realized that:

[i]f judgments of other contracting states were going to be easily recognized and enforced, then the specified bases of jurisdiction must be the only ones permitted, and each contracting state must be prepared to give up—at least within the ambit of the Convention—those bases of jurisdiction that other states regarded as exorbitant (Art. 3). Contracting states were not required to repeal the objectionable statutory bases of jurisdiction (Art. 4), but jurisdiction on these bases could henceforth not be exercised in actions against persons domiciled in other contracting states.

Accordingly, the French gave up their Article 14 jurisdiction allowing any French plaintiff to sue in a French court regardless of the domicile or nationality of their opponent. Likewise, the Germans gave up their Article 23 jurisdiction granting personal jurisdiction over a defendant in Germany if the defendant had property in Germany. When the British finally

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18. ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 423 (1993); Brussels Convention, supra note 5, tit. III.
20. Brussels Convention, supra note 5, arts. 5-15.
21. LOWENFELD, supra note 18, at 424.
22. Id. at 424; Brussels Convention, supra note 5, art. 3. One of the most notorious examples of this type of exorbitant jurisdiction is the Jean-Claude Killy underwear case, where an Austrian court asserted in personam jurisdiction in a paternity suit over the famous skier using an undergarment carelessly abandoned in a hotel room. This infamous exercise of judicial power is memorialized in a less famous doggerel by David D. Siegel.

Pack Up Your Troubles - Carefully
Why the gasping? Why so waxen?
What's the matter, Anglo-Saxon?
Don't you like our theoretical advance?
Don't you find cerebral pleasure
In the comprehensive measure
Of the things our law can do with someone's pants?

If our courts in sober session
Happen into the possession
Of a pair of drawers whose occupant fled fast,
We indulge the helpful fiction
That we've also jurisdiction
Over him whose fleeting form they covered last.

It is really a refinement
That we discharge this assignment
Only after he who owns the shorts has gone.
We would deem it much too bold of
Any sheriff to take hold of
Someone's garment while the poor chap has it on.
joined the Convention, they similarly gave up granting jurisdiction based solely on the defendant’s presence in the United Kingdom.\textsuperscript{23}

Another key provision of the Convention states that final determination of jurisdiction is left up to the court first seised of that particular case.\textsuperscript{24} This means that if a party first sues in an Italian court, and another party to the case subsequently sues on the same matter in a French court, the French court should defer to the Italian court in the matter of jurisdiction, and allow the suit to go forward in Italy.\textsuperscript{25}

Along with these issues of jurisdiction, the Convention also addresses recognition and enforcement of judgments among members.\textsuperscript{26} The Convention states that “[a] judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required.”\textsuperscript{27} In fact, “Article 34 makes clear that the Convention expects very liberal enforcement procedures of judgments from courts in other contracting states.”\textsuperscript{28}

The Convention strives to create a unified Europe with respect to legal decisions, founded upon simplified and explicitly delineated bases for jurisdiction.\textsuperscript{29} It does not espouse the vagueness of common law jurisdic-

\begin{flushleft}
Take advantage of this power.
Should your marriage, say, go sour,
You could sue your wife in any land you please:
In advance, while things are peaceful,
Just come tour with a valise full
Of her petticoats and female B.V.D.’s.

If you’re threatened by our action
You may find some satisfaction
In advice we urge that tourists keep in mind:
No amusement will you lack here;
Just be sure that when you pack here
You have not left any underwear behind.

David D. Siegel, \textit{In Vagrant Verse}, in \textbf{CASE AND COMMENT} 56, 62–63, Sept.–Oct. (1971). Unfortunately, the Convention’s exclusion does not apply to any readers from non-signatory states, so please heed the following warning: this form of jurisdiction could still catch you. \textit{Dashwood}, \textit{supra} note 8, at 239.
\end{flushleft}

\textsuperscript{23.} \textit{Lowenfeld}, \textit{supra} note 18, at 424.

\textsuperscript{24.} Brussels Convention, \textit{supra} note 5, art. 21; Phillips v. Symes, 1 W.L.R. 853 (2002) (defendant claimed that the English court should not issue an anti-suit injunction because the Greek court was first seised of the proceedings). \textit{See also} \textit{Dashwood}, \textit{supra} note 8, at 32 (noting that Articles 21 and 22 of the Brussels Convention, concerning deference to the court first seised of a case, were designed to avoid concurrent jurisdiction on related matters).

\textsuperscript{25.} Brussels Convention, \textit{supra} note 5, art. 26; \textit{see also} George A. Bermann, \textit{The Use of Anti-Suit Injunctions in International Litigation}, 28 \textbf{COLUM. J. TRANSNAT’L L.} 589, 610 n. 82 (1990). This concept is also referred to as \textit{lis pendens}, or \textit{lis alibi pendens}. \textit{See generally} Fernand Schockweller, \textit{Lis Alibi Pendens and Related Proceedings}, \textit{in CIVIL JURISDICTION AND JUDGMENTS IN EUROPE}, 157–90 (Harry Duinjtjeb Tebbens et al. eds., 1992).

\textsuperscript{26.} Brussels Convention, \textit{supra} note 5, tit. III.

\textsuperscript{27.} \textit{Id.} art. 26.

\textsuperscript{28.} \textit{Lowenfeld}, \textit{supra} note 18, at 425. \textit{See} Brussels Convention, \textit{supra} note 5, art. 34.

\textsuperscript{29.} \textit{See} Adrian Briggs, \textit{CIVIL JURISDICTION AND JUDGMENTS} 3 (Peter Rees ed., 3d ed. 2002) (“In civil and commercial cases, the new ground rule, the new basic law, is that contained in the various European instruments: documents drafted in Europe, and being
tional decisions, nor any extended scrutiny of a court’s claim for jurisdiction. The drafters strove to create ease of jurisdictional determinations, and to avoid parallel, and possibly conflicting litigation. As the Council of the European Union noted:

[...] in the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of lis pendens and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending.

One may consider these to be lofty goals for a region as complex as Europe, but the general intentions of the document are certainly clear.

B. What is an Anti-Suit Injunction?

The United Kingdom was a willing signatory to the Brussels Convention, yet English courts continue to use anti-suit injunctions against other members of the Brussels Convention. The British position can be justified by noting that the Brussels Convention does not outlaw anti-suit injunctions, in fact, the Convention has nothing to say about them whatsoever. There is, however, an argument that English use of anti-suit injunctions conflicts with the Brussels Convention’s overall goals. Does the practice of issuing anti-suit injunctions disingenuously take advantage of inevitable gaps in a document as broad and unprecedented as the Brussels Convention, blatantly defying the general theme and intention of the document? Or is it a clearly permissible activity because anti-suit injunctions are not specifically outlawed by the Convention?

The anti-suit injunction is an intriguing common law device. It is an extreme remedy, rarely requested and even more rarely granted. It develop...
The anti-suit injunction has deep roots in English law. Traceable at least to fifteenth-century England, the remedy first appeared in the form of a writ of prohibition by the common law courts to the ecclesiastical courts to prevent their expansive jurisdictional assertions. Later, the Court of Chancery invoked the remedy as a means of preventing a party from bringing suit in the common law courts under circumstances in which doing so would be contrary to good conscience. Though initially directed at proceedings in other English courts, the anti-suit injunction eventually was extended to proceedings in foreign countries. It is in that very different arena that the remedy is now most commonly deployed by English courts.

One may use an anti-suit injunction when a party brings a suit in a foreign court, such as Italy, and the other party believes that the courts of another country, such as Britain, provide a more appropriate forum. A party may make a motion in the British court, arguing that the opposing party should be enjoined from further pursuit of the suit in the other jurisdiction. The power to issue such an injunction "arises because the enjoined party is subject to the in personam jurisdiction of the English court." A court will grant the injunction when it "must intervene to prevent injustice." Once issued, the anti-suit injunction "restrain[s] a party by injunction from commencing or continuing to prosecute proceedings in a foreign court." The foreign court is not specifically enjoined—only the parties—but the de facto invasion of the foreign court's jurisdiction by the anti-suit injunction is obvious. A statute granting this power to the English courts states that an English court may issue an injunction "in all cases in which it appears to the court to be just and convenient to do so." This is a highly effective and extreme remedy because all of the trappings of a traditional injunction follow with an anti-suit injunction. This means that

38. See Bermann, supra note 25, at 593-94.
39. Id.
41. See id.
42. Lenenbach, supra note 6, at 266.
43. Id. at 267.
44. STONE, supra note 35, at 144.
45. See WHINCOP & KEYES, supra note 36, at 151-52.
46. Lenenbach, supra note 6, at 267, quoting Supreme Court Act, 1981, § 37 (Eng.).
47. PRE-EMPTIVE REMEDIES IN EUROPE 301-02 (Nicholas Rose ed., 1992); SHERIDAN, supra note 37, at 78 ("Breach of an injunction ... constitutes contempt of court, which may call for punishment, deterrence of future disobedience or, especially when the obligation is to do a single act such as handing over a chattel, coercion to comply. Commital to prison is the usual method of securing any of those three objectives. Punishment may also take the form of a fine.") (citations omitted). See also STONE, supra note 35, at
recognition of the injunction by the foreign court is unnecessary to ensure the effectiveness of the anti-suit injunction, because if a party insists on proceeding in the foreign arena after the English court issues the anti-suit injunction, jail and monetary fines in England may quickly follow.  

C. When and Why Are Anti-Suit Injunctions Issued?

English precedent somewhat curbs the discretionary standard for issuing anti-suit injunctions outlined by the English statute. There are two main categories of situations where English courts will issue anti-suit injunctions: they will do so (1) "in situations where England is the natural forum and the foreign proceeding would be vexatious or oppressive" (hereinafter category (1) injunctions); and (2) "in cases where commencing a foreign action constitutes a breach of a forum selection clause or arbitration agreement" (hereinafter category (2) injunctions).  

Regarding the first category, "the power has been exercised cautiously" by English courts:

[An anti-suit injunction should not be granted unless the English court is satisfied that the continuance of the foreign proceedings would be oppressive, and this normally requires that the English court should consider itself the natural forum for the determination of the dispute, but also that the continuance of the foreign proceedings would cause injustice to the defendant there (as by substantially prejudicing his position in connection with a related claim against a third person), and that prevention of the foreign proceedings would not unjustly deprive the plaintiff there of a legitimate advantage. Moreover, owing to the absence of any sufficient English interest, an English court will usually refuse to grant an anti-suit injunction designed to prevent an English party from suing in one foreign court, where the appropriate forum is another foreign court.]

146 ("In the context of international commerce, the anti-suit injunction leads ultimately to situations in which the operations of major multinational companies are brought to a halt through sequestration of assets, and the imprisonment of the senior executives.").

48. Id.

49. See Lenenbach, supra note 6, at 267.

50. Id. at 322.

51. STONE, supra note 35, at 144 (stating with respect to the first category of anti-suit injunctions that "it now seems to have been accepted that, in the absence of a jurisdiction or arbitration agreement, it would be contrary to the Brussels Convention for an English court to grant an anti-suit injunction against proceedings in another contracting state in respect of a matter within the scope of the Convention." (citation omitted). See also Steven R. Swanson, The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions, 30 GEO. WASH. J. INT'L, L. & ECON. 1 (1996) (arguing that U.S. courts' use of a similar "vexatious" rule to decide whether or not to issue an anti-suit injunction is improper, and more consideration should be given to international comity).

52. STONE, supra note 35, at 144. See Airbus Industrie v. Patel, 2 Lloyd's Rep. 8 (1997) (various litigation proceedings were brought in Texas after a plane crash, Airbus requested an anti-suit injunction in the English High Court restraining parties—English residents—from pursuing their action against Airbus in Texas claiming that the actions in Texas were contrary to justice, and vexatious or oppressive).
This is a difficult standard to satisfy, and while anti-suit injunctions are a rarity in general, those under category (1) occur even less often.

British courts take a different approach to category (2) cases concerning breach of an explicit contract provision naming an English forum. Indeed, "where a foreign action is brought in breach of an agreement for English exclusive jurisdiction or arbitration . . . the English courts will readily grant an anti-suit injunction unless the party suing abroad, even in another contracting state to the Brussels Convention, establishes good reason or strong cause why it should not be held to its contract."

A recent English decision outlined the standard for category (2) injunctions:

Where a contract provides that all disputes between parties are to be referred to the jurisdiction of the English courts, the court normally has jurisdiction to hear and determine proceedings in respect thereof. An English court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court in breach of a contract to refer disputes to an English . . . court.

The parties to an exclusive jurisdiction clause are prima facie to be held to their bargain. In an exclusive jurisdiction clause case it is prima facie oppressive and vexatious to litigate elsewhere than in the agreed forum.

Where there is a valid exclusive jurisdiction clause the court will give effect to it by granting an anti-suit injunction . . . unless strong cause/strong reasons are shown by the party in breach of the clause as to why an injunction . . . should not be granted.

The English courts want to enforce the contractual reality voluntarily created by the contract's parties, and consider violation of an exclusive jurisdiction clause to be a considerable breach. The English courts justify this standard by noting that without the anti-suit injunction, "the claimant will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy."

Moreover, "jurisdiction is discretionary and is not exercised as a matter of course, but good reason needs to be shown why [jurisdiction] should not be exercised." The English standard in this situation favors the non-breaching plaintiff.

53. See Stone, supra note 35.
54. See id., at 144; Stuart Dutson, Breach of an Arbitration or Exclusive Jurisdiction Clause: The Legal Remedies if it Continues, 16 Arb. Int'1 89, 94 (2000) ("The English courts have described cases in which the foreign proceedings amount to a clear breach of contract as the 'paradigm' case for the grant of an anti-suit injunction.") (citation omitted).
56. Soc'y of Lloyd's v. Peter Everett White (No. 2) [2002] I.L.Pr. 11, 104, 104 (emphasis added).
57. See id.
59. Id.
II. Anti-Suit Injunctions: Problems and Controversy

Anti-suit injunctions are used only rarely in a narrow set of situations, therefore, even courts familiar with the procedure can be thrown into confusion when anti-suit injunctions come into play. For example, British Airways Board v. Laker Airways, Ltd., involving parties from Britain and the United States, demonstrates the confusion accompanying the use of anti-suit injunctions. In that situation, the anti-suit injunction was followed by a “counter-anti-suit injunction,” and two common law countries had a procedural stand-off across the Atlantic. The significance of Laker is that the dispute involved two common law countries—relatively familiar with anti-suit injunctions—and yet confusion and problems still arose.

If such a bizarre set of procedural circumstances could occur between common law countries, imagine the potential chaos of an anti-suit injunction thrown into a civil law proceeding! A civil law court may not even know that anti-suit injunctions even exist, let alone how they operate. As noted above, a basic tenet of the Convention is that the court first seised (the court first presented with the case) determines if it has jurisdiction over the proceedings. While British use of anti-suit injunctions against co-signatories is not explicitly outlawed by the Convention, many argue that it flies in the face of the doctrine of *lis pendens*.

There is heated criticism of the British use of anti-suit injunctions against co-signatories. For example, Stone contends that it is clear that English use of anti-suit injunctions is incompatible with the Brussels Convention, and can not be used justifiably against a co-signatory, in any context. Indeed, a British conflict of laws author notes that in cases where

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61. British Airways Board v. Laker Airways, Ltd., 3 W.L.R. 413; Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909. See also Bermann, *supra* note 25, at 591-93. ("[T]he ruling showed that the prospect of further interjurisdictional impasse was not to be dismissed. All in all, the protracted *Laker* litigation left observers puzzled and disturbed by the vast anti-suit and counter-antisuit injunction possibilities.") (citations omitted).
63. *Id.*
64. See id.
65. See, e.g., Hans Van Houtte, *May Court Judgments that Disregard Arbitration Clauses and Awards be Enforced under the Brussels and Lugano Conventions?,* 13 Arb. Int'l 85, 92 (1997) ("Moreover, and even more essential, anti-suit injunctions do not fit into the framework of the Brussels and Lugano Conventions. . . . Consequently, courts from one Convention State should not interfere with court proceedings in another Convention State. In brief, anti-suit injunctions are fundamentally incompatible with the Brussels and Lugano Conventions.") (citations omitted).
66. Stone, *supra* note 35, at 145 ("[T]here can be no doubt that it is incompatible with the Brussels Convention for an English court to grant an anti-suit injunction against proceedings in a court of another contracting state to the Convention concerning a matter within the scope of the Convention, whatever the reason for injunction may be. . . . For the structure, the detailed text and the various purposes of the Brussels Convention indicate with unmistakable clarity that. . . . a court of a contracting state must be allowed to determine its own jurisdiction, without interference by courts of other contracting states."). See also T.C. Hartley, *Civil Jurisdiction and Judgments* 5 (1984) ("The Euro-
the Brussels Convention governs the jurisdiction over a defendant, "[i]f the proceedings to be restrained were commenced in the courts of [another] Contracting State before the English court was seised, Article 21 of the Convention[ ] requires the English court to declare that it has no jurisdiction if two proceedings have the same cause of action." 67

A. Continental Bank v. Aeakos Compania Naviera: 68 Two Perspectives

Continental Bank was one of the first cases to address the issue of an English anti-suit injunction against another signatory to the Brussels Convention. 69 In this case, a loan agreement between parties from England and Greece contained choice-of-law and choice-of-forum clauses stating that English law and English courts would govern related disputes. 70 The borrowers defaulted and subsequently brought suit in Greece against the bank. 71 The bank requested and received an anti-suit injunction in an English court before the Greek court determined whether its own courts properly had jurisdiction. 72 This decision proved extremely controversial. 73

Trevor C. Hartley and Andrew S. Bell are British commentators who present different perspectives on the controversy and its ramifications. 74 Bell is critical of the English court’s decision and argues that since all parties agreed that the Greek court was the one first seised, the British court’s obligation was to respect the doctrine of lis pendens and not issue the anti-suit injunction. 75 In the alternative, Bell argues that a British court should at least stay such proceedings until the Greek court had made a decision as to its jurisdiction. 76 Bell also notes that

[the grant of the injunction effectively deprived the Greek court of this opportunity, an opportunity which Article 21 strongly suggests it should have had. This was an even more egregious interference with the structure and operation of the convention than refusing to respect the decision of a court of another Contracting State as to its jurisdiction]. 77

Bell contends that the Court of Appeal’s decision to uphold the anti-suit injunctive relief in Continental Bank disrupts the structure and logic of the
Brussels Convention. In his opinion, “The spirit of co-operation implicit in the Brussels Convention is seriously subverted where courts of one Contracting State are denied the opportunity of examining their own jurisdictional base by the courts of another Contracting State.”

Bell argues that British courts exhibit dangerously interfering hubris by allowing anti-suit injunctions to inhibit the jurisdictional determinations of the court first seised.

Hartley sees the situation from a different angle. He asks “whether the institutional value of harmony between courts should prevail over the more personal value of justice in the individual case. Most lawyers in the common-law world would say that individual justice should prevail; civilian lawyers, on the other hand, might see things differently.” Upon application for the anti-suit injunction, the English courts determined that England had jurisdiction, and that English law explicitly governed the contract. Hartley states that “[i]t followed from this that the Greek courts ought to have declined jurisdiction under Article 17 of the Brussels Convention, but there seemed to be no sign that they would do so. The court therefore considered the injunction an appropriate remedy.” Hartley argues that the use of the anti-suit injunction was a quick, effective and appropriate remedy necessary to halt an expensive suit in a forum explicitly barred by the loan agreement. In his view, the anti-suit injunction was “[t]he only practical way of enforcing the rights of the bank... there is no reason why it should be refused just because another Contracting State is involved.”

Bell’s concern is with the effectiveness of the Brussels Convention as a whole, and he worries that the anti-suit injunction undermines the Convention’s central idea of lis pendens—deference to the court first seised. Hartley, in contrast, considers the anti-suit injunction a useful tool to effectuate individual rights. Hartley would argue that parties who negotiate a contract provision should have that contract provision respected by the court, and that whether a court is first seised should not allow it to maintain jurisdiction improperly. Bell focuses on the spirit of the Convention, and the cooperation and respect he thinks the document necessitates, while Hartley would contend that individual rights should not be sub-

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78. Id.
79. Id. at 207.
80. Id.
81. See generally Hartley, supra note 73.
82. Id. at 170.
83. Id.
84. Id. Article 17 concerns jurisdiction agreed to by parties to a contract. It indicates that the court first seised should cede jurisdiction to the court chosen by the parties in the contract.
85. Id. at 171.
86. Id.
87. See generally Bell, supra note 69.
88. See generally Hartley, supra note 73.
89. Id.
verted to the Convention. Moreover, Hartley contends that the Convention allows this wiggle room, and the justice value at stake is worth the possible inconsistencies that may result.

B. A Common Law Remedy in a Civil Law Context

The use of anti-suit injunctions against other Brussels Convention signatories is further complicated by the fact that the anti-suit injunction has no corollary in the civil law system. Lenenbach comments that “[t]o a civil lawyer, some common law legal institutions are so alien they seem to come from another legal universe.” The judicial discretion inherent in issuing an anti-suit injunction does not exist in the civil law system. Civil law is based upon a system of codes where judicial discretion is discouraged, and the constant adaptation and fluidity of the common law system is alien. The civil system thus considers common law remedies unpredictable, confusing and upsetting to their system as a whole—and the Brussels Convention has many more civil system signatories than those from common law systems.

As the particular example of anti-suit injunctions demonstrates, the meshing of common law and civil law systems is not necessarily a natural or intuitive process. Further, the ECJ continues to attempt to balance the supremacy of EU law with deference to national processes and variations, so the confusion caused by the shotgun marriage of these different systems continues.

90. See generally Bell, supra note 69; Hartley, supra note 73.
91. See generally Hartley, supra note 73.
92. See Lenenbach, supra note 6, at 259; Principles of European Contract Law, Parts I and II xxiii (Ole Lando & Hugh Beale eds., 2000) (discussing some significant differences between common law systems and civil law systems: “In civil law systems there is a general and pervasive principle of good faith; in the European common law systems there is no such general principle . . . the civil law considers it legitimate for a contract to contain penalty clauses designed to deter a party from breaking the contract; the common law regards the imposition of penalties . . . as improper and unenforceable. Differences of these kinds are inimical to the efficient functioning of the Single European Market.”).
93. See Lenenbach, supra note 6, at 259 (noting that to a civilian lawyer both punitive damages and anti-suit injunctions come from a “foreign world”).
94. Id.
96. See generally Brussels Convention, supra note 5; see also Principles of European Contract Law, supra note 92, at xxii–xxiii.
98. Principles of European Contract Law, supra note 92, at xxii (“One of the most intractable problems of European legal integration is the reconciliation of the civil law and common law families . . . . [T]here remain major differences between civil law and the common law systems in relation to legal structure and reasoning, terminology, and fundamental concepts and classifications and legal policy.”). See Gráinne De Búrca, National Procedural Rules and Remedies: The Changing Approach of the Court of Justice, in Remedies for Breach of EC Law 37 (Julian Lombay & Andrea Biondi eds. 1997) (“There is no single complete Community legal system, and there is as yet little Community law
III. What Should Be Done?

This section focuses upon the issuance of category (2) anti-suit injunctions, issued when there is a violation of a contract's jurisdiction or arbitration clause, because they represent a greater problem than category (1) issuances.99 The test for category (1) issuance of an anti-suit injunction sets a sufficiently high bar that its use against a Brussels Convention member would be extremely rare.100

A. British Options

1. Stop Issuing Anti-Suit Injunctions?

One approach to the problem of British use of anti-suit injunctions against Brussels Convention members is to argue that Britain needs to completely stop its use of anti-suit injunctions in this context. When the United Kingdom agreed to sign onto the Convention they also agreed to a concomitant abdication of a degree of sovereignty.101 Indeed, one can argue that anti-suit injunctions are just a school-yard bully's way of maintaining turf, and that allowing a suit to go forward in another Brussels Convention state, even in violation of an express contract provision, would not be extremely prejudicial. Arguably, the signatories of the Brussels Convention are modern states with sufficiently similar ideas about contract enforcement, and other important areas of law.102 Given that assumption, the question becomes whether allowing a case to go forward in Spain would really harm a British citizen? Indeed, some argue that there "is little to be said for arbitrary obstruction arising from judicial chauvinism."103

But this is an overly simplistic view of the situation, and ignores the fact that British courts remain unlikely to cease to use anti-suit injunctions against Brussels Convention signatories.104 True, the basis of the Brussels Convention is deference to the court first seised, as well as deference to that court's determination of jurisdiction, in order to foster predictability

regulating the procedural and substantive conditions for the grant of remedies at the national level. Thus the potential tension between the core constitutional principles of EC law and the specific procedural and substantive provisions of the national legal systems is evident . . . it has at times appeared . . . that the autonomy of the national legal systems will prevail over the effectiveness of Community law." (citation omitted); Carol Harlow, A Common European Law of Remedies?, in THE FUTURE OF REMEDIES IN EUROPE 78 (Claire Kilpatrick et al. eds., 2000) ([R]emedies in national legal systems differ considerably . . . not even the minimal toolkit of remedies is common to every national system.").

99. STONE, supra note 35, at 144.
100. Id.
101. REDWOOD, supra note 2, at 152. "A great deal of power has already passed from Britain to the European institutions through successive treaties . . . transferring more and more power to a centralised government in Brussels and the European Parliament."
102. See PRINCIPLES OF EUROPEAN CONTRACT LAW, supra note 92, at xxv. The Commission of the European Contract Law drafted the principles by drawing to some extent from the legal systems of every Member State.
103. STONE, supra note 35, at 146.
and uniformity of enforcement. Nonetheless, in the area of contracts, especially in the context of international agreements, clauses specifying a particular country's jurisdiction for litigation and arbitration are incredibly important. These agreements themselves, formed voluntarily by private individuals, create predictability and foster the necessary and important creation of international contracts. Arguably, if these contract clauses can be easily circumvented, the use of contracts in the international context may be undermined. Therefore, the British court's use of anti-suit injunctions for the limited purpose of enforcing contract provisions is not unjustified, and indeed it can provide an important check on the entire system of international contracts.

2. Anti-Suit Injunctions and Freedom of Contract

In light of the above argument, a better question than whether Britain should stop issuing anti-suit injunctions is: why courts in countries that are parties to the Brussels Convention do not acknowledge or enforce contract provisions that specify another court as the proper forum? One could argue that taking jurisdiction contrary to an explicit jurisdiction clause is a harsher example of "arbitrary obstruction arising from judicial chauvinism" than a British court's issuance of an anti-suit injunction against such an action. While deference to the court first-seised is important, ancient principles of contract enforcement, especially in the international arena, arguably should be at least as important. Parties have the freedom to shape their legal world through contracts—within acceptable boundaries—and the world they create through their contract should be enforced to the fullest extent possible. This right should not be ignored or diluted.

Indeed, British courts strive to enforce the original intent of contracting parties, and hold them to their bargain—pacta sunt servanda. In Donohue v. Armco, a party sought an anti-suit injunction from the English court to prevent an opposing party from suing in any other

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105. Id.
106. Lowenfeld, supra note 18, at 327.
107. See Donald Harris, David Campbell & Roger Halson, Remedies in Contract & Tort 6–7 (2d ed. 2001) ("[T]he law of contract has proven to be a necessary institutional support for the capitalist economies based on generalised exchange, by providing the security to [the claimant] of being able ultimately to obtain a legally enforceable remedy against [the defendant] when [the defendant] breaches by failing to perform without a lawful excuse. The law of contract provides a framework within which parties can, if they wish, turn their voluntary agreement into a binding arrangement subject to external sanction... The law thus enables the parties to make arrangements which are ultimately much more reliable than those which depend exclusively on sanctions within their own control.").
108. See generally Hartley, supra note 73.
110. Stone, supra note 35, at 146.
111. See supra note 107.
Suit had been brought in New York, in alleged violation of an exclusive jurisdiction clause in the disputed contract. The English court noted:

If parties do not submit disputes that are within the [exclusive jurisdiction] clause to the English courts then, on the face of it, they are infringing the other parties' legal rights. The English court's general approach is to enforce those contractual agreements unless there is good reason not to do so. . . . The burden of establishing a good reason for not granting an injunction in the case of an [exclusive jurisdiction clause] is upon the party in breach of the clause.

Freedom of contract may seem to be a facile flag that is waved in the face of many an evil. There exists, however, a reason that this concept is so common to modern Western legal systems—it helps legal systems work, especially the international legal system. In fact, the Commission of European Contract Law, "a body of lawyers drawn from all the member States of the European Union" which drafted the Principles of European Contract, strongly support this notion. The Commission's Principles clearly support freedom of contract stating that "parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing." Moreover, "the Principles acknowledge the rights of the citizens and their enterprises to decide with whom they will make their contracts and determine the contents of these contracts."

As such, the British use of anti-suit injunctions in category (2) contract situations proves to be in harmony with the predictability goal of the Brussels Convention. It is clear that British courts will issue such an injunction to enjoin parties from violating a contract clause citing Britain as the proper forum for resolution of disputes. It is easy to predict when a British court will act in this situation. Predictability is in fact undermined, when a court refuses to acknowledge an explicit jurisdiction or arbitration clause.

B. The European Court of Justice and The Hague Reaction to British Anti-Suit Injunctions

The European Court of Justice (ECJ) will probably determine the fate of Britain's use of anti-suit injunctions against other contracting members of the Brussels Convention. The House of Lords recently referred a case concerning anti-suit injunctions to that court.

In Turner v. Grovit parallel proceedings were brought in Spain against the plaintiff in an English case. The plaintiff sought an anti-suit injunc-
tion to prevent the proceedings in Spain arguing that the Spanish litigation was solely meant to harass. On appeal, the House of Lords determined that under English Law the anti-suit injunction was proper, but referred the question of whether the order was proper under the Brussels Convention to the European Court of Justice. The ECJ has yet to rule on the issue.

It should be noted that the ECJ ruling will probably not resolve the broad issue of whether anti-suit injunctions may be issued by England. The Turner case concerns category (1) anti-suit injunctions, the category that most English courts agree constitutes improper use of the anti-suit injunction. Category (2) anti-suit injunctions, those that British courts issue much more frequently, will not be addressed by the ECJ in this case. Indeed, the question that House of Lords posed to the ECJ narrowly asks whether issuing an anti-suit injunction is proper against “defendants who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts?” The ECJ answer to this carefully phrased query will be unlikely to sound the death knell of anti-suit injunctions.

Some commentators contend that the ECJ is likely to be hostile to British use of anti-suit injunctions. Bell argues that “it is difficult to imagine that the European Court of Justice would be sympathetic to the use of a jurisdictional weapon such as the anti-suit injunction which has the potential to overpower the allocation of jurisdiction which the Brussels Convention enshrines.” Hartley notes that the ECJ’s decision in this area is impossible to predict, but he agrees that “[s]ome members of the Court would certainly regard the political goal of institutional harmony as paramount: the European Court has not so far been conspicuous for its zeal in protecting the rights of the individual where they conflict with institutional interests.” Hartley indicates that the particular facts of the case presented to the ECJ would prove very important in determining the Court’s decision on this issue. The Turner situation supports this last

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123. Id.
125. See Jarvis, supra note 13, at 427 (noting that a preliminary reference to the ECJ often takes between 18 and 20 months).
126. See supra note 52 (noting that category (1) anti-suit injunctions to prevent suits that are "vexatious or oppressive" are issued less frequently than category (2) anti-suit injunctions issued to enforce a forum selection clause).
128. Bell, supra note 69, at 209.
129. Hartley, supra note 73, at 170.
130. Id. Hartley argues that on the facts of Continental Bank "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."
statement, because no matter how hostile the ECJ may be to anti-suit injunctions, that court can only answer the question posed to it.

While the ECJ is unlikely to reach a final decision regarding anti-suit injunctions any time soon, the proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters attempts to fill some of the gaps left by the Brussels Convention, including the Convention's failure to directly address anti-suit injunctions.131 Some of the drafters of the Hague Convention admit that there may be a limited role for anti-suit injunctions that enjoin actions begun in another forum solely to be vexatious or to wear down the opponent.132 Many other participants at the Hague negotiations, however, consider anti-suit injunctions to be an infringement on territorial sovereignty.133 While the negotiations may prove very difficult, contracting states would benefit from creating agreed upon rules regarding anti-suit injunctions, instead of submitting to a world without any determinative rules.134

IV. Anti-Suit Injunctions: A Glimpse at the British Psyche?

One could argue that the solution outlined in Section III, supra, of this Note just begs the question of genuine British involvement in further European integration. A good argument can be made that use of the anti-suit injunction, in any form or situation, is not what the drafters and other signatories of the Brussels Convention had in mind.135 Recall that the Brussels Convention addresses enforcement as well as jurisdiction.136 That means that when an English court issues an anti-suit injunction, the other Member States must also uphold it. Moreover, even if a Member State refuses to recognize the anti-suit injunction under the narrow public policy loophole of the Convention,137 we swing around a vicious circle: the basic premise of the Convention is again undermined—common recognition and enforcement of judgments. Some argue that the United Kingdom just creates unnecessary complications with its anti-suit injunction shenanigans, and should decide to become genuinely involved in the EU and its related agreements, or not.138

The British, however, seem very content to maintain their unpopular stance by continuing to enforce anti-suit injunctions. Ostensibly, "it is not easy wholly to banish antisuit injunctions from a legal culture accustomed

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132. Id. at 226; see generally Hartley, supra note 73; see also Preliminary Ruling Turner, supra note 124.
133. Burbank, supra note 131, at 226.
134. Id. at 226.
135. See generally Brussels Convention, supra note 5.
136. Id. tibs. 1 & III.
137. Id. art. 27.
138. See DUFF, supra note 3, at xi ("It would be bizarre now for the British to fail to deepen solidarity with a liberal and democratic Europe. But in order to make such a positive contribution the British have got to change their attitude towards the continent.").
to them."\textsuperscript{139} Dicta in one English judgment in 1996 suggested that "the problem of anti-suit injunctions between EC countries might be solved by a Directive in favour of their recognition!"\textsuperscript{140}

The problem therefore, is that Britain does not have to "play nice" if it does not want to "play nice." Britain seems unsure about a united Europe, and it remains content to walk the line that geography, history, and the dynamics of political power continue to grant them.\textsuperscript{141} While the march toward further European integration may seem inevitable,\textsuperscript{142} many British remain "Euro sceptics."\textsuperscript{143} Either consciously or unconsciously, Britain's continued use of anti-suit injunctions against Convention members is a direct manifestation of that skepticism. The British believe that they enjoy a special relationship with the United States, and are not necessarily willing to put a "European" relationship ahead of their relationship with the most powerful nation in the world.\textsuperscript{144} Moreover, many British would argue that they have a "fundamentally different approach to nationhood and sovereignty"\textsuperscript{145} than the rest of Europe. In fact,

All British governments, whether right, left or centre, do believe that most important decisions about British life should be taken by the British government and debated in the British Parliament. All British governments find it difficult to square this with a strong and deeply felt wish on the part of continental politicians for more and more decisions to be taken by a bureaucracy in Brussels and not put through their own domestic parliaments.\textsuperscript{146}

Yet despite all of their ambivalence and even hostility towards further integration with continental Europe, Britain did indeed cede a great deal of sovereignty to the European Union, and a great deal of their common law British rules to the Brussels Convention.\textsuperscript{147} Therefore, the maintenance of the anti-suit injunction, besides providing legitimate support for freedom of contract, may also be seen as a manifestation of "a fine-tuned legal balance between the requirements of European integration and state sovereignty."\textsuperscript{148} As one British subject notes: "we are also an island people. We

\begin{footnotes}
\item[139] Burbank, supra note 131, at 225-26.
\item[140] Stone, supra note 35, at 168, citing Phillip Alexander Securities v. Bamberger, 12 July 1996 (noting that in this case the English court stated that the anti-suit injunction granted was based on an incorrect understanding of the situation, yet the judgment still advocated broad recognition of anti-suit injunctions).
\item[142] See Duff, supra note 3, at ix-x ("The twenty-first century could be the first to see the peaceful unification of Europe . . . . We take the view that the European Commission must become both stronger and more accountable . . . . Such reforms will reinforce the federal element in the makeup of the European Union.").
\item[143] Redwood, supra note 2, at 57; see Duff, supra note 3, at xi.
\item[144] Redwood, supra note 2, at 3.
\item[145] Id. at 57.
\item[146] Id.
\item[147] Id. at 152.
\end{footnotes}
take pride in our centuries-long success as an independent country.” Anti-suit injunctions do not violate any specific provisions on the Brussels Convention, and their continued use may be seen as a way for Britain to continue to assert its unique qualities.

Conclusion
The British anti-suit injunction is alien to the other signatories of the Brussels Convention, but the principles behind why a British court will issue an anti-suit injunction to enjoin parties from proceeding in a foreign court against the express provisions of a contract clause are not alien to those other signatories. Parties have freedom to contract, and freely negotiated contract provisions should be upheld. If they are not upheld, a British court should be free, in this clearly defined context, to try to enforce those contract provisions through use of an anti-suit injunction.

Moreover, while use of anti-suit injunctions may often be justified on freedom of contract grounds, it may also be viewed as a completely legal way that the British can continue to be themselves in the increasingly civil law atmosphere of Europe. Britain is European, but it is also separate from Europe. While a desire for neat and tidy political and legal solutions is admirable, it is not always feasible or completely desirable. Europe is an incredibly complex region, and it is naive to believe that all of those complexities can be mitigated by a sweeping document like the Brussels Convention. The limited use of the anti-suit injunction by the British will not threaten the Brussels Convention as a whole, yet it provides an outlet for the British to assert their unique British qualities.

149. REDWOOD, supra note 2, at 58.
150. The end. Stop. See supra note 1.