THEMIS COMPETITION 2021

Semi-Final C

EU and European Civil Procedure

TH/2021/03

SHOULD I STAY OR SHOULD I GO?

anti-suit injunctions between international comity and mutual trust

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SHOULD I STAY OR SHOULD I GO?

ANTI-SUIT INJUNCTIONS BETWEEN INTERNATIONAL COMITY AND MUTUAL TRUST

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PART I

1. *Mutual trust as building block of the judicial cooperation in civil matters within the EU*

Although the notion of mutual trust is not mentioned in the Treaties, it has become an essential building block of the European Union and gained the status of a general principle, arguably a structural principle of EU constitutional law.

It finds an express reference in Opinion 2/13 on the Accession of the EU to European Convention on Human Rights (ECHR), where the Court of Justice (hereinafter, ECJ) emphasized that "*the principle*

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of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained"[1].

In particular, the areas in which the principle of mutual trust has developed are that of judicial cooperation in civil and criminal matters, mainly linked to the Area of Freedom, Security and Justice (hereinafter AFSJ), where it is the cornerstone of those matters[2].

Mutual recognition - according to which a decision taken in a Member State is more or less automatically accepted by another Member State, thus acquiring legal force - implies that the receiving State relies on the adequacy of the regulatory system of the issuing State, whose rules offer equal or equivalent protection and are correctly applied.[3].

Mutual trust made its first appearance in the context of the internal market, in situations where (detailed) harmonization could not be reached or was considered undesirable[4]. Nevertheless, it is only in the AFSJ that it assumed such a pronounced role: "*one explanation could be that the need for mutual trust is clearly underlined in the relevant legal instruments in that Area and that the deeply problematic tension between mutual trust and protection of fundamental rights has come to the fore much more in the AFSJ than it ever did in the context of the internal market*"[5].

The principle of mutual trust is not a self-standing standard for review; it does not produce legal effects on its own but is applied "*in tandem*" with provisions of secondary Union law in which concrete measures of the AFSJ are enacted.

While the case-law in the context of the internal market show that mutual trust was closely linked to the provisions of the Treaty governing freedoms, in the AFSJ this principle guides the interpretation of secondary Union law. In other words, it serves as an - often contextual - argument for a certain interpretation of the provisions at stake. Therefore, on a very general level, the application of the principle of mutual trust implies that one Member State can be confident that other Member States respect and ensure an equivalent level of certain common values, in particular the principles of freedom, democracy, respect for human rights and the rule of law[6].

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[1] ECJ, opinion 2/13 of 18.12.2014, § 191. On the 'discovery' of the principle and its elaboration see J.-C. BONICHOT, M. AUBERT, *Les limites du principe de confiance mutuelle dans la jurisprudence de la Cour de justice de l'Union européenne: comment naviguer entre Charybde et Scylla,* in Revue Universelle des Droits de l'Homme, 2016, pp. 1-5.

[2] S. PRECHAL, '*Mutual Trust Before the Court of Justice of the European Union'*, European Paper (EP) (2017).

[3] See *inter alia* ECJ, 23.12.2009, *Detiček*, C-403/09, § 4; 30.05.2013, *Jeremy F.*, C-168/13 PPU, § 50. Not surprisingly, mutual trust is emphasized in the preamble of various instruments concerning judicial cooperation in civil and criminal matters (e.g. recitals 16 and 17 of Regulation (EC) 44/2001; recital 21 of Regulation (EC) 2201/2003; recital 10 of Council Framework Decision 2002/584/JHA of 13.06.2002 on the European arrest Warrant.

[4] N. CAMBIEN, '*Mutual Recognition and Mutual Trust in the Internal Market'*, European Papers, 2017, Vol. 2, No 1, www.europeanpapers.eu.

[5] S. PRECHAL, 'Mutual Trust', *infra*, where the author wonders "*If the principle of mutual trust is to be considered a principle of EU constitutional law, the question arises to what extent the principle may or will have a larger field of application than the AFSJ. A principle with a constitutional scope should indeed apply in a broad fashion, beyond the AFSJ. The Court's case law does not exclude that possibility*".

[6] Cf. Art. 2 TEU. See also opinion 2/13, cit., para. 168.

2. *The principle of international comity: extension and scope*

International comity is the recognition a State pay to the legislative, executive, or judicial acts of another State; it implies that a court should defer to the laws of other States when actions are taken pursuant to those laws.

The doctrine of international comity has been described variously "*as a choice-of-law principle, a synonym for private international law, a rule of public international law, a moral obligation, expediency, courtesy, reciprocity, utility, or diplomacy. Authorities disagree as to whether comity is a rule of natural law, custom, treaty, or domestic law. Indeed, there is not even agreement that comity is a rule of law at all*[7]". Considering that this doctrine touches upon various principles of international law, it has been stated that it is "*one of the more confusing doctrines evoked in cases touching upon the interests of foreign states*[8]*"*.

It was a group of Dutch jurists, in the late seventeenth century, who created the doctrine of international comity, based on the idea that *comitas gentium* (that is "civility of nations") required the application of foreign law in certain cases because sovereigns "*so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects*[9]". Accordingly, comity was considered, from one side, a principle of international law, and to another, the decision to apply foreign law itself was left to the State as an act of free will.

Later the idea of comity was introduced into English law by Lord Mansfield, a British barrister and jurist, who considered its application as discretionary, with courts applying foreign law "*except to the extent that it conflicted with principles of natural justice or public policy*[10]".

In the United States the comity doctrine was firstly applied by Justice Joseph Story of the Supreme Court, who agreed with the idea that its application should be voluntary and consensual in order to foster trust among States. That is why, unlike the enforcement of judgments between States in the United States (which is governed by the Comity Clause of the Constitution), there is no constitutional obligation on a U.S. court to recognize or enforce a foreign judgment.

Nor is comity of nations embodied in international law. However, sovereign nations still use comity of nations for public policy reasons. Under comity, a reviewing court does not reopen cases that have already been heard in other courts; instead, it examines the foreign judicial system. After considering factors (such as fairness and impartiality of that foreign system, the foreign court's personal

[7] JOEL R. PAUL, '*Transformation of International Comity*', 71 Law & Contemporary Problems 19, 19–20 (2008).
[8] See "*International Human Rights Litigation in U.S. Courts*", 2d rev. ed. (Martinus Nijhoff, 2008: eds. Beth Stephens et al.), p. 355.
[9] JOEL R. PAUL, '*Transformation of International Comity'*, infra, p. 23.
[10] JOEL R. PAUL, '*Transformation of International Comity'*, infra, pp. 23-24.

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jurisdiction over the defendant, the existence of subject matter jurisdiction, and the presence of fraud), the reviewing court might choose to respect and enforce that foreign court's judgments.

3. *The Brussels Convention and the "Brussels regime".*

In 1968 the EEC already started its activity in the sphere of civil jurisdiction, by way of the Brussels Convention, whose aim was to streamline the recognition and enforcement of judgments in the EEC. For that purpose, jurisdiction rules were inserted, so that they could recognise and enforce each other's judgments without further ado.

Recognition and enforcement of judgments were essential for the functioning of the internal market that was being developed: for cross-border trade to be efficient, one would have to be able to enforce a civil judgment against a debtor in another EEC country where he had assets.

As a pure matter of international law, the Brussels Convention was a multilateral treaty. It did not form part of EEC legislation. The European Court of Justice only had power to interpret the Convention, based on an additional protocol to the Convention itself. Therefore, whenever new Member States joined the EEC, the Convention had to be renegotiated. Then it had to be signed and ratified by all the Member States, as public international law requires.

It was only in 1999 that the European Community obtained authority to legislate on civil jurisdiction. This brought, among others, two important instruments in this matter: Reg. (EC) 44/2001 (Brussels I, on jurisdiction, recognition and enforcement of judgments in civil and commercial matters)[11] later replaced by Reg. (EU) 1215/2012 (Brussels I *bis*) which made it possible to directly proceed with the enforcement of an executive decision in another Member State of the EU, exactly as if it were a national judicial measure. In particular, eliminating the need for an *exequatur* from the judicial authority of the executing State.

In fact, before the entry into force of the new Regulation, having an enforceable measure executed in another EU country entailed, at first, the need to request the competent authority of the executing country for a (further) declaration of enforceability of the provision (following a purely formal check). This step naturally involved the implication of a local lawyer, with the consequent expenses, as well

[11] It should be noted, right from the start, that each of these regulatory instruments stands in a relationship of continuity with respect to its predecessors. This element is explicitly recognized in Recital 34 of the Brussels I bis Regulation, which requires that the provisions of the Regulation be interpreted in a consistent manner with respect to the interpretation provided by the Court of Justice of the European Union with reference to the 1968 Brussels Convention and the Regulation Brussels I. Precisely, in order to apply the principle of continuity, the Court has, on several occasions, sanctioned the direct applicability of the interpretation of the provisions of the Convention and the Brussels I Regulation to the Brussels I bis Regulation, whenever such provisions can be considered equivalents (See ECJ, 15.6.2017, *Kareda*, C-249/16, § 27; 17.10.2017, *Bolagsupplysningen and Ilsjan*, C-194/16, § 24).

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as further delay. The declaration of enforceability then had to be notified to the party against whom the execution was requested, who had the opportunity to appeal.

Instead, the Brussel I*bis* Regulation expressly provides that the decision issued by the judicial authority of an EU Member State which is enforceable in that State, is also enforceable in all other member States without requiring a declaration of enforceability.

Operationally, in order to immediately start the enforcement in another Member State, the interested party have to make use of a multilingual standard form accompanying the decision to be served to the recipient; the latter is, in turn, entitled to oppose, based on some grounds for refusal set out in the Regulation. The same rules also apply to authentic instruments and court settlements.

The simplification brought about by the Brussels I*bis* Regulation is evident, at least for decisions pronounced after 10.01.2015, the Regulation not being applicable to enforceable decisions issued in proceedings instituted beforehand.

4. *Parallel proceedings within and outside the EU: lis pendens vs forum non conveniens.*

In international litigation it is possible that more than one court has jurisdiction to hear a dispute. A unilateral approach, based on the affirmation of jurisdiction by each State can lead to parallel proceedings and, if both cases are pursued to the end, conflicting judgments. Some legal systems have ways of dealing with such events, while others ignore it, sticking to a unilateral approach.

One solution is to apply a rule of priority; however, also when no parallel proceedings are in place, a defendant might argue that the court which the plaintiff elected is not the most appropriate to hear the case and that another court should be.

The main tools a defendant can use to avoid a hearing in a court chosen by the plaintiff are *lis pendens*, *forum non conveniens* and the anti-suit injunction[12]. The "Brussels regime" foresees rules on *lis pendens* and related actions, but not on *forum non conveniens* and anti-suit injunctions which are a more aggressive and unilateral way of dealing with parallel proceedings[13].

As to the rules of *lis pendens* contained in the Brussels I*bis* Regulation, the ECJ has indicated, at least implicitly, that these rules are not entirely jurisdictional, in any case not for determining when they apply and when not[14].

[12] Jurisdictional rules make a specific court competent to hear a case on the basis of a certain connection, such as the domicile of the defendant. Rules on *lis pendens*, *forum non conveniens*, related actions and anti-suit injunctions do not grant jurisdiction. They can only be seen as jurisdictional rules in the sense that they prevent jurisdiction.

[13] As to the rule of *lis pendens*, it is characterized by strictness and predictability. On the other hand, the *forum non conveniens* rule is difficult because it is discretion- orientated. The doctrine often requires a glance into the alternative forum. This includes the concerns of a fair trial in the foreign country.

[14] See in this regard ECJ, 27.06.1991, *Overseas Union Insurance*, C-351/89. See also R Geimer, "*The Right to Access to the Courts under the Brussels Convention*" in Court of Justice on the European Communities, Civil Jurisdiction and Judgments in Europe, Butterworths, 1992, p 39.

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In order to determine the scope of the EU rules, one refers to whether the courts concerned are situated in the EU or not. This determination of applicability brings the rules of *lis pendens* and related actions in line with the rules on recognition and enforcement of judgments, otherwise the scope of the rules on *forum non conveniens* (and anti-suit injunctions) seems different.

In the EU instruments and in national laws *lis pendens* is generally defined as the pending of the same proceeding between the same parties in more than one court. In this case a defendant may then argue that the second court should not hear the case. It is based on the principle that the same request should not be made more than once as this would amount to harassment of the defendant by causing him unnecessary litigation and extra costs.

The Brussels regime solution is based on a strict rule of priority: the first-seised court retains jurisdiction, while the second-seised court stays the proceedings until the former has decided on its jurisdiction. If this is the case, the latter must decline jurisdiction. There is no discretion in the application of the rule, as in some national systems[15].

However, if concurrent actions are pending in an EU Member State and in a third State, the Brussels I Regulation's rigid *lis pendens* rule does not apply, and the more discretionary art.33 takes place. Such issue would have to be resolved in accordance with bilateral treaties or the domestic private international rules[16].

Furthermore, the Brussels I*bis* Regulation does not prohibit the observation of *lis pendens* obligations towards third States, based on national law or a bilateral or multilateral treaty between an EU Member State and a third State[17].

In the countries where it applies, the *forum non conveniens* doctrine is invoked where the defendant accepts that the court has jurisdiction but alleges that the case can more conveniently, or more appropriately, be heard by another court. When successful, the court grants a stay on the basis of *forum non conveniens*. That means that if the other forum, for some reason does not retain jurisdiction, the parties can revert to the court that granted the stay and that court will hear the case.

The doctrine of *forum non conveniens* is not accepted in most civil law systems; however, although often misunderstood and unappreciated, it remains useful in international civil litigation as it allows to respect third States' courts and their jurisdiction providing a solution for situations in which an EU Member State's court has jurisdiction, while a ground of jurisdiction does exist in a third State.

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[15] Application of the rule requires the presence of three elements: a) the same parties; b) the same dispute; c) the same cause of action.

[16] The Regulation is only concerned with proceedings in EU Member State courts: a rule of strict priority does not seem workable outside the framework of a convention or a regulation.

[17] Arts 71 and 72 Brussels I Regulation. See also R GEIMER, '*The Right to Access to the Courts under the Brussels Convention*' in *Court of Justice of the European Communities*, p 42-43.

Finally, it can prove useful when an EU Member State court has jurisdiction, while the parties concluded a *forum* clause in favor of a third State's court[18].

5. *Forum shopping and Italian torpedoes, as unintended effect of the "first-in-time" rule*

Sometimes the *lis pendens* rule can be abused by one of the parties – often the stronger one – by bringing proceedings in an EU Member State where the judicial system works slower than in the other EU Member States, so that the other party is blocked from bringing proceedings elsewhere in the EU.

This particular phenomenon of abuse of the procedural rules in case of jurisdictional agreements, developed in cross-border disputes – particularly in intellectual property cases[19] - was nicknamed as "*Italian torpedo*".

In particular, the action could be brought by the party in a EU Member State whose jurisdiction has no connection to the claim and, moreover, the court of the Member State in whose favour the jurisdiction clause is drafted must then wait until the court first seised has dealt with the jurisdiction dispute[20]. The resulting delay and expenses often force the unfortunate torpedoed victim to settle[21].

The drafting of *lis pendens* provisions and the strict interpretation of both art.27 of Brussels I and art.29 of Brussels Ibis Regulations have triggered this abusive practice among Member States. In the civil law system, after all, jurisdiction is seen as a matter of public law and does not allow interference by a foreign court, unlike in the English legal order where jurisdiction belongs to civil and commercial matter.

Although the rules on *lis pendens* had the obvious purpose of avoiding different judgments on the same dispute by the courts of different Member States, however, the result was a rush to the courts to avoid a potential torpedo action on the other side[22].

The key reform in this respect led to the new Article 31(2) on *lis pendens*, according to which: "*Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay*

[18] However, the judgment of the European Court of Justice in the *Owusu* case has seriously restricted *forum non conveniens*, even in favour of third State courts.

[19] TC HARTLEY, "How to abuse the law and (maybe) come out on top: Bad-faith proceedings under the Brussels Jurisdiction and Judgments Convention" in JAR Nafziger & SC Symeonides (eds), *Essays in Honour of Arthur T von Mehren*, (fn 244) p 73-81 at p 77-78 & 81.

[20] A classic example of Italian torpedo can be found in the ECJ case *Trasporti Castelletti v Hugo Trumpy*, where an Italian court took more than 10 years to decide that it had no jurisdiction to hear a claim over a bill of lading containing an English jurisdiction clause.

[21] J. WOOD, N. ALLAN, 'Sinking the Italian torpedo: the recast Brussels Regulation' in RPC, according to which, "*this usually means suing for a declaration of non-liability in Italy, sinking the opponent's claim"*.

[22] "*While the Brussels Regulation was generally regarded as a successful piece of legislation, it has often been criticised for this reason and the European legislature is to be commended for attempting to tackle the problem"*, see J. Wood, N. Allan, infra.

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the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement". This provision should prevent most of the torpedo actions.

PART II

6. Anti-suit injunctions: structure, characteristics and use in practice

Anti-suit injunctions (hereinafter ASI) are judicial measures in use in the courts of the UK at least since 1600, initially as instruments to trigger the jurisdiction of the ecclesiastical courts and subsequently used by the Court of Chancellery in order to prohibit parties to a dispute to apply to common law courts for resolution. They derive from Equity, a body of rules complementary to those of Common law, and characterized by State origin (precisely the Court of Chancellery), by the most marked discretion, by remedial perspective and greater flexibility, in a corrective function of the rigidity of the common law.

In fact, the English regulation of the ASI does not place precise limits on their adoption, rather leaving it to the judge to evaluate the granting, case by case, based on criteria of appropriateness and of that equitable function typical of the common law tradition.

This instrument of jurisprudential origin was then codified in art. 37 of the Supreme Court Act of 1981, under which «the High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so».

It should also be emphasized that in recent years there has been an intensification of the practice of anti-suit injunctions and its expansion beyond the original sphere of the English courts, ending up being adopted also by American judges and of other third-States (sometimes even from civil law courts, thus representing a phenomenon of not only English but also ultra-European and even global significance).

By the ASI, a contracting party can request a court to sanction its counterpart which manifests the intention to introduce, or has already instituted, a proceeding in a different State and in a court deemed incompetent for various reasons. That mostly happens when the recipient of the ASI has instituted the proceeding in violation of a contractual clause that establishes exclusive jurisdiction in a particular court, or in violation of an arbitration clause that establishes the referral to arbitrators of disputes arising between the parties.

If the requested court considers that the conditions for granting an ASI exist, it prevents the contracting party from establishing or continuing the proceeding before the court deemed incompetent. Failure to comply with this order is a contempt of court which may be followed by the arrest of the person who carries out this act and the attachment of his assets.

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As for their prerequisites, ASI are issued under two conditions: 1) the court issuing the injunction considers itself the natural *forum* for the trial, and there is a "sufficient interest" in the substantive claim which is being pursued in the foreign jurisdiction; 2) the circumstances of the case require such a remedy and reasons of substantial justice do not advocate for the trial to take place elsewhere (which would lead to an application of the *forum non conveniens* doctrine).

This is a remedy of both a preventive and a subsequent nature, being able to inhibit the counterpart from either instituting a proceeding or continuing it, if already introduced. It is also a measure of a personal nature, being addressed not to the judge of the case, but to the party who commenced the proceeding before a judge allegedly lacking jurisdiction.

In this vein the ASI represents an instrument aimed at avoiding parallel proceedings and particularly at discouraging the practice of *forum shopping*; it has also been noted that ASIs are often granted by the English courts in function of substantial justice, to free the contractor in "good faith" from the oppressive vexatious conduct of his counterpart: in particular, establishing a tiring proceeding in an incompetent jurisdiction often with the intention of indefinitely postponing its conclusion.

According to another view, the ASI would represent an instrument of protection of the contractual rights of the parties, aimed at protecting the principle *pacta sunt servanda*, which binds the contracting parties to respect the conditions they established. In this context, ASIs would be aimed at guaranteeing those interests that lie behind an exclusive jurisdiction clause or an arbitration clause.

As it is evident, the granting of ASIs is in strong friction with the principle of international comity we addressed in part I of this paper.

7. ASI in the context of the Brussels I-*bis*: exclusive choice of court agreements and arbitration agreements.

From a mutual trust perspective, one of the issues that first had to find a solution in this area was the interplay between international *lis pendens*, which was given a uniform and binding discipline with the "Brussels regime", and the issuance of ASIs that soon brought about a strong friction with the above principle. The ASI, in fact, apparently seem to move implicitly from a diametrically opposite assumption: the mistrust by the English courts in other jurisdictions.

The ECJ jurisprudence, after the approval of Regulation (EC) 44/2001, took an opposite stance as regards the issuance of the ASI in most of its known cases.

In *Turner v. Grovit*[23] - where an action initiated in Spain by the employer against his former employee was deemed vexatious and oppressive by the English court and sanctioned with an ASI – the ECJ stated that the use of an ASI caused an interference with the jurisdiction of the other Member State

[23] ECJ, 27.04.2004, *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*, C-159/02

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which undermined the fundamental purpose of the Brussel I Regulation, regardless of the claimant's reasons and therefore even where the action first initiated was deemed vexatious.

In *West Tankers Inc v Allianz* SpA[24], concerning the violation of an arbitration clause, thus of a contractual right of the parties, the ECJ considered that the use of the ASI was inappropriate and stated that it would violate "*the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction is based*".

We can therefore conclude that in the light of this jurisprudence, for cases in civil or commercial matters (and therefore within the scope of the Brussels Regulations) involving the courts of Member States, the use of ASI is prohibited.

8. ASI towards Member States and third States: double standard in the protection of the claimant

The application of ASIs revealed some grey areas. Firstly, they would be invalid only within the EU, where the aforementioned Regulations are binding; outside the EU, where the Brussels regime is not applicable, the possibility of granting an ASI could abstractly be re-expanded. Consequently, the issuance of an ASI, which against an EU citizen would be inadmissible, would instead be practicable against a citizen of a third State, who does not enjoy the protection ensured by the Brussels Regulations as interpreted by the ECJ.

Thus, a "double standard" of protection would be determined according to the nationality of the claimant and the different treatment would only be justified by the defendant's lack of European citizenship. This has led to strong perplexities in legal practitioners relating to what appears to be an unjustified inequality of treatment.

This dyscrasia has led to diverging opinions. Some believed that this difference in treatment revealed the unreasonableness of the ECJ's arguments and that the comity principle, strenuously defended and rigidly applied by the Court, should be mitigated, meaning it in a more flexible and elastic sense, certainly permeable by the ASI. From this dogmatic point of view, the ASI – as instruments of protection against vexatious and oppressive judicial actions – must be able to be recognized both outside and inside the EU. Others, held that the very identity of *ratio*, represented by the mutual trust, by the respect of the national jurisdictions and the right of defence of the applicants, makes the prohibition of issuing the ASI exportable even outside the strict scope of application of EU law. They should be prohibited regardless of the national identity of the recipient.

[24] ECJ, 10.02.2009, *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.*, C-185/07

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From another point of view, the aforementioned prohibition would be valid, within the EU, only within the scope of application of the aforementioned Regulations, while beyond their scope it would be possible to issue ASIs also towards EU citizens.

In particular, following the adoption of the Brussels Ibis Regulation, the *lis pendens* discipline contained therein would no longer apply to arbitration matters. In particular, recital n. 12 would have excluded arbitration procedures from the scope of the Regulation in order to emphasize the autonomy of national jurisdictions from arbitration disputes. Thus, according to this opinion, since arbitration is removed from the discipline of the new Regulation, there would be a revival of the possibility of issuing ASI at least in this area. This conclusion was disavowed by those who believe that this outcome would still be contrary to the principles of comity and the free circulation of foreign decisions (to which arbitration decisions must be assimilated) and that in any case, where the European legislator had wanted to determine such an important effect, he would have made an explicit statement, especially in the light of such settled European jurisprudence.

9. Antisuit injunctions in EU Member States: first appraisal of anti-ASI in French and German Courts

As we have seen, ASI entail a friction with numerous principles of cardinal importance.

First of all, ASIs in fact demonstrate the mistrust that the foreign Court first seized would not recognize its lack of jurisdiction, denying to declining it and – even where this is not the case – would not render justice as equitable as an English court or an arbitral tribunal would do.

The principle of national sovereignty also appears to be violated, as the ASI in fact – despite issued *in personam* – indirectly influences, inhibiting it, the free exercise of jurisdiction by the first court.

The ASI also compresses the right of defence of the claimant. Although *forum shopping* sometimes represents a pathological and deplorable drift, the possibility of choosing its own judge, while others are potentially endowed with jurisdiction, still represents a connotation of the right of action. In response to these distortions, the application in practice highlighted various reactions of courts receiving ASIs.

In some cases, ASIs were simply ignored. Considering that the first court is the only one able to decline its jurisdiction, in cases where foreign courts have deemed illegitimate the ASIs directed against one of the parties in their proceeding, they have simply decided not to recognize them, continuing to hear the case. This occurs especially when the recipient of the injunction does not own assets in the issuing country, so it can hardly be enforced.

In case of arbitration, this refusal to recognize an ASI stems from the so-called principle of the *kompetenz kompetenz*: the jurisdiction of the arbitral tribunal in fact does not derive from national or

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international law but from the will of the parties. It would be insensitive to the "indication" of the jurisdiction provided by a different judge, as only the arbitral tribunal can judge on its own jurisdiction.

In other cases, the recipient courts responded with an anti-ASI against the subjects who issued the ASI, forbidding the sender to frustrate or disturb the proceeding in progress. With the anti-ASI, the court inhibits the party from continuing with the request for the issuance of an ASI. This is evidenced by two paradigmatic measures, one of the Higher Regional Court of Munich in the case *Nokia v. Continental* [25]and another issued by a French court in the case *IPCom v. Lenovo*[26].

The adoption of anti-ASI, however, was regarded with great perplexity by the legal practitioners.

On the one hand, it undermines the relationship between courts, generating a conflict dealt with by an indefinite succession of reciprocal inhibitory ASI. This would cause a paralysis of the judicial action and therefore a serious prejudice to the right of defence of both counterparties. On the other hand, the same arguments (in particular their contrast with EU law) prove that anti-ASIs should be considered equally inadmissible, as they violate foreign sovereignty and judicial power, along with the right of defence of the party who sought protection from the court that heard the case.

We arrive at the paradox, therefore, that ASIs and anti-ASIs would equally be allowed, or declared inadmissible.

Against this background, it would be necessary to scrutinize more carefully the argument put forward by the High Court of Munich according to which anti-ASIs derive their legitimacy from the fact that they constitute an instrument of reaction against an illegitimate provision. And it would be necessary to answer the following question: an invalid measure, adopted in the context of a judicial action might be considered valid when adopted in reaction to the former?

PART III

10. *Right of access to court: in particular, the right to sue or to be sued in a particular forum*

According to international and European human rights law, States should guarantee everyone the right to obtain a remedy if her/his rights have been violated., and the right to access to court became one of the fundamental principles upon which the Rule of Law is based.[27]

Different human rights are strictly linked to access to court: the right to a fair trial under Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights as well as the right to an effective

[25] See LG München I, judgment of 2.10.2019, case no.21 O 9333/19

[26] See Court of Paris, 20.01.2020 - Case No. RG 19/60318

[27] G. MCALOON, *Double standards in comity and the suppression of the rights of the plaintiff: the future use of anti-suit injunctions* in Private International Law examined.

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remedy under Article 13 of the ECHR and Article 47 of the Charter. Therefore, the right to access to court could be meant as a right enabling individuals to enforce other rights[28].

The jurisprudence of the ECtHR on art. 6 helps to understand the international law framework within which anti-suit injunctions are to be evaluated and understood[29].

After Brexit the UK continues to adhere to the ECHR, therefore remains subject to the rules of the Charter and to the jurisdiction of the Strasbourg Court. Consequently, the legitimacy of the ASIs and any limits to their issuance will have to be scrutinized not only from the perspective of EU law but also that of the ECHR.

The ASIs interfere with at least two rights protected by the Charter: the right of expression pursuant to art. 10 and, more importantly, that of defence or access to justice, pursuant to art. 6 and 13. As has already been illustrated, the ASI prevents a person from seeking justice before a certain court, considered by his contractual counterpart to be lacking of jurisdiction or, in any case, not convenient. This evidently limits both his right to take legal action and that of expressing his legal reasons in the manner, in the seat and under the rules of the chosen legal system.

ECoHR jurisprudence does not consider the aforementioned rights to be absolute, but compressible when certain requirements and conditions are met. In particular, CoE law deems the limitations admissible where they are aimed at satisfying a legitimate objective, are proportionate and do not irremediably sacrifice the applicable law.

Some scholars consider an ASI legitimate, based on a threefold reasoning: 1) they pursue legitimate aims, either protecting the part of a contract from the vexatious and oppressive conducts of another who exercised a judicial action in an incompetent court, and avoiding parallel proceedings; 2) anglo-saxon jurisprudence and doctrine have always recommended particular caution in issuing them, only when strictly necessary and after a careful balancing of the interests at stake (see above Cap. 2, Par. 1: the ASI can be granted where the jurisdiction has a connection with the specific case and reasons of substantial justice support the attraction of the competent court); 3) ASIs do not radically eliminate the right to access to justice. They merely affirm the exclusive jurisdiction of the court which issues them, where the recipient of the ASI will still be able to fully exercise its right of defence.

Different conclusions could be reached when it is believed that the right to seek justice is a non-fungible right. The ASI, by preventing the recipient from initiating or continuing proceedings before a particular court, would definitively eliminate the party's right to obtain justice in the light of the law invoked and its rules. This, if on the one hand it is prejudicial to the right of defence in light of the

[28] See, inter alia the *Handbook on European law relating to access to justice*.

[29] See in this regard ECtHR, 16.07.2002, *P C and S v United Kingdom*, n.56547/00, §89 e 91.

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regulatory peculiarities of the various European states, on the other it appears contrary to the aforementioned principles of comity and mutual trust.

In civil law countries, the principle of access to court is a particular expression of State sovereignty[30] and, as such, it should be safeguarded when a court uses injunctions to restrain a party from instituting or continuing proceedings in a foreign court. Indeed, it is generally admitted that, although these injunctions only operate *in personam*, sometimes they generate indirect interferences with the proceeding of the foreign court. For example, already in 1989, the Brussels Civil Court refused to recognize an American ASI because it was repugnant to Belgian public policy in combination with article 6 ECHR.[31]

Moreover, the use of ASIs challenges the so-called comity, defined by the ECJ, in *Allianz SpA v West Tankers, Inc.*, as the "trust between justice systems".

Instead, in common law countries, as in the UK, non-compliance with an ASI is considered as being in contempt of the court; consequently, as a matter of public policy, the recipient cannot take advantage in that country of the result of his contemptuous behavior. However, this has not prevented the ASI to be perceived as an extra-territorial remedy and as a form of interference with proceedings of another jurisdiction even when the foreign *forum* is totally disconnected with the factual situation.

On a different vein, the Brussels I-*bis* Regulation foresees grounds for jurisdiction which only indirectly govern relations between private litigants, without implying the admissibility of a right to be sued abroad being protected by an anti-suit injunction.[32]

In *Gray v Hurley***,** [2019] EWCA Civ 2222, the appellant argued that the right not to be sued outside England, where she was domiciled, obliged the court to give effect to that right by granting an anti-suit injunction. The Court of Appeal considered that the issue was not *acte claire* and made a preliminary reference to the ECJ (pursuant to Article 267 TFEU) asking whether Article 4(1) of the Brussels I-*bis* Regulation provided someone domiciled in England with a right not to be sued outside England so as to oblige the courts to give effect to that right by granting an anti-suit injunction.[33].

However, the Court of Appeal having withdrawn its request for preliminary ruling, the case has been removed from the register.

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[30] *Anti-Suit injunctions in Private International law*, Europa Institut.

[31] Civ. Bruxelles, 18.12.1989, R.W. 1990-1991, p. 676.

[32] A. MUKARRUM, "*A Dangerous Chimera: Anti-suit Injunctions based on a 'right to be sued' at the place of domicile under the Brussels Ia Regulation?", 136 Law Quarterly Review 379, 2020*

[33] The questions referred to the ECJ were the following: '1. Does Article 4 (1) of Regulation (EU) No 1215/2012 confer a directly enforceable right upon a person domiciled in a Member State? 2. If it does: a) where such right is breached by the bringing of proceedings against that person in a third state, is there an obligation upon the Member State to provide a remedy, including by the grant of an anti-suit injunction? B) Does any such obligation extend to a case where a cause of action available under the law applicable in the courts of the Member State?'

11. *Interplay between anti-suit injunctions and the "Brussels regime": do they always infringe the principle of mutual trust?*

The EU incorporated a presumption of mutual trust between Member States in various regulatory instruments adopted in recent years[34] although its application in practice has proven difficult. Its main advantages are automatic recognition and streamlined enforcement of judicial decisions. Therefore, "*based on mutual trust, the system includes very limited grounds to refuse the recognition and execution of a judicial decision or to raise questions regarding the legal system of the Member State of the issuing authority. Automaticity has presented a number of challenges, most notably with regard to the protection of the fundamental rights of affected individuals*".[35]

That said, it is generally believed that the European Regulations have reduced the power of the English courts to grant anti-suit injunctions because they are deemed contrary to the mutual trust.

In *Turner v Grovitt*[36], the ECJ considered the use of an ASI as an interference with the jurisdiction of another Member State, undermining the fundamental purpose of the Brussel I Regulation, regardless of the claimant's reasons.[37]

It should also be considered that, in order to force a party to comply with the clause identifying an exclusive *forum*, the "Brussels system" has devised the already quoted Article 31 (2) of Brussels I-bis.[38]

Against this background, some scholars argue, that the Brussels I-bis Regulation prevented the English courts to intervene when a party to the contract brings an action in breach of English jurisdiction clause in another Member State in order to frustrate proceedings in the right forum.[39] The use of the word "shall" should thus prove that jurisdiction under Article 4 is 'mandatory' but not 'exclusive' in the hierarchy of jurisdictional rules of Brussels I-bis Regulation.

[34] See *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*, EUI Working Papers, MWP 2016/13, EVELIEN BROUWER AND DAMIEN GERARD (eds.), pp. 24-25 according to which "mutual recognition has emerged as the motor of European integration in criminal matters under the third pillar. The adoption in 2001 by the Council of a detailed Programme of measures to implement the principle of mutual recognition of decisions in criminal matters has been followed by the adoption of a wide range of Framework Decisions putting forward comprehensive system of mutual recognition in the field of criminal justice extending from the pretrial (recognition of Arrest Warrants, Evidence Warrants, Freezing Orders, Decisions on bail) to the post-trial stage (recognition of confiscation orders, of decisions on financial penalties, of probation orders, and of decisions on the transfer of sentenced persons). The system of mutual recognition was completed pre-Lisbon by a Framework Decision on judgments in absentia, which amended a number of the preceding Framework Decisions to specify cases when recognition of a judgment could or could not be refused in such cases". See also A. WILLEMS, *The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal*, German Law Journal (2019), 20, pp. 468–495.

[35] See "*Mapping Mutual Trust", supra*, note 40, pp. 24-25.

[36] ECJ, 27.04.2004, *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*, C-159/02.

[37] G. MCALOON, *supra* note 1.

[38] A. MUKARRUM, *supra* note 33.

[39] M.E. CHOWDHURY, *Anti-suit injunction and Brexit – a way forward*.

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In this regard, it is worth mentioning the ECJ's decision in *Owusu v Jackson*[40], which establishes that the court of a Member State may not decline jurisdiction, but it does not establish a further requirement preventing the commencement or continuation of proceedings in another jurisdiction. The doctrine comes to this conclusion also by examining the current Article 22 (1) of the Brussels I-bis Regulation and its jurisprudential application according to which it provides a mandatory exclusive jurisdiction of the English courts which can be protected by an anti-suit injunction[41].

However, Article 31 (2) of Brussels I-bis is not always respected; nevertheless, according to the ECJ a breach of mutual trust does not lead to invalidity of the decision, nor allow a refusal of recognition and enforcement. Therefore, we could assume that for the ECJ the principle of non-revision of jurisdiction is more important than the compliance to the jurisdiction rules[42].

If this is the approach, then ASIs (at least) in cases of non-exclusive jurisdiction could be acceptable. Furthermore, the issue of arbitration deserves some specific consideration.

As said before, in *Allianz SpA v West Tankers, Inc.*, the ECJ held that an ASI is incompatible with the Regulation's system of jurisdiction based on mutual trust.

Notwithstanding, it should also be said, as underlined by the doctrine, that if an ASI is an 'action or ancillary proceeding' relating to 'the conduct of an arbitration procedure or any other aspects of such a procedure' (fourth paragraph of Recital 12 of Brussels Ia), then the Regulation should not apply to it[43]. This interpretation allows to overcome the ECJ's position in *West Tankers* because the Regulation simply does not apply to an action or ancillary proceeding relating to the conduct of an arbitration.

Moreover, as far as ASI and arbitration are concerned, in *Gazprom*[44] the ECJ held that the enforcement by the court of a State of arbitral awards preventing a party from taking the case to a court in that Member State falls outside the scope of Regulation 44/2001, and has to be decided pursuant to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958.

In *Nori Holdings*[45], instead, the claimants' application for a final anti-suit injunction to restrain proceedings in Russia and Cyprus met with mixed success. While the court was willing to grant the ASI to restrain Russian court proceedings, it refused to do the same in relation to proceedings in

[40] See ECJ, 1.03.2005, *Andrew Owusu v N. B. Jackson*, C-281/02.
[41] See in this vein *Samengo-Turner v J&H Marsh & McLennan*, [2007] EWCA Civ 723, and *Petter v EMC Corporation*, [2015] EWCA Civ 828.
[42] See ECJ, 16.01.2019, *Stefano Liberato v Luminita Luisa Grigorescu*, C-386/17
[43] M. MOSES, *Will Antisuit Injunctions Rise Again in Europe?*, 20.11.2013, Kluwer Arbitration Blog, available at http://arbitrationblog.kluwerarbitration.com/2013/11/20/will-antisuit-injunctions-rise-again-in-europe.
[44] See ECJ, 13.05.2015, *Gazprom OAO v Republic of Lithuania*, C-536/13.
[45] See *Nori Holdings Ltd v Public Joint-Stock Co Bank Otkritie Financial Corporation*, [2018] EWHC 1343 (Comm)

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Cyprus, holding that the ECJ's judgment in West Tankers (on so-called intra-EU anti-suit injunctions) remained good law[46].

In any case, the importance of seeking answers to the question whether ASIs issued by English courts under common law are compatible or not with the Brussels Regulation is quite evident. Some scholars believe that the real problem is identifying what should be prioritized: while English courts which follow common law give priority to justice for the sake of parties rather than the interest of States, the ECJ – which follows public law – gives priority to the latter.[47]

12. ***Post-Brexit scenarios. Incoming and outgoing ASI in a hypothetical Anglo-Italian case***

The UK courts are the only in Europe that regularly adopt ASIs. Having the UK left the EU on 31.01.2020, they seem now free to grant them in proceedings involving EU Member States.[48]

Some scholars believe that Brexit and the subsequent non-applicability of the Brussels Ia Regulation (at least, for proceedings instituted after 31.12.2020) will now make those measures generally more common in Europe.[49] Should the circumstances so require, both the Supreme Court and the Court of Appeal have no formal obstacles to grant an ASI; it remains to be seen, however, whether they will eventually depart from their same case-law.[50]

While we have already touched upon the criteria that are to be applied by a jurisdictionally competent and appropriate *forum* when deciding whether or not to grant an ASI for the purpose of preventing the institution or continuance of foreign proceedings, it would also be interesting to analyze how an Italian judge could possibly react in case of an ASI granted against one of the parts of his/her proceeding, for example in cases of violation of an exclusive forum or arbitration clause.

As national judges and practitioners, we cannot miss to ask ourselves what fate an ASI would have issued against a party to a judgment previously established in Italy or, vice versa, the request to an Italian judge to issue such a measure.

In the first case scenario it is necessary to envisage the possibility that the recipient, fearing the consequences of the application of the injunction, complies with it, renouncing to the judgment instituted in Italy. In this case, *nulla quaestio*: the right of defence and the legal action that is an

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[46] *Nori Holdings: Commercial Court rules on anti-suit injunctions, gives guidance on arbitrability and upholds West Tankers as good law*, 08 August 2018, available at https://www.allenovery.com.

[47] Anti-suit Injunctions under Brussels I Regulation and Common Law – A Critical Comparative Examination of Principles and Practice.

[48] G. NIEHAUS, *First Anti-Anti-Suit Injunction in Germany: The Costs for International Arbitration*, February 28 2021, Kluwer Arbitration Blog, available at http://arbitrationblog.kluwerarbitration.com

[49] G. NIEHAUS, *supra* note 53.

[50] J.C. BETANCOURT, *Anti-Suit Injunctions in the EU: Are They Finally Back on the Menu?*, 12.02.2021, Kluwer Arbitration Blog.

expression thereof is a disposable right and the Italian judge would have no choice but to end the proceeding.

Otherwise the plaintiff and the defendant may ask the Italian judge to suspend the trial: in this case, being the parties in agreement, the judge, could in principle suspend the proceeding pursuant to art. 296 c.p.c. but such suspension would not benefit the case in question, since by express legislative provision it cannot be ordered for a period of more than 3 month (most likely insufficient for the conclusion of the proceeding before the court that issued the ASI). In fact, it should not be forgotten that Italy, by national and European principle, is required to guarantee a fair trial and a process that lasts a reasonable time. It is equally doubtful that the judge can apply art. 295 c.p.c. since this provision is to be considered to refer to the hypothesis of prejudice between judgments falling within the same Italian jurisdiction. Strictly speaking, it should not be possible to assume an analogical application to the present case since it is an exceptional rule and therefore requires a strict interpretation.

The Italian judge could then be required to adopt an identical measure of opposite sign the cd. anti-ASI, with which he inhibits the defendant from continuing the trial aimed at issuing the ASI or requesting its implementation. This path, as mentioned, would bring harmful consequences from several points of view: it would result in a paralysis of the judicial activity and the substantial denial of the protection required by both parties; it would damage international relations and above all it would expose itself to great doubts of legitimacy. If UK is no longer bound by EU law, this is not the case for Italy. Within the EU, the aforementioned principles that are contrary to the issuance of the ASI still apply, then it is not considered possible to make an exception for the sole fact that the recipient of the anti-ASI belongs to a state outside the EU or for the fact that in this case the asi would represent a mere reaction to an illegitimate ASI.

On a different vein, the Italian judge could decide not to accept the order contained in the ASI considering it ineffective, also pursuant to art. 64, paragraph 1, lett. f and g of the Italian Private International Law (L. 218/1995) which establishes that (automatic) recognition cannot be given to foreign judgments where a proceeding having the same object (let. F) is pending before an Italian court or where the judgment is contrary to public order. In our case, the process previously instituted in Italy would determine, according to the principle of *lis pendens*, the Italian jurisdiction. On the other hand, ASI proves to be contrary to the principle of both internal and international public order: 1) it damages Italian sovereignty by denying it; 2) it denies the plaintiff's right to invoke justice before the chosen court, and 3) violates the principle of comity and mutual trust, which must inspire relations of loyal cooperation between jurisdictions, even outside the borders of the EU.

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In the opposite case, in which the issuance of the ASI is requested to an Italian judge, the latter should respond, in coherence with the conclusions so far presented, for the inadmissibility of the request.

In conclusion, we want to highlight that the issuance of an ASI does not represent an indispensable protection tool for the defendant, since the Italian legal system knows other suitable tools to validly face a distorted use of judicial action and therefore to remedy those same pathological drifts to deal with which the ASI were conceived.

Art. 96 c.p.c. foresees a duty of compensation for damages by the party who has instituted a proceeding with wilful misconduct or gross negligence (so-called reckless litigation). This tool, leveraging the economic motive, distracts, even preventively, parties in bad faith (or grossly negligent) from establishing unfounded or spurious proceedings. Furthermore, the Italian legal system knows the instrument of the abuse of the law, a concept aimed at sanctioning with inadmissibility the conduct of a plaintiff who abusively twisted the exercise of the judicial action.

If the Italian judge has positively assessed the validity and effectiveness of the arbitration or exclusive jurisdiction clauses, raised by the defendant, by a prudent use of these two instruments, he will be able to validly oppose those legal claims brought in violation of them, declaring the inadmissibility of the request and recognizing legitimate jurisdiction to the foreign judge.

13. Conclusions

As we have seen in this paper, ASIs are generally granted for the limited purpose of enforcing contract provisions; they interfere with mutual trust, but there is room for granting them also within the "Brussels regime" in case of non-exclusive jurisdiction, as in these cases they don't infringe the principle of mutual trust. Moreover, if are considered as an 'action or ancillary proceeding' relating to 'the conduct of an arbitration procedure or any other aspects of such a procedure' then the Brussels I-bis should not apply to it (see its Recital 12).

Furthermore, Brussels I-bis addressed *lis pendens* issues to avoid torpedoes (art.31(2)) but has not solved them (at least, not entirely).

Brexit is likely to trigger more ASIs in the future. Indeed, Brussels Recast will no longer apply to proceedings commenced before the English courts, from 1st January 2021. Although this means that the specific Article 31 mechanism will no longer be available to users of the English courts, asymmetric jurisdiction clauses are likely to continue to be widely used in disputes that come before the English courts.

De jure condendo, various solutions to deal with ASIs could be envisaged.

First of all, in a future recast of Brussels I-bis regulation, the articles 33 and 34 which address *lis pendens* between an EU State and a third State could address their existence and (in)validity.

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It would even be possible to take inspiration from the 2005 Hague Convention on choice of courts agreements and, in particular, from its provisions on *interim* measures (art. 7). In this regard, it has been noted that the Brussels I-bis goes further than the Convention, because whereas the latter deals solely with jurisdiction agreements, the former contains a comprehensive system of jurisdiction based on various grounds, of which jurisdiction agreements are but one example. Another important distinction is that whereas the Convention deals only with mutually exclusive jurisdiction agreements Article 25 of Brussels Recast also extends to non-exclusive jurisdiction agreements. Finally, the Convention does not have any equivalent to the *lis pendens* rule of the Brussels I-bis and cannot benefit from the interpretative guidance of a supra-national Court.

As far as possible further solutions are concerned, it would perhaps be desirable a different and more severe approach by the ECJ on the consequences of infringing *lis pendens,* overcoming (at least in the most blatant situations) the case-law which considered that a violation of that principle does not allow a refusal of the recognition and enforcement of a judgment issued by an incompetent court.

Moreover, it also should be said that the UK government has applied to accede to the 2007 Lugano Convention, which is broadly similar to the Brussels I-bis , save that it does not include an equivalent mechanism to Article 31. However, it remains unclear whether the UK will accede to the Convention, as the required EU's consent has not yet been given.

Anyway, if its accession to the 2007 Lugano Convention were accepted, UK would be obliged to pay due account to ECJ case-law (including prohibition to grant ASIs towards EU Member States); otherwise, ASIs would continue to be granted as UK is no longer bound by Brussels I-bis.

In conclusion, it is desirable that mutually operative comity, due process of proceedings and the question of effectiveness would be mostly considered. In practice, the availability of anti-suit injunctions should be confined to cases of vexatiousness or oppression. Moreover, the fact that, in a particular case, an injunction would be unlikely to be effective should be evaluated by the court when deciding whether or not to grant that injunction.

Finally, it is important to underline that a rational and universally operative set of rules governing the assumption of *in personam* jurisdiction would greatly reduce the number of occasions upon which the need or temptation to resort to granting anti-suit injunctions would arise.

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