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**THE RESURGENCE OF THE ANTI-SUIT
INJUNCTION: ENFORCING JURISDICTION AND
ARBITRATION CLAUSES IN THE POST-BREXIT
ERA.**

ABSTRACT

The ASI was born in the 19th century in the United Kingdom and became the preeminent remedy for restraining abusive litigation and breach of choice of court agreements. Within the European Union, however, the instrument suffered a progressive erosion until its eventual disappearance, as the ECJ prioritized the principle of mutual trust over the enforcement of private forum agreements. Brexit has represented a resurgence of the ASI on its initial form, allowing English courts to return to the standard applied before the United Kingdom's accession to the EU. However, the ASI's tenure within the Brussels System left a lasting mark, and anti-suit-like remedies have begun to emerge in European civil law jurisdictions. Are these continental alternatives destined to become a frequent and viable remedy in European procedural law, or will they ultimately succumb to the same restrictions as their English predecessor?

Keywords: Anti Suit Injunction, Brexit, Principle of mutual trust, Choice of forum agreements, Arbitration, Damages awards, Brussels System.

RESUM

Les mesures anti-procés van néixer al segle XIX al Regne Unit i es van convertir en el principal remei per frenar els litigis abusius i l'incompliment dels acords de submissió expressa. Dins de la Unió Europea, però, l'instrument va patir una erosió progressiva fins a la seva desaparició, ja que el TJUE va prioritzar el principi de confiança mútua per davant de l'execució dels acords de fòrum. El Brexit ha representat un ressorgiment de l'ASI en la seva forma inicial, permetent als tribunals anglesos tornar a l'estàndard que s'aplicava abans de l'entrada del Regne Unit a la UE. No obstant això, el pas de l'ASI pel sistema de Brussel·les ha deixat empremta, i remeis similars a les mesures anti-procés han començat a sorgir en jurisdiccions europees de civil law. Estan aquestes alternatives continentals destinades a convertir-se en un remei freqüent i viable del dret processal europeu, o acabaran sucumbint a les mateixes restriccions que el seu predecessor anglès?

Paraules clau: Mesures Anti-Procés, Brexit, Principi de confiança mútua, Acords d'elecció de fòrum, Arbitratge, Indemnització de danys i perjudicis, Sistema Brussel·les.

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1. INTRODUCTION

The present thesis originates from a profound interest in the intersection between procedural law and private international law—a fascination sparked during my Erasmus stay at the University of Bergen. It was in a course on International Civil Procedure, while discussing the mechanics of *lis pendens* under the Brussels Regulation, that I first encountered the concept of the Anti-Suit Injunction (ASI) and the abusive litigation tactic known as the "Italian Torpedo". Consequently, this work aims to explore the evolution and resurgence of the ASI, starting from a foundational knowledge of the Brussels and Lugano Systems¹ and the landmark cases of the European Court of Justice (ECJ).

The primary objective of this research is to analyse the ASI's development and application in the wake of the United Kingdom's withdrawal from the European Union. By focusing on the ASI, this study seeks to understand how this unique common law instrument has navigated the constraints of cross-border judicial cooperation and how its role has been redefined in the modern era.

The structure of this study is divided into five main sections. Following this introduction, Section 2 establishes the conceptual framework of the English ASI, distinguishing between its contractual and non-contractual regimes. Section 3 analyses similar procedural remedies in civil law systems, specifically focusing on damage awards for breach of choice-of-court agreements in Spain and Germany. Section 4 provides a deep dive into the ECJ's doctrine on the ASI, highlighting the shift from the mutual trust era—where the Court progressively eroded anti-suit relief—to the post-Brexit landscape, where

¹ Throughout this thesis, the terms "Brussels System" (or "Regime") and "Lugano System" (or "Regime") refer to the frameworks established by the Brussels Convention (1968), and its successive iterations via Regulation (EC) No 44/2001 and Regulation (EU) No 1215/2012, as well as the Lugano Conventions of 1988 and 2007, respectively. These terms are used contextually and chronologically; therefore, their specific meaning must be interpreted in accordance with the legal timeframe addressed in each section.

English courts have restored the standard established in the judgement in *The Angelic Grace*. Finally, Section 5 evaluates the viability within the European Union of damages awards for breach of choice-of-court agreements, contrasting continental damages with the prohibited "quasi-Anti Suit Injunction" (quasi ASI) and proposing an ideal remedy that remains compatible with the principle of mutual trust.

2. THE ENGLISH ASI: CONCEPTUAL FRAMEWORK

2.1 Nature, jurisdiction, and legal basis

The ASI is a judicial order through which the English High Court restrains a party from commencing or continuing legal proceedings in a foreign jurisdiction. Although the statutory foundation for this power resides in Section 37(1) of the Senior Courts Act 1981, which allows for injunctions where "just and convenient," its exercise is strictly governed by judicial precedent².

This remedy is defined by its *in personam* substance; the order is directed exclusively at the litigant and, therefore, it does not formally challenge the competence or sovereignty of the foreign judiciary³. However, because the order indirectly affects foreign proceedings, it is regarded as an exceptional exercise of jurisdiction that must be handled with due regard for international comity⁴.

Failure to comply with the injunction constitutes contempt of court, which may result in the imposition of fines, the sequestration of assets within the United Kingdom or even imprisonment⁵.

The practical advantage of the ASI over other mechanisms for controlling forum-shopping is significant. By preventing the initiation or continuation of proceedings in an

² See *Infra* 2.2. *Principles of Application*.

³ Fawcett and Fawcett, *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law, Athens, August 1994*, 62.

⁴ For a definition of "comity", see *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, where the Canadian Supreme Court cites with approval the following definition: ' "comity" (...) is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws'.

⁵ Contempt of Court Act 1981 (UK Statutes 1981 c 49), s. 14(1).

alternative forum, the injunction spares the applicant the substantial expense and procedural complexity of litigating jurisdictional issues before a foreign court⁶.

2.2 Principles of application

English jurisprudence distinguishes between two primary categories of ASIs depending on whether they are non-contractual (equity-based) or contractual (obligation-based). Each category is governed by distinct requirements and underlying legal justifications⁷. Notwithstanding the above, the modern application of the remedy is primarily focused on the enforcement of choice of forum and arbitration agreements, that is, an obligation-based ASI⁸.

2.2.1 *The non-contractual regime: SNI Aérospatiale*

Where no prior agreement exists between the parties regarding the choice of forum, the court applies the cautious approach established in *SNI Aérospatiale v Lee Kui Jak*⁹. To grant an ASI under this regime, four primary conditions must be met:

1. Amenability to jurisdiction: The party to be restrained must be subject to the jurisdiction of the English court so that the injunction serves as an effective remedy.
2. Natural Forum: The English court must conclude that England is the forum with which the action has “the most real and substantial connection”. In other words, an English court cannot grant an equity-based ASI where the main proceedings are to be taken in a jurisdiction different from the English.

In such regard, the court evaluates “not only factors affecting convenience

⁶ Asariotis, ‘ASIs for Breach of a Choice of Forum Agreement’, 450.

⁷ Asariotis, ‘ASIs for Breach of a Choice of Forum Agreement’, 458.

⁸ Ambrose, ‘Can Anti-Suit Injunctions Survive European Community Law?’, 404.

⁹ *Societe Nationale Industrielle Aerospatiale (SNIA) v Lee Kui Jak*.

or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction and the places where the parties respectively reside or carry on business”¹⁰.

3. Vexation or oppression¹¹: It must be shown that the conduct of the defendant of suing abroad is oppressive (“acting under colour of asking for justice in a way which necessarily involves injustice”¹²) or vexatious (“frivolous or useless”¹³). By definition, it is not vexatious to bring an action in multiple jurisdictions where there are substantial reasons of benefit to the plaintiff.

Under this regime, comity is a primary concern. The court exercises its power “sparingly and with great caution”¹⁴ because the injunction is based on a subjective evaluation of what is fair (equity), rather than a clear breach of a promise.

2.2.2 The Contractual Regime: The Angelic Grace

A different standard applies when the injunction is sought to restrain proceedings brought in breach of an exclusive jurisdiction or arbitration agreement. As articulated in *The Angelic Grace*¹⁵, the emphasis shifts from equitable evaluation to the enforcement of contractual agreements. The principles governing this regime are as follows:

1. Valid choice of forum agreement: The applicant must demonstrate, to a high degree of probability, the existence of a valid agreement by virtue of which

¹⁰ *Spiliada Maritime Corp v Cansulex Ltd*.

¹¹ The requirement of vexation or oppression constitutes the primary contribution of *SNi Aérospatiale v Lee Kui Jak*. By introducing this threshold, the Privy Council established a specific regime for the issuance of ASIs. Since then, part of the doctrine defended that the guiding principles to that aim were the same as those established in *Spiliada Maritime Corp v Cansulex Ltd* for the stay of domestic proceedings. However, these terms have sometimes been used broadly to cover any situation where justice requires an injunction to be granted, see *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, 598. See also Ambrose, ‘Can Anti-Suit Injunctions Survive European Community Law?’, 404.

¹² *Societe Nationale Industrielle Aerospatiale (SNIA) v Lee Kui Jak*, 24.

¹³ *Ibid*, 24.

¹⁴ *Ibid*, 8.

¹⁵ *Aggeliki Charis Compania Maritima S.A. v Pagnan S.p.A. (The Angelic Grace)*, 1994.

the respondent assumed a contractual obligation to litigate exclusively in the chosen forum.

2. Promptness: The remedy must be sought without undue delay, ideally before the foreign proceedings have reached an advanced stage.
3. Inadequacy of damages: The injunction is only granted where monetary compensation is an inadequate remedy. Being sued in a specific forum must represent a unique interest, providing procedural advantages that cannot be quantified or replaced by an economic award, such as specific rules of evidence, disclosure standards, or the avoidance of a jury.
4. Absence of strong reasons for refusal: The court will grant the injunction unless the respondent can demonstrate "good reasons" why it should be refused. Thus, the burden of proof is reversed: the applicant does no longer need to establish vexation or oppression, but the respondent must justify that he had a legitimate reason to breach the contract¹⁶.

In this category, the constraints imposed by international comity are significantly attenuated. The court proceeds on the basis that enforcing a private bargain does not constitute a slight against the competence of a foreign judiciary, but simply the act of upholding the autonomy of the parties.

¹⁶ Asariotis, 'ASIs for Breach of a Choice of Forum Agreement', 458.

3. PROCEDURAL REMEDIES SIMILAR TO ASIS

Although a substantial part of the doctrine argues that the ASI is only present in common law systems¹⁷, some civil law regimes provide procedural remedies with a similar nature and purpose. In particular, this section analyses remedies analogous to anti-suit relief in the Spanish and German legal orders.

3.1 The Spanish case

On 12 January 2009, the Spanish Supreme Court issued a landmark judgement.¹⁸ The Court recognised a compensation for damages arising from the breach of a choice of forum agreement, based on article 1101 of the Spanish Civil Code¹⁹.

Since then, most of the Spanish judiciary had denied that possibility²⁰. The arguments against it were mainly two: a) First, that a choice of court agreement was not part of the substantial content of the contract, but rather a procedural clause, and therefore it did not fall within the scope of article 1101; b) Second, that a breach of such agreement was to be offset by the imposition of legal costs, and that such a decision fell within the jurisdiction of the seised court.

The Supreme Court rejected the first objection establishing that a choice of court agreement as that in the main proceedings is part of the substantial content of the contract.

The Court argued that whether a contractual clause belongs to the substantial content, and

¹⁷ Fawcett and Fawcett, *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law, Athens, August 1994*, 173, 186–87, 378–79, 397.

¹⁸ *Travelstead Group Spain v Usa Sogo Inc.*, 2009. From now on, this judgement will be referred as STS 263/2009.

¹⁹ “Any party who, in the performance of their obligations, acts with wilful misconduct, negligence or delay, or who in any way contravenes the terms of those obligations, shall be liable for damages.” (Author’s translation).

²⁰ See, the judgement under appeal and the case-law cited therein: *Travelstead Group Spain v Usa Sogo Inc.*, 2001. By contrast, *The Concentrate Manufacturing Company of Ireland (C.M.C.I.) v Pepsi-Cola de España S.A.* represents one of the few judgements awarding damages arising from the breach of a choice of court agreement. From now on, the latter will be referred as STS 1186/2007.

consequently whether article 1101 is applicable, does not depend upon its nature, but on the implications that its breach has in the economic equilibrium of the contract. In this regard, the choice of applicable law and the competent court may be decisive for the parties' intention to enter into the contractual relationship²¹.

As to the second objection, the Supreme Court asserted that recognising compensation for damages is compatible with an order for procedural costs issued by the Court not chosen. The Court's reasoning was that the compensation for damages covers every prejudice the claimant has suffered, which includes legal costs, but also other items. Consequently, the decision of the non-chosen court to award costs does not preclude the Spanish court from recognizing a right to damages, notwithstanding that any such costs must be set off against the final indemnity²².

3.2 The German case

3.2.1 *The Prozessverboten*

The *Prozessverboten* represent a doctrinal construct that shares several characteristics with the English ASI, most notably its *in personam* nature²³. Proponents of this measure argue that its legal basis lies in the subjective right of litigants not to be sued in a foreign forum²⁴. This right is derived either from a valid choice-of-court agreement²⁵ or from statutory tort law, specifically Sections 823 and 826 of the German Civil Code (BGB).²⁶

²¹ For all, see Third legal ground, paragraph 5 and 6.

²² For this and the previous paragraph, see Third legal ground, paragraph 7.

²³ Requejo Isidro, *Proceso en el Extranjero y Medidas Antiproceso (ASIs)*, 97.

²⁴ *Ibid*, 98.

²⁵ *Ibid*, 99-100.

²⁶ Section 823 addresses damages arising from intentional or negligent behaviour, while the latter concerns acts contrary to good customs. For a deeper explanation, see *Ibid* 101-103.

Conversely, critics of the *Prozessverboten* rely on two primary arguments. First, they contend that a forum choice clause does not strictly bind a court's jurisdiction but, rather, falls within the seized court's discretion to act in accordance with it. Second, they argue that even if a contractual obligation exists, it lacks procedural enforceability under German law due to the principle of *Rechtsschutzbedürfnis* (need for legal protection), which dictates that a remedy is only available if no simpler mechanism can achieve the same result. In this context, the dissenting sector considers that there are more appropriate and less intrusive alternatives such as a stay request to the seized court based on *forum non conveniens*, or to raise the defence of *lis pendens*.²⁷

The prevailing doctrinal consensus in Germany remains largely opposed to the adoption of the *Prozessverboten*.²⁸

3.2.2 Compensation for damages

Another German remedy for the breach of choice-of-court agreements is the award of damages, as affirmed by the German Federal Court (BGH) in its ruling of 17 October 2019.²⁹ Like the Spanish Supreme Court, the BGH also characterizes a choice-of-forum clause as a substantive contractual obligation. Consequently, the German Court asserts that such an agreement “is to be interpreted as obliging the parties to bring an action only in the (chosen) court of jurisdiction, with the consequence that, otherwise ... the costs incurred by the other party in bringing the action before the court lacking jurisdiction must be reimbursed.”³⁰

²⁷ For all, *Ibid* 99-100.

²⁸ *Ibid*, 103-104.

²⁹ BGH, Case III ZR 42/19.

³⁰ *Ibid* Para 42. Translation from German made with <https://www.deepl.com/es/translator>.

The legal basis for this compensatory relief is article 280(1) of the German Civil Code (BGB), which provides: “If the obligor breaches a duty arising from the obligation, then the obligee may demand compensation for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty.”³¹ According to the BGH, this provision remains applicable even if the jurisdiction agreement lacks an express liability clause.³²

Despite these similarities, the German and Spanish approaches remain distinct in two aspects. First, regarding the original proceedings, the German Court suggests that a prerequisite for awarding damages is that “the court to which jurisdiction has been derogated has recognised its lack of jurisdiction.”³³ Conversely, the Spanish Supreme Court has sometimes granted compensation for damages arising from a breach of a choice of forum agreement even though the foreign court had assumed jurisdiction³⁴.

The second distinction stems from Section 280(1) BGB. According to this provision, the German damages award is based on a fault-based liability system, exempting the obligor if he is not responsible for the breach. In contrast, Article 1101 and 1107 of the Spanish Civil Code establish a system of objective responsibility, where the obligor is generally liable for all foreseeable damages arising from the breach, regardless of whether those damages have been caused by its fault or not. In the Spanish regime, bad faith only serves to expand the scope of indemnification to unforeseeable damages.

³¹ Official translation provided by the German Ministry of Justice in https://www.gesetze-im-internet.de/englisch_bgb/.

³² BGH, Case III ZR 42/19, para. 45.

³³ *Ibid*, para 42.

³⁴ *The Concentrate Manufacturing Company of Ireland (C.M.C.I.) v Pepsi-Cola de España S.A.*

4. ECJ'S DOCTRINE ON ASIS

4.1 The Pre-Brexit Framework: The Hegemony of Mutual Trust and the Progressive Erosion of Anti-Suit Relief

4.1.1 *The Axiological Foundation of the Brussels System: The Principle of Mutual Trust*

The enactment of the 1968 Brussels Convention marked a profound change in the landscape of European private international law³⁵, enabling a shift from a fragmented network of bilateral conventions between the six original EEC Member States³⁶, to a multilateral system of cooperation in recognition and enforcement of judgements³⁷.

Such transformation was driven by a clear goal: providing legal protection for the relationships arising from the newly created single market³⁸. As the Commission noted in 1959: "a true internal market between the six States will be achieved only if adequate legal protection can be secured"³⁹.

³⁵ Report by Mr P. Jenard on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 8: "the Convention ... differs fundamentally from treaties and conventions of the same type previously concluded."

³⁶ These included, *inter alia*, the Convention between France and Belgium on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments (signed 8 July 1899) 151 CTS 285; the Convention between Belgium and the Netherlands on Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments (signed 28 March 1925) 93 UNTS 431; and the Treaty between Belgium, the Netherlands and Luxembourg on Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments (signed 24 November 1961) 710 UNTS 231.

³⁷ The aim for this transformation was already laid down in the foundational treaty of the EEC. To this regard, see Treaty establishing the European Economic Community (signed 25 March 1957, entered into force 1 January 1958) 298 UNTS 11 (EEC Treaty), para. 220.

³⁸ *Gubisch Maschinenfabrik KG v Giulio Palumbo*, ¶ 8; Moura Vicente, 'The Role of the Brussels I-Bis Regulation in European Private International Law and the Challenges Facing It', 1–2.

³⁹ Note sent by the Commission of the European Economic Community to the Member States on 22 October 1959 inviting them to commence negotiations, as referenced in Jenard, *Report on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 3. This objective was also outlined in the Treaty of Rome of 1957 (EEC Treaty), art 220, fourth indent.

The Brussels System was built upon the principle of mutual trust⁴⁰, that is, the presumption that all Member States are equally competent to provide effective judicial protection and to correctly interpret EU jurisdictional rules.

The principle of mutual trust functioned as the parent doctrine of two legal consequences⁴¹. The first of these was the principle of no review of jurisdiction⁴². The ECJ repeatedly affirmed that the Brussels Regime does not authorize a court in one Member State to determine whether a court in another Member State has jurisdiction⁴³, as the court first seised is "undeniably better placed"⁴⁴ to rule on its own competence. This prohibition was set nearly absolute in the Convention, the power of review being limited to the stage of recognition or enforcement, and confined to the exception regarding mandatory jurisdiction rules found in Article 28⁴⁵.

⁴⁰ Although, the ECJ established the notion of mutual trust in *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*. (*Cassis de Dijon*) in 1979, and that it wasn't explicitly mentioned in connection with jurisdiction until 2003, in *Erich Gasser GmbH v. MISAT Srl*, ¶ 72, the underlying logic of that doctrine was already woven into the fabric of the 1968 Convention. To this regard, see Jenard, *Report on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 46., in which Prof. Jenard states: "the Convention is based on the "complete confidence in the court of the State in which (a) judgment was given" and the assumption that "that court correctly applied the rules of jurisdiction of the Convention." See also, McClean et al., *The Conflict of Laws*, 93; Prechal, 'Mutual Trust Before the Court of Justice of the European Union', 76; and Matthias, 'Mutual Trust within Judicial Cooperation in Civil Matters', 6.

⁴¹ Prechal, 'Mutual Trust Before the Court of Justice of the European Union', 79.

⁴² Regarding the characterization of no review of jurisdiction as a feature of mutual trust, see Ruiz Jarabo Colomer, *Attorney General's Opinion on Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd NS Changeport SA.*, para. 33.

⁴³ *Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company*, ¶¶ 23–24; *Erich Gasser GmbH v. MISAT Srl*, 48–49; *Gregory Paul Turner v Felix Fareed Ismail Grovit*, 2004, ¶ 26; *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc*, ¶ 29; *'Gazprom' OAO v Lietuvos Respublika*, ¶ 33; *Charles Taylor Adjusting v. Starlight Shipping*, ¶ 37.

⁴⁴ *Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company*, ¶ 23.

⁴⁵ Among the grounds for refusal of recognition and enforcement established by the Brussels Convention (Art. 27 and 28), already very limited, only those laid down in article 28 are based on lack of jurisdiction of the issuing Court (Art 28, third indent). P. Jenard confirms this analysis in Jenard, *Report on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 46.

Additionally, mutual trust was the basis for the *lis pendens* rule of Article 21⁴⁶. With the objective of providing legal certainty within the internal market, the European legislator sought a rule based strictly on chronology⁴⁷. By adopting a "first-in-time" priority, the drafters aimed to create a clear, objective, and self-executing conflict-resolution mechanism⁴⁸, eliminating issues linked to judicial discretion, that is, prominently, parallel proceedings and irreconcilable judgements.⁴⁹

Such a mechanical solution was only sustainable because of the bedrock of mutual trust. Indeed, a rule that grants exclusive priority based on nothing more than the date of filing requires an absolute presumption that every court in the system is equally capable of delivering a standard of justice that all others can accept without question⁵⁰.

4.1.2 The Jurisprudential Collision: Turner v Grovit and the Rejection of the In personam Exception

With the expansion of the Brussels Convention to include new members, it became clear that the mechanical rigidity of the Brussels System was at odds with the discretionary nature of common law procedural remedies. While the English legal tradition prized the ability of a judge to intervene in the interest of justice, tailoring solutions to the case at

⁴⁶ *Erich Gasser GmbH v. MISAT Srl*, ¶ 74; *Gubisch Maschinenfabrik KG v. Giulio Palumbo*, ¶ 8. For an explanation of how the *lis pendens* rule works, see Bogdan, "The Brussels/Lugano *Lis pendens* Rule and the "Italian Torpedo"", 92.

⁴⁷ Pocar, *Report on the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Signed in Lugano on 30 October 2007*, para. 118.

⁴⁸ Some authors criticise this rule as it gives an advantage to one of the parties for the mere reason of having sued first, which, in turn, encourages a race to the courthouse. To this respect, see McClean et al., *The Conflict of Laws*, paras 6–043.

⁴⁹ *Gubisch Maschinenfabrik KG v. Giulio Palumbo*, ¶ 8.

⁵⁰ Bogdan, "The Brussels/Lugano *Lis pendens* Rule and the "Italian Torpedo"", 92.

hand, the European regime prioritized a blind systemic harmony that left no room for such subjective assessments.

This friction reached its peak in *Turner v Grovit*⁵¹, a landmark decision that established the incompatibility between the ASI and the foundational principles of the Brussels Regime.

The factual background of the case was conducive to highlighting this tension, as the equitable considerations strongly favoured the enforcement of the agreement. Mr. Turner, a British solicitor, had initiated proceedings in London against his former employers. In an attempt to harass and exert pressure on him, the defendants subsequently commenced a series of proceedings in Madrid. Recognizing the bad-faith nature of the Spanish litigation⁵², the English court granted an ASI to restrain the defendants from proceeding abroad. However, when the case reached the House of Lords⁵³, their Lordships referred the matter to the ECJ to determine whether such an injunction was compatible with the 1968 Convention. The respective positions adopted by the House of Lords and the ECJ remain pivotal, as they encapsulate the doctrinal clashing between the English tradition of equitable anti-suit relief and the structural requirements of the Brussels System.

4.1.2.1 The Position of the House of Lords

In its reference to the ECJ, the House of Lords maintained that the preservation of such a procedural remedy was not inconsistent with the Brussels framework. The main

⁵¹ *Gregory Paul Turner v Felix Fareed Ismail Grovit*, 2004.

⁵² *Gregory Paul Turner v Felix Fareed Ismail Grovit*, 1999, 14., Lord Justice Laws concluded the following: “On the question of abuse of process, it is to my mind plain beyond the possibility of argument that the Spanish proceedings were launched in bad faith in order to vex the plaintiff in his pursuit of the application before the Employment Tribunal ... all the credible evidence points one way ... and such fall to be condemned as abusive as a matter of elementary principle”.

⁵³ *Gregory Paul Turner v Felix Fareed Ismail Grovit*, 2001.

argument in this regard was the *in personam* nature of the ASI, which purportedly made it compatible with the principle of no review of jurisdiction:

“the order is not addressed to the foreign court and does not bind it. It does not involve a decision upon its jurisdiction ... The decision involved is about the quality of the conduct of the party sought to be restrained and the need to protect existing English proceedings.”⁵⁴

Additionally, the House of Lords argued that: a) the injunction served a core purpose of the Brussels Regime by avoiding the risk of irreconcilable judgments⁵⁵; b) since the English proceedings were the first in time, the grant of a restraining order in their support was not inconsistent with the Convention's *lis pendens* rules⁵⁶; c) the protection of domestic proceedings was a matter solely for the English court⁵⁷; d) ASIs were domestic procedural remedies and, therefore, they fell outside the scope of the Convention⁵⁸.

In light of the aforementioned arguments, the House of Lords concluded that the challenge to the ASI sought to give the Convention an "ambit, wider than is justified by any decision of the Court of Justice, so as to cover questions of the procedure to be followed and remedies to be adopted by national courts where jurisdiction is not the issue."⁵⁹

4.1.2.2 The Position of the ECJ

⁵⁴ *Gregory Paul Turner v Felix Fareed Ismail Grovit*, 2001, ¶ 34. This reasoning found support in the leading English doctrine, which suggested that while an ASI founded on an alleged jurisdictional error would indeed impair the Brussels System, an order directed at unconscionable conduct constitutes a legitimate application of national procedural law (See McClean et al., *The Conflict of Laws*, 419.).

⁵⁵ *Ibid*, ¶ 36.

⁵⁶ *Ibid*, ¶ 33.

⁵⁷ *Ibid*, ¶ 36.

⁵⁸ *Ibid*, ¶ 30.

⁵⁹ *Ibid*, ¶ 39.

Despite the reasoning of the English court, the ECJ and the *Advocate General Ruiz-Jarabo Colomer* rejected the House of Lords' position. This opposition was structured around two primary counterarguments.

The first and most significant rebuttal centered on a conflict with the principle of mutual trust, specifically its operational requirement of no review of jurisdiction⁶⁰. In this regard, the *Advocate General* observed that, notwithstanding the English courts' characterization of the remedy, the court granting the injunction "at some time or another, must verify the jurisdiction of the foreign court, and that clearly goes against the letter, spirit and purpose of the Brussels Convention."⁶¹

Parallel to this, the Court and the *Advocate General* addressed the *in personam* distinction. It was argued that, while the injunction was formally directed at the parties, such an order nonetheless constituted an "indirect interference" in the power of the foreign court. Indeed, by prohibiting a litigant from pursuing an action under threat of penalty, the English court deprived the foreign judicial authority of its jurisdiction to deal with the case⁶².

Beyond these primary pillars, the *Advocate General* warned of negative scenarios that could arise from the use of ASIs, namely: a) a conflict between an the conflictive

⁶⁰ Ruiz Jarabo Colomer, *Attorney General's Opinion on Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd NS Changepoint SA.*, paras 31–33, 36; *Gregory Paul Turner v Felix Fareed Ismail Grovit*, 2004, ¶¶ 24–26. The European Commission, the German government and the Italian government shared this point of view in their observations submitted to the ECJ (*Ibid*, para. 20).

⁶¹ Ruiz Jarabo Colomer, *Attorney General's Opinion on Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd NS Changepoint SA.*, para. 36. As previously discussed in this thesis [See Footnote 54], the English position is that an ASI to which whether or not the foreign court has assumed jurisdiction is merely a factor in a broader evaluation of the litigant's bad faith, rather than the very basis of the restraining order, was compatible with the Brussels System. However, the *Advocate General* found this distinction irrelevant. As this statement suggest, in his view, the mere act of a domestic judge assessing the jurisdiction of another Member State's court—regardless of the underlying motive—is by itself incompatible with the principle of mutual trust.

⁶² Ruiz Jarabo Colomer, *Attorney General's Opinion on Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd NS Changepoint SA.*, para. 34; *Gregory Paul Turner v Felix Fareed Ismail Grovit*, 2004, ¶ 28. Regarding the term "indirect interference", see Jackson, *Enforcement of Maritime Claims*.

assessment which the court of another Member State might arrive at; b) that all European courts arrogated such a power to themselves, which would lead to chaos; c) that such power were exercised only by English courts, which would represent them taking it upon themselves to exercise a distributive function which the Brussels Convention entrusted to an objective criteria (the *lis pendens* rule); d) that a judge who had issued an ASI was obliged to grant an order for enforcement of a judgment delivered in spite of his having expressly imposed a prohibition⁶³.

Furthermore, it was noted that the ASI infringed the subjective right of a litigant to determine which court to seize within the options provided by the jurisdictional rules contained in sections one to four of the Convention⁶⁴.

Finally, the Court denied that ASIs were domestic procedural remedies. The AG clarified that such measures were "precautionary or protective" in nature and thus fell squarely within the Convention's scope. It was held that while Member States generally remained free to organize their own domestic proceedings, they had to ensure that such procedural rules did not run counter to the philosophy or the effectiveness of the Brussels System⁶⁵.

Considering the above, the ECJ interpreted the Convention as precluding the grant of an injunction whereby a court of a Contracting State prohibited a litigant from commencing or continuing legal proceedings before a court of another Contracting State, even where that party acted in bad faith with a view to frustrating the existing proceedings⁶⁶.

⁶³ For all, Ruiz Jarabo Colomer, *Attorney General's Opinion on Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd NS Changeport SA.*, paras 33 and 36.

⁶⁴ *Ibid*, see footnote n° 7.

⁶⁵ *Ibid*, ¶ 37.

⁶⁶ *Gregory Paul Turner v Felix Fareed Ismail Grovit*, 2004, ¶ 31.

4.1.3 The Consolidation of the "Italian Torpedo": Systemic Pathologies and the Weaponization of Procedural Delay

The prohibition of anti-suit relief established in *Turner v. Grovit* came only months after *Gasser v. MISAT*⁶⁷, where the ECJ interpreted the Convention's *lis pendens* rule as requiring the court second-seised to stay its proceedings even when it had exclusive jurisdiction under a choice-of-court agreement.

The cumulative effect of these two decisions prompted an abusive litigation tactic known as the Italian Torpedo⁶⁸. By initiating proceedings in a "slow" forum, a bad-faith actor could paralyze the litigation for years until the court seised ruled on its own competence. Even if the tactical strike was eventually dismissed, the frustration of the defendant's immediate right to relief fulfilled the plaintiff's entire strategic interest⁶⁹. In other situations, the "torpedo" enabled him to force a settlement by exposing the other party to possibly irrecoverable costs⁷⁰.

As a result of *Gasser v. MISAT*, the manoeuvre could not be neutralized through an exclusive choice-of-forum clause, and following *Turner v. Grovit*, the defendant was precluded of seeking an ASI to force the bad-faith actor to abandon the "torpedo".

Despite of this this threat of systemic abuse, the restoration of anti-suit relief was never contemplated by the European legislator. Instead, Regulation (EU) No 1215/2012 introduced an exception to the general *lis pendens* rule "in order to enhance the

⁶⁷ *Erich Gasser GmbH v. MISAT Srl*.

⁶⁸ The "Italian Torpedo" refers to a bad-faith litigation strategy in which a party pre-emptively sues in a court with significant judicial backlog to exploit the mandatory stay of proceedings in any other, more appropriate, forum. The term was famously coined by Mario Franzosi; see Franzosi, 'Worldwide Patent Litigation and the Italian Torpedo'.

⁶⁹ Think, for instance, in patents law, where the Italian Torpedo was used for the first time. Until the court seised handed down a judgement or solved the application for interim relief, the bad faith actor could keep on infringing the patent.

⁷⁰ Magnus and Mankowski, *European Commentaries on Private International Law ECPIL*. Volume 1, 738.

effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics"⁷¹. Under the current framework, where a court designated in an exclusive choice-of-court agreement is seised, any other court must stay its proceedings until the chosen court declares that it has no jurisdiction, even if the not designated court was seised first⁷².

4.1.4 The Expansion of the Ban: Closing the Gaps in West Tankers and Taylor

The prohibition of ASIs established in *Turner v Grovit* did not constitute the end to its friction with the Brussels Regime. In the subsequent years, the ECJ expanded the scope of this restriction through two landmark cases.

4.1.4.1 Allianz SpA v. West tankers

First, in *Allianz SpA v. West tankers*, the Court extended the prohibition to ASIs restraining proceedings in breach of an arbitration agreements. In its ruling the ECJ followed a three step reasoning. First, it asserted that although the English proceedings regarding the ASI were outside the scope of the Brussels Regulation⁷³, they may nevertheless undermine its effectiveness if affected a proceeding that was within its scope⁷⁴. In this regard, the Court argued that a proceeding to determine the validity of an arbitration agreement, such as that in *Syracuse*, must be considered as falling within the Brussels

⁷¹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1, recital 22.

⁷² *Ibid*, article 31(2).

⁷³ Regulation 44/2001, art 1(2)(d); Attorney General's opinion, paras. 33 to 35 and 37. In paragraph 33, the Attorney General shows surprise at that the House of Lords, he says, making the same mistake it made in the *Turner* case, namely, focusing on the nature of the measure (which places it outside the scope of the Convention), whilst ignoring the effects that measure had on the Convention's operation.

⁷⁴ Paras 23 and 24 (ECJ)

Regulation's scope⁷⁵. Ultimately, it followed that an ASI such as that in the main proceedings was contrary to the principles of *kompetenz-kompetenz*⁷⁶ and mutual trust⁷⁷.

The decision in *West Tankers* was the subject of extensive academic debate. In its judgement, the ECJ sought to prevent the systemic risk of reciprocal ASIs within the European judicial order⁷⁸. This approach arguably constituted a teleological interpretation of the Brussels I Regulation that prioritized the functional effectiveness of the regime over strict adherence to the legislative boundaries of the arbitration exclusion.

Certain aspects of the AG's reasoning, which the ECJ mainly adopted in its judgement, were viewed as academically contentious⁷⁹. On one hand, by using the *effet utile* doctrine, the Regulation's reach was extended to a subject matter that was ostensibly excluded by its own text. On the other hand, the legal basis for choosing between competing interpretations of the arbitration exclusion was noted as somewhat narrow, relying heavily on the Evrigenis-Kerameus Report⁸⁰.

Although years later, in *Gazprom OAO v. Lietuvos Respublika*, the ECJ allowed the recognition and enforcement of ASIs issued by an arbitral tribunal, that was a hollow victory for the institution, as arbitral awards do not carry the threat of penalties for non-compliance.

4.1.4.2 Charles Taylor Adjusting v. Starlight shipping

⁷⁵ *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc*, ¶¶ 26, 27.

⁷⁶ *Ibid*, Para 29.

⁷⁷ *Ibid*, Para 30.

⁷⁸ Kokott, *Attorney General's Opinion on West Tankers Inc v RAS Riunione Adriatica Di Sicurta SpA*, para. 72.

⁷⁹ For a deep explanation of the arguments in *West Tankers*, see [2018] EWHC 1343 (Comm) (*Nori Holding Limited, Centimila Services Limited, Coniston Management Limited v Public Joint-Stock Company, Bank Otkritie Financial Corporation*), paras 71 et seq.

⁸⁰ Both positions are explained in para 38 *in fine* and 43. Reference to the Evringeris Kerameus report is made in para 49.

The prohibition on anti-suit relief was further extended in *Charles Taylor Adjusting v. Starlight shipping* to encompass “quasi” ASIs, that is, an order awarding compensation for damages arising from the breach of a choice of court agreement⁸¹. The ECJ reasoned that such remedies constituted an indirect restraint that equally obstructed the principle of mutual trust. Indeed, a financial penalty issued while proceedings in another Member State are pending could deter litigants from accessing the courts of other Member States, thus violating the seised court’s jurisdiction to rule on its own competence.

Considering the above, the Court argued that recognising such a decision would constitute a “manifest breach of an essential rule of law in the EU legal order and therefore in the legal order of that Member State”⁸². Consequently, Member States were allowed to refuse recognition of quasi ASIs based on the exception of public policy laid down in article 41(1)(a) of the Brussels I bis Regulation.

For many legal scholars, *West Tankers* and *Taylor*, alongside with *Turner*, lead to an essential conclusion: “in the eyes of the Court the principle of mutual trust between the Member States carries more weight than the need to fight abuses”⁸³.

4.2 The Post-Brexit Landscape

4.2.1 Transitional Regime: Proceedings initiated before 31 December 2020

The primary instrument for the transition of rules regarding jurisdiction, recognition, and enforcement of judicial decisions is Article 67 of the *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the*

⁸¹ Advocate general, para 38; ECJ, para 37.

⁸² ECJ, para 36.

⁸³ Bogdan, ‘The Brussels/Lugano *Lis pendens* Rule and the” Italian Torpedo’’, 96. Crucially, this argument is reinforced by the factual background of the cases mentioned: In *Turner*, the creation of an *ad hoc* entity to harass a counterparty by commencing Spanish proceedings; In *West Tankers*, suing in breach of an arbitration agreement; and in *Taylor*, initiating foreign proceedings over a matter already resolved by a court-sanctioned settlement.

European Union and the European Atomic Energy Community (the "Withdrawal Agreement"). Under this provision, Brussels I bis Regulation continue to apply to the United Kingdom, in respect of legal proceedings instituted before the end of the transition period and related actions⁸⁴. In this regard, the transition period starts on the date of entry into force of the Agreement and ends on 31 December 2020⁸⁵.

Furthermore, Article 95(1) of the Withdrawal Agreement establishes that the decisions of the ECJ issued before the end of the transition period remain binding in their entirety upon the United Kingdom. As *Turner*, *West Tankers* and *Taylor* fall within that group, English courts cannot issue ASIs to restrain a party from continuing proceedings that were initiated before the end of the transition period. Such prohibition stands even if the application for an ASI was made after the end of the transition period, as what the provision takes into account are the main proceedings.⁸⁶

4.2.2 The New Framework: Proceedings initiated after 31 December 2020

4.2.2.1. Restoration of the Angelic Grace Standard: The Return to "Business as Usual" for EU Disputes.

For cases initiated after the transition period, the ban on anti-suit relief stemming from *Turner*, *West Tankers*, and *Taylor* has ceased to apply. In the landmark case of *Ebury Partners*⁸⁷, the Commercial Court confirmed that ASIs are again an available remedy:

⁸⁴ Withdrawal Agreement, art 67(1)(a).

⁸⁵ *Ibid* art 126.

⁸⁶ The Commercial Court supports this view in *Simon v Taché*, ¶¶ 66–75. The Court based its reasoning on a literal interpretation of the latter nuance of article 67(1): "and in respect of proceedings or actions that are related to such legal proceedings".

⁸⁷ *Ebury Partners Belgium SA/NV v Technical Touch BV*.

“Prior to Brexit, it would not have been possible for anti-suit relief to be granted in a case such as the present, where a claimant seeks to enjoin proceedings in the court of an EU member state. It was common ground, however, that such relief is now potentially available”⁸⁸

To this effect, the principles governing the grant of ASIs in the post-Brexit era are those laid down in *The Angelic Grace* (see *Supra* Section 2.2.2). In particular, ASIs are ordinarily issued as a remedy for the breach of a jurisdiction or arbitration agreement unless the defendant can demonstrate strong reasons why the relief should be refused.

This shift represents a transition from a regime of mandatory mutual trust to one of standard international comity. To date, no post-Brexit judgment has suggested that the duties of comity should be applied with greater intensity toward EU Member States.

4.2.2.2. The Expansion of Equitable Relief: Quasi-Contractual Injunctions and Foreign-Seated Arbitration.

The reintroduction of the ASI into the Anglo-European legal space has not merely been a restoration of the *status quo ante*; rather, it has been characterized by a significant expansion of the remedy’s traditional boundaries.

In *QBE Europe v Generali*⁸⁹, the Commercial Court introduced the concept of quasi-contractual injunctions. Under this doctrine, where a litigant seeks to assert a right arising from a contract containing an arbitration or jurisdiction agreement, that litigant is bound by the agreement regardless of whether he was party to it or not. In these situations, the grounds for an ASI aren’t contractual, but quasi-contractual.

⁸⁸ *Ibid.* Para 21.

⁸⁹ *QBE Europe SA/NV v Generali Espana de Seguros y Reaseguros*.

According to the Commercial Court, the quasi-contractual ASI “has been rationalised on a benefit and burden basis: the ASI respondent cannot enjoy the benefit of the derived right without complying with the associated obligation to pursue the right only in the contractual forum.”⁹⁰ Some authors have referred to this requirement as the conditional benefit principle. The regime regulating such relief is the same than the one governing contractual injunctions.

The Supreme Court further broadened the horizon of English equitable power in *UniCredit v RusChemAlliance*⁹¹. According to this judgement, the fact that the arbitration tribunal where the main proceedings are to be heard is seated outside of the UK is not an obstacle for issuing an ASI in protection of those proceedings.

To reach such decision, the Court reasoned that multiple forums, not only the one where the arbitration seat is located, can hold the parties to their contractual bargain, as long as they have a substantial connection with the dispute⁹². To this regard, the fact that the contract is governed by English law represents a substantial connection to the English jurisdiction⁹³. Additionally, the Supreme Court explained that anti-suit relief do not clash with the jurisdiction of the forum where the arbitration seat is located, nor with the jurisdiction of the arbitration tribunal itself, when neither of them is able to restrain the defendant from breaching the arbitration agreement⁹⁴.

Ultimately, *QBE* and *Unicredit* signal a tendency: the post-Brexit ASI has not merely returned to its pre-*Turner* state; it has emerged with a wider jurisdictional scope and a judiciary increasingly willing to use it to prevent the breach of forum clauses.

⁹⁰ Para. 15

⁹¹ *UniCredit Bank GmbH v RusChemAlliance*.

⁹² Paras. 75, 82 and 98.

⁹³ Paras. 83 and 92

⁹⁴ Paras. 102 and 108

5. ANALYSIS OF THE VIABILITY OF DAMAGE AWARDS FOR BREACH OF CHOICE OF COURT AGREEMENTS IN THE EUROPEAN UNION

5.1 A New Frontier in the Brussels System: Distinguishing the German and Spanish Damage Awards from the Quasi-ASI

As previously established, there is no direct equivalent to the ASI in Continental European Law. This absence stems not only from the ASI's origins as a Common Law equitable remedy, but also from the aversion of the ECJ and the European Legislator toward measures that interfere with the jurisdiction of other Member States.

In this context, the debate concerning the validity of the Spanish and German damage awards discussed in Section 3 might appear to have been settled by *Charles Taylor Adjusting v. Starlight Shipping*. Indeed, the judicial orders issued in STS 263/2009 and BGH III ZR 42/19 bear a striking resemblance to what the ECJ categorized as a quasi ASI and, consequently, a compelling argument could be made that ECJ case law precludes national courts from granting such relief.

However, despite this apparent similarity there is a crucial distinction between the judicial order issued in *Taylor* and the award granted in STS 263/2009 and BGH III ZR 42/19: *the procedural stage at which the damages are awarded*.

In *Taylor*, the damage award was granted while the Greek proceedings were still pending. Thus, the indemnity encompassed not only costs already incurred, but also those that might arise from the continuation of proceedings before the foreign court. Conversely, the proceedings leading to STS 263/2009, as well as the procedural iter of BGH III ZR 42/19, only commenced after the foreign litigation had been fully resolved.

As Advocate General Richard de la Tour emphasized in his opinion over *Taylor*⁹⁵, the timing and nature of the award have been the subject of debate in the legal literature. These nuances warrant a deeper analysis to determine whether the continental approach to damages remains compatible with the Brussels System in the wake of the prohibition against the quasi-ASI.

5.2 Contractual Damages: A New Paradigm for Forum Enforcement?

5.2.1 Dissection of the conflict

As demonstrated throughout this thesis, the controversy surrounding the viability of ASIs and equivalent remedies within the EU stems from a tension between the principle of mutual trust, on one hand, and the doctrine of *pacta sunt servanda*, on the other. Within this framework—and notwithstanding the manifest interest of national courts in ensuring the integrity of agreements governed by their own law—the ECJ has consistently prioritized the preservation of mutual trust (see *Supra* Sections 4.1.2, 4.1.3, and 4.1.4).

It follows that for any remedy against breach of forum clauses to be permissible under the Brussels System, it must be configured in a manner that remains maximally deferential to the principle of mutual trust. Achieving this compatibility requires operationalizing the abstract principle of trust into a set of legal requirements. Based on the ECJ's settled jurisprudence, these requirements may be synthesized as follows:

a) Non-interference with the jurisdiction of the court seised⁹⁶: The award of damages must not impede the seised court's competence to determine its own jurisdiction. Interference occurs, for example, if a judicial order compels a claimant to withdraw their

⁹⁵ De la Tour, *Attorney General's Opinion on Charles Taylor Adjusting v. Starlight Shipping.*, footnote n° 49.

⁹⁶ Mention of this requirement is made, for example, in *Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company*, ¶ 23.

action before the court seised has had the opportunity to evaluate the validity of the choice-of-court agreement⁹⁷.

b) Prohibition of review as to the substance⁹⁸: The compensatory award cannot be grounded upon an alleged misapplication of EU or national law by the court seised. Mutual trust precludes a national court from scrutinizing the legal accuracy of a sibling court's adjudication, even for the purposes of calculating quantum.

Alongside mutual trust, the fundamental right of access to justice must as well serve as a boundary. The remedy cannot exert such a high degree of coercive pressure that it deprives a litigant of their right to seek a jurisdictional ruling from a Member State's court which he believes has jurisdiction.

5.2.2 *The ideal remedy*

In light of the aforementioned requirements, an ideal compensatory remedy for breach of a choice of court agreement should be characterized by three essential features:

Firstly, the award must be granted *ex-post*, occurring only *after the court seised has ruled on its own jurisdiction*. This temporal restriction is vital not only to respect the foreign court's jurisdiction but also to ensure consistency with the *lis pendens* mechanism established by Article 31(2) of the Brussels I-bis Regulation.

Secondly, compensation should be *contingent upon the court seised declining jurisdiction*. Granting damages when a sibling court has already affirmed its own jurisdiction creates a systemic conflict. Such a scenario forces the court awarding damages to issue a judgment in sharp contradiction to a prior judicial determination in another

⁹⁷ *Gregory Paul Turner v Felix Fareed Ismail Grovit*, 2004, ¶ 20.

⁹⁸ The prohibition of reviewing the merits of a judgement is established in Article 52 of the Brussels I bis Regulation. Regarding this prohibition, see also *Stefano Liberato v Luminita Luisa Grigore*, ¶ 54; *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, ¶ 60.

Member State. This outcome not only undermines the goal of minimizing irreconcilable judgments⁹⁹ but also violates the principle of *res iudicata* and the prohibition against reviewing the substance of foreign adjudications.

Finally, *the nature of the award must be strictly compensatory* rather than punitive. If litigants face the prospect of massive or exemplary damages for unsuccessfully asserting jurisdiction in another Member State, the remedy functions as a coercive measure that bars access to justice. Moreover, punitive awards are functionally indistinguishable from the "contempt of court" fines that characterize prohibited ASIs. Strictly compensatory damages—limited to the reimbursement of costs incurred due to the contractual breach—are more aligned with the spirit of the Brussels System. They prioritize the restoration of the parties' original bargain over the punishment of the litigant.

5.2.3 How far are the German and Spanish approaches from the ideal?

Having depicted the optimal remedy in terms of compatibility with the Brussels System, a question arises: How far are the German and Spanish approaches from the ideal? The assessment is based on the German Federal Court of Justice (BGH) Case III ZR 42/19, and the Spanish Supreme Court (TS) judgments 1186/2007 and 263/2009.

Regarding the first requirement, which concerns *whether the award is granted ex-post*, both the German and Spanish approaches fulfil this benchmark, issuing their orders for damages only after the foreign court has handed down a resolution regarding the initial lawsuit¹⁰⁰.

⁹⁹ See Recital 21, Brussels I bis regulation

¹⁰⁰ BGH, Case III ZR 42/19, ¶ 4; *The Concentrate Manufacturing Company of Ireland (C.M.C.I.) v Pepsi-Cola de España S.A.*, 4; *Travelstead Group Spain v Usa Sogo Inc.*, 2009, 2.

Turning to the second requirement, in respect to *whether the court first seised declined jurisdiction*, there is a sharp divergence between the two systems, as advanced in Section 3.2.2. The German approach posits that for compensation to be awarded, the court first seised must have declined jurisdiction. The BGH suggests that the contractual obligation to sue exclusively in the agreed forum carries a protective mechanism consisting of the reimbursement of costs, but this only applies “in so far as the court to which jurisdiction has been derogated has recognised its lack of jurisdiction”¹⁰¹. The logic here is that reimbursement is strictly grounded in the breach of a valid choice-of-court agreement. If the court seised assumes jurisdiction, it necessarily presupposes that the agreement is invalid or inapplicable and, as a consequence, the damage award loses its fundamental ground. The BGH thus remains deferent to the foreign court’s determination on its own competence.

Conversely, the Spanish Supreme Court will award damages regardless of whether the foreign court declined or assumed jurisdiction. In STS 1186/2007, the Spanish Court recognised a right to reimbursement although the Supreme Court of New York had fully assumed jurisdiction and handed down a final judgment on the merits. STS 263/2009 represents a slight shift toward respecting the foreign court’s decision. In Legal Ground III, the Court stated:

“The claim for costs before the American courts must be understood as a product of the claim for partial compensation for the damages suffered. The decision of those courts not to impose costs produces effects in the procedural field, but it is not an obstacle to the claim for damages by reason of contractual breach in an ad hoc proceeding, in which the estimation of the petition for

¹⁰¹ BGH, Case III ZR 42/19, ¶ 42.

costs by the Court of the United States of America would have had no other effect than the reduction of the amount susceptible to being claimed”¹⁰²

According to this reasoning, while the foreign decision on costs does not entirely determine the viability of compensation, it conditions the quantum. If the foreign court refuses to impose costs, the plaintiff in Spanish proceedings cannot claim that head of damage. Conversely, if the foreign court has already granted costs, the plaintiff cannot seek them a second time in Spain, as the claim over that head of damage has been satisfied. This approach reflects a degree of comity, as the Spanish Supreme court respects the foreign court's procedural determination and quantifies the compensatory award based on the decision issued abroad.

Finally, the German and Spanish legal systems align regarding the nature of the award: *it is strictly compensatory, and punitive damages are firmly rejected*. Thus, in the German approach, the compensatory nature of the damages is implicit. In BGH III ZR 42/19, the relief defendant sought corresponded exclusively to legal costs incurred while mounting a defense before the US District Court¹⁰³. The Spanish Supreme Court is even more explicit in its exclusion of punitive measures, stating: "The application of Spanish law establishes a specific contractual framework from the perspective of the assessment of damages (as punitive damages are excluded)."¹⁰⁴

¹⁰² Author's translation.

¹⁰³ BGH, Case III ZR 42/19, ¶ 8.

¹⁰⁴ *Travelstead Group Spain v Usa Sogo Inc.*, 2009, 19. Author's translation.

6. CONCLUSIONS

This thesis began by addressing the issue of ASIs (ASIs) from a triple perspective: *analytical, descriptive, and comparative*.

Firstly, *Section 2* analysed the ASI primarily through the lens of English case law. Although it was clarified that the modern use of the ASI is almost exclusively contractual—and subsequent sections focused on this variant—the extra-contractual ASI was also presented. This aimed not only to provide an overview of the institution, but also to use comparison as a method to illustrate the governing principles of each variant. Left for future consideration, perhaps in subsequent theses, is a deeper analysis of the historical origins and doctrinal configuration of the ASI, using as a starting point the superb explanation provided by Lord Hobhouse of Woodborough on pages 7 to 10 of the House of Lords judgment in *Turner*.

Section 4, the most extensive, was the next to be drafted. The analysis of the jurisprudence from the Luxembourg Court and the axiological foundations of the Brussels System enabled an understanding of the reasons that led the ECJ to progressively erode and eventually eradicate the ASI. The hesitations of the European legislator in facing this issue were also portrayed, as well as how this gave rise to abusive litigation tactics—particularly the Italian torpedo—which remain not fully resolved to this day.

In addition to being an end in itself, the analysis of the ECJ's case-law also served to enrich the thesis by revealing lines of research that had not been considered at the outset. Among these, a comparative study of remedies similar to the ASI in continental law stood out. Thus, in *Section 3*, with the support of various works by Professor Marta Requejo Isidro, several judgments from the Spanish Supreme Court and the German Federal Court

were studied, in which damages were granted based on the breach of an international choice-of-court agreement.

The reading and deliberation performed allowed for the drafting of a more creative section, where there are fewer citations and more of the author's own reasoning. Thus, *Section 5* contrasted the compensation for damages analysed in *Section 3* with the 'quasi ASI' established in *Taylor*. A key difference was identified: the procedural stage at which the damages were awarded. Subsequently, it was argued that this distinction could result in a different outcome regarding compatibility with the Brussels System. This was assessed in three steps in *Section 5.2*, concluding that, with certain modifications, the compensation for damages proposed by Spanish and German courts can approach the ideal of compatibility with the principle of mutual trust: an ex post remedy, limited to cases where the court first seized has declined jurisdiction, and of a strictly compensatory nature.

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