NOTE

RULE, BRITANNIA! A PROPOSED REVIVAL OF THE BRITISH ANTISUIT INJUNCTION IN THE E.U. LEGAL FRAMEWORK

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I. INTRODUCTION

When two parties to an international business transaction find themselves preparing for litigation over a deal gone awry, the frequently nettlesome question of proper venue can become even more consequential than in purely domestic suits. The issue of which party brings suit first, and where, can have a tremendous impact on the cost, length, and outcome of the dispute. In the European Union, for example, the doctrine of *lis alibi pendens* grants exclusive jurisdiction to the court first seized of the issue—a rigid and straightforward rule that would seem to provide justice and predictability to international parties.[1] If, however, a mischievous plaintiff—expecting to soon become a defendant in a suit filed by the wronged party—brings a preemptive, declaratory judgment suit on the issue in an overloaded or notoriously torpid venue, she can force the wronged party to suffer the inconvenience, cost, and delay of defending a suit in a venue that may not even have proper jurisdiction over the matter—and the injured party has no option but to simply bear the iniquity until the court makes its ruling.[2] This particular maneuver even has a name: the "Italian Torpedo," so named for its use in patent litigation where a harassing suit is brought by the patent-violating party in the Italian court system, a system well-known for its inefficiencies and delays.[3] Similarly, if the parties had previously signed a choice-of-court agreement, suit may still be filed in an improper venue, and that court has exclusive jurisdiction to decide a range of issues, including whether the choice-of-court agreement was valid in the first

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1. *See* James George, *International Parallel Litigation—A Survey of Current Conventions and Model Laws*, 37 TEX. INT'L L.J. 499, 509-11 (2002).

2. *See id.* at 510-11.

3. *See id.*

place—all the while preventing the contractually chosen venue from seizing the issue.[4]

Common law courts long ago recognized the injustice of such vexatious and abusive manipulations of venue rules, and created a remedy in the antisuit injunction.[5] These injunctions are brought against the manipulating party in a court with proper jurisdiction over the dispute, and they prohibit the enjoined party from continuing with the vexatious or abusive parallel suit under penalty of fine or imprisonment for contempt.[6] The use of these injunctions by the courts of Great Britain, however, were recently declared to be in violation of the Brussels I Regulation (Brussels Regulation), the codified set of venue rules adopted in the European Union.[7]

For centuries, the fluid common law system of Great Britain has stood in stark contrast to the more rigid, codified civil systems of Continental Europe—much to the satisfaction of many British jurists.[8] Since the advent of the European Economic Community (EEC), however, Great Britain slowly and hesitantly has ceded some of its traditional legal norms in the furtherance of European unity and harmonization.[9] Perhaps the most significant cession was the British adoption in 1988 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention), and its modern successor in 2000, the Brussels Regulation.[10] "Anxious to strengthen in the [European Economic Community] the legal protection of [its residents]," and with the aim of "determin[ing] the international jurisdiction of their courts," the member states agreed to adopt the Brussels Regulation, hoping that it would increase the predictabil-

4. *See* Martin Illmer & Ingrid Naumann, *Yet Another Blow: Anti-Suit Injunctions in Support of Arbitration Agreements Within the European Union*, 10 INT'L ARB. L. REV., Oct. 2007, at 147 n.2.

5. *See* Markus Lenenbach, *Antisuit Injunctions in England, Germany and the United States: Their Treatment Under European Civil Procedure and the Hague Convention*, 20 LOY. L.A. INT'L & COMP. L. REV. 257, 266 (1998).

6. *See* Case C-159/02, Turner v. Grovit, 2004 E.C.R. I-3565, I-3583 to I-3584; Thalia Kruger, *The Anti-Suit Injunction in the European Judicial Space:* Turner v Grovit, 53 INT'L & COMP. L.Q. 1030, 1031, 1034 (2004). *See generally* Case C-116/02, Gasser GmbH v. MISAT Srl, 2003 E.C.R. I-14693.

7. *See* Turner, 2004 E.C.R. at I-3590; Kruger, *supra* note 6, at 1035. R

8. Barbara George et al., *The U.K.'s 'Metric Martyr' Case: A Challenge to the European Union's Authority Over Its Member States*, 21 WIS. INT'L L.J. 299, 305 (2003).

9. *See id.* at 306-09.

10. *See* Paul Beaumont & Helena Raulus, *Update on Private International Law in the European Union–2001*, 96 AM. SOC'Y INT'L L. PROC. 109, 109 (2002); Robert Reuland, *The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention*, 14 MICH. J. INT'L L. 559, 567-68 (1993).

ity, enforceability, and uniformity of jurisdiction in cases involving parties within the member states.[11]

The Brussels Regulation exclusively provides the procedural steps a party might take when parallel litigation arises between two or more member states.[12] It omits, however, any discussion of alternative equitable approaches, such as antisuit injunctions.[13] Since it adopted the Brussels Convention, Great Britain's use of antisuit injunctions against parties trying to pursue parallel litigation in another member state's jurisdiction has been criticized heavily by Continental Europe, and, after the rulings of the European Court of Justice (ECJ) in *Turner v. Grovit*[14] and *Gasser v. MISAT*,[15] is no longer legal under the current framework.[16] While the use of antisuit injunctions to prevent injustice resulting from parallel litigation has a long history in British jurisprudence, the ECJ suggested that the antisuit injunctions' continued application demonstrates a lack of trust in the foreign court, conflict with the Brussels Regulation's stated goal of harmonization among member states, and improper interference with the jurisdiction of the foreign court by preventing that court from determining its competency to resolve the matter.[17] The ECJ has even gone so far as to require member states not only to grant each other "comity," but to grant a "mutual trust" that amounts to blind faith in the decisions and judgment of the foreign court in every case.[18]

The ECJ justifies requiring this "mutual trust" on the grounds that, although occasionally it will unjustly impact a particular litigant, the European legal system itself will be far more predictable and harmonious if judges are given minimal discretion in determining another states' jurisdiction.[19] This reasoning fails to recognize, however, that a middle ground may exist, where individual justice may be better guarded, while also preventing the unbridled discretion of the British—or any other state's—courts, fundamen-

11. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters pmbl., Sept. 27, 1968, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention].

12. *See* Council Regulation 44/2001, art. 4, 2001 O.J. (L 12) 1, 1 (EC) [hereinafter Brussels Regulation].

13. *See generally id.*

14. Case C-159/02, Turner v. Grovit, 2004 E.C.R. I-3565, I-3565.

15. Case C-116/02, Gasser GmbH v. MISAT Srl, 2003 E.C.R. I-14693, I-14749.

16. *See* Brussels Regulation, *supra* note 12, art. 27, at 9. R

17. *See* Turner, 2004 E.C.R. at I-3588 to I-3589; Lenenbach, *supra* note 5, at 307-08. R

18. Turner, 2004 E.C.R. at I-3588; Gasser, 2003 E.C.R. at I-14738 to I-14741; Kruger, *supra* note 6, at 1035. R

19. *See* Kruger, *supra* note 6, at 1037. R

tally undermining the harmony and predictability of the system. Without any language specifically addressing the use of antisuit injunctions in the Brussels Regulation, the ECJ may be concerned—and rightly so—about being unable to circumscribe the circumstances in which antisuit injunctions may be used; a properly drafted statute circumscribing their use, however, could mollify such fears.[20]

While the continued use of antisuit injunctions does not fully grant a foreign court the "mutual trust" that some member states would like to be given in every suit, their practical necessity in some circumstances is clear, and the equitable standard employed by British judges in granting them has been successful in preventing their abuse.[21] Given the Brussels Regulation's failure to address the antisuit injunction in any way, this Note proposes the codified incorporation of antisuit injunctions into the E.U. legal system, either through amending the Brussels Regulation, or by introducing a new Convention on Parallel Proceedings through the Hague framework. Such a statute would allow the limited use of antisuit injunctions in cases of abuse of process or breach of a choice-of-court agreement, articulating in express terms the circumstances in which an antisuit injunction may be granted and creating a mechanism for appeal if the enjoined party believes that the injunction is being used improperly.

Part II of this Note will discuss the history of the Brussels Regulation, the use of antisuit injunctions by British courts, and the ECJ decisions interpreting the Brussels Regulation that have effectively prohibited these injunctions. Part III will analyze the need for antisuit injunctions, propose statutory language that would allow for their use in a limited and predictable way, and evaluate two potential regimes—the Brussels Regulation and the Hague Convention—through which such a law could be adopted by the E.U. member states.

II. Discussion

Antisuit injunctions have significant historical precedence in the British legal system, and their use has spread to other common-law

20. *See generally* Brussels Regulation, *supra* note 12. R

21. *See* Clare Ambrose, *Can Anti-Suit Injunctions Survive European Community Law?*, 52 Int'l & Comp. L.Q. 401, 404 (2003) (noting that antisuit injunctions are used when "the ends of justice require it," usually in cases of a breached choice-of-court agreement or foreign litigation intended to be "vexatious or oppressive") (citation omitted).

jurisdictions, including the United States.[22] It is important to clarify that the scope of this Note is confined to the use of antisuit injunctions in litigation involving Great Britain and another E.U. member state; the use of antisuit injunctions against parties initiating parallel proceedings in courts outside of the European Union is beyond the scope of the Brussels Regulation and may continue regardless of their treatment within the European Union.[23] Nevertheless, antisuit injunctions' continued use in the United States and elsewhere may be seen as a testament to their effectiveness within common-law jurisdictions and their acceptance in the common-law world.[24]

A. *The Brussels Regulation, Parallel Litigation, and E.U.-U.K. Integration*

1. The Brussels Regulation

Prior to the Brussels Regulation, each European nation operated under its own procedures for establishing jurisdiction over multijurisdictional suits, including when and how to recognize and enforce judgments issued outside of its jurisdiction.[25] Many of these approaches conflicted with each other, reflecting differences in jurisprudence, sovereignty, and philosophies on judicial discretion.[26] These differences often fueled increased forum shopping and nonpayment of awarded damages.[27] To curtail some of these undesirable effects, many nations began to enter into bilateral agreements on the recognition and enforcement of international awards;[28] these agreements, however, lacked collective coherence and provided only limited predictability for parties to lawsuits.[29] The signatories to the Treaty of Rome (EEC Treaty), which established the EEC in 1958, sought to remedy this incoherence by increasing the consistency and applicability of these agreements through legal integration.[30] The signing of this treaty started a

22. *See id.*; Lenenbach, *supra* note 5, at 260. R

23. *See* Brussels Regulation, *supra* note 12, art. 1, at 3. R

24. Lenenbach, *supra* note 5, at 259-61. R

25. *See* Reuland, *supra* note 10, at 562 n.5 (noting that because of the Brussels Convention, rules from the original contracting states on "the recognition of foreign judgments, which took centuries to develop, no longer had any validity"). R

26. *See id.* at 573-74; Maura Wilson, *Let Go of That Case! British Anti-Suit Injunctions Against Brussels Convention Members*, 36 CORNELL INT'L L.J. 207, 209-11 (2003).

27. *See* Wilson, *supra* note 26, at 209-11. R

28. *See* Reuland, *supra* note 10, at 561. R

29. *See id.*

30. *See* Treaty Establishing the European Economic Community art. 220, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

trend of "Europeanization," which has continued into the twenty-first century.

Article 220 of the EEC Treaty, which provides the foundation for the Brussels Regulation, declares that "Member States, shall, so far as is necessary, engage in negotiations with each other with a view to ensuring for the benefit of their nationals . . . the simplification of formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards."[31] This aspiration first manifested itself more than thirty years before the Brussels Regulation, when the six original European Community member states—Belgium, West Germany, France, Italy, Luxembourg, and the Netherlands—drafted Europe's first convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters: the 1968 Brussels Convention.[32] The Brussels Convention represented a unique moment in Europe's post–World War II era, as it abandoned the tangled web of bilateral treaties between individual European states on jurisdiction and judgments, and replaced them with a unified agreement requiring the enforcement of judgments and awards from other member states—something akin to the Full Faith and Credit Clause of the U.S. Constitution's Article IV.[33] The Brussels Convention's scope extended to all "civil and commercial matters" arising in the various member states' courts, and it mandated that all courts apply its codified set of jurisdictional rules in cases of parallel proceedings.[34] Adoption of the Brussels Convention became a requirement for admittance to the EEC, and every subsequent member state to join the EEC accepted the Brussels Convention, occasionally subject to minor, technical amendments.[35] In 1988, the Lugano Convention, which almost identically followed the structure and substance of the Brussels Convention, expanded the terms of the Brussels Convention to the non-EEC member states of the European Free Trade Area.[36] Taken together, the Brussels and Lugano Conventions provided the basic framework for a European

31. *Id.*

32. Reuland, *supra* note 10, at 564-65. R

33. *See id.* at 561-62; George, *supra* note 1, at 511; Wilson, *supra* note 26, at 207-08. R

34. Brussels Convention, *supra* note 11, art. 1. R

35. *See* Reuland, *supra* note 10, at 567-69. R

36. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9; *see also* Reuland, *supra* note 10, at 569-70. The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is commonly referred to as the Lugano Convention. R

body of private civil and commercial law, one of the European Union's crowning legal achievements.[37]

While the explicit text of the Brussels Convention was uniformly adopted, the diverse legal traditions of the member states meant that conflicting interpretations of that text might result in uneven applications of its provisions, thereby significantly undermining the chief goal of the Brussels Convention.[38] In 1971, the member states addressed this risk by agreeing that the ECJ, which would provide an adequately impartial forum, would give final judgment on the Brussels Convention's meaning, making the ECJ the "first international court to be afforded jurisdiction over a private international law convention."[39] It was under this jurisdiction that the ECJ interpreted the Brussels Convention—in its current form as the Brussels Regulation—to forbid the use of antisuit injunctions against member states, a development discussed in greater detail below.[40]

By the end of the twentieth century, the EEC had absorbed the European Free Trade Area, new states had joined, and the Maastricht and Amsterdam Treaties had created a stronger, more integrated European Union.[41] Under these conditions, the Brussels Regulation was proposed to make the terms of the Brussels and Lugano Conventions directly applicable to all E.U. member states as a regulation, which is immediate and supersedes any conflicting national laws.[42] The Brussels Regulation largely mirrors the Brussels Convention, with a few exceptions, chief among those the definition of a "first-seized" court for purposes of the *lis pendens* doctrine.[43] Prior to 2000, the ECJ had not interpreted the question of "when proceedings become pending" under Article 21 of the Brussels Convention—now Article 27 of the Brussels Regulation.[44] The answer to that question is crucial to the application of

37. Reuland, *supra* note 10, at 560-61. R

38. *See id.* at 565-66.

39. *Id.* ("[T]he original Member States of the EC signed a protocol granting the [ECJ] the competence to interpret the Brussels Convention.").

40. *See* Case C-159/02, Turner v. Grovit, 2004 E.C.R. I-3565, I-3588 to I-3589; Case C-116/02, Gasser GmbH v. MISAT Srl, 2003 E.C.R. I-14693, I-14694 to I-14695; *infra* pp. 24-32.

41. *See* Armin von Bogdandy, *The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty*, 6 COLUM. J. EUR. L. 27, 32 (2000).

42. *See* Brussels Regulation, *supra* note 12, pmbl. ¶ 6, at 1; Beaumont & Raulus, *supra* note 10, at 109. R R

43. *See* Beaumont & Raulus, *supra* note 10, at 109-11. Other exceptions included adjustments to "domicile" for corporations or other "legal persons" or associations, "place of performance," and other matters concerning contracts, employment, and insurance. *Id.* R

44. *Id.* at 110.

lis pendens, which grants exclusive jurisdiction to the court "first-seized" of a suit. Without a clear answer, a number of different approaches under the member states' civil procedure laws existed, creating a large amount of confusion.[45] The Brussels Regulation, in Article 30, created a uniform standard, deeming a court first-seized:

> (1) At the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff [has served the defendant], or (2) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff [has served the defendant].[46]

This revision to the original Brussels Convention provided a uniform "first-seized" rule for the member states, and required that "[w]here proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the court first seized shall of its own motion *stay its proceedings* until such time as the jurisdiction of the court first seized is established."[47] If the first court's jurisdiction is affirmatively established, "any court other than the court first seized shall decline jurisdiction in favor of that court."[48] While the clarity and rigidity of this rule would presumably obviate the need for an antisuit injunction—or any other discretionary remedy—ever to be issued, blindly granting jurisdiction to the first-seized court has resulted in individual injustices and the supplanting of party agreements in favor of uniform procedure.[49]

To address the issue of party agreements, the 2005 Hague Convention on Choice of Court Agreements, which complements the Brussels Regulation in cases of contractual forum-selection clauses,[50] was drafted and adopted by the member states of the Hague Conference on Private International Law, including the United States and all of the E.U. member states.[51] The Hague

45. *See id.*
46. Brussels Regulation, *supra* note 12, art. 30, at 9. R
47. *Id.* art. 27 (emphasis added).
48. *Id.*
49. *See* Ambrose, *supra* note 21, at 404-06. R
50. *See* Matthew H. Adler & Michele Crimaldi Zarychta, *The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Band*, 27 NW. J. INT'L L. & BUS. 1, 35 (2006) ("The Convention provides that it should be interpreted in a way that is compatible with other treaties in existence between Member States."); Matthew Berlin, *The Hague Convention on Choice of Court Agreements: Creating an International Framework for Recognizing Foreign Judgments*, 3 BYU INT'L L. & MGMT. REV. 43, 55 (2006).
51. *See generally* Hague Convention on Choice of Court Agreements art. 5, June 30, 2005, 44 I.L.M. 1294 [hereinafter HCCH]; *see also* Berlin, *supra* note 50, at 43-44; HCCH R

Convention requires that a court properly selected by international parties to hear any disputes arising under their contract be the court where the dispute is settled.[52] It prohibits the use of *forum non conveniens* or other equitable considerations to transfer the dispute out of the chosen forum, stating that a court "shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State."[53] It also requires that "courts not selected by the choice of court agreement . . . suspend or dismiss proceedings to which an exclusive choice of court agreement applies," subject to exceptions, such as where the chosen forum finds the agreement to be void or has refused to take jurisdiction.[54] Furthermore, it allows the prevailing party in the suit "to seek to collect on that judgment in the territory of another signatory to the new agreement," making the result of a trial involving a choice-of-court agreement enforceable in other signatory jurisdictions.[55] While this regime increases the strength of such agreements among parties in E.U. member states by allowing the "chosen" court to determine the agreement's validity, the *lis pendens* doctrine still allows the first-seized court exclusive jurisdiction, particularly to decide whether the parties had "capacity to conclude the agreement under the law of the state seized" or whether allowing another court to hear the case would result in "injustice or contradict the law of the State seized,"[56] which essentially gives member state judges in the court first-seized a similar level of discretion to that found so odious and objectionable in the case of antisuit injunctions. Therefore, despite the improvements made by the Choice of Court Convention, the doctrine of *lis pendens* still prevails as the law of Europe.

Members, http://www.hcch.net/index_en.php?act=states.listing (last visited May 10, 2010). As of May 10, 2010, the only Member State to ratify the Convention was Mexico. HCCH Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last visited May 10, 2010). It remains unclear whether the states that drafted the HCCH will ratify it. Some scholars suggest that either the private sector will have to pressure nations to ratify it, or the United States will have to ratify it before others follow suit. *See* Adler & Crimaldi Zarychta, *supra* note 50, at 36. R

52. HCCH, *supra* note 51, art. 5; Berlin, *supra* note 50, at 57. R

53. HCCH, *supra* note 51, art. 5. R

54. Berlin, *supra* note 50, at 58; *see also* HCCH, *supra* note 51, art. 6 ("A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies . . . ."). R

55. Adler & Crimaldi Zarychta, *supra* note 50, at 2; *see also* HCCH, *supra* note 51, art. 8 ("A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter."). R

56. Berlin, *supra* note 50, at 58. R

2. European and British Jurisprudence on Parallel Litigation

The establishment of *lis alibi pendens* in the Brussels Regulation as the sole mechanism for resolving international parallel litigation reflects the dominance of civil law in Europe and the preference for nondiscretionary legal norms.[57] The British common-law system, like its cousin in the United States, contains innumerable multifactor balancing tests and sliding scales; a format rejected by the drafters of the Brussels Convention and the Brussels Regulation in favor of a civil-code framework, employing a "syllogistic reasoning process in which various fact patterns must be characterized to fit into a particular code section, without full regard for factual nuances."[58] As stated by Lord Steyn of the English House of Lords, "the genesis of the [Brussels] Convention is the jurisprudence of the civil law rather than the common law."[59] The advantage of such an approach is its uniformity and predictability; the judge must use his discretion only to place a particular fact pattern into the "correct" predetermined legal category rather than weigh equitable factors and potentially craft a new test or rule to produce a more customized result.[60] Put more bluntly, "civil law countries do not trust individual courts the way [common law countries do]," so the less discretion or equitable analysis required of a court, the better.[61] The inflexibility of a code-based system, however, sometimes results in "forced fits" that significantly discount important factors that demand a remedy other than those provided by the code.[62] Some have also criticized the Brussels system for allowing "manipulation, by, for example, winning the race to the courthouse with a declaratory action" intended either to prevent or delay an injured party's legitimate suit or by filing a second case that is "not quite identical" to work around the precise *lis pendens* language of the Brussels Regulation.[63] The former strategy, the notorious "Italian torpedo,"[64] is a type of forum shopping so named for the abuse of

57. *See* Adler & Crimaldi Zarychta, *supra* note 50, at 22-23; George, *supra* note 1, at 511-12. R

58. George, *supra* note 1, at 510; *see also* Adler & Crimaldi Zarychta, *supra* note 50, at 21-23. R

59. Cont'l Bank N.A. v. Aeakos Compania Naviera S.A., [1994] 1 Lloyd's Rep. 505, 510 (Eng.).

60. *See* George, *supra* note 1, at 510-11. R

61. Adler & Crimaldi Zarychta, *supra* note 50, at 21-23. R

62. George, *supra* note 1, at 510-11. R

63. *Id.* at 511.

64. Julia Eisengraeber, Lis Alibi Pendens *Under the Brussels I Regulation – How to Minimize "Torpedo Litigation" and Other Unwanted Effects of the "First-come, First-served" Rule* 7 (Ctr. for Eur. Legal Studies, Exeter Papers in European Law No. 16, 2004).

Italian courts, "where dockets move slowly," by potential defendants who seek a declaratory judgment of nonliability in an expected suit, blocking the prospective plaintiff from proceeding with the actual suit in a different, more appropriate forum.[65] While the consequences of waiting for the first-seized court to decline the request for declaratory relief may seem negligible at first, users of these "torpedoes" frequently achieve immunity from legitimate suits for five, or even ten years.[66] It is in situations like these, the British courts have implemented alternative, equitable options, including *forum non conveniens* and antisuit injunctions, which at least provide the chance for preventing abuse and promoting individual justice.[67]

To avoid overstating the differences in the British and European approaches to parallel litigation, it should be noted that *lis pendens* does exist in Britain and is used by the British courts.[68] The doctrine is applied "to consider staying or dismissing [a] local action," involving either "repetitive" or "reactive" suits.[69] Repetitive suits are those "involving multiple suits on the same claim by the same plaintiff(s) against the same defendant(s),"[70] and reactive suits are those "in which the defendant in the first action files a separate suit against the plaintiff in the first action, seeking a declaratory judgment of non-liability in the first action."[71] Both types of suits are often filed when "the first forum makes a preliminary ruling that displeases the plaintiff" or when the plaintiff "experiences 'post-filing dissonance' from discomfort with the judge, the type of court, the locale, or some other aspect of the first lawsuit."[72] For these purposes, namely where a plaintiff attempts to move the litigation simply due to dissatisfaction with its chosen forum, the British courts find *lis pendens* sufficient; however, as previously stated, they do not limit their options to *lis pendens* alone.[73] In cases where

65. Rochelle Dreyfuss & Jane Ginsburg, *Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters*, 77 CHI.-KENT L. REV. 1065, 1113 (2002); *see also* Joseph Straus, *Patent Litigation in Europe—A Glimmer of Hope? Present Status and Future Perspectives*, 2 WASH. U. J.L. & POL'Y 403, 414 (2000).

66. Straus, *supra* note 65, at 414 (discussing the use of Brussels and Italy as forums to preempt impending, legitimate patent litigation, frequently resulting in 5 to 10 years of immunity from suits brought by the plaintiff in other forums). R

67. *See* George, *supra* note 1, at 510. R

68. *See id.* at 509.

69. *Id.*

70. *Id.* at 535.

71. *Id.*

72. *Id.* at 536.

73. *Id.* at 510.

the defendant finds the plaintiff's chosen forum to be inconvenient, the first-seized British court may employ the doctrine of *forum non conveniens* and issue a discretionary stay or dismissal of the first action, subject to an equitable balancing test similar to that in the United States.[74] Or, in the event that the British court finds a foreign action to be "vexatious or oppressive," or in direct violation of a choice-of-court agreement between the parties, it can issue an antisuit injunction against the offending party, again, subject to discretionary factors.[75] These remedies exemplify the increased trust and discretion given to British judges as compared to their European peers;[76] their exclusion from the Brussels Regulation is a fundamental basis for British criticism of it.[77]

Regardless of the validity of the complaint that the Brussels Regulation excessively limits a nation's options for dealing with parallel litigation, Britain's membership in the European Union subjects it to the Brussels Regulation's current language.[78] This specific conflict is part of a larger pattern of British frustration over what many Britons view as the "Europeanization" of the English system,[79] and so long as Britons believe that their values are not represented, future advances towards greater European integration and harmonization will be potentially undermined.[80]

3. British Integration into the E.U. Legal Framework

Great Britain, with its uniquely non-Continental culture and common-law tradition, has generally resisted the post–World War II trend towards European legal integration.[81] As Winston Churchill commented in 1930, "We are with Europe, but not of it. We are linked, but not compromised. We are interested and associated, but not absorbed."[82] This attitude contributed substantially to Great Britain's decision to join only the European Free Trade Association (EFTA) and to remain, at least initially, apart from the

74. Ronald Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 Tex. Int'l L.J. 467, 471-72 (2002).

75. George, *supra* note 1, at 509. R

76. Adler & Crimaldi Zarychta, *supra* note 50, at 21-23. R

77. Wilson, *supra* note 26, at 216-20. R

78. Brussels Regulation, *supra* note 12, pmbl., at 1. R

79. George et al., *supra* note 8, at 322-24. R

80. *Id.*

81. *Id.*

82. *Id.* at 305.

EEC. By the 1960s,[83] however, Great Britain recognized that "[t]he economic ties among EFTA member nations had proven that they would never yield the kind of advantages to the British that EEC membership promised."[84] Still though, the decision of then–prime minister Edward Heath to enter Great Britain into the EEC produced sharp division at home; while Conservatives supported the decision, "the Labour Party was decisively opposed to it."[85] The nation's E.U. membership remains a contentious issue today, perhaps most sharply demonstrated in the recent "Metric Martyr" cases.[86] In these prosecutions, several British grocers were convicted for violating the E.U. Weights and Measures Act of 1985—which requires all member states to use the metric system—for selling produce using the British imperial weight scale.[87] These cases produced tremendous dissent and frustration among the British public, which largely viewed them as the latest attack on historical British culture and traditions by the continental European Union.[88] As the trend towards greater "Europeanization" continues, the inclusion of British legal norms in the E.U. framework could quell some of Great Britain's dissatisfaction and frustration with their perceived usurpation of British traditions and culture.[89] One significant way in which this could be accomplished is by adding a codified antisuit injunction procedure to the list of potential court actions in cases of parallel proceedings, increasing the representation of common-law norms within the E.U. system.

B. *The British Courts' Use of Antisuit Injunctions*

The British legal system has allowed for some form of antisuit injunction since as early as the fifteenth century.[90] This injunction, first known as a "writ of prohibition," initially was used against the ecclesiastical courts; by the nineteenth century, however, it had evolved into its present equitable-remedy form in the Court of

83. *Id.* at 305-07. Great Britain first sought membership to the EEC in 1961; however, Charles de Gaulle consistently vetoed Great Britain's membership until the end of his presidency in 1969. *See id.* Great Britain was finally admitted to the EEC in 1972. *See id.*

84. *Id.* at 306.

85. *Id.* at 307.

86. *Id.* at 299 & n.3 (Thoburn v. Sunderland City Council, Hunt v. Hackney London Borough Council; Harman v. Cornwall County Council; Collins v. Sutton London Borough Council, [2003] Q.B. 151 (Eng.)).

87. *Id.* at 299-301; Weights and Measures Act, 1985, c. 72, § 1 (Eng.).

88. George et al., *supra* note 8, at 324. R

89. *Id.*

90. Wilson, *supra* note 26, at 213. R

Chancery.[91] By this time, the potential use of an antisuit injunction had become a powerful tool to prevent a litigant in a matter before a British court from attempting to derail or vitiate the British proceedings by filing the suit in a foreign court.[92]

Currently, the injunction is used principally in two types of situations.[93] In the most egregious—and rare—cases, the offending litigant is seeking a negative declaratory judgment in the foreign court that might impinge on the enforceability of the judgment of the British court, or he might be using the foreign litigation simply to harass his opponent by forcing him to incur the additional time and expenses of a second litigation—similar to the "Italian torpedo" strategy.[94] The grant of an antisuit injunction in this case stops the offending litigant from committing an abuse of process, and by preventing the foreign litigation from proceeding, it also prevents the rare but potential situation where a foreign court does not dismiss the case on its own under the requirements of *lis pendens*, which would cause exactly the kind of distrust between jurisdictions that the Brussels Regulation seeks to avoid.[95]

In the second category of cases, the litigants previously agreed to a forum for any potential litigation, and the offending party is violating that contractual agreement by suing in a different jurisdiction.[96] In this situation, the grant of an antisuit injunction enforces the terms of a contract, which increases the predictability and uniformity of international contractual relationships, a stated goal of the Brussels Regulation.[97] While Article 23 of the Brussels Regulation declares that, given a choice-of-court agreement, the chosen court shall have jurisdiction, the *lis pendens* doctrine would give initial jurisdiction to the court first-seized of the matter, regardless of whether that court was the predetermined jurisdiction.[98] The first-seized court then must determine whether the agreement was

91. *Id.*; Lenenbach, *supra* note 5, at 266-67. R

92. Wilson, *supra* note 26, at 214-15. R

93. *Id.*

94. *Id.*

95. Turner v. Grovit [2001] UKHL 65, para. 36 (U.K.) ("In so far as a purpose of the Convention is to limit the risk of irreconcilable judgments, the use of [antisuit injunctions] by the English courts is effective to achieve or aid this result. (It has achieved it in this case: the probability of irreconcilable judgments has been avoided)."); Brussels Regulation, *supra* note 12, pmbl., at 1; Wilson, *supra* note 26, at 217-19. R

96. *See* Lenenbach, *supra* note 5, at 270-71. R

97. Brussels Regulation, *supra* note 12, pmbl., at 1; *see also* Trevor Hartley, *Antisuit Injunctions and the Brussels Jurisdiction and Judgments Convention*, 49 INT'L & COMP. L.Q. 166, 168-69 (2000). R

98. Brussels Regulation, *supra* note 12, arts. 23, 27, at 8-9. R

valid, an evaluation that could last for an extended period of time and require additional litigation expenses, not to mention that the first-seized court could reject the will of the parties and claim jurisdiction over the matter.[99]

The British courts rarely grant an injunction in the first type of case, as the standard for holding that a litigant is attempting to abuse process or harass the other party is very difficult to meet.[100] Under this standard, the courts must determine that Great Britain is a "natural forum" for the litigation; upon this finding, the courts are required to balance "the possible injustice to the defendant (of the foreign action) if the injunction is not granted" and the "possible injustice to the plaintiff if it is granted."[101] The British courts have been reluctant to find this standard met, and only seem to grant an injunction when the balance tilts greatly towards injustice for the defendant.[102] Given these factors, the "vexatious or oppressive" category of antisuit injunctions is rarer than the alternative "choice of court" kind.[103] In the second type of case, where a choice-of-court clause is being breached, "the court will give effect to it by granting an antisuit injunction (or a stay of domestic proceedings) unless strong cause / strong reasons are shown by the party in breach of the clauses as to why an injunction (or stay) should not be granted."[104] Both of these standards provide appropriate discretion on the part of the British court and ensure that they will only grant an antisuit injunction when one is truly justified.[105]

A valid argument frequently is raised, both by European and some British commentators, that antisuit injunctions infringe upon the foreign court's jurisdiction by preventing it from considering the matter at all.[106] As Lord Hobhouse explained in *Turner v. Grovit*, however, the injunction is directed at the offending party,

99. Berlin, *supra* note 50, at 58. This risk has been slightly reduced by the recent Hague Convention on Choice of Court Agreements, which limits the question of validity of the agreement itself to the named court. *Id.* The convention, however, also allows a non-named, first-seized court to assume jurisdiction if the court finds that dismissing jurisdiction would be against its own law, would create "injustice," or if one or both of the parties lacked capacity to enter into the agreement. *Id.* R

100. Wilson, *supra* note 26, at 214-15. R

101. Lenenbach, *supra* note 5, at 268-69. R

102. Wilson, *supra* note 26, at 214-15. R

103. *Id.*

104. Soc'y of Lloyd's v. Peter Everett White (No. 2), [2002] I.L.Pr. 11, 104 (Q.B.) (Eng.).

105. Wilson, *supra* note 26, at 214-16. R

106. *See id.* at 217-19; Ambrose, *supra* note 21, at 407-08. R

and not at the foreign court or its jurisdiction:[107] "Jurisdiction is a different concept . . . . [Antisuit injunctions] come into the picture at an earlier stage and involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction."[108] The difference is subtle, but important. If a British court has proper *in personam* jurisdiction over a party, and it is clear that the party is attempting to interfere with the suit by abusing another forum's jurisdiction, then the British court is justified in preventing the abuse and maintaining control over the suits and parties properly before it.[109] This should not come as an affront to the foreign court, as the standards used by the British courts to review a request for an injunction are well-known, and, as stated above, are not satisfied capriciously.[110] If the British court decides that an antisuit injunction is appropriate, the foreign court likely would have declined jurisdiction over the matter eventually anyway; the British suit, therefore, will suffer far less interference and inconvenience than if the foreign court had to independently go through the process of investigating the abuse.[111] In addition, the proper granting of antisuit injunctions also lightens the load of foreign dockets from frivolous suits.[112]

The granting of an antisuit injunction would not, however, always result in a positive benefit for the litigants. In the rare case that the foreign court would find error with the British court's assessment of the circumstances, there is no mechanism or process for the foreign court or the allegedly offending party to appeal the decision to a higher court—such as the ECJ—to settle the matter.[113] This leaves antisuit injunctions open to the common attack that they are an unpredictable and disrespectful implementation of common-law discretionary jurisprudence. It was based on this line of reasoning that they were found to violate the Brussels Regulation.[114]

107. *See* Turner v. Grovit [2001] UKHL 65, para. 26 (U.K.).
108. *Id.*
109. *See id.* at 120.
110. Wilson, *supra* note 26, at 214-15. R
111. Ambrose, *supra* note 21, at 407-12. R
112. *See generally id.*
113. *See* Brussels Regulation, *supra* note 12, pmbl. ¶ 18, at 2. R
114. Wilson, *supra* note 26, at 217-19. R

C. *Antisuit Injunctions, the Brussels Regulation, and the ECJ*

The British courts' use of antisuit injunctions first drew the attention of European commentators in the 1994 choice-of-court agreement case of *Continental Bank v. Aeakos Compania Naviera.*[115] The ECJ did not address their legality under the Brussels Regulation, however, until recently in *Turner v. Grovit*[116] and *Gasser v. MISAT.*[117] Those cases addressed the use of antisuit injunctions in both abuse of process and breach of choice-of-court agreement situations. In each litigation, the ECJ found that the injunctions violated the spirit and purpose of the Brussels Regulation and they were thereby forbidden.[118]

1. *Continental Bank v. Aeakos Compania Naviera*

Continental Bank was among the first cases to address the use of antisuit injunctions against member states of the Brussels Convention, which Great Britain had joined six years earlier.[119] The plaintiff, Continental Bank, was a U.S. company that entered into various loan agreements with fifteen shipping companies, collectively managed and represented by the Greek defendant Aeakos Compania Naviera.[120] Provided in each of these loan agreements was a choice-of-court clause stating "This Agreement shall be governed by and construed in accordance with English law" and "Each of the borrowers . . . hereby irrevocably submits to the jurisdiction of the English Court[ ]."[121]

When a default by the borrowers led to litigation, the defendant first brought suit in Greece, a clear violation of the express terms of the contract.[122] Continental then responded by seeking an antisuit injunction in Great Britain to prevent the defendant from proceeding in the Greek action.[123] Aeakos Compania argued this action was illegal under Articles 21 and 22 of the Brussels Convention—the *lis pendens* articles—which gave exclusive jurisdiction to

115. Cont'l Bank N.A. v. Aeakos Compania Naviera S.A., [1994] 1 Lloyd's Rep. 505, 505 (Eng.); Wilson, *supra* note 26, at 217; *see also* Trevor Hartley, *Brussels Jurisdiction and Judgments Convention: Jurisdiction Agreement and Lis Alibi Pendens*, 19 EUR. L. REV. 549 (1994). R

116. *See* Case C-159/02, Turner v. Grovit, 2004 E.C.R. I-3565, I-3590.

117. *See* Case C-116/02, Gasser GmbH v. MISAT Srl, 2003 E.C.R. I-14693, I-14696.

118. *Id.* at I-14696 to I-14697; Turner, 2004 E.C.R. at I-3591.

119. Wilson, *supra* note 26, at 217. R

120. *See* Cont'l Bank N.A., [1994] 1 Lloyd's Rep. at 505-06 (Eng.).

121. *Id.* at 507.

122. *See id.*

123. *See id.*

Greece as the first-seized forum.[124] Lord Steyn ruled that "there is nothing in the Convention which is inconsistent with a power vesting in the English Court to grant an injunction the objective of which is to secure enforcement of an exclusive jurisdiction agreement."[125] In response to the protestations of the defendant that "[t]he question whether the Greek Court has jurisdiction ought to be left to the Greek Court" and "[t]he English Courts ought to trust the Greek Court," Lord Steyn noted that, "because the bank cooperated [with the Greek proceeding] at an early stage in asking for an adjournment . . . . [i]t does not appear that the Greek Court will consider the impact on its jurisdiction of the exclusive jurisdiction agreement."[126] In addition to this evidence that the Greek court would not have declined jurisdiction, Lord Steyn also pointed to the Greek rules of civil procedure that would have required Continental to file "a defense on the merits at the same time as an objection to jurisdiction," as well as incur "[l]egal fees . . . apparently amount[ing] to about US$120,000," along with other burdens.[127] In the opinion of the British court, ignoring these factors and declining the antisuit injunction would have been "vexatious and oppressive" for Continental, and so the injunction was granted.[128] This case attracted significant criticism from both European and British legal scholars who viewed the court's decision as an affront to the letter and spirit of the Brussels Convention; however, the ruling was not appealed to the ECJ and so the practice of granting antisuit injunctions continued until the *Turner* case in 2001.[129]

2. *Turner v. Grovit*

In *Turner v. Grovit*, the plaintiff was a British solicitor who moved to Spain to pursue employment with a group of companies directed by Grovit that ran *bureaux de change*,[130] with their central management located in Great Britain.[131] After a brief tenure in that post, Turner was terminated from his position and returned to Great Britain to file a suit against the defendant for improper dis-

124. *See id.* at 509-10.
125. *Id.* at 511.
126. *Id.* at 511-12.
127. *Id.* at 512.
128. *Id.*
129. *See* Hartley, *supra* note 115, at 549-52; Wilson, *supra* note 26, at 217-18. R
130. The English translation of "Bureaux de change" is "foreign currency exchange markets."
131. Case C-159/02, Turner v. Grovit, 2004 E.C.R. I-3565, I-3565.

missal.[132] The defendant objected to the British court's jurisdiction, claiming that, since Turner was employed in Spain, the Spanish courts had jurisdiction over the matter.[133] When the British tribunal dismissed these arguments, the defendant brought suit against Turner in Spain, claiming breach of his service agreement, and arguing Spanish jurisdiction on the same grounds as it had done in the British suit.[134] Evidence was presented to the Court of Appeal in London that the Spanish court was exercising jurisdiction over the matter, and Turner then filed a motion for an antisuit injunction against Grovit to prevent the Spanish suit from proceeding.[135] The Court of Appeal ultimately granted the injunction and required the defendant to cease his action in the Spanish court, holding that the Spanish proceedings were nothing but a ploy to harass and oppress the plaintiff and that the proceedings constituted an abuse of process.[136]

The defendants appealed the Court of Appeal's ruling to the House of Lords, claiming that the Brussels Regulation prohibited the use of antisuit injunctions.[137] The House of Lords found the argument compelling, and so referred a preliminary question to the ECJ asking whether such injunctions are permissible under the Brussels Regulation when the offending party is acting in bad faith with the intent of "frustrating or obstructing proceedings properly before the English courts."[138] The ECJ, under Advocate-General Ruiz-Jarabo Colomer, issued a sweeping ruling, holding that the "English courts can no longer grant antisuit injunctions in cases that fall within the scope of application of the Brussels [Regulation] and where the other court belongs to another [E.U.] Member State."[139] The ECJ reasoned that the use of antisuit injunctions violated the Brussels Regulation aim of "mutual trust" between member states, and that the Brussels Regulation had its own mech-

132. *Id.*
133. *Id.*
134. *Id.*
135. Turner v. Grovit [2001] UKHL 65, para. 15 (U.K.). The defendant argued that the *lis alibi pendens* doctrine of Article 21 was not implicated because the causes of action were separate. The Court of Appeal rejected this argument, finding the two actions were based upon the "same contractual relationship" and concerned the "same subject matter." *Id.* para. 18. However, the House of Lords held that the question was immaterial because "whether or not the Madrid court was in breach of Article 21 is a matter for the Madrid court." *Id.* para. 20. The only question before the House of Lords was whether the Court of Appeal had the authority to grant antisuit injunctions. *Id.*
136. *Id.* para. 16; Kruger, *supra* note 6, at 1032. R
137. Turner, 2004 E.C.R. at I-3565; Kruger, *supra* note 6, at 1032. R
138. Kruger, *supra* note 6, at 1032-33. R
139. *Id.* at 1035; *see also* Turner, 2004 E.C.R. at I-3590.

anism for preventing parallel litigation through the *lis pendens* doctrine contained in Article 21.[140]

Since the question presented to the ECJ was simply a preliminary one, specifically directed at the legality of antisuit injunctions in the abstract, the ECJ's decision did not take into account the circumstances surrounding the defendant's initiation of proceedings in Spain, and thus did not address the important issue of protecting individual justice within the framework of the Brussels Regulation.[141] Rather, the ECJ pointed to the virtue of "mutual trust" and comity between member states as the ultimate aim of the Brussels Regulation, and declared that, while antisuit injunctions do not explicitly violate any provision of the Brussels Convention, "the value[s] underlying [them] fundamentally opposes that of the European judicial space."[142] This ruling, therefore, effectively abolished the use of antisuit injunctions in "abuse of process" or "harassment" cases, as that was the basis for the preliminary question; it did not, however, address the second type of case, where the antisuit injunction is sought to prevent the breach of a choice-of-court agreement.[143]

3. *Gasser v. MISAT*

In *Gasser v. MISAT*,[144] the ECJ did not specifically address the use of antisuit injunctions in the breach of contract context, but announced a rule under the Brussels Regulation that effectively rendered such injunctions void.[145] In this case, the plaintiff was a merchant in Austria doing business with an Italian defendant operating out of Rome.[146] The two parties had agreed to a choice-of-court clause in their commercial contract granting the Austrian courts jurisdiction over any contractual disputes.[147] In April 2000, the defendant MISAT sought damages against Gasser for breach of contract, and brought suit in the Italian court, despite the terms of the contract.[148] Gasser responded by suing MISAT in the Austrian

140. *See* Kruger, *supra* note 6, at 1034. The English Court of Appeal found that the Brussels Regulation solution of *lis alibi pendens*, Brussels Regulation, *supra* note 12, arts. 21-22, at 7-8, was inapplicable. Cont'l Bank N.A. v. Aeakos Compania Naviera S.A., [1994] 1 Lloyd's Rep. 505, 511-512 (Eng.). R R

141. *See* Kruger, *supra* note 6, at 1038-39. R

142. *Id.* at 1036.

143. *Id.* at 1038-39.

144. Case C-116/02, Gasser GmbH v. MISAT Srl, 2003 E.C.R. I-14693.

145. *See* Illmer & Naumann, *supra* note 4, at 147 n.2. R

146. Gasser, 2003 E.C.R. at I-14699.

147. *Id.*

148. *Id.*

court, claiming that it was the proper venue under the choice-of-court agreement.[149] The Austrian court stayed the proceedings before it in light of Article 27 (*lis pendens*) of the Brussels Regulation, requiring the court second-seized of a dispute to stay proceedings until the court first-seized determines whether it has jurisdiction.[150]

Given the choice-of-court clause and the well-known reality that Italian courts move very slowly when deciding jurisdiction, the Austrian Court of Appeal submitted a question to the ECJ asking whether the requirements of Article 27 were absolute, regardless of circumstances.[151] The ECJ ruled that any court second-seized of a dispute must always stay proceedings until the first-seized court decides its own jurisdiction, regardless of how long that may take, and despite the existence of any kind of exclusive jurisdiction agreement.[152] While this ruling did not explicitly address the use of an antisuit injunction issued against the party bringing suit in a jurisdiction other than the agreed upon one, it essentially forbid such action, as it would violate the required stay of proceedings under *lis pendens*.[153] As in *Turner*, the ECJ exalted the Brussels Regulation's aim to create "predictability and uniformity" within the European Union, and it dismissed any concerns over abusive litigation as insufficient to "call into question the interpretation of any provision of the [Brussels Regulation]."[154]

In a sense, however, the rigidity with which the ECJ applied Article 27 does damage the predictability of international contracts, as the potency of a choice-of-court clause falls subject to the discretion of the potentially nonselected first-seized court, and the offending party is allowed to delay the expediency of the nonoffending party's cause of action by first filing the claim in an improper venue.[155] While *lis pendens* generally enjoys support from European jurists, this harsh application of it has drawn criticism.[156] In fact, "the Commission of European Contract Law . . . [,] which drafted the Principles of European Contract, strongly supports

149. *Id.*

150. *See id.* at I-14729; Brussels Regulation, *supra* note 12, art. 27, at 9. **R**

151. *See* Louise Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transactional Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 48-49 (2004).

152. *See* Case C-116/02, Gasser GmbH v. MISAT Srl, 2003 E.C.R. I-14693, I-14738 to I-14741.

153. *See id.*

154. *Id.* at I-14740 to I-14741.

155. *See* Teitz, *supra* note 151, at 48-50. **R**

156. *See generally* Donohue v. Armco Inc. [2004] UKHL 64 (U.K.).

[the] notion" that, in cases where British courts are chosen by contract between the parties, "if [the] parties do not submit disputes that are within the [exclusive jurisdiction] clause to the English courts, then, on the face of it, they are infringing the other parties' legal rights."[157] While the proper application of *lis pendens* will frequently result in the first court declining jurisdiction, the nonoffending party will suffer the time and expense of litigating venue twice, as well as suffering the risk that the first, improper court will not decline jurisdiction. In requiring this format, the ECJ is endorsing an unnecessarily rigid system for producing "mutual trust" above the rights of individuals to receive justice.[158]

Ironically, the two cases in which the ECJ rejected the underlying philosophy on which antisuit injunctions are granted were both cases in which an antisuit injunction could have prevented injustice.[159] In *Turner*, the Spanish court was prepared to take jurisdiction over the second suit, which, the evidence overwhelmingly showed, was initiated in bad faith with an aim simply to harass.[160] In *Gasser*, the Italian legal process for determining jurisdiction was known to be "excessively long," and the Austrian court clearly had jurisdiction over the matter under the choice-of-court clause.[161] When such abuses are allowed by other member states, it only seems appropriate that the British courts should be allowed to defend themselves, their residents, and their legal system by intervening. If one member state is not delivering justice through its actions, that state does not necessarily deserve the blind "mutual trust" that the ECJ declares mandatory of all Brussels Regulation signatories. While a uniform system for determining jurisdiction within the European Union is indeed one of the chief aims of the Brussels regime, the "legal protection of its residents" is also an aim, and one that should not be so casually abandoned in favor of a harsh and rigid legal doctrine.[162]

III. Analysis

While the ECJ's rulings in *Turner* and *Grovit* may have applied the provisions of the Brussels Regulation too narrowly, they are the

157. Wilson, *supra* note 26, at 222. R

158. *See* Teitz, *supra* note 151, at 49-51. R

159. *See* Case C-159/02, Turner v. Grovit, 2004 E.C.R. I-3565, I-3568 to I-3569; Case C-116/02, Gasser GmbH v. MISAT Srl, 2003 E.C.R. I-14693, I-14700 to I-14701.

160. *See* Turner, 2004 E.C.R. at I-3568 to I-3569.

161. *See* Gasser, 2003 E.C.R. at I-14728 to I-14730.

162. Brussels Convention, *supra* note 11, pmbl. R

legal standards the British courts must now follow.[163] For the moment, these decisions prohibit British courts from using antisuit injunctions in cases involving other member states, regardless of the circumstances.[164] This is not necessarily a permanent death knell for antisuit injunctions however, as the recently adopted Hague Convention on Choice of Court Agreements, discussed earlier, indicated continental Europe's willingness to address some of the problems for which the antisuit injunction is the best remedy.[165] One commenter notes the following:

> A solution is at hand with a combination of the two analytical approaches. Codifying the common law rules will add uniformity and predictability and lessen contradictions. Adding detail and nuance to the civil code rules will lessen their rigidity and occasional unfairness. This includes distinctions between repetitive and reactive litigation, declaratory action exceptions to first-filed rules, and increased judicial discretion. Several model laws and treaties already reflect this hybrid approach.[166]

In situations where one party is seeking "vexatious or oppressive" parallel litigation, or is violating the terms of a choice-of-court agreement, some British and European legal scholars clearly want to restrict such actions.[167] Through either of the two potential approaches advocated by this Note, a codification of antisuit injunctions would allow for their use in limited and predictable circumstances, and with sufficient procedural safeguards to prevent their becoming an unpredictable and arrogant weapon of the British judicial system within the European Union.[168]

A. *The Need for Antisuit Injunctions*

Several valid questions may be raised at the outset of any discussion on this issue. Why are antisuit injunctions the most effective mechanism to protect a party from the bad-faith actions of its opponent in filing parallel proceedings? Doesn't the proper application of *lis pendens*, despite the limitations of its rigidity, sufficiently prevent such abuses of process or violations of contract? Could damages, or some other kind of remedy be used to compensate a party injured by abuse of process without the risk or appearance of infringement upon the foreign court's jurisdiction?

163. *See* Illmer & Naumann, *supra* note 4, at 147. R
164. *See* Turner, 2004 E.C.R. at I-3565; Gasser, 2003 E.C.R. at I-14693.
165. *See* Adler & Crimaldi Zarychta, *supra* note 50, at 10-30. R
166. George, *supra* note 1, at 529-30. R
167. *See id.*
168. *Id.*

Civil-law systems in the European Union do not have a remedy comparable to the antisuit injunction; rather, they usually "trust the other court to decline jurisdiction," or, after a foreign judgment has been rendered in violation of E.U. rules, they simply refuse to recognize it.[169] As the *Continental Bank*, *Turner*, and *Gasser* cases demonstrate, simply "trusting the foreign court" may fail to sufficiently protect individual parties and can lead to unnecessary and unjust outcomes, despite the spirit of comity that may motivate such trust.[170] And though the doctrine of *lis pendens* does create a predictable "first-seized" rule, the rigidity of this rule can cause more injustice than it prevents.[171] For example, an untoward party, fearing litigation, may race to seek a declaratory judgment in a friendly court—the so-called Italian torpedo—possibly thwarting the plaintiff's impending lawsuit, but certainly buying the defendant time and costing the plaintiff the time and expense of two separate trials. Or, as in *Turner*, a party may initiate a suit substantially similar, but just different enough to evade *lis pendens* with the sole aim of harassing the other party.[172] Similarly, a disgruntled party to a choice-of-court agreement might blatantly flout that agreement by initiating proceedings in another forum. This action, as examined above, costs the wronged party time and money to establish that the "first-seized" court does not have jurisdiction to hear the dispute; it also creates the potential that the court may not recognize the choice-of-court agreement and force the dispute to be settled in violation of the contract terms.[173] Such an occurrence would clearly violate the aim of protecting individual justice.

Furthermore, reliance on the doctrine presupposes that the second-seized court will find the two suits to be over "the same cause of action," as required by Article 27.[174] If, as might have happened in the case of *Turner*, the second-seized court decides that the second suit is sufficiently different, regardless of its merits, it can claim jurisdiction over the matter.[175] This is another area in which the rigidity of the doctrine can be abused to vex or harass a litigant.[176]

169. Ambrose, *supra* note 21, at 414. R

170. *See* discussion on *Continental Bank*, *Turner*, and *Gasser supra* pp. 117-22.

171. *See* discussion on "Italian torpedoes" *supra* pp. 110-11.

172. *See* Turner v. Grovit [2001] UKHL 65, paras. 13-14 (U.K.); discussion on "Italian torpedoes" *supra* pp. 110-11.

173. *See* Cont'l Bank N.A. v. Aeakos Compania Naviera S.A., [1994] 1 Lloyd's Rep. 505, 512 (Eng.).

174. Brussels Regulation, *supra* note 12, art. 27, at 9. R

175. *See id.*

176. Teitz, *supra* note 151, at 49-50. R

While *lis pendens* will most likely result in the dismissal of jurisdiction by improper forums and the eventual resolution of disputes in the proper forum, its terms leave plenty of room for "gaming the system" by malicious parties, and is in this way an incomplete solution.[177]

Another approach advocated by some European courts is to refuse to recognize an award obtained in bad faith or in the wrong forum.[178] While such a refusal may protect a party in foreign forums, the judgment in the ruling court's jurisdiction still stands, and any assets the offending party may have in that forum are jeopardized. This approach is further complicated by the strictures of Article 34 of the Brussels Regulation, which require the forum refusing to recognize a judgment from another member state to demonstrate that recognition of that judgment would be "manifestly contrary to public policy."[179] This standard, as in the United States, is difficult to meet and could force a country to recognize an inherently unjust judgment attained through abuse of process or in breach of contract, but not clearly in violation of public policy.[180]

Since all matters under the Brussels Convention are commercial,[181] the use of damages to compensate a party injured by the rigidity of the Brussels Convention's provisions has been proposed as an alternative to antisuit injunctions.[182] The proposal suggests that a party who suffers the time, expense, or other injury of a foreign parallel proceeding that the British court views as improper could simply be compensated by an order of monetary damages against the offending party in the British litigation.[183] This would be "as strong a deterrent against wrongful pursuit of foreign proceedings as an injunction," but would grant greater "trust" to the foreign court by allowing it to decide jurisdiction for itself.[184] It is difficult, however, to see this alternative creating any more comity or predictability than an antisuit injunction; it likely produces less protection for the nonoffending party. If damages were indeed equal in their deterrent effect to antisuit injunctions, then just as many parties would be "forced" to withdraw from the foreign pro-

177. *See id.*
178. Ambrose, *supra* note 21, at 415. R
179. Brussels Regulation, *supra* note 12, art. 34, at 10. R
180. *Id.*; Ambrose, *supra* note 21, at 415. R
181. Brussels Regulation, *supra* note 12, art. 1, at 3. R
182. *See* Ambrose, *supra* note 21, at 415. R
183. *See id.*
184. *Id.* at 415-16.

ceedings, causing just as many foreign courts to object to British interference with their jurisdiction. Such a strong deterrent device that inherently questions the actions of another member state's courts would also likely be viewed by the ECJ as improper and illegal under the same "mutual trust" requirements of the Brussels Regulation that have made antisuit injunctions illegal.[185] Additionally, damages in the British court could not necessarily protect against the potential harm from an improper foreign judgment, depending on the location of both parties' various assets, and their award also necessarily would produce the multiplicity and inconsistency of judgments that the Brussels Regulation seeks to prevent.[186]

Forum non conveniens is another doctrine used by common-law countries to ensure that litigation proceeds in the proper venue. According to the doctrine, a "national court may decline to exercise jurisdiction on the ground that a court in another State . . . would objectively be a more appropriate forum for the trial of the action."[187] Like the antisuit injunction, however, it does not have a counterpart in civil-law systems. Also like the antisuit injunction, *forum non conveniens* is illegal under the Brussels Regulation, as announced by the ECJ in *Owusu v. Jackson* in 2005.[188] The *Owusu* case involved an English plaintiff who was injured by a Jamaican defendant while on vacation in Jamaica.[189] When the plaintiff brought suit in England, the British court deemed that, despite being the court first-seized of the matter, Jamaica was clearly the more appropriate forum to hear the dispute.[190] The Court of Appeal referenced the ECJ when determining the preliminary question of whether the British court could use *forum non conveniens* to dismiss the suit and allow it to proceed in Jamaica.[191] The ECJ held that, regardless of whether the parallel litigation was proceeding in a member state or a non–member state—like Jamaica—the doctrine of *forum non conveniens* explicitly violates the Brussels Regulation:

> It must be observed, first, that Article 2 of the Brussels Convention is mandatory in nature and . . . . no exception on the basis of the *forum non conveniens* doctrine was provided for by the

185. *See* Case C-159/02, Turner v. Grovit, 2004 E.C.R. I-3565, I-3587; Case C-116/02, Gasser GmbH v. MISAT Srl, 2003 E.C.R. I-14693, I-14746 to I-14747.

186. *See* Ambrose, *supra* note 21, at 415-16. R

187. Case C-281/02, Owusu v. Jackson, 2005 E.C.R. I-1383, I-1450.

188. *See id.* at I-1462; Louise Ellen Teitz, *Developments in Parallel Proceedings: The Globalization of Procedural Responses*, 38 Int'l Law. 303, 312-13 (2004).

189. Owusu, 2005 E.C.R. at I-1451.

190. *See id.* at I-1453; Teitz, *supra* note 188, at 312-13. R

191. *See* Owusu, 2005 E.C.R. at I-1453; Teitz, *supra* note 188, at 312-13. R

> authors . . . . Respect for the principle of legal certainty, which is one of the objectives of the Brussels convention . . . would not be fully guaranteed if the [British court] had to be allowed to apply the *forum non conveniens* doctrine.[192]

In reaching this conclusion, the ECJ has emphatically rejected a common-law, discretionary standard for resolving problems of parallel litigation and jurisdiction under the Brussels Regulation.[193] Furthermore, in cases of choice-of-court clauses, the recent Hague Convention on Choice of Court Agreements proscribes courts selected by the parties from declining jurisdiction based on any *forum non conveniens* considerations.[194] Thus, despite the usefulness of the doctrine in many common-law systems, there is no longer a place for its use in E.U. parallel litigation disputes.

Given these conditions, a law allowing antisuit injunctions could "help to fill a gap in the [Brussels Regulation] without negating its existence."[195] This would achieve all of the intended purposes of antisuit injunctions better than any other type of remedy by suspending the foreign litigation until the forum litigation has run its course, preventing any inconsistent or multiple judgments and protecting the nonoffending party from the time or financial injuries of an improper parallel suit.

B. *A Proposed Solution*

The ECJ has made clear that it disapproves of antisuit injunctions; as noted above, the ECJ finds antisuit injunctions' implementation too discretionary and in conflict with the rigid "mutual trust" it believes should govern all legal decisions within the European Union.[196] Given this attitude, the only way that the antisuit injunction may be revived within the present E.U. framework is through the creation of a new codified scheme that either amends or supersedes the requirements of the Brussels Regulation. Such a codification could be effected in one of two ways: it could be an addition to the Brussels Regulation's existing treatment of parallel litigation; or it could create a new international treaty on parallel litigation under the Hague Convention regime. Either solution would effectively produce the same outcome.

Though British jurists would likely be among the loudest in support of such a law, they would not be alone. Some of the drafters

192. Owusu, 2005 E.C.R. at I-1459 to I-1460.
193. *Id.*
194. Berlin, *supra* note 50, at 58. R
195. Kruger, *supra* note 6, at 1036. R
196. *Id.* at 1035-36.

of the recently proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters are on record recognizing the benefits of antisuit injunctions, admitting that "there may be a limited role for anti-suit injunctions in the EU," such as those that enjoin actions begun in another forum solely to be vexatious or oppressive.[197] Also, as previously mentioned, the Commission of European Contract Law strongly supports enforcing the terms of choice of contract clauses, which can be obstructed by the strict application of *lis pendens*.[198]

Any model antisuit injunction law would need to contain specific language regarding the limited circumstances in which a court could properly grant the injunctions. As in the British implementation of the injunction, the court would initially need *in personam* jurisdiction over the party to be enjoined. Once jurisdiction is established, the court would have to abide by a universal procedure where the involved parties could demonstrate the merits of an injunction given the circumstances. If the injunction was sought to prevent an abuse of process, or if the offending party was accused of bringing the parallel litigation simply to harass or vex the nonoffending party, the burden of proof would be on the offending party to demonstrate the legitimacy of his actions. In determining legitimacy, the court should employ a standard akin to the British test, considering the appropriateness of the forums and balancing the potential benefits and harms to the litigants in issuing the injunction. For example, if Party B is aware of an impending suit being brought against her by Party A in the "natural" forum—that forum in which the transaction occurred and in which the injury arose—and Party B preemptively seeks a declaratory judgment of nonliability against Party A in an "improper" forum—perhaps a forum notorious for crowded dockets or excessively protracted waiting periods—Party A could initiate the suit in the "natural" forum and seek an antisuit injunction against Party B to cease the proceedings in the "improper" forum. The "natural" forum court would then have the opportunity to consider the circumstances and weigh the value and propriety of granting an antisuit injunction.

If the injunction is being sought in a case of alleged breach of a choice-of-court agreement, the burden of proof again would be on

197. Stephen Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 Am. J. Comp. L. 203, 226 (2001).

198. Wilson, *supra* note 26, at 222. *See generally* Donohue v. Armco Inc. [2004] UKHL 64. R

the offending party to demonstrate why the clause or the contract was invalid. In both cases, a preponderance of evidence standard would likely be sufficient to maintain the rarity with which injunctions are granted, while still protecting the nonoffending party in cases where the impropriety of their opponent's actions is clear. For example, if Party A and Party B entered into a choice-of-court agreement for their transactions, and Party B, alleging a breach of contract, brings suit against Party A in a "nonchosen" forum, Party A could initiate a suit in the "chosen" forum and seek an antisuit injunction against Party B. The "chosen" forum court would then be afforded the first review of the exclusive jurisdiction agreement, and could rule on whether the action in the "nonchosen" forum violates that agreement. This would be more intuitive, and in line with the Hague Convention on Choice of Court Agreements, as the first opinion on the applicability of a forum-selection clause should come from the court chosen in the agreement.[199]

With this structure in place, the proposed statute would also give ultimate review over the specific use of antisuit injunctions to the ECJ. If the offending party is unable to meet his burden of proof in demonstrating why an antisuit injunction is inappropriate, both that party and the court of the jurisdiction in which the parallel suit had been filed should have the opportunity to appeal the decision of the issuing court to the ECJ. This check on the issuing court's authority would support the unification goal of the Brussels Regulation, as no single court would be superior to any other member state court by virtue of its power to enjoin a party from seeking another jurisdiction to prosecute its suit.

By clearly delineating and standardizing the circumstances under which a party may seek an antisuit injunction and the process by which a court may grant one, E.U. member states likely would find these injunctions far less controversial and threatening, and may even choose to adopt their use. At the very least, a proposed codification of antisuit injunctions—and the subsequent negotiations—would give the entire European legal community the chance to discuss the relative merits of antisuit injunctions. Member states could determine whether to adopt a standardized version of the injunctions, rather than maintain the status quo of prohibiting their use under the abstract principles of "mutual trust" and "comity," as defined by the ECJ.

199. *See* HCCH, *supra* note 52, art. 3. **R**

C. *An Amendment to the Brussels Regulation and a Hague Convention on Parallel Proceedings*

Both proposed vehicles for including a codified antisuit injunction in the E.U. legal framework offer strengths and weaknesses. Amending the Brussels Regulation to include an "Article on Antisuit Injunctions" would implement their use within the well-established Brussels regime. Such an action would involve fewer questions of national sovereignty and jurisdiction than an entirely new Hague Convention, which would have to be individually adopted and ratified by each signatory state. An amendment to the Brussels Regulation would also be confined to E.U. member states, limiting the debate to the views of nations currently embroiled in the controversy. The proposed article, however, would not be a simple addition to the existing text; it would require the rewording of several current articles to accommodate the new provisions and avoid creating contradictory language, including Article 23 on choice-of-court agreements, Articles 25 and 26 concerning jurisdiction of seized courts, and Article 27 on the *lis pendens* doctrine.[200]

A new Hague Convention on Parallel Proceedings would benefit from having input from and applicability to nations outside of Europe, such as the United States—a kindred spirit to Britain on the use of antisuit injunctions. The Hague regime has demonstrated its usefulness as a vehicle for jurisdictional agreements, as evinced by the recently adopted Hague Convention on Choice of Court Agreements, which furthered the enforceability of choice-of-court agreements among international parties, an area of prime concern to users of antisuit injunctions.[201]

As with the Hague Convention on Choice of Court Agreements, the primary caveat to pursuing a new Hague Convention would be the strong chance of confusion and controversy in determining how to apply the Brussels Convention over the present and conflicting language of the Brussels Regulation. Perhaps it could include language similar to that of the Choice of Court Agreement requiring that the Brussels Convention "be interpreted in a way that is compatible with other treaties in existence between Member States."[202] As the Brussels Regulation does not contain any discussion of antisuit injunctions either way, perhaps this conflict of laws

200. Brussels Regulation, *supra* note 12, arts. 23, 25-27, at 8-9. R
201. Berlin, *supra* note 50, at 58-59. R
202. Adler & Crimaldi Zarychta, *supra* note 50, at 35. R

would be easily resolved by the ECJ, but it is certainly worth considering in weighing the two options against each other.

Ultimately, these two options would produce the same result, but face the same fundamental hurdle: agreement among the E.U. member states that antisuit injunctions are a useful and predictable legal remedy. However, the need for such a remedy will likely become increasingly clear to continental jurists as cases of abuse of the rigid *lis pendens* system continue to accumulate in the courts.

IV. Conclusion

The creation of the European Union has led to significant legal efficiencies and increased predictability through the adoption of the Brussels Regulation and its predecessors. Most of the agreements reached regarding private civil and commercial law are uncontroversial among the member states, despite the diversity in legal traditions and normative values. In the area of parallel proceedings, however, the strong preference for a strict *lis pendens* rule, to the exclusion of any other equitable considerations, has created significant tension between Great Britain and Continental Europe.

Britain, while slowly ceding some of its historical individuality and autonomy, is loath to entirely replace its legal traditions in the name of European integration. In the area of international private law, this hesitancy is prominently reflected in the frustration over the ECJ's invalidation of antisuit injunctions being used in international cases by the British courts. The ECJ's reasoning fails to allow for a more balanced "integration" of legal values and seems to adopt stubbornly the civil law's preference for rigid predictability over the flexibility and increased individual justice available through common-law approaches. By allowing the limited use of antisuit injunctions in British courts, or in any court that would choose to adopt their use, individual justice can be better protected, and by structuring the injunctions' application and giving ultimate review of their use to the ECJ, no single court can be accused of unbridled interference with the jurisdiction of other member states, and the goal of European legal integration still may be achieved. Whether through amendment to the Brussels Regulation or through a new Hague Convention on Parallel Proceedings, the codification of antisuit injunctions could help appease the British desire for the survival of their legal traditions, provide for more consistent and fair trial outcomes, and advance the cause of European integration.