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Kaepa, Inc. v. Achilles Corp.: Comity in International Judicial Relations

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Cover Page Footnote

International Law; Commercial Law; Law

NOTE

Kaepa, Inc. v. Achilles Corp.: Comity in International Judicial Relations

I. Introduction

In an economically interdependent world, cooperation and comity¹ among sovereign nations take on paramount importance.² Disputes arising out of international commercial transactions naturally present the possibility of concurrent jurisdiction in the courts of the parties' respective nations.³ Concurrent jurisdiction carries a concomitant risk that the parties will seek relief in different forums, resulting in duplicative, burdensome, and possibly even vexatious litigation.⁴ However, if one nation's court attempts to forestall this type of litigation by ordering the parties to

¹ "Judicial comity" is defined as "[t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." BLACK'S LAW DICTIONARY 267 (6th ed. 1990). Comity also has been defined as "the basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or 'considerations of high international politics concerned with maintaining amicable and workable relationships between nations.'" Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 3-4 (1991) (footnotes omitted).

² *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 629 (5th Cir. 1996) (Garza, J., dissenting), *reh'g, en banc, denied*, 83 F.3d 421 (5th Cir. 1996), *petition for cert. filed* (U.S. June 17, 1996).

³ See *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992) ("In an increasingly international market, commercial transactions involving players from multiple nations have become commonplace" and "[e]very one of these transactions presents the possibility of concurrent jurisdiction . . ."); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 952 (D.C. Cir. 1984) ("The reality of our interlocked international economic network guarantees that overlapping, concurrent jurisdiction will often be present.").

⁴ See *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) (recognizing that the district court had found that foreign litigation would be vexatious to the plaintiff and would cause "additional expense"); *Bethell v. Peace*, 441 F.2d 495, 498 (5th Cir. 1971) (holding that the district court was within its discretion to relieve plaintiff of expense and vexation of litigating in a foreign court).

refrain from suing in a foreign forum, its action may insult the foreign court.⁵ As a result, relations between the nations may suffer a disturbing tension.⁶ It was this conundrum between vexatious litigation and the possibility of international unease which faced the Fifth Circuit in *Kaepa, Inc. v. Achilles Corp.*⁷

In *Kaepa*, the Fifth Circuit held that a federal district court did not abuse its discretion by enjoining a party from asserting mirror-image claims in a foreign forum where such foreign litigation would cause "inequitable hardship" and "tend to frustrate and delay the speedy and efficient determination of the cause."⁸ The Fifth Circuit's holding underscores a debate which has continued among the circuit courts for decades.⁹ On the one hand, several circuits adopt the Fifth Circuit's relaxed standard of comity which allows a district court to interfere with a foreign forum's jurisdiction where foreign litigation would be duplicative or vexatious.¹⁰ On the other hand, several other circuits follow a stricter standard of comity which gives deference to foreign courts unless to do so would threaten the jurisdiction of the district court

⁵ See *Gau Shan*, 956 F.2d at 1355 (stating that an antisuit injunction "conveys the message . . . that the issuing court has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility"). In addition, a court order forbidding parties to sue in other forums, although not directed at the foreign court, has the effect of denying the foreign court an opportunity to hear the dispute. *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964). See generally, George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589 (1990) (discussing the development of antisuit injunctive relief affecting foreign forums).

⁶ Such tension arose in *Laker Airways*, where the D.C. Circuit responded bitterly to the United Kingdom's foreclosure of any non-English proceeding to enforce American antitrust policy, stating that it was "a naked attempt exclusively to reserve by confrontation an area of prescriptive jurisdiction shared concurrently by other nations." 731 F.2d at 954.

⁷ 76 F.3d 624 (5th Cir. 1996).

⁸ *Id.* at 627 (quoting *In re Unterweser Reederei, GmbH*, 428 F.2d 888, 896 (5th Cir. 1970), *aff'd on reh'g en banc*, 446 F.2d 907 (5th Cir. 1971), *vacated sub nom.*, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

⁹ See, e.g., *Allendale Mut. Ins. Co. Inc. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431-32 (7th Cir. 1993); *Seattle Totems Hockey Club Inc. v. National Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982); *Bethell v. Peace*, 441 F.2d 495, 498 (5th Cir. 1971); *Unterweser*, 428 F.2d at 896; *Sperry Rand Corp. v. Sunbeam Corp.*, 285 F.2d 542 (7th Cir. 1960); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987); *Laker Airways*, 731 F.2d at 927; *Canadian Filters Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578 (1st Cir. 1969).

¹⁰ See *infra* notes 62-101 and accompanying text.

or allow the evasion of important public policies.¹¹

Part II of this Note will examine the facts and procedural history of the *Kaepa* case and discuss the majority and the dissenting opinions in the Fifth Circuit.¹² Part III will explore the background law leading up to *Kaepa*.¹³ Part IV will assess the significance of *Kaepa* in light of these past holdings.¹⁴ Finally, in Part V, the Note concludes that although the Fifth Circuit's holding in *Kaepa* clarified its standard of comity, it leaves in question the proper role of the judiciary in international relations.¹⁵ The conclusion explains that the political branches of government are better suited than the judiciary to maintain relations with foreign nations.¹⁶ For this reason, the legislative and executive branches of government should determine foreign policy, while courts should exercise only their judicial authority in presiding over private disputes.

II. Statement of the Case

A. *The Facts and the District Court Ruling*

In April 1993, *Kaepa, Inc.* ("Kaepa"), an American athletic footwear manufacturer, entered into a distributorship agreement with *Achilles Corp.* ("Achilles"), a Japanese business entity with annual sales of approximately one billion dollars.¹⁷ By the terms of the agreement, Achilles received an exclusive right to market Kaepa's shoes in Japan.¹⁸ Furthermore, the agreement stipulated that United States law and the English language would govern the interpretation of the agreement, and that Achilles consented to the jurisdiction of the Texas courts.¹⁹

¹¹ See *infra* notes 102-43 and accompanying text.

¹² See *infra* notes 17-58 and accompanying text.

¹³ See *infra* notes 59-146 and accompanying text.

¹⁴ See *infra* notes 147-66 and accompanying text.

¹⁵ See *infra* notes 167-79 and accompanying text.

¹⁶ Paul, *supra* note 1, at 75-76.

¹⁷ *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 625 (5th Cir. 1996), *reh'g, en banc, denied*, 83 F.3d 421 (5th Cir. 1996), *petition for cert. filed* (U.S. June 17, 1996).

¹⁸ *Id.*

¹⁹ *Id.* at 625-26 & n.1.

In July 1994, after becoming increasingly dissatisfied with Achilles' performance of the contract, Kaepa filed suit in Texas state court.²⁰ In its complaint, Kaepa alleged: "(1) fraud and negligent misrepresentation by Achilles to induce Kaepa to enter into the distributorship agreement, and (2) breach of contract by Achilles."²¹ Achilles timely removed the case to the United States District Court for the Western District of Texas.²² Once in federal district court, Achilles participated with Kaepa in extensive discovery.²³ Then, in February 1995, more than six months after the filing of the original suit, Achilles unexpectedly filed a separate action in a Japanese court.²⁴ In the Japanese suit, Achilles made two claims which essentially mirrored Kaepa's original claims: (1) fraud by Kaepa to induce Achilles to enter into the distributorship agreement, and (2) breach of contract by Kaepa.²⁵ In response, Kaepa filed a motion to enjoin Achilles from prosecuting the Japanese action.²⁶ Achilles, in turn, filed a motion to dismiss the federal court action on the grounds of forum non conveniens.²⁷ The district court denied Achilles' motion to dismiss and issued an injunction ordering Achilles to abort its prosecution of the Japanese action and to file its counterclaims with the district court.²⁸

B. The Fifth Circuit Decision

The Fifth Circuit reviewed the district court's injunction, focusing on Achilles' three arguments: (1) that the district court had failed to give proper deference to principles of international

²⁰ *Id.* at 626.

²¹ *Id.*

²² *Id.* at 624, 626.

²³ *Id.* at 626. The court noted that the discovery process had been "laborious" and that, by the date of appeal, the parties had accumulated tens of thousands of documents. *Id.*

²⁴ *Id.*

²⁵ *Id.* Achilles conceded that the Japanese action was a compulsory counterclaim under Federal Rule of Civil Procedure 13(a). *Id.* at 628 n.14 (citing FED. R. CIV. P. 13(a)). However, since the injunction was upheld, the court declined to rule on the whether Rule 13(a) applied to claims brought in foreign courts. *Id.*

²⁶ *Kaepa*, 76 F.3d at 626.

²⁷ *Id.*

²⁸ *Id.*

comity in granting its injunction;²⁹ (2) that by not conducting a hearing on Kaepa's motion to enjoin, the district court had failed to grant the notice and opportunity to be heard prerequisite to the issue of an injunction;³⁰ and (3) that the district court had failed to require Kaepa to post a bond which is also prerequisite to the issue of an injunction.³¹ In its analysis, the Fifth Circuit used a deferential "abuse of discretion" standard to determine the propriety of the district court's injunction.³²

In addressing the issue of international comity, the Fifth Circuit noted that the circuit courts agree that federal courts have the power to enjoin persons subject to their jurisdiction from prosecuting foreign suits.³³ The court then acknowledged that "[t]he circuits differ . . . on the proper legal standard to employ when determining whether that injunctive power should be exercised."³⁴ Relying on its own previous decisions,³⁵ the court stated the rule in the Fifth Circuit:

a district court does not abuse its discretion by issuing an antisuit injunction when it has determined "that allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in 'inequitable hardship' and 'tend to frustrate and delay the speedy and efficient determination of the cause.'"³⁶

The court defended its rule stating that, "even though the

²⁹ *Id.*

³⁰ *Id.* at 628. In response to this argument, the Fifth Circuit held that since the injunction was not based on any disputed facts, the Federal Rules of Civil Procedure did not require an oral hearing. *Id.* (citing FED. R. CIV. P. 65(a)(1)). Rather, the parties' written memoranda were sufficient to meet the requirements of notice and opportunity to be heard. *Id.*

³¹ *Id.* In response to this argument, the Fifth Circuit noted that the district court is required to secure the posting of a bond, "in such sum as the court deems proper . . ." *Id.* (quoting FED. R. CIV. P. 65(c)). The Fifth Circuit noted that since the amount of the bond is a matter of discretion, the district court may seek no bond at all. *Id.* (citing *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir. 1978)).

³² *Id.* at 626. Under the abuse of discretion standard, findings of fact are upheld unless clearly erroneous and legal conclusions are reversed if incorrect. *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 626-627 (citing *Bethell v. Peace*, 441 F.2d 495, 498 (5th Cir. 1971) and *In re Unterweser Reederei, GmBH*, 428 F.2d 888, 890, 896 (5th Cir. 1970), *aff'd on reh'g en banc*, 446 F.2d 907 (5th Cir. 1971), *vacated sub nom. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

³⁶ *Id.* at 627 (quoting *Unterweser*, 428 F.2d at 896).

standard . . . focuses on the potentially vexatious nature of foreign litigation, it by no means excludes the consideration of principles of comity.”³⁷ The court pointed out that although other circuits “give greater deference to comity and apply [a] more restrictive standard[,]” the Fifth Circuit declined “to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action.”³⁸

Applying its standard of comity to the lower court’s injunction of Achilles’ Japanese litigation, the Fifth Circuit first examined whether the antisuit injunction in this case posed an actual threat to relations between the United States and Japan.³⁹ It concluded that because (1) “no public international issue was implicated by the case” and (2) the dispute had, for several months, been in the American legal system with Achilles’ complete participation, there was no threat to notions of comity posed by the district court’s injunction.⁴⁰ Proceeding to inquire into the vexatious nature of the Japanese litigation, the Fifth Circuit concluded that prosecution of the Japanese suit would constitute “an absurd duplication of effort[,]”⁴¹ and that Achilles’ filing, in Japanese court, of claims mirroring Kaepa’s claims in American court “smack[ed] of cynicism, harassment, and delay.”⁴² Based on these findings, the majority held that the district court did not abuse its discretion in issuing an injunction enjoining the prosecution of the Japanese suit.⁴³

C. Dissent to the Fifth Circuit Decision

The dissent in *Kaepa* illustrated that the conflict among the circuit courts may also exist within a circuit.⁴⁴ The dissent cautioned the majority against ignoring the principles of

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* (quoting *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 430-31 (7th Cir. 1993)).

⁴² *Id.* at 627-28.

⁴³ *Id.* at 628.

⁴⁴ *Id.* at 629 (Garza, J., dissenting).

international comity because “[u]nless we proceed in each instance with respect for the independent jurisdiction of sovereign nation’s courts, we risk provoking retaliation in turn, with detrimental consequences that may reverberate far beyond the particular dispute and its private litigants.”⁴⁵ The dissent also lauded the stricter standard of comity, noting that “the standard followed by the Second, Sixth, and D.C. Circuits more satisfactorily respects the principle of concurrent jurisdiction and safeguards the important interests of international comity.”⁴⁶ Conversely, the dissent denounced the majority opinion, stating that it “does not grant the principle of international comity the weight it deserves”⁴⁷

The dissent proclaimed that it would have applied the strict standard of comity in judging the district court’s injunction.⁴⁸ Under the dissent’s standard, two factors would determine the propriety of an antisuit injunction: “(1) whether the foreign action threatens the jurisdiction of the district court; and (2) whether the foreign action was an attempt to evade important public policies of the district court.”⁴⁹ The dissent noted that the first factor distinguishes between foreign actions that are interdictory and those that are merely parallel.⁵⁰ Where the foreign action is interdictory, that is it seeks to “carve out exclusive jurisdiction over the action[,]”⁵¹ the first factor permits a defensive injunction to protect the jurisdiction of the issuing court.⁵² However, in this case, the dissent found no direct threat to the jurisdiction of the district court.⁵³ The dissent continued by noting that the second

⁴⁵ *Id.* (Garza, J., dissenting).

⁴⁶ *Id.* at 632 (Garza, J., dissenting).

⁴⁷ *Id.* at 629 (Garza, J., dissenting).

⁴⁸ *Id.* at 632 (Garza, J., dissenting).

⁴⁹ *Id.* (Garza, J., dissenting).

⁵⁰ *Id.* at 633 (Garza, J., dissenting).

⁵¹ *Id.* at 632 (Garza, J., dissenting).

⁵² *Id.* at 632-33 (Garza, J., dissenting).

⁵³ *Id.* at 633 (Garza, J., dissenting). The dissent noted that where two simultaneous proceedings are in rem or quasi in rem, the second proceeding may threaten the jurisdiction of the first because the second court may order the property upon which the first court’s jurisdiction is based to be moved out of the first court’s jurisdictional boundaries. *Id.* (Garza, J., dissenting). Also, the dissent cited *Laker Airways* as an instance where an antisuit injunction was properly issued under the stricter standard of

factor protects the "important policies of the forum."⁵⁴ According to the dissent, there is a significant difference between the policy interest of a forum in enforcing its statutes and the policy interest of having disputes settled in a single forum.⁵⁵ Of the latter, the dissent stated that it does not "outweigh the important interests of international comity."⁵⁶ From this analysis, the dissent found that there was no evidence that Achilles sought to evade any important policy of the United States forum.⁵⁷ Therefore, the dissent concluded the district court had abused its discretion in issuing an injunction against Achilles' Japanese action.⁵⁸

III. Background Law

In deciding *Kaepa*, the Fifth Circuit was faced with a division of authority regarding the proper standard of international comity applicable to antisuit injunctions affecting foreign jurisdictions.⁵⁹ Whereas the Fifth, Seventh, and Ninth circuits apply a standard which focuses on the vexatious nature of foreign litigation subject to an injunction or other court action,⁶⁰ the First, Second, Sixth, and D.C. circuits insist that a stricter standard is necessary to prevent the erosion of the international economy.⁶¹

A. The Relaxed Standard

Prior to *Kaepa*, the Fifth Circuit had applied a relaxed standard of comity in antisuit injunctions. For example, in *In re Unterweser Reederei, GmbH*,⁶² the Fifth Circuit faced the question of whether a district court, sitting in admiralty, abused its

comity. *Id.* (Garza, J., dissenting) (citing *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984)). For a discussion of *Laker Airways*, see *infra* notes 108-22 and accompanying text.

⁵⁴ *Kaepa*, 76 F.3d at 634 (Garza, J., dissenting).

⁵⁵ *Id.* (Garza, J., dissenting).

⁵⁶ *Id.* (Garza, J., dissenting).

⁵⁷ *Id.* (Garza, J., dissenting).

⁵⁸ *Id.* (Garza, J., dissenting).

⁵⁹ *Id.* at 627.

⁶⁰ *Id.* at 627 & n.10, 11; see also *infra* notes 62-101 and accompanying text.

⁶¹ *Id.* at 627 & n.12; see also *infra* notes 102-43 and accompanying text.

⁶² 428 F.2d 888 (5th Cir. 1970), *aff'd on reh'g en banc*, 446 F.2d 907 (5th Cir. 1971), *rev'd on other grounds sub nom.*, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

discretion in enjoining a German company from instituting an action concerning the same matter in the High Court of Justice in London.⁶³ Answering the question in the negative, the court noted that “[a] court of equity has the traditional power to enjoin parties, properly before it, from litigating in another court.”⁶⁴ The court continued that the power to enjoin “ha[d] been exercised where the foreign litigation would: (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court’s in rem jurisdiction or quasi in rem jurisdiction; or (4) where the proceedings prejudice other equitable considerations.”⁶⁵ The court only briefly addressed the issue of comity, stating that although “a domestic court has no power to restrain the courts of a foreign nation, it has admitted power to deal with litigants properly before it. An exercise of the latter power is not the assumption of the former.”⁶⁶ Since the district court had found that the English action would have caused undue delay and “inequitable hardship,”⁶⁷ the Fifth Circuit found no abuse of discretion in the district court’s injunction.⁶⁸

Less than one year later, the Fifth Circuit again faced the issue of international comity in *Bethell v. Peace*.⁶⁹ There, the Fifth Circuit upheld Florida law which allowed courts to enjoin parties from pursuing foreign litigation if such litigation would be vexatious or would allow the evasion of state law.⁷⁰ *Bethell*

⁶³ *Id.* at 890. The Fifth Circuit’s analysis in this case appears to have ignored the fact that the contract between the plaintiff and the defendant contained a forum selection clause which specified that disputes arising out of the contract “must be litigated before the High Court of Justice in London, England.” *Id.* at 889. This is contrary to *Kaepa*, where the Fifth Circuit’s holding upheld a forum selection clause. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996), *reh’g, en banc, denied*, 83 F.3d 421 (5th Cir. 1996), *petition for cert. filed* (U.S. June 17, 1996).

⁶⁴ *Unterweser*, 428 F.2d at 890.

⁶⁵ *Id.*

⁶⁶ *Id.* at 892. However, the Supreme Court has stated: “[t]he fact . . . that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.” *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964) (quoting *Peck v. Jenness*, 48 U.S. 612, 625 (1849)).

⁶⁷ *Unterweser*, 428 F.2d at 896.

⁶⁸ *Id.*

⁶⁹ 441 F.2d 495 (5th Cir. 1971).

⁷⁰ *Id.* at 498.

involved a Florida real estate broker's contract to purchase property in the Bahamas owned by several Florida residents who had signed the contract, and one Bahamian who had not signed the contract.⁷¹ Because the district court had already found the agreement "invalid on its face,"⁷² the Fifth Circuit held that the district court did not abuse its discretion "in relieving the plaintiff of expense and vexation of having to litigate in a foreign court."⁷³

The relaxed standard of comity was also applied by the Ninth Circuit in *Seattle Totems Hockey Club v. National Hockey League*.⁷⁴ In this antitrust case, the plaintiffs had contracted to sell a fifty-five percent interest in the Seattle Totems to one of the defendants, Northwest Sports, which owned the Vancouver Canucks.⁷⁵ However, instead of performing the contract, the plaintiffs sued to have the agreement declared void and unenforceable, alleging that the defendants had engaged in unlawful monopolization of the ice hockey industry.⁷⁶ Twenty-seven months later, the defendant brought claims for breach of contract in the British Columbia Supreme Court.⁷⁷ Subsequently, the district court granted the plaintiffs' motion to enjoin the Canadian litigation.⁷⁸ The Ninth Circuit upheld the injunction stating that the breach of contract claims brought by the defendant in Canadian court were actually compulsory counterclaims in the American antitrust action.⁷⁹ On the issue of comity, the court seemed poised to apply a strict standard stating the power to enjoin

⁷¹ *Id.* at 496.

⁷² *Id.* at 498.

⁷³ *Id.* The court did find that the district court's injunction was too broad because it seemed to affect the rights of persons who were not parties to the litigation. *Id.* at 498-99.

⁷⁴ 652 F.2d 852 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982).

⁷⁵ *Id.* at 853 & n.1.

⁷⁶ *Id.* at 853.

⁷⁷ *Id.* The contract had been executed in Vancouver, British Columbia, and provided that the laws of British Columbia would govern the interpretation of the agreement. *Id.* at 853 n.1.

⁷⁸ *Id.* at 853.

⁷⁹ *Id.* at 854. Although the contract in dispute stipulated that Canadian law would govern, the court held that because procedural issues are governed by the local forum, the Federal Rules of Civil Procedure, rather than Canadian law, determined whether the claims were compulsory counterclaims. *Id.* (citing FED. R. CIV. P. 13(a)).

parties from bringing foreign actions should be "used sparingly."⁸⁰ However, the court proceeded to apply a standard of vexatiousness declaring that allowing "separate actions [would] likely . . . result in unnecessary delay and substantial inconvenience and expense to the parties and witnesses."⁸¹ Therefore, the Ninth Circuit concluded that the district court had not abused its discretion in enjoining defendants from instituting the Canadian action.⁸²

Normally, the relaxed standard of comity is justified as favoring the convenience of the parties.⁸³ However, in *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*,⁸⁴ the Seventh Circuit, applying the relaxed standard of comity, upheld an injunction of litigation in a foreign forum which arguably may have been more convenient to the parties than the American forum.⁸⁵ In this massive fire insurance litigation, the district court had issued a preliminary injunction against Bull Data Systems, Inc., the U.S. subsidiary of a French corporation, owned in large part by the government of France, to abstain from pursuing an action in a French forum, the Commercial Court of Lille.⁸⁶ In upholding the injunction, the Seventh Circuit noted that "at first glance . . . enjoining what is practically an arm of the French state . . . from litigating a suit on a French insurance policy in a French court may seem an extraordinary breach of international comity."⁸⁷ However, the Seventh Circuit noted that the Commercial Court of Lille was really a panel of arbitrators that

⁸⁰ *Seattle Totems*, 652 F.2d at 855 (quoting *Philp v. Macri*, 261 F.2d 945, 947 (9th Cir. 1958)).

⁸¹ *Id.* at 856.

⁸² *Id.*

⁸³ See *Seattle Totems*, 652 F.2d at 856; *Bethell v. Peace*, 441 F.2d 495, 498 (5th Cir. 1971); *In re Unterweser, GmbH*, 428 F.2d 888, 890 (5th Cir. 1970), *aff'd on reh'g en banc*, 446 F.2d 907 (5th Cir. 1971), *vacated sub nom.*, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); see also *Philips Medical Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993) ("This increasingly is one world and we have difficulty seeing why the usual and by no means stringent rules for limiting duplicative litigation should stop at international boundaries.").

⁸⁴ 10 F.3d 425 (7th Cir. 1993).

⁸⁵ *Id.* at 428.

⁸⁶ *Id.* at 427.

⁸⁷ *Id.* at 428.

had no clerical staff and that did not hear live witnesses.⁸⁸ According to the Seventh Circuit, a tribunal of this nature is not equipped “to resolve a massive document case.”⁸⁹ Therefore, the Seventh Circuit concluded that if it allowed the French proceeding “there would be clear prejudice to Allendale”⁹⁰ The Seventh Circuit faced the difficult issue of comity stating that “[a]ll the considerations bearing on the grant of preliminary relief support [the preliminary injunction]—with the possible exception of international comity.”⁹¹ Here the Seventh Circuit noted that where the strict standard of comity presumes that an antisuit injunction poses a threat to international comity, the relaxed standard requires “some empirical flesh on the theoretical skeleton.”⁹² Furthermore, the Seventh Circuit explained, the presence of substantial U.S. interests will weigh against a threat to comity.⁹³ Finding that the U.S. interest in protecting its corporate citizens from excessive insurance claims was substantial,⁹⁴ the court held that the injunction was within the equity power of the district court.⁹⁵

Contrary to the impression left by *Allendale*, the relaxed standard of comity will not allow a district court to block any foreign litigation between the parties before the court. For example, in *Sperry Rand Corp. v. Sunbeam Corp.*,⁹⁶ the Seventh Circuit applied a standard of vexatiousness to German patent and trademark infringement litigation which had been enjoined by the district court.⁹⁷ In reversing the lower court injunction, the Seventh Circuit noted that the litigation in Germany involved a trademark registered in Germany and that the cause of action arose

⁸⁸ *Id.* at 429.

⁸⁹ *Id.* at 430.

⁹⁰ *Id.*

⁹¹ *Id.* at 431.

⁹² *Id.* Without stating a clear test, the Seventh Circuit suggested that the relaxed standard of comity would likely “consider tangible evidence of a threat to comity” *Id.* at 432.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 433. Acknowledging that it was making a debatable decision, the Seventh Circuit noted that whether the injunction was within the equity power of the district court was “not free from doubt.” *Id.*

⁹⁶ 285 F.2d 542 (7th Cir. 1960).

⁹⁷ *Id.* at 545.

under German trademark infringement laws.⁹⁸ Thus, because the litigation pending in the district court would not resolve issues pending in the German forum, the Seventh Circuit found that the German litigation was not vexatious to the defendant.⁹⁹ Accordingly, the Seventh Circuit held that the lower court had erroneously granted the injunction enjoining the German litigation.¹⁰⁰

The cases cited above from the Fifth, Seventh, and Ninth circuits illustrate the development of a relaxed standard of comity. Under this standard, a district court may enjoin parties subject to its jurisdiction from prosecuting vexatious foreign litigation if there is a duplication of parties and issues.¹⁰¹ In order to more fully understand the role of comity in relations, it is instructive to compare this rule to the strict standard of comity held by other circuits.

B. The Strict Standard

The First, Second, Sixth, and D.C. circuits apply a stricter standard of comity than the Fifth, Seventh, and Ninth circuits. The circuits applying a stricter standard will generally uphold an antisuit injunction, which restricts the jurisdiction of a foreign forum, only if the foreign litigation would: (1) threaten the jurisdiction of the district court, or (2) permit an evasion of important policies of the forum.¹⁰²

In 1969, the strict standard of international comity was

⁹⁸ *Id.* at 544. In addition, the Seventh Circuit plainly was influenced by the possibility of prejudice to the plaintiffs that the injunction created. *Id.* at 545. The court stated that the longer two trademarks remain in side-by-side use, "the greater is the presumption that confusion between them is unlikely." *Id.* at 546. Therefore, by extending the side-by-side use of the products in Germany, the injunction may have adversely affected plaintiff's infringement action in the German forum. *Id.*

⁹⁹ *Id.* at 545.

¹⁰⁰ *Id.* at 546.

¹⁰¹ See *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1353 (6th Cir. 1992) (noting that "[t]he Ninth and Fifth Circuits hold that a duplication of the parties and issues, alone, is generally sufficient to justify the issuance of [a foreign suit] injunction"); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928 (D.C. Cir. 1984) (noting that "[s]ome courts issue the [foreign suit] injunction when the parties and issues are identical in both actions").

¹⁰² *Laker Airways*, 731 F.2d at 927.

introduced in *Canadian Filters Ltd. v. Lear-Siegler, Inc.*¹⁰³ In this patent infringement case, the First Circuit overruled a district court's injunction enjoining the defendant's litigation on a Canadian patent in the Canadian Exchequer Court.¹⁰⁴ The court based its decision on a respect for the jurisdiction of the Canadian court warning that "the direct effect of the district court's action on the jurisdiction of a foreign sovereign requires that such action be taken only with care and great restraint."¹⁰⁵ However, the court stated that comity must yield where "the [issuing] forum seeks to enforce its own substantial interests, or in limited circumstances when relitigation would cover exactly the same points, as, for example when both suits are in rem"¹⁰⁶ Because the Canadian litigation involved a foreign patent right outside the district court's jurisdiction, the First Circuit concluded that comity must prevail and vacated the district court's injunction.¹⁰⁷

The exceptions to comity presented by the First Circuit in *Canadian Filters* were clarified in *Laker Airways v. Sabena, Belgian World Airlines*.¹⁰⁸ In *Laker Airways*, the D.C. Circuit upheld an injunction enjoining a Dutch airline and a Belgian airline from filing actions in England's High Court of Justice.¹⁰⁹ The D.C. Circuit first observed that "[t]here are no precise rules governing the appropriateness of antisuit injunctions."¹¹⁰ However, the D.C. Circuit then announced the rule that an anti-foreign-suit injunction violates the principles of comity unless it "is necessary

¹⁰³ 412 F.2d 577 (1st Cir. 1969).

¹⁰⁴ *Id.* at 579. The plaintiff sought declaratory relief from the district court to the effect that defendant's U.S. patent and its very similar Canadian patent on certain filters were invalid. *Id.* at 578. The defendant responded by filing suit in the Canadian Exchequer alleging that the plaintiff had infringed its Canadian patent by producing certain fans. *Id.*

¹⁰⁵ *Id.* at 578.

¹⁰⁶ *Id.* at 579.

¹⁰⁷ *Id.* Interestingly, because the injunction had been in effect for almost a full court year, the court felt that corrective action was required. *Id.* Accordingly, in a unique showing of deference, the First Circuit ordered the district court not to take action for almost one year to allow the Canadian court an opportunity to catch up. *Id.*

¹⁰⁸ 731 F.2d 909 (D.C. Cir. 1984).

¹⁰⁹ *Id.* at 956.

¹¹⁰ *Id.* at 927.

to prevent an irreparable miscarriage of justice.”¹¹¹ To clarify what it meant by “irreparable miscarriage of justice,” the D.C. Circuit stated that “[i]njunctions are most often necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant’s evasion of the important public policies of the forum.”¹¹² In reviewing the lower court’s injunction, the D.C. Circuit observed that the British government was hostile to American antitrust policy.¹¹³ In passing the Protection of Trading Interests Act,¹¹⁴ the British government had legislatively empowered the “English Secretary of State”¹¹⁵ to designate foreign laws which persons conducting business in the United Kingdom were to disregard.¹¹⁶ Pursuant to this legislation, the English Secretary of State had issued an order prohibiting non-American airlines doing business in the United Kingdom from complying with American antitrust policy.¹¹⁷ The English Court of Appeal had upheld the order as valid¹¹⁸ and subsequently had enjoined Laker Airways from pursuing American antitrust claims against two British airlines.¹¹⁹ Based on the British court’s injunction of Laker Airways’ antitrust claims against the two British airlines, the D.C. Circuit perceived the British court as a threat to the district court’s jurisdiction over Laker Airways’ claims against other foreign airlines.¹²⁰ The court also noted that the availability of a British injunction of American litigation constituted an opportunity for the defendant airlines to evade important antitrust policies of the U.S. forum.¹²¹ Because

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 915, 953.

¹¹⁴ *Id.* at 920 (citing Protection of Trading Interests Act, 1980, ch. 11 (Eng.)).

¹¹⁵ *Id.* at 920

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* (citing *British Airways Bd. v. Laker Airways*, 3 W.L.R. 545, 575, 591 (Eng. C.A. 1983)).

¹¹⁹ *Id.* The D.C. Circuit noted later that the British executive had effectively tied the hands of the British judiciary. *Id.* at 947. By making it unlawful for the British airlines to comply with discovery requests, the English secretary of state had made the American case “wholly untriable.” *Id.* Therefore, the British court had no choice other than to enjoin the American litigation. *Id.*

¹²⁰ *Id.* at 930-31, 934.

¹²¹ *Id.* at 934.

the British courts were likely to be hostile to the district court's jurisdiction, the D.C. Circuit upheld the district court's antisuit injunction as a defensive action.¹²²

The Second Circuit refined the D.C. Circuit's analysis in *Laker Airways* to an explicit two-factor test in *China Trade & Development Corp. v. M.V. Choong Yong*.¹²³ In *China Trade*, the Second Circuit applied the strict standard of comity and reversed a district court injunction enjoining a Korean shipping company from commencing an action in a Korean forum.¹²⁴ The case arose out of a contract to ship soybeans from the United States to China.¹²⁵ Unfortunately, the ship ran aground and the soybeans were ruined.¹²⁶ As a result, the Chinese importer filed a breach of contract claim in federal district court¹²⁷ and the Korean shipping company filed an action for the equivalent of a declaratory judgment in the Korean forum.¹²⁸ In reversing the lower court injunction of the Korean action, the Second Circuit stated that compared to vexatiousness and the risk of a "race to judgment,"¹²⁹ two factors were of much greater significance: "(A) whether the foreign action threatens the jurisdiction of the enjoining forum, and (B) whether strong public policies of the enjoining forum are threatened"¹³⁰ The Second Circuit then noted that although the parties and issues were exactly the same in the foreign litigation,¹³¹ the Korean court had taken no action to restrict the jurisdiction of the district court.¹³² Thus, the Second Circuit found

¹²² *Id.* at 956.

¹²³ 837 F.2d 33 (2d Cir. 1987).

¹²⁴ *Id.* at 37.

¹²⁵ *Id.* at 34.

¹²⁶ *Id.*

¹²⁷ *Id.* To establish jurisdiction, the federal district court for the Central District of California had attached the defendant's ship. *Id.* To secure the release of the ship and the refile of the action in the Southern District of New York, the defendant had provided \$1,800,000, the value of the ship, as security. *Id.* As part of this agreement with the plaintiff, the defendant also waived any right to a dismissal of the new action based on forum non conveniens. *Id.*

¹²⁸ *Id.* at 35.

¹²⁹ *Id.* at 36.

¹³⁰ *Id.*

¹³¹ *Id.* at 36, 37.

¹³² *Id.* at 37.

that there was no threat to the jurisdiction of the district court.¹³³ The Second Circuit also was not persuaded that the Korean shipping company, by filing the Korean action, intended to evade important policies of the United States forum.¹³⁴ Therefore, the Second Circuit reversed the injunction against the Korean shipping company.¹³⁵

Significantly, the circuit courts in *Laker Airways* and *China Trade* used precisely the same test, but came to opposite results.¹³⁶ While *China Trade* shows that the strict standard of comity limits the power of federal courts to restrain the jurisdiction of foreign forums, *Laker Airways* illustrates that the strict standard of comity does not bar all anti-foreign-suit injunctions. Thus, the difference between these two holdings demonstrates the great deference to international comity in these circuits as well as the limits of that deference.

Finally, in 1992, the Sixth Circuit, following the Second and D.C. circuits' strict standard of comity, decided *Gau Shan Co. v. Bankers Trust Co.*¹³⁷ There, the Sixth Circuit held that a preliminary injunction enjoining an American bank from litigating a parallel claim in a Hong Kong forum constituted an abuse of discretion by the district court.¹³⁸ In this case, the district court had combined the strict and relaxed standards by holding that "because parallel proceedings duplicate the parties and issues, the federal courts' important public policy of a just, speedy and inexpensive

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* In *China Trade*, the Second Circuit unequivocally rejected the analysis of the district court which closely resembled the relaxed standard of comity. *Id.* at 35. After determining that the Korean action entailed a duplication of parties and would have been adequately disposed of by the American action, the district court concluded that the Korean litigation would be vexatious and would encourage a race to judgment. *Id.* Based on these findings the district court permanently enjoined the Korean action. *Id.*

¹³⁶ Compare *China Trade*, 837 F.2d at 37 (reversing the district court's injunction), with *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 956 (D.C. Cir. 1984) (affirming the district court's injunction).

¹³⁷ 956 F.2d 1349 (6th Cir. 1992).

¹³⁸ *Id.* at 1358. The original claim brought in the federal district court alleged that the defendant had fraudulently induced the plaintiff to sign a promissory note and asked for rescission of the note. *Id.* at 1352. Prior to the filing of the federal court action the defendant had threatened litigation in Hong Kong to collect on the note. *Id.*

determination . . . ; would be evaded [by allowing them]”¹³⁹ The Sixth Circuit held that the district court had erred in characterizing the interest in a just and speedy trial as an “important public policy,” as that term is applied under the strict standard of comity.¹⁴⁰ The Sixth Circuit, quoting *China Trade*, took the view that while an injunction could be appropriate if “a party attempts to evade compliance with a statute of the forum that effectuates important public policies, an injunction is not appropriate merely to prevent a party from seeking ‘slight advantages in the substantive and procedural law to be applied in a foreign court.’”¹⁴¹ Like the Second Circuit’s holding in *China Trade*, the Sixth Circuit found that the Hong Kong litigation posed no threat to the district court’s jurisdiction.¹⁴² Therefore, the Sixth Circuit held that the district court had erred in granting the injunction.¹⁴³

The case law leading up to *Kaepa* shows that the circuits were deeply divided as to the proper standard of international comity applicable to anti-foreign-suit injunctions. The First, Second, Sixth, and D.C. circuits were following a stricter standard of comity that gave deference to foreign courts unless to do so would: (1) threaten the jurisdiction of the district court; or (2) allow the evasion of important public policies.¹⁴⁴ The Fifth, Seventh, and Ninth circuits were applying a relaxed standard of comity that permitted a district court to enjoin foreign litigation if: (1) a policy of the forum would be frustrated; (2) the foreign litigation would be vexatious; (3) the district court’s jurisdiction would be threatened; or (4) the proceedings would prejudice other equitable considerations.¹⁴⁵ However, under the relaxed standard, it had

¹³⁹ *Id.* at 1354.

¹⁴⁰ *Id.* at 1358.

¹⁴¹ *Id.* at 1357 (quoting *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 37 (2d Cir. 1987)).

¹⁴² *Id.* at 1356.

¹⁴³ *Id.* at 1358.

¹⁴⁴ *China Trade*, 837 F.2d at 36.

¹⁴⁵ *In re Unterweser Reederei, GmbH*, 428 F.2d 888, 890 (5th Cir. 1970), *aff’d on reh’g en banc*, 446 F.2d 907 (5th Cir. 1971), *vacated sub nom.*, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

remained unclear when comity must prevail.¹⁴⁶

IV. Significance of the Case

Prior to *Kaepa*, courts applying the relaxed standard of comity had been vague in describing the role international comity should play in the consideration of antisuit injunctions.¹⁴⁷ However, in *Kaepa* the Fifth Circuit enunciated a much clearer standard for comity which compelled respect for the jurisdiction of a foreign forum only under an "actual threat" to foreign relations.¹⁴⁸ In declaring this actual threat standard, the Fifth Circuit broadened the gap between the relaxed standard of comity, which now allows a district court to enjoin foreign litigation unless it finds a real threat to international comity,¹⁴⁹ and the strict standard, which "presume[s] a threat to international comity whenever an injunction is sought against litigating in a foreign court."¹⁵⁰

¹⁴⁶ Cf. *Philips Medical Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993) (noting that because neither the U.S. State Department nor the foreign office of Argentina complained to the district court, it was unlikely relations between the two nations had been put at risk).

¹⁴⁷ The Seventh Circuit noted that the difference between the two standards of comity had to do "with the inferences to be drawn in the absence of information." *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431 (7th Cir. 1993). The Seventh Circuit also suggested that the relaxed standard demanded some evidence that the antisuit injunction would impair comity. *Id.* However, the Seventh Circuit's decision in *Allendale* did not go so far as to set a clear evidentiary standard. Rather, the Seventh Circuit avoided setting such a standard by shrewdly stating that the relaxed standard required "some indication that [the injunction] really would throw a monkey wrench, however small, into the foreign relations of the United States." *Id.* (emphasis added).

¹⁴⁸ *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996), *reh'g, en banc, denied*, 83 F.3d 421 (5th Cir. 1996), *petition for cert. filed* (U.S. June 17, 1996).

¹⁴⁹ *Kaepa*, 76 F.3d at 630 (Garza, J., dissenting).

¹⁵⁰ *Allendale*, 10 F.3d at 431. Although the Supreme Court has not declared under what circumstances a federal court must refrain from interfering with the jurisdiction of foreign courts, an analogy may be made to the Court's general rule that federal courts and state courts should refrain from interfering with each others' jurisdiction. *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964). Where jurisdiction is in personam, parallel actions in federal and state courts are generally allowed to proceed, at least until one court enters a judgment upon which res judicata may be pled in the other court. *Id.* An exception to the rule is that a court, proceeding in rem or quasi in rem, may claim exclusive jurisdiction. *Id.* This rule allowing parallel domestic suits has been useful in the consideration of antisuit injunctions affecting foreign forums. *See Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C. Cir. 1984). It should be noted, however, that Congress has authorized federal courts to stay the proceedings of state courts "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1994). Congress has also authorized federal courts to

Although the actual threat standard empowers courts to protect litigants against vexatious and oppressive litigation, it raises troubling questions regarding the proper role of courts in foreign policy and focuses attention on alternate judicial means of navigating the delicate realm of international comity.

The actual threat standard put forth in *Kaepa* clarified the standing of comity in the Fifth Circuit. *Kaepa* instructed district courts in the Fifth Circuit to evaluate the actual effect of enjoining foreign litigation.¹⁵¹ Without some concrete evidence of harm to foreign relations, the district courts are to assume that no such harm exists.¹⁵² In this respect, *Kaepa* freed district courts to wield their equitable authority to enjoin oppressive litigation. However, the Fifth Circuit's method of granting this freedom is not free from criticism.

The actual threat standard exacerbates two issues upon which critics have attacked the relaxed standard of comity.¹⁵³ The most troublesome criticism of the actual threat standard is that it requires the district court to determine the political effect of an antisuit injunction.¹⁵⁴ Authorities have questioned whether courts have the ability or the authority to make such determinations.¹⁵⁵ A court that undertakes to evaluate foreign policy could be seen to intrude on the power of other governmental branches to manage foreign relations.¹⁵⁶ It has been suggested that a court could avoid such an intrusion by soliciting an executive opinion as to the

"issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1994). These provisions suggest that Congress may intervene to empower federal courts to protect their jurisdiction against foreign interference. For a further discussion of federal injunctive relief from state court proceedings, see Michael G. Collins, *The Right to Avoid Trial: Justifying Federal Court Intervention Into Ongoing State Court Proceedings*, 66 N.C. L. REV. 49 (1987).

¹⁵¹ *Kaepa*, 76 F.3d at 630 (Garza, J., dissenting).

¹⁵² *Id.* (Garza, J., dissenting).

¹⁵³ See, e.g., Paul, *supra* note 1, at 50, 75.

¹⁵⁴ See *Kaepa*, 76 F.3d at 630 (Garza, J., dissenting) (stating that antisuit injunctions are essentially an intrusion into the realm of international economic policy that should be left to the legislature and to the treaty making process).

¹⁵⁵ See *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 951 (D.C. Cir. 1984) (stating that "courts inherently find it difficult neutrally to balance competing foreign interests"); Paul, *supra* note 1, at 75 (noting that courts are not "equipped to negotiate political disputes").

¹⁵⁶ Paul, *supra* note 1, at 50.

international effect of an antisuit injunction.¹⁵⁷ However, even if courts could obtain such executive opinions, threats to international relations are not always apparent at the time an antisuit injunction is issued.¹⁵⁸ Consequently, executive authorities may prove as ineffective as the courts in making such premature determinations. As the dissent in *Kaepa* noted “[i]t is precisely this troubling uncertainty . . . that cautions us to make the respectful deference underlying international comity the rule rather than the exception.”¹⁵⁹ Furthermore, a court that requests executive opinions on matters of foreign policy might jeopardize its standing as an independent legal authority by appearing to act at the behest of the executive.¹⁶⁰

A second criticism of the actual threat standard is that it may allow many more anti-foreign-suit injunctions to be issued.¹⁶¹ Such an aggressive position by the federal circuits may invite foreign courts to retaliate by issuing injunctions restricting the jurisdiction of American courts.¹⁶² Where in *Laker Airways* the American court took defensive action to protect its jurisdiction, a foreign court is likely to do the same in response to an American injunction. The ultimate effect of this battle between jurisdictions would be to leave the parties with no remedy at all.¹⁶³ Moreover, a jurisdictional battle between forums would subvert the traditional justifications for comity: reciprocity, utility, courtesy, and morality.¹⁶⁴ Finally, since there is simply no way to predict the standards by which various foreign courts will decide whether to

¹⁵⁷ See *Philips Medical Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993) (dictum) (suggesting that executive opinions from either nation may have aided in deciding whether a threat to relations existed).

¹⁵⁸ *Kaepa*, 76 F.3d at 631 (Garza, J., dissenting).

¹⁵⁹ *Id.* (Garza, J., dissenting).

¹⁶⁰ Paul, *supra* note 1, at 50 n.209.

¹⁶¹ *Kaepa*, 76 F.3d at 631 (Garza, J., dissenting) (noting that under the majority standard “concurrent jurisdiction involving a foreign tribunal will rarely, if ever, withstand the request for an antisuit injunction”).

¹⁶² See *Kaepa*, 76 F.3d at 630 (Garza, J., dissenting); *Laker Airways*, 731 F.2d at 927.

¹⁶³ See *Laker Airways*, 731 F.2d at 927; See also *Peck v. Jenness*, 48 U.S. 612, 625 (1849) (noting that a similar effect would be realized between states engaged in a jurisdictional battle).

¹⁶⁴ Paul, *supra* note 1, at 53.

retaliate to an American injunction,¹⁶⁵ an increase in the number of injunctions issued by American courts would increase uncertainty in the international market place. Accordingly, the actual threat standard announced in *Kaepa* has raised important issues regarding the judiciary's proper role, if any, in foreign relations, leaving commentators wondering if there is a better way than judicial comity to protect international relations.¹⁶⁶

V. Conclusion

The actual threat standard, enunciated in *Kaepa*, has underscored the difficulty courts have in determining the existence and the nature of a political conflict.¹⁶⁷ As one commentator has noted: "[p]olitical conflicts that arise with foreign governments should be resolved through political negotiation, not litigation. The courts are neither constitutionally competent to rewrite legislation, nor equipped to negotiate political disputes."¹⁶⁸ Courts should therefore adjudicate private disputes without resorting to political judgments regarding the effect of their actions. This is not to say that the courts should ignore the principles of comity. To the contrary, courts should give great deference to international comity by allowing political disputes with foreign nations to be decided in executive and legislative forums which have the authority and ability to resolve them properly.¹⁶⁹ Since the strict standard of comity presumes that an antisuit injunction will adversely affect foreign relations, courts should adhere to this deferential standard and grant antisuit injunctions only where the court's jurisdiction would be threatened or where important policies of the forum would be evaded by foreign litigation.¹⁷⁰

¹⁶⁵ *Id.* at 79 ("There is no clear evidence of a customary international norm compelling comity on the basis of international law.").

¹⁶⁶ See Paul, *supra* note 1, at 74-77; see also Laura M. Salava, *Balancing Comity With Antisuit Injunctions: Considerations Beyond Jurisdiction*, 20 J. LEGIS. 267, 270 (1994).

¹⁶⁷ *Kaepa*, 76 F.3d at 630 (Garza, J., dissenting).

¹⁶⁸ Paul, *supra* note 1, at 75.

¹⁶⁹ Paul, *supra* note 1, at 75.

¹⁷⁰ See *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984). Commentators have viewed the *Laker Airways* analysis favorably. See, e.g., Aryeh S. Friedman, *Laker Airways: The Dilemma of Concurrent Jurisdiction and*

Although this rule seems harsh to litigants faced with the cost and inconvenience of litigating in forums that are thousands of miles apart, courts have other mechanisms that do not threaten comity to accommodate distressed litigants. First, the distressed litigant can petition the foreign court to dismiss the foreign litigation on the grounds of forum non conveniens.¹⁷¹ This solution avoids a jurisdictional dispute since the foreign court can decide for itself whether the litigation before it is vexatious or harassing.¹⁷² If a forum non conveniens dismissal is not available or is denied by the foreign forum, the litigant can petition one forum to stay its proceedings until the resolution of the case in the other forum.¹⁷³ The litigant could then plead res judicata to expedite the later litigation.¹⁷⁴ Both of these solutions allow a litigant to avoid or minimize vexatious litigation without asking one court to impede the jurisdiction of another.¹⁷⁵ Since less intrusive measures are available to litigants faced with vexatious and oppressive litigation, antisuit injunctions which interfere with the jurisdiction of a foreign court should be granted only in extreme circumstances where foreign litigation would threaten the jurisdiction of the local forum or would allow the evasion of important policies of the forum.¹⁷⁶

Conflicting National Policies, 11 BROOK. J. INT'L L. 181, 182 (1985) (stating that *Laker Airways* "suggests a possible solution to the concurrent jurisdiction quandary"); Daryl A. Libow, Note, *The Laker Antitrust Litigation: The Jurisdictional 'Rule of Reason' Applied to Transnational Injunctive Relief*, 71 CORNELL L. REV. 645, 666 (1986) ("[T]he rule of reason analysis in the context of transnational injunctive relief will inject an element of certainty and consistency . . .").

¹⁷¹ *Kaepa*, 76 F.3d at 632 (Garza, J., dissenting). For a general discussion of forum non conveniens, see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

¹⁷² *Cf. Kaepa*, 76 F.3d at 632 (Garza, J., dissenting) (noting that "[t]he district court is not in a position . . . to make the forum non conveniens determination on behalf of the Japanese court").

¹⁷³ *Canadian Filters Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 579 (1st Cir. 1969).

¹⁷⁴ *See Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1352 (6th Cir. 1992). However, where a foreign forum refuses to recognize an American judgment, a permanent injunction may be appropriate to give the American judgment meaningful effect. *See Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 433 (7th Cir. 1993).

¹⁷⁵ *Kaepa*, 76 F.3d at 633-34 (Garza, J., dissenting).

¹⁷⁶ *See China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984). One commentator has proposed that these less intrusive measures be combined into a four-step process for courts to follow before granting an injunction:

Because the world is becoming increasingly interdependent,¹⁷⁷ concurrent jurisdiction with foreign forums will become a more frequent issue in commercial litigation. As the D.C. Circuit noted, "comity serves our international system like the mortar which cements together a brick house."¹⁷⁸ The lack of a consistent policy toward international comity will become a menacing threat to the integrity of our international "mortar." Therefore, the need for a consistent policy toward anti-foreign-suit injunctions requires that the split among the circuits regarding the proper standard of international comity be settled. To guide the lower courts in addressing this complex issue, the Supreme Court should intervene and declare the proper standard of international judicial comity.¹⁷⁹

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First, [the American court] should determine whether the parties and issues in both the American and foreign actions are identical, so that resolving one action would dispose of the other Second, the American court should determine, sua sponte if necessary, whether it should dismiss or stay the action before it on the ground of forum non conveniens. Third, if the American court decides that it is the most convenient forum to decide the case, that court should require the party requesting the injunction to ask the foreign court to dismiss or stay its proceeding on the ground of forum non conveniens. Fourth, and only if the foreign court refuses to dismiss or stay the suit before it, the American court should consider whether an injunction is necessary to prevent the evasion of important domestic policies.

Teresa D. Baer, Note, *Injunctions Against the Prosecution of Litigation Abroad: Towards a Transnational Approach*, 37 STAN. L. REV. 155, 175 (1984).

¹⁷⁷ *Kaepa*, 76 F.3d at 629 (Garza, J., dissenting).

¹⁷⁸ *Laker Airways*, 731 F.2d at 937.

¹⁷⁹ Such a declaration may come in the form of a modification to Rule 65 of the Federal Rules of Civil Procedure which governs the granting of injunctions. See Salava, *supra* note 166, at 270 (suggesting that Rule 65 be amended to incorporate the strict standard of comity in granting antisuit injunctions). The Supreme Court's power to prescribe rules of procedure for federal courts is derived from a Congressional mandate. See 28 U.S.C. § 2072(a) (1994). Therefore, a rule-based declaration by the Court would have the additional benefit of implicit Congressional authorization.