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International Parallel Litigation—A Survey of Current Conventions and Model Laws

JAMES P. GEORGE[†]

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I. INTRODUCTION

Parallel litigation is difficult to define and sometimes means what the speaker wants it to mean. It may be limited to identical lawsuits with exactly the same parties and the same claims. It may also mean any instance of two or more lawsuits that may result in claim preclusion for some or all of the parties. It includes concepts of reactive and repetitive

litigation,¹ related litigation,² and derivative litigation.³ Whatever it is thought to encompass, it incurs criticism as being vexing and harassing, wasteful of the parties' and courts' resources, and inclined to produce inconsistent results and possibly inter-governmental discord.⁴ At the same time, it is a prime example of the long tradition of forum shopping and is a useful tool for the attorney seeking either recovery or protection for the client.

Contradictory policies have also been a problem. Courts' authority and willingness to remedy parallel litigation draws on a number of conflicting doctrines and policies: honoring plaintiff's choice of forum, favoring the first-filed lawsuit, reluctance to dismiss an action that has proper jurisdiction and venue, avoidance of waste, convenience to parties, and respect paid to coordinate courts and governments and, in state-federal conflicts, federalism.⁵

International litigation has the additional problem of the different approaches of the common law and civil law countries. Common law jurisdictions use parallel litigation remedies that favor a multi-factor test and measure detail and nuance, but lack consistency and predictability. Civil law jurisdictions use code-based remedies with more rigid rules and less recognition of special circumstances. Both seem to allow local plaintiffs to manipulate the litigation to a degree that undermines fairness.

The struggle—to define parallel litigation (which cases are parallel enough to justify stopping one?) and deal with its contradictory policies—is problematic even within the United States. International litigation amplifies the problem, and moreover, amplifies the policy concerns over waste, harassment, and judgment consistency. In the past few decades, treaties and model laws have addressed the issue, with varying approaches and results. This article will examine thirteen of those efforts, commenting on their content, approach, and merits. It will do so against a background of existing remedies under the common law and civil law for international parallel litigation.

A. *The Settings*

Parallel litigation occurs in four distinct settings. The first is intra-jurisdictional—within the same jurisdiction, such as within Texas or within the U.S. federal system, governed entirely by that jurisdiction's internal law. The second is intra-union—in two or more states that are members of a constitutional (the United States) or treaty-based union (the European Union), both of which may be governed by the forum state's local law, by interstate compacts, or by federally imposed law. The third is state-federal—in a court of a

1. "Repetitive actions [are] multiple suits on the same claim by the same plaintiff against the same defendant. [A reactive action] is a separate suit filed by a defendant in the first action against the plaintiff in the first action, [usually] seeking a declaratory judgment [of nonliability in the first action] . . . or asserting an affirmative claim [arising] out of the same transaction or occurrence as [alleged in] the first suit." James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 774 (1999).

2. Related litigation may refer to "separate suits involving similar parties or issues to which claim preclusion may not apply, but [which are] eligible for issue preclusion and [to some extent], subject to . . . [criticism as] wasteful litigation." *Id.*

3. Examples of derivative litigation include (1) a first suit for liability, with a second suit by the defendant's insurer seeking a declaration of nonliability on defendant's policy, e.g., *Montrose Chem. Corp. v. Superior Court*, 861 P.2d 1153 (Cal. 1993); and (2) an underlying action in which an attorney has allegedly committed malpractice, with a second action by the client against the attorney, e.g., *Adams v. Paul*, 904 P.2d 1205 (Cal. 1995). Derivative litigation will ordinarily not qualify for parallel litigation remedies, but could in some circumstances.

4. George, *supra* note 1, at 776.

5. *Id.* at 776–77.

federally subordinated state, and in a court of its federal parent, which raises special issues of federalism in the United States, governed by federal common law. The fourth is international—in entirely distinct states not bound by a federal system or a comprehensive treaty, where the parallel litigation remedy may be governed by local law, a specific (often bilateral) treaty, or international custom.

This discussion will address primarily the second and fourth categories of parallel litigation—intra-union and international. The international category is obvious from the title of this article. The intra-union choice is less obvious, but is included because it offers examples of current model laws and treaties that are being compared in this article.

In all four settings, the approaches by courts, legislators, and the drafters of treaties and model laws have basic similarities and significant differences. In instances of similarity, however, we must avoid concluding that the law is homologous when it is not. In many jurisdictions there have been too few cases to permit development of a well-considered policy for dealing with jurisdictional conflicts. Moreover, the emergence of a more cohesive international community may cause changes in the law before it has a chance to develop locally.

B. The Remedies—Five Responses to Parallel Litigation

Within these four settings, up to five remedies for parallel litigation may be available: (1) do nothing and continue to litigate both cases; (2) transfer and consolidate the cases into one case; (3) stay or temporarily suspend one of the cases awaiting the outcome and possible preclusive effect of the active litigation; (4) dismiss all but one of the cases; and (5) enjoin a litigant from pursuing another case. The definitions below provide a common entry point for their application in the various jurisdictional conflicts.

1. Do Nothing

In the interstate, state-federal, and international settings, the mere duplication of actions is not necessarily grounds for any remedy absent a treaty. Many jurisdictions presumptively or conclusively allow the local action to continue, with the first-to-judgment having whatever preclusive effect it may have on the other. In the United States, for example, except for actions concerning real property, there is no outright bar to parallel or related lawsuits in state and federal courts.⁶ This is also true in several foreign countries,⁷

6. See, e.g., *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1938); *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926–27 (D.C. Cir. 1984); *Colo. River Water Conservation Dist. No. 7 v. United States*, 424 U.S. 800, 814–19 (1976); *White Light Prods., Inc. v. On The Scene Prods., Inc.*, 660 N.Y.S.2d 568 (N.Y. App. Div. 1997).

7. See J.J. FAWCETT, *DECLINING JURISDICTION IN INTERNATIONAL LAW* (1995) (discussing a variety of rules that either ignore foreign litigation or allow discretion to stay the local case). Countries using these rules include France, *id.* at 180–83; Italy, *id.* at 284–86; Japan, *id.* at 311–12; Sweden, *id.* at 374–76; and the United Kingdom, *id.* at 221–23.

but not all.⁸ The do-nothing remedy is usually tempered by a discretionary power to grant one of the other four remedies below.⁹

2. Transfer and Consolidation

Transfers and consolidations are distinct procedural functions, available only within the same jurisdiction. That may be changing. Currently there are interjurisdictional means of moving disputes, for example by *forum non conveniens* or by enforcing a forum selection agreement, but this is accomplished by dismissing in one forum and refile in the other. There are also proposals for interjurisdictional transfers in the form of uniform acts and treaties, but no jurisdictions have signed on.¹⁰ Within a single jurisdiction, transferring a case for consolidation with a parallel case is often unnecessary. Instead, parties merely amend one of the lawsuits to add the necessary claims and parties from the other lawsuit.¹¹ Transfer and consolidation may be necessary, however, to preserve claims that for any reason may not be added by amendment, for example, where a limitations period has run. Other reasons are to use discovery gathered in the transferred case, and to take advantage of the transferor court's preliminary rulings which would be lost if the case were simply dismissed.

3. Stays

A stay is a court's temporary suspension of the prosecution of its own case, although the term is sometimes used to describe a temporary suspension that one court imposes on another, as in a bankruptcy stay. Stays are imposed for parallel litigation where the court wishes to defer to an action in another court, but where it may be necessary to reactivate the case if the other litigation does not result in final judgment, or if that other judgment is not entitled to preclusion in the forum issuing the stay. In the United States, "abatement" is sometimes used for stay, although that term can also mean dismissal.¹² In civil law usage, the term "suspension" in European legal usage appears to operate as a stay, that is, a temporary cessation of litigation.

8. Germany and Switzerland require the suspension of a local case when a parallel foreign case is likely to be recognized there. FAWCETT, *supra* note 7, at 196–97 (Germany), 389–90 (Switzerland). Some Japanese courts also apply this rigid approach. *Id.* at 313. Note that several of the countries which do not have the mechanical German approach may nonetheless stay a local action if the foreign one will probably be recognized, such as in France, *id.* at 181, but the decision is discretionary and the court may allow both cases to proceed.

9. See George, *supra* note 1, at 777; see, e.g., *infra* notes 33–41 (U.S. federal court stays and dismissals of parallel international litigation); *infra* notes 42–57 (U.S. federal court anti-suit injunctions against parallel foreign cases). Unlike this general rule for common law remedies for parallel litigation, the conventions and model laws discussed in this article are a mix of discretionary and non-discretionary approaches.

10. See Unif. Law Comm'rs, *Uniform Transfer of Litigation Act*, at http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-utola.asp (last visited Mar. 14, 2002), discussed *infra* notes 91–93 and accompanying text.

11. See George, *supra* note 1, at 820.

12. The confusion apparently stems from the contrary meanings of "abatement" in law (dismissal) and equity (temporary suspension). See *Pringle v. Sizer*, 2 S.C. 59, 68 (1870), discussed in George, *supra* note 1, at 779.

4. Dismissals

Dismissals, like stays, are remedies that courts impose on their own cases. They are less preferred because a dismissal (1) terminates an otherwise proper lawsuit (that is, one with proper jurisdiction and venue); (2) upends the timetable in that case; and (3) assumes a perfect identity with the other case that will not result in the non-meritorious loss of any claims or fundamental rights. Dismissals are ordered for parallel litigation in lieu of stays where it is clear that the other litigation will be adequate to protect all parties' interests and where all jurisdictional prerequisites are satisfied.

5. Antisuit Injunctions

A fifth option is to ask the court to enjoin the opposing party from pursuing the other case. This is especially appropriate when the other court may not grant a motion to stay its own action. The injunction applies only to the party being enjoined; it does not apply to the court or judge presiding over the parallel case—i.e., courts of original jurisdiction may not enjoin each other. However, an appellate court with jurisdiction over a trial court (that is part of the same state system or federal circuit) may freeze the litigation in the lower court where a motion for stay was improperly denied.

One treatise describes four reasons for antisuit injunctions: (1) stopping litigation of the same dispute in another forum;¹³ (2) consolidating related but not identical claims in the moving party's preferred forum;¹⁴ (3) stopping the relitigation in another forum to protect the prevailing party in a completed case;¹⁵ and (4) preventing the opponent from seeking an antisuit injunction in the other forum.¹⁶ Stays and dismissals may achieve the same objectives, but antisuit injunctions are effective where the other forum is unlikely to grant the stay or dismissal.

The antisuit injunction is the most controversial of the remedies for parallel litigation because it interferes with another court's power, often in another state or country. As noted above, the injunction is against the party, not against the other court.¹⁷ Some courts and commentators, however, suggest that this distinction is meaningless and that the other forum may perceive that its powers are being challenged or compromised.¹⁸

One final point is the regression of these remedies. As one ascends through the local, regional, and finally international hierarchy, the availability of remedies diminishes. That

13. GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 475 (3d ed. 1996) (citing *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir. 1996); *Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am.*, 651 F.2d 877 (3d Cir. 1981)).

14. *Seattle Totems Hockey Club Inc. v. Nat'l Hockey League*, 652 F.2d 852 (9th Cir. 1981).

15. *Bethell v. Peace*, 441 F.2d 495 (5th Cir. 1971); *see also Scott v. Hunt Oil Co.*, 398 F.2d 810 (5th Cir. 1968).

16. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *Owens-Ill., Inc. v. Webb*, 809 S.W.2d 899 (Tex. App.—Texarkana 1991, writ dismissed w.o.j.).

17. *See Laker Airways*, 731 F.2d at 927; *Gannon v. Payne*, 706 S.W.2d 304, 306 (Tex. 1986); *Turner v. Grovit*, [2002] 1 All E.R. 320 (H.L. 2001).

18. *See Gannon*, 706 S.W.2d at 306–07 (citing *Laker Airways*, 731 F.2d at 937); *see also Total Minatome Corp. v. Santa Fe Minerals, Inc.*, 851 S.W.2d 336, 339 (Tex. App.—Dallas 1993, no writ); Trevor C. Hartley, *Comity and the Use of Antisuit Injunctions in International Litigation*, 35 AM. J. COMP. L. 487 (1987) (discussing 731 F.2d 909 (D.C. Cir. 1984)); William Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1713 (1992) (citing George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L., 589, 629 (1990)).

is, the more distinct the jurisdictions, the less likely that one of these remedies will be applied. Within the same jurisdiction, courts will readily transfer or dismiss parallel cases based on policies of efficiency and economy. Where jurisdictional boundaries are crossed (i.e., interstate, state-federal, international), there is a greater reluctance to interfere. The greater the boundary crossed, the greater the reluctance. This hesitance includes both a reluctance to stay or dismiss the local case out of fear that the plaintiff will not have an adequate forum in another jurisdiction and an even greater reluctance to enjoin the other action. This makes perfect sense, but parties sometimes fail to consider or accept this reality.

C. *Universals in Parallel Litigation*

A few features of parallel litigation are nearly universal. Foremost is the notion of exclusive jurisdiction for the first-filed case concerning immovable property (and to a lesser extent, movable property), provided that the court has jurisdiction over the property.¹⁹ A second universal is the importance, at least in domestic parallels of winning the race to the courthouse, to take advantage of a first-filed (or first-seized) rule that may range from automatic deference to the first-filed case²⁰ to presumptions favoring the first-filed case.²¹ The universal aspect of this rule is its presence as a factor, and not its likelihood of prevailing. It is most common in domestic parallels, particularly in intrajurisdictional ones. It is now, however, being applied to international parallels and is a factor in motions to stay²² and in *forum non conveniens* dismissals.²³

A third universal is the problem of identifying whether the cases are sufficiently similar to warrant judicial interference with party autonomy. To the extent that identity of

19. The leading U.S. case is *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939): "We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized . . ." *Id.* at 466. *Princess Lida* was a domestic case, but the rule applies equally in requiring second-filed U.S. cases to yield to foreign courts. *See, e.g., Dailey v. Nat'l Hockey League*, 987 F.2d 172, 176 (3d Cir. 1993) (discussing 305 U.S. 456 (1939)). The European view is expressed in Article 16 of the Brussels Convention, providing exclusive jurisdiction in the state in which the property is located. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1978 O.J. (L 304) 77 [hereinafter Brussels Convention].

20. Examples of fixed rules favoring the first-filed case (or in some cases, the first-seized court) include the ZIVILPROZESSORDNUNG [CIVIL PROCEDURE STATUTE] (F.R.G.) § 261 Nr. 1 ZPO, *discussed in* FAWCETT, *supra* note 7, at 196; the CODICE DI PROCEDURA CIVILE [CODE OF CIVIL PROCEDURE] (Italy), art. 39, *discussed in* FAWCETT, *supra* note 7, at 281; and the Brussels Convention, *supra* note 19, art. 21.

21. *See, e.g., W. Gulf Mar. Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 730 (5th Cir. 1985) (stating that a federal court should have heeded the first-filed rule and dismissed its second-filed case in deference to a federal court in New York). Illinois and New York statutorily authorize a discretionary presumption favoring the first-filed case. *See* 735 ILL. COMP. STAT. 5/2-619(a)(3) (1993); N.Y. C.P.L.R. 3211(a)(4) (Consol. 1994). Some states do not recognize this presumption for interstate or foreign parallels. *E.g., Dayan v. McDonald's Corp.*, 382 N.E.2d 55, 58 (Ill. App. Ct. 1978); *Pesquera del Pacifico S. de R.L. v. Super. Ct.*, 201 P.2d 553, 554-55 (Cal. Ct. App. 1949).

22. The *Colorado River/Moses Cone* test, developed for state-federal parallels but used for international parallels, includes as factors the order of filing and the relative progress of the two actions. *See infra* notes 33-36 and accompanying text; *see also* *Banco Bilbao Vizcaya, S.A. v. Naiz, S.A.*, 615 So.2d 233, 234 (Fla. Dist. Ct. App. 1993) (abating a second-filed action in deference to one in Spain).

23. *See, e.g., Meadows v. ICI*, [1989] 1 Lloyd's Rep. 181, 189 (Q.B. 1989). The *forum non conveniens* test in the United States is a balancing test of "public and private factors," both of which would seem to favor, at least presumptively, a forum that had significantly progressed with the case over one which had not. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). *But see* *George*, *supra* note 1, at 945 (arguing that the progress of the two cases should not be a factor where defendant meets its high burden of proving the other forum more convenient).

the parties and claims is a factor, both the meaning of “identical” and the required degree of similarity varies broadly among jurisdictions and sometimes among courts within a single jurisdiction.

II. COMMON LAW AND CIVIL LAW DIFFERENCES

A. *The Common Law Approach*

1. The United States

a. *The Multifaceted Approach*

State and federal parallel litigation rules in the United States are derived almost entirely from common law and equity. Common law reasoning is inductive and focused on particularities, sharply contrasting with the deductive process inherent in statutory and code applications. This contrast is nowhere more apparent than in the differences between the common law and civil law approaches to parallel litigation remedies. Judges in the United States had great discretion in finding, fashioning, or modifying rules to fit a result that seemed just or appropriate. This practice led to a set of rules with nuances that could address a variety of situations with maximum attention to the particular facts of each case. These nuanced rules, in turn, avoided a weakness of the code and statutory systems, in which judges must characterize the dispute in order to fit it into a code provision, sometimes resulting in forced fits. The weakness was that the same inductive process could, in egregious fact patterns, lead to rules that did not fit well with most cases.

The common law system, at least in the United States, composed a series of multifaceted tests with rebuttable presumptions. These presumptions included a presumption favoring party autonomy that encourages allowing parties to proceed with multiple lawsuits except in extreme circumstances;²⁴ a contrary presumption favoring the first-filed action in domestic parallels;²⁵ a presumption favoring forum selection clauses;²⁶ a presumption against declaratory actions;²⁷ and a presumption against antisuit injunctions, especially in

24. See, e.g., *Colo. River Water Conservation Dist. No. 7 v. United States*, 424 U.S. 800, 818 (1976) (referring to “the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them,” followed by a test that allows deviations from that obligation); *White Light Prods., Inc. v. On The Scene Prods., Inc.*, 660 N.Y.S.2d 568, 574–75 (N.Y. App. Div. 1997) (holding that a dismissal of a second-filed New York action in deference to one in California was an abuse of discretion absent a *forum non conveniens* evaluation). This party-autonomy presumption is generally ignored in intrajurisdictional parallels that tend to favor the stay, dismissal, or transfer of duplicate lawsuits. See George, *supra* note 1, at 785–819.

25. This applies particularly in the intrafederal setting. See, e.g., *W. Gulf Mar. Ass'n*, 751 F.2d at 730. See *supra* note 21 for additional references.

26. See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Int'l Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112 (5th Cir. 1996).

27. E.g., *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995) (federal-state parallel); *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952) (intrafederal parallel); *Space Master Int'l, Inc. v. Porta-Kamp Mfg. Co.*, 794 S.W.2d 944 (Tex. App.—Houston [1st Dist.] 1990, no writ) (interstate parallel). There is little evidence that the presumption against declaratory judgment actions applies in international litigation. See George, *supra* note 1, at 904–69 (discussing the various tests regarding foreign parallel litigation under state and federal law in the United States). None of these tests turn on whether one action is for declaratory judgment. *Id.*

international litigation.²⁸ Some of these multi-factored tests are balancing tests, some of which require the balancing of both private and governmental interests.²⁹

Overall, courts in the United States offer a full range of remedies. Interestingly, this holds true in federal courts even for intrafederal parallels, where transfer and consolidation might seem the only necessary solutions.³⁰ The legal standard is typically discretionary.³¹

b. Two Examples

Although there are many nuances to parallel litigation, two examples illustrate the United States' common law approach to parallel litigation.

i. Stays and Dismissals of the Local Action in International Litigation

The first example is the federal common law approach to a motion for stay or dismissal of an *in personam* action that is duplicated in a foreign court that does not involve title to property and is not subject to a forum clause. Any of three doctrines may apply, with the first two borrowed from domestic parallel doctrines, and the third a true international law remedy.

The first doctrine is drawn from *Landis v. North American Co.*,³² designed for intrafederal parallel cases, and the second is from *Colorado River Water Conservation District v. United States*,³³ dealing with parallel state-federal cases. Because federalism plays a role in *Colorado River* that is missing in *Landis* (and that is inappropriate for international cases), one might expect the tests to differ. In fact their elements are similar, but a principal distinction is that *Colorado River* has a stronger presumption for retaining

28. "[P]arallel proceedings on the same *in personam* claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one [jurisdiction] which can be pled as *res judicata* in the other." *Gau Shan v. Banker's Trust Co.*, 956 F.2d 1349, 1352 (6th Cir. 1992) (quoting *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C. Cir. 1984)).

29. The *Colorado River* balancing test is used in considering stays and dismissals in state-federal and international parallels. *Colo. River Water Conservation Dist. No. 7 v. United States*, 424 U.S. 800 (1976). The *Landis* balancing test is used for the same issues in intrafederal and international parallels. *Landis v. N. Am. Co.*, 299 U.S. 248 (1936); 28 U.S.C. § 1404 (1994) is a statutory balancing test used for intrafederal *forum non conveniens*. See, e.g., *Muller v. Walt Disney Prods.*, 822 F. Supp. 1033, 1035 (S.D.N.Y. 1993); and the *Gulf Oil* balancing test applies to international *forum non conveniens* motions in U.S. federal courts. See 330 U.S. 501 (1947). State courts have similar tests. See George, *supra* note 1, at 820-49. Antisuit injunctions are multi-factor tests, but tend to focus on the bad faith motives or vexatious results of the other litigation, rather than a balancing of interests. See *infra* notes 42-45.

30. **Transfer:** Federal Rule of Civil Procedure 42(a) permits consolidation of federal lawsuits having a common question of law or fact, but does not address transfer, which must be done under 28 U.S.C. § 1404(c) (1994) (transfer within the federal division), 28 U.S.C. § 1404(b) (transfer to another division in the same federal district), 28 U.S.C. § 1404(a) (inconvenient forum transfer, including those based on forum selection agreements), 28 U.S.C. § 1406(a) (transfer to correct improper venue), or 28 U.S.C. § 1407 (multidistrict transfer of complex multiparty cases for pretrial purposes only). **Stay:** See, e.g., *Kerotest Mfg. Co.*, 342 U.S. at 180 (1952) (affirming a stay of a second-filed patent case). **Dismissal:** The dismissal grounds under Federal Rule of Civil Procedure 12 may not be used to remedy parallel litigation, including intrafederal parallels. Instead, federal common law governs parallel litigation. See, e.g., *Ulmet v. United States*, 888 F.2d 1028, 1031 (4th Cir. 1989). **Antisuit injunction:** Federal courts may enjoin parties from pursuing parallel actions in other federal courts. See, e.g., *Wm. Gluckin & Co. v. Int'l Playtex Corp.*, 407 F.2d 177 (2d Cir. 1969) (upholding New York federal court's injunction against parallel patent case in Georgia federal court).

31. See generally George, *supra* note 1.

32. 299 U.S. at 248.

33. 424 U.S. at 800.

the challenged case and allowing both actions to proceed until one reaches judgment.³⁴ *Colorado River*, thus, has a higher burden of proof, at least as stated, but whether it is higher in application is another question.

The *Landis* test has seven factors: (1) comity; (2) the adequacy of relief available in the other forum; (3) judicial efficiency; (4) the degree of identity of the parties and issues in the two cases; (5) the likelihood of prompt disposition in the other forum; (6) convenience to the parties, counsel, and witnesses; and (7) the possibility of prejudice if the stay or dismissal is granted.³⁵ The *Colorado River* test (as modified by the *Moses Cone* case³⁶) has nine factors: (1) which court first assumed jurisdiction over a *res*, if applicable; (2) the relative convenience of the alternative forum; (3) the desirability of avoiding piecemeal litigation; (4) which case was first filed; (5) the relative progress of the two actions; (6) the extent to which federal law applies; (7) any other special factors (in *Colorado River*, it was the government's willingness to litigate similar claims in state court); (8) the adequacy of the alternative forum in protecting the litigants' rights; and (9) whether the action in the immediate forum was vexatious or filed in bad faith.³⁷ These factors may be summarized as federalism, comity, fairness to parties, and judicial economy and could cynically be titled: "The *Erie* Doctrine Meets *Gulf Oil v. Gilbert*."³⁸ The original cases favored dismissal as a remedy but some have now turned to stays, especially when dealing with foreign litigation.³⁹

Landis has no presumption favoring ongoing jurisdiction, while *Colorado River* emphasizes federalism (which should not apply in international litigation) and has a higher burden of proof. Both doctrines are discretionary, both use balancing tests, and both can lead to stay or dismissal.

The third doctrine is comity, which encourages deference to foreign acts and judgments. Its vague standards have resulted in comparatively less use in international parallel litigation in the United States.⁴⁰

ii. Federal Injunctions Against Foreign Litigation

U.S. federal law permits antisuit injunctions, but the federal circuits are split on the standards. The more liberal standard (in the Fifth, Seventh, and Ninth Circuits) permits an

34. *See id.* at 818.

35. *See* *Nigro v. Blumberg*, 373 F. Supp. 1206, 1213 (C.D. Pa. 1974).

36. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

37. *Id.* at 15–28.

38. For readers who know neither doctrine, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) is the currently-disarrayed test for choosing between state and federal law to be applied in a federal case where both may be appropriate (the disarray is from confusion about the proper test to be applied, *see Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996)). *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947), is the federal common law balancing test for *forum non conveniens*. For critics of balancing tests, especially those who dislike governmental interest analysis, this extended *Colorado River* test must be dismaying, both with its number and categories of factors that include assessing the degree of claim identity, federal interest in applying federal law, party convenience, and so on. For those of us who like or tolerate balancing tests, *Colorado River* is workable because in close cases, the court should allow both cases to continue. Stays or dismissals should occur only where the factors clearly point to the other forum.

39. *E.g.*, *Lumen Constr., Inc. v. Brant Constr. Co., Inc.*, 780 F.2d 691 (7th Cir. 1985).

40. Comity as U.S. law stems from *Hilton v. Guyot*, 159 U.S. 113 (1895), which addressed the recognition of judgments from foreign countries, announcing the requirement of respect for the legislative, executive, and judicial acts of foreign sovereigns. *Id.* at 164. It is arguably misapplied to parallel litigation, which, as a pending lawsuit, does not involve any final sovereign decree. It is nonetheless occasionally applied as the sole basis for deference to a parallel foreign case, *e.g.*, *Ensign-Bickford Co. v. ICI Explosives U.S.A. Inc.*, 817 F. Supp. 1018 (D. Conn. 1993). *See generally* George, *supra* note 1, at 910–12, 971–74.

injunction if the foreign action would: (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's *in rem* or *quasi in rem* jurisdiction; or (4) prejudice other equitable considerations.⁴¹ The stricter standard (in the Second, Sixth, and D.C. Circuits) limits foreign antisuit injunctions: (1) to protect the forum's jurisdiction; or (2) to prevent evasion of the forum's important public policies.⁴² This view includes the concept that a duplication of the parties and issues, alone, is not sufficient to justify a foreign antisuit injunction.⁴³ *China Trade* added that the need to protect a federal court's jurisdiction from a parallel foreign action only occurs (1) when the jurisdiction is *in rem* or *quasi in rem* or (2) in *in personam* actions, the foreign proceeding is an attempt to establish exclusive jurisdiction over the dispute.⁴⁴

This brief description of U.S. law on parallel litigation omits much, and readers should consult other sources for a more thorough discussion.⁴⁵ But it does illustrate the multifaceted approach to questions addressed more abruptly in code systems.

2. The United Kingdom

English remedies for international parallel litigation are generally consistent with those in the United States. English courts apply the doctrine of *lis alibi pendens* to consider staying or dismissing the local action⁴⁶ and distinguish between repetitive and reactive suits.⁴⁷ *Forum non conveniens* is an available remedy both in parallel cases and otherwise.⁴⁸ Antisuit injunctions are available when the ends of justice require it, and if the foreign action would be vexatious or oppressive.⁴⁹ For parallel cases involving other signatories to the Brussels or Lugano Conventions, English courts apply the somewhat civil-law-based directives of those rules, although a recent case confirmed that English courts may issue antisuit injunctions in cases otherwise governed by the Brussels Convention, provided that the foreign action was an unconscionable abuse of process.⁵⁰

41. *In re Unterweser Reederei GmbH*, 428 F.2d 888, 896 (5th Cir. 1970), *aff'd on rehearing en banc*, 446 F.2d 907 (1971), *rev'd on other grounds*; *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 855-56 (9th Cir. 1981); *Allendale Mutual Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993).

42. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-33 (D.C. Cir. 1984); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36-37 (2d Cir. 1987); *Sea Containers, Ltd. v. Stena, A.B.*, 890 F.2d 1205, 1214 (D.C. Cir. 1989); *Gau Shan Co. v. Banker's Trust Co.*, 956 F.2d 1349, 1354-55 (6th Cir. 1992).

43. *Laker Airways*, 731 F.2d at 928, *quoted in Gau Shan*, 956 F.2d at 1355.

44. *China Trade & Dev. Corp.*, 837 F.2d at 36-37. This narrower standard has been affirmed without significant discussion in the Eleventh Circuit, after adoption by an Alabama federal district court. *See Mut. Serv. Cas. Ins. Co. v. Frit Indus., Inc.*, 805 F. Supp. 919 (M.D. Ala. 1992), *aff'd*, 3 F.3d 442 (11th Cir. 1993).

45. *See FAWCETT, supra note 7*, at 401-28. *See generally George, supra note 1*.

46. *E.g., The Abidin Daver*, 1 A.C. 398, 408-09 (H.L. 1984). *See ALBERT VENN DICEY & JOHN HUMPHREY CARLILE MORRIS, THE CONFLICT OF LAWS 395-96* (Lawrence Collins ed., 11th ed. 1987) for a discussion of *lis alibi pendens*.

47. *See GEOFFREY CHESHIRE & P.M. NORTH, PRIVATE INTERNATIONAL LAW 114-19* (Butterworth & Co. 10th ed. 1979) (1935).

48. *E.g., Abidin Daver*, 1 A.C. 398, 411-12 (H.L. 1984) (appeal taken from Eng.); *Spiliada Mar. Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460 (H.L. 1986) (appeal taken from Eng.); *see also CHESHIRE & NORTH, supra note 47* at 119-22; *DICEY & MORRIS, supra note 46*, at 389-95; *FAWCETT, supra note 7*, at 207-33.

49. *See British Airways Bd. v. Laker Airways Ltd.*, [1985] 1 A.C. 58, 95 (H.L. 1984); *Societe Nationale Industrielle Aerospatiale v. Lee Kui Jak*, 1 A.C. 871 (H.L. 1987), *discussed in FAWCETT, supra note 7*, at 229-32; *see also CHESHIRE & NORTH, supra note 47*, at 112-14; *DICEY & MORRIS, supra note 48*, at 396-98.

50. *Turner v. Grovit*, 1 All E.R. 320 (H.L. 2001).

As with other summaries in this article, readers are cautioned that the law invariably has far greater complexity than the general conclusions stated here. This is particularly true of English and U.S. law, whose common law source has created a diverse case law around these basic doctrines.

B. *The Civil Law Approach*

Civil law systems—based on codes—use 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. Their strength is the certainty and predictability of relatively fixed rules. The weakness of this syllogistic process is that it does not address the variety of special circumstances that courts encounter, and its rules do not expand with the development of precedent (even though court decisions may influence later applications of that code section). The author recognizes that civil law remedies cannot be described in this brief article with any real accuracy. Just as with similar remedies for the United States, even within a strict code system, subtleties abound both in text and in application. With that limitation in mind, the following observations are made about civil law remedies for parallel litigation.

Although many civil law jurisdictions use *lis pendens* in domestic cases, many do not in international cases unless required by treaty.⁵¹ Those that do not use *lis pendens* instead apply, at least by default, the first remedy—do nothing and await the outcome and possible preclusive effects.⁵² Preclusion has been historically less likely in international litigation, but increasingly common under treaty. Where *lis pendens* is applied in international parallel cases, the effect is that the court later seized with jurisdiction is obligated to dismiss the second case. An “identical case” is typically defined as being the same parties and the same cause of action,⁵³ although it is unclear how much sameness is required, and one suspects that civil law judges may impose some unauthorized discretion here.

Civil law remedies may or may not address related cases, that is, parallels that were not sufficiently identical to warrant *lis pendens* dismissal.⁵⁴ Civil law jurisdictions typically have no *forum non conveniens* doctrine,⁵⁵ no antisuit injunctions,⁵⁶ and no presumption

51. See generally FAWCETT, *supra* note 7. Belgium does not apply *lis pendens* in international cases. *Id.* at 107–10. France does apply *lis pendens* subject to a likelihood of eventual judgment recognition in France. *Id.* at 180–82. Germany applies *lis pendens* routinely. *Id.* at 196–98. Greece does apply *lis pendens* under certain conditions. *Id.* at 247–52. Italy does not apply *lis pendens* except when required by treaty. *Id.* at 284–86. Japan does, applying a “special circumstances” test somewhat like that in the United States. *Id.* at 310–16. The Netherlands does apply *lis pendens*. *Id.* at 336–37. Spain does apply *lis pendens*. CÓDIGO CIVIL [CIVIL CODE] art. 1252. Sweden has no clear rule except where a treaty would require judgment enforcement. FAWCETT, *supra* note 7, at 374–76. Switzerland does apply *lis pendens*. *Id.* at 389–90. For the countries that do apply *lis pendens* in international cases, it is important to note that each may apply the doctrine differently, with distinct elements and exceptions.

52. See FAWCETT, *supra* note 7, at 284–86.

53. The German Civil Procedure Code authorizes sua sponte dismissal of a second action between the same parties on the same claim. § 261 III Nr. 1 ZPO (F.R.G.); see FAWCETT, *supra* note 7, at 196. Article 39 of the Italian Code of Civil Procedure similarly defines *lis pendens*. See FAWCETT, *supra* note 7, at 281. The French Code applicable to domestic parallels, on the other hand, merely refers to the “same dispute.” NOUVEAU CODE DE PROCÉDURE CIVILE [NEW CODE OF CIVIL PROCEDURE] art. 100 (Fr.).

54. France, for example, has a domestic doctrine of *connexité* that now appears possible for application in international cases. See FAWCETT, *supra* note 7, at 175 n.2, 181. Greece has a similar doctrine—*forum connexitatis*—but there is no indication of its availability for international parallel cases. See *id.* at 254. German law has clarified that domestic remedies for staying related cases do not apply to foreign cases other than those governed by the Brussels Convention, art. 22. See *id.* at 199–200.

55. See FAWCETT, *supra* note 7, at 10.

against a first-filed declaratory suit. The results have the benefit of being far more predictable than those in the United States and perhaps England but have the disadvantage of being fairly inflexible and somewhat capable of manipulation by, for example, winning the race to the courthouse with a declaratory action, or by filing a second case that is not quite identical.

III. TREATIES AND MODEL LAWS

Starting in the mid-twentieth century, treaties addressing parallel litigation in one form or another began appearing, and somewhat later in that period, legal think-tanks such as the Hague Convention,⁵⁷ UNIDROIT,⁵⁸ and the American Law Institute⁵⁹ began drafting model laws directed at the same issues. There are currently at least ten treaties or model laws, either in force or being drafted, that address some aspect of parallel litigation. This study includes two U.S. models designed for complex litigation that are not directed at international litigation, but that offer definitions and structure that may be helpful.

A. *European Union Conventions*

1. The Brussels Convention

The Brussels Convention, properly known as the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,⁶⁰ was the first international model for resolving problems with parallel litigation. Its function is broader than resolving parallel litigation, seeking to resolve conflicts of territorial jurisdiction and to promote the recognition and enforcement of judgments in civil and commercial cases litigated in the European Union. The Convention is limited to “civil and commercial matters”⁶¹ in the courts of contracting states, which include the states of the European Union.⁶² It has been called “Europe’s full faith and credit clause”⁶³ but functions more broadly than that of the United States.

Articles 21 through 23 of the Convention address parallel litigation, dividing it into three categories: (1) identical actions, (2) related actions, and (3) actions having exclusive

56. Summarizing his compilation of parallel litigation remedies in various common law and civil law countries, Dean Fawcett concludes that antisuit injunctions are “confined to common law jurisdictions.” FAWCETT, *supra* note 7, at 40. The civil law discussions that follow Fawcett’s summary illustrate this contention. *See id.* at 186–87. A better illustration may be the current conflict regarding English courts’ issuance of antisuit injunctions in cases governed by the Brussels Convention, whose other signatories do not allow them, and who may interpret the Brussels Convention as disallowing them. *See Turner v. Grovit*, 1 All E.R. 320 (H.L. 2001).

57. *See infra* note 158.

58. *See infra* note 180.

59. *See infra* note 118.

60. Brussels Convention, *supra* note 19.

61. The Convention defines “civil and commercial matters” by what they are not: (1) revenue, customs, or administrative matters; (2) status arising out of matrimonial relationship, or wills and succession; (3) bankruptcy proceedings; (4) social security; or (5) matters in arbitration. *Id.* art. 1.

62. Contracting states currently include Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. Brussels Convention, *supra* note 19, pmbli.; *see also* P.M. NORTH & J.J. FAWCETT, CHESHIRE AND NORTH’S PRIVATE INTERNATIONAL LAW 183–84, 187 n.12 (Butterworth & Co. 13th ed. 1999).

63. Lee S. Bartlett, *Full Faith and Credit Comes to the Common Market: An Analysis of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 24 INT’L & COMP. L.Q. 44 (1975), *quoted in* EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 1006 (2d ed. 1992).

jurisdiction (such as *in rem* actions).⁶⁴ The Convention uses the term “*lis pendens*” ambiguously, with the heading “Lis Pendens—Related Actions” applying to the entirety of Section 8, that is, Articles 21 through 23.⁶⁵ This heading’s most obvious meaning is that the two terms “*lis pendens*” and “related actions” are mutually exclusive, with the title identifying two topics covered in Section 8. Another possible meaning is that the terms are synonymous and the intent is to state the Latin term “*lis pendens*” (the Convention’s only use of Latin) in English. This ambiguity is compounded by the Convention’s failure to repeat the term “*lis pendens*” in the text of any article. The better assumption is that the first possibility is correct because Article 21 refers to “proceedings involving the same cause of action . . . between the same parties”⁶⁶ (apparently meaning *lis pendens*), while Article 22 refers explicitly to “related actions,” a usage more or less consistent with other European laws.⁶⁷

The Brussels Convention deals with parallel litigation as follows:

a. Identical Parallel Actions

Article 21 defines identical actions as those involving the “same cause of action between the same parties,” and provides that courts of member states must stay proceedings until the court “first seised” perfects its jurisdiction, and once established, must dismiss or “decline jurisdiction.”⁶⁸ One term is crucial here: The “court first seised” designates the action with priority for *lis pendens*, but the determination of being seised is left to local law. Some states define “seised” as the time of filing the action or seeking summons,⁶⁹ while other states define “seised” at a latter point, such as service of process on the defendant.⁷⁰ This creates problems where, for example, a German citizen files a suit in Germany but has trouble serving process on a Swedish defendant, during which time the Swedish defendant files a parallel case in Sweden. Under Swedish law, the Swedish court now becomes the court first perfecting jurisdiction.⁷¹ The Convention also makes no distinction for reactive or repetitive actions, even for declaratory judgment actions.

b. Related Actions

Related actions provide more options. Article 22 provides that any court other than the first filed may stay its action while the others are pending, or may decline jurisdiction if the law of the second court permits consolidation and the court first seised has jurisdiction over both. A related action is one “so closely connected that it is expedient to hear and

64. Brussels Convention, *supra* note 19, arts. 21–23.

65. *Id.*

66. *Id.* art. 21.

67. *Id.* art. 22. The most recent example is the International Law Association’s London-Leuven proposal, in which Principle 4.1 defines *lis pendens* as “the same parties and the same subject matter,” with Principle 4.2 addressing “related actions.” Resolution No. 1/2000, Int’l Civil & Commercial Litig., *Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters*, 69TH CONFERENCE OF THE INT’L L. ASSOC. (July 2000) (on file with author) [hereinafter *London-Leuven Principles*]. Note, however, that the Brussels Convention defines *lis pendens* somewhat differently as “same cause of action” rather than “same subject matter.” Brussels Convention, *supra* note 19, art. 21.

68. Brussels Convention, *supra* note 19, art. 21.

69. See FAWCETT, *supra* note 7, at 34, 198–99 (Germany), 221 (United Kingdom).

70. *Id.* at 34, 221 (discussing the United Kingdom prior to 1992), 376 (Sweden).

71. *Id.* at 376.

determine them together to avoid the risk of irreconcilable judgment resulting from separate proceedings.”

c. Exclusive Jurisdiction

Exclusive jurisdiction is designated in Article 16 as including *in rem* actions (except for tenancies of immovable property for six months or less), constitutional challenges, business entity dissolution, public register validity, intellectual property registration, and judgment enforcement.⁷² EU regulations provide further definitions.⁷³ For instances of conflicting exclusive jurisdiction, Article 23, provides that “any court other than the court first seised *shall decline* jurisdiction.”⁷⁴

d. Antisuit Injunctions

Antisuit injunctions are not authorized by the Brussels Convention, but may arguably be invoked under national law, even when the other state has subject matter jurisdiction.⁷⁵

e. Transfers and Consolidations

Transfers and consolidations are not authorized under the Brussels Convention, but as noted above, courts may dismiss later-filed actions where transfer and consolidation are possible under national law. It is unclear whether this deference to transfers under national law includes *forum non conveniens* dismissals.

f. Forum Selection Clauses

Forum selection clauses are honored, with Article 17 providing for exclusive jurisdiction in the parties’ chosen court and requiring dismissal in other courts.⁷⁶

g. Forum Non Conveniens

Forum non conveniens is not mentioned in the Brussels Convention. The current draft of the proposed Hague Convention on the Recognition and Enforcement of Foreign

72. *See id.*

73. Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 22, 2001 O.J. (L 12) 1, *reprinted in* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION: SELECTED TREATIES, STATUTES AND RULES 91, 101–02 (2d ed. 2001).

74. Brussels Convention, *supra* note 19, art. 23 (emphasis added).

75. Specifically, Article 24 allows litigants to apply to the courts of a contracting state for “such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.” Brussels Convention, *supra* note 19, art. 24. As a result, civil law jurisdictions lacking antisuit injunctive relief cannot offer the remedy, while courts in the United Kingdom can. *See Turner v. Grovit*, 1 All E.R. 320 (H.L. 2001). Note, however, that the House of Lords’ decision to enjoin Grovit from his parallel Spanish suit does not necessarily have the agreement of other European Union members.

76. Brussels Convention, *supra* note 19, art. 17.

Judgments has a *forum non conveniens* provision⁷⁷ that would become national law for signatory nations in the European Union.

In summary, the Brussels Convention:

- Defers to the first-filed action for (1) identical cases and (2) instances of two or more courts having exclusive jurisdiction (this rule does not apply to instances of a single court having exclusive jurisdiction or cases governed by valid forum selection clauses);
- Allows discretionary stays for later-filed related actions;
- Enforces valid forum selection clauses;
- Further allows for dismissal of any related action (first or later-filed) where transfer and consolidation is possible under national law; and
- Defers to local law for antisuit injunctions and other provisional relief.

The Convention's shortcomings are that it uses a rigid first-filed rule for identical cases that makes no distinction for declaratory judgment actions or for the often-related distinction of reactive versus repetitive claims.

2. The Lugano Convention

The Brussels Convention has a twin in the Lugano Convention, subject to minor variations in the text and other variations in the protocols. Like the Brussels Convention, it is also titled the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,⁷⁸ and it embraces the members of the European Free Trade Association.⁷⁹ Conflicts with the Brussels Convention are addressed in Article 54B, providing that membership in the Lugano Convention does not prejudice members of the European Union from seeking application of the Brussels Convention,⁸⁰ and that the Lugano Convention will apply in any event to: (a) jurisdiction issues, where the defendant is domiciled in the territory of a signatory state which is not a member of the European Union, or where Articles 16 or 17 confer jurisdiction;⁸¹ (b) parallel litigation matters, when dual proceedings are instituted in a signatory state which is not a member of the European Union and in another state which is;⁸² and (c) judgment recognition and enforcement matters, where either the judgment rendering state or the state applied to is not a member of the European Union.⁸³ The Lugano Convention's provisions for parallel litigation are found in Articles 21 and 22, numbered and worded identically to those in the Brussels Convention.⁸⁴

77. See Proposed Hague Convention on the Recognition and Enforcement of Foreign Judgments, Interim Text from Commission II of the First Part of the Diplomatic Conference (June 6–20, 2001); see also Edward C.Y. Lau, *Update on the Hague Convention on the Recognition and Enforcement of Foreign Judgments*, 6 ANN. SURV. OF INT'L & COMP. L. 13, 21 (2000).

78. 1988 O.J. (L 319) 9, reprinted in 28 I.L.M. 620 (1989) [hereinafter Lugano Convention].

79. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, and Switzerland.

80. Lugano Convention, *supra* note 78, art. 54B(1).

81. *Id.* art. 54B(2)(a).

82. *Id.* art. 54B(2)(b).

83. *Id.* art. 54B(2)(c).

84. *Id.* arts. 21–22; Brussels Convention, *supra* note 19, arts. 21–22.

3. The European Union Insolvency Convention

The European Union Convention on Insolvency Proceedings⁸⁵ briefly addresses parallel litigation in Article 15, providing only that the “effects of insolvency proceedings on a lawsuit pending concerning an asset or right of which the debtor has been divested shall be governed solely by the law of the Contracting State in which that lawsuit is pending.”⁸⁶ Thus, the Convention applies only to conflicts created by insolvency stays within the EU jurisdictions. Presumably, the Brussels Convention would govern the parallel litigation issues.

B. Proposals from the United States

1. The Uniform Interstate and International Procedure Act

The Uniform Interstate and International Procedure Act⁸⁷ is a model act for adoption by states in the United States, directed at resolving jurisdictional conflicts in state court actions involving interstate and international incidents.⁸⁸ It addresses personal jurisdiction, service of process, the taking of depositions outside the state for use in domestic litigation, determination of foreign law, and proof of domestic and foreign records, but not parallel litigation.⁸⁹ It does, however, permit jurisdiction to be declined by stay or dismissed based on a claim that the forum is inconvenient.⁹⁰

2. The Uniform Transfer of Litigation Act

The Uniform Transfer of Litigation Act⁹¹ is another model act from the Uniform Law Commissioners that has yet to be adopted by any state. It is designed to replace *forum non conveniens*—which involves an action’s dismissal and refileing—with something akin to nationwide venue transfer, much like the federal inconvenient forum process under Section 1404(a) of Title 28 of the U.S. Code.⁹² The stated reasons for transfer are (1) to serve the fair, effective, and efficient administration of justice and (2) the convenience of the parties and witnesses.⁹³ The Uniform Transfer of Litigation Act lacks any express discussion of parallel litigation, but could be used to transfer and consolidate related actions.

85. Convention on Insolvency Proceedings, Nov. 23, 1995, 35 I.L.M. 1223.

86. *Id.* art. 15.

87. UNIF. INTERSTATE AND INT’L PROCEDURE ACT, 13 U.L.A. 355 (1968). This act was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1962. It has been adopted in Arkansas, ARK. CODE ANN. §§ 16-4-101–16-4-108 (Michie 1999); District of Columbia, D.C. CODE ANN. §§ 13-401–13-434 (1981); Massachusetts, MASS. GEN. LAWS ANN. ch. 223A, §§ 1–14 (West 2000); Michigan, MICH. COMP. LAWS ANN. §§ 600.1852, 600.2114a, 600.2118a (West 1996); Pennsylvania, 42 PA. CONS. STAT. ANN. §§ 5321–5329 (West 1981); Virgin Islands, 5 V.I. CODE ANN. §§ 4901–4943 (1997); and adopted in part in New York and Oklahoma. See 13 U.L.A. 356 (General Statutory Notes).

88. See 13 U.L.A. 355 (Prefatory Note).

89. *Id.*

90. UNIF. INTERSTATE AND INT’L PROCEDURE ACT § 1.05, 13 U.L.A. 377 (1968) (providing that “[w]hen the court finds that in the interest of substantial justice an action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just”).

91. UNIF. TRANSFER OF LITIG. ACT, 14 U.L.A. 222 (2001).

92. 28 U.S.C.A. § 1404(a) (1994).

93. UNIF. TRANSFER OF LITIG. ACT § 104, 14 U.L.A. 228 (2001).

3. The Conflict of Jurisdiction Model Act

The Conflict of Jurisdiction Model Act was drafted by the American Bar Association's Section on International Law and Practice, and was adopted by Connecticut in 1991.⁹⁴ Its purpose is to encourage early determination of the adjudicating forum and to inhibit vexatious and/or parallel litigation.⁹⁵ These purposes are accomplished by blocking judgment recognition; that is, local courts must refuse recognition of a foreign judgment from a parallel action unless the local forum has determined the other forum to be the proper adjudicating forum.⁹⁶

The Act applies to cases where "two or more proceedings arising out of the same transaction or occurrence were pending," and requires a party wishing to enforce a resulting judgment to make timely application (1) to the first known court of competent jurisdiction, (2) to the adjudicating forum after its selection, or (3) "to any court of competent jurisdiction if the foregoing courts were not courts of competent jurisdiction."⁹⁷ Timeliness must be "within six months of reasonable notice of two such proceedings, or of reasonable notice of the selection of an adjudicating forum."⁹⁸ Judgment by an "adjudicating forum" is binding on any person served with notice of an application to designate, and courts of an adopting state then are required to enforce the judgment according to ordinary rules for enforcement of judgments.⁹⁹

The adjudicating forum is selected by application of a multi-factor test resembling that for common law *forum non conveniens*, but more detailed.¹⁰⁰ These factors may be established by any evidence admissible in the adjudicating forum or other competent forum, with a suggested list including both factual and legal evidence.¹⁰¹ Once the adjudicating forum is determined, its selection "shall be accorded presumptive validity in this State if the written decision determining the adjudicating forum evaluated the substance of the factors set forth in Section 2(c)."¹⁰²

The Conflict of Jurisdiction Model Act differs from other existing standards and proposals by limiting itself to (1) a test for designating the proper forum, and (2) sanctioning non-complying parties by denying recognition, or full faith and credit, to the judgment. The multi-factor test for determining the appropriate forum goes well beyond most other tests. While it does not expressly refer to reactive and repetitive litigation, or to declaratory judgments, it does consider "the nature and extent of litigation that has proceeded over the dispute,"¹⁰³ which presumably could allow a court to decline jurisdiction over a first-filed declaratory action.

The Model Act also does not clearly specify whether it is intended for application to related-but-not-identical litigation. Instead, its scope is merely "cases where two or more

94. CONN. GEN. STAT. ANN. §§ 50a-200–50a-203 (West 1958). For the Model Act's text, see The Conflict of Jurisdiction Model Act, reprinted in Louise Ellen Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 INT'L LAW. 21 app. 1 at 56 (1992).

95. This statement was deleted in the Connecticut statute, but appears in the Model Act in Section 1, titled "Declaration of Public Policy," which further notes the Model Act's function of avoiding the enforcement of judgments obtained in vexatious litigation, parallel proceedings, and litigation in an inconvenient forum. See Teitz, *supra* note 94, at 56.

96. Conflict of Jurisdiction Model Act § 2(a).

97. *Id.*

98. *Id.* § 2(b).

99. *Id.* § 2(c).

100. *Id.* § 3 (including fourteen factors somewhat too detailed to restate here).

101. *Id.* § 4.

102. Conflict of Jurisdiction Model Act § 2(c).

103. *Id.* § 3(m).

proceedings aris[e] out of the same transaction or occurrence”¹⁰⁴ This broad wording is both good and bad to litigants in parallel actions. The Model Act’s scope is broad, both as to the degree of relatedness and the detail of the balancing test used to determine the proper forum.¹⁰⁵ The only rigid feature is the requirement that parties apply for the determination of the proper adjudicating forum. That flexibility allows a variety of parties to attack the first forum, but the same flexibility makes results difficult to predict. On the other hand, a litigant who failed to invoke the Model Act would risk unenforceability in any other forum where the Act applied and a related case was pending, provided the opponent succeeded in establishing that the second forum satisfied the balancing test. As with many balancing tests, this one would work well in the more obvious cases and produce confusion in the closer ones. In any event, it is a well-thought-out formulation for a difficult problem and one of the earlier proposals.¹⁰⁶

4. The Complex Litigation Proposals in the United States

Two projects in the United States have addressed the procedural problems arising in complex litigation. Both discuss the transfer and consolidation of related cases filed in federal courts, or in state and federal courts, and both are aimed at developing statutory schemes such as the Multi-District Litigation Statute, found in Section 1407 of Title 28 of the U.S. Code, which allows for the transfer of complex cases in federal courts for pretrial purposes.

Neither proposes rules for related cases involving jurisdictions outside of the United States. However, these remedies could be used in complex parallel disputes involving multiple courts in the United States and one or more foreign forums. The domestic cases could be transferred and consolidated, and the foreign case(s) could then be (1) ignored (that is, allowed to continue to judgment), (2) stayed or dismissed by the foreign court, or (3) enjoined by the U.S. court. Having stated this, it must also be noted that these proposals are not intended to be used in complex parallel disputes, and doing so would, to some extent, violate their balancing tests. The existence of foreign litigation might dissuade a U.S. court from applying these remedies.

To the extent that these proposals are not applicable to international litigation, they are nonetheless examples of multi-jurisdictional remedies for complex parallel litigation. They are also indicative of the U.S. approach to remedies for parallel litigation; that is, the proposals are structured toward case-by-case analysis of (1) whether the cases are sufficiently related, and (2) what ought to be done about it. This approach contrasts with the general European approach, which is more or less a structured approach that dictates a specific remedy, such as retaining the first-filed case and dismissing the others.

a. *The Federal Judicial Center’s Manual for Complex Litigation (Third)*

The *Manual for Complex Litigation (Third)*¹⁰⁷ is limited to “related cases” within the United States that involve at least one federal court. This includes intrafederal parallel

104. *Id.* § 2(a).

105. *Id.* § 3.

106. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 215–16 n.12 (1993) [hereinafter ALI COMPLEX LITIGATION PROJECT]. See generally Teitz, *supra* note 94, for a general discussion by one of the Model Act’s authors.

107. MANUAL FOR COMPLEX LITIGATION (THIRD) (1995) [hereinafter COMPLEX LITIGATION MANUAL 3d].

litigation and state-federal parallel litigation, but not intra-state, interstate, or international parallel litigation.¹⁰⁸ Moreover, the manual does not focus on all parallel litigation involving a federal court, but merely on “complex cases,” that is, litigation involving “one or more related cases which present unusual problems . . . and require extraordinary treatment”¹⁰⁹ The manual deals only in passing with remedies for parallel litigation and focuses, instead, directly on management aspects of truly complex cases such as class actions.¹¹⁰

The manual does not define “related litigation,” but provides that related cases may be identified “on the face of the Complaint”;¹¹¹ this provision in the manual is identical to the requirement in the ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure.¹¹² The manual further provides that “related cases pending or which may be later filed in the same court, whether or not in the same division, should be assigned at least initially to the same judge,”¹¹³ and encourages consolidation of cases not filed in the same court by use of Section 1404(a) or Section 1406 of Title 28 of the U.S. Code or, if those do not apply, under the multidistrict transfer statute, located in Section 1407, for pretrial purposes only.¹¹⁴ For related cases filed in state court, the manual recommends removal and consolidation in a single court or dismissal (voluntary or *forum non conveniens*) and refile in a single federal court.¹¹⁵

Where consolidation in one federal court is not possible (for personal jurisdiction or venue reasons), the manual recommends “coordination” of the cases, whether they are all in federal court¹¹⁶ or in federal and state courts.¹¹⁷

b. The ALI's Complex Litigation Project

The American Law Institute's project on complex litigation¹¹⁸ examined the same issues as the Federal Judicial Center's work in its *Complex Litigation Manual 3d* but with broadened scope that included interstate transfer and consolidation. Both projects focus on the unusual problems presented in truly complex cases, defined here as “the phenomenon of multiparty, multiforum lawsuits.”¹¹⁹ The ALI work avoids duplication of several areas covered in the *Complex Litigation Manual 3d*¹²⁰ and limits its coverage to the remedies of transfer and consolidation.¹²¹ It exceeds the manual's coverage, however, in examining

108. *See id.* § 10.2, at 5.

109. *Id.* at 3 (quoting from the first *Complex Litigation Manual 3d*, and noting the second edition's abandonment of that description in favor of a functional one highlighting the need in truly complex cases for judicial management and coordination between courts).

110. *Id.* §§ 10.1–10.2, at 3–5.

111. *Id.* § 20.123, at 13.

112. *See infra* note 181.

113. COMPLEX LITIGATION MANUAL 3d, *supra* note 107, at 13.

114. *Id.* § 20.123, at 13–14.

115. *Id.* at 14.

116. *Id.* § 31.14, at 256.

117. *Id.* § 31.31, at 259.

118. ALI COMPLEX LITIGATION PROJECT, *supra* note 106.

119. *Id.* at 3.

120. These areas include “scope and management of discovery, organization of counsel in multiparty actions, trial scheduling, preparation and management, and the administration of certain ‘complex’ forms of relief.” *Id.*

121. ALI COMPLEX LITIGATION PROJECT, *supra* note 106, at 1–3.

transfer and consolidation not only in the intrafederal¹²² and state-federal contexts,¹²³ but also in the interstate context within an interstate compact.¹²⁴

As with other parallel litigation laws or proposals, the central feature of the ALI project's approach to transfer and consolidation is defining "related litigation." The definition varies here according to the setting. For intrafederal transfers, the actions are sufficiently related if they "involve one or more common questions of fact and transfer and consolidation will promote the just, efficient, and fair conduct of the actions."¹²⁵ This is termed "minimal commonality" and is obviously designed to promote intrafederal transfer.¹²⁶

For federal case transfers to state courts, actions are sufficiently related if "the events giving rise to the controversy are centered in a single state and a significant portion of the existing litigation is lodged in the courts of that state."¹²⁷ These criteria do not so much define the relatedness of the cases, but set the terms for using a state court for pre-trial or trial consolidation of complex cases. This process of federal-to-state transfer is not currently possible by direct action but is possible by filing a parallel case in state court and staying or dismissing the federal action. Because the proposals in Section 4.01 have not been implemented, it is unclear whether the inexact definition of relatedness is truly feasible.

For interstate consolidation, actions are sufficiently related if (1) "common questions of fact predominate" and (2) "transfer and consolidation will substantially promote the just, efficient, and fair conduct of the actions and is superior to their separate adjudication."¹²⁸ Again, this definition differs slightly from the others, setting a higher threshold that must be cleared to justify interstate transfer. This, too, is an experimental definition with no track record to verify its effectiveness as a viable solution. The ALI project also sets forth the existing Uniform Transfer of Litigation Act in its Appendix C; it is discussed elsewhere in this article.¹²⁹

Finally, for consolidation of state and federal cases in one federal court, the ALI project proposes an amendment to federal removal jurisdiction that would allow removal of cases that "arise from the same transaction, occurrence, or series of transactions or occurrences as an action pending in the federal court, and share a common question of fact with that action."¹³⁰ This expansion of removal jurisdiction raises constitutional concerns, which the ALI addresses by adding a discretionary factor providing for removal of common issues, related claims, or the entire claim.¹³¹ Moreover, in order to make this proposal conform with Article III of the Constitution,¹³² the ALI notes the function of the current supplemental jurisdiction statute and proposes a conforming amendment that would expand supplemental jurisdiction beyond the requirement of complete diversity.¹³³ Within the state-

122. *Id.* at 21–163.

123. *Id.* at 165–216 (discussing transfer from federal to state court), 217 (discussing removal from state court to federal court).

124. *See generally id.* at 165–216; *id.* § 4.02, at 201; *id.* app. B, at 559–674.

125. ALI COMPLEX LITIGATION PROJECT, *supra* note 106, § 3.01(a), at 37.

126. *Id.* § 3.01 cmt. c at 42–44; *see also id.* § 3.01 cmt. c, at 48–49 nn.6–11.

127. *Id.* § 4.01(a)(1), at 177; *see also id.* § 4.01 cmt. e, at 186–91.

128. *Id.* at Appendix B, proposed Uniform Complex Litigation Act, at 564–65, § 1(a); *see also id.* cmt. c, at 568–75.

129. *See supra* notes 91–93 and accompanying text.

130. ALI COMPLEX LITIGATION PROJECT, *supra* note 106, § 5.01(a), at 220–21; *see also id.* § 5.01 cmt. b, at 225–27.

131. *Id.* § 5.01(c), at 221.

132. *Id.* § 5.01 cmt. d, at 235.

133. *Id.* § 5.03 cmt. a, at 256–60.

to-federal consolidation proposal, the ALI project has a limited discussion of antisuit injunctions as a means of stopping related litigation that escaped transfer and consolidation.¹³⁴ Here, the concept of “related litigation” is worded as “transactionally related proceedings.”¹³⁵ Further discussion calls for a decision based on the presence of common issues, acknowledging that the decision cannot be “reduced to some formulaic determination of minimum commonality” but must instead be determined on a case-by-case basis according to which issues have the “level of commonality” that warrants consolidation.¹³⁶ This approach—a seemingly circular definition of related litigation—is typical of the U.S. view of parallel litigation generally and differs sharply from the European approach of formulaic determinations; it is perhaps the hallmark distinction between the two systems. Labeling this a circular definition is not this author’s condemnation of the case-by-case approach. To the contrary, this article proposes that the European system goes a bit too far in attempting precise categorizations of disputes incapable of such pigeonholing.

5. The ALI International Jurisdiction and Judgments Project

The ALI International Jurisdiction and Judgments Project¹³⁷ has a limited focus on the recognition and enforcement of foreign judgments, and addresses jurisdictional rules only as a basis for non-recognition of a judgment.¹³⁸ The Project’s stated purpose is the drafting of a proposed federal statute governing the recognition and enforcement of foreign judgments,¹³⁹ which currently are done in federal courts under state law.¹⁴⁰

The current draft contains a provision for declining jurisdiction when another action is pending. The proposed remedy is limited to “identical actions,” defined as those actions in the United States involving the same parties and the same subject matter as an action pending in the court of a foreign country.¹⁴¹ The identical action remedy provides that the U.S. court shall stay, or where appropriate, dismiss, the action if (1) the foreign action is “under jurisdictional principles not prohibited under this statute [sic],”¹⁴² and (2) “the foreign court . . . may be expected to render a judgment entitled to recognition under this Act [sic].”¹⁴³ Then the proposal provides three discretionary exceptions to granting stays or dismissals of parallel second-filed actions: (1) the foreign court’s jurisdiction was invoked in order to frustrate the exercise of jurisdiction of the court in the United States, (2) the foreign proceedings are vexatious, or (3) there are other compelling reasons for the U.S. court, rather than the foreign court, to resolve the controversy.¹⁴⁴

The commentary following this section of the International Jurisdiction and Judgments Project notes the close relationship of grounds for declining jurisdiction—under either *lis pendens* or *forum non conveniens*—to the grounds for declining the recognition and

134. *Id.* § 5.04, at 263.

135. ALI COMPLEX LITIGATION PROJECT, *supra* note 106, § 5.04(a), at 263.

136. *Id.* cmt. d, at 272; *see also* § 5.04 cmt. c, at 270-71 nn.8-9.

137. AMERICAN LAW INSTITUTE, INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT (Council Draft No. 1, Nov. 20, 2001) [hereinafter INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT].

138. *Id.* §§ 2, 6.

139. *Id.* at i.

140. *Id.* at iii-v (noting that *Hilton v. Guyot*, 159 U.S. 113 (1895), is the only federal pronouncement on the enforceability of foreign judgments, there being no applicable treaties or statutes). *Hilton* invoked comity as the guiding standard, but offered that “[t]he most certain guide . . . is a treaty or statute.” 159 U.S. at 163.

141. INTERNATIONAL JURISDICTION AND JUDGMENT PROJECT § 8(a).

142. *Id.* § 8(a)(i).

143. *Id.* § 8(a)(ii).

144. *Id.* § 8(b).

enforcement of foreign judgments. It further notes the alternatives of (1) addressing parallel litigation at the judgment enforcement stage, as proposed by the Conflict of Jurisdiction Model Act,¹⁴⁵ or (2) at the jurisdictional stage by *lis pendens* and *forum non conveniens*, as proposed here in the International Jurisdiction and Judgments Project.¹⁴⁶ In considering these jurisdictional-stage remedies, the commentary notes that the instant ALI project disfavors but does not disallow antisuit injunctions, thereby leaving the decision to “developing jurisprudence.”¹⁴⁷ For the two available remedies—*lis pendens* and *forum non conveniens*—the commentary notes that the starting point is the first-filed rule, citing its use in the Brussels and Lugano Conventions.¹⁴⁸ But unlike the Brussels and Lugano Conventions, the ALI proposal provides three exceptions, as noted above. And unlike the London-Leuven Principles, the ALI proposal provides judicial discretion to favor the second-filed U.S. action, rather than following a complicated formula for establishing priorities for parallel actions.¹⁴⁹

Although this ALI project makes important distinctions for second-filed actions that should be retained, it offers no express reference to or commentary discussion of the difference between reactive and repetitive litigation. Repetitive litigation, with the same plaintiff filing similar or identical actions in multiple forums, should be presumptively disallowed unless the two-fold plaintiff can justify the duplication. However, its omission here may be intended under an approach that would leave that factor (repetitive litigation by plaintiff), and others, to the court’s inherent discretion. A more troubling omission is the lack of any definition of *lis pendens*, which commonly means identical actions, with the same parties and claims. In fact, the ALI project expressly defines its parallel litigation focus as “a proceeding including the same parties and the same subject matter.”¹⁵⁰ Nonetheless, the commentary refers to *Posner v. Essex Insurance Co., Ltd.*,¹⁵¹ in which the cases apparently were not identical, but merely had “significantly common issues and parties.”¹⁵² One solution is to broaden the scope of *lis pendens* to significantly related actions, distinguishing that from merely related actions that might be issue preclusive but not claim preclusive.

6. The ALI Transnational Insolvency Project (Tentative Draft, April 14, 2000)

The ALI Transnational Insolvency Project¹⁵³ is limited to reconciling conflicts in bankruptcy and other insolvency actions in NAFTA member states—Canada, Mexico, and the United States. Specifically, Procedural Principle 5 (Reconciliation of Stays) provides that “[w]here there are parallel proceedings, each NAFTA court should attempt to minimize conflict between bankruptcy stays”;¹⁵⁴ and “[w]here there are parallel proceedings and a main proceeding in a NAFTA country has been recognized in a second NAFTA country, any moratorium or similar order issued in the recognizing country shall apply to conduct in

145. See *supra* Section III.B.3, notes 94–106 and accompanying text.

146. INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT, *supra* note 137, § 8 cmt. (a).

147. *Id.* § 8 cmt. (d).

148. *Id.* § 8 cmt. (c).

149. *Id.* This sentence reflects the Commentary’s view, and not necessarily the author’s. The benefit of the London-Leuven Principles, in setting out the criteria for favoring a second-seized action, is to require the court to frame its decision around specific factors, while the ALI proposal provides a more open discretion. It is unclear to this author which method is better.

150. *Id.* § 8(a).

151. *Posner v. Essex Ins. Co.*, 178 F.3d 1209 (11th Cir. 1999).

152. INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT, *supra* note 137, § 8 cmt. (b).

153. AMERICAN LAW INSTITUTE, TRANSNATIONAL INSOLVENCY PROJECT (Tentative Draft Apr. 14, 2000).

154. *Id.* Procedural Principle 5(A), at 67.

a third country only insofar as the conduct is not within the jurisdiction of the main proceeding.”¹⁵⁵

Additionally, Procedural Principle 6 (Abusive Filings) provides:

When a non-main proceeding is filed in a NAFTA country and the court in that country determines that country has little interest in its outcome as compared to the country that is the center of the debtor’s main interest, the court should i) dismiss the bankruptcy case, if dismissal is permitted under its law and no legitimate interests would be damaged by dismissal or ii) ensure that the bankruptcy stay arising from the non-main proceeding has no effect outside that country.¹⁵⁶

Because insolvency actions are, for the most part, *in rem* proceedings, the ALI Transnational Insolvency Project’s proposal must be understood as applying to a limited and special area of parallel litigation—*in rem* actions—for which exclusive jurisdiction ordinarily exists in the first court to secure jurisdiction over the property. As such, these proposals are consistent with general principles of parallel litigation and are, although well-drafted and no doubt necessary, nonetheless uncontroversial.¹⁵⁷

C. *Proposals from International Groups*

1. The Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Proposed)

The proposed Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters¹⁵⁸ addresses conflicts in both personal and subject matter jurisdiction and judgments in civil and commercial matters.¹⁵⁹ It provides the following for parallel litigation.

a. *Lis Pendens*

Article 21 is addressed to *lis pendens*, for which it uses the Brussels Convention definition of same parties and same cause of action, with the qualifier “irrespective of the relief sought.”¹⁶⁰ The Hague Convention gives priority to the first-filed case “if the court first seised has jurisdiction . . . and is expected to render a judgment capable of being

155. *Id.* Procedural Principle 5(B), at 67.

156. *Id.* Procedural Principle 6, at 69.

157. Compare to the European Union’s Convention on Insolvency Proceedings, *supra* note 85.

158. Summary of the outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference (Interim Text, June 6–22, 2001), <http://www.hcch.net/e/workprog/jdgm.html> [hereinafter Hague Convention].

159. The term “civil and commercial matters” is defined somewhat like the same term in the Brussels and Lugano Conventions, but with more exclusions. *Id.* art. 1.1. Article 1.1 excludes “revenue, customs or other administrative matters.” Article 1.2 further excludes status and capacity, maintenance obligations, matrimonial property and related rights, wills and succession, insolvency, social security, arbitration matters, and admiralty and maritime matters. Additionally, this article contains proposed exclusions for antitrust and competition claims, nuclear liability, provisional and protective matters, *in rem* claims in immovable property, and the validity or nullity of legal entities. *Id.* art. 1.2.

160. *Id.* art. 21.1.

recognised under the [Hague] Convention in the State of the court second seized”¹⁶¹ The second-seized court must stay proceedings until presented with a judgment from the first-seized court that complies with the Convention’s recognition or enforcement provisions, whereupon the second court dismisses its action.¹⁶²

Exceptions are where (1) the first case is a declaratory judgment action;¹⁶³ (2) the second-seized court is indicated in an inconvenient forum analysis under Article 22;¹⁶⁴ (3) the second-filed case was filed pursuant to the parties’ choice of forum agreement;¹⁶⁵ (4) a later-filed case is in a court having exclusive jurisdiction;¹⁶⁶ or (5) the first court fails to proceed within a reasonable time.¹⁶⁷

b. *Related Litigation*

Related litigation is not expressly addressed, but could be included in a *forum non conveniens* analysis under Article 22.¹⁶⁸

c. *Choice of Forum*

Article 4 requires courts to honor parties’ choice of forum agreements that presumptively create exclusive jurisdiction unless the parties agree otherwise.¹⁶⁹ Article 4 also defines validity as to form,¹⁷⁰ authorizes written post-contract consent to a different forum,¹⁷¹ and uses a *renvoi* choice-of-law rule by declaring that the law governing forum clauses is that of the forum state’s choice-of-law rule.¹⁷²

d. *Inconvenient Forum*

Article 22 provides for discretionary stays or dismissals on inconvenient forum grounds,¹⁷³ limited to exceptional circumstances and listing party convenience based on residence, the location of the evidence and the witnesses, the various limitation or prescription periods, and judgment enforcement considerations.¹⁷⁴ The issue must be raised no later than the first defense on the merits¹⁷⁵ and does not apply where jurisdiction is based solely on national law and not on the Hague Convention principles.¹⁷⁶

161. *Id.*

162. *Id.* art. 21.2.

163. Hague Convention, *supra* note 158, art. 21.6 (reversing the first-filed rule and requiring the first-seized court to stay proceedings until the second-seized court renders a judgment enforceable under the Convention).

164. *Id.* art. 21.7.

165. *Id.* art. 21.1 (cross-referencing to the forum selection rules in Article 4).

166. *Id.* art. 21.1.

167. *Id.* art. 21.3.

168. *See infra* notes 174–76 and accompanying text.

169. Hague Convention, *supra* note 158, art. 4.1.

170. *Id.* art. 4.2.

171. *Id.* art. 4.3.

172. *Id.* art. 4.4.

173. *Id.* art. 22.1.

174. *Id.* art. 22.2. Interestingly, these factors apparently do not include the public interest factors (the interests of the forum states and other affected states) found in common law *forum non conveniens*.

175. Hague Convention, *supra* note 158, art. 22.1.

176. *Id.* art. 22.6.

e. *Antisuit Injunctions*

The Hague Convention does not provide for antisuit injunctions. Similar to the civil law remedies and the Brussels and Lugano Conventions, the Hague Convention's reference to provisional measures does not embrace antisuit injunctions.¹⁷⁷ Provisional measures are limited to other injunctive relief such as freezing assets.¹⁷⁸ However, the Convention is ambiguous as to whether it intends to bar antisuit injunctions as a parallel litigation remedy, or merely defer to local law. This could result in a signatory jurisdiction that allows for antisuit injunctions, such as the United States, applying them in tandem with the Convention.¹⁷⁹

2. The ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure

The ALI and UNIDROIT are jointly drafting principles and rules for certain types of international litigation, entitled the Principles and Rules of Transnational Civil Procedure,¹⁸⁰ and divided (as of Council Draft No. 1) into twenty-eight broadly stated principles and thirty-nine more precise rules. Although the topics span litigation from service of process through appeal and judgment enforcement, reference to parallel litigation was not added until the current draft. Council Draft No. 1 adds Principle 25 "Lis Pendens and Res Judicata," which requires in pertinent part that the identity of claims and parties for *lis pendens* purposes be determined by the pleadings,¹⁸¹ but does not dictate any application of parallel litigation remedies. At this time, there is no corresponding rule referring to *lis pendens* or any other aspect of parallel litigation. The current draft also indirectly refers to parallel litigation in the provisional measures section, providing that "[i]n accordance with forum law and subject to applicable international conventions, the court may issue an injunction to restrain or require conduct of any person who is subject to the court's authority where necessary to preserve the status quo or to prevent irreparable injury pending the litigation."¹⁸² This section presumably authorizes an antisuit injunction in circumstances limited to these criteria. The guiding standard, and the extent of remedy, is a "principle of proportionality."¹⁸³

3. The London-Leuven Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters

The most thorough and perhaps best-thought-out proposal comes from the International Law Association's Principles on Declining and Referring Jurisdiction in Civil

177. Telephone Interview with Stephen Burbank, a member of the Study Group on Judgment of the U.S. State Department Advisory Committee on International Law, which advises the U.S. delegation to the Hague regarding this proposed convention (Dec. 10, 2001); see also Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 225-26 n.107 (2001) [hereinafter Burbank, *Jurisdictional Equilibration*].

178. See Hague Convention, *supra* note 158, art. 13.

179. See Burbank, *Jurisdictional Equilibration*, *supra* note 177, at 226 n.107.

180. AMERICAN LAW INSTITUTE, ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE (Council Draft No. 1, Nov. 16, 2001), <http://www.ali.org/ali/unidroittrans.htm>.

181. *Id.* princ. 25.1 ("In applying the rules of *lis pendens* to a proceeding conducted under these principles, the scope of the proceeding should be determined by the claims and defenses in the parties' pleadings, including amendments.").

182. *Id.* princ. 17.1.

183. *Id.*

and Commercial Matters,¹⁸⁴ known as the “London-Leuven Principles” for their drafting sites. Focused solely on parallel litigation, the London-Leuven Principles strive to provide a thorough model law for international application.

Sections 1.1 through 1.2 define the London-Leuven Principles’ scope as stating the circumstances for declining original jurisdiction by suspension (stay) or termination (dismissal) and under specified exceptional circumstances, referring the matter to a court in another state.¹⁸⁵ The implication is that these are exclusive grounds for declining jurisdiction. The London-Leuven Principles stop short of determining rules of original jurisdiction, which are a matter of national law with oversight by international law.¹⁸⁶

The remaining principles set out in detail a proposal for dealing with parallel litigation. Because of the proposal’s thoroughness, it is paraphrased below in detail.

a. Summary of the London-Leuven Principles

Principle 2: Preliminary Matters

- 2.1 *Implementing the Principles*: The burden is on party seeking use of convention to raise a motion in the originating court. The court may not act *sua sponte*.¹⁸⁷
- 2.2 *Timeliness*: A party must make application at outset of proceedings, and must be determined by the court on summary proceedings at the earliest opportunity, and in any event before defendant is required to plead on the merits.¹⁸⁸
- 2.3 *Appeal* is made under national law and must be done expeditiously.¹⁸⁹

Principle 3: Jurisdiction-Selecting Clauses

- 3.1 Prorogation clauses: The parties’ exclusive choice must be honored, and the court may not decline.¹⁹⁰
- 3.2 Derogation clauses: If parties have chosen another forum as exclusive, then the originating court shall either terminate on the grounds of no jurisdiction, or as the case may be, decline jurisdiction.¹⁹¹
- 3.3 Non-exclusive choices: If the parties’ choice is not exclusive, then the court may hear the case, or may decline under Principle 4.¹⁹²

Principle 4: Declining Jurisdiction

- 4.1 *Lis Pendens*: The London-Leuven Principles define *lis pendens* as “proceedings involving the same parties and the same subject matter,”¹⁹³ and require that courts

184. *London-Leuven Principles*, *supra* note 67.

185. *Id.* princ. 1.1–1.2.

186. *Id.* princ. 1.2.

187. *Id.* princ. 2.1.

188. *Id.* princ. 2.2.

189. *Id.* princ. 2.3.

190. *London-Leuven Principles*, *supra* note 67, princ. 3.1.

191. *Id.* princ. 3.2.

192. *Id.* princ. 3.3.

other than the first-seised stay proceedings until the first-seised court considers the issues of inconvenient forum under Principle 4.3; once that is done, the proper court litigates the case and the other courts dismiss the parallel actions.¹⁹⁴ This means the first-filed (or possibly first-served) action determines which forum will decide where the lawsuit is to be litigated, subject to its discretion to consult with the other courts.

- 4.2 *Related actions* are limited to cases capable of consolidation with a related action in another forum.¹⁹⁵ Unlike identical actions, related actions have no mandatory provisions. Instead, any court (including the first-seised) involved in related actions may choose to address the problem of multiplicity, or may allow the matter to be adjudicated without interference.¹⁹⁶ A court may stay or dismiss the action, but if it does so, it must also refer the action to the other court under the standards stated in Principle 5.¹⁹⁷ Thus, related actions may be declined discretionarily without regard to which was first filed, or to the inconvenient forum factors in Principle 4.3.¹⁹⁸ Presumably, related actions incapable of referral and consolidation under Principle 5 may nonetheless be subjected to the inconvenient forum analysis in Principle 4.3.
- 4.3 *Other Grounds for Referral* is an inconvenient forum provision, calling for referral where another forum is “manifestly more appropriate . . . taking into account the interests of all the parties, without discrimination on the grounds of nationality,”¹⁹⁹ based on the following factors:
- (a) the location and language of the parties, witnesses and evidence;²⁰⁰
 - (b) the balance of advantages of each party afforded by the law, procedure and practice of the respective jurisdictions;²⁰¹
 - (c) the law applicable to the merits;²⁰²
 - (d) in cases under Principle 4.1 [*lis pendens*], the desirability of avoiding multiplicity of proceedings or conflicting judgments having regard to the manner of resort to the respective court’s jurisdiction and the substantive progress of the respective actions;²⁰³
 - (e) the enforceability of any resulting judgments;²⁰⁴
 - (f) the efficient operation of the judicial system of the respective jurisdictions;²⁰⁵ and
 - (g) any terms of referral under Principle 5.3.²⁰⁶

193. *Id.* princ. 4.1.

194. *Id.*

195. Note that under London-Leuven Principles, “related action” is not defined other than as one capable of consolidation. The Brussels and Lugano Conventions define “related” as “so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgement resulting from separate proceedings.” See Brussels Convention, *supra* note 19, art. 22; Lugano Convention, *supra* note 78, art. 22.

196. *London-Leuven Principles*, *supra* note 67, princs. 4.1–4.2.

197. *Id.* princ. 4.2.

198. *Id.*

199. *Id.* princ. 4.3.

200. *Id.* princ. 4.3(a).

201. *Id.* princ. 4.3(b).

202. *London-Leuven Principles*, *supra* note 67, princ. 4.3(c).

203. *Id.* princ. 4.3(d).

204. *Id.* princ. 4.3(e).

205. *Id.* princ. 4.3(f).

206. *Id.* princ. 4.3(g).

Principle 5: Referral

- 5.1 For referrals under 4.3 (inconvenient forum), the applicant must show the referring court that the alternative court (1) “has and will exercise jurisdiction”²⁰⁷ and (2) “is likely to render judgment on the merits within a reasonable time.”²⁰⁸
- 5.2 Courts may communicate directly in considering these applications for referral. The court-to-court communications may be by party application or *sua sponte*, with the latter requiring notice to all parties.²⁰⁹ The court communications must be in writing or otherwise on the record and must do so in a language acceptable to the alternative court.²¹⁰
- 5.3 Parties and the referring court are encouraged to consider the terms to be drafted in the referral order, including:
 - (a) “applicant’s submission to jurisdiction of the alternative court”;²¹¹
 - (b) “terms regarding applicants raising the defenses of limitations or other prescription of the action in the alternative court.”²¹²
- 5.4 Except where international convention provides otherwise, the originating court, if deciding to refer under 5.1, shall either (1) suspend jurisdiction until the jurisdiction of the alternative court is established; or (2) “where national law provides, terminate its proceedings.”²¹³

Procedure in the Alternative Court

- 5.5 The alternative court must decide questions of its own jurisdiction at the outset, and in any event before defendant is required to plead on the merits.²¹⁴
- 5.6 Applicants must transmit the referral order to the alternative court with the originating court’s reasons.²¹⁵
- 5.7 Applicants must inform the originating court of the alternative court’s decision regarding acceptance of the case.²¹⁶
- 5.8 If the alternative court declines jurisdiction for any reason, the originating court may resume jurisdiction.²¹⁷

207. This presumably means that the alternative court will not dismiss for lack of personal jurisdiction, venue, failure to state a claim, similar to common law practice under *forum non conveniens*. See George, *supra* note 1, at 942–50.

208. *London-Leuven Principles*, *supra* note 67, princ. 5.1(b).

209. *Id.* princ. 5.2.

210. *Id.*

211. *Id.* princ. 5.3(a).

212. *Id.* princ. 5.3(b).

213. *Id.* princ. 5.4.

214. *London-Leuven Principles*, *supra* note 67, princ. 5.5.

215. *Id.* princ. 5.6.

216. *Id.* princ. 5.7.

217. *Id.* princ. 5.8.

Principle 6: Consequences of Referral

Once the originating or referring court has declined jurisdiction under Principle 3 or Principle 4, the courts of the originating state may not later decline the enforcement of a judgment from the alternative court on the grounds of the alternative court's lack of jurisdiction.²¹⁸

Principle 7: Antisuit Injunctions

- 7.1 Where the states involved are parties to an international convention providing common rules for the exercise of original jurisdiction, no court may issue an antisuit injunction.²¹⁹ Each such court must make the sole determination of (1) its own jurisdiction and (2) questions regarding the application of these principles.²²⁰
- 7.2 Where there is no applicable international convention, a court may not issue antisuit injunctions if it is satisfied that these principles will be applied by the other courts in which identical or related actions are pending.²²¹
- 7.3 Courts may issue an antisuit injunction where an exclusive jurisdiction clause has been breached under the laws applicable in the courts of both states.²²² (Note the implication for choice of law here—that is, it is not the law of both states, but the “law applicable in the courts of both states.”²²³)

b. Differences between London-Leuven and the Brussels and Lugano Conventions

The London-Leuven Principles compare most readily to the Brussels and Lugano Conventions (discussed further in this section as Brussels/Lugano), all three being thorough in their approaches to parallel litigation. There are, however, several differences. First, Brussels/Lugano is limited to signatory states in the European Union and the European Free Trade Association (i.e., in an emerging federal system),²²⁴ while London-Leuven aims at broad international application.²²⁵ The second difference is subject matter: London-Leuven is narrowly drawn to jurisdictional conflicts,²²⁶ while the Brussels/Lugano Conventions address all aspects of jurisdiction from creation to execution.²²⁷

Third, London-Leuven differs regarding first-filed actions—while Brussels/Lugano creates rules and presumptions favoring them,²²⁸ London-Leuven (1) subjects identical actions to *forum non conveniens* analysis²²⁹ and, thus, does not automatically apply the first-filed rule, although it does vest the first-filed court with the power to decide where the case

218. Presumably the originating or referring court could decline judgment enforcement on other grounds.

219. *London-Leuven Principles*, *supra* note 67, princ. 7.1.

220. *Id.*

221. *Id.* princ. 7.2.

222. *Id.* princ. 7.3.

223. *Id.* princ. 7.3.

224. Brussels Convention, *supra* note 19, art. 60; Lugano Convention, *supra* note 78, art. 60.

225. *See generally* *London-Leuven Principles*, *supra* note 67.

226. *Id.* princs. 1.1–1.2.

227. *See generally* Brussels Convention, *supra* note 19; Lugano Convention, *supra* note 78.

228. *See* Brussels Convention, *supra* note 19, arts. 21–23.

229. *London-Leuven Principles*, *supra* note 67, princ. 4.1.

should be litigated;²³⁰ (2) provides no first-filed presumption for related actions;²³¹ and (3) provides that related actions capable of consolidation may be discretionarily referred,²³² and related actions, incapable of consolidation, may apparently be referred under the *forum non conveniens* analysis of Principle 4.3.²³³

Other differences are that London-Leuven: (1) has no provision for resolving multiple exclusive jurisdiction assertions;²³⁴ (2) does not define “related action”;²³⁵ and (3) authorizes limited antisuit injunctions²³⁶ which Brussels/Lugano either does not allow or leaves to local law.²³⁷ Perhaps most notably, London-Leuven does not base parallel litigation remedies on any likelihood of judgment recognition or preclusion between the jurisdictions.

IV. RECOMMENDATIONS

Civil law codes are applied in a deductive, syllogistic manner based on the code section’s wording. This process has the strength of uniformity and predictability, but has the weakness that judges applying codes must characterize the dispute in order to fit into a code provision, resulting sometimes in forced fits.

Common law reasoning, on the other hand, is inductive, flowing from a case’s particular facts to the synthesis of a general rule. Judges are thus allowed greater discretion in fashioning and modifying rules to fit the result that seems just, at least in the judge’s mind. This process developed a set of rules in parallel litigation with nuances addressing a variety of situations. But the weakness in this common law process is that discretion and variety lead to arbitrariness, lack of predictability, and rules that are sometimes canceled out by contradictions.

However well these imperfect systems have worked domestically, they are ill-suited for international litigation, where the disadvantages of parallel litigation are magnified. The current morass of tests in the United States (such as the *Colorado River-Landis*-comity triad for stays and dismissals) needs focusing and the elimination of contradiction. The civil law needs to adopt more flexible rules that account for the great variety of fact settings and litigation tactics.

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 contradiction. Adding the 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.

230. *Id.*

231. *Id.* princ. 4.2 (lacking any reference to first-filed actions).

232. *Id.* In comparison, Article 22 of both the Brussels and Lugano Conventions provides for discretionary dismissal for related actions where consolidation is possible. See Lugano Convention, *supra* note 77, art. 22; Brussels Convention, *supra* note 19, art. 22.

233. The London-Leuven Principles do not expressly state this, but the author infers it from the *forum non conveniens* language in Principle 4.3.

234. See Brussels Convention, *supra* note 19, art. 23.

235. Brussels/Lugano defines “related action” as one where preclusion might apply (Article 22), while London-Leuven merely limits its remedy for related actions to those capable of consolidation (Principle 4.2), which presumably means those within the same jurisdiction. See Lugano Convention, *supra* note 77, art. 22; Brussels Convention, *supra* note 19, art. 22.

236. *London-Leuven Principles*, *supra* note 67, prins. 7.1–7.3.

237. See Brussels Convention, *supra* note 19, art. 24.

Several model laws and treaties already reflect this hybrid approach. As drafters continue their work, the following suggestions are appropriate.

A. Clarify and Standardize the Terminology

1. Identical Actions

Lis pendens rules often expressly apply only to parallel actions involving the same parties and the same claims or causes of action. It is far from clear how “same” they must be to qualify for a stay or dismissal. Must there be a one-to-one identity of parties? Of claims? If so, parallel remedies are easily avoided by creative use of claim and party joinder. One suspects that the degree of requisite sameness depends on the judge, thus giving a degree of discretion both to common law and civil law judges. That is not to say that discretion is bad, since this article recommends its use, as noted below. But discretion calls for guidelines, which should include a test for identifying of actions such as “same transaction or occurrence or series of transactions or occurrences”²³⁸ or “likely to result in claim preclusion for some or all of the claims.”²³⁹ There are no doubt other good ones, but something is needed to focus the court’s assessment on claim identity.

2. Related Actions

Some treaties and model laws do not refer to related actions, and it may not be necessary if the definition of “same claim” is sufficiently broad to cover closely related, but not perfectly identical claims. However, there may be some parallel cases in which claim preclusion will not result, but issue preclusion will, with significant effects on the related litigation that ought to be eligible for a remedy. If remedies for related litigation are not available, a litigant could seek an advantage by filing a related claim in a friendlier and speedier forum, containing an element whose resolution would be dispositive of the first litigation.

3. First-Filed and First-Seized

In the United States, courts sometimes apply a presumption favoring the first-filed suit,²⁴⁰ and this apparently means what it says—the date of filing of the plaintiff’s complaint with the court clerk. There are no known cases in the United States where this is a problem. In Europe however, the Brussels Convention has a somewhat all-but-conclusive rule

238. This is the test for permissive party joinder under Federal Rule of Civil Procedure 20, and more importantly, the most popular of the common law tests for the “same claim” element of claim preclusion. See, e.g., *Saud v. Bank of New York*, 929 F.2d 916, 919 (2d Cir. 1991); see also RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1981); 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE 2D § 4407 (2d ed. 1981). The Conflict of Jurisdiction Model Act uses this test.

239. See Hague Convention, *supra* note 158, art. 2.1; INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT, *supra* note 137, art. 8(a)(ii); § 328 ZPO (F.R.G.), discussed in FAWCETT, *supra* note 7, at 196–97; *Miniera di Fragne Case*, Nov. 26, 1974, 1 Cass. civ. 1975, 491 (Fr.), discussed in FAWCETT, *supra* note 7, at 181; see also RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION 104 (3d ed. 1998), discussed in George, *supra* note 1, at 774. Note that the London-Leuven Principles do not rely on judgment recognition as a basis for parallel remedies.

240. See sources cited *supra* note 21.

favoring the “first-seized” case, and the date that a case is seized depends on local law.²⁴¹ In Sweden, the court is seized of jurisdiction when the case is filed,²⁴² but in Germany, jurisdiction is not seized until the defendant is served.²⁴³ This has significant consequences in races to the courthouse because the Brussels Convention’s *lis pendens* rule favors the “court first seized.”²⁴⁴ The United Kingdom had a similar seized-when-filed rule prior to reinterpretation in 1992.²⁴⁵ When a party sues a defendant in a German court but does not immediately perfect service of process, the defendant can quickly sue in Sweden (assuming the German plaintiff’s amenability), and if the Swedish filing predates the German service of process, the Swedish case prevails and the earlier-filed German case must be dismissed.²⁴⁶ It would seem that countries (especially those in a treaty system) could subordinate their laws to the need for a common definition of the court’s acquisition of jurisdiction. This is done correctly in the proposed Hague Convention.²⁴⁷

4. Stay, Dismiss, and Abate

Abatement is a confusing term in U.S. usage, capable of meaning either a stay (temporary cessation) or a dismissal (permanent cessation). The confusion apparently stems from abatement’s different meanings in law and equity, as Justice Story explained in 1848.²⁴⁸ The easy solution is not to use “abatement” in parallel litigation remedies having interstate or international implications, and instead, use the terms “stay” and “dismiss.”

B. Clarify the Treaty/Model Law’s Relation to Local Law

Some of the treaties and model laws have gaps that create legal uncertainties. Does the absence of reference to *forum non conveniens* or antisuit injunctions mean that those remedies are no longer available in disputes covered by this law, or does the gap merely express deference to local law? This problem has a two-part solution.

1. Promote Uniformity

The treaty or model law should ideally be as self-contained as possible, with minimal deference to local law on crucial issues like when the case is first-seized²⁴⁹ (as discussed in the first recommendation) or the availability of antisuit injunctions.²⁵⁰

241. See Brussels Convention, *supra* note 19, arts. 21–23.

242. Swed. Code of Jud. Proc., ch. 13, s. 4 (discussed in FAWCETT, *supra* note 7, at 34, 376).

243. FAWCETT, *supra* note 7, at 198–99.

244. Brussels Convention, *supra* note 20, art. 21.

245. Dresser UK Ltd. V. Falcongate Ltd. [1992] 1 Q.B. 502, 523 (Bingham L.J.).

246. See Fawcett, *supra* note 7, at 198–99.

247. See Hague Convention, *supra* note 158, art. 21.5.

248. “[I]n the sense of Courts of Equity, an abatement signifies only a present suspension of all proceedings in the suit from the want of proper parties capable of proceeding therein. At the common law, a suit, when abated, is absolutely dead.” JOSEPH STORY, COMMENTARIES ON EQUITY PLEADING § 354 (1848). Many states seized on one or the other meaning of abatement, resulting in different meanings in different states. This is reflected even in Black’s Law Dictionary, which defines “Abatement of action” as “an entire overthrow or destruction of the suit so that it is quashed and ended.” BLACK’S LAW DICTIONARY 4 (6th ed. 1990). However, Black’s defines “Plea in abatement” as something that “merely suspends or postpones its prosecution.” *Id.* at 1151–52.

249. See *supra* Part III.A.1(a), notes 68–71 and accompanying text.

250. See *infra* Part B.2 and note 251.

2. Clarify the Treaty/Model Law's Preemptive Function, or Alternatively, its Deferential Function

Where local law is applicable, one must clarify the treaty/model law's interplay with local law. Confusion has resulted where treaties, such as the Brussels Convention, omit mention of a key component of parallel litigation, such as antisuit injunctions. The omission leads to contrary interpretations that (1) the Convention preempts local law in signatory states and the omitted remedy is no longer available in cases governed by the Convention or (2) the Convention simply failed to address the issue and local law may supplement the Convention. This dispute is currently underway between the United Kingdom and Spain, and no doubt other Brussels signatories that do not authorize antisuit injunctions.²⁵¹

C. Harmonize the Remedies

It may be asking too much of civil law jurisdictions to alter local law to accommodate such drastic remedies as antisuit injunctions, or of common law jurisdictions to forego that remedy. One solution may be to limit the use of such antisuit injunctions to standards similar to those under the United States Anti-Injunction Act, which limits federal courts' enjoining actions in state courts.²⁵² Under the Act, a federal injunction against state-court litigation must satisfy one of three categories: (1) expressly authorized by Congress; (2) necessary to protect *in rem* jurisdiction; or (3) necessary to protect or effectuate a final judgment.²⁵³ Federal law also requires that the injunction satisfy equity standards of irreparable harm and no adequate remedy at law.²⁵⁴ If, for example, the Act were modified to apply to international litigation with the first category eliminated, then antisuit injunctions would be appropriate only to protect *in rem* jurisdiction or to protect an existing, final judgment. Neither of these should be terribly controversial under existing parallel litigation standards, since the first category (*in rem* jurisdiction) is widely accepted as exclusive jurisdiction, and the second category does not involve *pending* parallel litigation. If this limited injunctive remedy were coupled with an effective *lis pendens* rule to stay or dismiss identical or substantially related litigation, and if the *lis pendens* motion had to be filed within thirty to sixty days of the second suit's filing (or amendment that added a substantially related claim), then antisuit injunctions might not be deemed as necessary as they are now in the United States.

In turn, if this were combined with an effective and standardized *forum non conveniens* rule, along with standards for recognizing forum selection clauses (in both prorogation and derogation instances), then we might have a reasonably workable set of remedies for international parallel litigation, as follows:

- Do nothing and accept the preclusion consequences, if any. This approach emphasizes each party's right to litigate in a chosen forum, except in cases that are either identical or so similar that private interests and public policies call for a remedy.

251. See *Turner v. Grovit*, [2002] 1 All E.R. 320 (H.L. 2001), in which the House of Lords ruled that an English court could enjoin a Spanish lawsuit that would have relitigated issues already litigated in an English action. Antisuit injunctions are authorized under English law, *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak*, 1 A.C. 871 (H.L. 1987), but are not mentioned in Spanish law or the Brussels Convention. See *Turner*, [2002] 1 All. E.R. 320.

252. United States Anti-Injunction Act, 28 U.S.C.A. § 2283 (1994).

253. *Id.*

254. See *id.*

- Transfer and consolidate parallel cases. If *forum non conveniens* were more accepted, it could lead to international transfer agreements that would be more effective than the current dismissal model.
- Move for a stay. Where transfer is inappropriate or unavailable, and a dismissal risks parties' rights (or possibly forum state interests), then a stay is appropriate, presumptively of the latter-filed action.
- Move for a dismissal. These are appropriate where (1) another forum has exclusive jurisdiction under the standards imposed by the treaty or model law; or (2) where the plaintiff has filed, either first or second, in bad faith.
- File for an antisuit injunction. If limited to protecting in rem jurisdiction and final judgments, and, with the hope that the other forum would dismiss its case in either circumstance, the controversial antisuit injunction should be almost unnecessary.

D. Use Both Bright-Line and Multifaceted Tests

Use bright-line categories and rules where they produce fair results with reasonable consistency. This recommendation includes *in rem* cases involving movables (and possibly other *in rem* cases), status determinations such as custody and competency, and private actions involving public policy issues such as anti-trust violations. Do not rely on fixed tests in the many areas where they are capable of undermining a party's or the forum's legitimate interests. If a governmental interest analysis is unacceptable in these tests, do not use it, but do not let that eliminate balancing tests altogether. Moreover, consider the aspects of government interest analysis—the factors focused on evidence, convenience, docket burden, and so on are easy to apply. Those based on assessing the forum's policy interests behind its substantive law are more difficult to apply.

E. Consider the Nature of the First-Filed Suit

Parallel litigation rules should distinguish between (1) identical litigation and related litigation; (2) reactive litigation and repetitive litigation (same plaintiff in both); and (3) plaintiff-driven litigation and anticipatory litigation (declaratory judgments). In particular, declaratory actions and repetitive suits are inherently suspect, although even here a rigid test will work unfair results in some cases. A presumption against these actions is more appropriate. Parallel litigation remedies should also take into account special rules that develop around certain subject matter, such as patent litigation.

F. Use Presumptions

Presumptions are appropriate (1) against repetitive suits unless a plaintiff shows a reason; (2) against declaratory suits, especially second-filed declaratory suits; (3) in favor of exclusive forum clauses; (4) in favor of a plaintiff's choice of forum in the absence of a forum clause; and (5) where none of these factors is present, in favor of the first-filed action.

G. *Prefer a Discretionary Standard in Most Instances*

Judicial discretion goes hand-in-hand with presumptions and multi-factored tests.

V. APPENDIX: THE VOCABULARY OF PARALLEL LITIGATION

Terms Descriptive of Parallel Litigation

Parallel Litigation: Two or more lawsuits with sufficient identity of parties and claims that a decision in one is likely to have a preclusive effect on some or all of the claims in the remaining suit. This meaning thus embraces both parallel actions with identical claims and parties, and ones not perfectly identical but strongly related with a significant overlap of parties and claims. Note that the test is one of claim preclusion, but might in some circumstances include issue preclusion for instances where an issue would be dispositive in the other litigation and would result in significant hardship or unfairness.²⁵⁵ This is not to say that a likelihood of issue preclusion is always appropriate grounds for a stay or dismissal. Rather, it should be limited to cases where important issues should be determined in primary litigation (like property title, probate, bankruptcy, etc.) rather than in ancillary litigation. The mere existence of an issue preclusion possibility is not, by itself, a significant factor and should not lead to a treatment of multiple cases as “parallel” unless other factors are present.

Reactive Litigation: A category of parallel litigation in which the defendant in the first action files a separate suit against the plaintiff in the first action, seeking a declaratory judgment of nonliability in the first action²⁵⁶ or asserting a claim that arises out of the same transaction or occurrence as the first suit.²⁵⁷ In the two lawsuits, both plaintiffs may believe their respective choice of forum to be the more appropriate (or essential to success), and both may be reluctant to forego their choice of forum, even where the entire lawsuit may be litigable in one court.

Repetitive Litigation: A category of parallel litigation involving multiple suits on the same claim by the same plaintiff(s) against the same defendant(s).²⁵⁸ This category includes multiple-but-separate actions by class members on the same cause of action raised in the class action, seeking to represent the same or a similar

254. This definition is an alteration of the one in Marcus & Sherman, *supra* note 239, which limits parallel litigation to situations where claim preclusion will necessarily result, while I prefer to use the term for situations in which claim preclusion is likely, since one forum cannot always predict preclusion in another.

256. *Wm. Gluckin & Co. v. Int'l Playtex Corp.*, 407 F.2d 177 (2d Cir. 1969); *Tex. Liquor Control Bd. v. Canyon Creek Land Corp.*, 456 S.W.2d 891, 895 (Tex. 1970).

257. *See, e.g., Mfrs. Hanover Trust Co. v. Kingston Investors Corp.*, 819 S.W.2d 607 (Tex. App.—Houston [1st Dist.] 1991, no writ); *see* Allan D. Vestal, *Reactive Litigation*, 47 IOWA L. REV. 11 (1961).

258. *See, e.g., Semmes v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970); *Foyt v. Championship Auto Racing Teams, Inc.*, 947 F. Supp. 290 (S.D. Tex. 1996); *see* Allan D. Vestal, *Repetitive Litigation*, 45 IOWA L. REV. 525 (1960).

class.²⁵⁹ There are many reasons for a party to file two lawsuits in the same matter. Three are (1) the plaintiff anticipates a real or imagined jurisdictional flaw in the first lawsuit and files the second to beat the limitation period; (2) the first forum makes a preliminary ruling that displeases the plaintiff; or (3) without any ruling or action by the first forum, 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. Plaintiffs who file a second lawsuit in the same matter often file a voluntary dismissal or nonsuit in the first case. Some do not, however, and that leads to repetitive parallel litigation and possibly reactive litigation. For example, assume that P sues D in Forum A, and D then counterclaims against P. P now decides that Forum A is undesirable—because of the judge, locale, type of court, a bad preliminary ruling, or P’s intuition—and files a second lawsuit in Forum B that provides what P perceives as a better setting. Now we have two affirmative claimants, each desiring a distinct forum, in what are now reactive suits that may both be aggressively pursued.²⁶⁰

Derivative Litigation: Some disputes involving multiple litigation are not truly parallel or duplicative, but instead involve an underlying suit with a later derivative. Two examples are (1) an underlying action for liability where the defendant’s insurer files a derivative declaratory action to assert nonliability,²⁶¹ and (2) an underlying action in which a plaintiff’s attorney has allegedly committed malpractice, and plaintiff’s immediate derivative action for malpractice filed before the underlying action is final.²⁶² These multiple disputes are neither reactive or repetitive; they often do not lend themselves to resolution under the standard remedies for parallel litigation, and instead may have distinct tests. This category of multiple lawsuits is generally not addressed here.

Terms Relating to Remedies for Parallel Litigation

Antisuit Injunctions: Antisuit injunctions are orders directing a party in one court not to pursue parallel litigation in another court. References to “provisional measures” in treaties and model laws may include authority for antisuit injunctions. Note that this remedy calls for a court to issue an order relating to litigation in another court, while other remedies (stay and dismissal) affect only the

259. *Katz v. Realty Equities Corp. of N.Y.*, 521 F.2d 1354 (2d Cir. 1975).

260. *See, e.g., Semmes*, 429 F.2d 1197; *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66 (Tex. App.—Dallas 1996, no writ).

261. *See, e.g., Montrose Chem. Corp. v. Superior Court*, 861 P.2d 1153 (Cal. 1993).

262. *See, e.g., Adams v. Paul*, 904 P.2d 1205 (Cal. 1995).

litigation in the court imposing the remedy.

Dismissal:

Dismissal (or termination) is the final disposal of a case that does not ordinarily allow for reactivation. Termination is the equivalent term in some European and international usage. Dismissal or termination as a remedy for parallel litigation would, of course, not be on the merits. Dismissal may not be the preferred option because it (1) terminates a lawsuit with proper jurisdiction and venue; (2) upends the timetable in that case; and (3) assumes the existence of a perfect identify with the parallel case, or at least sufficiently similar that no claims are lost or other prejudice results. Dismissal is available in several forms in most jurisdictions, including voluntary dismissals (either unilaterally by plaintiff or by stipulation) and involuntary dismissals based on *lis pendens*, forum clauses, and *forum non conveniens*.

First-Filed Rule:

The first-filed (or first-seized) rule is the rule (or sometimes presumption) that the case filed first should control forum selection, and that later-filed cases should be transferred (if possible), stayed, dismissed, or enjoined. In common law jurisdictions, it is a presumption that the first plaintiff's choice of forum controls—absent special circumstances such as a forum selection clause exclusively designating another forum, lack of jurisdiction over property, the bad faith filing of a declaratory action in the first forum, and other exceptions. In civil law jurisdictions, it operates as part of a fixed *lis pendens* rule that is more mechanically applied and may give priority to the “first-seised court,” that is, the one first obtaining jurisdiction over the parties and subject matter. In all jurisdictions, the rule or presumption operates most effectively to remedy parallel litigation in the same state or country, or among signatories to a treaty, such as the Brussels Convention, and may not apply to interstate, state-federal, or international litigation.

Lis Pendens and Lis Alibi Pendens:

These terms have multiple related meanings and functions. Under U.S. common law, *lis pendens* (suit pending) is a notification filed in the public records to give the public notice that a lawsuit is pending, with the result that non-parties now may be bound by the eventual results.²⁶³ One example is notice, filed in the property deed records, of a pending lawsuit claiming title to land, such that non-parties who may acquire title do so subject to the results of the legal claim.

Lis alibi pendens (suit pending elsewhere)²⁶⁴ is a special category of *lis pendens* notice, providing notice of a parallel action. It is used as the basis for a motion to stay or dismiss one

263. BLACK'S LAW DICTIONARY 942–42 (7th ed. 1999).

264. *Id.* at 942.

of the actions. In several treaties and model laws originating outside the United States, the term *lis pendens* embraces *lis alibi pendens*, and its usage implies that the multiple suits must be perfectly identical in order for the doctrine to apply.²⁶⁵

Stay:

A stay (or suspension) is a court's action temporarily stopping its own case, allowing for later reactivation if circumstances justify. "Suspension" is the equivalent term in some European²⁶⁶ and international²⁶⁷ usage. However, the term "stay" is not entirely clear. It is sometimes used to mean a temporary suspension imposed by another court, either on a party or a court. One example is a bankruptcy court's automatic "stay" of related civil proceedings, and another is the editor's title choice for the federal Anti-Injunction Act, which is termed a "Stay of State Court Proceedings."²⁶⁸ This may be a legitimate meaning for stay, but it is less confusing to limit the term to a court's self-imposed suspension of proceedings. The procedure in parallel litigation is to ask one of the courts to suspend prosecution of its own action, pending resolution of the other case. If the other case becomes final (that is, if it is decided on the merits by a competent court and becomes final under the law of the rendering state or country), it should have a preclusive effect as to the stayed action, which can then be dismissed. On the other hand, if the parallel case does not result in a valid and final judgment on the merits, then the stayed case may be revived and litigated. If circumstances change during the stay, it may be lifted for good cause (although there are no examples of this in stays imposed based on parallel litigation).

An important distinction must be made between stays and dismissals. Dismissals are preferred over stays for parallel litigation within the same jurisdiction, while stays are preferred over dismissals (if a remedy is available at all) for parallel cases in multiple jurisdictions. This rule is logical; the use of dismissals for local duplication is more economical, while the use of stays for interjurisdictional conflicts reflects courts' greater reluctance to extinguish a case and expose the local plaintiff to the mercy of a distant forum. Stays provide protection by reviving the case in the event of problems in the other forum. Where dismissals are available in interjurisdictional conflicts the test is a heightened one, often linked to *forum non conveniens* analysis.²⁶⁹ The test for stays, on the other hand, may be as simple as the first-filed rule. One exception to the no-dismissal rule is for *in rem* cases, where

265. See Brussels Convention, *supra* note 20, art. 21.

266. See, e.g., § 148 ZPO (F.R.G.), discussed in FAWCETT, *supra* note 7, at 197.

267. See Hague Convention, *supra* note 158, art. 21(1); *London-Leuven Principles*, *supra* note 68, princ. 4.1.

268. See 28 U.S.C.A. § 2283 (1994).

269. See *White Light Prods., Inc. v. On The Scene Prods., Inc.*, 660 N.Y.S.2d 568 (N.Y. App. Div. 1997); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 cmt. e (1971).

courts will generally dismiss in deference to the court first assuming control over the property.

Transfer:

Transfer (or referral) is the movement of a case from one court to another, possible only within the same jurisdiction, or pursuant to a treaty to which the transferor and transferee states are signatories. Transfers are used primarily to correct improper venue within a jurisdiction, or in response to an intrajurisdictional *forum non conveniens* motion, but are also used to transfer a parallel case and consolidate it with another in the same jurisdiction.

Other Terms

Forum Selection Clause:

A clause in a contract that designates a forum for litigation or arbitration. Forum clauses may further be described as:

(a) Exclusive forum clause: choosing one forum and eliminating all others

(b) Permissive or non-exclusive forum clause: lacking the exclusive language, and generally enforceable if sued upon, but not necessarily sufficient to mandate a change of forum if one party sues in a different forum where defendant is amenable.

(c) General forum clause: choosing a geographic location, such as "Texas" or "England."

(d) Specific forum clause: choosing a particular court within the geographic location, such as "the London Court of Justice"²⁷⁰ or "the California Superior Court for the County of Orange."²⁷¹

(e) Prorogation and derogation clauses: A prorogation clause supports the filing in a given forum. If the parties' clause designates Florida and plaintiff files his action in a state or federal court in Florida, followed by defendant's challenge to personal jurisdiction, the clause is a prorogation clause supporting plaintiff's filing (although not necessarily mandating the outcome).²⁷² A derogation clause undermines a plaintiff's filing in a particular forum. If the forum clause designates England and plaintiff files in a court in Texas, then the clause is a derogation clause.

270. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2 (1972).

271. *Int'l Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112, 113-14 (5th Cir. 1996).

272. *See Alexander Proudfoot Co. World Headquarters L.P. v. Thayer*, 877 F.2d 912, 916 (11th Cir. 1989).

273. *See George, supra* note 1, at 924, 938-41.

Whether a clause is prorogation or derogation has implications for amenability, the law governing the clause, and possibly other issues.²⁷³

Forum Non
Conveniens:

A common law invention enabling a defendant to seek dismissal in the instant forum for refile in defendant's choice of forum, based on significant inconvenience and a balancing of the parties' interests and the affected states' interests. In the United States, the remedy is now codified for intrafederal²⁷⁴ and most intrastate²⁷⁵ practice, but remains common law for interstate and international disputes. It is largely unrecognized by civil law jurisdictions, but is making progress in litigation-oriented treaties and model laws.

*"Seised" and
"Seized":*

In this article, the term was used and spelled as each specific law used that term. When applied to jurisdiction (as here), the term means "perfected" according to the author's translation. In other words, a court is seised or seized with jurisdiction whenever the last act necessary to perfect jurisdiction occurs. In some states (e.g. England and U.S. federal courts), this last act occurs when the lawsuit is filed with the clerk of the court. In other states (e.g., Germany, Kansas, Oklahoma), the last act occurs when the defendant is served process.

In this discussion, the concept of "seised" turns on personal jurisdiction because the term as used here refers to the court's power over the defendant. Nonetheless, it is interesting to note that this same concept of the court's being properly "seised" is also a subject matter jurisdiction concept (having to do with the proper invocation of the court's power) and a venue concept (having to do with the propriety of one court's litigating the claim instead of another court.)

274. See 28 U.S.C.A. § 1404(a) (1993).

275. E.g., TEX. CIV. PRAC. & REM. CODE § 15.002(b) (Vernon Supp. 2002).