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A Comity of Errors: Understanding the International Abstention Doctrine

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ESSAY

A COMITY OF ERRORS: UNDERSTANDING THE INTERNATIONAL ABSTENTION DOCTRINE

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I. INTRODUCTION

You are sitting in your office in Miami, a hotspot for litigation related to Latin American trade and investment, when your client comes in with a problem. A foreign corporation has infringed upon your client's valid copyright in Florida. In an attempt to beat your client to the punch, the foreign corporation has already sued your client in a Latin American court to obtain a declaration that it is not infringing. The foreign court has not

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yet rendered a judgment. Understandably, your client prefers to litigate his claim close to home in a federal court in Florida. Should you bring the claim here, or will the federal court merely abstain from hearing the case based on the pending foreign case?

The federal court will base its decision on the Eleventh Circuit's international abstention doctrine in the case.[2] So, if you are going to advise your client about whether to bring the case, you must know how this doctrine works.

II. ABSTENTION BEGAN AS A RESPONSE TO PARALLEL DOMESTIC LITIGATION

To understand international abstention, one must first understand its genesis. Federal courts initially applied the abstention doctrine to situations of concurrent jurisdiction between a state court and federal court (both courts being within the United States). But for a federal court to even consider abstaining, it first had to determine that the cases were parallel.

So what makes a claim parallel? Proceedings are parallel if "substantially the same parties are contemporaneously litigating substantially the same issues in more than one forum."[3] But the fact that the parties and the claims are not precisely the same does not mean that the cases are not parallel.[4] If that were the standard, only the most uninspired litigant would ever face an unwelcome abstention order. All one would have to do is frame the issues a little bit differently or include an additional defendant and a court would hear the case.

Nevertheless, if a court decided that the cases were parallel, a court then had to decide the real question — that is, whether it was proper to abstain.[5] Abstention was always the "extraordinary" exception and not the rule.[6] Although not an absolute, federal courts had a "virtually unflagging" obligation to hear the cases that came before them.[7]

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2. *See* Turner Entm't Co. v. Degeto Film, 25 F.3d 1512 (11th Cir. 1994).

3. Interstate Material Corp. v. City of Chi., 847 F.2d 1285, 1288 (7th Cir. 1988).

4. *Id.*

5. *See Turner Entm't Co.*, 25 F.3d at 1518.

6. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976); Ortega Trujillo v. Conover & Co. Communications, 221 F.3d 1262, 1265 (11th Cir. 2000); *Turner Entm't Co.*, 25 F.3d at 1518; Bosdorf v. Beach, 79 F. Supp. 2d 1337, 1343 (S.D. Fla. 1999).

7. *Colo. River Water Conservation Dist.*, 424 U.S. at 817; Caspian Inv., Ltd. v. Viacom Holdings, Ltd., 770 F. Supp. 880, 884 (S.D.N.Y. 1991).

With those principles in mind, the U.S. Supreme Court, in *Colorado River Water Conservation District v. United States*,[8] limited abstention to three categories. First, abstention should be limited in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.[9] Second, in situations where difficult questions of state law have been presented that bear on policy problems of substantial public import whose importance transcends the result in the case then at bar.[10] Third, where federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, state nuisance proceedings antecedent to a criminal prosecution, or collection of state taxes.[11] In those circumstances, considerations of state-federal relations justified a federal court's decision to abstain from hearing a case.

But most concurrent jurisdiction cases did not come within those three general categories. As a result, the U.S. Supreme Court crafted a separate principle resting on the concept of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."[12] Some courts have called this the "exceptional-circumstances test" because a federal court should defer to a state court proceeding only under limited, exceptional circumstances.[13] The courts have now come to consider this "wise judicial administration" standard a fourth abstention category (or, more accurately, deference to parallel proceedings) commonly known as the *Colorado River Water Conservation District* doctrine.[14]

The Eleventh Circuit established a four-part test to apply when considering this fourth abstention category: first, the inconvenience of the federal forum; second, whether either court has jurisdiction over property; third, the desirability of avoiding piecemeal litigation; and fourth the order in which jurisdiction was obtained.[15] In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[16] the U.S. Supreme Court added two additional factors: first whether federal law provides the rule of decision;

8. *Colo. River Water Conservation Dist.*, 424 U.S. at 814-16.
9. *Id.*
10. *Id.*
11. *Id.* at 814.
12. *Id.* at 817.
13. *See* Lops v. Lops, 140 F.3d 925, 961 (11th Cir. 1998) (Kravitch, J., dissenting).
14. *Id.*
15. *Id.*
16. 460 U.S. 1, 23-27 (1983).

and second whether the state court proceedings would be inadequate to protect the parties rights.[17] The idea was to prevent forum shopping.[18]

Courts typically reviewed these factors in combination since no single factor ruled.[19] What was important in one case was not necessarily important in another. But the balance always favored the exercise of jurisdiction; in other words, the standard was high.[20]

So, why is this domestic abstention history lesson significant? Because it is this fourth abstention category — that is, abstaining based upon "wise judicial administration" — that the Eleventh Circuit focused upon when developing its international abstention doctrine.[21] A court will rely on the international abstention doctrine in deciding whether to hear a case.

III. THE DOCTRINE FOR DEALING WITH PARALLEL PROCEEDINGS IN THE UNITED STATES AND A FOREIGN COURT IS BORN — INTERNATIONAL ABSTENTION

Just as with Colorado River's domestic abstention, international abstention only becomes relevant if the domestic and international cases are parallel. Not surprisingly, the cross-national analysis is similar to the domestic analysis. In an international case, that court will decide if the two (or more) cases involve materially similar issues, documents, and parties.[22] Just as with domestic abstention, the parties and claims do not need to be identical.[23] It is often enough that the parties are closely related.[24] If a court decides that the parties and claims are distinct, then abstention is not an issue.[25]

But even if a court concluded that a claim is substantially the same as the pending case, making it a parallel proceeding, all is not lost. As with domestic abstention (albeit for different reasons), courts regularly permit

17. *Id.*; *see also* TranSouth Fin. Corp. v. Bell, 149 F.3d 1292, 1294-95 (11th Cir. 1998).

18. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 17 n.20; *see also* Bosdorf v. Beach, 79 F. Supp. 2d 1337, 1346 (S.D. Fla. 1999).

19. Colorado River Water Conservation Dist. v. United States, 424 U.S 800, 818-19 (1976).

20. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 16.

21. *See supra* text accompanying note 8.

22. *See* Turner Entm't Co. v. Degeto Film, 25 F.3d 1512, 1518 n.6 (11th Cir. 1994).

23. Caspian Inv., Ltd. v. Viacom Holdings, Ltd., 770 F. Supp. 880, 884 (S.D.N.Y. 1991).

24. *See id.*

25. *See* Ronar, Inc. v. Wallace, 649 F. Supp. 310, 319 (S.D.N.Y. 1986).

parallel proceedings in American courts and foreign courts to proceed unabated.[26]

Colorado River Water Conservation District provided the basic framework for the development of the Eleventh Circuit's international abstention policy. The seminal international abstention case in the Eleventh Circuit is *Turner Entertainment Co. v. Degeto Film*.[27] In *Turner*, a dispute arose between an American licensor and German licensees over a license agreement.[28] One week after the German licensees filed a declaratory judgment action in Germany, the American licensor filed a breach of contract lawsuit in U.S. District Court in Atlanta, seeking injunctive relief.[29] The district court ultimately held that considerations of fairness, efficiency and international comity warranted abstention pending the conclusion of the German litigation.[30]

In coming to its decision, the Eleventh Circuit noted two distinct but similar approaches adopted by the federal courts — both derived in part from the criteria enumerated in *Colorado River Water Conservation District*.[31] The first approach simply applied the *Colorado River Water Conservation District* elements to the international context.[32]

The second approach, developed primarily in the Southern District of New York, focused on the effect on international comity if U.S. courts permitted parallel cases to continue in different countries.[33] This second line of cases considered the following factors: the similarity of the parties and issues involved in the foreign litigation; the promotion of judicial efficiency; the adequacy of relief available in the alternative forum; fairness to and convenience of the parties, counsel, and witnesses; the possibility of prejudice to any of the parties; and the temporal sequence in which the actions were filed.[34]

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26. Ortega Trujillo v. Conover & Co. Communications, 221 F.3d 1262, 1265 (11th Cir. 2000); *Turner Entm't Co.*, 25 F.3d at 1521.

27. *Turner Entm't Co.*, 25 F.3d at 1512.

28. *Id.* at 1514.

29. *Id.* at 1516-17.

30. *Id.* at 1523.

31. *Id.* at 1518.

32. *Turner Entm't Co.*, 25 F.3d at 1518 (citing Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 685 (7th Cir. 1987)); Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926-27 (D.C. Cir. 1984).

33. *Turner Entm't Co.*, 25 F.3d at 1518 (citing Cont'l Time Corp. v. Swiss Credit Bank, 543 F. Supp. 408, 410 (S.D.N.Y. 1982)); Ronar, Inc. v. Wallace, 649 F. Supp. 310, 318 (S.D.N.Y. 1991); Caspian Inv., Ltd. v. Viacom Holdings, Ltd., 770 F. Supp 880, 883-84 (S.D.N.Y. 1991).

34. *Caspian Inv., Ltd.*, 770 F. Supp at 884; *Cont'l Time Corp.*, 543 F. Supp. at 410.

From these two approaches, the Eleventh Circuit noted three general factors to determine whether a federal court should abstain from hearing a case that is parallel to a pending proceeding overseas: "(1) a proper level of respect for the acts of our fellow sovereign nations — a rather vague concept referred in American jurisprudence as international comity; (2) fairness to the litigants; (3) efficient use of scarce judicial resources."[35] This has become known as the international abstention doctrine.

Careful analysis is needed of each element when deciding whether to bring a client's claim.

A. *The Comity Confusion*

Comity in the international abstention context consists of showing the proper level of respect for the acts of fellow sovereign nations. It is not a hard and fast rule but rather a general concept that courts use to ensure that, as the world gets smaller, we can legally coexist with the rest of the world:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[36]

This comity definition has primarily been used to recognize judgments rendered in foreign nations.[37] Comity is the international res judicata. So if the foreign court has not rendered a judgment, strictly speaking, comity should not apply. Thus, the principle of comity as a way to recognize judgments should really play only a small role in international abstention.

Nevertheless, the Eleventh Circuit has attempted to keep comity in play.[38] The Eleventh Circuit has cleverly separated comity in the international abstention context into two rubrics — retrospective and prospective.[39] As stated by the Eleventh Circuit, retrospective international comity involves respect for foreign judgments (the more traditional

35. *Turner Entm't Co.*, 25 F.3d at 1518.
36. *Id.* at 1519.
37. *Id.* at 1519 n.11.
38. *See id.* at 1518.
39. *See id.* at 1519.

respect-for-final-judgment comity); prospective international comity (the innovative comity theory) involves analyzing the interests of our government, the foreign government, and the international community.[40] What most lawyers mean when they say comity in the context of international abstention is really retrospective comity — that is, comity in the sense of recognizing a judgment. But the Eleventh Circuit, through its use of prospective comity, has found a way to inject the general concept of respecting foreign nations and their judicial systems into international abstention.[41]

When applied retrospectively, "general comity concerns include" the following: "(1) whether the judgment was rendered via fraud; (2) whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence; and (3) whether the foreign judgment is prejudicial, in the sense of violating American public policy because it is repugnant to fundamental principles of what is decent and just."[42] This concept rests on the principle that a failure to defer to the foreign judgment would have serious consequences—for example, conflicting judgments and dueling courts.[43]

But the more common abstention situation arises when the foreign court has not rendered a judgment in the foreign case. In deciding whether to bring a case, one must decide if a court will extend prospective comity to the foreign proceeding. In making its decision, a court, as stated above, will assess the interests of our government, of the foreign government, and of the international community.[44] A court will also determine whether the foreign court is competent to hear the claims and whether it will use fair and just proceedings in deciding the case.[45] In deciding each country's interest, a court may also consider forum selection provisions, the applicable law, and the actual language (that is, English or Spanish) of the agreement.[46]

As a result, if, as in our example, the copyright infringement took place in Florida, then the federal court in Florida has a compelling interest to hear the case. Moreover, one may also want to obtain an injunction to stop the infringement. Thus, because the foreign corporation is infringing upon

40. *See Turner Entm't Co.*, 25 F.3d at 1519.

41. *See id.* at 1519.

42. *Id.*

43. *Id.* at 1521.

44. *Ungaro-Benages,* 379 F.3d at 1238; Ingersoll Miling Mach. Co. v. Granger, 833 F.2d 680, 685 (7th Cir. 1987).

45. *See* Posner v. Essex Ins. Co., Ltd., 178 F.3d 1209, 1224 (11th Cir. 1999).

46. *Id.*

the copyright here in Florida, it only makes sense for the federal court in Florida to enforce such an injunction, to hear the case.

B. *Abstention Must Be Fair to the Litigants*

Next, a court will consider whether abstaining would be fair to the parties. In deciding this issue, courts will generally look to three factors. First, courts will consider the order in which the parties filed the suits.[47] Some courts have held that priority goes to the suit first filed.[48] But in parallel proceedings where the parties filed the lawsuits close together in time, courts generally do not give priority based solely on the first-filing.[49] Yet, if the foreign litigation is in its incipiency, many courts will deny a motion to stay an action in federal court where the foreign proceeding was filed after the American action.[50] So, if you think you have a case that will withstand the international abstention doctrine, file your claim quickly.

Second, courts will look to the forum's convenience.[51] Sometimes convenience will depend upon which jurisdiction has a greater interest. If the witnesses and anticipated experts reside primarily in the foreign country, this will weigh in favor of the foreign forum and vice versa if the opposite situation is present.[52] This resembles a *forum non conveniens* analysis, which "authorizes a trial court to decline to exercise its jurisdiction, even though the court has venue, where it appears that the convenience of the parties and the court, and the interests of justice indicate that the action should be tried in another forum."[53]

Third, a court will consider the possibility of prejudice to parties resulting from abstention.[54] If anything about the foreign forum might foreclose a chance for a litigant to obtain a fair and just result, then a court may hear the case to ensure the parties can fully and fairly litigate their claims.[55]

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47. *Turner Entm't Co.*, 25 F.3d at 1522 (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976)).

48. Ronar, Inc. v. Wallace, 649 F. Supp. 310, 318 (S.D.N.Y. 1986).

49. *Turner Entm't Co.*, 25 F.3d at 1522.

50. *Ronar*, 649 F. Supp. at 318-19.

51. *Turner Entm't Co.*, 25 F.3d at 1522.

52. *Id.*

53. Ford v. Brown, 319 F.3d 1302, 1306-07 (11th Cir. 2003).

54. *Turner Entm't Co.*, 25 F.3d at 1522; Caspian Inv., Ltd. v. Viacom Holdings, Inc., 770 F. Supp. 880, 884 (S.D.N.Y. 1991).

55. Hilton v. Guyot, 159 U.S. 113, 205 (1895); *Turner Entm't Co.*, 25 F.3d at 1522.

This third factor provides the strongest fairness argument. In the instant case, the foreign corporation will argue that it filed its claim first and that it would be inconvenient to litigate in the United States. But one will have (at the very least) an equally compelling argument that if a court does not hear the case the infringement will continue and one will be left without an adequate remedy at law.

C. *The Catchall Category — Conservation of Judicial Resources*

A court will next consider the efficient use of scarce judicial resources.[56] A court's ubiquitous conservation of judicial resources category has four elements.

First, a court considers the inconvenience of the federal forum. Plainly, convenience recurs as a theme. Many courts have now acknowledged that the modern conveniences of telecommunications, facsimiles, electronic mail, and discount air travel tend to reduce the burden of litigating in a distant forum.[57] Thus, one should argue that in this day and age it would not be a major burden for the foreign corporation to litigate in the United States.

Second, courts want to avoid piecemeal litigation.[58] A court will not want to allow both proceedings to continue if it fears that the foreign court and the federal court must synchronize their calendars and that the litigation would have to move back and forth from one country to another.[59] But if the claims depend on the laws of the different jurisdictions then a court may decide the litigation is not "piecemeal" and permit the parallel proceedings to continue.[60] For example, the intellectual property issues involved in our example entail separate and independent rights arising from each nation's unique laws.[61] Hence, a court may determine that the dual proceedings must continue to allow the parties to fully adjudicate their rights.[62] So, where federal law provides the

56. *Turner Entm't Co.*, 25 F.3d at 1522.

57. *See* Ambrosia Coal & Const. Co. v. Pages Morales, 368 F.3d 1320, 1332 (11th Cir. 2004); Euromarket Designs, Inc. v. Crate & Barrel, Ltd., 96 F. Supp. 2d 824, 832-33 (N.D. Ill. 2000).

58. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976); *Turner Entm't Co.*, 25 F.3d at 1522; Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 685 (7th Cir. 1987).

59. *Turner Entm't Co.*, 25 F.3d at 1522.

60. *See Euromarket Designs*, 96 F. Supp. 2d at 843.

61. Black & Decker Corp. v. Sanyei Am. Corp., 650 F. Supp. 406, 409 (N.D. Ill. 1986).

62. *Id.*

substantive controlling law, courts are free to exercise their duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to the litigants.[63]

Third, a court will consider whether the actions have parties and issues in common.[64] This element overlaps with the determination a court must make about whether the cases are parallel in the first place. Yet, where the underlying facts appear to be similar to each other, a court may conclude that the cases are different because the legal rights involved and the underlying public policies may differ in each jurisdiction.[65]

Even if the facts in the two cases are analogous, do not give up on this factor. In the instant case, you should argue that the relief you seek is different. For example, your client may want the federal court to enter an injunction to prevent the infringement from continuing while the case filed by the foreign corporation merely seeks a declaration about the copyright's validity. You should argue that these are essentially different types of claims because they seek different relief.

Fourth, a court will consider whether the alternative forum is likely to render a prompt disposition.[66] Generally, courts will assess the progress of discovery in each case and whether a trial on the merits has occurred in either country.[67] Therefore, if the proceeding in one forum has moved significantly farther along than the other, a court may abstain for judicial efficiency reasons.[68] But this only means that you must act quickly. In the instant case, immediately upon learning about the foreign case you should decide whether to file in federal court in Florida. Courts do not want to initiate new litigation in the United States if a long and protracted litigation has taken place in a foreign court. So the longer you wait to file, the further the foreign action may progress, and the harder it will be to maintain your action in a federal court in Florida.

You should also make it clear to the federal court that it will be more efficient to litigate the case here in Florida than to fight about the foreign judgment's legitimacy in a domestication lawsuit later on.

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63. *Euromarket Designs*, 96 F. Supp. 2d at 843 (citing Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984)).

64. *Turner Entm't Co.*, 25 F.3d at 1522.

65. *Black & Decker Corp.*, 650 F. Supp. at 410.

66. *Turner Entm't Co.*, 25 F.3d at 1522 (citing Ronar, Inc. v. Wallace, 649 F. Supp 310, 318 (S.D.N.Y. 1986)).

67. *See id.* at 1522-23.

68. *Id.*

IV. WILL A COURT STAY OR DISMISS IF YOU LOSE? THE DIFFERENCE COULD BE SIGNIFICANT

If the federal court dismisses your case on abstention grounds, you are out of luck, especially if a court dismisses with prejudice. Fortunately, that is not what usually happens. Instead, most courts order a stay because it protects the parties' rights while permitting the federal court to manage its time effectively.[69] If you are losing the abstention battle, prepare for a stay and live to fight another day. You never know what will happen during the life of a case. After the conclusion of the foreign proceeding, the federal court may decide that issues relating to the American interests remain undetermined. A stay will allow a court to retain jurisdiction if a decision or appeal in the foreign forum alters any of the issues and mandates that the federal court in Florida hears the case.[70]

V. USE ANTI-SUIT INJUNCTIONS TO PREVENT FOREIGN LITIGATION

If a court decides that your case can proceed, then you may want to take action to prevent the foreign court from rendering a decision that may contradict the American court. But how do you do that? You should consider obtaining an anti-suit injunction.

American courts have the power to control the conduct of persons subject to their jurisdiction, even to the extent of forbidding them from maintaining litigation in foreign jurisdictions.[71] Although no precise rules governing the appropriateness of anti-suit injunctions exist, since such an exercise effectively restricts the foreign court from exercising its jurisdiction, American courts are careful, if not hesitant, to issue them.[72] But where the actions of a litigant in a foreign forum threaten the federal court's jurisdiction, the federal court may consider issuing an injunction to stop the litigant's participation in the foreign proceeding.[73] If a party

69. Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 686 (7th Cir. 1987).

70. *Turner Entm't Co.*, 25 F.3d at 1523.

71. Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926 (D.C. Cir. 1984).

72. *Laker Airways*, 731 F.2d at 927; Mutual Serv. Cas. Ins. Co. v. Frit Indus., Inc., 805 F. Supp. 919, 921 (MD. Ala. 1992).

73. *Laker Airways*, 731 F.2d at 927.

attempts to ignore the forum's important policies by litigating before a foreign court, an anti-suit injunction may solve the problem.[74]

So use this procedure (with caution) to ensure that your opponents do not go forum shopping to your client's disadvantage.

VI. CONCLUSION

File your claim. You are not forum shopping, you just got beat to the courthouse steps. Although a court may ultimately decide that considerations of comity, fairness, and judicial resources mandate abstention in deference to the foreign court, you owe it to your client to try to bring the case in the most convenient and appropriate forum. You should not put your clients' case in fate's hands by hoping that the foreign forum will dismiss it. Do not let your opponent choose the forum where the case will be heard. And remember, abstention is the exception, not the rule.

74. China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 37 (2d Cir. 1987).