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## Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation

Louise Ellen Teitz

*Roger Williams University School of Law*

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## Articles

# Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation

Louise Ellen Teitz\*

*[A] rule which permitted parallel proceedings would avoid a “race to file” but in its place would be an equally troubling “race to judgment”. If neither action is stayed, the advantage goes to the first party to obtain judgment in its favour because the other jurisdiction would be expected to respect that judgment. Permitting parallel proceedings to continue would encourage a litigation strategy in which each side would attempt to expedite its own action while prolonging in any way possible the other party’s action through endless motions or other delaying tactics. In other words, allowing parallel proceedings to continue would not avoid entirely the problem of a “race to the courthouse” but would simply push the problem back a stage in the*

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\* Professor of Law, Roger Williams University Ralph R. Papitto School of Law, Bristol, Rhode Island. The author gratefully acknowledges the invaluable research assistance of Kathryn Windsor. Portions of this article appear in Louise Ellen Teitz, *Developments in Parallel Proceedings: Globalization of Procedural Responses*, 38 INT’L LAW. 303 (2004) and Louise Ellen Teitz, *Parallel Proceedings – Sisyphean Progress*, 36 INT’L LAW. 423 (2002). Copyrights 2004 and 2002 American Bar Association and Louise Ellen Teitz. Reprinted with Permission. © 2004 Louise Ellen Teitz. All Rights Reserved.

*proceedings.*<sup>1</sup>

*It seems to me that in this day of exceedingly high costs of litigation, where no comity principles between nations are at stake in resolving a piece of commercial litigation, courts have an affirmative duty to prevent a litigant from hopping halfway around the world to a foreign court as a means of confusing, obfuscating and complicating litigation already pending for trial in a court in this country.*<sup>2</sup>

Just over ten years ago, a new undertaking in private international law was being inaugurated at the Hague in the form of a treaty on the enforcement of foreign judgments in the Hague Conference on Private International Law (Hague Conference), an inter-governmental organization composed of over 50 countries.<sup>3</sup> In an attempt to gain greater respect for U.S. judgments abroad, especially in an era of increasing international trade and commerce, the United States government in 1992-93 encouraged the Hague Conference to negotiate a multilateral convention on foreign judgments. In this article I consider the problems of concurrent proceedings in multiple countries over the last decade in the context of the complementary developments in the enforcement of foreign judgments during the same period. While multiple proceedings and enforcement of judgments have taken independent journeys, both have traveled toward a convergence which attempts to harmonize problems of multiple proceedings within the context of enforcing judgments.<sup>4</sup>

## I. INTRODUCTION

As the world has become smaller, the number of parallel pro-

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1. *Westec Aerospace Inc. v. Raytheon Aircraft Co.*, [1999] 67 B.C.L.R. 3d 278, 289 (B.C. Ct. App. 1999) (Rowles, J.A.).

2. *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 40 (2d Cir. 1987) (Bright, J., dissenting).

3. The Hague Conference on Private International Law (Hague Conference) is devoted to harmonizing private international law and working towards concluding international treaties in this area. See *infra* Part VII.A-B.

4. This conjunction of parallel proceedings and enforcement of judgments is seen in attempts to harmonize concepts of *lis pendens* on one hand, and *forum non conveniens*, or declining jurisdiction, on the other. See *generally* DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW (J.J. Fawcett ed., 1995).

ceedings has been expanding. Increasing globalization of trade has both multiplied the number of parallel proceedings and the number of countries whose courts are facing the challenge of concurrent jurisdiction.<sup>5</sup> The proliferation of multiple proceedings has led to a variety of approaches,<sup>6</sup> especially in U.S. courts, which reflect the doctrinal inconsistencies in analyzing multiple proceedings, often with tools developed for purely domestic use.<sup>7</sup> Thus one finds analogies to state-state, state-federal, and federal-federal models. These divergent methods highlight the increasing need for U.S. courts to adopt a uniform response to parallel proceedings involving a foreign forum.

During the last decade, the problems of parallel proceedings and related issues have gained increasing attention within the context of transnational litigation and dispute resolution. The attempts to negotiate a worldwide convention on jurisdiction and enforcement of foreign judgments at the Hague<sup>8</sup> have highlighted this dilemma, as discussed below. Similarly, attempts to rationalize and federalize enforcement of foreign judgments within the

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5. See discussion *infra* Part IV.A.

6. See LOUISE ELLEN TEITZ, *TRANSNATIONAL LITIGATION* 233-50 (1996 & Supp. 1999) [hereinafter *TRANSNATIONAL LITIGATION*]; Louise Ellen Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 *INT'L LAW* 21, 28-48 (1992) [hereinafter Teitz, *Taking Multiple Bites*].

7. For a discussion of the incorrect reliance on domestic precedent in an international context, see *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1222-24 (11th Cir. 1999), discussed in Louise Ellen Teitz, *International Litigation; Parallel Proceedings and the Guiding Hand of Comity*, 34 *INT'L LAW* 545, 546-47 (2000).

8. There is extensive literature on the Hague jurisdiction and judgments negotiations and drafts. See generally SAMUEL P. BAUMGARTNER, *THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS: TRANS-ATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION* (2003); LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN (James A.R. Nafziger & Symeon C. Symeonides eds., 2002) [hereinafter *LAW AND JUSTICE*]; Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 *CORNELL L. REV.* 89 (1999); Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 *DEPAUL L. REV.* 319 (2002); Arthur T. von Mehren, *Enforcing Judgments Abroad: Reflections of the Design of Recognition Conventions*, 24 *BROOK. J. INT'L L.* 17 (1998) [hereinafter von Mehren, *Enforcing Judgments Abroad*]; Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 *LAW & CONTEMP. PROBS.* 271 (1994) [hereinafter von Mehren, *Recognition and Enforcement*].

United States, particularly those by the American Law Institute (ALI),<sup>9</sup> have had to address the issue of parallel proceedings.<sup>10</sup> Meanwhile across the Atlantic, the problem of parallel proceedings within the context of internal judicial integration under the Brussels Convention<sup>11</sup> and now the Brussels Regulation<sup>12</sup> has reached the European Court of Justice which has been attempting to reconcile European law with the national law of common-law jurisdictions that include the doctrines of antisuit injunctions and discretionary dismissals.<sup>13</sup> Even if there is currently no harmoni-

9. See INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT (Tentative Draft No 2, 2004) [hereinafter INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT]. Professors Lowenfeld and Silberman, both from the NYU School of Law, are the reporters. See Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635 (2000).

10. INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT, *supra* note 9, at § 11. The ALI draft statute specifically acknowledges the connection between parallel proceedings and forum non conveniens, being entitled "Declination of Jurisdiction When Prior Action Is Pending." See discussion *infra* Part VII.C.

11. See Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1990 O.J. (C 189) 2 [hereinafter Brussels Convention].

12. The Brussels Convention was replaced by EU Regulation 44/2001 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Mar. 1, 2002, 2001 O.J. (L 12) 1, *amended by*, 2002 O.J. (L 225) 1 [hereinafter Brussels Regulation]. Denmark is not under the regulation and continues to follow the Brussels and Lugano Conventions. See Brussels Convention, *supra* note 11; Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9 [hereinafter Lugano Convention].

13. This article does not focus on efforts of judicial integration in the European Union (EU) except as they relate specifically to parallel proceedings, *lis pendens*, and declining jurisdiction in connection with recognition and enforcement of judgments. For a discussion of antisuit injunctions and the Brussels Convention/Regulation, see Clare Ambrose, *Can Anti-Suit Injunctions Survive European Community Law?*, 52.2 INT'L & COMP. L.Q. 401 (2003). The article discusses *Turner v. Grovit*, an English case discussed *infra* at Part V, in which the European Court of Justice addressed the issue of the use of an injunction to restrain proceedings in abuse of process within the context of the Brussels Convention. *Turner v. Grovit*, [2002] 1 W.L.R. 107 (H.L. 2001), *preliminary reference made*, Case C-159/02, [2003] ECR \_\_\_\_, [2004] 1 Lloyd's Rep. 216, *judgement of the full court*, [2004] ECR 00 (27 Apr. 2004), [2004] 2 Lloyd's Rep. 169; see also Richard Fentiman, *Ousting Jurisdiction and the European Conventions*, in 3 THE CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES, 107 (Alan Dashwood et al. eds., 2001); Trevor C. Hartley, *How to Abuse the Law and (Maybe) Come Out on Top: Bad-Faith Proceedings under the Brussels Jurisdiction and Judgments Convention*, in

zation internationally of the treatment of parallel proceedings, a heightened awareness of its connection with judgment enforcement represents a significant step forward.

On the reverse end of a lawsuit, the inability to enforce judgments from one forum in another forum also creates multiple proceedings.<sup>14</sup> There is neither a constitutional nor federal statutory requirement to give full faith and credit to a foreign judgment, as opposed to a sister state judgment.<sup>15</sup> Rather, the enforcement of foreign judgments within the United States is largely a matter of state law<sup>16</sup> and is basically controlled by common law except in those states that have adopted the Uniform Foreign Money-Judgments Recognition Act (the Uniform Act).<sup>17</sup> More than half of the states have currently adopted some version of the Uniform Act, although the states vary in the exceptions to recognition, including the requirement of reciprocity which currently is demanded only in eight states.<sup>18</sup> The ALI is presently drafting a statute that would federalize the recognition and enforcement of foreign judgments within the United States<sup>19</sup> and that would impose a reciprocity requirement.<sup>20</sup> These efforts would help create a

LAW AND JUSTICE, *supra* note 8, at 73 [hereinafter Hartley, *How to Abuse the Law*].

14. See generally TRANSNATIONAL LITIGATION, *supra* note 6, at 251-292; see discussion *infra* Part VI.

15. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

16. Federal courts in diversity jurisdiction, which is generally the basis for jurisdiction of suits involving foreign parties, apply state law for recognition and enforcement under the *Erie* doctrine. See *Hunt v. BP Exploration Co. (Libya)*, 492 F. Supp. 885, 892 (N.D. Tex. 1980); *Somportex, Ltd. v. Philadelphia Chewing Gum Corp.*, 318 F. Supp. 161, 164 (E.D. Pa. 1970), *aff'd*, 453 F.2d 435 (3d Cir. 1971). See discussion *infra* Part VI.

17. 13 U.L.A. 263 (1986) [hereinafter UFMJRA]. The Act has a narrow scope, covering only money judgments, leaving the remainder for common law development. The National Conference of Commissioners on Uniform State Laws (NCCUSL) is currently working on updating and amending the UFMJRA. See Uniform Law Commissioners, at <http://www.nccusl.org/Update/>.

18. See *infra* note 234.

19. INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT, *supra* note 10; see discussion *infra* Part VII.C.

20. *Id.* at § 7. The reciprocity requirement is controversial. It was the focus of much of the debate at the May 2004 ALI annual meeting, where a mo-

consistent approach, making “importing” of foreign judgments turn in part on the treatment of U.S. judgments abroad.

Nor can one easily or freely “export” U.S. judgments for enforcement abroad since the United States is not a party to any multilateral convention enforcing foreign civil judgments. In contrast, certain countries, such as the members of the European Community and the European Free Trade Association (EFTA), have worked to provide free movement of foreign judgments by reducing divergent treatment of jurisdiction and enforcement of judgments.<sup>21</sup> The Hague Conference on Private International Law has been working on a convention since 1992 that would establish standards for jurisdiction and for subsequent recognition of judgments. The proposed convention was one that would not only treat recognition and enforcement of judgments but also establish the bases of jurisdiction that would be acceptable for enforcement.

The jurisdictional component of the convention proved to be the more problematic in negotiations because there are significant and controversial differences among countries as to acceptable bases of jurisdiction. U.S. notions of doing-business and tag jurisdiction, and our emphasis on the relationship of the defendant's activities to the forum, differ from personal jurisdiction concepts elsewhere. The process has continued for the last decade without resolution due to a multitude of factors ranging from disagreement over basic concepts of adjudicative jurisdiction, differences in the treatment of consumers, problems arising from the internet and e-commerce, and the increasing internal integration of judicial process within the European Community.<sup>22</sup> A decision was

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tion to delete the reciprocity portion of section 7 failed. *See Actions Taken With Respect to Drafts Submitted at 2004 Annual Meeting* (American Law Institute, Fall 2004), at <http://www.ali.org>.

21. *See generally* Brussels Convention, *supra* note 11; Brussels Regulation, *supra* note 12; Lugano Convention, *supra* note 12; *see also* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS (Gerhard Walter & Samuel P. Baumgartner eds., 2000).

22. *See* Hague Conference on Private International Law, International Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Hague Conference), *Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference*, Prel. Doc. No. 16 (Feb. 2002) [hereinafter Hague Conf. Prelim. Doc. No. 16], available at <http://www.hcch.net/e/workprog/jdgm.html> (last visited Oct. 7, 2004); Hague Conference, *The Impact of the Internet on the Judgments*

made after 2001 to put a comprehensive convention on hold and instead to tackle a smaller project.<sup>23</sup> As discussed in more detail below, these recent attempts to negotiate a scaled-back convention that would address choice of court clauses in the commercial context offer significant hope for progress in enforcing foreign judgments resulting from consensual agreements and provide certainty to businesses in selecting fora for resolution of subsequent disputes. In the process, this commercial choice of court convention also offers a *lis pendens* solution to parallel litigation contrary to forum selection clauses.

## II. PARALLEL PROCEEDINGS – WHAT GOES AROUND COMES AROUND

At first blush one might question the relationship of parallel proceedings and enforcement of judgment in the international context. Yet if one views the process of litigation as a chronological timeline, one of the crucial questions driving initial filing considerations is the possibility of, and potential problems with, enforcing any resulting judgment at the end of the suit.<sup>24</sup> Along the way,

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*Project: Thoughts for the Future*, Prel. Doc. No. 17 (Feb. 2002) (prepared by Avril D. Haines) [hereinafter Hague Conf. Prelim. Doc. No. 17], available at <http://www.hcch.net/e/workprog/jdgm.html> (last visited Oct. 7, 2004); Hague Conference, *Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Prel. Doc. No. 19 (Aug. 2002) (prepared by Andrea Schulz) [hereinafter Hague Conf. Prelim. Doc. No. 19], available at <http://www.hcch.net/e/workprog/jdgm.html> (last visited Oct. 7, 2004); Hague Conference, *The Relationship Between the Judgments Project and Other International Instruments*, Prel. Doc. No. 24 (Dec. 2003) (prepared by Andrea Schulz) [hereinafter Hague Conf. Prelim. Doc. No. 24], available at <http://www.hcch.net/e/workprog/jdgm.html> (last visited Oct. 7, 2004); see also Fausto Pocar, *The Drafting of a World-Wide Convention on Jurisdiction and the Enforcement of Judgments: Which Format for the Negotiations in The Hague?*, in LAW AND JUSTICE, *supra* note 8, at 191.

23. Commission I on General Affairs and Policy of the Nineteenth Diplomatic Session met in April 2002 and decided “to move to an interim informal process, exploring new ways of negotiating. . . .” Hague Conf. Prelim. Doc. No. 19, *supra* note 22, at ¶¶ 5-15; Letter of Hans van Loon, Secretary General of the Hague Conference, Convocation Special Commission on Judgments, 1-9 December 2003 (August 19, 2003) (copy on file with author). For the latest draft of the Choice of Court Convention, as well as the older and more ambitious drafts, see the Hague Conference on Private International Law’s website, at <http://www.hcch.net/e/workprog/jdgm.html>.

24. See generally TRANSNATIONAL LITIGATION, *supra* note 6, at 101-05; see discussion *infra* Part VI.



one may have to reevaluate both the choice of initial forum and potential enforcement several times during the litigation process based on decisions and actions of the opposing party. Indeed one factor determining initial filing or subsequent strategy might be the existence of an earlier-filed action in another forum or a subsequently filed defensive action in another forum. Parallel proceedings exist because of concurrent jurisdiction, both adjudicative and prescriptive.<sup>25</sup> Problems of enforcement of foreign judgments arise in part from differing notions of adjudicative and prescriptive jurisdiction. Thus, when Country B is faced with the issue of enforcing a judgment from Country A, it must consider whether Country A, the rendering forum, had an acceptable basis for personal jurisdiction and whether it had the power to regulate the particular conduct. Often Country B is faced with this problem while there is still ongoing litigation or arbitration of the same or related matter, in Country B or in Country C, a third unrelated country. Alternatively, Country B has to decide which of more than one judgment it should recognize. Thus, the same problems motivating parties to file more than one proceeding also impact eventual enforcement.

The response of other countries to parallel proceedings is expressed under various doctrines which govern the enjoining of party participation in foreign proceedings or the staying of pending proceedings. Countries that are signatories of the Brussels Convention, now the Brussels Regulation, or the Lugano Convention adopt a strict *lis pendens* rule that jurisdiction generally rests with the court first obtaining jurisdiction, and other litigation is stayed "until such time as the jurisdiction of the court first seised is established."<sup>26</sup> The Regulation leaves no discretion for the court to defer in favor of another court, other than the one first seized under the Regulation (or Convention).<sup>27</sup>

The lack of shared standards for parallel proceedings –

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25. Adjudicative jurisdiction refers to personal jurisdiction, or the court's power over a person or entity. Prescriptive jurisdiction refers to a state or country's ability "to make its law applicable to the activities, relations, or status of persons, or the interest of persons in things. . . ." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) [hereinafter RESTATEMENT].

26. Brussels Regulation, *supra* note 12, art. 27(1).

27. Brussels Convention, *supra* note 11, art. 21. See discussion *infra* Part V.

stay/defer, enjoin the parties from acting in the other suit, or continue both independently – within the United States and internationally, allows parallel proceedings to thrive and creates subsequent problems of enforceability. At the root of the problem are the fundamental differences in attitudes toward parallel proceedings and judicial discretion. How a legal system chooses to treat multiple proceedings is illustrative of its attitudes about “comity.” Comity is an implicit concern in both parallel proceedings and enforcement of judgments. Although the classic definition of comity in the United States is derived from *Hilton v. Guyot*,<sup>28</sup> an 1895 Supreme Court case dealing with enforcement of judgments, the concept comes into play as well when a court is forced to consider how to react to parallel proceedings.<sup>29</sup> Two of the potential responses – one court deferring to another or both courts continuing – reflect a willingness to accord some comity to the foreign sovereign’s courts. Thus any attempt to reach an agreement about enforcing judgments will also have to consider the treatment of parallel proceedings, either as part of the jurisdiction provisions or as part of the consideration of the basis for nonrecognition at the time of enforcement, or at both times.

#### A. *Origins and Responses to Parallel Proceedings*

Given the increasingly transnational character of daily transactions, litigants are considerably more likely to find themselves embroiled in simultaneous proceedings in two or more locations, one of which might even be cyberspace.<sup>30</sup> Varied circumstances can result in duplicative litigation in multiple forums, either simultaneously or successively. There is also the possibility that the second forum is not a court but an arbitral tribunal. Parallel proceedings result from a myriad of causes, not only concurrent jurisdiction. The availability of different procedural systems encourages forum shopping, even when one action has already been filed. U.S. courts offer extensive discovery, jury trials, and the possibility of large damage awards, encouraging parties to

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28. 159 U.S. 113 (1895). See generally Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1 (1991).

29. This assumes the system has no mandatory *lis pendens* rules.

30. See Louise Ellen Teitz, *Parallel Proceedings: Moving into Cyberspace*, 35 INT’L LAW. 491, 493-95 (2001) [hereinafter Teitz, *Moving into Cyberspace*].

bring actions in the United States.<sup>31</sup> Similarly, the existence of different underlying substantive law and forum bias for its own law also encourage filing suit on "home ground," even if suit is already filed elsewhere. Parallel proceedings may also be purely vexatious, intended to increase the burdens on an opponent and the cost and time of litigating.

Regardless of the reasons for the multiple proceedings, there are three possible responses: (1) stay or dismiss the domestic action; (2) enjoin the parties from proceeding in the foreign forum (referred to as an antisuit injunction); or (3) allow both suits to proceed simultaneously, with the likely attendant race to judgment. The proliferation of multiple proceedings has led to a variety of approaches, both here and abroad, which are reflected in U.S. decisions. Often the analyses, developed purely for domestic use, for responses (2) and (3) are intertwined; when a request for response (2) is denied, response (3) is the usual result. Thus, the rules for allowing parallel proceedings and issuing antisuit injunctions are reverse images. There are of course variations on these responses, both among foreign countries and within the United States.<sup>32</sup>

The approach traditionally urged in U.S. courts as to litigation in multiple forums has been to allow parallel proceedings to continue simultaneously: "[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 which can be pled as *res judicata* in the other."<sup>33</sup> International litigation dispersed in multiple countries is treated as analogous to lawsuits in different states within the United States. It is impossible to consolidate actions in two states or in two countries without first departing from one system, either through dismissal or stay. Once

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31. "As a moth is drawn to the light, so is a litigant drawn to the United States." *Smith Kline & French Labs. Ltd. v. Bloch*, [1983] 1 W.L.R. 730 (C.A. 1982) (Lord Denning, MR).

32. For example, a court may dismiss an action rather than stay it. The response to a *forum non conveniens* motion in a U.S. federal court is dismissal. In some states, such as California, the response is a stay.

33. *Laker Airways, Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C. Cir. 1984); *see also Scheiner v. Wallace*, 832 F. Supp. 687, 693 (S.D.N.Y. 1993), *dismissed by, sanctions disallowed*, 860 F. Supp. 991 (S.D.N.Y. 1994) ("general rule of comity requires domestic court to exercise jurisdiction concurrently with foreign court").

one suit has reached judgment, the prevailing party generally seeks to foreclose further action in the remaining suit.<sup>34</sup> While this approach works within the United States where the constitutional guarantee of full faith and credit extends to a sister state's judgment, there is no international equivalent to the Full Faith and Credit Clause. First to judgment does not mean first to enforcement. In the international arena, when a party seeks to enforce the judgment from the first-finished suit in the second country, re-litigation may be necessary, at least when the rendering forum is the United States and the enforcing forum is outside the United States.

A second potential response to parallel proceedings is to defer to another forum, either (1) staying the pending action until an action in another forum is resolved or (2) dismissing the pending action, with or without conditions, in favor of an action pending in another forum. Generally, the basis for requesting a stay is the inconvenience, practical or financial, of litigating in several locations. Indeed, in American practice, parties often join the motion to dismiss for forum non conveniens with an alternative motion to stay.<sup>35</sup> American courts have shown inconsistency in their willingness to defer to courts of other sovereigns. The difficulty arises in deciding whether to categorize parallel proceedings between a U.S. court and a foreign court as analogous to the state/federal, state/state or federal/federal relationship,<sup>36</sup> since there are different precedents for each relationship.<sup>37</sup>

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34. See, e.g., Scheiner, 832 F. Supp. at 693.

35. Some U.S. federal courts have treated motions to stay pending foreign proceedings as equivalent to, or together with, motions to dismiss for forum non conveniens. See, e.g., Philadelphia Gear Corp. v. Philadelphia Gear Corp. de Mexico, 44 F.3d 187 (3d Cir. 1994). The assumption that staying an action allows the result in the foreign action to control is only partially correct since it does not take into consideration the ultimate issue of recognition and enforcement of judgments and the location of assets that might be used to satisfy the judgment.

36. Compare, e.g., Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines, 925 F.2d 1193, 1195 (9th Cir. 1991) (rejecting notion that a federal court owes greater deference to foreign courts than state courts), with Brinco Mining, Ltd. v. Federal Ins. Co., 552 F. Supp. 1233, 1242-43 (D.D.C. 1982) (treating standard as same as between two federal courts). See, e.g., AAR Int'l, Inc. v. Nimelias Enters. S.A., 250 F.3d 510, 518 (7th Cir. 2001); Posner v. Essex Insurance Co., 178 F.3d 1209 (11th Cir. 1999); Szabo v. CGU Int'l Ins., PLC, 199 F. Supp. 2d 715 (W.D. Ohio 2002).

37. See General Electric Co. v. Deutz AG, 270 F.3d 144, 150, 152 (3d Cir.

This is particularly true when the federal court chooses to defer or declines to proceed. When the federal court has jurisdiction but chooses not to exercise it in deference to another proceeding, usually that of a state, this discretionary refusal implicates the doctrine of abstention. However, when the federal court defers to a court of another country rather than a state, the argument is generally couched in terms of "comity."<sup>38</sup> While comity initially was considered in connection with recognition and enforcement of a foreign judgment, amounting to giving extraterritorial effect to another sovereign's laws, its use has been extended to a general concept of "courtesy." Comity then becomes a basis for a federal court to abstain from acting, including refusing to enjoin parallel proceedings,<sup>39</sup> and has become enmeshed in the federal abstention case law, reflecting another attempt to squeeze transnational litigation problems into the existing mold of domestic lawsuits.

A stay in favor of proceedings in a foreign court is discretionary, based on the inherent power of the court to control its own docket.<sup>40</sup> The basis for a stay in federal court has often been tied explicitly to judicial efficiency<sup>41</sup> and to the impact on the system,

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2001); *see also* Advantage Int'l Mgmt. v. Martinez, No. 93 Civ. 6227 (MBM), 1994 WL 482114 (S.D.N.Y. Sept. 7, 1994):

Although the Supreme Court has not addressed specifically the criteria that courts should consider when determining the propriety of staying or dismissing a federal action in deference to another lawsuit pending in a foreign jurisdiction, courts faced with this issue have articulated a standard premised, in part, on analogous Supreme Court precedent concerning the contemporaneous exercise of jurisdiction by federal courts, or by federal and state courts. *See, e.g.,* Caspian Invs., Ltd. v. Vicom Holdings, Ltd., 770 F. Supp. 880, 884 (S.D.N.Y. 1991) (citing *Colorado River*, 424 U.S. at 817).

*Id.* at \*2.

38. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). The Supreme Court defined comity as follows:

"Comity," in the legal sense, is neither a matter of absolute obligation . . . nor of mere courtesy and good will . . . . 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.

*Id.* *See generally* Paul, *supra* note 28.

39. *See* discussion *infra* Part II.B.

40. *See, e.g.,* *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *Trujillo v. Conover & Co. Communications*, 221 F.3d 1262, 1264 (11th Cir. 2000).

41. One court explained the relationship this way:

at least in the case of abstention under the *Colorado River*<sup>42</sup> doctrine. In *Colorado River*, a purely domestic case, the Supreme Court acknowledged that federal courts had a “virtually unflagging obligation . . . to exercise the jurisdiction given them,”<sup>43</sup> but proceeded to provide a checklist of factors to be balanced to determine if the case fell within one of the limited circumstances in which federal courts should abstain in “the presence of a concurrent state proceeding for reasons of wise judicial administration. . . .”<sup>44</sup> In its subsequent refinement and limitation of *Colorado River*, the Supreme Court has characterized the paramount concern in that case as “[the] avoidance of piecemeal litigation. . . .”<sup>45</sup> Under the *Colorado River* doctrine, a court looks to see if either forum has jurisdiction over the property at issue:

In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction [federal/state], a federal court may also consider such factors as the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums . . . [no] other

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Numerous factors bear on the propriety of staying litigation while a foreign proceeding is pending. They include pragmatic concerns such as the promotion of judicial efficiency and the related questions whether the two actions have parties and issues in common and whether the alternative forum is likely to render a prompt disposition. Also relevant are considerations of fairness to all parties or possible prejudice to any of them. A third group of concerns relates to comity between nations. When as in this case the foreign action is pending rather than decided, comity counsels that priority generally goes to the suit first filed.

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

Other cases have provided different formulations for the test to determine whether to grant a stay. See, e.g., Dragon Capital Partners L.P. v. Merrill Lynch Capital Servs., Inc., 949 F. Supp. 1123 (S.D.N.Y. 1997); Continental Time Corp. v. Swiss Credit Bank, 543 F. Supp. 408, 410 (S.D.N.Y. 1982) (adding temporal sequence to the factors in *I.J.A., Inc. v. Marine Holdings, Ltd.*, 524 F. Supp. 197 (E.D. Pa. 1981)).

42. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

43. *Id.* at 817.

44. *Id.* at 818-19.

45. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983) (quoting *Colorado River*, 424 U.S. at 819).

factor is necessarily determinative.<sup>46</sup>

Some federal cases reflect hostility to relying on *Colorado River* to stay cases in favor of foreign proceedings. For example, the Ninth Circuit, in a recent case it described as "an ordinary commercial dispute over the loss of cargo," reversed the district court's granting of a stay pending the outcome of proceedings in Switzerland because the circuit court found no "exceptional circumstances" to justify abstention.<sup>47</sup> Relying on cases that involve state/federal disputes, the court emphasized that "conflicting results, piecemeal litigation, and some duplication of judicial effort is the unavoidable price of preserving access to . . . federal relief."<sup>48</sup> The court then reasoned that the foreign aspect was "immaterial," and that "no greater deference" was owed to foreign courts than *state* courts.<sup>49</sup>

In contrast to the Ninth Circuit's approach, the U.S. District Court for the District of Columbia determined that a foreign court, in this case a Canadian one, was owed the same degree of deference as *another federal* court.<sup>50</sup> The court applied the *Colorado River* test, stating that "the concerns that federalism normally presents for a diversity court are not implicated in this case."<sup>51</sup> In dismissing, the court relied on "international comity" and a "well-founded aversion to forum shopping on an international scale," as well as application of the *Colorado River* factors.<sup>52</sup>

A recent District Court decision within the Sixth Circuit is also typical of the attempt to fit purely domestic doctrine into international proceedings. The court, facing reverse parallel declaratory actions in connection with uninsured motorist insurance, refused to abstain in favor of the London action, relying on *Colo-*

46. *Colorado River*, 424 U.S. at 818 (citations omitted).

47. *Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines*, 925 F.2d 1193, 1194-95 (9th Cir. 1991).

48. *Id.* at 1195 (quoting *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979), *cert. denied*, 469 U.S. 872 (1984)).

49. *Id.* (emphasis added).

50. *Brinco Mining, Ltd. v. Federal Ins. Co.*, 552 F. Supp. 1233, 1240 (D.D.C. 1982). The court stated two facts for support: (1) the other forum was Canada, which was also a common-law country; and (2) the plaintiff was trying to use the U.S. court to circumvent proceedings it had originally brought in its own country. *Id.*

51. *Id.*

52. *Id.* at 1242.

*rado River* abstention: “The same principles which govern parallel state and federal proceedings apply to parallel proceedings in a foreign court.”<sup>53</sup> The court proceeded to apply the eight factors from *Moses Cone*, another domestic precedent, giving strong weight to the ability of the English insurer to litigate in the United States, the lack of “exceptional circumstances” to justify abstention, and a comment by the English judge that should Ohio law be determined to govern, the Ohio proceedings should deal with matters of Ohio law.<sup>54</sup>

### B. Comity and International Abstention in the Last Decade

A decade ago, federal courts, led by the Eleventh Circuit, began espousing a new doctrine of deference described as “international abstention,” a term reflecting the inconsistent precedents. This doctrinal approach – while similar to “comity” as used by some courts, such as those in the Second Circuit<sup>55</sup> – takes its roots initially from the federal abstention doctrine involving federal and state proceedings. In one of the first major international abstention cases, *Turner Entertainment Co. v. Degeto Film GmbH*,<sup>56</sup> the Eleventh Circuit, in a later-filed reverse breach of contract suit, deferred to pending German litigation in connection with proceedings involving a license agreement concerning television broadcasts. The court acknowledged a duty to exercise jurisdiction, but proceeded to consider the two lines of precedent, and to create an

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53. *Szabo v. CGU Int'l Ins., PLC*, 199 F. Supp. 2d 715, 719 (S.D. Ohio 2002) (citing *AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 518 (7th Cir. 2001)).

54. *Id.* at 720-21.

55. *See, e.g., Rapture Shipping, Ltd. v. Allaround Fuel Trading B.V.*, No. 03 Civ. 738 (JFK), 2004 WL 253339 (S.D.N.Y. Feb. 10, 2004) (holding that pursuant to the principles of comity, the judgment of a Netherlands court would be honored); *Aquinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996) (dismissing on grounds of international comity and forum non conveniens a class action brought by Ecuador residents against a U.S. oil company for damages caused by oil exploration), *vacated*, *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (dismissing for forum non conveniens subject to condition of Texaco's consent to jurisdiction in Ecuador), *remanded to Aquinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (holding that because Texaco had submitted to jurisdiction in Ecuador, and the strong presumption for plaintiff's forum was overcome by private and public factors favoring the alternative forum, Texaco's motion to dismiss on forum non conveniens grounds was granted), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

56. 25 F.3d 1512 (11th Cir. 1994).



international abstention doctrine:

This circuit has never considered the question of "international abstention." In other federal courts, at least two distinct but very similar approaches to international abstention have developed. Both have lifted criteria for analysis from case law concerning concurrent jurisdiction between federal and state courts.

... These two sets of principles overlap to a large extent, and we find both lines of cases helpful to our analysis. Taking the two approaches together, courts have sought to fashion principles that will promote three readily identifiable goals in the area of concurrent international jurisdiction: (1) a proper level of respect for the acts of our fellow sovereign nations – a rather vague concept referred to in American jurisprudence as international comity; (2) fairness to litigants; and (3) efficient use of scarce judicial resources.<sup>57</sup>

The court also considered fairness, which was composed of three elements: (1) order of filing; (2) convenience of the forum; and (3) possible prejudice to the parties resulting from abstention.<sup>58</sup>

A similar result was reached in the later Eleventh Circuit case, *Posner v. Essex Insurance Co.*,<sup>59</sup> where the court rejected the argument that the Supreme Court's decision in *Quackenbush v. Allstate Insurance Co.*<sup>60</sup> was relevant to domestic cases. In *Quack-*

57. *Id.* at 1518.

58. *Id.* at 1521-22.

59. 178 F.3d 1209, 1222-24 (11th Cir. 1999).

60. 517 U.S. 706 (1996). Some federal courts, especially the district courts, appear to have hastily seized upon the language in *Quackenbush* about the ability of a federal court to dismiss only in cases of equitable relief, and therefore these courts have emphasized the need to "stay" as opposed to "dismiss" the pending United States litigation.

For an interesting discussion of the issue of applying *Quackenbush* in the international context and the need for a stay, rather than a dismissal, see 767 *Third Avenue Assocs. v. Consulate General of the Socialist Fed. Republic of Yugoslavia*, 60 F. Supp. 2d 267, 278-82 (S.D.N.Y. 1999), in which the District Court stayed litigation involving a dispute over rented diplomatic offices in connection with the disintegration of Socialist Federal Republic of Yugoslavia as a non-justiciable political question:

The deference that is necessary here is deference to an executive branch foreign policy determination, which itself is a policy of defer-

*enbush*, the Supreme Court surveyed the domestic abstention doctrines and held that federal courts had the power to dismiss or remand *only* in equitable relief cases.<sup>61</sup> In *Posner*, a Florida individual and majority shareholder of SMC, a privately held Maryland corporation, sued Essex, a Bermuda insurer that was owned 35% by SMC and 65% by Salem, a Pennsylvania corporation of which Posner owned 49%. The suits alleged a variety of claims, including financial mismanagement and breach of contract, in connection with failure to pay claims on insurance policies. Essex, after denying the claims, filed a declaratory judgment action in Bermuda on the validity of the insurance policies.

The district court dismissed all claims in the United States on grounds of personal jurisdiction or international abstention.<sup>62</sup> In reviewing the portion of the lower court's action dismissing in favor of the parallel Bermuda litigation, the Eleventh Circuit addressed the plaintiff's argument that *Quackenbush* removes the discretion of the district court to abstain in a nonequitable claim, the sort at issue here:<sup>63</sup> "Read in the proper context . . . the Supreme Court's admonition that courts generally must exercise their non-discretionary authority in cases over which Congress has granted them jurisdiction can apply only to those abstention doctrines addressing the unique concerns of federalism."<sup>64</sup> Finding that *Quackenbush* did not control in the realm of international litigation and that *Turner* was the controlling precedent, the Eleventh Circuit then applied the three *Turner* factors to decide what to do in relation to an earlier-filed Bermuda action. The court reviewed the basis for abstention, finding that the Bermuda forum was competent, that it was fair to allow the earlier-filed Bermuda action to proceed, but modified the dismissal to a stay.<sup>65</sup> The Elev-

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ence to ongoing international efforts. The principles underlying the choice of a stay over a dismissal apply equally when the deference motivating abstention bases not on constitutional *federalism* and *federal-state* comity, but instead, as here, on constitutional *separation of powers* and *national-international* comity.

*Id.* at 282.

61. *Quackenbush*, 517 U.S. at 731.

62. *Posner*, 178 F.3d at 1213-1214.

63. *Id.* at 1222-1223.

64. *Id.* at 1223.

65. *Id.* at 1224. The Court stated:

With respect to the first factor, international comity, the district

enth Circuit, although abstaining in favor of parallel foreign litigation, correctly acknowledged that domestic abstention doctrines are inapplicable to relationships “between federal courts and foreign nations (grounded in the historical notion of comity).”<sup>66</sup> The Eleventh Circuit has continued to create a jurisprudence that recognizes the differences between domestic and international litigation, as illustrated by the decision in *Posner*.<sup>67</sup>

Comity as the basis for staying U.S. litigation in deference to foreign litigation, especially when the foreign suit was filed first, has become an increasingly acceptable approach during the last decade, even in light of the intervening *Quackenbush* decision. The doctrine of international abstention explicitly incorporates “comity” through the first factor of “proper respect.”<sup>68</sup> Courts have continued to cobble together a collection of factors to consider when deciding whether to abstain in the international context. Courts have begun to realize the “overarching concerns for a federal court facing concurrent international jurisdiction including demonstrating a proper level of respect for the acts of other sovereign nations, ensuring fairness to litigants, and efficiently using scarce judicial resources.”<sup>69</sup>

In another example during the decade, *Goldhammer v. Dunkin' Donuts, Inc.*,<sup>70</sup> involving proceedings in two common-law fo-

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court found no evidence that the Bermuda court was not competent to hear the claims or would not use fair and just proceedings . . . . The district court also noted that the insurance “policies are governed by Bermuda law, and their underwriter Essex, is a Bermuda corporation” . . . . As the district court recognized, the second and third *Turner* factors – fairness and judicial resources – also counsel in favor of abstention. With respect to fairness, the facts that Essex filed a year before the commencement of this case, and allowing both actions to proceed risks inconsistent judgments, outweigh any convenience that the parties might enjoy in the Florida forum. Finally . . . they . . . involve significantly common issues and parties.

*Id.*

66. *Id.* at 1223; see also *Linear Products, Inc. v. Marotech, Inc.*, 189 F. Supp. 2d 461, 464-68 (W.D. Va. 2002).

67. See, e.g., *Mut. Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312 (11th Cir. 2004); *Seguros Del Estado, S.A. v. Scientific Games, Inc.*, 262 F.3d 1164 (11th Cir. 2001).

68. *Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994).

69. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Kozeny*, 115 F. Supp. 2d 1243, 1247 (D. Colo. 2000).

70. 59 F. Supp. 2d 248 (D. Mass. 1999).

rum, <sup>71</sup> a District Court in the First Circuit also considered defendant's motion to dismiss the U.S. lawsuit in favor of an earlier-filed English action. The court put together a "roster of relevant factors" for ruling on the motion, taken from earlier cases in several courts, <sup>72</sup> including: (1) similarity of parties and issues (here minimal differences); (2) promotion of judicial efficiency ("not dispositive," but a "key factor"); (3) adequacy of relief in the alternative forum (here Dunkin' Donuts U.K. claims that it will lose its Massachusetts unfair and deceptive trade practices claim); (4) fairness and convenience of the parties, counsel, and witnesses (equal here); (5) possibility of prejudice (consideration of different procedures available); and (6) temporal sequence of filing. <sup>73</sup> The court's analysis in *Goldhammer* is interesting in its incorporation of significant aspects of a forum non conveniens analysis – specifically reducing the "fairness" factor to convenience of the parties, counsel, and witnesses – and analyzing procedural differences in discovery available in the United States, as opposed to what amounts to the "alternative forum," here England. <sup>74</sup> The impor-

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71. *Id.* at 249-50. In both concurrent litigation cases and forum non conveniens cases, the significance of a common legal tradition receives some weight, even when unstated: "Because the United States and England share the same common law heritage, deference to British proceedings is consistent with notions of international comity." *Id.* at 254-55.

72. *Id.* at 252. Many of the factors appear in *Caspian Investments, Ltd. v. Viacom Holdings, Ltd.*, 770 F. Supp. 880, 884 (S.D.N.Y. 1991). The facts and analysis are also similar to *Dragon Capital Partners L.P. v. Merrill Lynch Capital Services, Inc.*, 949 F. Supp. 1123 (S.D.N.Y. 1997). See Louise Ellen Teitz, *International Litigation, Parallel Proceedings: Treading Carefully*, 32 INT'L LAW. 223, 225 (1998) [hereinafter Teitz, *Treading Carefully*] (discussing the relevant factors of *Dragon Capital*).

73. *Goldhammer*, 59 F. Supp. 2d at 252-53; see also *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 115 F. Supp. 2d at 1247-49 (discussing the individual factors); see also *AAR Int'l, Inc. v. Vacanes Heliades S.A.*, 100 F. Supp. 2d 875, 878 (N.D. Ill. 2000) (citing *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898-99 (7th Cir. 1999)), *rev'd*, 250 F.3d 510 (7th Cir. 2001), *cert. denied*, 534 U.S. 995 (2001); *Sabre, Inc. v. Air Canada, Inc.*, No. 3-02-CV-2016-L, 2002 U.S. Dist. LEXIS 23697, at \*8 (N.D. Tex. Dec. 9, 2002) (providing a list of factors to weigh in considering forum non conveniens).

74. In response to Dunkin' Donuts U.K.'s concerns that it could not take pre-trial depositions in England, the court commented on the new procedural rules in England as yet untried: "As the federal courts grapple with controlling discovery costs and English courts look to expand discovery rights, soon the key difference between the two systems might be in the wigs." *Goldhammer*, 59 F. Supp. 2d at 254 n.1.

tance of comity, especially when there is a shared "common law heritage" is stressed at several points:<sup>75</sup> "[N]otions of international comity are at an apex when parties inject themselves into the economy of another nation for profit, particularly one as close as Great Britain, and then try to extricate themselves from its jurisdiction."<sup>76</sup>

These cases illustrate the confusion and conflicting treatment of parallel proceedings by U.S. courts involving American and foreign courts. In addition, they demonstrate the use of "comity" as a basis for *abstaining*, thus deferring to another forum, as opposed to being used as justification for *allowing* parallel proceedings in both forums to continue.<sup>77</sup> Staying parallel proceedings even when

75. *Id.* at 254-55.

76. *Id.* at 255-56. In *MLC (Bermuda) Ltd. v. Credit Suisse First Boston Corp.*, 46 F. Supp. 2d 249 (S.D.N.Y. 1999), another case involving multiple proceedings in the United States and England, the federal court for the Southern District of New York applied similar factors, taken also in part from *Caspian Invs., Ltd. v. Viacom Holdings, Ltd.*, 770 F. Supp. 880, 884 (S.D.N.Y. 1991), to dismiss the U.S. action in deference to the pending prior proceedings in London.

The court in *MLC* actually adds a factor not usually seen in an analysis of whether to stay or dismiss in deference to parallel litigation – the plaintiff's choice of forum – which the court here states "is entitled to much less weight when it is made after the filing of a concurrent action arising out of the same series of transactions." *MLC*, 46 F. Supp. 2d at 254. The consideration of plaintiff's choice of forum is generally reserved for forum non conveniens and personal jurisdiction analysis.

The court also seems to suggest that whenever there are two suits, only one should proceed – the other court should, it is assumed, defer: "[D]ismissal will likewise promote judicial economy. Where a single court is capable of fairly and competently adjudicating an entire controversy, there is little reason to divide the task between two courts." *Id.* For an interesting comparison, one can look at the English proceeding involving a portion of this litigation in the Commercial Court in London, where the court issued a limited antisuit injunction as to certain claims, which were then eliminated from the U.S. complaint. *Credit Suisse First Boston (Europe) Ltd. v. MLC (Bermuda) Ltd.*, [1999] 1 Lloyd's Rep. 767, 779-83 (Q.B. 1998).

77. See, e.g., *Advantage Int'l Mgt., Inc. v. Martinez*, No. 93 Civ. 6227 (MBM), 1994 WL 482114, at \*4 n.2 (S.D.N.Y. Sept. 7, 1994) (citing *Colorado River*, 424 U.S. at 817-18). The Court explained this concept:

Courts use the terms comity and, to a lesser extent, international abstention, to refer to the doctrine of judicial deference to pending foreign proceedings . . . although neither of these terms technically is appropriate. Comity refers to deference to another sovereign's definitive law or judicial decision, see *Hilton v. Guyot*, . . . not to its preliminary decision to enact a law or issue a judgment. Abstention is a jurisdiction limiting doctrine relevant only to a limited category of

the parties and issues are not identical has been approved by several courts when the court foresees the ability to use the first judgment to preclude further litigation.<sup>78</sup> The longer the litigation has been proceeding when the second suit is filed and the stage that the initial litigation has reached appear to be decisive factors when ruling on a motion to stay the parallel proceeding. Courts are reluctant to allow a party to use a late-filed subsequent action to frustrate ongoing proceedings. When the second suit is filed in the United States, courts are more willing to defer to the foreign proceeding, and more reluctant to enjoin the continuation of the foreign proceeding.

Throughout the last decade then one finds more and more courts, when faced with parallel proceedings, staying or dismissing the U.S. action, especially if it is the later-filed suit, viewing this as an appropriate response to concurrent jurisdiction and one dictated by both judicial efficiency and a growing awareness of "comity." In addition, one finds more and more courts acknowledging the need for developing jurisprudence for parallel international cases apart from that used for domestic situations of litigation because of the failure of domestic precedent to incorporate the added concerns of foreign sovereigns.

### III. ANTISUIT INJUNCTIONS DURING THE DECADE

Enjoining parties from proceeding in another forum, the third possible response to parallel litigation, is clearly the most abrasive. Injunctions therefore are and should be difficult to obtain. While the injunctive relief sought is technically against the parties rather than the foreign court, the impact is often the same and the offense to the other court's jurisdiction and sovereignty is as obvious.<sup>79</sup> During the last decade, an increasing number of courts advocated restraint in the granting of antisuit injunctions, not only

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cases concerning constitutional adjudication and state-federal relations.

*Id.*

78. See, e.g., *Herbstein v. Breutman*, 743 F. Supp. 184 (S.D.N.Y. 1990); *Black & Decker Corp. v. Sanyei Am. Corp.*, 650 F. Supp. 406 (N.D. Ill. 1986).

79. Cf. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996). Here the Fifth Circuit found specifically that the dispute was essentially private and the antisuit injunction granted by the district court did not "[trample] on notions of comity." *Id.* at 627.

in the United States but abroad as well, in most cases, other than perhaps defamation cases.

Federal courts in the United States deciding whether to enjoin parallel proceedings in foreign forums generally divide into two camps:<sup>80</sup> the First, Second, Third, Sixth and D.C. Circuits that follow the *Laker* "sparingly used" approach;<sup>81</sup> and the Fifth, Seventh, and Ninth Circuits that use the more liberal approach.<sup>82</sup> Assuming that the suits involve the same parties and that the resolution of the case in the enjoining court would be dispositive of

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80. For a thorough discussion of the two approaches to antisuit injunctions, see George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589 (1990); Note, *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039 (1985). For an interesting analysis of parallel proceedings circuit by circuit, see Margarita Trevino de Coale, *Stay, Dismiss, Enjoin, or Abstain? A Survey of Foreign Parallel Litigation in the Federal Courts of the United States*, 17 B.U. INT'L L.J. 79 (1999); Trevor C. Hartley, *Comity and the Use of Antisuit Injunctions in International Litigation*, 35 AM. J. COMP. L. 487 (1987); Russell J. Weintraub, *Parallel Litigation and Forum-Selection Clauses*, in LAW AND JUSTICE, *supra* note 8.

For the Canadian perspective on antisuit injunctions and parallel proceedings, see JEFFREY TALPIS, "IF I AM FROM GRAND-MERE, WHY AM I BEING SUED IN TEXAS?" RESPONDING TO INAPPROPRIATE JURISDICTION IN QUEBEC-UNITED STATES CROSSBORDER LITIGATION (2001). For the use of antisuit injunctions in the U.K., see ADRIAN BRIGGS & PETER REES, *CIVIL JURISDICTION AND JUDGMENTS* §§ 5.33-5.50 (3d ed. 2002). A negative declaration can also be used in lieu of an antisuit injunction. See generally Andrew S. Bell, *The Negative Declaration in Transnational Litigation*, 111 LAW Q. REV. 674 (1995).

81. *Laker Airways, Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984). The case itself provides a lengthy history of the litigation, as well as a description of proceedings in England. *Id.* at 917-21. See also *British Airways Bd. v. Laker Airways* [1984] 3 W.L.R. 413; see generally Gary B. Born, *Recent British Responses to the Extraterritorial Application of United States Law: The Midland Bank Decision and Retaliatory Legislation Involving Unitary Taxation*, 26 VA. J. INT'L L. 91 (1985); Aryeh S. Friedman, *Laker Airways: The Dilemma of Concurrent Jurisdiction and Conflicting National Policies*, 11 BROOK. J. INT'L L. 181 (1985); Daryl Libow, Note, *The Laker Antitrust Litigation: The Jurisdictional "Rule of Reason" Applied to Transnational Injunctive Relief*, 71 CORNELL L. REV. 645 (1986).

82. The liberal standard of enjoining parallel proceedings in cases of duplicative litigation is illustrated by the Fifth and Ninth Circuit approaches, especially in *In re Unterweser Reederei, GmbH*, 428 F.2d 888 (5th Cir. 1970). See also *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855-56 (9th Cir. 1981). The approach is also described as consisting of the five factors enumerated in *American Home Assurance Co. v. Ins. Corp. of Ireland, Ltd.*, 603 F. Supp. 636, 643 (S.D.N.Y. 1984).

the action, courts look to see if there is an exception to the general rule favoring concurrent litigation. The *Laker* approach recognizes exceptions when the injunction is necessary (1) to protect the enjoining court's jurisdiction or (2) to protect important public policy of the forum. "[D]uplication of parties and issues alone is not sufficient to justify the issuance of an antisuit injunction."<sup>83</sup> The liberal standard of enjoining parallel proceedings in cases of duplicative litigation, as illustrated by the Fifth, Seventh, and Ninth Circuit approaches, accords less weight to comity and more to whether the litigation is vexatious or would result in "inequitable hardship," and would "tend to frustrate and delay the speedy and efficient determination of the cause."<sup>84</sup>

During the last ten years, this Circuit split has continued. One can compare a recent Seventh Circuit case<sup>85</sup> with a recent Third Circuit case<sup>86</sup> to see the differences in approach and philosophy. The Seventh Circuit is aligned with the more liberal approach where duplication of parties and issues is a sufficient basis for an antisuit injunction. The Seventh Circuit's opinion reflects an emphasis on efficiency, while that of the Third Circuit gives greater weight to comity and respect for foreign sovereigns and their judicial systems. In *Allendale Mutual Insurance Co. v. Bull Data Systems*,<sup>87</sup> a subsidiary of a French computer manufacturer, whose parent was a French corporation ninety percent of whose stock was owned by the French government, obtained worldwide insurance coverage from Allendale, a U.S. insurance company and its British subsidiary, FMI. A subsequent fire of suspicious origin destroyed a warehouse of computers in France valued at about \$100 million. The insurance companies, responding to a claim of loss, sought a declaratory judgment in federal court in Illinois that the fire was committed by arson of the insured and therefore was outside the policy, or that if there was no arson, then coverage would be limited to the specific policy of FMI. Bull Data filed its own suit in Illinois against Allendale and the insurance broker. In

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83. *Laker*, 731 F.2d at 928 (citing *Compagnie des Bauxite de Guinea v. Ins. Co. of N. Am.*, 651 F.2d 877, 887 (3d Cir. 1981)).

84. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996) (citing *Unterweser Reederei GmbH*, 428 F.2d at 890, 896).

85. *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 10 F.3d 425 (7th Cir. 1993).

86. *General Electric Co. v. Deutz AG*, 270 F.3d 144 (3d Cir. 2001).

87. 10 F.3d 425 (7th Cir. 1993).



addition, it instituted separate proceedings against FMI in the Commercial Court of Lille, France, arguably the court with exclusive jurisdiction over suits seeking enforcement of insurance policies governed by the French insurance code. Allendale and FMI subsequently asked the French court to stay its proceedings pending a criminal investigation by a French magistrate which they had sought the stay was granted.<sup>88</sup>

In the midst of discovery in the American suit, Bull Data filed a motion to lift the stay and proceed in the French court. The Seventh Circuit found the timing peculiar, given that the French magistrate's investigation of the fire was allegedly "on the verge of completion."<sup>89</sup> Not surprisingly, Allendale then moved in Illinois for a preliminary injunction against Bull Data's continuing to litigate in the French Commercial Court, which was granted by the U.S. district court, and affirmed by the Seventh Circuit, despite that: (1) the fire occurred in France; (2) most of the evidence was in French and located in France; and (3) one insurance policy specifically called for application of the French insurance code.<sup>90</sup>

In granting the injunction, the Seventh Circuit placed great weight on the arbitrator-like nature of the French tribunal and what it viewed as the French court's insufficient experience and resources to handle a complex case<sup>91</sup> – a rather chauvinistic view of international transactions. In keeping with its narrow viewpoint, the court refused to accord any weight to comity, stating that its analysis required, unlike the stricter *Laker* approach, at least some evidence that "the issuance of an injunction really would throw a monkey wrench, however small, into the foreign relations of the United States."<sup>92</sup> The court added:

When we say we lean toward the laxer standard we do not mean that international comity should have no weight in the balance . . . . The difference between the two lines of cases has to do with the inferences to be drawn in the absence of information. The strict cases presume a threat to international comity whenever an in-

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88. See *id.* at 426-27.

89. *Id.* at 427.

90. *Id.* at 426-27.

91. *Id.* at 429-31.

92. *Id.* at 431.

junction is sought against litigating in a foreign court.<sup>93</sup>

Yet, the court belittled the amicus brief of the Commission de Controle des Assurances, the French agency that regulates the insurance business in that country, and then suggested that “[w]e are given no indication, moreover, that the French commission is authorized to speak for the French state.”<sup>94</sup> Ultimately, the Seventh Circuit placed great weight on the American plaintiff’s need for a U.S. forum, as well as the major shortcomings the court perceived in the French “court.”<sup>95</sup>

The court admitted that if the FMI policy were construed as containing an arbitration clause requiring dispute resolution in the Commercial Court of Lille, it would have been forced to uphold the clause. The court maneuvered away from that restriction, saying that Bull Data had not asserted the arbitration clause and instead had been content to litigate its dispute in Illinois federal court, until it suddenly tried to reactivate the French suit.<sup>96</sup> Such an undercurrent of strategic litigation, designed to harass the opposing party, receives greater weight in the Seventh Circuit than in the stricter Second and D.C. Circuits, where comity outweighs vexatiousness.<sup>97</sup>

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93. *Id.*

94. *Id.* at 432.

95. Emphasizing the plaintiff’s need, the court said: “we don’t think the ‘strict’ cases would refuse to weigh against such a threat [sic] substantial U.S. interests. Groupe Bull is French, but Allendale is American, and the United States has an interest in protecting its citizens, including its corporate citizens, from trumped-up multi-million dollar claims.” *Id.*

96. The court explained this point:

The injunction merely prevents a French company from seeking to revive a dormant proceeding before an arbitral tribunal in France. The only concern with international comity is a purely theoretical one that ought not trump a concrete and persuasive demonstration of harm to the applicant for the injunction, if it is denied, not offset by any harm to the opponent if it is granted.

*Id.* at 432-33.

97. One recent Fifth Circuit case, *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996), affirmed the district court’s grant of an antisuit injunction, without security, in connection with a mirror image lawsuit filed in Japan by the defendant in the U.S. litigation. The court, finding that the case was basically a private contract dispute, refused to “give greater deference to comity” and continued to adhere to the position it had taken in earlier cases and that followed by the Ninth and Seventh circuits. *Id.* at 625, 627. The court continued: “[w]e decline, however, to require a district court to genuflect

The *Laker* approach gained a majority when the Third Circuit in 2001 officially aligned itself with the “more restrictive standard” after hinting at the importance of comity within the transnational litigation context in several earlier cases.<sup>98</sup> In *General Electric Co. v. Deutz AG*,<sup>99</sup> the Court of Appeals reversed the district court’s order enjoining the defendant’s efforts in English courts to enforce the right to arbitration on the basis of comity, and in the process rejected an argument that an important public policy, “the sanctity of the jury verdict,” would be threatened without the injunction.<sup>100</sup>

In *Deutz*, GE entered into a joint venture contract with Moteren-Werke Mannheim AG, a German corporation, to design and manufacture diesel engines for locomotives. Under the contract, Moteren-Werke’s parent, Deutz AG, would guarantee the obligations (of design) of the subsidiary. When the joint venture fell apart and Deutz refused to provide additional funding, GE brought suit in federal court in Pennsylvania for breach of contract. Deutz, besides challenging personal jurisdiction, also asserted that the contract required arbitration. In July 1999, while the suit was pending in the district court, Deutz sought to arbitrate before the International Arbitration Association in London. The district court, meanwhile, ruled that there was personal ju-

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before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action.” *Id.* at 627. The dissent, by Judge Emilio Garza, outlines the arguments against antisuit injunctions and in favor of international comity and the approach now used in the First, Second, Third, Sixth and D.C. Circuits, providing a passionate plea for comity:

International comity represents a principle of paramount importance in our world of ever increasing economic interdependence. Admitting that “comity” may be a somewhat elusive concept does not mean that we can blithely ignore its cautionary dictate. . . . Amicable relations among sovereign nations and their judicial systems depend on our recognition, as federal courts, that we share the international arena with co-equal judicial bodies, and that we therefore act to deprive a foreign court of jurisdiction only in the most extreme circumstances.

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

98. See, e.g., *Compagnie Des Bauxites de Guinea v. Ins. Co. of North America*, 651 F.2d 877 (3d Cir. 1981), *aff’d*, 456 U.S. 694 (1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (applying comity in connection with prescriptive jurisdiction in antitrust case); *Armstrong World Indus., Inc. v. Sommer Allibert, S.A.*, No. Civ. 97-3914, 1998 WL 195938 (E.D. Pa. April 13, 1998).

99. 270 F.3d 144 (3d Cir. 2001).

100. *Id.* at 159, 162.

risdiction and submitted to a jury the issue of whether the contract language provided for arbitration. The jury found that Deutz was not entitled to arbitration. In April 2000, before the arbitration panel issued a decision, Deutz petitioned the High Court in London to enjoin GE from continuing to litigate in federal court in Pennsylvania, which the English court declined to do. At the end of July 2000, after the London court had refused to enjoin GE and before the arbitral panel's decision, GE convinced the district court in the United States to do what the London court had refused to do – issue an antisuit injunction, here with the parties reversed, and enjoin Deutz from resorting to the High Court in the future. In November 2000, the arbitration panel held that GE and Deutz had not agreed to arbitrate this dispute, closing the circle.<sup>101</sup>

The Third Circuit, although finding that Deutz was not entitled to compel arbitration under the contract, reversed the antisuit injunction, in the process clearly joining with those Circuits following a *Laker*, stricter approach to granting antisuit injunctions:<sup>102</sup> “The circumstances here were not so aggravated as to justify interference with the jurisdiction of the courts of another sovereign state, and there is no indication that the English courts would have prevented General Electric from arguing the *res judicata* effect . . . of the . . . [district court] order.”<sup>103</sup> In addition, the English High Court had already refused to issue an injunction against GE and had given no indication that it was likely to issue one. Finally, the Third Circuit rejected the argument that the public policy of the forum – the importance of a jury verdict – was threatened by the parallel litigation.<sup>104</sup> Indeed, GE's position would insulate any jury findings from challenge in any way out-

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101. *Id.* at 149.

102. *Id.* at 148-49, 160-62.

103. *Id.* at 159.

104. *Id.* The court stated:

Although the jury unquestionably has a more important role in the American jurisprudential system than in that of any other nation, its verdict is neither infallible nor immune from judicial scrutiny.

We have been cited to no authority that endorses enjoining proceedings in a foreign court on the grounds that an American jury verdict might be called into question.

*Id.*

side the United States and would also undermine related arbitral tribunals, especially where there are issues of arbitrability.

The Third Circuit in *Deutz* repeatedly acknowledges that parallel litigation involving international proceedings is different from purely domestic litigation, and thus the precedent should reflect different values, particularly comity. The court looks at its own international cases and goes to great pains to show deference to the English High Court's ruling: "Our jurisprudence thus reflects a serious concern for comity. . . . This is not an aggravated case that calls for extraordinary intervention, nor is it sufficient that the ruling of the arbitral panel might have jeopardized the district court's jurisdiction."<sup>105</sup> The Third Circuit's unwillingness to accept a jury fact determination in a civil case as an essential public policy of the forum is an acknowledgment that not all litigation will or need follow the American model. The Third Circuit's opinion represents one of the very positive steps during the last decade toward realization of the significant differences between parallel proceedings which are wholly domestic and parallel proceedings that involve a foreign action, thus implicating different values and comity concerns.

In March 2004, the First Circuit rejected the liberal approach and aligned itself with the "conservative" approach, although with some reservations.<sup>106</sup> In *Quaak et al. v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*,<sup>107</sup> a securities fraud class action litigation against KPMG, the accounting firm and its Belgium office, the appellate court affirmed the district court's granting of an injunction in connection with parallel proceedings in Belgium.<sup>108</sup> The district court's decision is a classic use of an antisuit injunc-

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105. *Id.* at 161-62.

106. *In re Lernout & Hauspie Secs. Litig*, 2003 U.S. Dist. LEXIS 22466 (D. Mass. Dec. 12, 2003), *aff'd sub. nom.*, *Quaak et al. v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004).

We reject the liberal approach. We deem international comity an important integer in the decisional calculus – and the liberal approach assigns too low a priority to that interest. In the bargain, it undermines the age-old presumption in favor of concurrent parallel proceedings – a value judgment that leaves us uneasy – and presumes that public policy always favors allowing a suit pending in an American court to go forward without any substantial impediment.

*Quaak*, 361 F.3d at 17.

107. 361 F.3d 11 (1st Cir. 2004).

108. *Id.* at 13-14.

tion to protect the court's own jurisdiction and to prevent circumvention of important forum public policies, here the vindication of investor claims for securities fraud violating U.S. law.<sup>109</sup> The investors sued KPMG in federal court in Massachusetts and, as part of discovery, the court ordered production of audit work papers by KPMG-Belgium in their custody by December 1, 2003. Rather than seeking review of the discovery order, KPMG-Belgium instead went into Belgium court three days before the documents were to be produced. On November 27, Thanksgiving Day, it sought an *ex parte* order from the Belgian court to enjoin plaintiffs from enforcing the U.S. discovery order, with a significant penalty of one million Euros against each plaintiff for attempting enforcement of the U.S. order. The Belgian court denied the *ex parte* application but scheduled a hearing for December 16, 2003.<sup>110</sup>

On December 1, when the documents were to have been produced under the U.S. court order, KPMG-Belgium instead provided the plaintiffs with a fax of the motion it had filed in Belgium three days before. The plaintiffs, obviously not happy with this turn of events, then sought their own antisuit injunction in the U.S. court. Relying on *Laker*, the U.S. court looked at the traditional tests for injunctive relief – the equitable aspects – and found that KPMG-Belgium never contested U.S. jurisdiction and that the plaintiffs would face irreparable injury. The court also rejected KPMG-Belgium's primary argument that it would face criminal penalties in Belgium if it turned over the confidential documents.<sup>111</sup> Ultimately, the court rejected KPMG-Belgium's claim of "inability to comply" with the U.S. court's discovery order as a pretext and granted the antisuit injunction.<sup>112</sup>

The First Circuit, reviewing for abuse of discretion, articu-

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109. *In re Lernout*, 2003 U.S. Dist. LEXIS 22466, at \*21 ("I issue this order with reluctance because the Belgian courts and law must be treated with great respect. Nonetheless, KPMG-Belgium's end-run on this Court's jurisdiction and on the federal securities laws cannot be tolerated.").

110. *Id.* at \*20.

111. *Id.* at \*16-21.

112. This argument and the U.S. court's response is similar to that seen in cases following *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987), which used a balancing of the plaintiffs' attempts to get the documents by other means, the importance of the papers for the litigation, the likelihood of harm to the defendant and the efforts to avoid that harm.

lated its standards for the granting of an antisuit injunction, focusing on the standards set in *Laker*, and emphasized that it did not view *Laker* as creating only two bases for injunctions, but rather as an analysis that put great weight on comity:<sup>113</sup>

In an increasingly global economy, commercial transactions involving participants from many lands have become common fare. This world economic interdependence has highlighted the importance of comity . . . . This predictability, in turn, depends on cooperation, reciprocity, and respect among nations. That helps to explain the enduring need for a presumption – albeit a rebuttable one – against the issuance of international antisuit injunctions.<sup>114</sup>

The First Circuit found that the district court's injunction, to protect its jurisdiction, was necessary and equitable under the circumstances: "In this case, the district court acted defensively to protect its own authority from an interdictory strike and we are confident that, in doing so, the court kept the balance steady and true."<sup>115</sup> Thus, the granting of the antisuit injunction here reinforces an approach that stresses a comity analysis, not only in the granting of injunctions but throughout the discovery process and the entire proceedings, and reflects a significant recent trend towards acknowledging the need for respect for other legal systems.

#### IV. IMPORTANT TRENDS OF THE LAST DECADE IN PARALLEL PROCEEDINGS

Reviewing the developments in the last ten years, one can find some trends emerging in the treatment of parallel proceedings that suggest what may happen in the next decade. Throughout the decade there has been a strong strain of cases reflecting an increasing awareness of the role of comity and a willingness to defer to a foreign proceeding. One sees more open recognition of the interconnected and interwoven nature of commercial litigation in a global economy.

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113. *Quaak et al. v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 18 (1st Cir. 2004).

114. *Id.* at 19.

115. *Id.* at 22.

### A. Cyberspace

Multiple lawsuits involving the internet have posed significant problems, initially in terms of prescriptive jurisdiction, especially in defamation and trademark-related cases.<sup>116</sup> There is an increasing likelihood of litigation seeking to enforce local domestic laws on foreign-based websites, along with reactive litigation to enjoin the proceeding or the enforcement of any order. The underlying problem, concurrent jurisdiction, will continue to spawn parallel proceedings as long as there are not internationally agreed norms for conduct and control of cyberspace.

The cyberspace cases tend to break into two groups: those involving issues of free speech and defamation torts, and those involving issues of intellectual property, especially trademark and domain name. The cases in the second category are in many ways the creation and byproduct of the internet.<sup>117</sup> Before the internet, the scope of a trade name was more limited, usually to the physical geographic area nearby or at most nationally. For example, the name "Crate and Barrel" in Ireland might not confuse purchasers about the source if the internet didn't create the possibility of users confusing the Dublin store with the Chicago-based chain in the United States.<sup>118</sup> But the internet and "Google" searches know no national borders so that the new technology has made it possible to create confusion in trade names and trademarks not previously possible in a bricks and mortar world.<sup>119</sup>

#### (1) Trademark and Domain Names

The confusion in trademark and intellectual property rights is exacerbated by the multiple regulations concerning the use and

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116. See Teitz, *Moving Into Cyberspace*, *supra* note 30, at 491-42; Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *rev'd*, 379 F.3d 1120 (9th Cir. 2004).

117. See, e.g., Millennium Enters., Inc. v. Millennium Music, L.P., 33 F. Supp. 2d 907, 921-23 (D.Or. 1999) (analyzing whether internet contacts with the forum state constituted sufficient minimum contacts for personal jurisdiction).

118. Euromarket Designs, Inc. d/b/a Crate & Barrel v. Crate & Barrel Ltd., 96 F. Supp. 2d 824, 828-29 (N.D. Ill. 2000). The parallel English litigation is *Euromarket Designs, Inc. v. Peters and Crate & Barrel Ltd.*, [2000] E.T.M.R. 1025 (Ch. 1999) (Eng.).

119. See, e.g., Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 451 (3d Cir. 2003).



registration of domain names under ICANN.<sup>120</sup> ICANN provides its own mandatory Uniform Domain-Name Dispute Resolution Policy (UDRP) for certain types of claims, generally described as “cybersquatting” or bad faith hijacking of a domain name.<sup>121</sup> Although ICANN and its authorized dispute resolution providers are not part of a court system, the UDRP procedure is yet another body where there is the potential for parallel and inconsistent proceedings. This is especially true since the United States enacted its own independent statute concerning cybersquatting, the Anti-cybersquatting Consumer Protection Act (ACPA),<sup>122</sup> which provides for federal court subject matter jurisdiction<sup>123</sup> and damages.<sup>124</sup> Since a court is not bound by any ICANN determination,<sup>125</sup> there is the distinct possibility of having two inconsistent results: “Unlike traditional binding arbitration proceedings, UDRP proceedings are structured specifically to permit the domain-name registrant two bites at the apple.”<sup>126</sup> The result of the ICANN process is generally self-executing in that the domain name is transferred. On the other hand, the U.S. case law that is developing in connection with domain name registration is that it is a “res,” located at the place of registration which in the United States has generally been Virginia.<sup>127</sup> Thus two different “sover-

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120. The Internet Corporation for Assigned Names and Numbers (ICANN) at <http://www.icann.org> (last visited October 5, 2004).

121. Uniform Domain Name Dispute Resolution Policy (UDRP), at <http://www.icann.org/dndr/udrp/policy.htm> (last visited October 5, 2004). This policy does not apply to all types of domain names, especially those in the country code level. For a study of the types of dispute resolution used by some levels, see *Questionnaire on Member States' Experiences with ccTLDs*, at [http://www.itu.int/ITU-T/studygroups/com02/surveys\\_cctld.html](http://www.itu.int/ITU-T/studygroups/com02/surveys_cctld.html) (last visited October 5, 2004). For example, “.co.U.K.” uses a process administered by Nominet that differs from the ICANN process. See Nominet.u.k., *About the Dispute Resolution Service*, at <http://www.nominet.org.U.K./DisputeResolution/AboutTheDrs/> (last visited October 5, 2004).

122. 15 U.S.C. § 1125(d) (2004) [hereinafter ACPA].

123. *Id.* § 1121.

124. *Id.* § 1125(d)(2)(d).

125. UDRP, *supra* note 121, ¶ 4(k) (“The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent . . . the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution. . .”).

126. Storey v. Cello Holdings, L.L.C., 347 F.3d 370, 381 (2d Cir. 2003).

127. See, e.g., *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento De Barcelona*, 330 F.3d 617 (4th Cir. 2003) (finding jurisdiction proper in Virginia because the plaintiff's domain name was registered in that state); *America*

eigns,” two different standards, two different remedies and two different results raise issues of parallel proceedings.<sup>128</sup>

A recent lower court case out of the Fourth Circuit, *Global-SantaFe Corp. v. Globalsantefe.com*,<sup>129</sup> illustrates the extent of the multiple proceedings possible within the context of cybersquatting – actions in Virginia, ICANN, and a Korean court. More significantly, the case also raises conflicting determinations of adjudicative jurisdiction – in this case in rem jurisdiction, which exists over the domain name itself through the location of the registry. The case involved an action against the domain holder of “global-santefe.com,” a Korean entity who registered the domain name with a Korean registrar, Hangsang, on September 4, 2001.<sup>130</sup> Less than one day earlier, Global Marine Inc. and Santa Fe International Corp., trademark holders of their individual names, announced a planned merger to be known as GlobalSantaFe Corp. These U.S. corporations subsequently filed suit under the ACPA, claiming that the registration by the Korean registrar, Hangsang Systems, Inc., infringed their domain name and sought to have the domain name transferred to them. The sole basis for jurisdiction was statutory under the ACPA for in rem jurisdiction over the domain name.<sup>131</sup> VeriSign, Global Registry Services – the registry for top-level “.com” domain names – is based in Virginia. In fact, the implications of in rem jurisdiction are noted by the court when it suggests that U.S. courts could eventually have no basis for jurisdiction or no ability to cancel registration of a domain name if the registries are not in the United States.<sup>132</sup> In this case, Hang-

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Online, Inc. v. Aol.Org, 259 F. Supp. 2d 449, 451 (E.D. Va. 2003) (finding in rem jurisdiction was proper because the domain name registry was located in that district); cf. *Globalsantafe Corp. v. Globalsantafe.com*, 250 F. Supp. 2d 610, 615 (E.D.Va. 2003) (directing that in rem jurisdiction under the ACPA is appropriate only if there is no personal jurisdiction in any other district).

128. Courts in the Third and Fourth Circuits have explicitly refused to be bound by UDRP determinations. See, e.g., *Barcelona.com, Inc.*, 330 F.3d at 626 (giving no deference to an UDRP decision); *Dluhos v. Strasberg*, 321 F.3d 365, 373-74 (3d Cir. 2003) (making a *de novo* review).

129. 250 F. Supp. 2d 610 (E.D. Va. 2003).

130. The original registration was by Jongsun Park who transferred it to Fanmore Corp., whose contact was Jong Ha Park. *Id.* at 613.

131. *Id.* at 617 n.16.

132. *Id.* at 623-24. The court elaborated:

The current ability to assert jurisdiction over a large number of domain names in this district pursuant to the ACPA hinges on two fac-

sang tendered to the court the domain name on December 20, 2001. Ultimately, the now merged trademark holders obtained a default judgment under the ACPA and an order to Verisign to transfer the domain name to them.

The domain name holder, Park, not accepting the jurisdiction of the Virginia federal court over the domain name, filed an application in Korea to enjoin Hangsang from transferring the domain name under the U.S. court order. Several months later, on September 17, 2002, the Korean court granted the injunction, finding that the Virginia federal court did not have jurisdiction.<sup>133</sup> Like many parallel proceedings, the actions are often the result of differing notions of the scope of personal jurisdiction. And like many parallel proceedings, the result is two conflicting orders – in this case, one from the Korean court ordering the Korean registrar, Hangsang, not to transfer the domain name, and one from the U.S. court, ordering the Registry, VeriSign, to cancel the domain name. Thus the Registry found itself facing conflicting orders.

Unlike many of the contemporary parallel proceedings sagas, the U.S. district court's opinion considers the international comity implications and issues of abstaining or deferring to the Korean action. The court relies on the *Princess Lida* doctrine, a doctrine derived from a 1939 Supreme Court case.<sup>134</sup> Like many wholly domestic precedents, it has been expanded to cover domestic and foreign litigation, establishing a straight "first in time" rule for jurisdiction over the "res." Unfortunately, the court's discussion of the application of the first in time rule and the Korean court's decision illustrates the fundamental differences in the bases for jurisdiction. The question in part is whether jurisdiction over the domain name should be determined by where the *registrar* is or where the *registry* is, and where the "res" or domain name is lo-

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tors, (i) the location of VeriSign within this district and (ii) the current popularity of the ".com" and ".net" top-level domain names. . . . [A] desire to avoid United States jurisdiction may cause foreign registrants to choose to use domain names within their respective country code top-level domains, whose registries are located in and operated by the foreign countries . . . . The result may be an increasing number of domain names registered out of reach of United States jurisdiction . . . .

*Id.*

133. *Id.*

134. *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939).

cated.<sup>135</sup> In fact, the case is an example of the attempts to expand traditional notions of “property” and personal jurisdiction to cover intangibles located in cyberspace. Here, since the trademark holders had won the race for the res (domain name), the court decides it would be inappropriate to recognize the foreign court order.<sup>136</sup> The court then gives lipservice to an obligation to consider “the important question of comity among nations.”<sup>137</sup> Ultimately, the court decides comity is not required because (1) it only applies to “current” proceedings and the proceedings are not current as judgment has entered; (2) the Korean action was deliberately designed to block the U.S. action; and (3) the forum has a significant interest in protecting its own trademark holder’s rights.<sup>138</sup> In the end, the court’s strongest argument for refusing to abstain is “that Judgment supports significant public policies under United States law”<sup>139</sup> of trademark, and after all, the U.S. court had jurisdiction first – at least under U.S. jurisdiction theories. It is clear that there is a distinct possibility of conflicting results today, and this is even more likely to occur as more country codes are opened up and more registrars are involved in more countries.<sup>140</sup>

Because of the nature of the internet, parallel proceedings are also likely in the future to include consumers who may or may not also be acting as small business enterprises. The role of consumers and the different mandatory law applicable to them was one of the significant stumbling blocks to the negotiations of a comprehensive worldwide treaty on jurisdiction and enforcement of judgments at the Hague,<sup>141</sup> and continues to create issues for aspects

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135. *GlobalSantaFe*, 250 F. Supp. 2d at 625 n.42.

136. *Id.* at 625 (citing *Sec. & Exch. Comm’n v. Banner Fund Int’l*, 211 F.3d 602, 611-12 (D.C. Cir. 2000)).

137. *Id.* at 626.

138. *Id.*

139. *Id.*

140. The most recent addition to providers is the Asian Domain Name Dispute Resolution Centre (ADNDRC) which was approved on February 28, 2002. ICANN, *Approved Providers for Uniform Domain-Name Dispute-Resolution Policy*, at <http://www.icann.org/dndr/udrp/approved-providers.htm> (last visited Oct. 8, 2004). ICANN also states that the UDRP has been adopted by the following registrars: “.aero,” “.biz,” “.com,” “.coop,” “.info,” “.museum,” “.name,” “.net,” and “.org” top-level domains. ICANN, *Uniform Domain-Name Dispute-Resolution Policy*, at <http://www.icann.org/udrp/> (last visited Oct. 8, 2004).

141. See Hague Conf. Prelim. Doc. No. 17, *supra* note 22; see generally

of the smaller choice of court convention.<sup>142</sup> Many of the small business issues are intertwined with intellectual property concerns and arise in connection with the scope of coverage of the convention. Small business and nonprofit organizations – as users of licenses and other forms of intellectual property – often within the context of the internet are concerned with jurisdiction and enforcement of judgments, but frequently only as a result of their resistance to underlying substantive law issues, such as validity of non-negotiated contracts made online.<sup>143</sup> Thus often the stumbling blocks to enforcement are also the causes of parallel proceedings.

## (2) *Speech Regulation*

Conflicting regulations of commercial activities and speech are clearly leading to parallel litigation as evidenced by *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*,<sup>144</sup> which is illustrative of this new wave of parallel litigation that involves the regulation of conduct occurring on the internet. Cases such as *Yahoo, Gutnick*,<sup>145</sup> and *Harrods*<sup>146</sup> reflect the uncertain reach of prescriptive jurisdiction in cyberspace. Of the three cases, *Yahoo* is both the best-known and the most problematic. The *Yahoo* reverse declaratory judgment suit in federal court in California starkly pitted French anti-Nazi speech regulation against U.S.

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INTERNET, WHICH COURT DECIDES? WHICH LAW APPLIES? PROCEEDINGS OF THE INTERNATIONAL COLLOQUIUM IN HONOUR OF MICHEL PELICHET (Katharina Bole-Woelki & Catherine Kessedjian eds., 1998) [hereinafter INTERNET, WHICH COURT DECIDES?]; WHO RULES THE NET? A NEW GUIDE TO NAVIGATING THE PROPOSED RULES OF THE ROAD FOR CYBERSPACE (Adam Thierer & Clyde Wayne Crews, eds., 2003).

142. See Stratton Shartel, *Hague Delegates Find Consensus, Narrow Disputes, as Diplomatic Conference Nears*, 9 ELEC. COMMERCE AND LAW REP. 450 (May 12, 2004); Stratton Shartel, *Hague Delegates Revise Choice of Court Convention, but Some Concerns Remain*, 8 ELEC. COMMERCE AND LAW REP. 1134 (December 17, 2003).

143. See INTERNET, WHICH COURT DECIDES?, *supra* note 141, at 80-81; Hague Conf. Prelim. Doc. No. 17, *supra* note 22, at ¶ 8.

144. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *rev'd*, 379 F.3d 1120 (9th Cir. 2004).

145. *Gutnick v. Dow Jones & Co.*, (2001) V.S.C. 305, *appeal dismissed*, *Dow Jones & Co., Inc. v. Gutnick*, (2002) 194 A.L.R. 433 (Austl.).

146. *Dow Jones & Co. v. Harrods Ltd.*, 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003). The parallel English litigation is *Harrods Ltd. v. Dow Jones & Co., Inc.*, [2003] EWHC 1162 (Eng. 2003).

First Amendment protections.<sup>147</sup> Although the underlying substantive issue has been addressed within the context of enforcing foreign defamation judgments,<sup>148</sup> the addition of the criminal sanction<sup>149</sup> and the use of cyberspace raise new issues, including the ability to block access within the limits of new technology.

The first *Yahoo* suit was filed in Paris<sup>150</sup> by two groups – the Union of Jewish Students and LICRA, the International League against Racism and Antisemitism – seeking to enforce French laws that forbade the sale of Nazi-related goods, in this case through Yahoo's U.S.-based portal.<sup>151</sup> In addition, they sought to compel Yahoo to pay penalties for violating the French Penal Code in the amount of 100,000 Francs per day for every day that Yahoo continued to violate the law.<sup>152</sup> In May 2000 the French court required Yahoo to block French users from accessing the Nazi-related goods on the U.S. website, Yahoo.com, and found that the selling or displaying of Nazi material “was a threat to the public order.”<sup>153</sup> The Paris court appointed a panel of experts to determine the validity of Yahoo's claim that it was not feasible techno-

147. See *Yahoo!*, 169 F. Supp. 2d at 1192-93.

148. See, e.g., *Matusevitch v. Telnikoff*, 877 F. Supp. 1, 4 (D.D.C. 1995) (mem.) (applying Maryland Uniform Foreign-Money Judgments Recognition Act); *Abdullah v. Sheridan Square Press, Inc.*, No. 93 Civ. 2515, 1994 WL 419847, at \*1 (S.D.N.Y. May 4, 1994) (mem.); *Bachchan v. India Abroad Publ'ns Inc.*, 585 N.Y.S.2d 661 (Sup. Ct. 1992); see generally TRANSNATIONAL LITIGATION, *supra* note 6, at 271-73.

149. A French court indicated that it would bring criminal actions against Yahoo and its former president, with an initial trial date set for May 7, 2002. League Against Racism & Antisemitism – LICRA & Yahoo! Inc., T.G.I., Paris, 20 Nov. 2000, Interim Order No. RG: 00/05308, 4 [hereinafter LICRA], *translation available at* <http://www.cdt.org/speech/international/001120yahoofrance.pdf>. If found guilty, the former president could have been sentenced to up to five years in prison as well as fined. On February 11, 2003, the charges were dropped. Kerry Shaw, *French Court Rejects Suit Against Yahoo*, NEW YORK TIMES, Feb. 12, 2003, at C9.

150. LICRA, *supra* note 149. The initial injunction was issued on 22 May 2000. *Id.* at 2.

151. *Id.* at 4. (stating that “the simple act of displaying such objects in France constitutes a violation of Article R645-1 of the Penal Code and therefore a threat to the public order.”)

152. *Id.* at 20.

153. *Id.* at 2-4. Yahoo! Inc., a California-based corporation, has a French subsidiary, Yahoo France, that operates a server in France but has not violated the French penal code since it does not display links to Nazi-related web sites. *Id.* at 18-20.

logically or financially to block French users from its servers in the United States. In November 2000, the Paris court, relying on the reports of some of the experts, upheld the determination that Yahoo must comply within three months of the order or face fines of 100,000 Francs per day.<sup>154</sup>

In response to the Paris suit, Yahoo filed a second suit in federal court in San Jose, California, seeking a declaratory judgment that the French judgment was not enforceable in the United States and that the French court lacked jurisdiction to control Yahoo's U.S.-based website.<sup>155</sup> Since Yahoo had no significant assets in France, any attempt to enforce the French fines would probably require an action in the United States where Yahoo had assets. The district court ultimately determined that it had personal jurisdiction over the defendants, that the controversy was not moot and that the possibility of enforcement was real.<sup>156</sup> The district court went to great pains to stress what it viewed as the purpose of the U.S. action: "Rather, the purpose of the present action is to determine whether a United States court may enforce the French order without running afoul of the First Amendment. . . . [A] United States court is best situated to determine the application of the United States Constitution."<sup>157</sup> Rejecting the defendants' request for abstention, the district court granted summary judgment for Yahoo and found that enforcing the judgment would be inconsistent with the First Amendment. In so doing, it relied heavily on earlier cases refusing to enforce British libel judgments.<sup>158</sup> The court indicated that this holding applied even if Yahoo had the technological ability to block access as required by the French court. In passing, the court suggested that the constitu-

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154. *Id.* at 20.

155. The complaint in the United States, *Yahoo! Inc. v. La Ligue Contre Racisme et L'Antisemitisme*, C00-21275 PVT ADR (N.D. Cal. December 21, 2000) is available at [www.cdt.org/speech/international/001221yahoo.complaint.pdf](http://www.cdt.org/speech/international/001221yahoo.complaint.pdf). The case is also discussed in Mylene Mangalindan & Kevin Delaney, *Yahoo! Ordered to Bar the French From Nazi Items*, WALL ST. J., Nov. 21, 2000, at B1. The suit also sought an injunction to prevent French Anti-Semitism advocacy groups from trying to enforce the French judgment in the United States. *Yahoo! Inc.*, C00-21275 PVT ADR at 12, 13.

156. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

157. *Id.* at 1191-92.

158. *Id.* at 1192-93.

tional protection of speech might trump any treaty or convention in connection with speech that originated in the United States.<sup>159</sup>

The Ninth Circuit, after more than a year and a half of deliberations, reversed the District Court's decision.<sup>160</sup> The court held that it did not have personal jurisdiction over the French defendants.<sup>161</sup> By deciding the case on personal jurisdiction grounds, the court left open many questions regarding the regulation of the internet. In the interim, the French court dismissed the criminal charges that had been filed against Yahoo and its former CEO.<sup>162</sup> Yahoo has since instituted policies restricting content that is "hateful or racially, ethnically or otherwise objectionable," and also requiring compliance with all applicable foreign laws.<sup>163</sup>

Who regulates conduct in cyberspace and what happens in the realm of concurrent jurisdiction are far from settled. While there may be no international judgments convention in place as yet,<sup>164</sup> for the multinational corporation the *Yahoo* litigation is but a harbinger of what is to come when the local laws conflict with U.S. values and policies. A significant part of the litigation will turn on who controls the cyberspace in which the conduct is occurring. Electronic commerce that travels across the unmarked boundaries of cyberspace has generated high profile disputes as multiple jurisdictions try to regulate and control cyberspace. The attempt to subject the users of cyberspace to the laws of competing jurisdictions results in inconsistent regulation reflecting different legal values and cultures, and a friction that was more theoretical than real in an everyday context ten years ago. Areas such as defamation, intellectual property, and securities law are ripe for friction among courts. The recent Australian suit against the Dow Jones

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159. *Id.* at 1193 ("Absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment.").

160. The case was argued before the Ninth Circuit in December 2002. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 379 F.3d 1120, 1120, 1127 (9th Cir. 2004).

161. *Id.* at 1126-27.

162. The charges were dropped on February 11, 2003. *See supra* note 149.

163. *See* Yahoo Terms of Service, No. 6 Member Conduct, at <http://docs.yahoo.com/info/terms/> (last visited October 8, 2004).

164. *See* discussion *infra* Part VII.A.



for defamation based on the internet publication of an article from the Wall Street Journal<sup>165</sup> is likely to recur, raising the question of where a defamation actually occurs and whether an internet publisher is liable wherever an article can be downloaded or accessed. The amount of parallel litigation generated by issues of concurrent prescriptive jurisdiction is likely to increase exponentially, especially in cyberspace and areas where there is a lack of consensus on underlying substantive law and value, unless jurisdiction can be limited by the effects doctrine, targeting and disclaimers?<sup>166</sup>

### B. *Forum Selection Clauses*

A second trend in parallel proceedings that has continued to emerge is the number of cases that involve proceedings outside of or contrary to a choice of court or choice of forum clause. Sometimes the alternative forum is an arbitral tribunal. Many of the cases raise questions of interpretation and scope of the clauses, especially in connection with multiple parties who may not be part of the underlying contractual transaction. Chosen courts may be asked to restrain parties from continuing other proceedings; non-designated courts may be asked to stay actions in deference to the designated forum. The trouble arises when the two courts involved disagree in interpretation, scope, or validity of the forum selection clause. The new Hague Conference Draft Choice of Court convention seeks to reduce some of this parallel litigation, as discussed in Part VII. This dilemma of varying interpretations or standards of substantive validity is one inherent in any transnational dispute on choice of forum clauses and is one that will need to be addressed in any Hague Conference Choice of Court convention.<sup>167</sup>

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165. *Dow Jones & Co., Inc. v. Gutnick*, (2002) 194 A.L.R. 433 (Austl.) (affirming lower court's decision that the statements the plaintiff (Gutnick) complained of were published in Victoria when downloaded by the Dow Jones subscribers, therefore the defamation occurred in Victoria and Victoria was not an inappropriate forum).

166. The effects doctrine has been used recently in domestic internet defamation cases, especially by the Fourth Circuit. *See, e.g., Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (finding that to assert jurisdiction for a web site posting, the plaintiff must show an intent to target and focus on a certain group of readers).

167. *See discussion infra* Part VII.B. A convention on choice of court can define its own standards of substantive validity, or it can rely on a choice of law rule for determining validity which in turn may incorporate national law.

One recent case illustrates the potential for parallel proceedings when different courts disagree about the interpretation or scope of an arbitration clause. The litigation on both sides of the Atlantic in the *Armco* cases<sup>168</sup> snaked its way through the United States and English courts to a decision by the House of Lords.<sup>169</sup> The final English appellate opinion illustrates the statesmanlike use of comity to defuse the escalating proceedings, while providing some protection for the English defendant in the New York forum.

The *Armco* cases arise out of a management buy-out headed by Mr. Donohue and Mr. Atkins of a group of English insurance companies (BNIG) owned by Armco and some of its subsidiaries. The negotiators for Armco in the buy-out were Mr. Rossi and Mr. Stinson. Armco alleged that Donohue, Rossi, Stinson, and later Atkins, "the group of four," conspired to defraud Armco and its subsidiaries of millions of dollars through a complex scheme that involved buying the insurance companies through Wingfield, a New Jersey corporation that allegedly was secretly owned by Rossi and Stinson, then Armco executives. Armco claimed that as part of the fraudulent scheme, the group persuaded Armco to inject extra money into the failing English insurance companies and to sign contracts in connection with the sale that contained English exclusive jurisdiction clauses. Armco brought suit against the group of four and additional corporate conspirators<sup>170</sup> in the Southern District of New York to recover funds from the fraudulent scheme, alleging common law fraud, conversion, breach of fiduciary duty and RICO violations. Several other suits were filed against Donohue and others in Hong Kong, New Jersey and Singapore. Some of the defendants filed motions to dismiss for lack of

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168. The U.S. proceeding is *Armco, Inc. v. North Atl. Ins. Co. Ltd.*, 68 F. Supp. 2d 330 (S.D.N.Y. 1999). The English proceedings are under the name *Donohue v. Armco Inc.* The lower court opinion is reported at [1999] 2 Lloyd's Rep. 649 (Q.B. 1999) (Aikens, J., dismissing application for an antisuit injunction). The Court of Appeals decision is reported at [2000] 1 Lloyd's Rep. 579 (C.A. 2000) (granting the antisuit injunction).

169. The House of Lords decision is reported at [2001] U.K.H.L. 64 (H.L. 2001), [2002] 1 Lloyd's Rep. 425.

170. The cases in both the United States and England involved multiple parties, both individual and corporate, some of whom were not made parties to the exclusive jurisdiction clauses or contracts and some of whom were named in one claim or one forum and not another. This summary attempts to simplify the complex facts and focus on the underlying suit/antisuit injunction. See *Armco*, 68 F. Supp. 2d at 340.

personal jurisdiction, improper venue, and *forum non conveniens*. The defendants specifically challenged the filing of suit in breach of the English exclusive jurisdiction clauses contained in the transfer and sale agreements.<sup>171</sup>

In the subsequent English proceedings, Donohue sought to enjoin the U.S. litigation as vexatious and oppressive as evidenced by its being in breach of the exclusive jurisdiction clauses. Rossi, Stinson, and several of the related corporate entities created for the sale and purchase, including Wingfield, applied to join as "co-claimants" in the English antisuit proceedings. They are referred to by the English appellate courts as "PCCs." The English trial court found that the exclusive jurisdiction clauses, although valid, only bound some of the parties and that the claims in the New York lawsuit were based on a pre-existing conspiracy, and therefore did not arise out of the contracts and were largely outside the exclusive jurisdiction clauses.<sup>172</sup> The court also found that the proceedings against Donohue in New York were neither vexatious nor oppressive, England was not the "natural forum" for the litigation and the other co-claimants also were not entitled to an injunction.<sup>173</sup> The English parties, defendants in the United States, appealed the denial of the antisuit injunction in England.<sup>174</sup>

In the interim, the District Judge in the New York federal court proceeding denied the motions to dismiss based on personal jurisdiction, improper venue, and *forum non conveniens*. The court agreed with the plaintiffs that exclusive jurisdiction clauses did not cover the pending litigation and were unenforceable because

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171. The only parties to the three agreements at issue on the Armco side were AFSIL, AFSEL, and AFSC, with Armco Inc. succeeding to the rights and obligations of AFSEL (two other members of the Armco group, APL and NNIC, were not parties). Similarly, on the Donohue side, CISHL, Wingfield, Mr. Donohue, and Mr. Atkins were the only parties to the agreements, meaning that Mr. Rossi and Mr. Stinson and their companies were not parties to the agreements or to the exclusive jurisdiction clauses. *Donohue*, [2001] U.K.H.L. 64 at ¶ 7.

172. *Donohue*, [1999] 2 Lloyd's Rep. at 664-65.

173. *Id.* at 664.

174. The courts on both sides of the Atlantic also spent significant time discussing the interrelationship of both the Armco conglomerate of companies and the individual and corporate defendants, particularly in connection with which parties were signatories to contracts and which were bound by the exclusive jurisdiction clauses. This analysis was also relevant in proceedings in both New York and London to the question of duplication of litigation.

induced by fraud. In denying the *forum non conveniens* motion, the district court relied specifically on the intervening English trial court opinion to demonstrate that the United States had a greater interest in the action.<sup>175</sup>

The next stage for the proceedings was back in England before the Court of Appeal, which reversed the lower trial court and issued an antisuit injunction against the Armco entities from proceeding in New York.<sup>176</sup> Besides Donohue individually there were the PCCs (two individuals and four corporations). The PCCs, hanging on Donohue's coattails, were also ultimately granted an injunction. Even though all but one were not parties to any exclusive jurisdiction clause, they were considered necessary and proper parties for the English proceedings. The Court of Appeal injunction included these parties "to give effect to the exclusive jurisdiction clauses and to ensure trial in England of the issues arising out of or connected with the management buy-out between all the parties involved."<sup>177</sup> The court determined that the New York proceedings were within the scope of the exclusive jurisdiction clause. Contrary to the lower court's approach of looking at the most appropriate place for the litigation, when there is an exclusive jurisdiction clause there has to be a strong reason not to grant an antisuit injunction since it is considered "prima facie oppressive and vexatious to litigate elsewhere than in the agreed forum."<sup>178</sup>

The final act of this litigation was in the House of Lords which reversed the Court of Appeal. The Lords first reviewed the decision of the Court of Appeal to include in the antisuit injunction not only Mr. Donohue, but the PCCs who had not been party to the exclusive jurisdiction clauses. The Lords clarified the principles controlling the grant of an injunction as established in other case law that an injunction is only available when justice requires, and will only restrain vexatious or oppressive foreign litigation. In ad-

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175. *Armco*, 68 F. Supp. 2d at 341 ("Although trial in England would be an adequate alternative forum, the court concludes that the relevant private and public factors indicate that litigating this case in the United States is completely appropriate.")

176. *Donohue v. Armco Inc.*, [2000] 1 Lloyd's Rep. 579, 594 (C.A. 2000).

177. *Donohue v. Armco Inc.*, [2001] U.K.H.L. 64, ¶ 15 (H.L. 2001), [2002] 1 Lloyd's Rep. 425, 430.

178. *Donohue*, [2000] 1 Lloyd's Rep. at 589.

dition, the foreign forum must not be the natural home for the litigation. The court also must look to see what injustices there might be to both parties, including whether the defendant (here the plaintiff in the foreign action) will be deprived of advantages in the foreign forum to which he is entitled. Applying these principles, the House of Lords found that England was not the natural forum for the proceedings, and as to these defendants, the New York litigation was neither vexatious nor oppressive.<sup>179</sup>

The House of Lords then addressed the grant of the antisuit injunction as to Donohue alone and the case law controlling the discretion to enforce exclusive jurisdiction clauses either through staying or restraining:

[W]here parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case.<sup>180</sup>

After reviewing numerous cases that involved multiple parties and claims that were outside exclusive jurisdiction clauses, coupled with the emphasis on avoiding inconsistent judgments, the House of Lords turned to specific facts. Donohue had the right as to the Armco entities with whom he had exclusive jurisdiction clauses to expect not to be sued in New York, and even more critically, not to be subject to RICO claims that would be possible in New York but not in England. The other PCCs, however, were fair game for the Armco entities to pursue "any claim they choose in any convenient forum where they can found jurisdiction," including New York.<sup>181</sup> Similarly, some of the Armco entities not bound by the exclusive jurisdiction clauses could pursue Donohue where

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179. *Donohue*, [2001] U.K.H.L. 64 at ¶ 20. In addition, the House of Lords considered "another more technical objection" that of jurisdiction, and decides that "[i]t would be wrong in principle to allow these PCCs to use Mr. Donohue's action as a Trojan horse in which to enter the proceedings when they could have shown no possible ground for doing so in their own right." *Id.* at ¶ 21.

180. *Id.* at ¶ 24.

181. *Id.*

he could be found, and the Armco entities bound could pursue him on claims outside the exclusive jurisdiction clauses – all of which appear to have found jurisdiction in New York and could proceed even if an antisuit injunction were issued.

The House of Lords denied the injunction but added a condition that Mr. Donohue may not be sued for RICO claims or “multiple or punitive damages,” and that Mr. Donohue could claim that the sale and purchase agreement was governed by English law.<sup>182</sup>

I am driven to conclude that great weight should be given to it . . . . [T]he interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice.<sup>183</sup>

Thus, the House of Lords allows the goal of “submission of the whole dispute to a single tribunal” for “a comprehensive judgment” in the interests of justice to override enforcement of an exclusive jurisdiction clause, at least when there are multiple parties and claims that are appropriately litigated in a foreign forum.<sup>184</sup> The result encourages courts to avoid granting antisuit injunctions which will simply result in encouraging conflicting judgments, but also counsels courts to attempt to shape some compromise where possible to protect the contractual expectations of parties.

In contrast to the balanced approach of the House of Lords in the *Armco* litigation, the Seventh Circuit in *AAR International, Inc. v. Vacances Heliades S.A.*<sup>185</sup> again demonstrated its resistance to “comity” by reversing the lower court’s abstention order and enforcing a “permissive forum selection clause.”<sup>186</sup> The District Court

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182. *Id.* at ¶ 36. The actual undertaking includes two other entities, Wingfield and CISHL. *Id.* at ¶¶ 31-32.

183. *Id.* at ¶ 34.

184. *Id.*

185. 250 F.3d 510 (7th Cir. 2001).

186. *Id.* at 525-27. *See, e.g.,* *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 10 F.3d 425 (7th Cir. 1993); *see discussion supra* Part III.

had granted a motion to abstain in favor of two, possibly three, proceedings in Greece concerning the lease of an airplane and dismissed the U.S. reverse image case.<sup>187</sup> Following the *Colorado River*<sup>188</sup> and *Moses Cone*<sup>189</sup> domestic precedents of abstention "for wise judicial administration," the lower court applied a "laundry list of factors,"<sup>190</sup> but put heavy weight on the repetitive nature of the actions and the satisfactory alternative forum in Greece.<sup>191</sup>

The Seventh Circuit unfortunately turned first to domestic precedent, even though the cases involved foreign litigation as well.<sup>192</sup> The court disagreed with the lower court's determination that the U.S. and Greek actions were parallel and that the Greek actions would likely dispose of the claims in the U.S. action. By reading the requirement of *Moses Cone* to mean it would be a "serious abuse of discretion" if there is *any doubt* as to the actions being parallel, the Seventh Circuit found a basis to reverse.<sup>193</sup> The appellate court decided that the lower court improperly balanced the abstention factors.<sup>194</sup> The Seventh Circuit found that the lower court put "undue weight on the inconvenience of the federal forum for the [Greek] appellees, and did not adequately consider the in-

187. *AAR Int'l, Inc. v. Vacances Heliades S.A.*, 100 F. Supp. 2d 875, 878 (N.D. Ill. 2000).

188. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

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

190. *AAR Int'l, Inc.*, 100 F. Supp. 2d at 878. The District Court stated:

The Seventh Circuit directs me to consider a laundry list of factors: (1) the identity of the court that first assumed jurisdiction over the property; (2) the relative inconvenience of the federal forum; (3) the need to avoid piecemeal litigation; (4) the order in which the respective proceedings were filed; (5) whether federal or foreign law provides the rule of decision; (6) whether the foreign action protects the federal plaintiff's rights; (7) the relative progress of the federal and foreign proceedings; and (8) the vexatious or contrived nature of the federal claim.

*Id.* (citing *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898-99 (7th Cir. 1999). For a discussion of the lower court opinion in *Finova*, see Teitz, *Treading Carefully*, supra note 72, at 404-05.

191. *AAR Int'l, Inc.*, 100 F. Supp. 2d at 878 ("[T]he most economical use of my time is to let the Greek courts handle it.")

192. *Id.* at 517-18.

193. *Id.* at 520.

194. *Id.* at 522-23.

convenience of the Greek forum for AAR.”<sup>195</sup> The Circuit further found that the district court did not weigh properly the non-exclusive Illinois jurisdiction clause and the irrevocable waiver of objection to Illinois as an inconvenient forum contained in the lease, and thus there was a basis for reversal even under the abuse of discretion standard.<sup>196</sup> This clause then is a heavy weight in the Seventh Circuit’s eyes in refusing to abstain in the face of parallel litigation, such that AAR ultimately appears to receive from this non-exclusive clause the benefits that would otherwise be accorded only to an exclusive jurisdiction clause.

Cases like *Armco* and *AAR* that result from differences in the interpretation and enforcement of forum selection clauses serve to highlight the need for the multilateral choice of court convention currently being negotiated in The Hague.<sup>197</sup> The convention would enforce forum selection clauses much the way the New York Convention<sup>198</sup> assures that agreements to arbitrate are enforceable. Even when parties attempt to pre-ordain the location of later disputes in transnational transactions, the inability to enforce that agreement without litigation nullifies the value of a choice of forum clause and removes the predictability and allocation of costs for which the parties bargained. A convention that enforces exclusive choice of court clauses as well as the resulting judgments will go a long way toward providing some certainty and encouraging consensual choice of forum in global business.

#### V. EUROPEAN APPROACHES TO INTEGRATING COMMON-LAW THEORIES OF PARALLEL PROCEEDINGS

During the last several years, there have been several cases in Europe that have involved issues of parallel proceedings. Four recent cases before the European Court of Justice reflect the problems arising from increased judicial cooperation under the Brussels Regulation. Specifically, the difficulty arises from attempts to integrate the common-law doctrines of antisuit

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195. *Id.* at 522.

196. *Id.* at 523.

197. See discussion *infra* Part VII.

198. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 (codified at 9 U.S.C. §§ 201, 208 (2004)) [hereinafter New York Convention].



injunctions and forum non conveniens into European law.<sup>199</sup> Both the Brussels Regulation and its predecessor Brussels Convention contain *lis pendens* provisions which come into effect when the first court of a member state is seised; any other member state's courts must stay proceedings "until such time as the jurisdiction of the court first seised is established."<sup>200</sup>

This strict "first in time" approach under the Brussels Convention was challenged and upheld in a case decided in 2003 by the European Court of Justice when one of the parties filed suit contrary to a choice of court clause and in a country where the legal proceedings were exceptionally slow. In *Erich Gasser GmbH v. MISAT Srl*,<sup>201</sup> an Austrian clothing company sold clothes to an Italian company, with invoices having an exclusive choice of jurisdiction clause for an Austrian court. Following a dispute between the parties, the Italian buyer brought suit in Rome, seeking a declaration that the contract had been terminated and also seeking damages. The seller subsequently brought suit in Austria under the forum selection clause for payment on the outstanding invoices. The Austrian court, on its own motion, stayed proceedings under the then Brussels Convention Article 21.<sup>202</sup> Reference was made to the European Court of Justice (ECJ) for a ruling whether the Austrian court had to stay all proceedings until the court first seised had declared it had no jurisdiction under Article 21 because of the exclusive Austrian choice of court clause.<sup>203</sup> Gasser and the U.K. government argued that choice of court clauses should be "encouraged" since they "contribute to legal certainty in commercial relationships."<sup>204</sup>

The reasons given in part by the ECJ for rejecting these arguments focus on the need to avoid the possibility of irreconcilable judgments at all costs between the courts of member states and

199. For a discussion of antisuit injunctions and the Brussels Convention/Regulation, see Ambrose, *supra* note 13.

200. Brussels Regulation, *supra* note 12, at art. 27.

201. Case C-116/02, [2003] ECR \_\_\_\_ (9 Dec. 2003).

202. *Id.* at ¶ 15; see also Brussels Convention, *supra* note 12, at art. 21.

203. *Eric Gasser*, [2003] ECR \_\_\_\_ at ¶ 19.

204. *Id.* at ¶ 31. The U.K. had proposed to avoid the risk of irreconcilable judgments the court first seised "whose jurisdiction is contested in reliance on an agreement conferring jurisdiction must stay proceedings until the court which is designated by that agreement, and is the court second seised, has given a decision on its own jurisdiction." *Id.* at ¶ 33.

the “legal certainty sought by the Convention.”<sup>205</sup> The ECJ also rejected the arguments of the U.K. government about the potential for abuse through filing in the wrong forum to delay the proceedings. Indeed in this case, proceedings in the derogated court, Italy, take “excessively long.”<sup>206</sup> Gasser argued that in such a case, the courts of the State second seised should be entitled to rule on the question of jurisdiction rather than wait for the nonchosen but first seised court to rule that it has no jurisdiction. The ECJ insisted on a very literal reading of Article 21:

68. It is not compatible with the philosophy and the objectives of the Brussels Convention for national courts to be under an obligation to respect rules on *lis pendens* only if they consider that the court first seised will give judgment within a reasonable period.

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72. Second, it must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. . . It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction.<sup>207</sup>

*Gasser* suggests the potential for abuse by deliberately stalling litigation in violation of a choice of court clause. Contrary to the ECJ's laudatory comments about certainty, *Gasser* has the potential to nullify the value of an exclusive choice of court clause, making certainty the captive of procedural maneuvers. In the end, the fastest runner to the courthouse may triumph over party autonomy and contractual choice.

The ECJ also considered the implications for European law of parallel proceedings in two member states when one state is a common-law jurisdiction. This time the question in *Turner v. Grovit*<sup>208</sup> concerned the use of an antisuit injunction to stop pro-

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205. *Id.* at ¶ 51.

206. *Id.* at ¶ 33.

207. *Id.* at ¶¶ 68-72.

208. [2002] 1 W.L.R. 107 (H.L. 2001), *preliminary reference made*, Case C-159/02, [2003] ECR \_\_\_\_\_, [2004] 1 Lloyd's Rep. 216, *judgment of the full court*, [2004] ECR 00 (27 Apr. 2004), [2004] 2 Lloyd's Rep. 169; *see* Hartley, *How to*

ceedings filed or threatened to be filed in another member state that constituted an abuse of process, when the defendants were alleged to be acting “in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts.”<sup>209</sup> The case highlights fundamental differences in the treatment of parallel proceedings in certain circumstances in common-law countries and civil law countries. Turner, a British national, went to work in Spain. Following an employment dispute, he asked to terminate the contract and returned to London where he brought an action for a form of unfair dismissal in the Employment Tribunal, London. Meanwhile, the employer had instituted proceedings in Spain seeking damages against Turner. Turner then asked the English High Court to issue an antisuit injunction against the defendants from continuing the proceedings in Spain. The English court issued the injunction for a short period of time but refused to renew the order.<sup>210</sup> Turner then sought and received an injunction from the English Court of Appeal which viewed the proceedings in Spain as being for the sole purpose of intimidating Turner, and therefore an abuse of process, warranting injunctive relief.<sup>211</sup> The House of Lords referred the matter to the ECJ in December 2001 to determine if the antisuit injunction was inconsistent with the Brussels Convention.<sup>212</sup> The defendants, as well as the German and Italian governments, urged that the antisuit injunction was irreconcilable with the Brussels Convention.

The Advocate General’s preliminary opinion<sup>213</sup> determined that the Convention “must be interpreted as precluding the judicial authorities of a Contracting State from issuing orders to litigants restraining them from commencing or continuing proceedings before judicial authorities of other Contracting States.”<sup>214</sup> In reaching this result that reinforced the *lis pendens* provisions in the Brussels Convention in favor of the court first

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*Abuse the Law*, *supra* note 13.

209. *Id.* at ¶ 18.

210. *Id.* at ¶ 11.

211. *Id.* at ¶ 12.

212. *Id.* at ¶ 18.

213. The Advocate General issued an opinion on 20 November 2003. Case C-159/02, *Turner v. Grovit*, [2003] ECR \_\_\_\_ (20 Nov. 2003), [2004] 1 Lloyd’s Rep. 216.

214. *Id.* at ¶ 38.

seised, the Advocate General made reference to case law in other common-law jurisdictions, including the United States, and suggested that the Convention's structure did not allow for antisuit injunctions:

30. The arguments against compatibility with the Convention put forward in the course of these preliminary proceedings stem from the idea that one of the pillars of the international instrument is the reciprocal trust established between the various national legal systems, upon which the English restraining orders would seem to cast doubt.

31. That view seems to me to be decisive. [] European judicial cooperation, in which the Convention represents an important landmark, is imbued with the concept of mutual trust, which presupposes that each State recognizes the capacity of the other legal systems to contribute independently, but harmoniously, to the stated objectives of integration.<sup>215</sup>

The ECJ, following this approach in its final opinion issued on April 27, 2004, left no room for national law to continue, at least where the proceedings are in two member states.<sup>216</sup> This result of a strong *lis pendens* when both parties are nationals of the community, along with *Gasser*, increases the pressure to be the first to file. The decision also encourages vexatious filings to wrest jurisdiction away from the otherwise natural forum.

*Owusu v. Jackson*<sup>217</sup> raises the next question: What about when parties are from third countries, not members of the European Union? Is *forum non conveniens* still viable under the Brussels regime? *Owusu* also introduces the issue of multiple parties since only one of the defendants is from a member state and the other five are domiciled in Jamaica. Mr. Owusu, an English domiciliary, was injured at the beach while on holiday in Jamaica. He brought suit in tort in England against multiple parties, all but

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215. *Id.* at ¶¶ 30-31.

216. *Turner v. Grovit*, [2004] ECR 00 (27 Apr. 2004), [2004] 2 Lloyd's Rep. 169 (Judgment of the Full Court).

217. [2002] I.L.Pr. 45 (C.A. 2002), *preliminary reference made*, Case C-281/02, *Owusu v. Jackson*, [2003] ECR \_\_\_\_.

one of whom were Jamaican limited liability companies, for failing to warn of dangers of a submerged sand bank. He also brought suit for breach of contract against the English company from whom he rented the villa. The English lower court judge found that Jamaica was the appropriate forum for the proceedings for several reasons and, *but for* the Brussels Convention precluding staying the action against the one English defendant he would have done so.<sup>218</sup> Since he could not stay the suit against the English defendant he would not want to stay as to the other defendants because then two different courts, one in England and one in Jamaica, would try the same factual issues and might reach conflicting results and thus conflicting judgments. To avoid the parallel litigation, he refused to stay any of the proceedings in London.

The decision was appealed to the Court of Appeal which subsequently made a reference to the ECJ based on the mandatory requirements of Article 2 of the Brussels Convention requiring suit in the domicile of a defendant from a member state.<sup>219</sup> This is contrary to the national law which allowed the exercise of discretionary power in the form of *forum non conveniens* when the parties were from non-contracting states and the potential parallel litigation did not involve another member state. The English court, in referring the matter to the ECJ, recognized that the issue of *forum non conveniens* and the relationship to mandatory provisions of the Brussels Convention/Regulation as applied to defendants from nonmember states inherently raises the potential of parallel proceedings and the issue of what response is permissible, at least when courts of third countries are involved.<sup>220</sup> The ECJ

218. *Id.* at ¶ 20.

219. Case C-281/02, *Owusu v. Jackson*, [2003] ECR \_\_\_\_.

220. *Id.* at ¶¶ 59–63. The Court of Appeal noted:

45. The present case is concerned with the doctrine of *forum conveniens*, when applied as between a member state and a non-member state. But it might just as easily have been concerned with the doctrine of *lis alibi pendens*, or “prorogation of jurisdiction,” . . . or any of the other situations for which the Brussels Convention provides discretionary or mandatory exceptions. . . . If article 2 is mandatory, then a defendant domiciled in England must be sued in England in all such cases even if the Convention would allow or require the action to be brought in the courts of another member state if a domiciliary of another member state was involved.

*Id.* at ¶ 45 (citation omitted).

has yet to act in *Owusu* but its decision will no doubt affect parallel proceedings issues – either indirectly through forum non conveniens dismissals/stays, or directly through *lis pendens* – for those actions that involve a member state that, under its national law, allows discretionary dismissals or antisuit injunctions, such as the U.K., and a third country.

European law on parallel proceedings is now having a direct impact on U.S. corporations who have foreign subsidiaries and do business abroad. In *American Motorist Insurance Co. (AMICO) v. Cellstar Corp.*<sup>221</sup> the English court's discretion to dismiss was limited by Convention/Regulation since one of the two defendants was a U.K. subsidiary of a U.S.-based company. Cellstar, a U.S. corporation with its principal place of business in Texas, obtained an insurance policy from AMICO, an Illinois insurance company doing business in Texas. The insurance policy was to cover Cellstar's global business of providing wireless communication equipment which it carried out through subsidiaries. The insurance policy for "global transportation," issued by AMICO's Texas office, was to cover Cellstar and its subsidiaries worldwide against losses of cell phones in transit in connection with sales operations in seventeen countries. The litigation related to a claim for about one million pounds for a loss in March 2000 for shipments made by Cellstar's U.K. subsidiary (CUK) to other locations in Europe.<sup>222</sup> After AMICO denied coverage, demand was made by CUK and Cellstar in the United States. In response, AMICO filed suit in London a week later for a negative declaration against CUK and Cellstar. Cellstar subsequently filed suit in Dallas against AMICO for wrongful failure to settle the claim, eventually joining other incidents of loss as well. AMICO did not seek to stay the Texas litigation, which would probably have not been granted, but eventually joined CUK as a third party in the Texas suit.<sup>223</sup>

By suing CUK, the U.K. subsidiary, in England, AMICO was able to get jurisdiction under the Brussels Convention/Regulation for an insurance policy issued in Texas by a Texas insurer to a Texas corporation to cover its foreign subsidiaries. In the U.K. liti-

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221. *American Motorists Ins. Co v. Cellstar Corp.*, [2003] I.L.Pr. 22 (C.A. 2003).

222. *Id.* at ¶ 2.

223. *Id.*

litigation seeking a negative declaration of nonliability, AMICO tried to have Cellstar joined as a necessary party and claimed that the worldwide insurance policy was governed by English law. The lower court in the U.K., after determining that English law would not govern the insurance policy, found that Texas was therefore the appropriate forum for the resolution of the dispute and stayed the action against CUK.<sup>224</sup> AMICO argued on appeal that the lower court was without authority under the Brussels Convention to exercise discretion and stay the action against CUK. Thus the court was faced with an issue similar to *Owusu*, of whether, in light of the mandatory terms of the Brussels Convention/Regulation that establish where an English-domiciled corporation may be sued, an action in a member state can be stayed in favor of an action in a third country which is the "forum conveniens." The appellate court found that the entire insurance policy was subject to Texas law, and that at a minimum Cellstar should not be a party to suit in London, but that suit should be in Texas.<sup>225</sup> The court recommended a reference to the ECJ of the issue of staying the action against CUK in favor of proceedings in Texas,<sup>226</sup> again raising the issue of whether the discretionary doctrine of staying or dismissing parallel litigation that is vexatious or brought in an inconvenient forum can co-exist under the Brussels Regulation when the alternative forum is a nonmember state.

Although the case is a continent away, the implications of the ECJ cases are significant for U.S. companies with foreign subsidiaries in Europe who may find themselves litigating in several forums and no longer able to get out of the litigation in Europe. When one combines the ability to seek negative declaratory actions with the *lis pendens* and the loss of the discretionary ability to dismiss in favor of foreign litigation in the appropriate forum under the Regulation, one finds the result is multiple proceedings. Although the insurance contract in *AMICO* was to cover losses in Europe and of foreign subsidiaries, Cellstar would not necessarily anticipate that an insurance policy bought in Texas and from a Texas insurer would force it or its subsidiary to be sued in the U.K. if it subsequently had a disputed claim for coverage. The ul-

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224. *Id.* at ¶ 4.

225. *Id.* at ¶¶ 48, 50-51.

226. *Id.* at ¶¶ 49, 51.

timate result is the increased likelihood of having to litigate on two continents if a corporation has a European subsidiary and is sued. This at least suggests the possibility of vexatious litigation whenever a U.S. company is sued in Europe by joining a European subsidiary or necessary party – much the way a plaintiff in a U.S. court can avoid removal to federal court in a nonfederal question case by joining a nondiverse party.<sup>227</sup> Cases that an English court might previously have stayed, now will have to continue if the ECJ construes the Brussels Regulation narrowly, in keeping with the *Gasser* and *Turner* decisions, to foreclose the operation of national law when the other litigation is pending in the court of a third country.

#### VI. ENFORCING FOREIGN JUDGMENTS IN THE U.S.

Enforcement and recognition of judgments, although chronologically the last concern in litigation, is one of the first considerations in initiating a lawsuit. Indeed the ability to enforce a judgment and the potential for prejudgment relief may ultimately control the initial decisions of whether and where to sue. As discussed earlier, there is no constitutional provision requiring recognition of foreign judgments,<sup>228</sup> nor any multilateral agreement to which the United States is a party. Rather, the state or federal court is free to accord “comity” to the foreign judgment, a concept frequently cited but rarely explained in any way other than by

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227. Perhaps the best known example of this is *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), where the anecdotal basis for joining Seaway and World-Wide was to keep the defendants from removing to federal court and out of the more favorable jury pool in the state court.

228. See *supra* note 15. There is no requirement under the Constitution for giving full faith and credit to a foreign judgment. Nor does the Full Faith and Credit Statute control foreign judgments. See U. S. CONST. art. IV, § 4; 28 U.S.C. § 1738 (2004).

The United States does have some Treaties of Friendship with individual countries which elevate judgments from the particular country to the status of a sister state judgment. See, e.g., Treaty of Friendship, Commerce, and Navigation Between the United States of America and The Republic of Korea, Nov. 7, 1957, U.S.–Korea, 8 U.S.T. 2217; Treaty of Friendship, Commerce and Navigation Treaty Between the United States of America and the Kingdom of Greece, Aug. 3, 1957, U.S.–Greece, 5 U.S.T., 1829. These treaties, under the Supremacy Clause, preempt contrary state law. See *Choi v. Kim*, 50 F.3d 244 (3d Cir. 1995) (elevating Korean judgment to status of sister state); *Vagenas v. Continental Gin Co.*, 988 F.2d 104, 106 (11th Cir. 1993) (elevating Greek judgment to status of sister state).



quoting the major Supreme Court opinion on the recognition of a foreign judgment, *Hilton v. Guyot*,<sup>229</sup> a one hundred year old case involving the recognition of a French judgment. In *Hilton*, the Supreme Court established the basic contours of the common-law comity approach to recognition of foreign judgments.<sup>230</sup> In a five to four decision, the Supreme Court ultimately refused recognition to the French judgment because of the lack of reciprocity in that France would not enforce a similar U.S. judgment. *Hilton*, by negative implication, lists the potential defenses to recognition: (1) lack of a full or fair trial; (2) lack of subject matter jurisdiction; (3) lack of personal jurisdiction; (4) trial under a system lacking impartiality or due process; (5) prejudice in the legal system or court;

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229. 159 U.S. 113 (1895).

230. *Id.* at 163-64. The Court announced:

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." Although the phrase has been often criticized, no satisfactory substitute has been suggested.

"Comity," in the legal sense, is neither a matter of absolute obligation . . . nor of mere courtesy and good will . . . . 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.

. . . .

When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in a foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.

*Id.* at 163-64, 205-06; see *id.* at 202-03.

and (6) fraud in procuring the judgment. The only significant deviation from *Hilton* is the subsequent deletion of a requirement for reciprocity; indeed, the majority of those cases relying on *Hilton* fail to discuss any reciprocity requirement.<sup>231</sup>

The parameters for granting comity to a foreign judgment set out in *Hilton*, with the exception of the reciprocity requirement, continue to dominate our thinking on treatment of foreign judgments in both federal and state courts. Even though the recognition and enforcement of judgments within the United States is largely a matter determined by state law, recognition and enforcement is subject to federal constitutional standards that may serve to invalidate foreign judgments.<sup>232</sup> A foreign judgment may not be recognized or enforced if it violates due process.

Today, there are three basic approaches followed by federal and state courts, all of which to some extent derive from the tenets established by *Hilton*. First, some courts rely strictly on a common-law approach, derived from *Hilton*, but usually without the reciprocity requirement. Others use a statutory approach, applying the Uniform Foreign Money-Judgments Recognition Act.<sup>233</sup> This Uniform Act, first adopted by the National Conference of Commissioners on Uniform State Laws in 1962, has been enacted in some version by more than half the states.<sup>234</sup> Although its

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231. See, e.g., *de la Mata v. Am. Life Ins. Co.*, 771 F. Supp. 1375, 1382-83 (D. Del. 1991), *aff'd without opinion*, 961 F.2d 208 (3d Cir. 1992); *Pilkington Bros. v. AFG Indus., Inc.*, 581 F. Supp. 1039, 1043-44 (D. Del. 1984). Both of these cases are federal courts construing state law.

232. See ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD 1-20 (Ronald A. Brand ed., 1992); Robert B. von Mehren, *Enforcement of Foreign Judgments in the United States*, 17 VA. J. INT'L LAW 401, 401-403, 408-410 (1977); Robert E. Lutz, *Enforcement of Foreign Judgments, Part I: A Selected Bibliography on the United States' Enforcement of Judgments Rendered Abroad*, 27 INT'L LAW 471 (1993); Robert E. Lutz, *Enforcement of Foreign Judgments, Part II: A Selected Bibliography of Enforcement of United States Judgments in Foreign Countries*, 27 INT'L LAW 1029 (1993).

233. UFMJRA, *supra* note 17.

234. The following states have enacted the UFMJRA: Alaska, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, and Washington. The District of Columbia and the Virgin Islands have also adopted it. Uniform Law Commissioners, *UFMJRA*, at [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-ufmjra.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufmjra.asp) (last visited Dec. 12,

direct application is to foreign judgments for money only, states that have adopted it often look to it for guidance in treating non-money foreign judgments.<sup>235</sup> The third approach is the Restatement (Third) of Foreign Relations Law of the United States (Restatement (Third)) which is similar to the earlier Uniform Act, but covers a broader category of judgments including judgments “establishing or confirming the status of a person, or determining interests in property.”<sup>236</sup> Both the Restatement (Third) and the Uniform Act provide for a foreign judgment meeting certain requirements to be treated like a sister-state judgment entitled to full faith and credit.<sup>237</sup> The absence of a uniform national ap-

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2004).

235. See, e.g., *Milhoux v. Linder*, 902 P.2d 856 (Colo. Ct. App. 1995).

236. RESTATEMENT, *supra* note 25, at § 481. The Restatement (Third) incorporates many of the *Hilton* defenses involving fairness, due process, and jurisdiction, and adds defenses such as conflicting judgments and those contrary to an express forum selection agreement, but not a reciprocity requirement. *Id.* at § 482. Of these defenses, there are only two mandatory grounds for nonrecognition: lack of personal jurisdiction and lack of due process in the rendering jurisdiction. *Id.* The six discretionary grounds for nonrecognition comprise: (1) lack of subject-matter jurisdiction; (2) lack of notice; (3) fraud; (4) public policy of the United States or the forum state; (5) conflicting final judgments; and (6) a contrary contractual choice of court. *Id.* Comment h to section 482 suggests that the contractual choice of court includes selection of an arbitral tribunal. *Id.* § 482 cmt. h. For a comparison of the Restatement (Third) and the Uniform Act, see Ronald A. Brand, *Enforcement of Foreign-Money Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 265-80 (1991).

237. RESTATEMENT, *supra* note 25, at § 481 cmt. c; UFMJRA, *supra* note 17, at § 3. The UFMJRA establishes a presumption of recognition and enforcement “in the same manner as the judgment of a sister state which is entitled to full faith and credit.” UFMJRA, *supra* note 17, at § 3. The defenses to recognition are similar to those of the Restatement (Third), with the burden of proof being placed on the party attempting to avoid recognition. *Id.* The Act contains three grounds for mandatory recognition: lack of due process, personal jurisdiction, or subject matter jurisdiction. *Id.* at § 4 (a). The grounds for discretionary nonrecognition comprise: (1) lack of notice; (2) fraud in the judgment; (3) public policy; (4) conflicting judgments; (5) a contrary forum selection clause; and (6) a seriously inconvenient forum. *Id.* § 4 (b). This last category is not available under the Restatement (Third). RESTATEMENT, *supra* note 25, at § 482 (2). Of the adopting states, some have made all grounds for nonrecognition mandatory. See, e.g., GA. CODE ANN. § 9-12-114 (1993); MASS. GEN. LAWS. ANN. ch. 235, § 23A (West 2000). Moreover, eight adopting states have added a reciprocity requirement, which is discretionary in seven of those states. See FLA. STAT. ANN. § 55.605 (West 1994 & Supp. 2004) (discretionary); GA. CODE ANN. § 9-12-114 (1993) (mandatory); IDAHO CODE § 10-1404 (Michie 2004) (discretionary); ME. REV. STAT. ANN. tit 14, §

proach to recognition and enforcement of judgments has hampered parties in securing judgments that will be enforceable abroad. In addition, the lack of homogeneity makes it difficult to enforce foreign judgments here, especially when the enforcing forum requires reciprocity.

## VII. A DECADE OF NEGOTIATIONS AT THE HAGUE

For the last decade, the Hague Conference on Private International Law (Hague Conference)<sup>238</sup> has been laboring to create a multilateral convention on jurisdiction and the enforcement of judgments, which of necessity would address parallel litigation and the potential for inconsistent judgments.<sup>239</sup> The Hague Conference's undertaking in 1992–93 to work on a general convention on the recognition and enforcement for foreign judgments was generated largely by the suggestion of the United States.<sup>240</sup> The U.S., not a party to any bilateral or multilateral convention on the enforcement of foreign judgments, sought to find a means for private parties to enforce foreign judgments outside of the United States without relitigation and to “level the playing field” for litigants in the U.S.<sup>241</sup> The convention was designed to help the

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8505 (West 2003) (discretionary); MASS. GEN. LAWS. ANN. ch. 235, § 23A (West 2000) (mandatory); N.C. GEN. STAT. § 1C-1804 (2003) (discretionary); OHIO REV. CODE ANN. § 2329.92 (West 2004) (discretionary); TEX. CIV. PRAC. & REM. CODE ANN. § 36.005 (Vernon 1997) (discretionary).

238. The Hague Conference's treaties on aspects of international litigation such as The Taking of Evidence Abroad, and the Service of Documents Abroad are well known, as it is pioneering work in the area of family law. See, e.g., Hague Conference, Convention of the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 1231, available at <http://www.hcch.net/e/conventions/index.html> (last visited Dec. 12, 2004); Hague Conference, Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, *opened for signature* November 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (entered into force October 7, 1972), available at <http://www.hcch.net/e/conventions/index.html> (last visited Dec. 12, 2004).

239. See *supra* note 8. See generally [http://hcch.e-vision.nl/index\\_en.php](http://hcch.e-vision.nl/index_en.php).

240. See BAUMGARTNER, *supra* note 8, at 1; von Mehren, *Recognition and Enforcement*, *supra* note 8, at 271; Peter Nygh, *Arthur's Baby: The Hague Negotiations for a World-Wide Judgments Convention*, in LAW AND JUSTICE, *supra* note 8, at 151, 152.

241. See generally Peter Trooboff, *Ten (and Probably More) Difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Initial Lessons*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 263 (John J. Barcelo

“middle class litigant,”<sup>242</sup> not just the large multinational corporations who already could afford to resolve their transnational disputes with arbitration. U.S. litigants often found it much harder to enforce U.S. judgments abroad than the reverse situation for non-U.S. judgments seeking to be enforced in the United States. The initial suggestion of the U.S. was a mixed convention, the idea of Arthur von Mehren,<sup>243</sup> where there would be three lists of jurisdictional bases and the corresponding recognition.<sup>244</sup> The white grounds were acceptable bases under the convention, black grounds were unacceptable, and a gray list was where national law would continue but recognition was not required under the convention.<sup>245</sup> Many member states who had little trouble having their judgments recognized and enforced in the United States viewed the negotiations as a way to cut-back on what they viewed as exorbitant aspects of U.S. personal jurisdiction, including general doing business jurisdiction, activity-based jurisdiction and tag jurisdiction.

#### A. *The Comprehensive Jurisdiction / Judgments Draft*

Much has been written about the history of the negotiations and the problems that plagued it, from an initial 1999 draft that was a copy of the Brussels Convention to the 2001 Interim Draft that was a consensus version with multiple options and 201 footnotes.<sup>246</sup> Many of the obstacles to the conclusion of a comprehensive jurisdiction and judgments convention to which the United States would be a party were not apparent at the beginning of the

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& Kevin M. Clermont eds., 2002).

242. Peter Trooboff, a member of the U.S. delegation, frequently used this expression in advocating for a comprehensive judgments convention. *See id.* at 263.

243. *See generally* von Mehren, *Enforcing Judgments Abroad*, *supra* note 8.

244. *See id.* at 283-84.

245. *See id.*

246. The 2001 draft text of the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, an interim text, was drawn up at Part One of the Nineteenth Diplomatic Session, which was held from 6-22 June 2001. Hague Conference, *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference*, June 6-22, 2001 (prepared by the Permanent Bureau and the Co-reporters), available at [http://www.hcch.e-vision.nl/upload/wop/jdgm2001draft\\_e.pdf](http://www.hcch.e-vision.nl/upload/wop/jdgm2001draft_e.pdf). (last visited Dec. 12, 2004).

decade when negotiations began but arose much later, including the rise of the internet and electronic commerce, the role of the consumer and the increased integration of the European Community.<sup>247</sup> The documents of the Hague Conference itself point out many of the problems.

Part of the problem at the Hague Conference is similar to that currently occurring within the European Union with its attempts to accommodate both civil and common-law traditions. But unlike the European Union, the Hague Conference has no ECJ or its equivalent to settle disputes or harmonize interpretations, nor is there a common trade goal. While this lack of shared values or goals among the Hague Conference members has made drafting a treaty difficult, one of the best examples of the blending of legal traditions is the crafting of Articles 21 and 22, those dealing with *lis pendens* and *forum non conveniens*. The common law tradition allows discretion to decline jurisdiction, in contrast to the civil law tradition. This same difficulty in melding the two systems, as mentioned earlier, is illustrated by the current litigation within the European Community involving whether the discretionary doctrines of *forum non conveniens* and *antisuit injunctions* survive the Brussels Regulation with its strict *lis pendens* and defined grounds for jurisdiction.<sup>248</sup>

The Hague delegates managed to reach a compromise between the civil and common law traditions, evidenced by the balance achieved in the complementary articles concerning *lis*

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247. Following the June 2001 diplomatic session, there were informal meetings among different member nations exploring ways to continue the work on the Judgments Convention. For a discussion of the state of the negotiations, see Hague Conf. Prelim. Doc. No. 16, *supra* note 22.

Two other documents on the Hague Conference website, both produced by Avril D. Haines, provide insight into the problems the Conference has faced, especially in connection with the internet and also the problems related to choice of court agreements. See Hague Conf. Prelim. Doc. No. 17, *supra* note 22.; Hague Conference, *Choice of Court Agreements in International Litigation: Their Use and Legal Problems to Which They Give Rise in the Context of the Interim Text*, Prel. Doc. No. 18 (Feb. 2002) (prepared by Avril D. Haines) [hereinafter Hague Conf. Prelim. Doc. No. 18], available at <http://www.hcch.net/e/workprog/jdgm.html> (last visited October 7, 2004); see also Fausto Pocar, *The Drafting of a World-Wide Convention on Jurisdiction and the Enforcement of Judgments: Which Format for the Negotiations in The Hague?*, in *LAW AND JUSTICE*, *supra* note 8.

248. See discussion *supra* Part VI.

pendens and *forum non conveniens*. The 2001 Interim Draft provides for a *lis pendens* based on first filed or “seised,” but allowing the potential for declining jurisdiction in favor of a “clearly more appropriate forum.” Thus the objectionable aspect of the Brussels Convention/Regulation of creating a race to file is tempered by considerations of appropriateness and convenience. Similarly, the potential for broad discretionary declining of jurisdiction is limited to a specific time period and specific elements of convenience, but also tied to the potential for subsequent enforcement.<sup>249</sup>

### B. *The Choice of Court Convention*

After a stalemate in 2001 in connection with producing a comprehensive jurisdiction and judgments convention to which the U.S. would be a party, some country members of the Hague Conference called for a scaled-back convention that might provide limited relief while not addressing some of the controversial areas involving consumers, electronic commerce, and intellectual property. Beginning in October 2002, an Informal Working Group met to attempt to draft a less inclusive convention, ultimately coming up with a draft of a choice of court agreements convention after three meetings. The hope was to produce a choice of court/forum

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249. For a discussion of *forum non conveniens* and the balance with *lis pendens*, especially in relation to the Hague Convention 1999 and 2001 drafts, see Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L.J. 467 (2002). Professor Brand has been a member of the U.S. delegation to the Hague Conference for the Jurisdiction and Judgments Convention, and has noted:

The common elements of *forum non conveniens* doctrine throughout the common law world have been incorporated into the rules found in Article 22 of the Interim Text of a Hague Convention on jurisdiction and foreign judgments. . . . At the same time, this provision is balanced against the *lis pendens* rules found in Article 21. The combination integrates elements of predictability found in the civil law *lis pendens* approach with the search for equitable results that underlies the common law *forum non conveniens* doctrine. . . . Articles 21 and 22 of the Interim Text provide a constructive focus for comparative analysis and set the stage for progress in the world of parallel litigation.

*Id.* at 495. See also Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203 (2001).

convention<sup>250</sup> that would enforce forum selection clauses and resulting judgments, much as the New York Convention does with arbitration clauses and subsequent arbitral awards. Although only a small piece of the puzzle of a judgments convention, a large portion of multiple proceedings is generated by actions contrary to forum selection clauses or actions to enforce forum selection clauses. A choice of court convention could have a positive impact not only on dispute resolution but also on transactional planning, providing enforcement for exclusive choice of court clauses as well as for the resulting judgments.

In a survey of practitioners conducted by the ABA Section of International Litigation and Practice in October-November 2003, over 98% of those responding indicated that a convention on choice of court agreements would be useful for their practice. Over 70% indicated that a convention would make them "more willing to designate litigation instead of arbitration" in their contracts.<sup>251</sup>

The Hague Conference on Private International Law has since produced a significant draft of an Exclusive Choice of Court Agreements Convention. A full Special Commission was held in December 2003, and a second one in April 2004, from which emerged the most recent draft, Working Document No. 110 E (Revised), available at the Hague Conference's website.<sup>252</sup> Although the earlier drafts had called for jurisdiction and a *lis pendens* for exclusive choice of court clauses, they also provided for recognition and enforcement of non-exclusive clauses as well. The current draft addresses only exclusive choice of court clauses in international cases, as defined in Article 1(2).<sup>253</sup> The draft convention

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250. See Hague Conf. Prelim. Doc. No. 16, *supra* note 22, at n.4.

251. The survey is a product of the ABA Working Group on the Hague Convention on Choice of Court Agreements, which is co-chaired by Louise Ellen Teitz and Janis H. Brennan, a partner at Foley, Hoag LLP in Washington, D.C. Douglas Earl McLaren at Bechtel SAIC Company LLC also helped to develop the survey. Help was also provided by the D.C. Bar Association and the Association of the Bar of the City of New York. The survey was based on the draft text prior to the December 2003 Special Commission which provided some coverage for non-exclusive choice of court agreements.

252. Hague Conference, *Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Work. Doc. No. 110 E (Revised) (Apr. 2004) [hereinafter Working Doc. No. 110 E (Revised)], available at <http://www.hcch.net/e/workprog/jdgm.html> (last visited Dec. 12, 2004).

253. *Id.* at art. 1.



would enforce exclusive forum selection clauses under Article 5 unless the agreement is “null and void” under the law of the chosen court. A nonchosen, or derogated court, under Article 7 would be required to suspend or dismiss its proceedings unless the agreement was null and void under the law of the chosen court, there was a lack of capacity under the law of the court seised, or “giving effect to the agreement would lead to a very serious injustice or would be manifestly contrary to fundamental principles of public policy.”<sup>254</sup> The April 2004 draft flags several policy issues that need further clarification.<sup>255</sup> The United States had hoped to use language parallel to the New York Convention but the ground of “very serious injustice” is similar to the current Supreme Court standard for substantive invalidity of “unreasonable or unjust” in *The Bremen v. Zapata Off-Shore Co.*<sup>256</sup>

Other policy decisions are becoming more divisive in connection with the recognition and enforcement provisions and potential reasons for non-enforcement. Recognition and enforcement of

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254. *Id.* at art. 7:

*Article 7 Obligations of a court not chosen*

If the parties have entered into an exclusive choice of court agreement, any court in a Contracting State other than that of the chosen court shall suspend or dismiss the proceedings unless -

- a) the agreement is null and void under the law of the State of the chosen court;
- b) a party lacked the capacity to enter into the agreement under the law of the State of the court seised;
- c) giving effect to the agreement would lead to a very serious injustice or would be manifestly contrary to fundamental principles of public policy of the State of the court seised;
- d) for exceptional reasons, the agreement cannot reasonably be performed; or
- e) the chosen court has decided not to hear the case[, except where it has transferred the case to another court of the same State as permitted by Article 5, paragraph 3 b)].

*Id.* (citations omitted).

255. See *Id.* at art. 7 nn.3-6; see also Hague Conference, Draft Report, Preliminary Document No. 26, *Preliminary Draft Convention on Exclusive Choice of Court Agreements*, Prel. Doc. No. 26, at ¶¶ 54-55 (Dec. 2004) (prepared by Masato Dogauchi & Trevor C. Hartley), [hereinafter Prelim. Doc. No. 26], available at [http://hcch.e-vision.nl/upload/wop/jdgm\\_pd26e.pdf](http://hcch.e-vision.nl/upload/wop/jdgm_pd26e.pdf) (last visited December 7, 2004).

256. 407 U.S. 1 (1972).

a judgment that results from an exclusive choice of court clause designating a member state may be refused generally only if the agreement is null and void, the party lacked capacity, the defendant did not have sufficient notice, the judgment was obtained by fraud, the recognition would be “manifestly incompatible” with public policy, or the judgment is inconsistent with another judgment.<sup>257</sup> Thus, there is the opportunity for review of the validity of

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257. Working Doc. No. 110 E (Revised), *supra* note 252, at art. 9.

*Article 9 Recognition and enforcement*

1. A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognized and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the following grounds -

- a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;
- b) a party lacked the capacity to enter into the agreement under the law of the requested State;
- c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,
  - i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested, or
  - ii) was notified to the defendant in the requested State in a manner that violated the public policy of that State;
- d) the judgment was obtained by fraud in connection with a matter of procedure;
- e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State; or
- f) the judgment is inconsistent with a judgment given in a dispute between the same parties in the requested State, or it is inconsistent with an earlier judgment given in another State between the same parties and involving the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State[under an international agreement], and provided that the inconsistent judgment was not given in contravention of this Convention.

[1 *bis*. Paragraph 1 shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, para-

the exclusive forum selection clause three times: by the chosen court when it takes jurisdiction, by the non-chosen court when it must suspend or dismiss proceedings contrary to the exclusive forum selection agreement, and by the enforcing court at the time of recognition and enforcement of the judgment. The draft now indicates that the determination of validity is to be made under the law of the court chosen, but the non-chosen court and the enforcing court still have the possibility in rare cases to apply their public policy.

One addition in the December 2003 Special Commission was a damage provision that, contrary to the U.S. position, would allow a reduction in certain cases not only for awards of non-compensatory damages or punitive damages, but also for compensatory damages that are “grossly excessive.”<sup>258</sup> The “grossly excessive language,” added near the end of the Special Commission, follows language that was in the 2001 draft. However, in the context of a comprehensive judgments convention covering tort actions, this provision was a compromise of interests. In the smaller contractual choice of court convention, the provision makes no sense when parties have contractually chosen the forum to hear their dispute. Indeed, the addition of Article 10(2)(a) (now Article 15), initiated by Canada, makes the convention less attractive for businesses who might again favor arbitration since there is no similar provision for reduction of awards under the New York Convention and there is the possibility in some cases for punitive noncompensatory damages to be upheld in full. The potential review and recognition is continued in the April 2004 draft, now as Article 15. In addition, the April 2004 draft includes several categories of exclusions: asbestos related matters added by Canada,<sup>259</sup> and natural resources and joint ventures items added by China.<sup>260</sup> Brackets and footnotes, currently up to Number 18, have crept

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graph 3 b.)

*Id.* (citations omitted).

258. Hague Conference, Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Work. Doc. No. 49 E (Revised), art. 10 (Dec. 2003) (copy on file with author). Note that as a result of several additions and revisions to this December 2003 draft, Article 10 has been renumbered as Article 15. Working Doc. No. 110 E (Revised), *supra* note 252, at art. 15.

259. Working Document No. 110 E (Revised), *supra* note 252, at art. 20.

260. *Id.* at art. 20 n.15.

into the newest draft, especially in connection with issues related to intellectual property. The simple, short initial draft, modeled on the New York Convention, is becoming more complex with more special interests added and more areas where consensus is lacking. Thus the attempt to parallel the New York Convention has been sabotaged.

Nonprofit organizations continue to voice concerns with the non-negotiated contracts and their potential inclusion in the convention when commercial, a problem that ultimately reflects dissatisfaction with the underlying substantive contract law that validates contract formation in these circumstances. The current draft of the convention does not include an independent standard of substantive validity but incorporates a choice of law of the chosen court.

The final diplomatic conference, tentatively scheduled for June 2005, will need to address several unresolved issues. There are still several areas to be worked out or refined including: scope; coverage of intellectual property and the "incidental question"; relationship to other regional conventions (particularly the European Union), or what is called "disconnection"<sup>261</sup>; relationship of *lis pendens* and stays to actions and judgments from courts of contracting and noncontracting states; bases for refusal to recognize choice of court agreements and judgments; and the treatment of damage awards. There is also the question of how the convention should handle wholly domestic transactions for purposes of both jurisdiction and enforcement, and what constitutes "wholly domestic." For example, do we want a judgment resulting from a contract between a New York buyer and California seller, with a California choice of court, to be enforced under the convention should the buyer manage to move all of its assets out of the United States? Of course, the problem will be that the buyer would move all the assets not to another contracting country, but to some offshore noncontracting country.

The convention would enforce forum selection clauses and resulting judgments, much as the New York Convention does with arbitration clauses and subsequent arbitral awards. The convention has the potential to offer increased certainty and subsequent

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261. For a discussion of some of these issues of disconnection, see Hague Conf. Prelim. Doc. No. 24, *supra* note 22.

enforceability for consensual commercial transactions. From the standpoint of parallel proceedings, the draft convention, or one similar, offers the possibility of reducing a significant amount of parallel litigation through the enforcing “stick” of a modified *lis pendens* provided in Article 7, and the “carrot” of enforcement in Article 9, if not contrary to an exclusive choice of court clause. Reducing the friction generated from these cases discussed above would go a long way to reduce the number and need for parallel litigation and to provide predictability in planning transactions.<sup>262</sup>

### C. *The American Law Institute and Other Efforts*

The American Law Institute (ALI) has undertaken a project to federalize the enforcement of judgments with a proposed statute containing a modified *lis pendens* provision, tied to subsequent enforceability of a judgment. The International Jurisdiction and Judgments Project was begun originally to produce implementing legislation for a Hague Conference comprehensive jurisdiction and judgments convention, but as the Hague project stalled, the ALI's work has continued forward as a proposed federal statute, The Foreign Judgments Recognition and Enforcement Act (FJREA).<sup>263</sup>

Section 11 of the draft, “Declination of Jurisdiction When Prior Action is Pending,” adopts a basic *lis pendens* principle that presumes the first-filed matter, either here or abroad, should proceed, if that judgment would be entitled to recognition under the FJREA, which includes a reciprocity provision under Section 7.<sup>264</sup> The U.S. court would stay or dismiss the second-filed U.S. action, unless the foreign action was based on jurisdictional grounds not

262. There is still considerable work to be done on the problem of chosen and nonchosen courts in the 2004 Draft. See Prelim. Doc. No. 26, *supra* note 255, at ¶¶ 146-52, 172-76.

263. See INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT, *supra* note 9.

264. See *id.* at §§ 7, 11. A reciprocity requirement has been controversial. Scholars have criticized this reciprocity requirement that was included in *Hilton v. Guyot*, 159 U.S. 113 (1895). See, e.g., Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT'L L. 121, 128 (1997) (“The Supreme Court in *Hilton v. Guyot* was wrong in insisting on reciprocity.”); Richard H.M. Maloy & Desamparados M. Nisi, *A Message to the Supreme Court: The Next Time You Get a Chance, Please Look at Hilton v. Guyot; We Think It Needs Repairing*, 5 J. INT'L LEGAL STUD. 1, 2 (1999) (arguing that the Supreme Court should reject reciprocity for enforcing foreign judgments).

recognized under the FJREA or was subject to certain defenses. These defenses generally follow those enumerated in the Uniform Foreign Money-Judgments Recognition Act<sup>265</sup> and in *Hilton v. Guyot*.<sup>266</sup>

Section 11 also provides grounds for a court to decline to defer to another first-filed foreign action. A U.S. court could decide not to defer to a foreign action although first-filed where: (1) the U.S. forum was the "more appropriate forum"; (2) the foreign action was vexatious or frivolous; or (3) for "other compelling reasons." Section 11 works in tandem with the nonrecognition provisions by providing for discretionary nonrecognition of a foreign judgment when a prior action is pending in the United States. Article 11 is designed "to create an incentive for a foreign court to decline jurisdiction in favor of a prior U.S. proceeding."<sup>267</sup> In addition, Section 5 also provides for discretionary nonrecognition of antisuit injunctions. Thus the ALI proposed statute would bring coherence to this area of jurisprudence and provide a rule that encouraged suit in the most appropriate forum by offering a *lis pendens*.<sup>268</sup> This *lis pendens* would also encourage parties to avoid vexatious litigation or litigation filed to frustrate suit in the most appropriate forum by allowing a court to refuse to enforce a foreign judgment obtained in a later filed foreign action, or one that was designed to preempt litigation in the more appropriate U.S. forum, such as through an antisuit injunction or negative declaration.<sup>269</sup>

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265. UFMJRA, *supra* note 17.

266. 159 U.S. 113, 205-06 (1895). *See* discussion *supra* Part VI.

267. INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT, *supra* note 9 at § 11 cmt. k.

268. *See* Andreas F. Lowenfeld, *Forum Shopping, Anti-suit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314, 319-20 (1997).

269. The ALI Statute builds on and perfects concepts like those in the the International Law Association's project covering both *forum non conveniens* and parallel proceedings. *See generally* INT'L LAW ASS'N, LEUVEN/LONDON PRINCIPLES ON DECLINING AND REFERRING JURISDICTION IN CIVIL AND COMMERCIAL MATTERS (2000), at <http://www.ilahq.org>; CONFLICT OF JURISDICTION MODEL ACT (1987), *reprinted in* Teitz, *Taking Multiple Bites*, *supra* note 6. The International Law Association project covers both *forum non conveniens* and parallel proceedings. Efforts to harmonize approaches to parallel proceedings from a procedural standpoint could lead to a more consistent and predictable, as well as less abrasive, method of handling parallel proceedings and reduce the costs to parties and judicial systems. *See* Stephen B. Burbank, *Jurisdictional Equilibration: The Proposed Hague Convention*

Differences in approach to parallel litigation as well as differences in jurisdiction "are a permanent source of conflict between the courts of different nations and often hinder the recognition and enforcement of foreign judgments."<sup>270</sup> The ALI Judgments Project is a concrete means to reduce multiple proceedings, encouraging parties to sue once and in the most appropriate forum by both offering the carrot of a *lis pendens* and using the stick of denial of recognition of a judgment resulting from a violation. Indeed, as with the Hague Conference judgments projects, the ALI project as well recognizes the need to address parallel litigation and inappropriate forum in any coherent effort to codify recognition and enforcement.<sup>271</sup>

### VIII. CONCLUSION

Global forum shopping with parallel proceedings has become a worldwide problem, requiring more than unilateral actions. The last decade has shown the increasing need for a consistent jurisprudence in the United States and elsewhere to deal with multiple proceedings, antisuit injunctions and deference to other courts. The work at the Hague on a Choice of Court Convention and the ALI International Jurisdiction and Judgments Project with an explicit *lis pendens* reflect attempts to address aspects of multiple proceedings. These varied and multiple approaches to transnational litigation offer the promise of harmonization in several areas, and thus hope for the attendant reduction in the amount of concurrent litigation and friction it generates. The global efforts on many fronts to harmonize approaches to parallel proceedings from a procedural standpoint could lead to a more consistent and predictable, as well as less abrasive, method of handling parallel proceedings, and help reduce the costs to parties

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*and Progress in National Law*, 49 AM. J. COMP. LAW 203, 204 (2001).

270. Rolf Stürner, *Some European Remarks on a New Joint Project of the American Law Institute and UNIDROIT*, 34 INT'L LAW. 1071, 1073 (2000) (discussing the ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure.)

271. The European Commission, in conjunction with the Brussels Regulation, has focused more on the issues of judicial cooperation within the Community and with third countries. The integration of European law with the common-law and civil law origins also has an impact on the continued existence of parallel proceedings and antisuit injunctions when one or more of the litigants is a member state.

and to judicial systems. Unfortunately, in the United States there is a continuing attempt to squeeze the parallel proceedings problem into the shoes of domestic doctrines, shoes that are both too small and too old to fit the larger needs of transnational dispute resolution.



