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BALANCING COMITY WITH ANTISUIT INJUNCTIONS: CONSIDERATIONS BEYOND JURISDICTION

International comity is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation.¹ The doctrine is not a rule of public international law,² but the voluntary maintenance of amicable external relations with other nation states, furthering the development of an effectively functioning international system.³ Increased economic interdependence among nations requires greater respect for comity, achieving a balance between the needs of an independent sovereign to regulate its internal affairs and the needs of other independent sovereigns to do the same.⁴

Before issuing an antisuit injunction, a district court must consider equitable circumstances to determine whether the injunction is required to prevent an irreparable miscarriage of justice.⁵ However, when a party is enjoined from commencing or continuing litigation in the courts of another sovereign nation, principles of international comity should also be considered. Unfortunately, the Federal Rules of Civil Procedure do not provide adequate guidelines for courts faced with the possibility of enjoining a litigant or defendant from commencing or continuing litigation in a foreign court.

Eight circuits have addressed foreign antisuit injunctions with respect to principles of international comity. The First, Fifth, Seventh and Ninth Circuits do not emphasize international comity, issuing foreign antisuit injunctions in cases where there is merely a duplication of parties and issues.⁶

In contrast, the Second, Third, Sixth, and D.C. Circuits maintain that the mere duplication of parties and issues does not properly consider the effect of the foreign

1. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

2. Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An intersection between public and private international law*, 76 AM. J. INT'L. L. 280, 281 (1982).

3. *Id.* at 283.

4. Michael David Schimek, *Anti-Suit and Anti-Anti-Suit Injunctions: A Proposed Texas Approach*, 45 BAYLOR L. REV. 499, 504 (1993). *But see*, *Philips Medical Sys., Int'l., v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993) (interpreting the increased economic interdependence of the world to indicate that the reasons for limiting duplicative domestic litigation should not stop at international boundaries).

5. FED. R. CIV. P. 65(b) states, in relevant part:

A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

6. *Canadian Filters v. Lear-Siegler, Inc.* 412 F.2d 577 (1st Cir. 1969); *In re Unterweser Reederei*, 428 F.2d 888 (5th Cir. 1970), *vacated*, *M/S Bremen v. Zapata Off-Shore*, 407 U.S. 1 (1972); *Allendale Mutual Ins. v. Bull Data Sys.* 10 F.3d 425 (7th Cir. 1993); *Seattle Totems Hockey Club v. Nat'l. Hockey League*, 652 F.2d 852 (9th Cir. 1981), *cert. denied*, *Northwest Sports Enterprises v. Seattle Totems Hockey Club*, 457 U.S. 1105 (1982).

antisuit injunction.⁷ An amendment to Rule 65 of the Federal Rules of Civil Procedure would resolve the circuit split by providing courts with a consistent standard to apply when deciding whether to enjoin actions pursued in foreign jurisdictions.

I. THE LAX STANDARD: DUPLICATION OF PARTIES AND ISSUES

The First, Fifth, Seventh and Ninth Circuits have enjoined parties from pursuing relief in a foreign court upon finding a duplication of the parties and issues.⁸ These circuits determined that duplicative foreign litigation tends to: (1) frustrate a policy of the forum issuing the injunction;⁹ (2) be vexatious or oppressive;¹⁰ (3) threaten the issuing court's in rem or quasi in rem jurisdiction;¹¹ or (4) prejudice other equitable considerations.¹²

The Seventh Circuit found international comity to be a purely theoretical doctrine.¹³ The Court held that convincing evidence of the importance of comity can only be shown by a concrete and persuasive demonstration that a particular injunction would threaten foreign relations.¹⁴ The Seventh Circuit reasoned that if foreign courts were concerned about their nationals, they would inform United States' courts through the State Department or foreign offices of the concerned country.¹⁵ The silence of these agencies implies that foreign antisuit injunctions do not actually jeopardize amicable relations with foreign nations.¹⁶

II. THE STRINGENT STANDARD: PROTECTION OF JURISDICTION AND PUBLIC POLICY

The Second, Third, Sixth, and D.C. Circuits find mere duplication of parties and issues insufficient to justify an injunction that would prevent a foreign court from

7. *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985); *China Trade & Development v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987); *Compagnie des Bauxites de Guinee v. Ins. Co. of North America*, 651 F.2d 877 (3d Cir.), *aff'd*, *Ins. Co. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Gau Shan v. Bankers Trust*, 956 F.2d 1349 (6th Cir.), *appeal dismissed*, 1992 U.S. App. LEXIS 4035 (6th Cir. June 11, 1992); *Sea Containers v. Stena AB*, 890 F.2d 1205 (D.C. Cir. 1989); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

8. *See supra* note 6 and accompanying text. *Contra Laker Airways*, 731 F.2d at 928. (finding that a foreign antisuit injunction issued simply because the same parties and issues are involved to be inconsistent with the general rule which permits parallel proceedings in concurrent jurisdictions in personal actions).

9. *See, e.g., In re Unterweser*, 428 F.2d at 890, 896 (allowing an injunction prohibiting further litigation in an English court because simultaneous prosecution of the same action in the foreign forum would result in inequitable hardship and frustrate and delay the speedy and efficient determination of the cause).

10. *See, e.g., Allendale*, 10 F.3d at 431 (determining that allowing two lawsuits to proceed simultaneously would be "gratuitously duplicative, . . . vexatious and oppressive").

11. *See, e.g., In re Unterweser*, 428 F.2d at 890 (citing the four factors as justification for issuing a foreign antisuit injunction).

12. *See, e.g., Seattle Totems*, 652 F.2d at 856 (considering the relevant factors, two separate actions would likely result in unnecessary delay and substantial inconvenience and expense to the parties and witnesses or that separate adjudications could result in inconsistent rulings or even a race to the judgment). *But see, Canadian Filters*, 412 F.2d at 579 (stating that respect for comity is the general rule, but negating the effect of that rule by allowing the foreign antisuit injunction whenever the forum seeks to advance its own substantial interests or when relitigation would cover exactly the same points).

13. *Allendale*, 10 F.3d at 432-33.

14. *Id.* at 431.

15. *Philips Medical Sys.*, 8 F.3d at 605.

16. *Id.*

exercising its proper jurisdiction.¹⁷ These circuits carefully consider the effects of the injunction on international comity, issuing foreign antisuit injunctions only in the most extreme cases.¹⁸ Recognizing the possible harmful effects of needlessly or haphazardly issuing a foreign antisuit injunction, such an injunction is issued only if necessary (1) to protect the jurisdiction of the issuing forum; or (2) to prevent evasion of important public policies.¹⁹

The Sixth Circuit found that unrestrained and liberal use of foreign antisuit injunctions creates several concerns.²⁰ First, the possibility exists that no relief will be granted. If both the foreign court and the United States court issue injunctions preventing their respective national from prosecuting a suit in the foreign forum, both actions would be paralyzed and neither party would be able to obtain any relief.²¹ Second, international commerce would be greatly affected by liberal use of antisuit injunctions. Merchants engaged in international commerce depend on the ability to predict the consequences of their actions in overseas markets. Antisuit injunctions threaten predictability by making cooperation and reciprocity between courts of different nations less likely.²² Finally, by denying foreign courts the right to exercise their proper jurisdiction, the United States Judiciary conveys a message that they lack confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently.²³ Such disrespect for foreign legal systems will be countered with similar actions by foreign courts, at the expense of international cooperation.²⁴

III. CONCLUSIONS AND RECOMMENDATIONS

The Supreme Court makes it clear that only by reaching decisions that reflect the needs of the international system will our courts develop a legal regime within which transnational intercourse can take place effectively.²⁵ Recognizing comity promotes international commerce by allowing corporations to predict more accurately the consequences of their actions, ensures that litigants have the opportunity to resolve their disputes, and allows the other branches of government to resolve highly political disputes when they arise.²⁶

17. See *China Trade*, 837 F.2d at 36 ("since parallel proceedings are ordinarily tolerable, the initiation before a foreign court of a suit concerning the same parties and issues as a suit already pending in a United States court does not, without more, justify enjoining a party from proceeding in the foreign forum"); *Compagnie des Bauxites*, 651 F.2d at 887 (holding that duplication of issues and delays in filing did not alone justify the breach of comity among the courts of separate sovereignties); *Gau Shan*, 956 F.2d at 1355 ("factors such as vexatiousness or oppressiveness and a race to judgment are likely to be present whenever parallel action are proceeding concurrently . . . an antisuit injunction based upon these factors would tend to debilitate the policy that permits parallel actions to continue and that disfavors antisuit injunctions"); *Sea Containers*, 890 F.2d at 1213-14 ("that the parallel foreign proceeding would be 'vexatious' to the domestic plaintiffs and a race to judgment causing additional expense are not sufficient additional considerations but only factors . . . likely to be present whenever parallel actions are proceeding concurrently").

18. See, e.g., *Davis*, 767 F.2d at 1038; *China Trade*, 837 F.2d at 37; *Compagnie des Bauxites*, 651 F.2d at 887; *Gau Shan*, 956 F.2d at 1354; *Laker Airways*, 731 F.2d at 926.

19. *Davis*, 767 F.2d at 1039; *China Trade*, 837 F.2d at 36; *Sea Containers*, 890 F.2d at 1214; *Laker Airways*, 731 F.2d at 927, 931; *Gau Shan*, 956 F.2d at 1354.

20. *Gau Shan*, 956 F.2d at 1352-55.

21. *Id.* at 1354-55.

22. *Id.* at 1355.

23. *Id.*

24. *Id.*

25. *Maier*, *supra* note 2, at 303.

26. *Id.*

By freely allowing foreign antisuit injunctions, the First, Fifth, Seventh, and Ninth Circuits fail to consider the important effects of international comity. Some circuits suggest that international comity is threatened only when they have notice from a nation that it perceives such a threat.²⁷ However, in the interests of cooperation and reciprocity, we cannot require other countries to continuously investigate litigation involving their nationals seeking justice in United States courts.

Proper respect for comity ensures United States' courts that their decisions and judgments will be given reciprocal treatment in foreign jurisdictions.²⁸ Furthermore, the split among the circuits with respect to the importance of comity results in inconsistent application of United States foreign policy. Courts have neither the resources nor the mandate to assess how their decisions affect foreign affairs.²⁹ Creating a consistent standard for granting foreign antisuit injunctions would ensure that foreign affairs concerns remain within the control of the legislative branch. Thus, Congress should amend Fed. R. Civ. P. 65 to:

65(f) Foreign Antisuit Injunctions

Every order granting an injunction against a foreign national or entity preventing the commencement or continuance of litigation in a foreign tribunal must be necessary to: (1) protect the forum court's jurisdiction; or (2) protect the strong public interests or policies of the forum, considering the forum of the law allegedly evaded and the identity of the potentially evading party.³⁰

The proposed standard would allow a foreign antisuit injunction when one of two significant harms to the United States Federal Courts are present. First, courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants.³¹ Thus, a foreign antisuit injunction would be necessary to protect jurisdiction where the foreign proceeding attempts to carve out exclusive jurisdiction over concurrent actions or the basis for the jurisdiction is in rem or quasi in rem.³² Second, a foreign antisuit injunction would also be justified when a litigant attempts to evade important public policies of the forum nation.³³ A state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests.³⁴ The proposed amendment is explicit enough to prevent threats to international comity, while allowing the judges to exercise enough discretion to protect the proper exercise of their jurisdiction.

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27. See *supra* text accompanying notes 14-15.

28. Maier, *supra* note 2, at 508.

29. *Laker Airways*, 731 F.2d at 955 ("absent an explicit directive from Congress, this court has neither the authority nor the institutional resources to weigh the policy and political factors that must be evaluated when resolving competing claims of jurisdiction").

30. See, e.g., *Laker Airways*, 731 F.2d at 932.

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

32. *Gau Shan*, 956 F.2d at 1356; *Laker Airways*, 731 F.2d at 930.

33. *Laker Airways*, 731 F.2d at 931.

34. Maier, *supra* note 2, at 280 ("[F]rom the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act").

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