ARTICLE

WHEN A U.S. DOMESTIC COURT CAN ENJOIN A FOREIGN COURT PROCEEDING

Samantha Koeninger[*1] *& Richard Bales*[*2]

A federal court, at its discretion, may enjoin a parallel proceeding in a foreign court. Currently, there is a split among the federal courts of appeals as to the circumstances under which an anti-suit injunction should be granted. The Fifth, Seventh, and Ninth Circuits have adopted the "liberal approach." These courts have found that a court may enjoin a foreign proceeding if the parallel litigation is vexatious and duplicative. In contrast, the First, Second, Third, Sixth, Eighth, and D.C. Circuits have adopted the "restrictive approach." These courts require a higher standard, and have found that if the parallel litigation is duplicative and vexatious, that alone is not enough to warrant an anti-suit injunction. These courts emphasize the importance of international comity and consider it to be a main factor in evaluating whether to enjoin the foreign court. This article argues that courts should adopt the restrictive approach because giving due consideration to international comity creates stability for international businesses, ensures that mutual respect is maintained between domestic and foreign courts, prevents backlash from foreign courts unhappy with U.S. courts, and ensures that both domestic and foreign litigants are treated equally.

I. INTRODUCTION 475
II. BACKGROUND 477
A. Relevant Law 478
1. Must Have Jurisdiction 478
2. Full Faith and Credit Clause 478
3. Injunction 479
B. Problems With Parallel Litigation 480
C. Effect Of An Anti-Suit Injunction 481
D. Factors To Be Considered 482
1. International Comity as a Deciding Factor 483
2. How Much Deference Should Be Given to International Comity? 484
III. SPLIT OF AUTHORITY 485
A. Liberal Approach 485
B. Restrictive Approach 487
IV. ANALYSIS 490
A. Problems With The Split 490
B. Arguments For The Liberal Approach 491
C. Arguments For The Restrictive Approach 492
D. Proposal: Adopt The Restrictive Approach 493
V. CONCLUSION 495

I. INTRODUCTION

Parallel litigation arises when lawsuits that are similar, related, or identical are filed in different courts.[1] This can occur between the courts of two U.S. states or between a U.S. court and a foreign court.[2] Generally, parallel litigation arising in the domestic courts of two U.S. states can be easily resolved.[3] The Full Faith and Credit Clause, which requires each state to protect the "acts, records, and judicial proceedings of every other state," allows domestic courts to easily settle the issue of parallel litigation.[4] However, parallel litigation is not as simple when the parallel lawsuits arise in a U.S. court and a foreign court.[5] Parallel litigation in foreign courts potentially creates several issues, most significantly, because an international equivalent to the Full Faith and Credit Clause does not exist.[6] Neither a U.S. domestic court nor a foreign court is under any obligation to recognize the judgment of a foreign court.[7]

Parties involved in parallel litigation in two U.S. domestic courts often "race to judgment" and, subsequently, the race is won when one of the courts enters a judgment first.[8] The court with the first judgment is said to have "won the race" and will present the judgment to the "losing" court.[9] Further, the "losing" court will potentially be barred from adjudicating the proceeding, and could be forced to dismiss the case on grounds of res judicata.[10] If the court finds that the remaining claim has been decided: (1) in an earlier issue; (2) a final judgment on the merits was reached; and (3) involving the same parties, or parties in

---

*1 B.A. 2011 (Political Science) Northern Kentucky University; J.D. anticipated May 2015, Northern Kentucky University, Salmon P. Chase College of Law.

*2 Dean and Professor of Law, Ohio Northern University, Claude W. Pettit College of Law. When the bulk of this article was written, Dean Bales was a Professor of Law at Northern Kentucky University, Salmon P. Chase College of Law.

1 *See* Kathryn E. Vertigan, Note, *Foreign Antisuit Injunctions: Taking a Lesson From the Act of State Doctrine*, 76 GEO. WASH. L. REV. 155, 155 (2007).

2 *Id.*

3 *Id.* at 156.

4 U.S. CONST. art. IV, § 1.

5 *Id.* (implicit by language, specifically making no reference to recognition of international courts). *See also* Vertigan, *supra* note 1, at 156.

6 *See* Walter W. Heiser, *Using Anti-Suit Injunction to Prevent Interdictory Actions and To Enforce Choice of Court Agreements*, 2011 UTAH L. REV. 855, 872 n.104 (2011).

7 *Id.* at 873.

8 John Fellas, *A New Standard For International Anti-Suit Injunctions*, 231 N.Y. L.J, May 13, 2004.

9 *Id.*

10 *Id.*

privity, the claim will be dismissed.[11] However, when the parallel proceedings are brought in a U.S. domestic court and a foreign court, the race to judgment is less effective because the foreign court is under no obligation to adhere to the doctrine of res judicata.[12]

Lawsuits filed simultaneously in a U.S. and a foreign court are permitted to proceed simultaneously; however, there are several reasons why either the courts or the parties would desire otherwise.[13] Concerns such as the cost of litigation, the time required for preparing a lawsuit, inconvenience to the parties, and the risk of inconsistent judgments discourage parties from being involved in parallel proceedings.[14] Either of the litigating parties may request that the district court issue an anti-suit injunction, which would essentially prohibit the parties from continuing to prosecute the litigation in the foreign proceeding.[15]

The federal circuits are split regarding when courts should exercise their discretion and enjoin, or legally prohibit, a parallel foreign court proceeding. The Fifth,[16] Seventh,[17] and Ninth[18] Circuits take the "liberal approach."[19] These courts have found that a court may enjoin a foreign proceeding if the parallel litigation is vexatious and duplicative.[20] In contrast, the First,[21] Second,[22] Third,[23] Sixth,[24] Eighth,[25] and D.C. Circuits[26] take the "restrictive approach." These courts have found that duplicative and vexatious parallel litigation alone is not enough to warrant an anti-suit injunction.[27] The restrictive approach requires a

---

11 RESTATEMENT (SECOND) OF JUDGMENTS §§ 17, 24 (1982).

12 *Id.*

13 *See* Heiser, *supra* note 6, at 855.

14 *See* Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V., 310 F.3d 118, 127 n.7 (3d Cir. 2002).

15 *Id.* at 125.

16 *See* Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 627 (5th Cir. 1996).

17 *See* Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 431-33 (7th Cir. 1993).

18 *See* Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 652 F.2d 852, 856 (9th Cir. 1981).

19 *See* Laura Eddleman Heim, Note, *Protecting Their Own?: Pro-American Bias and the Issuance of Anti-Suit Injunctions*, 69 OHIO. ST. L.J. 701, 707-08 (2008).

20 *Id.* at 708.

21 *See* Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 17-19 (1st Cir. 2004).

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

23 *See* Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V., 310 F.3d 118, 126 (3d Cir. 2002).

24 *See* Gau Shan Co. v. Bankers. Trust Co., 956 F.2d 1349, 1352-54 (6th Cir. 1992).

25 *See* Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 361-63 (8th Cir. 2007).

26 *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984).

27 *Id.*

higher standard and places great importance on international comity.[28]

This Article analyzes the split of authority within the federal circuit courts with respect to enjoining a foreign court proceeding. Part II of this Article analyzes the concept of parallel litigation and explains how multiple lawsuits, proceeding simultaneously, can create problems.[29] Additionally, it describes the effects of an anti-suit injunction, the relevant law permitting courts to issue an anti-suit injunction, and the factors to be considered before granting an anti-suit injunction. Part III summarizes the "liberal approach," followed by the Fifth, Seventh, and Ninth Circuits, and the "restrictive approach," followed by the First, Second, Third, Sixth, Eighth, and D.C. Circuits.[30] Part IV of this Article describes the problems that arise because of the split of authority and the arguments for both approaches, proposing that the United States Supreme Court adopt the restrictive approach.[31] The current confusion between the circuits as to the appropriate standard for issuing an injunction creates uncertainty and unpredictability for businesses.[32] Indubitably, this creates problems because modern business and trade practices reach past the borders of the U.S.[33] To preserve the integrity of our courts and ensure that both American and foreign litigants are treated fairly, international comity should be a determining factor when deciding whether to enjoin a foreign court proceeding.

II. BACKGROUND

To understand problems created by the differing approaches is important to comprehend the authority governing parallel litigation. Parallel litigation arises only when courts have concurrent jurisdiction.[34] As explained below, this can create problems for courts and litigants.[35] Either party can request an anti-suit injunction. However, there are several factors that the deciding judge must consider before granting or denying the injunction such as: (1) the cost of litigation; (2) the burden on both of the parties; (3) the burden on the court (4) the amount of time

---

28 *Id.*

29 *See infra* Part II.

30 *See infra* Part III.

31 *See infra* Part IV.

32 *See* Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 160 (3d Cir. 2001).

33 *Id.*

34 BLACK'S LAW DICTIONARY 928 (9th ed. 2009) (defining "concurrent jurisdiction" as "[j]urisdiction that might be exercised simultaneously by more than one court over the same subject matter and within the same territory, a litigant having the right to choose the court in which to file the action.").

35 *See infra* Part II.B.

required to litigate both suits; (4) international comity; (5) public policy; (6) diplomatic implications; (7) the time at which the injunction is being sought; and (8) the potential consequences of the injunction.

A. Relevant Law

Article III of the U.S. Constitution establishes the judicial branch of the federal government, including the Supreme Court and the lower federal courts.[36] These courts have the ability to hear cases and controversies arising within their jurisdiction.[37] Further, through the Full Faith and Credit Clause, the Constitution provides that states must honor the judgments of other U.S. domestic courts.[38] The mandatory recognition of other U.S. domestic court judgments allows for final rulings, such as injunctions, to have effect in other states.[39]

1. Must Have Jurisdiction

Jurisdiction is proper when both personal and subject matter jurisdiction have been established.[40] Generally speaking, personal jurisdiction refers to a court's "power to bring a person into its adjudicative process."[41] Once personal jurisdiction is established, a court must also have subject matter jurisdiction, which refers to a court's "jurisdiction over the nature of the case and the type of relief sought."[42] Assuming the parties have chosen the proper venue, or place for a lawsuit to proceed, the court has jurisdiction over the case.[43] There are situations in which multiple courts satisfy jurisdiction requirements, which result in concurrent jurisdiction and, in turn, the possibility of parallel proceedings.[44]

2. Full Faith and Credit Clause

Both state and federal courts must give full faith and credit to the "judicial proceedings of every other state."[45] As provided in the Constitution under the Full Faith and Credit Clause, once a judgment is

---

36 *See* U.S. CONST. art. III, § 1.
37 *See* U.S. CONST. art. III, § 2.
38 U.S. CONST. art. IV, § 1.
39 *Id.*
40 BLACK'S LAW DICTIONARY 930 (9th ed. 2009).
41 *Id.*
42 *Id.*
43 *Id.* at 1695.
44 *See, e.g.*, Jones v. Am. Airlines, Inc., 57 F. Supp. 2d 1224, 1230 (D. Wyo. 1999).
45 U.S. CONST. art. IV, § 1.

reached in a U.S. domestic court, it is conclusive against the same parties, or parties in privity, in another U.S. domestic court.[46] Res judicata prohibits "parties from litigating a second lawsuit on the same claim."[47]

Litigation arising in two different U.S. courts involving foreign and domestic litigants will be subject to the Full Faith and Credit Clause if a judgment is reached in one of the domestic courts.[48] However, a lawsuit adjudicated in a U.S. domestic court and in a foreign court, involving a domestic litigant and a foreign litigant, will not result in a judgment that must be honored in the foreign court under the Full Faith and Credit Clause.[49]

3. Injunction

U.S. courts of general jurisdiction may possess legal and equitable remedies, depending on the specific court.[50] A legal remedy can be monetary, whereas an equitable remedy usually consists of nonmonetary relief such as an injunction or specific performance.[51] An injunction, one of the court's equitable remedies, is an order from the court "commanding or preventing an action."[52] In parallel proceedings, an anti-suit injunction is one in which the issuing court prohibits a litigant from instituting or continuing other related litigation, usually between the same parties on the same issue.[53]

Among the federal circuit courts, it is well settled that the "federal courts have the power to enjoin persons subject to their jurisdiction from prosecuting foreign suits."[54] If a court issues an anti-suit injunction, it prevents further prosecution of the prior foreign lawsuit.[55] However, courts differ as to the proper legal standard to be applied in determining when to exercise this power.[56] The Supreme Court has yet to speak on the issue or provide any guidelines for lower courts

---

46 50 C.J.S. *Judgments* § 1282 (2013).

47 BLACK'S LAW DICTIONARY 1425 (9th ed. 2009).

48 50 C.J.S. *Judgments*, *supra* note 46.

49 Heiser, *supra* note 6, at 873.

50 U.S. CONST. art. III § 2, cl.1.

51 BLACK'S LAW DICTIONARY 1408 (9th ed. 2009).

52 *Id.* at 855.

53 *Id.*

54 *See* Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 626 (5th Cir. 1996); *see also* Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 16 (1st Cir. 2004) ("It is common ground that federal courts have the power to enjoin those subject to their personal jurisdiction from pursuing litigation before foreign tribunals").

55 BLACK'S LAW DICTIONARY 609 (9th ed. 2009).

56 *See* Fellas, *supra* note 8.

confronted with a request for an anti-suit injunction.[57]

An injunction must comply with Rule 65 of the Federal Rules of Civil Procedure, which outlines injunctions and restraining orders.[58] During a court's consideration of an anti-suit injunction, a party may request a temporary restraining order or a preliminary injunction.[59] Either one of these tools can be used to halt or delay litigation in the foreign court while the U.S. district court decides whether or not to enjoin the duplicative proceeding.[60]

Whether an anti-suit injunction may be appropriate requires consideration of a variety of additional factors.[61] The moving party must show (1) the likelihood of actual success on the merits, (2) that he or she will suffer irreparable harm if relief is not granted, (3) that the non-moving party will not suffer irreparable harm if relief is granted, and (4) that granting the relief will be in the public interest.[62] Courts require the moving party to satisfy the required elements before issuing the anti-suit injunction.[63]

B. Problems With Parallel Litigation

Due to the drastic increase in global commerce over the recent decades, there has been an increase in the number of cases arising in the courts of more than one country.[64] Litigants, in their own self-interest, choose the court most likely to issue them a favorable outcome.[65] These competing interests have led to lawsuits being filed in multiple courts.[66] In fact, the battle over where litigation will take place may often be the most important and aggressively fought issue in a case involving litigation in two foreign courts.[67] Parallel proceedings in foreign courts create problems not only for the litigating parties, but for

---

57 *See* Robert Force, *The Position in the United States on Foreign Forum Selection and Arbitration Clauses, Forum Non Conveniens, and Antisuit Injunctions,* 35 TUL. MAR. L.J. 401, 442 (2011).

58 FED. R. CIV. P. 65.

59 *Id.*

60 *Id.*

61 *See* E.& J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 990 (9th Cir. 2006) (stating "an anti-suit injunction by its nature, will involve detailed analysis of international comity.").

62 *See* Gruntal & Co., Inc. v. Steinberg, 854 F. Supp. 324, 331 (D. N.J. 1994).

63 *Id.*

64 *See* N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601, 608 (2006).

65 *See* Fellas, *supra* note 8.

66 *Id.*

67 Calamita, *supra* note 64, at 608.

the courts as well.[68] Courts are already overwhelmed with litigation, and duplicative cases create a burden on the system.[69] Additionally, the proceedings carry the risk of legal chaos caused by inconsistent decisions in different courts on the same issues between the same parties.[70]

Furthermore, duplicative litigation increases the cost and inconvenience to the parties of the lawsuit.[71] It is wise for parties to have adequate representation in each country in which they are pursuing or responding to litigation. This creates a burden on the parties to find attorneys that are familiar with the laws and procedures of their respective courts. Depending on the country, the legal system can differ markedly from the U.S. legal system in a number of ways, such as: "whether the case is resolved by a judge or jury," whether the attorney is working on a contingent fee or paid by the hour, whether attorneys' fees are recoverable, or "whether punitive damages are available."[72] Often, litigating parties treat forum shopping as a natural process of litigation.[73] Unfortunately, their search for the most favorable court often results in duplicative litigation, leaving it to the courts to determine which proceeding may continue.[74]

C. Effect Of An Anti-Suit Injunction

Parallel litigation can arise between the courts of two U.S. states or between a U.S. domestic court and a foreign court.[75] These proceedings may continue simultaneously, but they usually end once a judgment is reached in one court and pled as res judicata in the other.[76] Alternatively, in either court, a party may file a motion requesting that the court issue an anti-suit injunction to stay the proceeding in the other court.[77]

---

68 *See* James E. Berger & Charlene Sun, *International Dispute Resolution Update: Foreign Anti-Suit Injunctions*, STAY CURRENT 1, Apr. 2010, *available at* www.paulhastings.com/resources/upload/publications/1572.pdf.

69 Calamita, *supra* note 64, at 610-11.

70 *Id.* at 611.

71 *See* Heiser, *supra* note 6, at 859; *see also* Carr v. Tillary, No. 07-314-DRH, 2010 WL 1963398, at *8-10 (S.D. Ill. May 17, 2010) (stating injunctions represent a fairly standard remedy to curb abusive litigation or to terminate proceedings that have been brought in connection that have been resolved previously).

72 *See* Fellas, *supra* note 8.

73 *Id.*

74 *Id.*

75 *See* Vertigan, *supra* note 1, at 157, 159.

76 *Id.* at 158.

77 *Id.* at 162.

A district court, in its discretion, has the authority to issue an anti-suit injunction.[78] This anti-suit injunction is an equitable remedy.[79] The injunction acts to enjoin one of the parties from continuing the litigation in the other court.[80] Courts have adopted competing views for determining under what circumstances an anti-suit injunction is appropriate.[81] An anti-suit injunction should be issued with care, especially against a foreign party, because enjoining a party from a lawsuit in a foreign country can be equivalent to actually enjoining the foreign court from adjudicating the proceeding.[82]

D. Factors To Be Considered

As discussed in the Introduction to this Article, the federal circuit courts are split on the factors that should be considered when determining whether to grant an anti-suit injunction.[83] At the federal district court level, the judge, in his or her discretion, must grant or deny the request for an anti-suit injunction.[84] The district court judge, following precedent set forth by the circuit court above, considers the factors of its adopted approach.[85] Judges give varying weight to these factors depending on the circuit in which they render their decision.[86]

Throughout the circuits, the general factors that the judges must consider vary widely. They include the cost of litigation, the burden on both of the parties, the burden on the court, the amount of time required to litigate both suits, international comity, public policy, diplomatic implications, the time at which the injunction is being sought, and the

---

78 *Id.* at 165-66.

79 *Id.*

80 *See* Steven R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity and the Antisuit Injunctions*, 30 GEO. WASH. J. INT'L L. & ECON. 1, 1 (1996).

81 *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 928 (D.C. Cir. 1984).

82 *See* Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V., 310 F.3d 118, 125 (3d Cir. 2002). *See also* Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am., 651 F.2d 877, 887 (3d Cir. 1981) (finding that "there is no difference between addressing an injunction to the parties and addressing it to the foreign court itself"); Fellas, *supra* note 8 (explaining that "[e]ven though an anti-suit injunction operates only against a party to the U.S. suit—on the ground that that party is subject to personal jurisdiction in the U.S. court—the effect of an anti-suit injunction is to interfere with the proceedings in a foreign court."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402(1)(c), 431(1).

83 *See supra* Part I.

84 *See* Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 16 (1st Cir. 2004).

85 *Id.*

86 *Id.*

potential consequences of the injunction.[87]

However, there are five factors that all courts agree are a precondition for granting an anti-suit injunction. First, all courts agree that the identity of the parties in the domestic and foreign proceedings must be identical.[88] The anti-suit injunction cannot be granted if the identity of the parties is not identical.[89] Second, all courts agree that the issues in each lawsuit, in the domestic and foreign proceedings, must concern the same issues of law.[90]

Third, all circuits agree that the mere fact that parallel proceedings exist is not enough to justify the issuance of an injunction.[91] Fourth, after a judgment has been reached in a U.S. domestic court, that court may protect the integrity of its judgment by issuing an anti-suit injunction to prevent another vexatious re-litigation.[92] Finally, the circuits agree that international comity should be considered, but the degree of its relevance differs between the two approaches.[93]

1. International Comity as a Deciding Factor

The United States Supreme Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."[94] It does not necessarily create an obligation on one court; rather, it acts more as a strong presumption.[95] Comity is present within the confines of the U.S. between the branches of government, but it also extends beyond U.S. borders.[96] International comity, in the courts specifically, is the recognition by a U.S. domestic court of the legislative, executive, or judicial acts of a foreign court.[97]

Courts have described it as a "complex and elusive concept."[98] All

---

87 *See* Calamita, *supra* note 64, at 610-12.

88 *See* Heiser, *supra* note 6, at 857 & n.9.

89 *Id.*

90 *Id.*

91 *See* Force, *supra* note 57, at 442; *see also* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984) (stating that "[t]he mere filing of a suit in one forum does not cut off the preexisting right of an independent forum to regulate matters subject to its prescriptive jurisdiction.").

92 *See id.* at 928.

93 *See* Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 160 (3d Cir. 2001).

94 Hilton v. Guyot, 159 U.S. 113, 164 (1895).

95 *See* Heim, *supra* note 19, at 721.

96 *Id.* at 707.

97 *See* Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, Inc., 466 F.3d 88, 92 (2d Cir. 2006) (quoting *Hilton*, 159 U.S. at 164).

98 Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984).

federal circuit courts consider the issue of international comity before granting or denying an anti-suit injunction.[99] However, among the circuit courts, comity has not been considered equally or given the same amount of deference.[100]

Nonetheless, it has been argued that international comity should be a court's deciding factor when determining whether to grant an anti-suit injunction.[101] Considerations of international comity encourage the recognition of the rule of law, albeit not mandatory recognition, but mutual respect between nations.[102] The appreciation between courts, in turn, builds mutual respect and can improve relations and trust.[103] The recognition of comity promotes stability and predictability within the courts.[104] Although the United States Supreme Court has not spoken directly to the issue of international comity, it has warned courts that the "expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."[105]

2. How Much Deference Should Be Given to International Comity?

Comity is "not a rule of law but one of practice, convenience, and expediency."[106] However, paying no deference to international comity could ultimately foster disrespect from foreign courts toward American courts and judicial proceedings.[107] When applying the principles of comity, a court does not give uncompromising deference to foreign proceedings; rather, several factors should be considered in whole.[108]

When no deference is given and a court agrees to grant an anti-suit injunction, the injunction travels further than the litigating parties.[109] Inherently, the injunction suggests a lack of confidence in the foreign court's ability to adjudicate the dispute fairly and efficiently.[110] No court has determined the appropriate amount of deference that should be given to international comity.

---

99 *See* Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 160 (3d Cir. 2001).

100 *Id.* at 160-61.

101 *Id.* at 160.

102 *See* Amkor Tech., Inc. v. Alcatel Bus. Sys., 287 F.Supp.2d 519, 525 (E.D. Penn. 2003).

103 *Id.*

104 *See Gen. Elec. Co.*, 270 F.3d at 160.

105 *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).

106 Overseas Inns. S.A. P.A. v. United States, 911 F.2d 1146, 1148 (5th Cir. 1990).

107 *See Gen. Elec. Co.*, 270 F.3d at 160.

108 Collins v. Oilsand Quest Inc., 484 B.R. 593, 595 (S.D.N.Y. 2012).

109 *See* Gau Shan Co. v. Bankers. Trust Co., 956 F.2d 1349, 1357 (6th Cir. 1992).

110 *Id.* at 1355.

III. SPLIT OF AUTHORITY

The federal circuit courts are divided as to the appropriate factors that should be considered when determining whether to enjoin a foreign court proceeding. With no guidance from the United States Supreme Court, the federal circuit courts have taken two approaches: the "liberal approach" and the "restrictive approach." Courts adopting the liberal approach are willing to grant anti-suit injunctions when the parallel proceedings are vexatious and duplicative.[111] On the other hand, courts adopting the restrictive approach require more than a showing of vexatious and duplicative proceedings; they consider international comity and grant anti-suit injunctions only in limited circumstances, such as when a foreign proceeding would threaten an American court's jurisdiction or issues of U.S. public policy.[112] Further, the split among the circuits provides little certainty in international business and creates uncertainty for parties mired in parallel litigation.

A. Liberal Approach

The circuits following the liberal approach–the Fifth, Seventh, and Ninth–are generally more likely to enjoin a foreign court proceeding, as opposed to the circuits following the restrictive approach. The Fifth, Seventh, and Ninth Circuits generally consider whether the foreign proceeding would "(1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; or (4) where the proceedings prejudice other equitable considerations."[113]

In *Kaepa Inc. v. Achilles Corp.*,[114] the United States Court of Appeals for the Fifth Circuit adopted the liberal approach.[115] The court considered the issue of comity but declined to require the district court to delve into the complex notion of international comity every time it must decide whether to grant an anti-suit injunction.[116] Rather, aligning with the liberal approach, the court considered whether the litigation

---

111 *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 928 (D.C. Cir. 1984).

112 *Id.*

113 *In re* Unterweser Reederei, Gmbh, 428 F.2d 888, 890 (5th Cir. 1970); *see also,* Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 627 (5th Cir. 1996) (court affirmed the lower court judgment to grant an anti-suit injunction after considering the relevant factors).

114 76 F.3d at 624.

115 *Id.* at 627.

116 *Id.*

was vexatious and duplicative.[117]

The case involved a contractual dispute between an American company, Kaepa, and a Japanese enterprise, Achilles Corporation.[118] The parties had entered into a distributorship agreement whereby Achilles obtained exclusive rights to market Kaepa's product in Japan.[119] Kaepa grew increasingly dissatisfied with Achilles's performance and sued for breach of contract in an American court.[120] Soon after, Achilles brought its own action in Japan.[121] Thereafter, Kaepa filed a motion asking the district court to enjoin Achilles from prosecuting its suit in Japan.[122] The district court granted Kaepa's motion to enjoin the Japanese court proceedings and Achilles appealed the district court's decision.[123]

On appeal, Achilles argued that, "the district court failed to give proper deference to principles of international comity when it granted Kaepa's motion for an anti-suit injunction."[124] However, the Court of Appeals emphasized the need to prevent vexatious and oppressive litigation, noting that "allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away" would result in unnecessary delay and substantial inconvenience to the parties.[125] Additionally, the court held that issuing an anti-suit injunction could not have been said to threaten relations between the countries, because "no international issue is implicated by the case."[126]

Similarly, the United States Court of Appeals for the Ninth Circuit, following the liberal approach, considered the potential inconsistencies and oppressiveness created by separate judgments.[127] In *Seattle Totems Hockey Club v. National Hockey League*, the court affirmed the holding of the district court enjoining the foreign court proceeding.[128] The district court considered factors including, "the convenience to the parties and the witnesses, the interest of the courts in promoting efficient administration of justice, and the potential prejudice to one

---

117 *See id.*

118 *Id.* at 625.

119 *Id.*

120 *Id.* at 626.

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.* at 627 (quoting *In re* Unterweser Reederei, Gmbh, 428 F.2d 888, 896 (5th Cir. 1970)).

126 *See id.*

127 *See* Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 652 F.2d 852, 856 (9th Cir. 1981).

128 *Id.*

party or the other" in determining whether to grant the anti-suit injunction.[129] Ultimately, the court reasoned that adjudicating the parallel lawsuits in two separate actions was inefficient because it added "unnecessary delay and substantial inconvenience" to the parties.[130]

The liberal approach places most of its emphasis on equitable considerations, such as "whether the foreign action is vexatious and oppressive, whether the foreign litigation leads to duplicative efforts, inconvenience, delay, expense, and harassment; and whether the foreign litigation might lead to inconsistent results or a race to judgment."[131] However, these equitable considerations are generally present in cases where similar claims are brought by the same parties in different jurisdictions.[132] Thus, courts using the liberal approach are more likely to issue a foreign anti-suit injunction.[133]

B. Restrictive Approach

On the other hand, the circuits following the restrictive approach are less likely to issue an anti-suit injunction. These circuits, the First, Second, Third, Sixth, Eighth, and D.C., limit granting anti-suit injunctions only to those situations where the foreign proceeding would threaten (1) the U.S. court's own jurisdiction over the issue, or (2) strong public policies of the U.S.

The courts following the restrictive approach have held that anti-suit injunctions should be granted "sparingly and only in the rarest of cases."[134] They assert that courts should put substantial weight on international comity when determining whether to grant the injunction.[135] Because international comity dominates the court's analysis, the party moving to enjoin the foreign proceeding must defeat the general presumption against issuing an anti-suit injunction under the restrictive approach.[136]

---

129 *Id.*

130 *Id.*

131 *See* Arif Ali et al., *Anti-Suit Injunction in Support of International Arbitration in the United States and the United Kingdom*, 11 INT'L ARB. L. REV. 12, 14 (2008).

132 *Id.*

133 *Id.*

134 *See* Gau Shan Co. v. Bankers. Trust Co., 956 F.2d 1349, 1354 (6th Cir. 1992); Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 359-60 (8th Cir. 2007); *see also* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984) (stating that an anti-suit injunction should only be granted in very limited circumstances).

135 Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 17 (1st Cir. 2004).

136 *See Gau Shan Co.*, 956 F.2d at 1354.

For example, in *General Electric Co. v. Deutz AG*,[137] the U.S. Court of Appeals for the Third Circuit reversed the decision of the district court granting an anti-suit injunction.[138] This case involved a breach of contract claim between an American manufacturer, General Electric, and a German corporation, Deutz AG.[139] At the district court, General Electric argued that denying the injunction would threaten the court's jurisdiction and matters of domestic public policy.[140] General Electric reasoned that an anti-suit injunction was necessary to protect the sanctity of the American jury system, allowing the parties to proceed and litigate before an American court.[141] The district court agreed and issued the anti-suit injunction, reasoning that the preservation of the sanctity of a jury verdict is an important matter of public policy.[142]

On appeal, Deutz AG argued that the district court abused its power in issuing the anti-suit injunction, specifically because proper weight was not given to the important issue of international comity, and, further, that sanctity of the jury was not a prevailing policy to maintain an anti-suit injunction.[143] The Court of Appeals held that the district court improperly granted an anti-suit injunction,[144] reasoning that protecting the sanctity of the American jury system did not justify interference with the jurisdiction of the foreign court, and that issues of international comity were not given appropriate consideration.[145]

The circuit court was not convinced that permitting Deutz AG to proceed in the foreign court would jeopardize the sanctity of the jury.[146] An American court has never endorsed enjoining a foreign proceeding on the grounds that the American jury verdict might be called into question.[147] Unquestionably, the American jury plays an important role in the American jurisprudential system, but it is not immune to judicial scrutiny from foreign courts.[148]

Comity should be reciprocal between foreign courts because such

---

137 Gen. Elec. Co. v. Deutz AG, 270 F.3d 144 (3d Cir. 2001).

138 *See id.* at 149.

139 *Id.* at 148.

140 *See* Gen. Elec. Co. v. Deutz AG, 129 F.Supp.2d 776, 787 (W.D. Penn. 2000).

141 *Id.* at 789.

142 *Id.* at 790.

143 *See Gen. Elec. Co.*, 270 F.3d at 159-60.

144 *Id.* at 149.

145 *Id.* at 159.

146 *Id.*

147 *Id.*

148 *Id.*

recognition promotes predictability and stability.[149] The circuit court noted that the foreign court properly adhered to issues of comity in refusing to issue an injunction against the U.S. proceedings, and the respect should be reciprocal.[150] The court further stated that American courts cannot continue to insist on a "parochial concept that all disputes must be resolved under [American] laws and in [American] courts."[151]

Another example of a case following the restrictive approach coming out of the U.S. Court of Appeals for the Third Circuit, *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products*,[152] stated that "the fact that a foreign action was 'harassing and vexatious' would not, by itself, warrant injunctive relief."[153] Additionally, "neither duplication of issues nor delay in filing justifies the issuance of an injunction."[154]

Further, the United States Court of Appeals for the D.C. Circuit in *Laker Airways Ltd. v. Sabena, Belgian World Airlines*,[155] also granted an anti-suit injunction, reasoning that the injunction was necessary to protect the jurisdiction of the court. The circuit court affirmed the district court's decision to grant the anti-suit injunction because the facts revealed that the defendants filed the foreign lawsuit for the "sole purpose of terminating the United States claim."[156] Protecting the jurisdiction of the court is not merely a factor to be considered in determining whether a court should grant an anti-suit injunction, but rather, it is a duty of the court to provide full justice to the litigant.[157]

However, the United States Court of Appeals for the Sixth Circuit, following the restrictive approach, did not grant an anti-suit injunction in *Gau Shan Co. v. Bankers. Trust Co.*[158] The court noted that the moving party's argument for "just, speedy, and inexpensive determination of every action," as stated in Fed. R. Civ. P. 1, does not cross the threshold of threatening strong public policy of the U.S.[159] The court recognized that there has been little guidance given to the

---

149 *Id.* at 160.

150 *Id.*

151 *Id.*

152 Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V., 310 F.3d 118 (3d Cir. 2002).

153 *See id.* at 127.

154 *Id.*

155 Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984).

156 *See id.* at 915.

157 *Id.* at 927.

158 *See* Gau Shan Co. v. Bankers. Trust Co., 956 F.2d 1349, 1358 (6th Cir. 1992).

159 *Id.* at 1354, 1358.

district courts in determining the appropriate weight to place on public policy considerations when deciding whether to permit an anti-suit injunction.[160] It surmised that courts, when evaluating whether to grant an anti-suit injunction, should consider issues of public policy, but such issues have never been a dispositive factor in determining whether to grant the injunction; rather, they should be considered in light of other surrounding circumstances.[161]

Similarly, the United States Court of Appeals for the Third Circuit has reasoned that anti-suit injunctions "involve a delicate question of comity" and should be "taken only with care and great restraint."[162] The circuits that have adopted the restrictive approach "place a premium on preserving international comity."[163] Finally, while the threshold is undoubtedly higher when courts adhere to the restrictive approach, the courts are sensitive to issues of important public policy and when protecting their own jurisdiction.[164]

IV. ANALYSIS

Because the United States Supreme Court has yet to address the issue of when a U.S. domestic court should enjoin a foreign court proceeding, the split between the liberal and restrictive approaches continues. However, disparity in the two approaches leaves great uncertainty and unpredictability in the American judicial system.

A. Problems With The Split

As foreign trade and business continue to expand, international business has become the norm, rather than the exception.[165] To ensure that foreign companies continue to do business with U.S. companies, there needs to be certainty and predictability in U.S. domestic courts.[166] Currently, a foreign company doing business with a U.S. company has no way of predicting whether a U.S. domestic court will prevent it from

---

160 *Id.* at 1357-58.

161 *Id.* at 1358 (holding that "only the evasion of the most compelling public policies of the forum will support the issuance of an anti-suit injunction").

162 *See also* Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am., 651 F.2d 877, 887 n.10 (3d Cir. 1981) (internal citations omitted).

163 *See* Kirby v. Norfolk S. Ry. Co., 71 F. Supp. 2d 1363, 1367 (N.D. Ga. 1999).

164 *Id.*

165 INT'L TRADE ADMIN, U.S. DEP'T OF COMMERCE, EXPORTING IS GOOD FOR YOUR BOTTOM LINE, *available at* http://www.trade.gov/cs/factsheet.asp (last visited Apr. 16, 2014) (noting that because of the Internet, trade agreements have dramatically increased access to markets worldwife).

166 *See* Heim, *supra* note 19, at 704.

litigating its dispute in its own country.[167] Due to the recent increase of international business, the U.S. needs a steady and predictive measure for determining when an anti-suit injunction should be issued.[168]

While forum shopping is advantageous and can be beneficial to the successful party, simply filing a suit in one forum does not necessarily require the injunction of an identical suit in foreign forum.[169] However, a uniform standard would strengthen the system and provide confidence to the courts with consistent rulings.

Until the United States Supreme Court speaks to the issue of enjoining a foreign court proceeding when there is parallel litigation, there will continue to be a debate regarding the correct factors and the weight policy should be given in determining whether to issue an injunction. Courts have recognized that the circumstances surrounding a request for an injunction should be examined carefully, and they are aware that granting or declining to grant an injunction could possibly cause irreparable harm to the parties.[170]

B. Arguments For The Liberal Approach

The liberal approach is undoubtedly more flexible and favored in a handful of circuit courts. Circuits adopting the liberal approach briefly consider international comity, but place a much greater emphasis on equitable concerns. There are two reasons why the liberal approach is favored over the restrictive approach.

First, the liberal approach is favored because it overwhelmingly considers the cost of litigation and burden on the litigating parties.[171] The liberal approach recognizes the economic hardship of parallel proceedings.[172] The cost of litigation is a large factor for potential litigants and can be a determining factor when deciding whether or not to pursue litigation.[173]

Second, the liberal approach is favored in several jurisdictions because it considers whether the foreign litigation leads to duplicative efforts or inconvenience.[174] Duplicative proceedings in foreign countries not only burden parties, but also courts, witnesses, and

---

167 *Id* at 703.

168 *Id* at 704.

169 *See* Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd., 435 F.Supp.2d 919, 926-27 (N.D. Iowa 2006).

170 *Id.*

171 Ali et al., *supra* note 131, at 14.

172 *Id.*

173 *See* Calamita, *supra* note 64, at 608-09.

174 Ali et al., *supra* note 131, at 14.

attorneys.[175] Courts adopting the liberal approach are likely to issue an anti-suit injunction because these equitable considerations are present in most cases where similar claims are brought by the same parties in two different jurisdictions.[176]

C. Arguments For The Restrictive Approach

The restrictive approach is more stringent, and favored in more than half of the circuit courts.[177] As the name of the approach suggests, courts following this approach are more reluctant to issue an injunction, requiring that litigants satisfy a higher threshold to persuade the court to enjoin a proceeding.[178] There are two reasons why the restrictive approach is favored over the liberal approach.

First, the restrictive approach is favored for the generously weighty consideration given to international comity. Adequate consideration of international comity ensures that the foreign court does not have any conflicting interest that would be burdened, were the court to grant the injunction.[179] The situation could arise where a foreign court has a serious interest in adjudicating the issue before its own court.[180] Under these circumstances, the U.S., by not giving deference to the interest of the foreign court, risks retaliation from the foreign court.[181] Moreover, an anti-suit injunction essentially conveys an ugly message that the U.S. domestic court "has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility."[182]

Second, the restrictive approach is favored by the majority of circuit courts because it is thought to treat both American and foreign litigants equally.[183] Scholars criticizing the liberal approach fear the U.S. domestic courts are showing favoritism to U.S. litigants.[184] By granting an anti-suit injunction, the court generally, although not always, is allowing a U.S. company to pursue its proceeding in an

---

175 Calamita, *supra* note 64, at 610-11.

176 Ali et al., *supra* note 131, at 14.

177 *See infra* Part III.B.

178 Ali et al., *supra* note 131, at 13.

179 *See* Teresa D. Baer, Note, *Injunctions Against the Prosecution of Litigation Abroad: Towards A Transnational Approach*, 37 STAN. L. REV. 155, 163-67 (1984).

180 *Id.* at 165-67.

181 *Id.* at 173.

182 *See* Gau Shan Co. v. Bankers. Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992).

183 Vertigan, *supra* note 1, at 173.

184 *Id.* at 168.

American court.[185] Again, because of the lack of emphasis placed on comity, American litigants may be at an advantage in their home courts.[186]

The restrictive approach considers not only the domestic court's interest in the litigation, but also the foreign court's interest, through international comity. Many argue this approach may be best in ensuring that all parties are treated equally.[187]

D. Proposal: Adopt The Restrictive Approach

The restrictive approach is superior because it respects important issues of international comity. This approach protects the interests of the U.S. domestic court by issuing injunctions only in situations where the domestic court's jurisdiction is threatened, or where an important issue of public policy is at issue. When the United States Supreme Court speaks to the issue of enjoining foreign court proceedings, it should adopt the restrictive approach for four reasons.

First, the restrictive approach will create stability for international businesses and foreign litigants.[188] This approach creates a rebuttable presumption that an anti-suit injunction will not be issued in the foreign court. The presumption allows foreign litigants the opportunity to file and pursue litigation in their own courts, along with the U.S. domestic court, so long as the foreign litigation does not offend either court's jurisdiction or U.S. public policy.

Second, mutual respect is maintained between U.S. domestic courts and foreign courts. The restrictive approach properly weighs the important principles of comity by fostering mutual respect between concurrent foreign proceedings.[189] Additionally, it provides security to international businesses or foreign individuals that their cases will not be enjoined merely because a parallel suit exists in an American court. Further, the liberal approach occasionally fails to realize that an anti-suit injunction may threaten the relationship between the countries even if the litigation involves issues outside of international concern.[190]

Third, the restrictive approach should be adopted to avoid any

---

185 *See, e.g.*, Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984).

186 *See* Heim, *supra* note 19, at 712.

187 *Id* at 738.

188 Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 160 (3d Cir. 2001) (noting that "comity promotes predictability and stability in legal expectations").

189 *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 928 (D.C. Cir. 1984).

190 *See* Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 627 (5th Cir. 1996).

backlash from foreign courts that become unhappy with the U.S. domestic courts' disregard for their authority. When U.S. domestic courts discount the issue of international comity, they often forget to consider the potential issue of retaliation.[191] Both U.S. domestic courts and foreign courts, in their discretion, may grant an anti-suit injunction.[192] The foreign court may grant an anti-suit injunction in the interest of justice, or merely in retaliation. In the unfortunate event that both the U.S. domestic court and the foreign court grant the injunction, the litigants may be left without a remedy.[193] The potential harm caused by the issuance of an anti-suit injunction will be difficult to predict. While it might seem economical to grant an anti-suit injunction in a single case, the long-term, cumulative effect of many U.S. courts issuing such injunctions could be severe.

Fourth, the restrictive approach ensures that both domestic and foreign litigants are treated equally.[194] By granting an anti-suit injunction, the court generally is allowing a U.S. company, or litigant, to pursue its proceeding in an American court.[195] Again, because of the lack of emphasis placed on comity, American litigants may have the home court advantage.[196] If the restrictive approach is adopted, proper weight will be given to international comity and all litigants will be treated equally.

For the foregoing reasons, this Article argues that the restrictive approach should be favored over the liberal approach. The First Circuit acknowledged, rightly, that courts should exercise "care and great restraint" before enjoining litigants from pursuing actions in foreign courts.[197] By adopting the restrictive approach, courts would be cautious and aware of the potential repercussions before granting an anti-suit injunction.[198] Further, this would promote predictability in the judicial system and ensure fairness in the American courts.

---

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

192 *Id.* at 630.

193 *Id.*

194 Vertigan, *supra* note 1, at 173.

195 *See, e.g.*, Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984).

196 *See* Heim, *supra* note 19, at 712.

197 Canadian Filters (Haewick) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 578 (1st Cir. 1969).

198 *Id.*

V. CONCLUSION

Federal circuit courts are divided as to under what circumstances a U.S. domestic court should enjoin a foreign court proceeding, and the United States Supreme Court, thus far, has declined to resolve this issue.[199] The Fifth, Seventh, and Ninth Circuits apply the liberal approach, granting anti-suit injunctions when they believe the suit to be vexatious or duplicative.[200] On the other hand, the First, Second, Third, Sixth, Eighth, and D.C. Circuits apply a more restrictive approach and are less likely to grant an anti-suit injunction.[201] In consideration of these different approaches, the restrictive approach is superior.[202] Adopting the restrictive approach will result in stronger relationships and encourage mutual respect between U.S. and foreign courts.[203]

The restrictive approach ensures fair consideration of both domestic and international interests. More importantly, if the United States hopes to continue to engage in relationships with foreign parties, the courts must give due respect to foreign jurisdictions, and ensure that the balance between domestic and foreign interests is properly weighed before deciding whether to enjoin a foreign court proceeding.[204]

---

199 *See supra* Part III.

200 *Supra* Part III.A.

201 *Supra* Part III.B.

202 *See supra* Part IV.D.

203 *See id.*

204 *See* Heim, *supra* note 19, at 740.