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International Antisuit Injunctions: Enjoining Foreign Litigations and Arbitrations - Beholding the System from Outside

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Legal Writing

**International Antisuit Injunctions:
Enjoining Foreign Litigations and Arbitrations -
Beholding the System from Outside**

supervised by

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Fall 2004

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CONTENTS

BIBLIOGRAPHY	III
I. INTRODUCTION	1
II. PIECES OF THE PUZZLE	2
A. Antisuit Injunctions as a Sub-Category of Injunctive Relief	2
a) Antisuit Injunctions	2
aa) Definition	2
bb) Effects of Antisuit Injunctions	3
cc) Development of the Antisuit-Injunction Tool	4
dd) Benefits of Antisuit Injunctions	5
ee) Forum non Conveniens	5
b) Injunctions	6
aa) Introduction	6
bb) Injunctions as a Form of Equitable Relief	7
cc) Injunctions Ordering the Specific Performance of Contracts	11
B. Comity	12
C. Antisuit Injunction Act	16
D. Foreign Models	17
a) Introduction	17
b) Swiss Approach towards non-Signatories of the Lugano-Convention	17
c) Lugano-Convention	19
E. Summary	23
III. AMERICAN JURISPRUDENCE - PUTTING THE PIECES TOGETHER	24
A. Comity-Threshold	24
B. Liberal Approach	26
C. Restrictive Approach	27
a) Introduction	27
b) Protection of Jurisdiction	28
c) Public Policy	30
D. Comparison of the Two Approaches	31
E. Summary	32
IV. MAKING AN ALTERNATIVE PICTURE	33
A. Inter-Sovereign Test	33
B. Inter-Parties Test	34
C. Summary	40

V.	ANTISUIT INJUNCTIONS AND INTERNATIONAL COMMERCIAL ARBITRATION	41
A.	Introduction	41
B.	Antisuit Injunctions in Support of Arbitration Proceedings	42
	a) Introduction	42
	b) Forum-Selection Clauses	42
	c) American Jurisprudence	44
	d) Discussion	45
	aa) Introduction	45
	bb) Impact of the Convention	46
	cc) Impact of the Contractual Nature of Arbitration Agreements	48
	e) Conclusion	53
C.	Antisuit Injunctions to the Detriment of Arbitration Proceedings	56
D.	Antisuit Injunctions Preventing the Enforcement of Arbitral Awards abroad	59
	a) Requested from a Court of the Country of Origin	59
	b) Requested from another Enforcement Courts	60
E.	Summary	62
VI.	CONCLUSION	62

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I. INTRODUCTION

1. There are two reasons why a lawyer from a civil law country is puzzled when he is confronted with an antisuit injunction: It is a concept which is unfamiliar to him, like the system of equity jurisprudence, in which it is embedded, and a concept he feels uncomfortable with. The latter is linked to the first and results from the fact that it is contrary to his understanding that a court actively enjoins a party from proceeding in court. In particular, when it comes to enjoining a party from concurrently proceeding in the courts of another sovereign. In such a posture, he rather expects the domestic court to question its own jurisdiction based on the principle of *lis pendens* or to refuse to enforce the foreign judgment if it finds that the foreign court did not have proper jurisdiction.

2. This paper intends to examine the peculiarities of antisuit injunctions and to assess in which circumstances they should be issued - in particular in cases where there are concurrent litigations or arbitrations in different *fora*. In the part following this introduction, the pieces of the puzzle will be laid out, i.e. the purpose and the development of the antisuit-injunction concept will be described. This is to give an introductory overview of this legal tool, and further to be able to make use of the background so established when analyzing specific issues related to antisuit injunctions (Part II). Then, the way antisuit injunctions which enjoin a party from litigating in the courts of a foreign sovereign are issued by federal courts¹ will be assessed (Part III) and an approach on how a court should respond to a request to enjoin a foreign litigation will be presented (Part IV). Finally, in Part V, it will be analyzed to what extent antisuit injunctions should be issued in the context of international arbitration proceedings, in particular whether international arbitrations that are concurrent to a domestic litigation, or foreign litigations that are concurrent to an international arbitration may be enjoined.

¹ Because the focus of this paper is with international cases, the issue of international antisuit injunctions will be addressed under federal jurisprudence because cases litigated or arbitrated abroad will often involve American and foreign parties, so that antisuit injunctions are in such a posture often issued by federal courts based on diversity jurisdiction.

II. PIECES OF THE PUZZLE

A. Antisuit Injunctions as a Sub-Category of Injunctive Relief

a) Antisuit Injunctions

aa) Definition

3. Antisuit injunctions are injunctions by a court that order a party not to commence or continue a suit in this or another court.² The authority of federal courts to enjoin foreign proceedings is founded on their authority to restrain persons over which they have personal jurisdiction,^{3, 4} and against whom an antisuit injunction can consequently be enforced,⁵ from doing acts contrary to equity.⁶ An analysis of the pertinent case law shows that antisuit injunctions are issued for the following reasons:

- (i) To enjoin litigants with records of frivolous litigation from future litigations concerning a particular matter in question;⁷
- (ii) To enjoin litigants from attempts to re-litigate an issue that has become *res iudicata*;⁸

² cf. Hartley, p. 487; Philipps, p. 2009.

³ cf. Paramedics v. GE Medical Systems, 369 F.3d 645, 652; Computer Associates International, Inc. v. Altai, Inc. 126 F.3d 365, 371; Kaepa, Inc. v. Achilles Corporation, 76 F.3d 624, 626; Gau Shan v. Bankers Trust, 956 F.2d 1349, 1352; Asset Allocation and Management Company v. Western Employers Insurance Company, 892 F.2d 566, 569; China Trade v. M.V. Choong, 837 F.2d 33, 35; Laker Airways v. Sabena, 731 F.2d 909, 926; Compagnie des Bauxites de Guinea v. Insurance Company of North America, 651 F.2d 877, 880; in re Laitasalo, 196 B.R. 913, 920; Chavier, p. 261.

⁴ Personal jurisdiction over a person not physically present in the forum requires that the party has certain minimum contacts with the forum (cf. International Shoe Co. v. Washington, 326 U.S. 310, 316), like doing business in the forum (comp. Laker Airways v. Sabena, 731 F.2d 909, 933). Also in proceedings *in rem* or *quasi in rem*, these minimum contacts must be present (cf. Schaffer v. Heitner, 433 U.S. 186, 212).

⁵ cf. Ambrose, p. 404.

⁶ cf. Baltimore & O. R. Co. v. Halchak, 71 F.Supp 224, 226-227.

⁷ Courts have the power and obligation to protect public and efficient administration of justice from individuals who have a history of frivolous litigation entailing vexation, harassment and needless expense to other parties and unnecessary burden on courts and their supporting personnel (Whitaker v. San Francisco County, Superior Court of California, 514 U.S. 208, 210; Lau v. Meddaugh, 229 F.3d 121, 123; Howard v. Mail-Well Envelope Co., 150 F.3d 1227; Cauthon v. Rogers, 116 F.3d 1334; In re Winslow, 17 F.3d 314; Olson v. Coleman, 997 F.2d 726; Ketchum v. Cruz, 961 F.2d 916; Moy v. U.S., 906 F.2d 467; Procup v. Strickland, 792 F.2d 1069; Urban v. United Nations, 768 F.2d 1497).

⁸ cf. in re SDDS, Inc., 97 F.3d 1030; 56 F.3d 866; Thompson v. Edward D. Jones & Co., 992 F.2d 187; in re G.S.F. Corp., 938 F.2d 1467; Charlton v. Estate of Charlton, 841 F.2d 988; American Jurisprudence 2d, Injunctions § 190.

- (iii) To enjoin a particular parallel proceeding;⁹
- (iv) To enjoin a party from enforcing an award.¹⁰

4. As already mentioned in the para. 2 hereinabove, the present paper puts the stress on the third posture in international settings. It will be examined when it is appropriate for a forum to enjoin the parties from proceeding with an action pending in a foreign forum when the parties are concurrently engaged in a litigation before the domestic court.

bb) Effects of Antisuit Injunctions

5. Antisuit injunctions fix the forum in an enforceable way; they are, therefore, first and foremost jurisdictional issues.¹¹ Nonetheless, their jurisdictional relevance makes them, at least indirectly, also important for the substance of the litigation; for the determination of the forum (i) entails which conflict-of-law rules, and thus which law, is applied and, by doing so, (ii) defines the result of the litigation; in another forum, the result might be different.¹²

6. Antisuit injunctions cannot in all cases exclude that the enjoined party proceeds in the forbidden forum or in a third forum:¹³ If the antisuit injunction is neither recognizable in the foreign forum nor enforceable e.g. by contempt-of-court measures. Also, if the injunction is simply issued too late, the enjoined party will (i) usually not abide by the injunction if it deems the foreign forum to be more promising for its case and (ii) might, if the foreign forum also issues antisuit injunctions, apply for a counter-antisuit injunction enjoining the other party from pursuing its action in the domestic court.¹⁴ If this request is granted, a "*battle*" between the different *fora* may be the consequence, each forum

⁹ If a matter in dispute is brought before different federal courts, the court which first obtains jurisdiction of parties and issues may preserve its jurisdiction by enjoining proceedings involving the same issues and parties that were begun thereafter in another federal court (cf. *Small v. Wagemann*, 291 F.2d 734, 735-736; *Victor Company, L.L.C., v. Ortho Organizers, Inc.*, 932 F.Supp. 261, 263; *American Horse Protection Association v. Lying*, 690 F.Supp 40, 42).

¹⁰ cf. *Philp v. Macri*, 261 F.2d 945, 946.

¹¹ cf. *Ambrose*, p. 401 and 408.

¹² cf. *Philipps*, p. 2010.

¹³ comp. *Laker Airways Limited v. Sabena Belgian World Airlines et al.*, 731 F.2d 909.

¹⁴ cf. *James v. Grand Trunk Western Railroad Company*, 14 Ill.2d 356, 371-372.

blocking access to the other.¹⁵ So, if all *fora* that are involved issue antisuit injunctions, this may lead to a deadlock of litigation.^{16, 17} An antisuit injunction is therefore only effective if the forum, from which a party shall be enjoined, does not have a corresponding concept or if an application to the foreign forum for a counter-antisuit injunction can actually be precluded by the antisuit injunction.

cc) Development of the Antisuit-Injunction Tool

7. The antisuit injunction tool was developed in England. In a first step, antisuit injunctions were issued by the common law courts to prevent the expansive jurisdiction of ecclesiastical courts;¹⁸ in a second step, the remedy was used by the Court of Chancery to enjoin parties from bringing suits in the common law courts where this was "*considered to be against good conscience*".¹⁹ So, antisuit injunctions were first used as a tool against another type of courts within the same jurisdiction. Then, the scope of application was first extended to Scotland, Ireland and the British colonies, and then to the rest of the world.^{20, 21}

¹⁵ cf. Hartley, p. 488-489. Such a battle may even take place within the United States (comp. National Basketball Association v. Minnesota Professional Basketball, Ltd. Partnership, 56 F.3d 866, 870).

¹⁶ cf. Gau Shan v. Bankers Trust, 956 F.2d 1349, 1354-1355; Laker Airways v. Sabena, 731 F.2d 909, 927; Lenenbach, p. 265; Najarian, p. 974; Swanson, p. 32; American Jurisprudence 2d, Injunctions § 195.

¹⁷ In sister-court cases, courts usually ignore an antisuit injunction that was issued by another state and do not consider these injunctions to require recognition under the Full Faith and Credit Clause (cf. Philipps, p. 2016 and 2019). On an international level, antisuit injunctions by a foreign forum are not entitled to recognition as a matter of right (cf. Kerwin, p. 931).

¹⁸ cf. Bermann, p. 593.

¹⁹ cf. Hartley, p. 489; Bermann, p. 594.

²⁰ cf. Hartley, p. 490; comp. Lenenbach, p. 267 et seq.; Kerwin, p. 929-930.

²¹ In a normal two-forum case, an injunction will nowadays be granted if it is established that England is the "*natural forum*" defined as the forum with which the action has the closest connection, provided that this does not deprive the claimant in the foreign court of a legitimate advantage of which it would be unjust to deprive him (cf. Hartley, p. 490-493; Bermann, p. 617-619), whereas the availability of a jury trial or of a broader discovery are not benefits an English court should protect by an antisuit injunction (cf. Lowenfeld, p. 317). If an English antisuit injunction is requested in aid of a third jurisdiction which cannot enforce an antisuit injunction itself this is only possible if the English forum has a sufficient interest of its own in the case (cf. Airbus Industries GIE v. Patel, [1998] 1 Lloyd's Rep. 631, 637 (H.L. 1998), that is the applicant must also in such a case establish that England is the natural forum (cf. Ambrose, p. 405-406; Anderson, p. 212-213). Apart from this general ground to enjoin a foreign proceeding, antisuit injunctions may also be granted in special circumstances; one of these is a contract under which the parties are obligated not to bring an action in a foreign forum, for instance if the jurisdiction of an English court or of an arbitral tribunal sitting in England is agreed upon in a forum-selection clause or an arbitration agreement (cf.

8. In the United States too, the antisuit-injunction tool evolved from a tool to put sister-state proceedings in order, i.e. from a domestic tool, to a tool that was applied in international settings as well.²²

dd) Benefits of Antisuit Injunctions

9. In a posture where actions relating to the same parties and issues are pending in different courts, antisuit injunctions concentrate an action in one court - the domestic court. This prevents (i) contradicting judgments, (ii) that the parties incur additional costs associated with concurrent litigation (iii) and that the dockets of the courts are overburdened. Antisuit injunctions therefore ensure procedural efficiency.²³ In the international context, the inconveniences of concurrent proceedings so prevented might be more readily present than in sister-state cases.²⁴ On the other hand, foreign relations are more fragile and may be negatively affected by antisuit injunctions.²⁵

ee) Forum non Conveniens

10. The concept of *forum non conveniens* enables the domestic courts, based on a motion usually filed by the respondent, to deny its jurisdiction in favour of a more convenient forum. Such an order will be issued if there actually is an alternate forum and if the presumption in favour of the claimant's choice of forum is overcome by private and public interest factors.²⁶ The private factors include: relative ease

Bermann, p. 623; Hartley, p. 494; Lenenbach, p. 270; Wilson, p. 215). Other such special grounds are certain defenses under English law (i) that make it unconscionable for the claimant to sue or (ii) prevent extraterritorial application of foreign law.

²² cf. Bermann, p. 593. In sister-state cases, antisuit injunctions are issued when the proceedings are vexatious, to protect the forum or one of its public policies or in case an obligation not to sue in the sister-state forum, e.g. as agreed upon in an arbitration agreement, has been breached (cf. *idem*, p. 594-597).

²³ cf. *Victor v. Ortho Organizers, Inc.*, 932 F.Supp. 261, 263 (1996); *American Horse Protection v. Lyng*, 690 F.Supp. 40, 45; comp. *Krerotest v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183; *International Fashion Products, B.V. v. Calvin Klein, Inc.*, 1995 WL 92321 2; Perry, p. 147; Sherman, p. 925; Werner, p. 1046 and 1052-1053.

²⁴ Additionally, Bermann points out that "*most foreign jurisdictions cannot be expected ... to decline jurisdiction on discretionary grounds such as forum non conveniens and thus [to] themselves police vexatious or oppressive litigation*", which would justify the use of the antisuit injunction tool (cf. Bermann, p. 606-607 and 619-620).

²⁵ cf. *idem*; comp. paras. 18 et seq. hereinafter.

²⁶ cf. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-509.

of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, the costs for obtaining willing witnesses and all other practical problems that make a trial expeditious and less expensive. The public factors include for instance avoiding to add further cases to courts with congested calendars, avoiding the imposition of the burden of jury duty upon people of a community which has no relationship to the litigation, promoting the local interest in having localized controversies settled at home and avoiding problems of conflict of laws. The court should also consider whether it is possible to include all potential parties in the alternate forum.²⁷ The "*ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice*".²⁸

11. Like an antisuit injunction, an order denying jurisdiction for *forum non conveniens* concentrates the dispute in one court. In contrast to an antisuit injunction, the decision on a motion for *forum non conveniens* is however limited to the jurisdiction of the domestic court and does not affect the proceedings before the foreign court. It is therefore only the jurisdiction of the domestic, not of the foreign court that is at stake. An antisuit injunction, where the domestic court expresses that it deems itself to be the proper court, can therefore be described as an offensive form of the *forum-non-conveniens* tool.²⁹

b) Injunctions

aa) Introduction

12. Antisuit injunctions are a specific form of injunctive relief.³⁰ It is therefore appropriate to pause and examine the principles that govern injunctive relief in general before going *in medias res*.

13. An injunction is a remedy that is designed to meet a real threat of a future wrong or a contemporary or past wrong likely to continue or recur.³¹ Injunctions are thus aimed at protecting

²⁷ cf. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 236-237; Cargill, Inc. v. Hartford Accident and Indemnity Company, 531 F.Supp. 710, 713.

²⁸ cf. Koster v. Lumbermens Mutuaol Casualty Co., 330 U.S. 518, 527.

²⁹ comp. Bermann, p. 606-607 and 619-620.

³⁰ cf. Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Miniyak, 335 F.3d 357, 364.

³¹ cf. Anderson v. United States, 612 F.2d 1112, 1114-1115; Farmland Dairies v. McGuire, 789 F.Supp 1243, 1250.

against future or continuing wrongful conduct rather than at restituting for injuries already inflicted.³²

Injunctions are divided into (i) temporary restraining orders, issued for a brief period of time pending a hearing on the application for a preliminary injunction; (ii) preliminary injunctions, issued preliminarily to a hearing on the merits;^{33, 34} (iii) permanent injunctions issued with perpetual effect following a final hearing on the merits.³⁵ Injunctive relief may, thus, be issued in the final order or as a provisional remedy.³⁶

bb) Injunctions as a Form of Equitable Relief

14. Equitable relief arose to prevent inadequate judgments that resulted from the inability of the courts of law to "*adapt judgments to the special circumstances of cases*".³⁷ Correspondingly, equitable relief aims to achieve fairness in a particular case³⁸ and is only available if no appropriate remedy at law exists,^{39, 40} as is for instance the case when an irreparable injury or a multiplicity of suits shall be prevented.⁴¹ So, injunctions that are mainly issued for these purposes are considered to be a form of

³² cf. Thomas v. Musical Mut. Protective Union, 24 N.E. 24, 24-25.

³³ cf. National Basketball Association v. Minnesota Professional Basketball, Ltd. Partnership, 56 F.3d 866, 872.

³⁴ So, a preliminary injunction aims at preserving the *status quo* until the court reaches the case's merits. Once the matters to which the preliminary injunction pertained are decided in the final judgment or a permanent injunction, the preliminary injunction ceases to be in effect; (cf. Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 315; Ireland v. Wynkoop, 36 Colo. App. 205, 225).

³⁵ cf. American Jurisprudence 2d, Injunctions §§ 7,8 and 10.

³⁶ cf. Jesse French Piano & Organ Co. v. Forbes 678, 680.

³⁷ cf. Thomas v. Musical Mut. Protective Union, 24 N.E. 24, 25.

³⁸ Equity is perceived as "*general fairness*" (cf. Things Remembered Inc. v. Petrarca, 516 U.S. 124, 132).

³⁹ cf. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312; Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 57.

⁴⁰ Actions at law and suits in equity are two separate systems of jurisprudence (cf. Armstrong Cork Co. v. Merchants' Refrigerating Co., 184 F. 199, 204) administered by the same courts (cf. Corpus Juris Secundum, Equity § 4). Whether an action at law or a suit in equity is filed must be assessed based on the relief sought (cf. Corpus Juris Secundum, Actions § 126). While "*in the action at law relief is almost invariably administered in the form of pecuniary compensation in damages for the injury received; in the other the court has discretionary power to adapt the relief to the circumstances of the case*" (cf. Troster v. Dann, 145 N.Y.S. 56, 58).

⁴¹ cf. Johnson v. Mansfield Hardwood Lumber Co., 143 F.Supp. 826, 835 (fn. 3). As to the second case, an injunction is available to prevent a wrongful act if the complainant would be required to bring many actions against many persons in order to be made whole; in such a constellation, the remedies at law may be found to be inadequate (*idem*).

equitable relief.⁴² The fact that this kind of relief was created to enable the courts to adapt the remedy to secure fairness for the case in question⁴³ evidences that the courts enjoy discretion when ruling on a request for equitable relief.⁴⁴ This is also true for antisuit injunctions which are, as already pointed out,⁴⁵ a subspecies of injunctive relief.⁴⁶ So, the end of fairness in a particular case shall be reached by the means of discretion of the court. This shall, according to the Supreme Court, secure "*complete justice*".^{47, 48, 49}

15. The discretion of a court whether to issue, and if so, to fashion the equitable remedy appropriate in the particular case,⁵⁰ does not mean that "equity" is synonymous with "natural justice administered without fixed rules" - rather equity jurisdiction consists of a system of fixed rules and principles,⁵¹ administered side by side with the common law.⁵² As to the principles governing the issuance of preliminary injunctions,⁵³ the Supreme Court holds that such a request can be granted if the following criteria⁵⁴ demonstrate a need to do so.⁵⁵

⁴² cf. Weinberger v. Romero-Barcelo, 456 U.S. 305, 311; Philp v. Macri, 269 F.2d 945, 947. Ordering specific performance of a contract would for instance be an equitable remedy whereas the awarding of damages is a legal remedy (cf. Smith v. Tritram, 20 P.2d 770, 770; Troster v. Dann, 145 N.Y.S. 56, 58).

⁴³ cf. Hecht Co. v. Bowles, 321 U.S. 321, 329.

⁴⁴ cf. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312.

⁴⁵ Comp. para. 12 hereinabove.

⁴⁶ cf. Philp v. Macri, 269 F.2d 945, 947; Bermann, p. 629-630.

⁴⁷ Brown v. Swann, 35 U.S. 497, 503.

⁴⁸ As a consequence thereof, the absence of precedents does not foreclose the exercise of equity jurisdiction (cf. American Ins. Co. v. Lucas, 38 F.Supp. 896, 921).

⁴⁹ It further follows from the goal of equity jurisdiction to establish fairness that equity can only be requested by one who conducts in good faith and in accordance with the "*principles of equity and righteous dealing*" (cf. American Ins. Co. v. Lucas, 38 F.Supp. 896, 921).

⁵⁰ cf. Federal Land Bank of St. Paul v. Ziebarth, 520 N.W.2d 51, 56-57. Comp. the general proposition that equity is flexible (cf. Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 322).

⁵¹ cf. American Ins. Co. v. Lucas, 38 F. Supp. 896, 921.

⁵² cf. Corpus Juris Secundum, Equity § 2. So, "equity" cannot, thus, be equated with "*ex aequo et bono*".

⁵³ The standards for granting a preliminary injunction are essentially the same as for a permanent injunction with the exception that the applicant must only establish a likelihood of success on the merits rather than actual success (cf. Amoco Production Co. v. Village of Gambell, AK, 480 U.S. 531, 546).

⁵⁴ The individual factors are "*factors to be balanced, not prerequisites that must be met*" (cf. Teamsters Local Unions Nos. 75 and 200 v. Barry Trucking Inc., 176 F.3d 1004, 1011; in re DeLorean Motor Co., 755 F.2d 1223, 1229), in particular, the "*stronger the likelihood that the plaintiff will win, the less of a showing he need make that the denial of the preliminary injunction would hurt him more than granting it would hurt the defendant*" (cf. Planned Parenthood of Wisconsin v. Doyle, 162 F.3d 463, 465) and vice

- (i) Inadequacy of remedies at law^{56, 57, 58, 59} and, connected therewith;⁶⁰
- (ii) Necessity⁶¹ for injunctive relief to prevent either (i) irreparable⁶² harm^{63, 64}, that would otherwise likely occur,⁶⁵ or (ii) a multiplicity of suits;^{66, 67, 68}

versa (cf. Standard Register Co. v. Cleaver, 30 F.Supp.2d 1084, 1099; American Jurisprudence 2d, Injunctions § 16; comp., however, U.S. v. Rural Elec. Convenience Co-op. Co., 922 F.2d 429, 432; United Offshore Company v. Southern Deepwater Pipeline Company, 899 F.2d 405, 408, where the Courts of Appeals for the Fifth and the Seventh Circuit held that each element of the test must be established -

without, however, detailing the degree of the showing and the interdependence between the elements).
55 The relevant Federal Rule of Civil Procedure governing injunctions does not alter these prerequisites for equitable relief (cf. Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318-319); when a statute specifically provides for injunctions, however, the above prerequisites need not be established (cf. Henderson v. Burd, 133 F.2d 515, 517).

56 cf. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312; Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 57; Sampson v. Murray, 415 U.S. 61, 88; Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 506.

57 This is the case, if the remedies at law which are available when equitable relief is sought cannot fully repair the wrong done to the person seeking relief (cf. Thomas v. Musical Mut. Protective Union, 24 N.E. 24, 25), i.e. cannot certainly, reasonably promptly and practicably preclude the potential harm from realizing (cf. Terrace v. Thompson, 263 U.S. 197, 214). Where e.g. the payment of money pursuant to a final award produces an adequate result, an injunction is not available (cf. Armour & Co. v. City of Dallas, 255 U.S. 280, 287).

58 A permanent injunction may also be ordered as "*attendant*" (American Jurisprudence 2d, Injunctions § 10) to an underlying cause of action if the applicant prevails on the merits (cf. Intervisual Communications, Inc. v. Volkert, 975 F.Supp. 1092, 1104).

59 The fact that a statute provides for a remedy does not entail (i) that this remedy must be considered the appropriate remedy for all sets of facts to which the statute applies and (ii) that the statutory remedy *per se* excludes equitable remedies; generally spoken, the introduction of a statutory form of action only abolishes the formal distinction, but not the inherent distinction between legal and equitable principles (cf. Corpus Juris Secundum, Actions § 130). Rather, even if the statute provides for injunctive relief, injunctions based on equity are still available unless the statute makes it clear that this shall not be the case (cf. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313; Porter v. Warner Holding Co., 328 U.S. 395, 398; Hecht Co. v. Bowles, 321 U.S. 321, 329; Brown v. Swann, 35 U.S. 497, 503).

60 cf. Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 506; Johnson v. Mansfield Hardwood Lumber Co., 143 F.Supp. 826, 835 (fn. 3). Mostly the lack of an adequate remedy at law on one side and the threat of irreparable harm or multiple suits on the other hand are listed as separate prerequisites although the latter is the consequence of the first (cf. e.g. U.S. v. Rural Elec. Convenience Co-op. Co., 922 F.2d 429, 432).

61 cf. Town of Haddam v. LaPointe, 42 Conn. App. 631, 639. A court does in particular not grant injunctions that are inefficient, of no benefit to the complainant (cf. Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515, 550) or impossible to comply with, since "*equity will not do a vain thing*" (cf. Local 1115 v. Hialeah Convalescent Home, Inc., 348 F.Supp. 405, 415; American Jurisprudence 2d, Injunctions § 21).

62 Harm is irreparable when the applicant cannot be made whole by an award of damages or other legal remedies (cf. Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 332).

63 cf. Miller v. French, 530 U.S. 327, 358; Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 340; Weinberger v. Romero-Barcelo, 456 U.S. 305, 312; Doran v. Salem Inn, 422 U.S. 922, 932; Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 57; Sampson v. Murray, 415 U.S. 61, 88.

- (iii) Likelihood⁶⁹ of success,⁷⁰ or showing that the merits of the claim present a serious question for litigation;⁷¹
- (iv) Balancing of possible harms to the parties⁷² and the public.^{73, 74}

⁶⁴ Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 386 points out that for a preliminary injunction to be granted it must be established that, although an equitable remedy exists at the time of the final award, irreparable harm will be suffered if no preliminary injunction is ordered. That is, the applicant must establish that he cannot "*easily wait to the end of the trial*". The threat of irreparable harm must, in other words, be imminent and real (cf. U.S. v. Oregon State Medical Soc., 343 U.S. 236, 333; Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 332; McLendon v. Continental Can Co., 908 F.2d 1171, 1182). When he requests a preliminary injunction, the applicant must in other words establish that the injunction is necessary at a time before the final hearing takes place, i.e. that his case is urgent.

⁶⁵ cf. Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 333.

⁶⁶ cf. Johnson v. Mansfield Hardwood Lumber Co., 143 F.Supp. 826, 835 (fn. 3).

⁶⁷ The term "multiplicity" encompasses simultaneous suits as well as efforts to re-litigate an issue already decided (cf. Rudinicki v. McCormack, 210 F.Supp. 905, 910).

⁶⁸ Equity "*favors the prevention of a multiplicity of actions*", involving "*the same issues of law or fact*" between the same parties (cf. Mathew v. Rodgers, 284 U.S. 521, 529-530; American Jurisprudence 2d, Injunctions § 38). When there are different individuals on one side, an injunction conditions that the suits involve an interest all the parties have in common, i.e. that the suits be not "*separate controversies unconnected [with each other as to] issues of fact*" and questions of law (cf. St. Louis, I.M. & S. Ry. Co. v. McKnight, 244 U.S. 368, 375) in order to prevent a person from "*being subjected to undue costs and inconvenience*" (cf. Public Nat. Bank of New York v. Keating, 47 F.2d 561, 562-563).

⁶⁹ The applicant must make a "*prima facie showing of his right to relief*" (cf. Gambar Enterprises, Inc. v. Kelly Services, Inc., 69 A.D.2d 297, 298).

⁷⁰ cf. Miller v. French, 530 U.S. 327, 358; Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 340 Doran v. Salem Inn, 422 U.S. 922, 932.

⁷¹ cf. Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 332; Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp., 25 F.3d, 119, 122.

⁷² A court must weigh the benefits and burdens of granting or denying a requested injunction on both parties. An injunction may be granted (i) when this test shows that the potential harm of the applicant is bigger than that of the other interested parties. (cf. Tigor Title Ins. Co. v. Cohen, 173 F.3d 63, 69), (ii) or when the harm the applicant is threatened with is of such a degree that an injunction is equitable even if it burdens even bigger inconvenience to the other party (cf. American Jurisprudence 2d, Injunctions § 37).

⁷³ cf. Miller v. French, 530 U.S. 327, 358; Yakus v. U.S., 321 U.S. 414, 440; City of Harrisonville, Mo. v. W. S. Dickey Clay Mfg. Col, 289 U.S. 334, 337.

⁷⁴ Thus, even if there is irreparable harm an injunction may be denied (cf Weinberger v. Romero-Barcelo, 456 U.S. 305, 312-313; Yakus v. U.S., 321 U.S. 414, 440; Railroad Comm'n. v. Pullman Co., 312 U.S. 496, 500) because the complainant is not entitled to an injunction as a matter of right (cf. Yakus v. U.S., 321 U.S. 414, 440; Tigor Title Ins. Co. v. Cohen, 173 F.3d 63, 68). Rather, also in such a case a court must use its discretion whether to grant an injunction by balancing the interests of the parties (cf. Banks v. National Collegiate Athletic Ass'n, 746 F.Supp. 850, 856). The court may for instance consider: (i) the conduct of the complainant (delay, clean-hands principle; cf. National Fire Ins. Co. of Hartford v. Thompson, 281 U.S. 331, 337-338); (ii) the substantiality of the threat faced by the complainant (cf State of Nebraska v. State of Wyoming, 515 U.S. 1, 2); and (iii) difficulties in framing or enforcing an effective

cc) Injunctions Ordering the Specific Performance of Contracts

16. Injunctions are also available to enjoin the violation of a contract and, thus, to order its specific performance.⁷⁵ Whether a preliminary injunction ordering the performance of a contract is appropriate, must be assessed based on the regular criteria listed in para. 15 hereinabove,⁷⁶ by taking the specific circumstances of the case into account.⁷⁷ If a permanent injunction is sought, the applicant must moreover establish the conditions for a judgment ordering specific performance of the contract.⁷⁸

17. When injunctive relief is sought because of a breach of contract, the prerequisite of irreparable harm⁷⁹ is satisfied, if either *"the subject matter of the contract is of such a special nature or peculiar value that damages would be inadequate; or [... if ...] some special and practical features of the contract, [render] it [...] impossible to ascertain the legal measure of loss so that money damages are*

order (cf. State ex rel. Mitchell v. Ross, 152 P.2d 675, 678). Moreover, the court should, when using its discretion, bear in mind (i) that injunctive relief ordinarily protects against unperformed acts, thus restricts the freedom of action of the party that is affected by such order (ii) and that injunctive relief must, therefore, be an extraordinary remedy (cf. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312; Fox Valley Harvestone, Inc. v. A. O. Smith Harvestone Products, Inc., 545 F.2d 1096, 1097), which should consequently - as a general guideline - only be used *"sparingly, and only in a clear case"* cf. Rizzo v. Goode, 423 U.S. 362, 378; Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak, 335 F.3d 357, 363-364).

⁷⁵ cf. United Mine Workers of America Dist. No. 5 v. Consolidation Coal Co., 666 F.2d 806, 812.

⁷⁶ cf. Teamsters Local Unions Nos. 75 and 200 v. Barry Trucking Inc., 176 F.3d 1004, 1011. When contractual rights are concerned, the criterion of likelihood of success normally entails that a preliminary injunction will not be granted if the contractual rights of the applicant are doubtful (cf. Consolidated Canal Co. v. Mesa Canal Col, 177 U.S. 296, 302). Even in these cases, it may, however, be adequate to preserve the *status quo* pending the final determination of the right in question (cf. American Jurisprudence 2d, Injunctions § 15).

⁷⁷ comp. Ireland v. Wynkoop, 36 Colo. App. 205, 221.

⁷⁸ I.e. (i) that there is a valid contract, that (ii) the plaintiff has performed its part of the contract, and that (iii) plaintiff and defendant are each able to continue performing their parts of the contract (cf. Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp., 992 F.2d 430, 433-434). Even then, such an injunction will be denied if specific performance is not appropriate under the circumstances (cf. Ireland v. Wynkoop, 36 Colo. App. 205, 225; American Jurisprudence 2d, Injunctions § 123).

⁷⁹ A contractor who faces possible future harm may request injunctive relief before he actually suffers harm (cf. Overholt Crop Ins. Sercie Co. Travis, 941 F.2d 1361, 1371).

impracticable".⁸⁰ So, if damages are assessable and readily and fully compensate the applicant for the breach of a contractual obligation by his counterparty, there is an adequate remedy at law for the applicant, so that injunctive relief cannot be granted.⁸¹

B. Comity

18. Antisuit injunctions are addressed to the parties; nonetheless, they *de facto* also affect the sovereignty of the foreign forum:⁸² A court enjoining a foreign proceeding effectively denies the jurisdiction of the foreign court, and by doing so "*regulat[es] the affairs of the foreign sovereign*".⁸³ The foreign forum will therefore consider an antisuit injunction to be an interference with its sovereignty and for this reason hardly ever recognize and enforce it.^{84, 85, 86} That is shown by *Grand Trunk Western Railroad* evidencing the reaction of a court, the Supreme Court of Illinois, which is faced with an antisuit injunction. In this case the court reasoned that the injunction destroyed its jurisdiction and that it should be entitled to the same respect for its jurisdiction that it accords to other courts; it therefore held that it was absent such respect able to protect its jurisdiction by issuing a counter-antisuit injunction.⁸⁷ This

⁸⁰ cf. *ECRI v. McGraw-Hill*, 809 F.2d 223, 226; *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386.

⁸¹ cf. *Compute-A-Call, Inc. v. Tolleson*, 285 Ark. 355, 356.

⁸² cf. *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products, N.V.*, 310 F.3d 118,126; *Laker Airways v. Sabena*, 731 F.2d 909, 927; *Compagnie des Bauxites de Guinea v. Insurance Company of North America*, 651 F.2d 877, 887 ("*... there is no difference between an injunction to the parties and addressing it to the foreign court itself*"); *James v. Grand Trunk Western Railroad Company*, 14 Ill.2d 356, 368 and 372 ("*destroys our jurisdiction*"); *Turner v. Gromit*, C-159/02, Judgment of the European Court of Justice of April 27, 2004, N 27; *Bermann*, p. 589; *Hartley*, p. 506; *Najarian*, p. 973-974. The formalistic view that an antisuit injunction is solely directed at the parties is for instance applied in *Cole v. Cunningham*, 133 U.S. 107, 118-119.

⁸³ cf. *Schimek*, p. 517 and 521.

⁸⁴ Although a court may recognize an antisuit injunction issued by another court, it is not required to do so (cf. *American Jurisprudence 2d, Injunctions* § 198; comp. fn. 17 hereinabove.).

⁸⁵ For domestic cases, see *James v. Grand Trunk Western Railroad Company*, 14 Ill.2d 356, 364, holding that comity did not require a court to discontinue the action before it in such a case.

⁸⁶ Nonetheless, an antisuit injunction is effective when the forum has personal jurisdiction over the enjoined party and is able to enforce it by contempt of court measures or the like (cf. e.g. *James v. Grand Trunk Western Railroad Company*, 14 Ill.2d 356, 359; according to the facts mentioned in this decision, one party was arrested and threatened with imprisonment in case of non-compliance with an antisuit injunction).

⁸⁷ cf. *James v. Grand Trunk Western Railroad Company*, 14 Ill.2d 356, 371-372.

domestic example shows that antisuit injunctions have the potential to lead to frictions between different *fora*, and to harm judicial cooperation.⁸⁸

19. An unlimited use of the antisuit-injunction tool would therefore conflict with the means and goals of one of the guiding principles of American jurisprudence, comity towards foreign sovereigns.⁸⁹ The means of comity, avoiding interference with other nations when tailoring remedies,^{90, 91} aim at promoting predictability and stability in legal expectations,⁹² as well as at furthering the respect for the American legal system and the smooth cooperation between the judicial systems of different sovereigns (the ends of comity). Antisuit injunctions do and effect the opposite. What the two concepts, comity and the antisuit-injunction tool, have in common is that they both aim to foster (different) domestic interests: While antisuit injunctions aim to protect the integrity of the American judicial system, comity aims to facilitate international judicial cooperation and thus, indirectly international commerce,⁹³ which certainly is in the interest of the American economy, which does business on a global level.⁹⁴ So, comity towards other nations as well is not without self-interest either.

20. "Comity" is not a clearly defined legal principle. It does not provide precise criteria when a foreign litigation shall not be interfered with. Comity rather stands for an idea than for a specific content. Moreover, comity does not entail a mandatory deference to the foreign forum. This deference is a "*unilateral decision of the forum*",⁹⁵ which is not required by international law.⁹⁶ On the other hand it is a

⁸⁸ cf. Lenenbach, p. 295.

⁸⁹ cf. *Hilton v. Guyot*, 159 U.S. 113, 202-203; *Paramedics v. GE Medical Systems*, 369 F.3d 645, 652; *China Trade v. M.V. Choong*, 837 F.2d 33, 36; *Laker Airways v. Sabena*, 731 F.2d 909, 927 and 937; *Farrell Lines Incorporated v. Columbus Cello-Polly Corporation*, 32 F.Supp.2d 118, 129; *Smoothline Ltd. and Greatsino Electronic Ltd. v. North American Foreign Trading Corp.*, 2002 WL 273301, 6; *In re Laitasalo*, 196 B.R. 913, 920; *American Jurisprudence 2d, Injunctions* § 195.

⁹⁰ cf. *Republic of the Philippines v. Westinghouse Electric Corp.*, 43 F.3d 65, 75.

⁹¹ In the context of a concurrent litigation, the litigation itself is the foreign act deserving consideration under the principle of comity.

⁹² cf. *China Trade v. M.V. Choong*, 837 F.2d 33, 35; *Laker Airways v. Sabena*, 731 F.2d 909, 937; *Amkor Technology v. Alcatel Business Systems*, 278 F.Supp.2d 519, 525; *Schimek*, p. 503-504.

⁹³ cf. *The Bremen v. Zapata Off-Shore, Co.*, 407 U.S. 1, 8-9.

⁹⁴ cf. *Maier*, p. 281 and 303-304; *Swanson*, p. 10-11.

⁹⁵ cf. *Laker Airways v. Sabena*, 731 F.2d 909, 937; *Maier*, p. 281.

⁹⁶ cf. *Swanson*, p. 4.

legal principle and not mere good will upon the other.⁹⁷ Comity thus stands for a "*blend of courtesy and expedience*",^{98, 99} and a court consequently enjoys a certain degree of discretion whether to defer to a foreign sovereign, as it has when ruling on a request for injunctive relief.

21. The focus of this paper lies with international antisuit injunctions, i.e. with cases where the forbidden forum is outside the United States. In such an international context, the principles of comity and mutual respect are "*even more compelling*",¹⁰⁰ and considerations relating to disposition and conservation of judicial resources have less weight than in a purely domestic context.¹⁰¹ Moreover, as sovereignty is paramount to any sovereign, the court of a foreign sovereign may be expected to be alienated to a higher degree than another court within the same sovereign when confronted with an antisuit injunction. And, as the world grows closer together, the relations between the sovereigns and thus comity between them becomes more and more important.¹⁰² Courts seized with international matters should therefore pay due regard to the principles of comity.¹⁰³ Otherwise, i.e. when one sovereign seeks exclusive control over activities also affecting foreign sovereigns,¹⁰⁴ and tries to impose its values on foreign sovereigns,¹⁰⁵ such a lack of comity could harm economic and social

⁹⁷ cf. *Hilton v. Guyot*, 159 U.S. 113, 163-164.

⁹⁸ cf. *Canadian Filters v. Lear Siegler*, 412 F.2d 577, 578.

⁹⁹ Recognition of the acts of another sovereign should under the principle of comity only be withheld when its acceptance would be "*contrary or prejudicial to the interest of the nation called upon to give it effect*" (cf. *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products, N.V.*, 310 F.3d 118, 126), so that a judgment of a foreign court affecting a thing or person within its jurisdiction should be deferred to (cf. *Rauschenbush*, p. 1065).

¹⁰⁰ cf. *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1213; contra: *Allendale Mutual Insurance Company v. Bull Data, Inc.*, 10 F.3d 425, 431; *Mutual Service Insurance v. Frit Industries, Inc.*, 805 F.Supp. 919, 923.

¹⁰¹ cf. *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1213; *Laker Airways v. Sabena*, 731 F.2d 909, 927 (fn. 49); see, however, *Cargill, Inc. v. Hartford Accident and Indemnity Company*, 531 F.Supp. 710, 715. The counterargument being that "*[t]his increasingly is one world and we have difficulty seeing why the ... rules for limiting duplicative litigation should stop at international boundaries*" (cf. *Philipps Medical Systems International, B.V. v. Bruetman*, 8 F.3d 600, 605).

¹⁰² cf. *Schimek*, p. 499.

¹⁰³ Comity also favors the enforcement of forum selection clauses (cf. *The Bremen v. Zapata Off-Shore, Co.*, 407 U.S. 1, 8-9) and arbitration agreements (cf. *Scherk v. Alberto-Culver* 417 U.S. 506).

¹⁰⁴ cf. *Schimek*, p. 503.

¹⁰⁵ cf. *The Bremen v. Zapata Off-Shore, Co.*, 407 U.S. 1, 8-9; *Maier*, p. 303-304.

development and could, according to several scholars, lead to frictions between sovereigns.^{106, 107}

¹⁰⁶ cf. Maier, p. 303-304; Schimek, p. 503-504; Swanson, p. 2 and 8-10.

¹⁰⁷ It may even be questioned, whether antisuit injunctions are, given their effect, consistent with the principle of equality of sovereigns, which is acknowledged by public international law. (cf. Lenenbach, p. 293-294).

C. Antisuit Injunction Act

22. In order to achieve "*harmony ... by avoiding ... friction between two systems of courts*",¹⁰⁸ Congress enacted the Antisuit Injunction Act.¹⁰⁹ Pursuant to this act federal courts may enjoin litigations in state actions¹¹⁰ only when this is expressly authorized by an Act of Congress,¹¹¹ or where an antisuit injunction is necessary to protect jurisdiction,^{112, 113} or a prior judgment by the court which is requested to enjoin the state-court action.^{114, 115} The other way round state courts may, according to *City of Dallas*, not enjoin actions in federal courts.¹¹⁶ This decision and the Antisuit Injunction Act show a certain reticence towards the antisuit injunction tool when different domestic sovereigns, the Federation and

¹⁰⁸ cf. *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 261.

¹⁰⁹ cf. 28 U.S.C. § 2283.

¹¹⁰ That a federal court can enjoin the prosecution of an action before another federal court is "*clear*" (*American Horse Protection v. Lyng*, 690 F.Supp. 40, 42).

¹¹¹ Federal courts may only enjoin state-court proceedings under the "in aid of its jurisdiction" exception based on the All Writs Act (28 U.S.C. § 1651) when a state court "*so interferes with the federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case*" (cf. *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295; *Peters v. Brants Grocery*, 990 F.Supp. 1337, 1341). So, the All Writs Act provides a legal basis for a federal court to enjoin a party from proceeding in a state-court if such an injunction is necessary to preserve or exercise subject matter jurisdiction (cf. *Peters v. Brants Grocery*, 990 F.Supp. 1337, 1341).

¹¹² The simple fact that a state court might in a concurrent-litigation case come to a decision before the federal court does, so that only few issues would be left to decide for the federal court, is not sufficient grounds to intervene with the state court proceedings, but is a consequence of the nation's dual system (cf. *National Basketball Association v. Minnesota Professional Basketball, Ltd. Partnership*, 56 F.3d 866, 872).

¹¹³ comp. paras. 40 et seq. hereinafter.

¹¹⁴ The reason why federal courts may only in exceptional circumstances enjoin state-court proceedings is that the states did not surrender their power to establish a judicial system of their own when the United States were formed (cf. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 285).

¹¹⁵ An antisuit injunction is admissible *in casu* if the following conditions are satisfied: (i) the same issues are in dispute in the later proceeding; (ii) the later proceeding is between the same parties; (iii) the party bringing the later suit must have had the opportunity to present its case; (iv) a final judgment was rendered in the first proceeding; (v) and the general conditions for granting injunctive relief must be satisfied - success being established by success in the first action, irreparable harm being established by the fact that re-litigation constitutes irreparable harm and the balance of interests being in disfavour of re-litigation as public interests aims at avoiding it (cf. *in re SDDS, Inc.*, 97 F.3d 1030, 1040-1041; cf. para. 15 hereinabove).

¹¹⁶ cf. *Donovan v. City of Dallas*, 377 U.S. 408, 412-413.

the States, are involved.¹¹⁷

23. Although *City of Dallas* and the Antisuit Injunction Act, as well as the policies underlying them are not directly applicable if the forbidden forum is abroad, they may give guidelines for an approach to international antisuit injunctions.¹¹⁸ Indeed, as these policies aim to ensure that (i) judicial comity, i.e. that a court of one sovereign should be reluctant to interfere with the courts of another sovereign, which is even more important in an international context,¹¹⁹ and (ii) judicial federalism, i.e. that the judicial sovereign on the federal level and on the state level operate essentially independently despite their frequently overlapping subject matter jurisdiction,¹²⁰ are respected,¹²¹ suggests that also proceedings pending in a foreign sovereign should be enjoined with reticence only.

D. Foreign Models

a) Introduction

24. The following paragraphs give a short overview over two systems outside the United States: The Swiss and the Lugano-Convention approach to concurrent litigations and antisuit injunctions. The second analysis in particular aims to examine whether a convention may have an impact on the authority of a sovereign to enjoin foreign proceedings.

b) Swiss Approach towards non-Signatories of the Lugano-Convention

25. In principle, a Swiss court implements the principles of *lis pendens* and *res iudicata*: (i) It will stay an action submitted to it if the subject-matter is already pending before a foreign tribunal,¹²² and on

¹¹⁷ For antisuit injunctions among federal and state courts, comp. fn. 22 and 110 hereinabove.

¹¹⁸ cf. *Mutual Service Insurance v. Frit Industries, Inc.*, 805 F.Supp. 919, 922 (fn. 2) and 923 (fn. 5); comp. Robertson, p. 411, 427-429 and 431 who submits that the same standards as under the Antisuit Injunction Act should apply in an international context.

¹¹⁹ comp. para. 21 hereinabove.

¹²⁰ Given this reasoning and the fact that foreign courts are for federal courts, like state courts, courts of another sovereign, this supports that international antisuit injunctions should only be issued when one of the exceptions of the Antisuit Injunction Act applies.

¹²¹ cf. Werner, p. 1063-1064.

¹²² Art. 9 of the Swiss Federal Act on International Private Law (SR 291) provides: (1) If an action concerning the same subject matter between the same parties is already pending abroad, the Swiss court shall stay the matter if it may be expected that the foreign court will, within a reasonable period of time, render a

the other hand not recognize a judgment rendered in a foreign action that was filed after the Swiss action (*lis pendens*).¹²³ (ii) And it will dismiss an action that is submitted to it when there is already a foreign decision on the issues that are to be tried in the Swiss court if this foreign judgment is recognizable in Switzerland (*res iudicata*).¹²⁴ By putting the stress on which court is seized first, (i) there cannot be, from a Swiss perspective, concurrent litigations and (ii) it is ensured that there are no conflicting judgments within Switzerland - irrespective of whether a Swiss or a foreign court decides first.¹²⁵

26. Antisuit injunctions to enforce on foreign sovereigns the Swiss view on which judgment should be recognized are not available. Also, if a foreign action is filed to evade a Swiss public policy, this only entails that the foreign judgment is not recognized in Switzerland, while antisuit injunctions are not available. It transpires the notion that (i) someone who has ties with a foreign sovereign that are close enough for that sovereign to assume jurisdiction and to enforce the judgment there or in a third forum accepts the risk that this may occur and that (ii) the jurisdiction to enforce plays an important role: If a foreign judgment can be enforced in the foreign or a third forum, there is no legal ground for a Swiss court to preclude the foreign judgment and its enforcement; it is limited to denying enforcement of the foreign judgment within Switzerland.¹²⁶

decision recognizable in Switzerland. (2) To determine when a claim is pending in Switzerland, the time of the first procedural act required for the bringing of a claim shall be conclusive. The introduction of a conciliation proceeding shall be sufficient. (3) The Swiss court shall dismiss the action when a foreign decision recognizable in Switzerland is submitted to it.

¹²³ cf. Art. 27(2)(c) of the Swiss Federal Act on International Private Law.

¹²⁴ Depending on the kind of case at issue, the conditions that a foreign award must satisfy to be recognizable in Switzerland may vary.

¹²⁵ Provided that the foreign decision is enforceable in Switzerland, which it is if the foreign forum has reasonable contacts to the facts.

¹²⁶ The Swiss court may, however, be forced to take the foreign judgment into account for its own decision, i.e. tailor its judgment in a way that considers the effects of a foreign judgment not recognizable in Switzerland (cf. Schwander, N 695).

c) Lugano-Convention

27. The Lugano Convention¹²⁷ between the members of the European Union and the members of the European Free Trade Association¹²⁸ defines the competent courts for civil and commercial matters¹²⁹ and provides that judicial decisions made in one signatory must be recognized and enforced by the other signatories.¹³⁰ With regard to concurrent litigations, the Lugano Convention implements the principle of *lis pendens*: The court, which was seized second, must stay proceedings until the court, which was seized first, decides on its jurisdiction; if the court, which was seized first, upholds its jurisdiction, the other court must dismiss the case.^{131, 132} The Lugano Convention thus allocates the jurisdiction for each case to the courts of one signatory and thus creates a single judicial system among the signatories. The judgment rendered by the courts of that signatory must then be enforced by the other signatories. That the courts of one signatory accept a decision of another signatory even if the domestic courts would have been competent as well,^{133, 134} expresses the mutual trust of the signatories in each other's judicial systems.¹³⁵ An essential part of this mutual trust is the persuasion that the courts of each signatory are as apt to correctly interpret the Lugano Convention as the

¹²⁷ Convention on Jurisdiction and Enforcement of Judicial Decisions in Civil and Commercial Matters of September 16, 1988 (the "Lugano Convention" or "LC").

¹²⁸ The Lugano Convention extended the system created by the Brussels-Convention entered into by the members of the European Union to the countries then members of the European Free Trade Association, i.e. Austria, Finland, Iceland, Norway, Sweden and Switzerland. Austria, Finland and Sweden subsequently joined the European Union.

¹²⁹ cf. Art. 2 et seq. LC.

¹³⁰ cf. Art. 25 et seq. LC (save for a few, limited grounds for exceptions, like *res iudicata* (cf. Art. 27 Nr. 3 LC)). In particular, it is not possible for the court before which enforcement is sought to re-examine the jurisdiction of the court which rendered the respective decision (except if the jurisdiction is based on provisions in titles III to IV LC; comp. Art. 28 LC and Lenenbach, p. 316).

¹³¹ cf. Art. 21 LC.

¹³² If two related actions are brought before the courts of two sovereigns, the court, which was seized second, may stay the proceedings and transfer the proceeding before it, upon a request by one of the parties, to the court, which was seized first if this court has jurisdiction over both actions (cf. Art. 22 LC).

¹³³ Because there are different alternative criteria to determine which court is competent in the particular case, it is not unusual that the courts of several signatories might uphold their jurisdiction based on the Lugano Convention. In such a case, it is decisive where the action is brought first.

¹³⁴ But were not applied to or only after the foreign court had been applied to.

¹³⁵ cf. *Turner v. Gromit*, C-159/02, Judgment of the European Court of Justice of April 27, 2004, N 24; Bell, p. 207.

domestic courts.¹³⁶

28. Great Britain is a signatory to the Lugano Convention and is one of the countries which issue antisuit injunctions.¹³⁷ The question arises whether the system created by the Lugano Convention precludes the British courts from issuing injunctions that enjoin actions before the courts of another signatory. The Lugano Convention does not expressly mention antisuit injunctions. Thus the question arises whether this tool is compatible or conflicts with the purpose and spirit of the Lugano Convention.¹³⁸ This analysis might provide a starting point for the analysis of the relationship of another convention, the New York Convention, and antisuit injunctions, which will be addressed in Part V.

29. The Lugano Convention allocates jurisdiction between the courts of the signatories. A court which is competent under a provision of the Lugano Convention has jurisdiction to decide the action before it. Consequently, there is no need to establish with which forum the action has the closest connection; a signatory to the Lugano Convention cannot be presumed to have the power to alter the system established by it. Therefore, there is no room for discretion or a notion of a "*natural forum*", one of the grounds for a British tribunal to issue an antisuit injunction.¹³⁹ In particular, when an action is already pending before a foreign forum, an injunction enjoining that action would conflict with the principle of *lis pendens* set forth in Art. 21 LC.¹⁴⁰ The context is slightly different when an action is first pending before a domestic court¹⁴¹ or when a decision has already been rendered in the domestic court, that is faced with a request to enjoin a proceeding before the courts of another signatory. In these settings, the domestic court does not conflict with the principles of *lis pendens* and *res iudicata* by issuing an antisuit injunction, but strives to ensure that these principles are not violated by the foreign court.

30. The pattern of the Lugano Convention provides reasons for and against antisuit injunctions in

¹³⁶ cf. *idem* N 25.

¹³⁷ cf. fn. 21 hereinabove.

¹³⁸ cf. Stone, p. 145.

¹³⁹ comp. fn. 21 hereinabove.

¹⁴⁰ cf. Lenenbach, p. 312-314; comp. Bell, p. 205-206.

such a posture: On the one hand, an antisuit injunctions ensures that the provisions on jurisdiction and enforcement of the Lugano Convention are given effect; on the other hand antisuit injunctions show a mistrust that the other signatories apply the Lugano Convention correctly. In scholarly writing, there seems to be an agreement that the second reasoning should prevail, i.e. that in "*the absence of a jurisdiction or arbitration agreement, it would be contrary to the Brussels Convention*" to enjoin an action before the courts of another signatory.¹⁴² This view is confirmed by the European Court of Justice, which held that an antisuit injunction is an infringement of the jurisdiction of the foreign court, which is incompatible with the Brussels Convention,¹⁴³ and that it would evidence mistrust towards the other signatory, which is at odds with the spirit of the Lugano Convention. This convincing reasoning also applies to the parallel Lugano Convention.

31. The Lugano Convention also contains a provision on forum selection-clauses in Art. 17 LC. If the conditions of this provision are satisfied, a court that is applied to in violation of the forum-selection clause must deny its jurisdiction and dismiss the case. A delicate situation arises when an action is first brought to a court other than the selected forum and this court deems the forum-selection clause to be invalid, while the selected forum considers the forum-selection clause to be valid.¹⁴⁴ In such a case, it is for the court which is seized first to decide whether there is a valid forum-selection clause.¹⁴⁵ One might object that forum-selection clauses are so "*incredibly important*", that they justify to issue antisuit injunctions in such a case; indeed the enforcement of agreements is desirable.¹⁴⁶ Several reasons point, however, in the other direction: First, there is no presumption (i) that the forum-selection clause is

¹⁴¹ If the suit is neither pending in the domestic nor in a foreign court, it is submitted that an antisuit injunction is not admissible as this might *de facto* conflict with allocation of jurisdiction as provided for in the Lugano Convention.

¹⁴² cf. Ambrose, p. 414; Bell, p. 206-207; von Houtte, p. 92; Lenenbach, p. 307; Stone, p. 144-145; contra: Lenenbach, p. 312, submitting that Art. 21 vests in the court first seized the power to enjoin proceedings in a foreign forum that is seized thereafter.

¹⁴³ cf. Turner v. Gromit, C-159/02, Judgment of the European Court of Justice of April 27, 2004, N 24-25 and 27.

¹⁴⁴ Comp. the Continental Bank v. Aeakos Compania Naviera case ([1994] 1 Lloyd's Rep. 505) and the two perspectives on this case discussed by Wilson, p. 217-219.

¹⁴⁵ cf. Bell, p. 206-208.

¹⁴⁶ cf. Wilson, p. 221.

valid and (ii) that the forum the parties selected must therefore first examine whether the requirements of Art. 17 LC are satisfied. In fact, this would contradict the general pattern of the Lugano Convention:¹⁴⁷ Even though Art. 17 LC harmonizes the standards for forum-selection clauses, some aspects, like the question of construction, will be addressed under national law so that a different outcome, e.g. as to the scope of the clause, is possible.¹⁴⁸ This confirms that different opinions on whether a forum-selection clause is valid, cannot be a reason to enjoin a litigation in another signatory. The existence of diverging opinions is compatible with the Lugano Convention. Second, the principle of *lis pendens* suggests that the court that is seized first is the first to examine its jurisdiction and thus the forum-selection clause. And given the mutual trust between the signatories,¹⁴⁹ there seems to be no justification to assume that the foreign court misapplies the Lugano Convention. Third, a judgment was rendered in breach of a forum-selection clause is not a ground to refuse recognition and enforcement under the Lugano Convention.¹⁵⁰ So, an antisuit injunction conflicts with the mechanism and the spirit of the Lugano Convention even if this injunctions aims to implement forum-selection clauses.¹⁵¹

32. It may thus be summarized that (i) the pattern of the Lugano Convention, in particular the stress that is put on *lis pendens*, (ii) the fact that jurisdiction is examined based on the same requirements in all signatories and (iii) the mutual trust that the Lugano-Convention will be applied correctly by all signatories, which is for instance expressed in the fact that the enforcing court shall not second-guess the jurisdiction of the court which rendered the decision, are hostile to antisuit injunctions by British courts against actions pending in another signatory, even if there is allegedly a forum-selection clause providing of the jurisdiction of British courts.

¹⁴⁷ cf. Bell, p. 206-208; comp. Briggs/Rees, N 5.39 (p. 374).

¹⁴⁸ cf. Bell, p. 208.

¹⁴⁹ cf. Turner v. Gromit, C-159/02, Judgment of the European Court of Justice of April 27, 2004, N 24; Bell, p. 207.

¹⁵⁰ cf. Bell, p. 205.

¹⁵¹ cf. Bell, p. 206-207; comp. Ambrose, p. 402 and Leigh, analyzing the impact of Turner v. Gromit on that issue.

E. Summary

33. The authority of American courts to enjoin a party from continuing a concurrent foreign proceeding is undisputed.¹⁵² Nonetheless, as doing so, at least indirectly, affects a foreign sovereign and thus conflicts with the - rather vague - principle of comity, the fact that there is a concurrent court proceedings is not "*without more*" a reason to enjoin the foreign proceeding.^{153, 154, 155} Therefore, American courts should only use their discretion to issue antisuit injunctions in such a posture if there is some other ground for equitable relief than the mere fact of the pendency of the concurrent suits.¹⁵⁶ An analysis of the Lugano Convention has shown that the existence of an international convention may have an effect on the availability of the antisuit injunction tool. Moreover, the policies behind the Antisuit Injunction Act suggest that antisuit injunctions should be issued with care when different sovereigns are involved. Part II examines how American courts put the pieces of this puzzle together. Part III suggests an alternative approach, which takes into account that antisuit injunctions are, lastly, a subcategory of injunctive relief.

¹⁵² cf. para. 3 hereinabove.

¹⁵³ cf. *Computer Associates International, Inc. v. Altai, Inc.* 126 F.3d 365, 372; *Gau Shan v. Bankers Trust*, 956 F.2d 1349, 1355; *China Trade and Development Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36; *Laker Airways v. Sabena*, 731 F.2d 909, 915, 926 and 928; *Compagnie des Bauxites de Guinea v. Insurance Company of North America*, 651 F.2d 877, 887; Baer, p. 164, 167 and 173.

¹⁵⁴ This is further supported by the fact that the U.S. Supreme Court held that, as a consequence of the federal system, it must be accepted that a case is concurrently pending before several courts where adjudication before a single judge would be possible (cf. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928). This is even more true in the global environment where the different sovereigns coexist on the same level.

¹⁵⁵ Thus, each forum that has jurisdiction according to its law is free to proceed to a judgment and concurrent jurisdiction is "*ordinarily to be respected*" for the same *in personam* claim (cf. *Laker Airways v. Sabena*, 731 F.2d 909, 926), so that under normal circumstances none of the courts is required to abstain from the action based on the principle of *lis pendens* (cf. Bermann, p. 611).

¹⁵⁶ cf. *Philip v. Macri*, 261 F.2d 945, 947.

III. AMERICAN JURISPRUDENCE - PUTTING THE PIECES TOGETHER

A. Comity-Threshold

34. Antisuit injunctions *de facto* affect the domestic affairs of a foreign sovereign,¹⁵⁷ and, by doing so, collide with the principle of comity.¹⁵⁸ On the other hand, they do secure procedural efficiency and the integrity of the domestic proceedings.¹⁵⁹ So, there is a conflict between those concerns and comity. To avoid this conflict, a foreign proceeding should only be enjoined if no less intrusive measure is available to implement the benefits of antisuit injunctions; if no such alternative measure is available, the domestic court has to weigh the conflicting interests.¹⁶⁰ If comity were not considered, an antisuit injunction would become "*nothing more than an aggressive attempt to seize exclusive jurisdiction*".¹⁶¹

35. Weighing the conflicting interests is, however, not an easy task to do since the extent of the duties comity imposes is uncertain.¹⁶² That subtlety of this task is evidenced by fact that the courts apply different standards although they agree that the starting point is that the principles of "*comity counsel that injunctions restraining foreign litigation be used sparingly and granted only with care and great restraint*".¹⁶³ Since this statement is as vague as the principle of comity itself and does not provide adequate guidance to determine when comity is outweighed and an antisuit injunction should be issued, it is not surprising that the courts, although they have the same starting point, give different

¹⁵⁷ cf. *Computer Associates International, Inc. v. Altai, Inc.* 126 F.3d 365, 371-372; *Laker Airways v. Sabena*, 731 F.2d 909, 937; comp. para. 18 hereinabove.

¹⁵⁸ cf. *Bermann*, p. 589 *Hartley*, p. 487 and 506; *Schimek*, p. 518 and 520. Some scholars therefore submit that an antisuit injunction should only be issued after the foreign court itself has dismissed an objections to the foreign court's jurisdiction that the party that requests an antisuit injunction may be expected to raise in the foreign court (cf. *Baer*, p. 168 and 178-179; *Bell*, p. 208; *Bermann*, 603 and 622; comp. *Asset Allocation and Management v. Western Employers Insurance Company*, 566, 573).

¹⁵⁹ cf. para. 9 hereinabove.

¹⁶⁰ cf. *Gau Shan v. Bankers Trust*, 956 F.2d 1349, 1354; *Laker Airways v. Sabena*, 731 F.2d 909, 933; non-enforcement of a foreign judgment would for instance go less far than enjoining the foreign proceeding (cf. *Bermann*, 603), but may be less effective.

¹⁶¹ cf. *Philipps*, p. 2024.

¹⁶² cf. *Laker Airways v. Sabena*, 731 F.2d 909, 937; comp. para. 20 hereinabove.

¹⁶³ cf. *Paramedics v. GE Medical Systems*, 369 F.3d 645, 652, *China Trade v. M.V. Choong*, 837 F.2d 33, 36; *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855; *Philp v. Macri*, 269 F.2d 945, 947; *Farrell Lines Incorporated v. Columbus Cello-Polly Corporation*, 32 F.Supp.2d 118, 129;

answers when it comes to the question in which cases comity is actually outweighed. That is, they are divided as to which of the several "*equitable factors*"¹⁶⁴ that are suggested as tie-breakers are appropriate to examine whether an antisuit injunction stands the test of comity in the particular case.¹⁶⁵

¹⁶⁶ These equitable factors are:¹⁶⁷

- (i) Frustration of an important public policy of the domestic forum;
- (ii) Threat to the domestic court's jurisdiction;
- (iii) Fact that a foreign action is vexatious or oppressive;
- (iv) Delay, inconvenience, expense, inconsistency or a race to judgment;
- (v) Prejudice to other equitable considerations.

36. As already described and denoted by authorities and scholars,¹⁶⁸ two approaches were developed by the courts when it comes to the question which of these equitable factors are appropriate tie-breakers: A liberal and a restrictive approach. These approaches are insofar comparable as (i) the jurisdiction of the foreign forum is in general not examined,¹⁶⁹ (ii) and an antisuit injunction may only be issued under both of them if a decision in the domestic proceeding will dispose of the foreign

Smoothline Ltd. and Greatsino Electronic Ltd. v. North American Foreign Trading Corp., 2002 WL 273301, 6; *In re Laitasalo*, 196 B.R. 913, 920; American Jurisprudence 2d, Injunctions § 195.

¹⁶⁴ cf. *China Trade v. M.V. Choong*, 837 F.2d 33.

¹⁶⁵ cf. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357, 366; *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products, N.V.*, 310 F.3d 118, 129; *Kaepa, Inc. v. Achilles Corporation*, 76 F.3d 624, 627; *Gau Shan v. Bankers Trust*, 956 F.2d 1349, 1352-1353; *China Trade v. M.V. Choong*, 837 F.2d 33; *Umbro International Inc. v. Japan Professional Football League*, 1997 WL 33378853 1,2; *Chavier*, p. 267; American Jurisprudence 2d, Injunctions § 185.

¹⁶⁶ These factors concern factual issues, so that the review of a Court of Appeals is limited to an assessment whether a District Court abused its discretion when issuing an antisuit injunction (cf. *Paramedics v. GE Medical Systems*, 369 F.3d 645, 652; *Kaepa, Inc. v. Achilles Corporation*, 76 F.3d 624, 627; *United Offshore Company v. Southern Deepwater Pipeline Company*, 899 F.2d 405, 407).

¹⁶⁷ cf. *Laker Airways v. Sabena*, 731 F.2d 909, 927; *Smoothline Ltd. and Greatsino Electronic Ltd. v. North American Foreign Trading Corp.*, 2002 WL 273301, 6.

¹⁶⁸ comp. *Mutual Service Insurance v. Frit Industries, Inc.*, 805 F.Supp. 919, 921; *Burck*, p. 481-484; *Najarian*, p. 963; *Philipps*, p. 2007; *Salava*, p. 267-268; *Swanson*, p. 12.

¹⁶⁹ Comp. for instance *Northern Californian Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306; *NBA v. Minnesota Professional Basketball Ltd.*, 56 F.3d 866; *U.S. v. Rural Elec. Convenience Co-op. Co.*, 922 F.2d 429; *China Trade v. M.V. Choong*, 837 F.2d 33. An exception is *Laker Airways* (cf. *Laker Airways v. Sabena*, 731 F.2d 909, 915, 921 and 926).

proceeding,¹⁷⁰ i.e. if the same parties and issues are involved.^{171, 172} If the parties are not identical, it must be assessed whether there are sufficiently similar to treat them as identical.¹⁷³ If the issues only partially overlap, no injunction, or only a limited injunction, should be granted.¹⁷⁴ The domestic proceeding is, however, not dispositive of the foreign proceeding, even if these conditions are met, when the domestic judgment will not be recognized in the foreign court, so that in such a case an antisuit injunction should not be issued.¹⁷⁵

B. Liberal Approach

37. Under this approach, the existence of any of the above equitable factors is a sufficient basis to issue an antisuit injunction.¹⁷⁶ By doing so, the courts following this approach consider judicial economy, inconvenience, delay or additional expenses caused by the foreign action to be adequate reasons to enjoin a foreign proceeding.^{177, 178} These concerns are potentially present in any concurrent litigation. Consequently, the courts following this approach consider comity to be outweighed easily. Indeed, the Court of Appeals of the Seventh Circuit submits that comity "*is a purely theoretical*

¹⁷⁰ cf. *China Trade v. M.V. Choong*, 837 F.2d 33, 36; *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 856; Perry, p. 125; comp. Baer, p. 158.

¹⁷¹ comp. fn. 68 hereinabove.

¹⁷² In other words, an antisuit injunction can only be issued if there is an American forum (cf. Bermann, p. 626; Hartley, p. 496).

¹⁷³ For this assessment, the affiliation between the different entities and whether the claims against the different entities arise out of the same facts and circumstances must be taken into account (cf. *Paramedics v. GE Medical Systems*, 369 F.3d 645, 652). According to another authority it is sufficient that the interests of the parties in both proceedings are identical (cf. *Motorola Credit Corporation v. Uzan*, 2003 U.S. Dist. Lexis 111 1, 6).

¹⁷⁴ comp. Baer, p. 176.

¹⁷⁵ cf. Raushenbush, p. 1054; comp. Baer, p. 176.

¹⁷⁶ cf. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357, 366; *Kaepa, Inc. v. Achilles Corporation*, 76 F.3d 624, 627; *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 856, where the court held that not only an identical claim in a second forum but also a (compulsory) counterclaim may trigger an antisuit injunction based on the criterion of vexatious litigation; *Bethell v. Peace*, 441 F.2d 495; *in re Unterwasser Reederei GmbH*, 428 F.2d 888, 895; *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 430-431 also seems to tend towards the liberal approach; the same is true for *Medtronic, Inc. v. Catalyst Research Corp.*, 518 F.Supp 946, 955-956, *aff'd.*, 664 F.2d 660.

¹⁷⁷ cf. Swanson, p. 24 and 33; comp. Perry, p. 147; Sherman, p. 925; Werner, p. 1046 and 1052-1053.

concern",¹⁷⁹ and precludes antisuit injunctions only when a judicial act threatens the relations between the United States and the foreign sovereign,¹⁸⁰ or, put it more descriptively, if an antisuit injunction would "throw a monkey wrench into the foreign relations of the U.S" in the particular case.¹⁸¹ So, at least in some of the cases that were decided under this approach, comity is only taken into account when the foreign sovereign actually considers itself to be restricted in exercising its judicial functions by an antisuit injunction and notifies the American court thereof. So, comity is taken into account in a retroactive way only - after the decision, but not for the decision. An impairment of comity may thus be cured, but is not prevented: The damage to comity will already be done, when a foreign sovereign actually invokes that an antisuit injunction endangers its sovereignty.

C. Restrictive Approach

a) Introduction

38. The starting point of the more restrictive approach, which is followed in several circuits¹⁸² and endorsed by several scholars,¹⁸³ is the proposition that goals aimed at by comity are endangered by any antisuit injunction because such an injunction shows that the foreign court is not thought to be able to adjudicate a dispute fairly and efficiently, e.g. to dismiss an action when it was only filed to harass

¹⁷⁸ That is they apply basically the same reasoning in the international context as they do when they decide whether to enjoin another domestic proceeding (cf. Swanson, p. 24; comp. Bermann, p. 595).

¹⁷⁹ cf. *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 432-433.

¹⁸⁰ *Kaepa, Inc. v. Achilles Corporation*, 76 F.3d 624, 627; *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431, requiring an intervention by an American or French agency; and *Philips Medical Systems International, B.V. v. Bruetman*, 8 F.3d 600, 605.

¹⁸¹ *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431.

¹⁸² cf. *Gau Shan v. Bankers Trust*, 956 F.2d 1349, 1355; cf. *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1214; *China Trade v. M.V. Choong*, 837 F.2d 33, 36; *Compagnie des Bauxites de Guinea v. Insurance Company of North America*, 651 F.2d 877, 887; *Canadian Filters v. Lear-Siegler, Inc.*, 412 F.2d 577, 579 (Salava, p. 267, Perry, p. 126 and Robertson, p. 422 consider the Court of Appeals for the First Circuit to follow the liberal approach. However, given the outcome of this case and the implied statement that inconvenience is not a sufficient ground to enjoin a foreign litigation (cf. *idem*, 579), this opinion is questionable; comp. Swanson, p. 12); *Laker Airways v. Sabena*, 731 F.2d 909, 927, leaving open the possibility of enjoining multiple suits brought for the sole purpose of harassment; cf. *idem* at 928 (fn. 57); *Mutual Service Insurance v. Frit Industries, Inc.*, 805 F.Supp. 919, 923, *aff'd*, 3 F.3d 442; *American Jurisprudence 2d, Injunctions* § 195.

the other party.¹⁸⁴ Such a statement hardly encourages international relations, as the domestic court would in effect, according to the Court of Appeals for the Second Circuit, express that the American court thinks it necessary to assume the responsibility for supervising the integrity of the judicial system of another sovereign.^{185, 186} Further to holding that it is *per se* undesirable that antisuit injunctions are too readily issued, the courts following the restrictive approach fear retaliation against American judicial decisions if the liberal approach is applied.^{187, 188}

39. Under the restrictive approach, comity is therefore held high and antisuit injunctions should only be issued in case there are the most compelling reasons to do so.¹⁸⁹ The restrictive approach thus expresses that comity in general requires a court to accept a concurrent *in personam* proceeding,¹⁹⁰ and that the mere duplication of proceedings and a possible race to judgment do not allow to enjoin a foreign litigation, since these factors are present in every concurrent litigation.¹⁹¹

b) Protection of Jurisdiction

40. Saying that concurrent proceedings are, in general, admissible, encompasses the admissibility of the foreign and the domestic proceeding. The courts following this approach therefore expect, because they generally do not interfere with a foreign proceeding themselves, that foreign courts act alike. So, whereas the effects of an antisuit injunction on the jurisdiction of the foreign forum trigger

¹⁸³ cf. Anderson, p. 232; Baer, p. 168; Najarian, p. 984; Raushenbush, p. 1067-1068; Salava, p. 270; Schimek, p. 508; contra: Perry, p. 144-145.

¹⁸⁴ cf. Gau Shan v. Bankers Trust, 956 F.2d 1349, 1355; Burck, p. 488; Salava, p. 269; Schimek, p. 521.

¹⁸⁵ cf. Chesley v. Union Carbide Corporation, 927 F.2d 60, 66; Jhirad v. Ferrandina, 536 F.2d 478, 484-485; Lenenbach, p. 265.

¹⁸⁶ This would also conflict with the "*accepted American policy on the recognition and enforcement of foreign judgments, which presumes that foreign courts are fair*" (cf. Baer, p. 172).

¹⁸⁷ cf. Gau Shan v. Bankers Trust, 956 F.2d 1349, 1355; Baer, p. 165; Maier, p. 304; Salava, p. 269; Schimek, p. 505.

¹⁸⁸ Kerwin, p. 934 however invokes that the restrictive approach does not adequately protect defendants from vexatious litigation.

¹⁸⁹ cf. Laker Airways v. Sabena, 731 F.2d 909, 927; Compagnie des Bauxites de Guinea v. Insurance Company of North America, 651 F.2d 877, 887, Laker Airways v. Pan American World Airways, 559 F.Supp. 1124, 1136-1138.

¹⁹⁰ cf. China Trade v. M.V. Choong, 837 F.2d 33, 36; Laker Airways v. Sabena, 731 F.2d 909, 926-927 and 938-939; Farrell Lines Incorporated v. Columbus Cello-Polly Corporation, 32 F.Supp.2d 118, 131.

concerns of comity, these concerns cannot prevail if the jurisdiction of the domestic forum is endangered by the foreign forum, that is when the foreign forum does not recognize that concurrent proceedings are in general admissible and thus endangers the domestic proceeding and violates the principle of comity itself. Also under the restrictive approach, an antisuit injunction may therefore be issued in such a case, i.e. if this is necessary to protect the jurisdiction of the domestic forum. This is in particular justified when a foreign forum seeks to "*carve out exclusive jurisdiction*" as e.g. by issuing an antisuit injunction enjoining the prosecution of an action before the domestic forum.^{192, 193, 194, 195}

Moreover, the admissibility of concurrent litigations is restricted to cases, where the litigations are actually concurrent. When a judgment is rendered in the domestic court and can be plead as *res iudicata* in the foreign forum, the foreign litigation can be enjoined to protect and earlier judgment of the domestic court and to prevent vexatious re-litigation.¹⁹⁶ *Laker Airways* and *China Trade* do not mention whether the *res-iudicata* effect of the domestic judgment in the foreign court must be assessed based on domestic or foreign law. An earlier Supreme Court decision however suggests that foreign law must be applied to this question.¹⁹⁷ This entails that not all American judgments qualify to be protected by an antisuit injunction. In particular, recognition and enforcement of an American judgment cannot be expected offhandedly, if an American court bases its jurisdiction on one of the long-arm statutes.

41. Moreover, the admissibility of concurrent foreign proceedings is, according to case law, limited to *in personam* proceedings. Concurrent proceedings *in rem* or *quasi in rem* may therefore be enjoined

¹⁹¹ cf. *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products, N.V.*, 310 F.3d 118, 127; *Laker Airways v. Sabena*, 731 F.2d 909, 928-929.

¹⁹² cf. *Gau Shan v. Bankers Trust*, 956 F.2d 1349, 1356; *China Trade v. M.V. Choong*, 837 F.2d 33, 36-37; *Laker Airways v. Sabena*, 731 F.2d 909, 927 and 929-930.

¹⁹³ In *Umbro International, Inc. v. Japanese Professional Football League*, 1997 WL 33378853 1, 3 the fact that the Japanese rules of procedures did not contain sufficient confidentiality protections was deemed to "*render this Court's protection of the parties meaningless*", which justified issuing an antisuit injunction.

¹⁹⁴ A court's jurisdiction is not threatened by the possibility that a ruling of a foreign court might eventually result in the voluntary dismissal of the action before the domestic court (cf. *Gau Shan v. Bankers Trust*, 956 F.2d 1349, 1356).

¹⁹⁵ According to *Laker Airways v. Sabena*, an attempt of a foreign forum to carve out exclusive jurisdiction is also constitutes a violation of public policy (cf. *Laker Airways v. Sabena*, 731 F.2d 909, 939).

¹⁹⁶ cf. *China Trade v. M.V. Choong*, 837 F.2d 33, 36; *Laker Airways v. Sabena*, 731 F.2d 909, 926-928 and 938-939; *Farrell Lines Incorporated v. Columbus Cello-Polly Corporation*, 32 F.Supp.2d 118, 131.

when the concept of *res iudicata* alone does not protect the jurisdiction of the domestic court.¹⁹⁸ The reason for this approach is that the foreign proceeding endangers the domestic jurisdiction in such a case because it might lead to the transfer of the property to the territory of the foreign forum thus depriving the domestic court of its basis for jurisdiction - the existence of the *res* in the domestic forum.¹⁹⁹

42. If one of above described cases is established, an antisuit injunction may be issued. In these cases, issuing an antisuit injunction may be described as a defensive measure,²⁰⁰ necessary for the "*United States courts [to] control access to their forums*".²⁰¹

c) Public Policy

43. The second ground to enjoin a foreign proceeding under the restrictive approach is (i) that the foreign action was initiated to evade an important public policy of the domestic forum, and (ii) that there is reason to believe that the foreign court will not implement this policy.²⁰² Seeking slight advantages in the substantive or procedural law of the foreign forum does, on the other hand, not suffice.²⁰³ Moreover, a high-level public policy must be concerned.²⁰⁴ This is deemed justified because already the standard for refusing to enforce foreign judgments on public-policy grounds is strict and an antisuit injunction is an even greater interference with the judicial system of the foreign forum, and thus with comity.²⁰⁵ The threshold must therefore be even higher for antisuit injunctions. So, only the evasion of the most

¹⁹⁷ cf. *Kline v. Burke Const. Co.*, 260 U.S. 226, 230.

¹⁹⁸ cf. *Mandevill v. Canterbury*, 318 U.S. 47, 48-49; *Kline v. Burke Construction Co.*, 260 U.S. 226, 230; *China Trade v. M.V. Choong*, 837 F.2d 33, 36; *Gau Shan v. Bankers Trust*, 956 F.2d 1349, 1356.

¹⁹⁹ comp. *Burck*, p. 480.

²⁰⁰ cf. *Laker Airways v. Sabena*, 731 F.2d 909, 915; comp. *James v. Grand Trunk Western Railroad Company*, 14 Ill.2d 356, 371-372.

²⁰¹ cf. *Laker Airways v. Sabena*, 731 F.2d 909, 936/937.

²⁰² cf. *Hartley*, p. 497; *Bermann*, p. 623.

²⁰³ cf. *Paramedics v. GE Medical Systems*, 369 F.3d 645, 654; *Gau Shan v. Bankers Trust*, 956 F.2d 1349, 1357; *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1214 ; *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36; *Laker Airways v. Sabena*, 731 F.2d 909, 931-932.

²⁰⁴ cf. *Laker Airways v. Sabena*, 731 F.2d 909, 930-93.

²⁰⁵ cf. *Gau Shan v. Bankers Trust*, 956 F.2d 1349, 1355; *Schimek*, p. 516.

compelling public policies outweigh concerns of comity when it comes to issuing antisuit injunctions.^{206,}

207

D. Comparison of the Two Approaches

44. What distinguishes the two approaches is essentially that reasons of judicial economy or prevention of delays, additional expenses and inconvenience are sufficient to enjoin a foreign proceeding under the liberal approach. Yet it must be expected that any concurrent litigation entails these disadvantages, so that actually any concurrent, foreign proceeding involving the same parties and issues is enjoined under the liberal approach. This does not seem compatible with comity, and contradicts the starting point also taken by the courts applying the liberal standard, i.e. that an antisuit injunction should, in order to implement comity, be issued only with restraint,²⁰⁸ as, in the greater picture, injunctive relief should be used "*sparingly, and only in a clear case*".²⁰⁹

45. Also, the liberal approach includes factors that are more appropriately addressed in a motion to dismiss the domestic action based on *forum non conveniens*.²¹⁰ However, in contrast to a decision on such a motion, where the court is limited to declining its own jurisdiction, a decision to enjoin a foreign proceeding effectively destroys the jurisdiction of the foreign forum. Given the different effects of these two jurisdiction-related motions, it is appropriate to decide them on different factors. A decision to decline the jurisdiction of the foreign forum based on the factors that are sufficient only under the liberal approach should therefore be made by the foreign forum,²¹¹ and arguments of vexatiousness and the like should only be addressed by the domestic court for a decision on a motion to dismiss based on

²⁰⁶ cf. *idem*, p. 1358.

²⁰⁷ On an international level, the public policy of a state deserves less weight than those of the nation (cf. *Gau Shan v. Bankers Trust*, 956 F.2d 1349, 1358. In this case, the availability of treble damages under Tennessee law was not held to be a public policy so important that it would justify an antisuit injunction).

²⁰⁸ cf. *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855.

²⁰⁹ *Rizzo v. Goode*, 423 U.S. 362, 378.

²¹⁰ comp. para. 10 hereinabove.

²¹¹ *Baer*, p. 172-174; comp. the dissenting opinion in *Kaepa, Inc. v. Achilles Corporation*, 76 F.3d 624, 632; *Raushenbush*, p. 1050.

forum non conveniens.²¹²

46. An argument submitted in support of the liberal approach is that antisuit injunctions must remain a viable option to ensure the integrity of a United States judgment and the interests of the United States litigants as long as foreign courts do not provide them with a "*reasonably predictable exequatur and res judicata procedure*".²¹³ This reasoning does, however, not support the liberal approach as it essentially aims at protecting domestic judgments, which is also a reason to enjoin foreign proceedings under the restrictive approach.²¹⁴

47. It is also invoked that the restrictive approach does not adequately protect a party against vexatious litigation and that antisuit injunctions should be available when a concurrent action is filed in bad faith.^{215, 216} These are valid arguments that deserve consideration. However, they are chiefly about the private interests of one of the parties. Such interests can be protected by both *fora*. Arguing that the foreign forum would not sanction bad-faith behavior would run counter to the principle of comity and can therefore not be a ground to issue an antisuit injunction,²¹⁷ unless (i) a public policy of the forum is violated by the foreign forum and (ii) a request to dismiss the foreign action has been dismissed by the foreign court. Moreover, beginning a litigation in a second forum does not amount to the degree of vexatiousness that is by itself considered to be a reason to enjoin a present or future litigation;²¹⁸ unlike in these cases, the party that the applicant wants to prevent from litigating does not file several similar or identical suits simply to harass the applicant, but one suit in a foreign forum, which may be understood as a reaction to the suit of the complainant.

E. Summary

48. Some courts follow a liberal approach, some a restrictive approach when confronted with a

²¹² cf. *Gau Shan v. Bankers Trust*, 956 F.2d 1349, 1355; *Laker Airways v. Sabena*, 731 F.2d 909, 928. So, a more decisive showing of inconvenience ought to be required in the anti-suit context than in the forum-non-conveniens context (Bermann, p. 614).

²¹³ cf. Perry, p. 150.

²¹⁴ comp. para. 40 hereinabove.

²¹⁵ For the latter case, see Philipps, p. 2011.

²¹⁶ cf. Kerwin, p. 934; comp. *Laker Airways v. Sabena*, 731 F.2d 909, 928 (fn. 57).

²¹⁷ comp. para. 38 hereinabove.

motion to enjoin a concurrent, foreign proceeding. Neither approach describes the contents of comity, but defines certain equitable factors in the presence of which comity is assumed to be outweighed. Under the liberal approach, the factors are such that any concurrent foreign proceeding can potentially be enjoined whereas the threshold under the restrictive approach is hard to cross. It is submitted, that, for the reasons mentioned in paras. 44 et seq. hereinabove, the restrictive approach better fits into the American legal system, in particular because the liberal approach does not adequately consider the existence and significance of the concept of comity. Part IV will now analyze whether this is a perfect fit, or whether certain adjustments are appropriate.

IV. MAKING AN ALTERNATIVE PICTURE

A. Inter-Sovereign Test

49. There is no international treaty or customary international law, that would prevent an American court from enjoining foreign proceedings.²¹⁹ Rather it is chiefly the domestic principle of comity that counsels restraint. While the restrictive approach takes comity into account, some decisions under this approach raise the concern that it should be applied with more formalistic accuracy in order to embed the restrictive approach more precisely into American law: The equitable factors used as tie-breakers for the comity-test, protection of the jurisdiction of the court or of an important public policy of the forum, do, firsthand, protect the integrity of the domestic judicial system itself and only secondhand the complainant,; the domestic court wants its jurisdiction to be protected and its public policy to be respected.²²⁰ Of course the applicant pursues his own interests by invoking that the jurisdiction of the domestic forum must be protected: He intends to escape the inconvenience of participating in a foreign litigation or an unfavorable law there applicable. This kind of inconvenience itself does, however, not suffice to issue an antisuit injunction under the restrictive approach, so that it should not be considered, when examining whose interests are protected by issuing an antisuit injunction by these two equitable

²¹⁸ comp. para. 3(i) hereinabove.

²¹⁹ cf. Lenenbach, p. 294. Given the long tradition of the common law countries, a custom precluding antisuit injunctions can hardly be assumed (cf. *idem*).

²²⁰ comp. fn. 64 hereinabove.

factors, the protection of the jurisdiction or of the public policy of the forum. It follows that the restrictive approach highlights the interests of the judicial system of the forum, but does not expressly refer to the interests of the parties.

50. Considering the interests of the two judicial systems that are involved is of course appropriate to assess whether comity is outweighed as described in paras. 38 et seq. hereinabove. On the other hand, as for any injunction, the concerns of the parties should be considered: Antisuit injunctions are a subspecies of equitable relief, which aims to establish fairness in the particular case,²²¹ which cannot be done without also addressing the interests of the parties. So, it is suggested to apply a two-step test when a motion to enjoin a foreign litigation is filed, the first step being an inter-sovereign test, by examining whether comity is outweighed, the second step being an inter-parties test, examining whether the interests of the applicant are such that they merit an antisuit injunction.²²²

B. Inter-Parties Test

51. It is submitted that the inter-parties test should be performed like the regular test for injunctions.²²³ This is not regularly done,²²⁴ but in line with several authorities.²²⁵ This brings antisuit

²²¹ comp. para. 14 hereinabove.

²²² An interesting proposal suggests to not always apply forum law to decide whether an antisuit injunction should be issued, but to take comity into account by determining, based on conflict-of-laws principles, the equities of which country should decide whether an antisuit injunction should be issued (comp. Kerwin, p. 940 et seq.). The fact that principles of equity and antisuit injunctions are not available in all jurisdictions makes this approach hard to implement and would for the same posture lead to different results depending on what foreign sovereign is involved if foreign equity is applicable; moreover, it seems *prima facie* justified to assume that whether a court should issue an antisuit injunction is - like its opposite, a stay or dismissal of the action - a procedural question to which forum law should apply.

²²³ cf. Chavier, p. 262-263; comp. Sherman, p. 927. According to *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products, N.V.*, 310 F.3d 118, 129, the criteria of protection-of-jurisdiction and public-policy are more restrictive than the general requirements for injunctions. This is, however, no reason not to check whether these general requirements are actually satisfied.

²²⁴ comp. *Paramedics v. GE Medical Systems*, 369 F.3d 645, 652; *Computer Associates International, Inc. v. Altai, Inc.* 126 F.3d 365, 372; *China Trade v. M.V. Choong*, 837 F.2d 33. Neither were these criteria considered by the District Court which decided on the motion in the latter case and whose decision was overturned on appeal (cf. *China Trade and Development Corp. v. M.V. Chong Yong*, 1987 WL 13732; comp. also *Farrell Lines, Inc. v. Columbus Cello-Poly, Corp.* 32 F.Supp.2d 118; *Smoothline, Ltd. v. North American Foreign Trading Corp.*, 2002 WL 273301 1,6). In a decision of a District Court in the Second Circuit rendered after *China Trade*, the criteria of irreparable harm and likelihood of success were however referred to (cf. *International Fashion Products, B.V. v. Calvin Klein, Inc.*, 1995 WL 92321 1).

injunctions in line with other injunctions while considering the peculiarities of antisuit injunctions, i.e. that they have jurisdictional aspects and that therefore the interests of the domestic and the foreign sovereign themselves are involved, by the inter-sovereign test, and it allows to consider some of the concerns raised by doctrine. For instance, several scholars submit that the applicant should first try to stop the proceeding in the foreign court before applying for an antisuit injunction in the domestic court,²²⁶ in order to ensure that a foreign proceeding is only interfered with if necessary. This concern is implemented by only issuing antisuit injunctions if the harm is not merely speculative, which is one of the conditions for regular injunctive relief.²²⁷

52. An adequate remedy-at-law exists when the foreign forum provides a legal instrument to achieve the result the applicant seeks to achieve with the antisuit injunction in the domestic forum. A remedy that might for instance exclude an antisuit injunction is the availability of a defense of *lis pendens* in the foreign forum.²²⁸

53. The Courts of Appeals for the Fifth Circuit submits that the criterion of likelihood of success,²²⁹ when an antisuit injunction enjoining a concurrent foreign proceeding is sought, has no meaning independent of whether the applicant has "*demonstrated that the factors specific to an antisuit*

²²⁵ cf. e.g. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357, 366; *Casa Marie, Inc. v. Superior Court of Puerto Rico For Dist. Of Arecibo*, 988 F.2d 252, 263; *U.S. v. Rural Elec. Convenience Co-op. Co.*, 922 F.2d 429, 438-439; *Specialty Bakeries, Inc. v. Robhal, Inc.*, 961 F.Supp. 822, 829; *United Offshore Company v. Southern Deepwater Pipeline Company*, 899 F.2d 405, 408; *American Horse Protection Association v. Lyng*, 690 F. Supp. 40, 42; *National Trust Company v. American Home Assurance Company*, 1987 WL 5837 1, 5. In an earlier decision the Court of Appeals for the Federal Circuit had however pointed out that the general criteria are of secondary nature and that the primary factor for the decision whether to grant an antisuit injunction is the convenience of the parties and the courts (cf. *Columbia Plaza Corp. v. Security National Bank*, 525 F.2d 620). According to the Supreme Court, it must be established that no adequate remedy at law exists and that the applicant faces irreparable harm (cf. *Northern Californian Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306, 1306-1307).

²²⁶ comp. Baer, p. 168 and 178-179; Bell, p. 208; Bermann, p. 603 and 622. For instance based on the concepts of estoppel, waiver, *lis pendens*, *res iudicata* or *forum non conveniens*. comp. *Asset Allocation and Management v. Western Employers Insurance Company*, 566, 573).

²²⁷ cf. *Energy Capital v. Caribbean Trading and Fidelity Corporation*, 1996 WL 157498 1, 10; *American Jurisprudence 2d, Injunctions § 33*; comp. *Casa Marie, Inc. v. Superior Court of Puerto Rico For Dist. of Arecibo*, 988 F.2d 252, 263.

²²⁸ cf. *Northern Californian Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306.

²²⁹ For permanent injunctions success must be established (comp. fn. 53 hereinabove) .

injunction weigh in favor of granting that injunction".²³⁰ The Court of Appeals for the Federal District agrees that the criterion of success on the merits does "*not apply*" to motions to enjoin the prosecution of concurrent litigation, but that "*[i]nstead*" it must be examined whether the issues and the parties are such that the disposition of one case would be dispositive of the other.^{231, 232} It is submitted here, that antisuit injunctions concern, at the end of the day, jurisdictional issues.²³³ Therefore, the merits of the case cannot be pertinent for the assessment whether the "merits" of the request for an antisuit injunction are established: The question thus remains what "success on the merits" relates to for an antisuit injunction. In line with other injunctions, the object of the injunction must be pertinent. If e.g. an order for specific performance of a contract is applied for, the contractual right on which the application is based must be established. Here, the object is whether the parties shall be restricted from access to a foreign court. The application for an antisuit injunction must in other words pass the inter-sovereign test. What the existence of a contractual right is for an injunction ordering the specific performance of the contract, is the comity threshold for an international antisuit injunction. Without a showing that the applicant has satisfied this condition, no antisuit injunction will be issued, irrespective of whether the court follows the liberal or the restrictive approach. The opinion of the Court of Appeals for the Fifth Circuit is therefore convincing. It is appropriate to include the comity threshold in the test whether success on the merits is established. Depending on whether preliminary or permanent relief is sought,

²³⁰ cf. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357, 362; *International Fashion Products, B.V. v. Calvin Klein, Inc.*, 1995 WL 92321 1,2.

²³¹ cf. *Katz v. Lear Siegler*, 909 F.2d 1459, 1463; *China Trade v. M.V. Choong*, 837 F.2d 33, 36; *Victor v. Ortho Organizers, Inc.*, 932 F.Supp. 261, 263; *Smoothline Ltd. and Greatsino Electronic Ltd. v. North American Foreign Trading Corp.*, 2002 WL 273301, 6; Baer, p. 175-176. In *Laker Airways v. Pan American World Airways*, 559 F.Supp. 1124, 1129 the United States District Court for the District of Columbia pointed out that it had to examine whether there was likelihood of success on the merits of the "*permanent injunction ... and the relative balance of injuries and the public interest*". The court held that "*it is likely that plaintiff will prevail on the merits of its request for a permanent injunction*" (cf. *idem* at 1136); exactly what part of its reasoning lead to this conclusion is not determinable. The decision was upheld on appeal, however without addressing the individual prerequisites for issuing an injunction (cf. *Laker Airways v. Sabena*, 731 F.2d 909).

²³² comp. para. 36 hereinabove.

²³³ comp. para. 5 hereinabove.

a showing of likelihood of success or of actual success is necessary.²³⁴

54. The requirement of irreparable harm is the adequate place to examine whether one of the equitable criteria mentioned in para. 34(iii) to (v) is satisfied. Concurrent proceedings entail that the plaintiff is forced to litigate in two sovereigns, possibly is subject to inconsistent rulings and faces additional expenses and delays.²³⁵ This is an inconvenience that must generally be considered to constitute irreparable harm. What constitutes harm is thus the result of the duplication of the action, i.e. that the foreign and the domestic forum essentially deal with the same issues. If they do not, there are no additional expenses, no race to judgment etc. So, an antisuit injunction should only be issued if the domestic action is dispositive of the foreign action. Disposition should however not be narrowed to actions between the same parties and concerning the same issues. If the domestic action concerns an issue that is a preliminary issue in the foreign proceeding, this should be encompassed under this heading as well.²³⁶ Moreover, the harm must be irreparable, and as long as a motion to dismiss the foreign action is not dismissed in the foreign court, an assertion of irreparable harm is merely speculative, and an antisuit injunction should not be issued.^{237, 238} If the foreign court dismisses an objection to its jurisdiction, factors like the possibility to recover damages and attorneys' fees may be taken into account when examining whether the foreign action actually constitutes irreparable harm.

55. In a last step, the public and private interests, which are supported and impaired by an antisuit

²³⁴ comp. fn. 53 hereinabove.

²³⁵ cf. *American Horse Protection v. Lyng*, 690 F.Supp. 40, 44; *International Fashion Products, B.V. v. Calvin Klein, Inc.*, 1995 WL 92321, 1.

²³⁶ If the proceeding before the domestic court concerns an issue that is preliminary for a proceeding in the foreign court, it faces a dilemma when an antisuit injunction is requested before it rules on the preliminary issue: Supposing that it will dismiss the case, it can enjoin the foreign proceeding based on an (anticipatory) protection of the domestic judgment; its decision is then also dispositive of the foreign proceeding. Supposing that it will uphold the requests filed, its decision would not be dispositive of the foreign action, but be the starting point for that action. While the first possible outcome satisfies the comity-threshold under the restrictive approach, the second does not. It is submitted here, however, that a court which faces such a case can in fact enjoin the domestic proceeding as the two actions are not truly concurrent, but in order. Moreover, a later protection of the domestic judgment might otherwise be precluded.

²³⁷ comp. *Energy Capital v. Caribbean Trading and Fidelity Corporation*, 1996 WL 157498 1, 10.

²³⁸ The harm that is caused by a second litigation - additional cost, delay etc. - is under the restrictive approach, which is the basis of the analysis under Title IV not a harm that qualifies as irreparable harm.

injunction must be weighed. As to the public interests of the foreign forum, it is submitted that they presumably do not outweigh those of the domestic forum if the comity threshold is taken under the restrictive approach.²³⁹ When assessing the balance of private interests, it must be examined whether the proceedings before the domestic or the foreign court better live up to the interests of both parties under the equitable factors listed in para. 35(iii) - (iv),²⁴⁰ which analysis is akin to that to be done when a motion to dismiss based on *forum non conveniens* is filed,²⁴¹ and which leaves some room for discretion to the domestic court.²⁴² Indeed, like for regular injunctions, it is in the discretion of the court to grant antisuit injunctions.²⁴³ Further to the equitable factors mentioned hereinabove, the court might also take into account where the award will be enforced and whether its award and/or that of the foreign forum can be enforced there. To perform this balancing test, some courts seem to take the available remedies and thus the substantive law into account.²⁴⁴ Here, it is submitted, that this should be avoided. Of course, a public policy of the forum may be considered to establish whether the comity threshold is taken. However, this is to ensure that cases that allegedly concern an important public policy of the forum are not dragged into a foreign forum. But the court should not go further and look behind the curtain when it comes to a balancing of the interests of the parties. For the balancing test, also the timing of the concurrent proceedings may be considered: An antisuit injunction may be more

²³⁹ However, if both in the foreign and in the domestic forum public policy concerns are involved, requiring the parties to bring suit in the respective forum, it would be adequate, but difficult to weigh the policies of both *for a* cf. *Faberge International, Inc. v. Di Pino*, 109 A.D.2d 235, 240), whereas a forum can hardly be blamed for implementing its own public policy as a tie-breaker. Comp., e.g., *Laker Airways v. Pan American*, in which case antitrust issues were dealt with in both *fora*, and where the court of first instance held that, since antitrust issues affecting the American market were involved, there was a strong public interest in having the action decided in the United States (cf. *Laker Airways v. Pan American World Airways*, 559 F.Supp. 1124, 1138).

²⁴⁰ cf. *Allendale Mutual Insurance Company v. Bull Data, Inc.*, 10 F.3d 425, 430; *International Fashion Products, B.V. v. Calvin Klein, Inc.*, 1995 WL 92321 1,2; Baer, p. 176-178.

²⁴¹ However, the plaintiff's choice of forum cannot have any impact on this decision as proceedings were initiated by both parties in the different *fora*.

²⁴² In particular it is not, according to these equitable factors, decisive which action was brought first (cf. *Columbia Plaza Corporation v. Security National Bank*, 525 F.2d 620, 627).

²⁴³ cf. *Philp v. Macri*, 261 F.2d 945, 947.

²⁴⁴ In *Laker Airways v. Pan American World Airways*, 559 F.Supp. 1124, the court examined what remedies are available under British and American law in order to determine in whose favor the balance-of-inconvenience test tips.

appropriate when the action was brought first in the domestic forum,²⁴⁵ in particular when substantial time has elapsed between the commencement of the two actions.²⁴⁶

²⁴⁵ cf. *Victor v. Ortho Organizers, Inc.*, 932 F.Supp. 261, 263.

²⁴⁶ cf. *Laker Airways v. Sabena*, 731 F.2d 909, 929.

C. Summary

56. The *Karaha Bodas* court pointed out that "*the suitability of such relief ultimately depends on considerations unique to antisuit injunctions*",²⁴⁷ and did not express itself as to the "*extent the traditional preliminary injunction test is appropriate*".²⁴⁸ The approach described in paras. 49 et seq. hereinabove considers the uniqueness of antisuit injunctions in the inter-sovereign test, which is performed on the standards of the restrictive approach. And the inter-parties test has the benefit that conditions that were developed to decide whether an antisuit injunction should be issued, like the one that the domestic action must be dispositive of the foreign action, are integrated into an already existing pattern.

57. The two-step test here suggested thus aims to highlight the system in which antisuit injunctions are embedded and to reflect the peculiarity of antisuit injunctions, that they protect the interests of one of the parties, like other injunctions, and at the same time those of the domestic forum itself - the protection of its jurisdiction and public policy. It also harmonizes antisuit injunctions with regular injunctions by examining whether the regular conditions for injunctions are satisfied in the second step of the test. Moreover, while recognizing that American law allows to issue antisuit injunctions, this test, by its first step, implements the proposition that antisuit injunctions should be issued with more restraint than ordinary injunctions by imposing extra-conditions,²⁴⁹ and only in sparingly and "*in very special circumstances*".²⁵⁰ Also, this approach takes into considerations that the effects of an antisuit injunction exceed those of a decision that the domestic forum is *non conveniens*, as the latter does not affect a foreign sovereign, i.e. by applying a higher standard for the first case, this approach puts these two

²⁴⁷ That is, a court is required to balance domestic judicial interests against concerns of international comity (*Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357, 366). The interests of two judicial

²⁴⁸ cf. *idem*, p. 364.

²⁴⁹ comp. Philipps, p. 2011.

²⁵⁰ cf. *Paramedics v. GE Medical Systems*, 369 F.3d 645, 652, *China Trade v. M.V. Choong*, 837 F.2d 33, 36; *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855; *Philp v. Macri*, 269 F.2d 945, 947; *Farrell Lines Incorporated v. Columbus Cello-Polly Corporation*, 32 F.Supp.2d 118, 129; *Smoothline Ltd. and Greatsino Electronic Ltd. v. North American Foreign Trading Corp.*, 2002 WL 273301, 6; *In re Laitasalo*, 196 B.R. 913, 920; *American Jurisprudence 2d, Injunctions*, § 195.

tools into proper proportion. Moreover, this approach also considers that comity concerns are more compelling in a international than in a domestic context,²⁵¹ as is not to be expected that antisuit injunctions are more readily available under this approach than under the Antisuit Injunction Act. The main difference between the restrictive approach and the approach here submitted is that it is suggested to include a quasi *forum-non-conveniens* test.

V. ANTISUIT INJUNCTIONS AND INTERNATIONAL COMMERCIAL ARBITRATION

A. Introduction

58. This paper has so far dealt with concurrent litigations. This part will analyze whether, and if so under what conditions, antisuit injunctions may be issued by an American court in the context of international arbitrations. Be it that the American court is requested to enjoin (i) a foreign litigation to protect an arbitration, which is concurrent to the foreign litigation, as in *Paramedics*,²⁵² or (ii) an arbitration, which is concurrent to a domestic litigation, as in *Uzan*.²⁵³ Moreover, it will be examined whether a court can enjoin a party from seeking enforcement of an arbitration award in a foreign forum.

59. A fourth alternative, which is not further addressed hereinafter because it was convincingly addressed in *Karaha Bodas*,²⁵⁴ is that an American court is at the same time requested to enforce a foreign arbitral award and to enjoin a foreign set-aside proceeding. The court examined the availability of such an injunction based on the New York Convention²⁵⁵ and concluded that a foreign set-aside proceeding (i) does not interfere with a domestic enforcement proceeding because the Convention separates the roles of the courts of the country of origin on the one hand, and on those in all other countries on the other hand, which are limited to decide on the enforcement of the award,²⁵⁶ and that (ii)

²⁵¹ cf. *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1213; contra: *Allendale Mutual Insurance Company v. Bull Data, Inc.*, 10 aF.3d 425, 431; *Mutual Service Insurance v. Frit Industries, Inc.*, 805 F.Supp. 919, 923.

²⁵² cf. *Paramedics v. GE Medical Systems*, 369 F.3d 645

²⁵³ cf. *Motorola Credit Corporation v. Uzan*, 2002 U.S. Dist. Lexis 19632, 9-12.

²⁵⁴ cf. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357.

²⁵⁵ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "Convention").

²⁵⁶ cf. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357, 372-373.

it therefore does not attack the jurisdiction of the enforcement court. An antisuit injunction as requested by the party that prevailed in the arbitration would therefore be at odds with the system created by the Convention. The approach taken in *Karaha Bodas*, keeping the tasks of the different countries apart, which are to some degree involved in the arbitration, will also provide a starting point to address the other postures described in para. 58 hereinabove.

B. Antisuit Injunctions in Support of Arbitration Proceedings

a) Introduction

60. A situation may arise where one party brings suit in a foreign forum, while the other party wants to arbitrate the dispute.²⁵⁷ The latter party might file a motion to compel arbitration based on section 206 of the Federal Arbitration Act²⁵⁸ combined with a motion to enjoin the foreign litigation, which was allegedly initiated in violation of an arbitration agreement. While the Convention as implemented by the Federal Arbitration Act provides that the first motion must be granted²⁵⁹ if arbitrability is established,²⁶⁰ it is silent as to the second motion. So, should a domestic court, if it is of the opinion that the parties must arbitrate their dispute, guard its order to compel arbitration with an injunction enjoining the foreign litigation?²⁶¹ This would, *prima facie*, implement the directions of the Convention to refer the parties to arbitration if there is an arbitration agreement and might be the only way to ensure that the parties will actually arbitrate the dispute.

b) Forum-Selection Clauses

61. Like arbitration agreements, forum-selection clauses contractually determine the jurisdiction for

²⁵⁷ Although this paper focuses on foreign litigations, it is mentioned for the sake of completeness, that federal courts have the authority to grant an injunction to stay state court proceedings in aid of an order to compel arbitration thus implementing the federal policy favoring arbitration expressed in the Federal Arbitration Act (cf. *Central Reserve Life Insurance v. Marelllo*, 2001 WL 41129 1,2).

²⁵⁸ 9 U.S.C.

²⁵⁹ Other signatories interpret the phrase "*refer to arbitration*" to be limited to an obligation of the courts to stay proceedings before them if an arbitration agreement is invoked, but not an obligation to compel arbitration as provided for in section 206 of the Federal Arbitration Act (cf. van den Berg, p. 129; Born, p. 296; Weigand, N 44 to Part 1).

²⁶⁰ cf. Art. II(3) of the Convention.

a defined legal relationship. Arbitration agreements are under this aspect a specialized kind of forum-selection clauses.²⁶² It is therefore appropriate to also consider jurisprudence and doctrine dealing with forum-selection clauses for the analysis mentioned in para. 58 hereinabove. The pertinent case law suggests that the enforcement of forum-selection clauses is a public policy allowing courts to issue antisuit injunctions in order to make sure that the dispute is litigated in the forum that was agreed upon.^{263, 264, 265} So, according to case law, the existence of a forum-selection clause has itself the effect that a foreign litigation can be enjoined, so that the domestic court can force its interpretation of jurisdiction on the foreign court²⁶⁶ without examining whether an antisuit injunction is necessary to protect the jurisdiction or a public policy of the forum. The existence of a forum selection clause might therefore outright trigger an antisuit injunction.

62. The other side of the coin is that a court must recognize a forum-selection clause and dismiss the case if it is applied to in violation of a forum-selection clause unless enforcement would clearly be unjust and unreasonable; proceeding otherwise would reflect something of a provincial attitude regarding the fairness of other tribunals.²⁶⁷ The reason for this deference is, according to the Supreme Court, that the expansion of American business would hardly be encouraged if "*notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our*

²⁶¹ comp. fn. 58 hereinabove.

²⁶² cf. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519.

²⁶³ cf. *Farrell Lines, Inc. v. Columbus Cello-Poly, Corp.*, 32 F.Supp.2d 118, 130; *International Fashion Products, B.V. v. Calvin Klein, Inc.*, 1995 WL 92321 1,2. Interestingly, the forum selection clause was not addressed in *Kaepa, Inc. v. Achilles Corporation*, 76 F.3d 624.

²⁶⁴ Also, the vindication of an obligation not to sue may justify an antisuit injunction (cf. *Bermann*, p. 608 and 618-619).

²⁶⁵ comp. *Lenenbach*, p. 285, submitting that (i) there is a strong need for the enforcement of forum-selection clauses, so that the non-recognition of a judgment that was rendered in violation of a forum-selection clause will not suffice if the judgment can be enforced in a country where the violation of the forum-selection clause will be accepted (cf. *idem*, p. 285) and that (ii) when the parties have voluntarily submitted themselves not to sue in a foreign forum, considerations of comity are less important, and an antisuit injunction should be issued more readily when the foreign forum does not accept the selection of the domestic forum (cf. *idem*, p. 285-286 and 290). The basis for an antisuit injunction is then that there is a contractual right not to sue abroad stemming out of the forum-selection clause (cf. *idem*, p. 288-289).

²⁶⁶ comp. *Lenenbach*, p. 23.

²⁶⁷ cf. *The Bremen v. Zapata Off-Shore, Co.*, 407 U.S. 1, 12-13 and 15; comp *Lenenbach*, p. 285.

courts".²⁶⁸ Like the concept of comity, this approach is therefore not without self-interest.

c) American Jurisprudence

63. The issue which is at stake here has recently been addressed in *Paramedics*.²⁶⁹ In this case, the Court of Appeals for the Second Circuit proceeded as follows: It (i) first determined whether the case before it was dispositive of the foreign litigation and, holding that it was, (ii) analyzed whether comity concerns were outweighed under the restrictive approach.²⁷⁰ According to *Paramedics*, the first condition is satisfied if the parties are substantially similar²⁷¹ and the dispute is arbitrable. Then, the dispute is reserved to arbitration, so that the motion to compel arbitration must be granted. If so, the case cannot be heard by the foreign forum. Insofar the domestic decision on the motion to compel arbitration is considered to dispose of the foreign litigation.²⁷² Regarding the second condition, the *Paramedics* court quoted *Laker Airways*²⁷³ and held that enjoining the foreign action was appropriate to protect the judgment compelling the parties to arbitrate.²⁷⁴

64. Whether an attempt to sidestep an arbitration agreement is for itself a sufficient basis for an antisuit injunction was not decided in *Paramedics*.²⁷⁵ In *Smoothline*, an earlier decision of the District Court for the Southern District of New York, this had been answered in the affirmative. The *Smoothline* court held that the American public policy favoring arbitration, which applies with particular force in the international context,²⁷⁶ is a sufficient basis to enjoin a foreign proceeding if it is established that the

²⁶⁸ cf. *idem*, p. 9-10.

²⁶⁹ cf. *Paramedics v. GE Medical Systems*, 369 F.3d 645.

²⁷⁰ cf. *idem*, p. 652; *Smoothline, Ltd. v. North American Foreign Trading Corp.*, 2002 WL 273301 1,6.

²⁷¹ cf. *Paramedics v. GE Medical Systems*, 369 F.3d 645, 652. So, it is sufficient that the "*real part[ies] in interest*" are bound by the arbitration agreement, so that even if a third party is named as party in the court proceedings arbitration can be compelled and the court proceedings be enjoined (cf. *Doctor's Associates, Inc. v. Hollingsworth*, 949 F.Supp 77, 85), respectively that the arbitration agreement is binding on non-signatories (cf. *in re Laitsalo* 196 B.R. 913, 917-920).

²⁷² cf. *Paramedics v. GE Medical Systems*, 369 F.3d 645, 653.

²⁷³ "*There is less justification for permitting a second action after a prior court has reached a judgment on the same issues*" (*Laker Airways v. Sabena*, 731 F.2d 909, 928 (fn. 53)).

²⁷⁴ cf. *Paramedics v. GE Medical Systems*, 369 F.3d 645, 654.

²⁷⁵ cf. *idem*, p. 654. The issue was left open because the court was of the opinion that an antisuit injunction should already be issued to protect the jurisdiction of the court.

²⁷⁶ cf. *idem*, p. 654.

subject-matter should be arbitrated.²⁷⁷ According to case law, the mere existence of both arbitration agreements and forum-selection clauses may thus entail that a foreign litigation is enjoined. This may be explained by the fact that the enforcement of these agreements is supposed to be compatible with the goals of equity and necessary because their special nature makes the mere avoiding of damages inadequate.²⁷⁸

d) Discussion

aa) Introduction

65. *In Paramedics*,²⁷⁹ the Court of Appeals for the Second Circuit limited its analysis whether or not to issue an antisuit injunction to a purely domestic perspective. It did neither address the Convention nor whether the foreign forum had already expressed its opinion on the arbitrability of the dispute, and the antisuit injunction was granted to implement the domestic decision to compel arbitration. Although the court applied the restrictive approach, whose starting point is the admissibility of concurrent litigation, it transpires that the starting point in *Paramedics* was just the other way round: That an arbitral tribunal and a court cannot have concurrent jurisdiction,²⁸⁰ and not that concurrent proceedings are in general admissible.²⁸¹ So, the finding of the *Paramedics* court that there was an agreement to arbitrate the dispute which was pending in the foreign proceeding pushed the applicant over the comity-threshold. This is consistent with the opinion expressed by one line of doctrine, which holds that comity weighs less heavily if the parties entered into an agreement to regulate the jurisdiction of their possible disputes.²⁸²

²⁷⁷ cf. *Smoothline, Ltd. v. North American Foreign Trading Corp.*, 2002 WL 273301 1,6. In a subsequent decision of the same court, the same question was, however, impliedly answered in the negative: Since an arbitration between the parties was already pending, no order to compel arbitration could be issued, so that an antisuit injunction to guard such an order was not available either (cf. *Laif X v. Axtel, S.A.*, 310 F.Supp.2d 578, 581). In the latter case, the existence of an arbitration agreement thus did not lead to an antisuit injunction.

²⁷⁸ comp. para. 17 hereinabove.

²⁷⁹ cf. *Paramedics v. GE Medical Systems*, 369 F.3d 645.

²⁸⁰ cf. *General Electric v. Deutz AG*, 129 F.Supp.2d 776, 788.

²⁸¹ comp. para. 33 hereinabove.

²⁸² cf. *Bermann*, p. 623; *Lenenbach*, p. 290.

66. The following discussion tries to examine whether the approach and the outcome of *Paramedics* are convincing. In particular, it will be examined (i) whether Convention has an impact on the solution of this kind of cases, and (ii) whether the significance that the contractual nature of the arbitration agreement is given²⁸³ is appropriate.

bb) Impact of the Convention

67. The Convention was incorporated into American law as the second chapter of the Federal Arbitration Act.²⁸⁴ Further to provisions on the enforcement of arbitral awards, the Convention also contains provisions on the relationship between domestic litigations and international arbitrations, in particular in Art. II(3), according to which provision the parties must be referred to arbitration under certain conditions. So, an analysis of whether antisuit injunctions may be issued in support of arbitrations would not be complete without taking the Convention into account.

68. The Convention does neither expressly limits nor recognizes the authority of a federal court to issue antisuit injunctions.²⁸⁵ Also, that India was the only nation which signed the Convention in 1958 and whose courts issue antisuit injunctions does not *per se* entail that the signatories meant, absent a provision allowing such injunctions, to exclude their issuance. It must rather be assumed that antisuit injunctions were not an issue when negotiating the Convention. It must therefore be established whether the spirit and the features of the Convention have an impact on the issue at stake. The mere absence of express wording itself cannot be a satisfying reasoning for either result.

69. One of the goals of the Convention is to promote the enforcement of arbitration agreements.²⁸⁶ Obviously, an antisuit injunction enjoining a foreign litigation commenced in disrespect of an arbitration agreement is a powerful means to that effect. Looking at the issue from another angle, raises, however, the some doubts whether this is actually the case: The reason why arbitration agreements must be

²⁸³ comp. para. 63 hereinabove *in fine*.

²⁸⁴ 9 U.S.C. § 201 et seq.

²⁸⁵ Putting the stress on the absence of an express provision precluding American courts from issuing antisuit injunctions, the Court of Appeals for the Fifth Circuit concludes that the Convention does not affect the authority of American courts to enjoin foreign proceedings (cf. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak, 335 F.3d 357, 365*).

enforced is to facilitate international business transactions and to promote stability in international trading.²⁸⁷ These goals resemble those of comity, which is, in turn, endangered by antisuit injunctions. So, it might be argued that this means to enforce arbitration agreements is contrary to the very idea of why arbitration agreements should be enforced. At least, this sheds certain doubts on the significance of the argument that antisuit injunctions protect arbitration agreements and thus implement one of the goals of the Convention. There are also other reasons that suggest that the system created by the Convention entails that antisuit injunctions should only be granted with reticence.

70. A feature of the Convention is the way it allocates the responsibility for the enforcement of arbitration agreements: The courts of each signatory are obligated to do this. They shall refer the parties to arbitration unless there are specific reasons why an arbitration agreement should not be enforced.²⁸⁸ The flipside of this assignment is the authority to perform it. The Convention does not entrust one particular signatory with determining whether a dispute must be brought to arbitration on behalf of all signatories. In other words, the Convention does not overcome the traditional limitation of the power of a sovereign to its territory. This pattern can also be detected in other provisions: (i) It is not the judicial system of one particular sovereign that decides whether an arbitral award shall be enforced; but the courts of "*[e]ach Contracting State*".²⁸⁹ The decision of the court of one signatory is not binding on another signatory. (ii) Even the decision of the courts of origin to set the award aside is not binding on the other signatories; they may refuse to enforce such an award, but they do not have to.²⁹⁰ So, the Convention allocates responsibility in the form of compartmentation to the courts of the different signatories.²⁹¹

71. Another structural feature of the Convention is allowing enforcement proceedings in the courts

²⁸⁶ cf. Art. II(3) of the Convention.

²⁸⁷ cf. *Smith/Enron Cogeneration Limited Partnership, Inc., v. Smith Cogeneration International, Inc.*, 198 F.3d 88, 92; *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 248 and 250; comp. Quigley, p. 1076.

²⁸⁸ cf. Art. II(1) and (III) of the Convention.

²⁸⁹ cf. Art. III in connection with Art. V of the Convention.

²⁹⁰ cf. Art. V(1)(e) of the Convention.

²⁹¹ comp. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357, 373.

of different sovereigns and, thus, concurrent pre- and post-arbitration enforcement proceedings²⁹² as well as concurrent set aside and enforcement proceedings.²⁹³ The fact that the Convention allows concurrent pre-arbitration proceedings²⁹⁴ and the fact that the Convention confers to each signatory the responsibility to handle these proceedings in accord with the Convention suggests that a multiplicity of pre-arbitration enforcement proceedings is, at least not "*without more*", a reason to issue an antisuit injunction.²⁹⁵ Indeed, every signatory must be assumed to have been aware and to have acknowledged this system created by the Convention when acceding to the Convention.

cc) Impact of the Contractual Nature of Arbitration Agreements

72. *Pacta sunt servanda*. So, one argument why an antisuit injunction should be permissible in support of an arbitration is that enjoining a foreign litigation is appropriate if the parties had previously agreed on a different forum, because an arbitration agreement must be presumed to be of considerable importance to the parties.²⁹⁶ This argument is however insofar treacherous as it takes the validity of the arbitration agreement as starting point,²⁹⁷ although such a presumption does not follow from the wording or the aims of the Convention.²⁹⁸ An arbitration agreement cannot be presumed to satisfy the requirements of the Convention. It is only valid if the conditions set forth in the Convention are satisfied, i.e. (i) if the "*subject matter [is] capable of settlement by arbitration*", (ii) if the arbitration agreement is not "*null and void, inoperative or incapable of being performed*", and (iii) if there is an "*agreement in writing*".²⁹⁹

²⁹² That is proceedings to enforce the arbitration agreement (pre-arbitration) or the arbitral award (post arbitration).

²⁹³ cf. Art. VI of the Convention.

²⁹⁴ In the posture that is analyzed here, there is a pre-award enforcement proceeding in the domestic court where the applicant requests that the parties be referred to arbitration, and in the foreign forum because the applicant may be expected to invoke the arbitration agreement in that forum as well.

²⁹⁵ cf. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357, 368-369.

²⁹⁶ comp. Wilson, p. 221.

²⁹⁷ The Court of Appeals for the Third Circuit e.g. points out that "*[s]ignatory nations have effectively declared a joint policy that presumes the enforceability of agreements to arbitrate*" (cf. *Rhone Méditerranée Compagnia Francese di Assicurazioni e Riassicurazioni v. Achille Lauro*, 712 F.2d 50, 54).

²⁹⁸ cf. Weigand, N 111 to Art. II (Part 3).

²⁹⁹ cf. Art. II of the Convention.

73. Obviously, a court will only enjoin a foreign litigation in support of an international arbitration if it is convinced that these conditions are satisfied. The question is, however, if the Convention prohibits the domestic court from doing so even in such a case, i.e. when the domestic court is of the opinion that the dispute must be arbitrated. In answering this question it must in particular be taken into account that the foreign forum is equally competent and responsible to decide this issue in accord with the Convention. It is therefore submitted that if both courts may, by applying the Convention, achieve different results, no antisuit injunction should be issued. In other words, if the Convention does not exclude that there may be different answers as to whether a dispute must be arbitrated, the domestic forum cannot take the simple fact that the foreign forum achieves a different result as a reason to enjoin the foreign proceeding. This would be at odds with the fact that the Convention does not exclude the possibility of concurrent pre-award enforcement proceedings, of which pattern every signatory may be assumed to be aware. It must therefore be assessed for each of the three conditions mentioned hereinabove whether the foreign and the domestic forum should receive the same answer to the question whether they are satisfied, and, if so, whether this warrants an antisuit injunction.

74. Art. II(1) of the Convention does not explicitly determine which law applies to the issue of non-arbitrability.³⁰⁰ From the proposals to this respect, the analogous application of Art. V(2)(a) is most convincing. Art. V(2)(a) of the Convention specifically addresses non-arbitrability and its analogous application secures that the same court does not reach different results regarding non-arbitrability depending on the point in time of its analysis, enforcement of the arbitration agreement or of the award.³⁰¹ To the first condition the law of the forum, i.e. where a party invokes that this conditions is not satisfied, is therefore applicable.³⁰² The courts of different jurisdictions may therefore *bona fide* reach

³⁰⁰ cf. van den Berg, p. 152. The fact that Art. II(1) refers to "[e]ach Contracting State" without containing a choice of law rule tends to suggest, however, that the law of the forum shall apply.

³⁰¹ This might be the case under the alternative proposal to apply Art. V(1)(a) *per analogiam* if enforcement of the arbitration agreement is not sought in the courts of the seat of the arbitration (comp. Weigand, N 57-58 to Art. II (Part 3)).

³⁰² cf. van den Berg, p. 153; Weigand, N 58 to Art. II (Part 3).

different answers to the question whether the dispute can be submitted to arbitration.^{303, 304} Based on the reasoning in para. 72 hereinabove, it is therefore submitted, that the fact that the foreign court considers a dispute to be non-arbitrable under its law cannot justify to enjoin a foreign proceeding. It is not possible for one signatory to claim that its solution for non-arbitrability is superior to that of another signatory.

75. The Convention is also silent regarding which law is applicable to the Art. II(3) threshold,³⁰⁵ and jurisprudence and doctrine are divided: (i) Some submit that the conflict of law rules of the *lex fori* are pertaining.³⁰⁶ (ii) According to another opinion, an arbitration agreement is invalid if it is subject to an internationally recognized defence or when it contravenes a fundamental policy of the forum.³⁰⁷ (iii) Others submit that Art. V(1)(a) should be applied by analogy.³⁰⁸ Since it is preferable that the validity of the arbitration agreement is determined consistently in the pre- and the post-arbitration stage, the third opinion is most convincing. So, to the second condition the law of the seat³⁰⁹ of the arbitration is applicable unless the parties chose a particular law; all courts should therefore apply the same law to

³⁰³ comp. van Houtte, p. 86-87. It is not yet decided by the European Court of Justice whether the existence of an arbitration agreement can be invoked against the enforcement of a judgment that was made in a signatory of the Lugano Convention in disregard of an arbitration agreement when the judgment is to be enforced in another signatory; if not, there is a conflict between the New York and the Lugano Convention (comp. van Houtte, p. 87-89).

³⁰⁴ Moreover, different results may be the consequence of a different extent of judicial control regarding arbitrability in the pre-arbitration context.

³⁰⁵ cf. Weigand, N 60 to Art. II (Part 3).

³⁰⁶ cf. Born, p. 314.

³⁰⁷ cf. Rhone Méditerranée Compagnia Francese di Assicurazioni e Riassicurazioni v. Achille Lauro, 712 F.2d 50, 53; Ledee v. Ceramiche Ragno, 684 F.2d 184, 187.

³⁰⁸ cf. van den Berg, p. 126-127; Weigand, N 60 to Art. II (Part 3).

³⁰⁹ This approach poses problems if the parties have not agreed on the seat of the arbitration (interestingly, the civil-law doctrine considers these cases to be rare (comp. Weigand, N 61 to Art. II (Part 3), while the common-law doctrine submits that there are many such cases (comp. Born, p. 314)). In particular because an arbitration agreement that does not fix the seat may pose numerous problems, it seems appropriate to require a showing by the applicant that the arbitration agreement is enforceable in such a case. Enjoining the foreign litigation without the prospect of an arbitration seems inadequate, i.e. an antisuit injunction should only be issued if there is at least potentially a concurrent arbitration. If the antisuit injunction is sought in an American court in such a case, it may e.g. be expected that the applicant also moves to compel arbitration in the district where the motion is filed (comp. Art. 4 FAA, Jain v. de Mere, 51 F.3d 686), thus determining the seat of the arbitration.

examine whether this condition is satisfied.³¹⁰ The question is thus whether it is admissible for the domestic court to enjoin the foreign proceeding if it thinks that the foreign court will misapply or has already misapplied the law of the seat of the arbitration. At the end of the day, a court, which has to take this decision before the foreign court has ruled on a defence of arbitrability has the following choice: It can choose to trust that the foreign court will correctly apply the Convention. This approach promotes comity between the courts of several sovereign, but bears the risk that the foreign court will not respect its obligations under the Convention. Or, the domestic court can make sure that the Convention will not be violated by issuing an antisuit injunction. This interferes with the sovereignty of the foreign court and thus endangers the goals comity tries to achieve. Both approaches have their flaws and a court should therefore try to handle such cases with care. Foremost by demanding from the applicant that he invoke the arbitration agreement in the foreign proceeding and by enjoining the foreign proceeding only if the foreign court then disrespects the arbitration agreement.³¹¹ This way, the issue is reduced to cases where the court unavoidably has to take a stand with respect to a motion to issue an antisuit injunction. Now, if the court must decide, because the foreign court refused to send the parties to arbitration, it should refrain from enjoining the foreign proceeding if the seat of the arbitration is within the territory of the foreign forum, whose proceedings are requested to be enjoined. Not only because the foreign forum must be presumed to know best how to apply its own law, but also because the parties deliberately chose this seat and thus accepted the risks connected therewith. If the seat of the arbitration is in a third signatory, an American court may take into account that the Convention does not create a relationship between the signatories that is as close as that between the signatories to the Lugano-Convention: Decisions of one signatory relating to the subject-matter of the Convention, need not, like decisions relating to jurisdiction under the Lugano Convention, be enforced quasi

³¹⁰ The same may theoretically be supposed under the approach that validity must be verified based on internationally recognized defenses (comp. fn. 307 hereinabove).

³¹¹ Comp. Lenenbach, p. 289, submitting that arbitration agreements are self-executory in the signatories of the Convention so that injunctive relief to enforce arbitration agreements is only needed if a party commences a lawsuit in a non-signatory that does not respect the arbitration agreement based on its internal law and Stone, p. 145, submitting that the Convention entrusts the duty of respecting an

automatically, and the Convention does not allocate jurisdiction between the signatories like the Lugano Convention. Therefore, it seems justifiable for an American court to enjoin a foreign litigation that interferes with an arbitration agreement if (i) it deems, in contrast to the foreign court, that the arbitrators have jurisdiction over their dispute under Art. V(1)(a) of the Convention,³¹² and (ii) if the specific requirements for an antisuit injunction³¹³ as well as for ordering specific performance of a contract³¹⁴ are satisfied.³¹⁵ Because the efficacy of the Convention depends on the good faith of the signatories and because such good-faith attitude might be affected by antisuit injunctions,³¹⁶ the foreign proceeding should however only be enjoined if it is established that the foreign forum undoubtedly misapplied the pertinent law.

76. The same as for questions regarding the substantive validity of arbitration agreements also applies to questions regarding their formal validity, as the Convention provides in Art II(2) for uniform standards, so that the same solution should be obtained irrespective of where this issue arises.

77. The system of the Convention thus precludes the domestic court from enjoining a foreign proceeding solely because a contract is invoked as basis for the jurisdiction of the arbitral tribunal, and thus indirectly as basis for the antisuit injunction: This argument *pro* antisuit injunctions, the existence of a jurisdiction-related agreement, is only available if there is only one correct solution and if the foreign court obviously got it wrong when examining the formal and/or substantive validity of the arbitration agreement. So, if the Convention is applicable, the (alleged) existence of an arbitration agreement

arbitration agreement to the court seized in breach of the arbitration agreement and that an antisuit injunction should, for that reason, not be issued in such a posture at all.

³¹² cf. *In re Laitsalo*, 196 B.R. 913, 924.

³¹³ Most courts facing this issue do not address the basic requirements for an injunction (an exception is *Specialty Bakeries, Inc. v. Robhal, Inc.*, 961 F.Supp. 822; comp. *in re Laitsalo*, 196 B.R. 913, 920; *Smoothline, Ltd. v. North American Foreign Trading Corp.*, 2002 WL 273301 1,6).

³¹⁴ comp para. 16 hereinabove.

³¹⁵ Arbitration agreements are enforceable like other contracts (cf. *Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468, 478; *Sphere Drake Insurance, Ltd. v. All American Life Insurance*, 307 F.3d 617, 620) and judgments compelling arbitration, which are protected by an antisuit injunction, order specific performance of such an agreement (cf. *Necchi s.p.a. v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693, 696; *Kulukundis Shipping Co., S/A v. Amtorg Trading Corp.*, 126 F.2d 978, 986; *Joseph Muller Corp. v. Commonwealth Petrochemicals, Inc.*, 334 F.Supp 1013, 1018).

supports granting antisuit injunctions only to a limited degree. Therefore, the opinion, that the clearest case for the grant of an antisuit injunction is where it enforces an existing contractual obligation, like an arbitration agreement,³¹⁷ is not convincing.

78. *Prima facie*, it may seem troublesome that the contractual nature of arbitration agreements is not given more weight. However, American courts should refrain from a provincial attitude regarding the fairness of other tribunals,³¹⁸ and the Convention allows the party that wants to oppose to the enforcement of an arbitration award to invoke that the arbitral agreement is invalid,³¹⁹ that the writing requirement is not met,³²⁰ and that the dispute is non-arbitrable.³²¹ The same should also be possible in the pre-arbitration stage, in particular because these conditions are also listed in Art. II of the Convention. Prohibiting a party from invoking that an arbitration agreement is not enforceable therefore seems to be at odds with the Convention.

79. Moreover, a party that has certain contacts with the foreign forum must expect that the foreign forum will in such a case confirm its jurisdiction. This will not harm this party as long as it does not have assets in this forum that make the judgment enforceable there. If it has, the party should even more have verified the enforceability of an arbitration agreement. Even in such a case, this party may still be awarded its claims in the domestic forum and be able to enforce it there; and it is not to be expected that an award that was actually rendered in violation of an arbitration agreement is enforceable in the domestic or a third forum.³²²

e) Conclusion

³¹⁶ comp. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357, 373; Quigley, p. 1070.

³¹⁷ cf. *Whincop/Keyes*, p. 152; comp. *Briggs/Rees*, N 5.39 (p. 373).

³¹⁸ cf. *The Bremen v. Zapata Off-Shore, Co.*, 407 U.S. 1, 12-13 and 15; comp. *Lenenbach*, p. 285.

³¹⁹ cf. Art. V(1)(a) of the Convention.

³²⁰ cf. *van den Berg*, p. 285.

³²¹ cf. Art. V(2)(a) of the Convention.

³²² comp. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357, 369, pointing out that it is not the burden of the American courts to protect a party from all legal hardship it might encounter in an international dispute.

80. The cases which are analyzed under this heading must be distinguished from *Karaha Bodas*³²³ because both the foreign and the domestic forum have the same function, they deal with the enforcement of an arbitration agreement.³²⁴ An antisuit injunction can therefore not be denied outright, but the arguments that are to a certain degree *contra* antisuit injunctions, that of the system created by the Convention, and *pro* antisuit injunctions, the contractual nature of arbitration agreements, must be weighed. It is submitted that the *crux* for this balancing is Art. II(3) of the Convention, which provides that the parties shall be referred to arbitration if certain conditions are satisfied. It transpires that the Convention intends to protect a party from litigation exposure before a court when there is an arbitration agreement.³²⁵ On the other hand, a party shall not be forced into an arbitration if it did not sign a valid arbitration agreement. Given these contradicting principles and the above analysis, it is submitted here that a foreign litigation should only be enjoined in support of an arbitration if the foreign court obviously misapplied the applicable provisions on substantive and/or formal validity of the arbitration agreement and therefore, wrongly, did not refer the parties to arbitration.³²⁶

81. What pushes the applicant over the comity threshold is the necessity to protect the integrity of the Convention, which mandates the signatories to refer the parties to arbitration if there is an arbitration agreement.³²⁷ The Convention does, on the other hand, oust domestic law as a source for equitable factors that may outweigh comity under the restrictive approach: (i) The system of equal responsibility of all signatories to implement the Convention precludes antisuit injunctions to protect the jurisdiction of the domestic court. Only if the foreign forum itself violates the system created by the Convention by carving out exclusive jurisdiction, a counter-antisuit injunction is compatible with the Convention. (ii) The public policy that warrants antisuit injunctions is the enforcement of arbitration

³²³ cf. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357.

³²⁴ comp. para. 58 hereinabove.

³²⁵ cf. Weigand, N. 102 to Art. II (Part 3).

³²⁶ cf. paras. 74-75 hereinabove.

³²⁷ In a domestic case, a federal court enjoined a state court action based on the re-litigation exception in the Antisuit Injunction Act, when a party intended to re-litigate its counterclaim, which had been dismissed in a previous arbitration, in state court (cf. *Doctor's Associates, Inc. v. Stuart*, 11 F.Supp.2d 221, 225). The court held that the confirmation of the arbitral award, the award of the arbitrators and the public policy in

agreements, which is directly deductible from the Convention.

82. Again, the regular criteria for injunctions must be taken into account:

- (i) Both domestic and foreign remedies at law must be taken into account to examine whether there are no adequate remedies at law. Inadequacy of a foreign remedy at law must be assumed from a domestic perspective when the foreign court does not handle an objection to its jurisdiction based on the arbitration agreement as it should pursuant to the Convention.³²⁸ As to the domestic remedies, it is submitted that monetary damages are inadequate if an arbitration agreement is violated.³²⁹
- (ii) Likelihood of success on the merits is established when there is a reasonable probability that resorting to a state-run courts violates an arbitration agreement between the parties.³³⁰ The merits thus relate to the arbitrability of the dispute.^{331, 332}
- (iii) Irreparable harm exists when bringing suit instead of initiating arbitration deprives the other party of its contractual right to arbitrate its claims and the thus creates the danger of conflicting judgments.^{333, 334}

favour of arbitration would be undermined if the defendant were allowed to return to the state court and therefore enjoined such a proceeding (cf. *Doctor's Associates, Inc. v. Stuart*, 11 F.Supp.2d 221, 225).
328 comp. para. 75 hereinabove.

329 cf. *Wilson*, p. 215.

330 cf. *Specialty Bakeries, Inc. v. Robhal, Inc.*, 961 F.Supp. 822, 829.

331 cf. *American Heritage Life Insurance v. Orr*, 294 F.3d 702, 707; *Miller v. Flume*, 139 F.3d 1130, 1137; *Spear, Leeds & Kellogg v. Central Life Insurance Co.*, 85 F.3d 21, 30; *Painewebber, Inc. v. Willard S. Hartmann*, 921 F.2d 507, 514; *United Offshore Company v. Southern Deepwater Pipeline Company*, 899 F.2d 405, 408; *General Electric v. Deutz AG*, 129 F.Supp.2d 776, 787 and 789; *Mount Ararat Cementary v. Cemetary Workers*, 975 F.Supp. 445, 447; *Amalgamated Food Employees Union v. National Tea Company*, 346 F.Supp. 875, 881.

332 A decision compelling arbitration is appealable pursuant to § 16(a)(3) of the Federal Arbitration Act (cf. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 88-89). Such a decision of a court of first instance is therefore not final and does not, in general, have *res iudicata* effect. Therefore, a court of first instance cannot rely on such a decision to enjoin a foreign proceeding, i.e. simply by pointing at its own earlier decision and stating that an antisuit injunction is necessary to protect that judgment (cf. *General Electric v. Deutz AG*, 270 F.3d 144, 159). So, arbitrability represents the merits of the case and is, therefore, relevant to assess whether there is success on the merits; the decision on arbitrability does, however, not push over the comity threshold under the protection-of-jurisdiction approach.

333 cf. *Paramedics v. GE Medical Systems*, 2003 WL 23641529 1, 12.

334 According to *Specialty Bakeries v. Robhal*, interference with the functioning of the arbitration process constitutes irreparable harm (cf. *Specialty Bakeries, Inc. v. Robhal, Inc.*, 961 F.Supp. 822, 829). This

- (iv) The principle that agreements must be abided by tips the balance in favor of the applicant if the foreign forum denies and the domestic forum upholds the formal and substantive validity of the arbitration agreement.

C. Antisuit Injunctions to the Detriment of Arbitration Proceedings

83. There may be cases where a dispute is pending before an American court and, concurrently, before a foreign arbitral tribunal. The question arises whether the claimant in the domestic litigation can then request that the foreign arbitration be enjoined. American case law approaches these cases like those involving concurrent litigations, i.e. an arbitral tribunal is given the same standing like a foreign court.³³⁵ Consequently, comity requires to pay respect to international arbitral tribunals as well,³³⁶ and comity is considered to be outweighed if the domestic court has to protect its jurisdiction or a public policy of the forum.³³⁷ So an arbitration is for instance enjoined if a motion to compel arbitration is dismissed,³³⁸ or to protect the *res iudicata* effect of a prior judgment of the court.³³⁹

perspective puts the stress rather on the institution of arbitration than on the parties seeking equitable relief. Since a party must establish that it itself will suffer irreparable harm, however, the reasoning in *Paramedics v. GE Medical Systems*, 2003 WL 23641529 1, 12 is more convincing.

³³⁵ comp. *General Electric v. Deutz AG*, 129 F.Supp.2d 776; *Koob v. IDS Financial Services, Inc.*, 629 N.Y.S.2d 426, 432; *Motorola Credit Corporation v. Uzan*, 2002 U.S. Dist. Lexis 19632.

³³⁶ cf. *General Electric v. Deutz AG*, 129 F.Supp.2d 776, 782.

³³⁷ cf. *Motorola Credit Corporation v. Uzan*, 2002 U.S. Dist. Lexis 19632 1, 10-11. In this case, the court first examined whether the domestic litigation was dispositive of the foreign arbitration. It held that the defendants before it had complete control over the party on their side in the arbitration and that the determination that was sought by the arbitrators (an award upholding the defence of *force majeure* and a corresponding adaptation of the contract between the parties) was the main defence against the fraud claims before the court (cf. *idem* at 11). The court therefore concluded that parties and issues were the same and enjoined the arbitration. It is submitted that the correct approach would have been to analyze whether the defendant's alleged fraudulent conduct, specifically related to the arbitration agreement and, if not, to have the defendant's defence, which related to the contract that contained the arbitration agreement, decided by the arbitrators (cf. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404). The decision of the arbitrators would in this case have been dispositive of the court action: Had they found *force majeure*, the actions filed in court would have had to be dismissed. It is therefore submitted that the court should not have enjoined the arbitration. Indeed, the court examined whether the claimant was likely to succeed on the merits of its claim, and not on its contention that claim should not be arbitrated (comp. para. 82(ii) hereinabove).

³³⁸ cf. *In re Piper*, 71 F.3d 298, 302, *Motorola Credit Corporation v. Uzan*, 2002 U.S. Dist. Lexis 19632 1, 10-11.

84. The cases on point do not discuss whether the Convention has any impact on the decision of the court. It is submitted that it has: The starting point of a decision to enjoin an arbitral tribunal is that the dispute is not arbitrable and that the parties shall therefore not be referred to arbitration, as follows from Art. II(3) of the Convention. So, Art. II(3) is the basis for the position that no one shall be compelled to arbitrate when there is no arbitration agreement. However, while an antisuit injunction would therefore not conflict with Art. II(3), it is not possible to identify arguments that positively support issuing antisuit injunctions in this provision.

85. Since the domestic forum considers the alleged arbitration agreement to be invalid in this posture, the enforcement of a mutually agreed way to settle a dispute is not a reason to enjoin the foreign proceeding. The starting point is therefore that this case involves proceedings pending in two tribunals and that antisuit injunctions can at most be issued to the extent this is possible in concurrent-litigation cases. Since the restrictive approach is favored here, an antisuit injunction is therefore only - if at all - possible if it is necessary to protect a public policy or the jurisdiction of the domestic forum.

86. The starting point for the analysis is that arbitral tribunals are thought to fairly, impartially and competently decide the case submitted to it, and in particular, to follow the law.³⁴⁰ The fact that the case is concurrently pending before a domestic court and a foreign arbitral tribunal must therefore be ascribed to the fact that these two tribunals apply different rules as to when a case must be submitted to arbitration - the court applying the domestic rules, the arbitral tribunal applying those of the *lex arbitri* - and not to a suspicion that the arbitral tribunal misapplies the law.

87. To maintain that an antisuit injunction is necessary to protect a public policy of the domestic forum, the applicant will generally maintain that the subject matter is non-arbitrable according to the standards of the forum. As already shown, different approaches to non-arbitrability are, however, not a

³³⁹ According to *General Electric v. Deutz AG*, 270 F.3d 144, 159, a judgment of a court of first instance that denies a motion to compel arbitration does, however, not have *res iudicata* effect, so that it is not sufficient to enjoin a foreign arbitration to protect a judgment of the domestic court (comp. fn. 332 hereinabove).

³⁴⁰ cf. *Shearson/American Express, Inc. v. MaMahon*, 482 U.S. 220, 232; *Mitsubishi Motors Corp., v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 634.

basis to enjoin a foreign proceeding.³⁴¹ A signatory must therefore respect a decision of the arbitral tribunal that the dispute is not non-arbitrable based on the standards of the applicable *lex arbitri* and cannot enjoin the foreign arbitration based thereon.

88. Regarding the protection of the jurisdiction of the domestic court, it may first be assumed that an arbitral tribunal is normally not empowered by the parties to issue antisuit injunctions, so that the domestic court will hardly ever need a counter-antisuit injunction to protect its jurisdiction.³⁴² Second, it must be examined whether an antisuit injunction may be issued to protect an earlier judgment on the merits of the domestic court. This depends on whether this judgment can be plead as *res iudicata* in the arbitration.³⁴³ Even if the domestic court answers this question in the negative, it is still another question whether it is compatible with the Convention to enjoin the arbitration. Here, it is submitted that it is not: If one forum enjoins an arbitration, it prevents an arbitral award and by doing so deprives the courts of the other signatories from examining themselves whether the arbitral tribunal had proper jurisdiction - be it in an enforcement proceeding or in a set-aside proceeding. The domestic court would transfer to itself the authority that the Convention vests in the courts of each signatory, and it forces its view on arbitral jurisdiction on the other signatories. The same is true for the relation between the country of origin and the domestic forum: According to the Convention the country of origin and the other signatories play different roles, and an antisuit injunction against a foreign set-aside proceeding is precluded if the role of the American court is limited to the enforcement of the arbitral award.³⁴⁴ An analogous application of the reasoning in *Karaha Bodas*,³⁴⁵ would therefore suggest that an interference with the country of origin is inappropriate, also when the interference takes place before the award is issued. For such a pre-award interference would preclude the country of origin from verifying whether the arbitral award satisfies the standards of the *lex arbitri*, which it is authorized to do

³⁴¹ cf. para. 74 hereinabove.

³⁴² Comp. however *General Electric Company v. Deutz AG*, 129 F.Supp.2d 776 where the arbitral tribunal tried to carve out exclusive jurisdiction *sua sponte*.

³⁴³ To assess this, the domestic court must take the perspective of the arbitral tribunal (comp. para. 40 hereinabove), i.e. apply the *lex arbitri* since it results from Art. V(1)(e) of the Convention that the arbitral tribunal is monitored pursuant to these rules.

³⁴⁴ comp. para. 58 hereinabove.

pursuant to Art. V(1)(e) of the Convention. According to this provision, it is the country of origin that is to monitor the arbitration. A potential enforcement court on the other hand is limited to issues relating to the enforcement of the award.³⁴⁶

89. So, while an arbitration agreement can be enforced by an antisuit injunction in some instances when the seat of the arbitration is not in the territory of the foreign forum, a finding that the parties did not agree to arbitrate cannot be enforced by an antisuit injunction, when the seat of the arbitration is in a foreign forum.

D. Antisuit Injunctions Preventing the Enforcement of Arbitral Awards abroad

a) Requested from a Court of the Country of Origin

90. A court of the country of origin of the award may face a request to enjoin the enforcement of an arbitration award in a foreign forum, e.g. based on the allegation that the award cannot be deemed binding since certain formalities are (not yet) complied with or based on the fact that a request to set the award aside was filed.³⁴⁷ In such a case, the court will have to decide whether the Convention applies such a request. If it does, the goal of the Convention to facilitate the enforcement of arbitration awards³⁴⁸ and Art. V(1)(e) suggest that an antisuit injunction should not be permissible. The latter provision vests in the courts of the signatory where enforcement is sought the discretion³⁴⁹ to enforce or disregard an award that was set-aside or is not yet binding in the country of origin. An antisuit injunction in such a posture would therefore be at odds with Art. V(1)(e). Moreover, it may again be referred to

³⁴⁵ cf. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357, 372-373.

³⁴⁶ cf. *idem*.

³⁴⁷ An example for such a case is *Oil Natural Gas Commission v. Western Co. of North America*, decided by the Indian Supreme Court (74 All India Rep. S.C. 674 (1987), printed in Tibor Varady/John J. Barceló, III/Arthur T. van Mehren, *International Commercial Arbitration*, St. Paul 1999, p. 637 et seq.). Since the parties had agreed that the Indian Arbitration Act should apply, the Indian Supreme Court considered the arbitration to be a domestic arbitration, with the consequence that the award must, pursuant to Indian law, be confirmed by an Indian court before it becomes binding. As the enforcement proceeding was initiated before the award was confirmed, enforcement of the award was deemed to be oppressive and, therefore, enjoined.

³⁴⁸ cf. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357, 366-367.

³⁴⁹ cf. Art. V(1): "*Recognition and enforcement of the award may be refused ...*" (emphasis added).

*Karaha Bodas*³⁵⁰ where the court reasoned that an enforcement court should not interfere with a set-aside proceeding because different tasks are assigned to the courts of the country of origin and the enforcement courts. Under this heading, it is just the other way round: The antisuit injunction is sought from the set-aside court. However, the reasoning in *Karaha Bodas* is general enough to be applicable *vice versa*.³⁵¹ It is therefore decisive whether the Convention has an impact on the issue at stake.³⁵²

91. The Convention does not affect the law of the country of origin for set-aside and domestic enforcement proceedings. But, the *crux* is that the Convention applies to the enforcement of arbitral awards in signatories other than that where the award was made.³⁵³ It is therefore submitted that a signatory must respect that enforcement in another signatory will take place according to the Convention, in particular because this very issue is addressed in the Convention itself.³⁵⁴ For this reason, the Convention applies and an antisuit injunction of the country of origin against the enforcement of the award in a foreign forum should not be issued: Whether the domestic law of the country of origin is taken into account is in the discretion of the enforcement forum.³⁵⁵

b) Requested from another Enforcement Courts

92. Another question needs to be addressed briefly. It will not arise often: Can an enforcement court enjoin an enforcement proceeding in another signatory? It is submitted here that this question should be answered in the negative. That enforcement proceedings may be concurrently pending in different courts follows from a reading of the Convention. This again suggests that the countries that acceded to the Convention were aware of this system and must therefore be thought to have agreed to it.

Moreover, issuing an antisuit injunction would conflict with the goal of the Convention to facilitate the

³⁵⁰ cf. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357.

³⁵¹ cf. *idem*, p 372-373.

³⁵² The dispute whether the term "non binding" shall be subject to an autonomous interpretation or an interpretation pursuant to the law of the country of origin is not decisive (comp. Weigand, N 77 to Art. V (Part 3)): Under both approaches, the courts where enforcement is sought have the discretion to enforce the award. The question is therefore, whether the Convention applies at all.

³⁵³ cf. Art. I of the Convention. According to this provision, it also applies for the enforcement of the award in the country of origin if the award is not considered as domestic there; this situation is, however, for the present analysis not of interest.

³⁵⁴ cf. Art. V(1)(e) of the Convention.

enforcement of foreign arbitral awards.³⁵⁶

³⁵⁵ cf. Art. V(1)(e) of the Convention.

³⁵⁶ cf. *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak*, 335 F.3d 357, 366-367.

E. Summary

93. As exemplified by the Court of Appeals for the Fifth Circuit in *Karaha Bodas*,³⁵⁷ it is appropriate to take the Convention into account when dealing with antisuit injunctions in the context of international commercial arbitrations. While the Convention does not expressly limit the availability of antisuit injunctions, its structure, in particular the allocation of different roles to different sovereigns, evidences that such injunctions are only in rare instances compatible with the structure and the spirit of the Convention.

94. When it comes to enjoining a foreign litigation in support of an arbitration, the courts should (i) not presume the validity of the arbitration agreement, but assess this, together with the other aspects of arbitrability as a preliminary issue, (ii) and respect that a foreign forum may obtain a different result to the same issue if the Convention does not fix a certain end or the means to get there. In particular, a better-law approach is mistaken. So, an antisuit injunction should only be issued in such a case if it follows objectively from the Convention that the foreign court obviously took a wrong decision. In the other cases where an antisuit injunction may be requested in the context of international arbitration, it is not compatible with the allocation of tasks and responsibilities provided for by the Convention to grant such a request.

VI. CONCLUSION

95. Antisuit injunctions are a powerful tool to enforce a decision on jurisdiction. But it goes without saying that the exercise of power by the domestic forum leads to frustration on the side of the foreign forum because of the interference with its jurisdiction.³⁵⁸ The present paper therefore submits that antisuit injunctions should not too readily be available, as under the liberal approach. It is also submitted that the test for antisuit injunctions should include the regular conditions for granting injunctive relief. This expresses that antisuit injunctions are a subspecies of injunctive relief and will in some cases limit the availability of the tool. Also, the alleged presence of a jurisdiction-related

³⁵⁷ comp. fn. 254 hereinabove.

³⁵⁸ comp. *James v. Grand Trunk Western Railroad Company*, 14 Ill.2d 356, 371-372.

agreement should not have the effect that foreign proceedings are enjoined outright; foreign courts may by applying their laws come to another conclusion than the domestic court regarding the validity of such an agreement.

96. Moreover, conventions on international civil procedure should be taken into account when deciding whether an antisuit injunction should be issued. In general, they will limit the availability of the antisuit injunction tool, because what a convention expresses, mutual trust, is at odds with what an antisuit injunction expresses, mistrust in the judicial system of other sovereigns.

97. The above reveals a certain skepticism against the antisuit injunction tool, which is based on comity-concerns and the fact that a concept that creates a deadlock³⁵⁹ when it is applied by all jurisdictions that are involved raises doubts as to its appropriateness. Moreover it may be asked whether a tool that was developed to secure the working of the judicial system within one sovereign, where concerns of efficiency have considerable weight, is an appropriate tool in the inter-sovereign context,³⁶⁰ even if its availability is limited based on comity concerns like under the restrictive approach. Of course the presence of multiple suits is not desirable. But it may be questioned whether antisuit injunctions are the adequate tool to prevent this on an international level, and, in particular, whether it should be up to one sovereign to *de facto* decide on the jurisdiction of another sovereign. Another approach for the domestic forum is (i) to accept that a foreign forum which with the parties have contacts assumes jurisdiction to adjudicate and/or enforce, a risk the parties must be assumed to have accepted, and (ii) to limit itself to avoiding that contradicting judgments are present within the domestic forum, which could for instance be achieved by strengthening the principle of *lis pendens*.³⁶¹

³⁵⁹ cf. para. 6 hereinabove.

³⁶⁰ comp. *Laker Airways v. Sabena*, 731 F.2d 909, 927 (fn. 49).

³⁶¹ cf. Lowenfeld, p. 318.