

Anti-Suit Injunctions and Admiralty Claims: The American Approach

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I. INTRODUCTION

The anti-suit injunction, as it is used in cases falling within the admiralty jurisdiction and in American practice generally, primarily functions as a mechanism by which a court may restrain a party over whom it has jurisdiction from bringing or pursuing parallel litigation in a foreign court. Despite a historical reluctance from United States courts to grant anti-suit injunctions, based upon concerns regarding the effect that the “extra-territorial” extension of judicial power of the United States may

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have on international comity, there is substantial benefit to litigants in having all disputes related to a subject or factual transaction resolved in one forum. Furthermore, the courts of several circuits have challenged the traditional underpinnings of the weight afforded to considerations of international comity, and have begun to recognize the burdens on the litigants of multiple, inconsistent judgments and parallel foreign proceedings in the context of transnational litigation.

The question that must be addressed at the outset is why does this have any particular relevance to those claims falling within the admiralty jurisdiction? The answer, if obvious, is fairly simple: the international nature of the maritime industry increases the likelihood that there will be a diversity of national citizenship among the parties. The import of this is that the probability of being confronted with a situation wherein the grant of an anti-suit injunction may be appropriate is higher in the admiralty and maritime realm than might otherwise be the case in litigation generally. Thus, while factors considered by various appellate courts in determining whether to grant anti-suit injunctions have developed over time in no particular reference to admiralty jurisdiction or maritime law, the increased chances that a practitioner may find themselves seeking to obtain and/or defending against a motion for an anti-suit injunction ancillary to a dispute with a “genuinely salty flavor”¹ justifies special attention to this issue in this context.

As noted by distinguished historians of English common law, roots of the anti-suit injunction remedy trace back to the medieval jurisdictional squabbles between the King’s courts of common law and the ecclesiastical and admiralty courts.² The courts of common law, desirous of retaining their monarchically granted monopoly over justice and protecting their purse,³ developed the “writ of prohibition” as a mechanism to restrain both

1. *Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961).

2. *See, e.g.*, JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 130-131 (Aspen Publishers 2009) (discussing the role of the writ of prohibition in jurisdictional disputes between common law and ecclesiastical courts); Norma Adams, *The Writ of Prohibition to Court Christian*, 20 MINN. L. REV. 272 (1935 – 1936) (origin of the writ of prohibition and its use in barring cases from ecclesiastical courts); *DeLovio v. Boit*, 7 F. Cas. 418, 434-435 (Story, Circuit Justice, C.C.D. Mass. 1815) (No. 3,776), 1997 AMC 550, 585 (citing and discussing English cases where writs of prohibition were issued to admiralty courts).

3. Courts of common law imposed fees for issuing the requisite writ needed by litigants to initiate a claim. *See, e.g.*, Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 611 (1997).

the would-be litigant and the rival tribunal from bringing or hearing a case falling within the “exclusive” jurisdiction of common law.⁴ The writ of prohibition was thus employed to protect the jurisdiction of the courts of common law, and in this sense, modern anti-suit injunctions may be used for largely the same effect.⁵

Although the writ of prohibition remains an available remedy in both federal and state jurisdictions, functioning much in the same way as the more familiar writ of mandamus insofar as it is directed at an inferior tribunal or court,⁶ anti-suit injunctions issued by U.S. courts, by contrast, are directed exclusively at *parties* (as opposed to the foreign court/tribunal in which that party may be seeking to initiate or continue parallel litigation). Thus notwithstanding their common origin, as they exist in contemporary American practice, the writ of prohibition and anti-suit injunction are distinct procedures aimed at distinct remedies.

This article is devoted exclusively to the latter procedure, specifically the divergent approach of federal appellate courts in granting anti-suit injunctions. Although the analysis varies by circuit, the courts agree on the same preliminary requirements to qualify for an anti-suit injunction. A district court must establish those requirements have been fulfilled before engaging in the substantive legal analysis. The preliminary requirements will be discussed first, followed by an overview of the main approaches to the question of when the issuance of an anti-suit injunction is appropriate.

II. THE ELEMENTS OF AN ANTI-SUIT INJUNCTION

As noted by the Fifth Circuit in *Kaepa, Inc. v. Achilles Corp.*,⁷ “[i]t is

4. See, e.g., David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 545 n.33 (1985 – 1986) (discussing use and function of the writ of prohibition vis-à-vis jurisdictional authority of courts of common law); see also *id.* at 544-546 (discussing use of writ alternatively as early form of injunctive relief dating to at least thirteenth Century).

5. See, e.g., *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 927-928 (D.C. Cir. 1984) (noting anti-suit injunctions may be issued to protect the jurisdiction of the district court if the court’s valid exercise of its jurisdiction would be impeded by foreign proceedings).

6. See, e.g., *N.L.R.B. v. Nash Finch Co.*, 404 U.S. 138, 142-143 (1971) (discussing availability of writ in certain contexts); *U.S. v. Morrison*, 28 So.3d 94 (Fla.App. 1 Dist., 2009) (granting writ of prohibition to restrain trial court from acting without jurisdiction); *Stephens Media, LLC v. Eighth Judicial District Court of Nevada*, 221 P.3d 1240, 1246 (Nev. 2009) (discussing function of writ); *Lee v. County Court of Erie County*, 267 N.E.2d 452, 454-455 (N.Y. 1971) (same).

7. 76 F.3d 624 (5th Cir. 1996)

well settled among the circuit courts . . . which have reviewed the grant of an antisuit injunction that the federal courts have the power to enjoin persons subject to their jurisdiction from prosecuting foreign suits.”⁸ As noted above, however, there is a split among appellate courts for when a court *should* exercise its discretion to provide the injunction. Despite this split, there is consensus as to two threshold requirements that must be met by the party seeking an anti-suit injunction before a district court can properly delve into the more substantively difficult issue of whether or not they will grant such relief. The two primary elements considered in this analysis are the “gatekeeping” inquiry and the impact upon international comity.

III. COMMON PREDICATES AMONGST THE CIRCUIT COURTS – THE “GATEKEEPING” INQUIRY

Prior to even reaching the question of whether an anti-suit injunction ought to be granted, the party seeking the anti-suit injunction must generally show two things: (1) that both the foreign and domestic proceedings must involve identical parties; and (2) that both the foreign and domestic proceedings involve the same legal issues and/or claims.⁹ This has been described as the “gatekeeping inquiry.”¹⁰ Though each circuit uses a substantially similar approach in regards to the first element, the circuits’ divergent approach to the second element does warrant some discussion.¹¹

In the Eleventh Circuit, for example, in order to satisfy the second element, a party must demonstrate that “the resolution of the case before the enjoining court [must be] dispositive of the action to be enjoined.”¹² As applied by the court, in order to show *prima facie* entitlement to an anti-suit

8. *Id.* at 626.

9. *See E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 991 (9th Cir. 2006) (citations omitted); *see also Canon Latin America, Inc. v. Lantech (CR), S.A.*, 508 F.3d 597, 601 (11th Cir. 2007).

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

11. There seems to be general agreement amongst the circuits that in regards to the first factor, substantial similarity of the parties, or identical principal parties, will suffice for satisfying the first element. *See also Paramedics Electromedicina Comercial, Ltda. v. GE Medical Sys. Info. Technologies, Inc.*, 369 F.3d 645, 652 (2d Cir. 2004) (noting close relationship of named parties in both foreign and domestic litigation sufficed).

12. *Canon*, 508 F.3d at 601 (citations omitted).

injunction, one must show more than parallel claims arising out of the same factual transaction; the claims in each forum must be identical. In finding that the claims were not “identical,” in *Cannon*, the Eleventh Circuit concluded that the breach of contract action being brought in Florida was not the same as the statutory action that had been asserted by the defendant in Costa Rica under Costa Rican law, because settling the claim of one would not decide the claim of the other.¹³ As noted by other commentators, when applied in this fashion, no injunction will ordinarily issue where the cause of action being pursued in the foreign forum could not be brought or heard in the United States.¹⁴

Other circuits, notably the First and Ninth Circuits, take a somewhat less formalistic approach toward finding that both domestic and foreign claims are the same. In *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren* (“*Quaak v. KPMG*”), the First Circuit found that the causes of action in the parallel proceedings were “substantially similar,” because the “essential character” of the foreign action directly implicated the pending U.S. litigation.¹⁵ Similarly, the Ninth Circuit applies a functionally identical test to determine whether the threshold elements have been met.¹⁶ In applying this standard, the Ninth Circuit’s analysis focuses on whether all issues can (and should)¹⁷ be resolved in the domestic litigation and on the relief sought as opposed to the statutory or legal basis for the foreign action.¹⁸

In sum, the circuits are in general agreement that the threshold “gatekeeping inquiry” must be conducted and satisfied prior to the grant of an anti-suit injunction. The courts, however, differ on the precise degree to

13. *Canon*, 508 F.3d at 601-602.

14. George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT’L L. 589, 626 nn. 141-142 (1990).

15. *Quaak*, 361 F.3d at 20. In *Quaak*, the foreign litigation was brought by KPMG-B in an attempt to effectively quash the discovery issued by the plaintiff in the U.S. litigation. Thus, while the claims were not identical in each proceeding, because the claims in the foreign proceeding were directly aimed at frustrating the U.S. litigation the Third Circuit found that they were sufficiently similar to sustain the granting of an anti-suit injunction, in part also based on equitable considerations. *Id.* at 20-21.

16. *Applied Medical Distribution Corp. v. Surgical Co. BV*, 587 F.3d 909, 915 (9th Cir. 2009).

17. Of note, is that in *Applied Medical*, the underlying contract contained a California forum selection clause, such that the court held that all claims “arising out of the contract” should be litigated in the United States. *Id.* at 917.

18. *Id.* at 917-918.

which issues, causes of action, and claims raised by the parties in the foreign and domestic forums must be identical. As a general matter, the closer the foreign and domestic claims are legally and factual intertwined, the greater the likelihood that they will meet the requirements of the “gatekeeping inquiry.”

IV. THE DIVERGENT APPROACH TO CONSIDERATIONS OF COMITY¹⁹

After the “gatekeeping inquiry” has been satisfied, the analysis employed by the various federal circuits begins to diverge significantly. Although common themes underlie the factors considered under the jurisprudence of each appellate court, both the weight given to international comity and the type of factors considered vary significantly. This has resulted in three main approaches. These are described herein as: the “conservative” approach, employed by the Second, Third, Sixth, Eighth, and D.C. Circuits; the “liberal” approach, employed by the Fifth, Seventh, and Ninth Circuits; and, the self-described “traditional” approach, employed by the First Circuit.²⁰ The characteristics of each approach are discussed below.

V. THE APPROACH OF THE SECOND, THIRD, SIXTH, EIGHTH, AND D.C.

19. The designation of the “lax” approach to the issuance of anti-suit injunctions as “liberal” and the more restrictive approach as “conservative” mirrors the nomenclature typically adopted by courts, which itself seems to have been derived from a previous article on this subject. See Richard W. Raushenbush, *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039, 1049-1051 (1985) (describing the two approaches as “liberal” and “conservative”).

20. The author would note here that the absence of the Fourth Circuit is an intentional omission, given that the Fourth Circuit has not yet had occasion to squarely address which analytical model it would apply. See *Albemarle Corp. v. AstraZeneca UK Ltd.*, No. 5:08-1085-MBS, 2009 WL 902348 at *6-7 (D.S.C. Mar. 31, 2009) (noting lack of standard adopted by Fourth Circuit); See also *Umbro Int’l, Inc. v. Japan Prof’l Football League*, No. C.A. 6:07-2366-13, 1997 WL 33378853 at *2 (D.S.C. Oct. 2, 1997). The omission of the Eleventh Circuit is also intentional. Notwithstanding the fact that the Eleventh Circuit has considered the propriety of a district court’s grant of a foreign anti-suit injunction on appeal, in each case that it has been considered it has found that the threshold requirements had not been met. See *Canon*, 508 F.3d 597 (reversing grant of anti-suit injunction on grounds that claims in foreign litigation were not identical); *SEC v. Pension Fund of America, L.C.*, 396 Fed.Appx. (West) 577 (11th Cir. 2010) (reversing grant of anti-suit injunction on grounds that the parties to the foreign proceeding were not identical). Thus whether the Eleventh Circuit would apply the conservative or liberal approach is an open question, although technically the “liberal approach” as applied in *Bethell v. Peace*, 441 F.2d 495 (5th Cir. 1971) is Eleventh Circuit precedent. See *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (Fifth Circuit decisions issued prior to October 1, 1981 constituted binding Eleventh Circuit precedent).

CIRCUITS—THE “CONSERVATIVE” APPROACH

A. *The Approach to Comity*

The courts using the “conservative” approach in granting an anti-suit injunction take the view that “only in the most compelling circumstances does a court have discretion to issue an antisuit injunction.”²¹ This reticence is premised upon considerations of international comity. As noted by the D.C. Circuit in the seminal case of *Laker Airways Ltd. v. Sabena Belgian World Airlines*:

The mere filing of a suit in one forum does not cut off the preexisting right of an independent forum to regulate matters subject to its prescriptive jurisdiction [Although] injunctions operate only on the parties within the personal jurisdiction of the courts . . . they effectively restrict the foreign court’s ability to exercise its jurisdiction. If the foreign court reacts with a similar injunction, no party may be able to obtain any remedy.²²

Subsequent courts that have adopted the same approach have put a slightly more pithy gloss on this sentiment: “Comity dictates that foreign anti-suit injunctions be issued sparingly and only in the rarest of cases.”²³

Underlying the considerations of comity in circuits that have adopted the “conservative approach” are two corollary assumptions: (1) the issuance of an anti-suit injunction has the potential to negatively impact international relations between the United States and the country where the foreign action is proceeding;²⁴ and (2) “parallel proceedings are ordinarily tolerable.”²⁵ In light of these considerations, under the conservative

21. *Laker*, 731 F.2d at 927.

22. *Id.* at 927 (citations omitted).

23. *Gau Shan Co., v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992) (also declaring “The days of American hegemony over international economic affairs have long since passed”); *see also* *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products, N.V.*, 310 F.3d 118, 126 (3d Cir. 2002) (noting a restrictive approach to the grant of anti-suit injunctions based upon a “serious concern for comity.” (quoting *General Elec. Co. v. Deutz Ag.*, 270 F.3d 144, 161 (3d Cir. 2001))); *accord* *China Trade and Development Corp. v. M.V. CHOONG YONG*, 837 F.2d 33, 35-36 (2d Cir. 1988).

24. *See, e.g.*, *Goss Int’l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 360-361 (8th Cir. 2007) (noting the potential impact of judicial decisions on foreign relations as basis supporting strong considerations given to comity) (citations omitted).

25. *China Trade*, 837 F.2d at 36.

approach there is a *de facto* (and in some circuits express) rebuttable presumption against issuing anti-suit injunctions predicated upon the substantial deference afforded to international comity. This, of course, begs the question: what exactly is “international comity?” As noted by many commentators and courts, a precise definition of the concept is elusive.²⁶ For purposes of this article, however, it is best defined by how the factors, used in determining whether a grant of anti-suit injunction is proper, are applied by courts using the conservative approach²⁷

B. The Factors Considered

Courts that have adopted the conservative approach also take a limited view of the factors used in determining whether an anti-suit injunction should issue in a particular case. The court must address whether the foreign parallel proceeding will:

- (1) Frustrate a policy of the enjoining court;
- (2) be vexatious [or oppressive];
- (3) threaten the issuing court’s jurisdiction;
- (4) prejudice other equitable considerations; or
- (5) result in delay, inconvenience, expense, inconsistency or a race to judgment.²⁸

Of these five factors, only the first and third factors are afforded much weight beyond lip service.²⁹ Therefore discussion in this section will be

26. See *Goss*, 491 F.3d at 360; see also *Turner Entm’t Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519 n.10 (11th Cir. 1994) (“comity has been defined in various places as ‘the basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or “consideration of high international politics concerned with maintaining amicable and workable relationships between nations.”) (citing Joel R. Paul, *Comity in International Law*, 32 HAR. INT’L L. J. 1, 3–4 nn.3–14 (1991))).

(citations omitted); see generally Elisa D’Alterio, *From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?*, 9 INT’L J. OF CONSTITUTIONAL LAW 394 (2011).

27. For example, several courts that follow the conservative approach speak to the diminished weight afforded to concerns of international comity where the enjoining court has already reached a judgment. See, e.g., *Goss*, 491 F.3d at 361 (citations omitted).

28. *Karaha Bodas Co., v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Karaha II)*, 500 F.3d 111, 119 (2d Cir. 2007) (citing *Ibeto Petrochemical Industries Ltd. v. M/T BEFFEN*, 475 F.3d 56, 64 (2d Cir. 2007)).

29. See *Deutz AG*, 270 F.3d at 160–161 (injunctions should issue “only to protect jurisdiction or an important public policy.”); *Gau Shan Co.*, 956 F.2d at 1355 (dismissing other factors on the basis that they are “likely to be present whenever parallel actions are proceeding concurrently.” (citation omitted)). Cf. *Karaha II*, 500 F.3d at 119 (noting that although all the factors concerning the protection of jurisdiction and implications for important public policies are afforded more weight, all five factors should still be considered). But see *Quaak*, 361 F.3d at 18

limited to a brief examination of those two factors.

In regards to the first factor—protecting an important public policy of the forum—what constitutes a public policy of sufficient import to justify the issuance of an anti-suit injunction is far from a settled question.³⁰ It is generally accepted that anti-trust regulation and consumer protection are both public policies that if frustrated by the foreign proceeding, may warrant an anti-suit injunction.³¹ The federal interest in ensuring the enforceability of arbitration agreements under the Federal Arbitration Act³² has also been deemed a sufficiently important policy.³³ In addition, at least one court has held that the Carriage of Goods by Sea Act (“COGSA”)³⁴ package limitation³⁵ constitutes a strong public policy justifying the use of an anti-suit injunction.³⁶

With respect to the second factor—preservation of jurisdiction—the Southern District of New York recently expounded upon its application in *Dandong v. Pinnacle Performance Ltd.*: “In *in personam* proceedings, if a foreign court is not merely proceeding in parallel but is attempting to carve out exclusive jurisdiction over an action, an injunction may be necessary to protect the enjoining court’s jurisdiction.”³⁷

In determining whether the foreign court was “attempting to carve out exclusive jurisdiction,” the district court looked to the motions filed in the foreign proceeding.³⁸ Finding that the party opposing the injunction was

(criticizing the conservative approach of being too restrictive by focusing on only two of the five factors).

30. See, e.g., *Gau Shan Co.*, 956 F.2d at 1357-1358 (noting very little case law on how much weight to give public policy considerations in determining whether to grant an anti-suit injunction).

31. See *id.*

32. 9 U.S.C. § 2.

33. *Ibeto Petrochemical Industries, Ltd.*, 475 F.3d at 65 (frustration of policy in favor of arbitration justified issuance of injunction); accord *Smith/Enron Cogeneration Ltd. P’ship, Inc. v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 99 (2d Cir. 1999) (stating that there is a strong federal policy in favor of arbitration (citations omitted)).

34. 46 U.S.C. § 30701 (2006).

35. *Id.* (former 46 U.S.C. 1304(5) was not recodified in 2006, and thus COGSA’s provisions are now listed as a “historic note” appended to § 30701).

36. *Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp.2d 118, 130-131 (S.D.N.Y. 1997).

37. *Dandong v. Pinnacle Performance Ltd.*, No. 10 Civ. 8086(LBS), 2011 WL 6156743 at *1, *5 (S.D.N.Y. Dec. 12, 2011) (citing *China Trade*, 837 F.2d at 36).

38. *Id.*

itself seeking an anti-suit injunction in the foreign forum, the court determined the foreign proceeding did “imperil” the court’s jurisdiction, and thus this factor weighed in favor of issuing an anti-suit injunction.³⁹ The court’s conclusion is consistent with the treatment this factor has received from other courts applying the conservative approach.⁴⁰

VI. THE APPROACH FOLLOWED IN THE FIFTH, SEVENTH, AND NINTH CIRCUITS—THE “LIBERAL” APPROACH

A. *The Approach to Comity*

In contradistinction to the conservative approach, those courts that apply the “liberal” test to the issuance of anti-suit injunctions take a much less deferential tack. Although international comity is still a factor considered under the analysis of the “liberal approach,” the Fifth Circuit went so far as to say: “[w]e decline . . . to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action.”⁴¹ As a practical matter, the minimization of comity interests has two primary implications. First, courts that employ the liberal approach do not apply a rebuttable presumption against the issuance of an anti-suit injunction.⁴² Second, much greater weight is afforded another factor: whether the foreign litigation is “duplicitous and vexatious.”⁴³

As noted, the potential impact of an anti-suit injunction on international comity comes into play as just one of the factors considered in determining whether to issue the injunction. In part, the courts’ skepticism toward the emphasis on international comity is justified by the indiscernible impact anti-suit injunctions have had upon the foreign relations of the United States.⁴⁴ In sum, these courts have concluded that

39. *Id.*

40. *See, e.g., Laker Airways*, 731 F.2d at 930 (“where the foreign proceeding is not following a parallel track but attempts to carve out exclusive jurisdiction over concurrent actions, an injunction may be necessary to avoid the possibility of losing validly invoked jurisdiction”).

41. *Kaepa, Inc.*, 76 F.3d at 627.

42. *Cf. E.J. Gallo*, 446 F.3d at 994–995 (the court weighs the factors to determine whether the impact on comity is “tolerable” and finds an injunction proper under any test).

43. *MacPhail v. Oceaneering Int’l, Inc.*, 302 F.3d 274, 277 (5th Cir. 2002) (citation omitted).

44. *See Philips Med. Sys. Int’l B.V. v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993) (“This increasingly is one world and we have difficulty seeing why the usual and by no means stringent

ordinary litigation, absent any identifiable issues directly implicating the public policy of the foreign forum; simply do not have a significant effect upon considerations of international comity.

B. The Factors Considered

Courts using the liberal approach apply more or less the same factors as those used under the conservative approach: “ ‘[F]oreign litigation may be enjoined when it would (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court’s . . . [jurisdiction]; or (4) where the proceedings prejudice other equitable considerations.’ ”⁴⁵

Although “delay, inconvenience, expense, inconsistency, or a race to judgment” is not treated as an independent factor, it is discussed in the context of balancing the equities of the case under the fourth factor.⁴⁶ The courts depart from the analysis employed under the conservative approach by a different allocation of the weight given to each factor. For example, the most expansive of the decisions discusses the factors in the disjunctive sense, whereby if a party can show that any one factor is present, an anti-suit injunction should issue.⁴⁷ More recently, however, those courts applying the liberal analysis have applied a more integrated approach involving the balancing of all the factors, including the interest in international comity.⁴⁸

rules for limiting duplicative litigation should stop at international boundaries. If [the foreign state] actually cares that [a litigant] is unable to defend against [a] suit in a [foreign] court we should expect to hear from either our State Department or the foreign office of the [foreign state], and having heard from neither we are skeptical that the district judge’s injunction has jeopardized amicable relations between the two countries.”); *E.J. Gallo*, 446 F.3d at 994 (“No public international issue is raised in this case. There is no indication that the government of Ecuador is involved in the litigation. [This case merely involves] a private party in a contractual dispute with . . . another private party. The case before us deals with enforcing a contract and given effect to substantive rights. This in no way breaches norms of comity.”); *Kaepa, Inc.*, 76 F.3d at 627 (“it simply cannot be said that the grant of the antisuit injunction actually threatens relations between the United States and [the foreign state]”).

45. *E.J. Gallo*, 446 F.3d at 990 (citing *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981)) (citation omitted).

46. *See, In re Unterweser Reederei, GmbH v. M/S BREMEN*, 428 F.2d 888, 896 (5th Cir. 1970), *aff’d on reh’g*, 446 F.2d 907 (1971); *Kaepa, Inc.*, 76 F.3d at 627–628 (so considering the concepts of delay and hardship in the context of equity);

47. *See, e.g., E.J. Gallo*, 446 F.3d at 990 (noting that the *Unterweser* case discussed the factors as disjunctive).

48. *See id.* at 991; *see also, Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan*

The courts' liberal analysis of the first and third factors—protection of public policy of the forum and protection of jurisdiction—mirrors that of the conservative approach.⁴⁹ The primary difference, and the focus of the analysis under the liberal approach, is on whether the foreign parallel proceeding will be “vexatious and oppressive.”⁵⁰ In analyzing whether or not the foreign litigation is vexatious and/or oppressive, the Fifth Circuit considers:

the presence of several factors, including (1) “inequitable hardship” resulting from the foreign suit; (2) the foreign suit’s ability to “frustrate and delay the speedy and efficient determination of the cause”; and (3) the extent to which the foreign suit is duplicative of the litigation in the United States.⁵¹

The courts that utilize this analytical approach do so with an eye towards avoiding a “gratuitously duplicative” effort caused by concurrently pending parallel proceedings involving identical issues.⁵² Generally, where a defendant initiates a foreign suit on identical issues only after a first-filed U.S. action, those courts that employ the liberal approach have been more inclined to conclude that such a litigation tactic “smacks of cynicism, harassment, and delay.”⁵³

That a foreign proceeding is initiated prior to domestic litigation does not, however, require a court to decline to issue an anti-suit injunction. Cases presenting this scenario have instead generally focused on other factors, such as the public policy of the forum and the consideration of equitable factors. For example, in *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*,⁵⁴ the party seeking to be enjoined had filed suit in France prior to the inception of the U.S. litigation.⁵⁵ This fact notwithstanding, the Seventh Circuit concluded that the issuance of an anti-suit injunction was justified on the balance of the equities of the case

Gas Bumi Negara (*Karaha I*), 335 F.3d 357, 366 (5th Cir. 2003) (considering/balancing all factors); *Commercializadora Portimex S.A. de CV v. Zen-Noh Grain Corp.*, 373 F. Supp. 2d 645, 649 (E.D. La. 2005).

49. See *Portimex*, 373 F. Supp. 2d at 649.

50. *Karaha I*, 335 F.3d at 366.

51. *Id.* (citations omitted).

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

53. *Kaepa, Inc.*, 76 F.3d at 628.

54. 10 F.3d 431.

55. *Id.* at 427.

because the defendant had both voluntarily participated in the U.S. suit until discovery revealed facts negatively impacting his claim, and because the foreign proceeding was “dormant” during the initial phase of the U.S. litigation.⁵⁶ Similarly, the Ninth Circuit in *E.J. Gallo Winery v. Andina Licores S.A.*,⁵⁷ was faced with a situation where the Ecuadorian defendant in the U.S. proceeding had filed suit in Ecuador before claims had been filed in the U.S.⁵⁸ Taking into account the forum policy in favor of enforcing forum selection and choice of law clauses applicable to the claims of the parties,⁵⁹ the Ninth Circuit found that the foreign proceeding was “messy, protracted, and potentially fraudulent” and held that a anti-suit injunction should issue.⁶⁰

VII. THE “TRADITIONAL” GLOSS OF THE FIRST CIRCUIT

Taking its cue from the D.C. Circuit’s decision in *Laker Airways*,⁶¹ the analysis applied by the First Circuit in its most recent pronouncement on anti-suit injunctions, *Quaak v. KPMG*,⁶² borrows from both the liberal and conservative approaches. KPMG initiated a Belgian suit, which led to an order enjoining the U.S. plaintiff’s attempt to enforce a discovery order issued by the U.S. District Court for the District of Massachusetts based upon Belgian privacy laws.⁶³ In turn, the United States District Court granted the plaintiff’s motion for an anti-suit injunction, which prohibited KPMG from enforcing the order of the Belgian court.⁶⁴

Faced with this record, the First Circuit framed its task on review thus: “An inquiring court must find a way to accommodate conflicting, mutually inconsistent national policies without unduly interfering with the judicial processes of a foreign sovereign.”⁶⁵ Taking issue with the “too easy

56. *Id.* at 431–432.

57. 446 F.3d 984.

58. *Id.* at 994.

59. Which, respectively, selected a California forum and the application of California law. *See id.* at 991–994.

60. *Id.* at 995.

61. 731 F.2d 909.

62. 361 F.3d 11.

63. *Id.* at 15.

64. *Id.* at 16.

65. *Id.* at 16 (citing *Laker Airways*, 731 F.2d at 916).

passage to international antisuit injunctions”⁶⁶ allowed under the liberal approach, and the “woodenness”⁶⁷ of the modern conservative approach, the court embraced what it deemed the “traditional version” of the analysis applicable to anti-suit injunctions.⁶⁸

A. The Approach to Comity

Like the conservative approach, substantial weight is afforded to considerations of international comity under the traditional approach. “[T]hose considerations ordinarily establish a rebuttable presumption against the issuance of an order that has the effect of halting foreign judicial proceedings.”⁶⁹ Like the courts that apply the conservative approach, the weight afforded to comity is predicated upon the First Circuit’s determination that the issuance of anti-suit injunctions directly affects comity.⁷⁰ Furthermore, the First Circuit relies on the premise that a well-functioning globalized market system depends upon the predictability inherent in giving deference to international comity.⁷¹

B. The Factors Considered

Unlike either the courts employing the liberal or conservative approaches, the First Circuit has not set forth a exclusive list of enumerated factors to be considered in determining whether to issue anti-suit injunctions. Instead, the court has identified a non-exclusive list of factors that may be considered in determining whether the presumption against the issuance of an anti-suit injunction has be overcome, noting:

[R]ebutting this presumption involves a continual give and take. In the course of that give and take. . . . [T]he presumption may be counterbalanced by other facts and factors particular to a specific

66. *Id.* at 17.

67. *Quaak*, 361 F.3d at 18.

68. *Id.*

69. *Id.*; *see also id.* at 19 (emphasizing “rebuttable” nature of the presumption).

70. *Id.* at 19.

71. *Id.* at 18-19 (“In an increasingly global economy, commercial transactions involving participants from many lands have become common fare. This world economic interdependence has highlighted the importance of comity, as international commerce depends to a large extent on the ability of merchants to predict the likely consequences of their conduct in overseas markets.” (citation and internal quotation marks omitted)); *accord Gau Shan Co.*, 956 F.2d at 1354 (“The modern era is one of world economic interdependence, and economic interdependence requires cooperation and comity between nations”).

case. These include (but are by no means limited to) such things as: the nature of the two actions (i.e., whether they are merely parallel or whether the foreign action is more properly classified as interdictory); the posture of the proceedings in the two countries; the conduct of the parties (including their good faith or lack thereof); the importance of the policies at stake in the litigation; and finally, the extent to which the foreign action has the potential to undermine the forum court's ability to reach a just and speedy result.⁷²

The First Circuit specifically noted that the two prime considerations under the conservative approach—preservation of jurisdiction and protecting important policies of the forum—are not due a “talismanic” significance in the analysis, but instead their approach takes into consideration the “totality of the circumstances.”⁷³ In *Quaak v. KPMG*, the First Circuit, noting the interdictory nature of the foreign proceeding and the fact that it directly impacted the jurisdiction of the district court, however, found that the issuance of an anti-suit injunction was justified.⁷⁴

VIII. CONCLUSION

Unlike English courts, a U.S. district court passing on the question of whether an anti-suit injunction should issue is not constrained (or guided) by a binding treaty addressing the issue. To the extent this results in a variance in their respective approaches to issue, at least in respect of EU Member countries, that distinction is a function of the structural environment in which they operate as oppose to one based upon philosophical differences. In both U.S. and U.K. forums, the subjects of inquiry and factors considered—e.g., international comity, whether the foreign litigation is vexations and oppressive, the protection of jurisdiction—are quite similar, albeit articulated in a different manner. That difference, however, is more one of form as opposed to function.

Anti-suit injunctions are an effective procedural tool that may be employed by litigants when faced with contemporaneous parallel litigation in a foreign forum. Because the various U.S. circuit courts differ with respect to the formulation and weight afforded to each factor, attention

72. *Quaak*, 361 F.3d at 19.

73. *Id.*

74. *Id.* at 20-21.

should be paid to the emphasis placed upon each element in argument. It is hoped that the practitioner will find the overview and explication of the various approaches applied by U.S. courts of some assistance in crafting their briefs and making an informed decision as to whether “genuflection” to a particular consideration is required.