

FOREIGN PARALLEL PROCEEDINGS FROM THE UNITED STATES

PERSPECTIVE: DO THE COURTS NEED A CRYSTAL BALL?

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As amply exemplified by the far-flung patent dispute between Apple and Samsung over smartphone products and computer tablets, described by one commentator earlier this year as “Apple v. Samsung: 50 suits, 10 countries -- and counting,”¹ the prospect (and reality) of parallel litigation between the same parties and over the same subject matter in the United States and a foreign jurisdiction is upon us. Setting aside the Apple/Samsung litigations as the extreme end of the spectrum, the matter of parallel civil litigation in the United States and South Korea takes on increased importance with the enactment of the nations’ Free Trade Agreement (“KORUS FTA”), which became effective March 15, 2012.² Simply, notwithstanding hopes that business goes smoothly, more trade and cross-border transactions will inevitably lead to more cross-border litigation and, in turn, an increased incidence in parallel proceedings in the United States and South Korea.

To address the circumstance of competing lawsuits filed in the United States and a foreign jurisdiction from the U.S. perspective, we would focus on two primary questions, which explore both the legal principles and theories at issue and the practical and strategic considerations in the parallel proceeding context. First, under what circumstances may a parallel United States lawsuit proceed or not proceed in light of a pending foreign lawsuit between the parties? The answer to this inquiry is not abundantly clear. Among the legal doctrines or

¹ See “List of 50+ Apple-Samsung lawsuits in 10 countries” at <http://www.fosspatents.com/2012/04/list-of-50-apple-samsung-lawsuits-in-10.html>.

² For background and materials on the KORUS FTA, see <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta>.

concepts typically implicated in considering whether a parallel U.S. action might proceed (or be thwarted, depending on the party's status as plaintiff or defendant) are (i) a stay or dismissal based on principles of "abstention," or (ii) invocation of an anti-suit injunction. As explained below, these standards are somewhat ill-defined and inconsistently applied by the U.S. courts.³

Competing jurisprudential and practical concerns are at the heart of this first question, somewhat predictably leading to an incoherent set of rules that are applied to achieve some sort of balance in these instances. For example, on one hand, the preference would ordinarily be that a plaintiff be accorded its chosen forum and that a court should duly exercise its jurisdiction over a matter properly before it. Indeed, the seminal U.S. case regarding abstention, in the context of parallel federal and state court proceedings, speaks of the federal courts' "unflagging obligation" to "exercise the jurisdiction given them."⁴ Moreover, there is no strict prohibition against concurrent proceedings before the courts of two sovereigns that each have jurisdiction over the matter and the parties, and as a matter of international comity, one sovereign's courts should not affect the proceedings in the other jurisdiction.⁵ But, on the hand, there must be concern for the most efficient use of the parties' and the respective judiciaries' resources, and avoiding the "race to judgment" and its potential consequence of conflicting judgments from different courts.

³ A third avenue for resolution of parallel proceedings would seem to be dismissal on *forum non conveniens* grounds, which one commentator argues is at least a well-developed body of law. See Kimberly Hicks, Note, *Parallel Litigation in Foreign and Federal Courts: Is Forum Non Conveniens the Answer?*, 28 REV. LITIG. 659 (2009). To the extent that *forum non conveniens* operates as a dismissal, however, it lacks the fluidity of the other remedies (a stay or injunction may be lifted depending on developments in the parallel proceeding) and, thus, is perhaps not an efficacious device in the long run for resolving parallel proceedings.

⁴ See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)

⁵ See *China Trade and Develop. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) ("Concurrent jurisdiction in two courts does not necessarily result in a conflict . . . When two sovereigns have concurrent *in personam* jurisdiction one court will ordinarily not interfere with or try to restrain proceedings before the other . . . "Parallel proceedings on the same *in personam* claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as *res judicata* in the other." [citations omitted]).

Overall, the optimal path would be to proceed in a single action that most comprehensively resolves the parties' entire dispute by proceedings that are consistent with those of the other jurisdiction.

The first question posed above and its underpinnings inevitably lead, however, to a second set of intertwined questions as to the potential results of the parallel foreign proceeding in terms of recognition of a foreign judgment, or application of *res judicata* and collateral estoppel principles. It is only when these questions are answered that we can determine whether the chosen suit was a comprehensive resolution within an appropriate set of proceedings, *i.e.*, addressing such matters as whether the foreign proceeding afforded due process such that a resulting judgment could be recognized, if there was an identity of claims, and whether an issue was fully and fairly litigated. And therein lays the rub to the first question, because often at the stage such objections are being made to the foreign proceeding, we are asking the courts to look into a crystal ball and make such determinations prospectively. Frequently, the solution might simply be to tacitly acknowledge that this determination cannot be made and to allow the proceedings to continue, deferring the determination until a judgment is ultimately considered in an action to recognize the foreign judgment (and maybe, in boxing parlance, with a hope that the parties will punch themselves out and reach a resolution⁶). Adding to the complexity of these issues, and the cloudiness of the crystal ball, the results of a recognition analysis or application of *res judicata* and collateral estoppel in a given case are likewise unclear, being dependent on how the foreign proceedings transpire and the venue in which recognition is sought, insofar as recognition standards vary.

⁶ See *supra* note 1.

Even outside the context of a monumental struggle like that between Apple and Samsung, the matter of parallel civil litigation in the United States and a foreign jurisdiction poses difficult jurisprudential, strategic and practical questions to which there are typically no clear answers. In the sections that follow, we review some of the principles typically applied to determine whether a U.S. action should proceed and related matters of concern regarding application of standards for foreign judgment recognition, res judicata and collateral estoppel.

As multiple commentators have observed, the current state of affairs and doctrines for resolving these matters seem inadequate amid the foreseeable increase of cross-border disputes and incidence of parallel proceedings.⁷ This is especially so with respect to disputes with South Korean entities due to the enhanced commerce and trade resulting from the KORUS FTA. It might be that as such cases percolate through the U.S. legal system, rules will become better clarified, but in the interim, practitioners should be aware of the playing field and should strongly consider the use of definitive forum selection clauses in their transactions where possible to avoid the perils of parallel proceedings.

I. May A Parallel U.S. Suit Proceed?

Where there are parallel actions pending in a United States court and a foreign court, the two most significant procedural doctrines or devices to be considered regarding whether the U.S.

⁷ See, e.g., Austen L. Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237, 239 (2010); N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601 (2006); Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1 (2004); Taryn M. Fry, Comment, *Injunction Junction, What's Your Function? Resolving the Split over Antisuit Injunction Deference in Favor of International Comity*, 58 CATH. U.L. REV. 1071 (2009); Hicks, *Parallel Litigation in Foreign and Federal Courts*, supra note 3.

suit will proceed are: (i) a stay or dismissal of the action based on “abstention” standards, and (ii) the imposition of an anti-suit injunction.⁸

A. *International Abstention*

As one commentator has observed, “finding a coherent answer” to the following question: “What should a court do when a lawsuit involving the same parties and the same issues is already pending in the court of another country?” is not easy.⁹ Rather,

⁸ Relatedly, dismissal of the action on grounds of *forum non conveniens* is also an option. See Hicks, *supra* note 3, at 688-91 (providing overview of *forum non conveniens* doctrine). *Forum non conveniens* focuses on three elements: whether the alternate forum is adequate, and the balance of private interests (*e.g.*, access to proof in the alternate forum, costs associated with litigating in the alternate forum, possibility of harassment in the alternate forum) and public interests (*e.g.*, administrative burden on the court, difficulties raised by the application of foreign law).

The adequate alternative forum prong has been repeatedly satisfied in instances where the alternate forum was Korea. See, *e.g.*, *Rodriguez v. Samsung Elecs. Co., Ltd.*, 734 F. Supp. 2d 220, 225 (D. Mass. 2010) (noting that “similar remedies” are available in Korea and U.S., and “neither party has asserted that plaintiffs would be treated unfairly by the Korean courts”); *S. Slater & Son v. Leder Mode Co., Ltd.*, 1991 U.S. Dist. LEXIS 16252, *12 (N.D. Cal. Oct. 31, 1991) (finding that plaintiff’s “contract and tort claims have analogues under Korean law” and while plaintiff alleged that certain parties would blacklist it if it brought suit in Korea, such threats were “in no way connected to the Korean courts”); *Fireman’s Fund Ins. Co. v. Pan Ocean Bulk Carriers, Ltd.*, 559 F. Supp. 527, 529 (N.D. Cal. 1983) (“Korea is an experienced admiralty jurisdiction.”).

Similarly, public interest factors tend to be fairly equalized as between the U.S. and Korea. See *Rodriguez*, 734 F. Supp. 2d at 228 (“In sum, the only public factor which may tip the scales in any way is the fact that Korean law may apply – all other public factors are equal. However, the application of foreign law cannot be given undue weight.”).

Private interest factors will most likely be determinative of a *forum non conveniens* challenge to U.S. jurisdiction over Korean jurisdiction. Compare *Rodriguez*, *supra* (rejecting *forum non conveniens* challenge by Korean company to U.S. claims brought by U.S. worker injured during travel to Korea to install machinery manufactured by his U.S. employer) with *S. Slater & Son*, *supra* (accepting *forum non conveniens* challenge to U.S. action for breach of contract and tortious interference with business arising out of non-conforming goods of Korean garment manufacturers).

⁹ Parrish, *Duplicative Foreign Litigation*, *supra* note 7, at 239.

few commentators have addressed the issue of reactive, duplicative foreign proceedings. The treatment of these kinds of parallel proceedings “remains one of the most unsettled areas of the law of federal jurisdiction,” and a dearth of scholarship explores how a court should proceed if the same case is already pending in a foreign forum. Lower court decisions are muddled, as judges apply at least three distinct approaches that are undertheorized. The Supreme Court of the United States, for its part, has never spoken directly to the issue and has not rescued the lower courts from their confusion.¹⁰

United States abstention standards derive from precedent addressing: parallel U.S. federal and state court proceedings (*Colorado River*), competing federal actions (*Landis*), and a concept characterized as “international abstention.” We will focus on the international abstention concept below are most relevant to our discussion, but to the extent that it has devolved from the *Colorado River* and *Landis* precedents, facets of those cases should be observed, especially to the extent that they militate toward the proposition that “courts are reluctant to stay an action pending resolution of a first-filed foreign action, concerned that deferring to a foreign court constitutes an abdication of their responsibility to hear a case once jurisdiction vests” and lead to an “overriding presumption . . . against declining jurisdiction.”¹¹

¹⁰ Dean Parrish further criticizes the U.S. approach to duplicative foreign litigation issue:

In the United States, ingrained assumptions contribute to the difficulty in responding to duplicative litigation. For one, much of the existing analysis of foreign parallel proceedings is drawn from domestic theory, without any serious consideration as to whether the domestic can be so easily grafted onto the international, or whether the two situations are comparable at all. A form of American exceptionalism is also often at play. Some issues are too important, or so it is believed, to be left to foreign courts. Lastly, the question of what to do with parallel proceedings conventionally has had an awkward relationship with jurisdictional doctrines. The existence of jurisdiction - and the federal courts' "virtually unflagging obligation" to exercise it - is touted as the primary reason why even duplicative actions must proceed unhindered.

Id. at 242-43.

¹¹ *Id.* at 247. *See Colorado River*, 424 U.S. at 817-18 (“This difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given

1. The Eleventh Circuit’s International Abstention Analysis

One of the seminal cases regarding “international abstention” is *Turner Entm’t Co. v. Degeto Film GmbH*.¹² In *Turner*, the Eleventh Circuit articulated a multi-part test to determine if “a federal court, which properly has jurisdiction over an action, should exercise its jurisdiction where parallel proceedings are ongoing in a foreign nation and a judgment has been reached on the merits in the litigation abroad.”¹³

Turner involved a dispute over a 1984 licensing agreement between an American company, as licensor, and a group of German entities, as licensees, for the broadcast in Germany of certain entertainment properties (old movies, television series, cartoons).¹⁴ The controversy arose over the scope of the broadcast area, which grew as a consequence of new satellite television technology (the utilization of an ASTRA satellite in 1991), such that the broadcast “footprint” encompassed most of Europe, rather than primarily Germany; the American licensor claimed this violated the license agreement.¹⁵

them . . . Given this obligation, and the absence of weightier considerations of state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention.” [citations omitted]; *Landis v. North Am. Co.*, 299 U.S. 248, 255 (1936) (Cardozo, J.) (“[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.”)

¹² 25 F.3d 1512 (11th Cir. 1994).

¹³ *Id.* at 1518.

¹⁴ *Id.* at 1514.

¹⁵ *Id.* at 1516 (“The Agreement’s drafters failed to anticipate that such an easy method of reaching a pan-European audience would become a standard mode of broadcasting during the life of the Agreement.”).

The German licensees filed a declaratory judgment action in Germany on April 29, 1993.¹⁶ The German court heard arguments and rendered a “judgment on the merits” on November 25, 1993.¹⁷ The German court concluded that the licensees did not have an absolute right to broadcast the licensor’s properties via the ASTRA satellite that had such an extensive range, but the licensees were obligated to broadcast to the German public and as a practical matter compelled to use the broadcast platform to fulfill those obligations.¹⁸ The German court found that “the parties had not contemplated the current circumstances involving the new technology,” and reasoned that “[g]iven this gap in the operation of the contract . . . [the court] was bound to apply the doctrine of good faith dealing to the situation . . . [and] attempted a supplemental interpretation of the contract to determine a result that parties negotiating in good faith would have negotiated.”¹⁹

The German court ultimately concluded that the American licensor should permit the German licensees to use to ASTRA satellite for its broadcasts, but that the German licensees would be required to pay an increased license fee, which would be determined at a later date.²⁰

The American proceedings, sounding in breach of contract, were commenced about one week after the German proceedings, on May 6, 1993, in Georgia state court.²¹ The action was removed to federal district court; the American licensor sought a preliminary and permanent injunction enjoining the German licensees for broadcasting its properties, and the German

¹⁶ *Id.*

¹⁷ *Id.* at 1517.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

licensees countered with a motion to dismiss or stay the American action in deference to German proceedings.²²

The Georgia federal district court held a hearing on the motions on June 29, 1993, during which it denied the German licensors' motion to dismiss or stay.²³ On September 10, 1993, the district court granted a preliminary injunction, but thereafter stayed the injunction conditioned on the German licensees posting a bond, and the German licensees obtained from the federal circuit court of appeals, by order dated October 19, 1993, a stay of the injunction pending appeal.²⁴

Notably, as were the facts of the *Turner* case and as the Eleventh Circuit framed the issue, the foreign proceeding resulted in a judgment while the U.S. action was still pending, if not in its infancy, prior to any discovery. As discussed below, among the factors to be considered in determining "international abstention" is the efficient use of judicial resources, which implicates the relative status of the competing actions. Given the various opportunities for time-consuming litigation devices in the U.S. system (pre-answer motion practice, extensive discovery, interlocutory appeals under certain circumstances²⁵), that the foreign proceeding would result in a judgment prior to the U.S. proceeding leading to a judgment is foreseeable, affecting the international abstention analysis.

2. The *Turner* International Abstention Standard

Recognizing that despite the federal courts' "virtually unflagging obligation" to exercise the jurisdiction conferred upon them . . . in some private international disputes the prudent and

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 1517-18.

²⁵ Generally, the type of dispute that will result in parallel proceedings would likely be subject to the jurisdiction of the federal courts, based on diversity jurisdiction between a citizen of a State and a citizen/subject of a foreign state, 28 U.S.C. § 1332(a)(2), and while federal appellate jurisdiction is based on the final judgment rule and does not provide generally for interlocutory appeals, as seen *Turner*, there are various exceptions under which appeals may proceed.

just action for a federal court is to abstain from the exercise of jurisdiction,” the court in *Turner* synthesized principles emerging from cases addressing concurrent jurisdiction between federal and state courts to identify three goals applicable to international abstention and a total of ten subissues within those basic principles:

(1) a proper level of respect for the acts of our fellow sovereign nations -- a rather vague concept referred to in American jurisprudence as international comity; (2) fairness to litigants; and (3) efficient use of scarce judicial resources.²⁶

a. International Comity Element

With respect to the goal of international comity, the Eleventh Circuit found three inquiries necessary:

(1) whether the judgment was rendered via fraud . . . (2) whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence . . . and (3) whether the foreign judgment is prejudicial, in the sense of violating American public policy because it is repugnant to fundamental principles of what is decent and just.²⁷

These “elements” are based mostly on the articulation of comity principles articulated in the 1895 U.S. Supreme Court decision in *Hilton v. Guyot*.²⁸ One might question whether the “international comity” analysis needs to go further though, to account for the current statutes governing the recognition of foreign country judgments and the more greatly detailed standards contained in those statutes. A foreign action might satisfy the international comity element under the *Turner* test, but a resulting judgment might not be recognized under the recognition statutes, particularly the Revised Act, under which a foreign judgment might be rejected based on the specific proceedings. The foreign action to which the U.S. court deferred would then essentially have been for naught, which would seemingly defeat other elements of the *Turner*

²⁶ *Turner*, 25 F.3d at 1518.

²⁷ *Id.* at 1519.

²⁸ 119 U.S. 113 (1895).

standard, such as efficiently using judicial resources and preventing prejudice to the parties (discussed below). In short, does it make sense to stay a U.S. action in deference to a foreign action that would result in a non-recognizable judgment? Yet, that result appears possible under the international comity element articulated in *Turner*, and requires the courts to prognosticate that such a result would not occur.

b. Fairness Element

Regarding fairness, the Eleventh Circuit looks to “(1) the order in which the suits were filed . . . (2) the more convenient forum . . . and (3) the possibility of prejudice to parties resulting from abstention.”²⁹ The first two inquiries are fairly straightforward, but the third poses some concern or difficulty when a court is asked to determine the question prospectively. Regarding the possibility for prejudice, the *Turner* court acknowledged that “[b]efore accepting or relinquishing jurisdiction a federal court must be satisfied that its decision will not result in prejudice to the party opposing the stay,” which means that the court must be satisfied that the party will have the opportunity to “fully and fairly litigate” in the foreign tribunal.³⁰ As alluded to above, this sort of prognostication requires the court to have a crystal ball, especially when the motion to stay is brought before it at the very inception of the dispute and there is not a record from the foreign proceeding on which to base that determination.

c. Efficiency Element

Finally, as criteria relating to the efficient use of judicial resources, the Eleventh Circuit identified:

(1) the inconvenience of the federal forum . . . (2) the desirability of avoiding piecemeal litigation . . . (3) whether the actions have parties and issues in

²⁹ *Turner*, 25 F.3d at 1521-22.

³⁰ *Id.* at 1522.

common . . . and (4) whether the alternative forum is likely to render a prompt disposition.³¹

Like the fairness analysis, a least one of these inquiries, the timing of the foreign disposition is difficult for a court to assess when the parallel actions are in their infancy, or, for example, where the action is of a type with which the foreign court might have limited experience, such as a complex mass tort or toxic tort action.

3. Applying International Abstention to a Parallel Korean Action

Applying this standard to a parallel Korean action presents something of a hypothetical, with facets of the fairness and efficiency elements being highly case-specific. With respect to international comity, the existence of the KORUS FTA, as well as the Friendship, Commerce and Navigation Treaty between the United States and the Republic of Korea (“KORUS FCN Treaty”), which guarantees national treatment and most favored nation status to nationals of the other with respect to access to courts,³² would seem to be important factors in assessing that element of the international abstention standard articulated by the Eleventh Circuit.

Overall, the standard for international abstention is a promising paradigm but seems to require further development and refinement, and could be a useful tool for additional U.S. courts to adopt as more incidents of parallel foreign proceedings emerge from the global economy.

B. *Antisuit Injunction*

Another approach to resolving the foreign parallel proceeding dilemma is for the U.S. court, rather than staying the action before it, to enjoin the parties from proceeding elsewhere, known as an anti-suit injunction. Consistent with the vagaries confounding the issue of foreign

³¹ *Id.*

³² Treaty of Friendship, Commerce and Navigation between The United States of America and The Republic Of Korea, U.S.-Kor., Nov. 28, 1956, 8 U.S.T. 2217.

parallel proceedings, antisuit injunction cases present a split among the federal circuits.³³

Among the circuit courts of appeals, the Eighth Circuit most recently addressed the issue in *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*; yet, the United States Supreme Court denied certiorari to resolve the circuit split.³⁴

As recounted by the Eighth Circuit, the split breaks down to a “‘conservative approach,’ under which a foreign antisuit injunction will issue only if the movant demonstrates (1) an action in a foreign jurisdiction would prevent United States jurisdiction or threaten a vital United States policy, and (2) the domestic interests outweigh concerns of international comity”; and a “‘liberal approach,” which places only modest emphasis on international comity and approves the issuance of an antisuit injunction when necessary to prevent duplicative and vexatious foreign litigation and to avoid inconsistent judgments.”³⁵ Prior to *Goss*, the “conservative approach had been adopted by the First, Second, Third, Sixth and District of Columbia Circuits,³⁶ while the “liberal approach” is relied upon by the Fifth, Seventh and Ninth Circuits.³⁷

As with international abstention principles, the imprecisely defined notion of comity drives consideration of whether to issue such an injunction:

Under either the conservative or liberal approach, “[w]hen a preliminary injunction takes the form of a foreign antisuit injunction, [courts] are required to balance domestic judicial interests against concerns of international comity.” . . .

³³ Fry, *Injunction Junction, What’s Your Function?*, *supra* note 7.

³⁴ 491 F.3d 355 (8th Cir. 2007), *cert. denied sub nom. Goss Int’l Corp. v. Tokyon Kikai Seisakusko*, 128 S. Ct. 2957 (2008).

³⁵ *Id.* at 359-60.

³⁶ *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35-37 (2d Cir. 1987); *General Elec. Co. v. Deutz AG*, 270 F.3d 144 (3d Cir. 2001); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

³⁷ *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993); *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984 (9th Cir. 2006).

We agree with the observations of the First Circuit that the conservative approach (1) “recognizes the rebuttable presumption against issuing international antisuit injunctions,” (2) “is more respectful of principles of international comity,” (3) “compels an inquiring court to balance competing policy considerations,” and (4) acknowledges that “issuing an international antisuit injunction is a step that should ‘be taken only with care and great restraint’ and with the recognition that international comity is a fundamental principle deserving of substantial deference.” . . . Likewise, we agree with the Sixth Circuit's observation the liberal approach “conveys the message, intended or not, that the issuing court has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility.”³⁸

In *Goss*, the Eighth Circuit reasoned that comity concerns were paramount and, thus, adopted the conservative approach.³⁹ Notably, in *China Trade*, the Second Circuit rejected an anti-suit injunction enjoining an action in Korea, concluding that “no important policy of the forum would be frustrated by allowing the Korean action to proceed” and “the Korean action pose[d] no threat to the jurisdiction of the district court.”⁴⁰

³⁸ *Goss*, 491 F.3d at 360 (citations omitted).

³⁹ *Id.* at 360-61 (“Although comity eludes a precise definition, its importance in our globalized economy cannot be overstated . . . Indeed, the ‘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.’ . . . We also note, the Congress and the President possess greater experience with, knowledge of, and expertise in international trade and economics than does the Judiciary. The two other branches, not the Judiciary, bear the constitutional duties related to foreign affairs. For these reasons, we join the majority of our sister circuits and adopt the conservative approach in determining whether a foreign antisuit injunction should issue.” [citations omitted]).

⁴⁰ *China Trade*, 837 F.2d at 34. The court further observed:

The possibility that a United States judgment might be unenforceable in Korea is no more than speculation about the race to judgment that may ensue whenever courts have concurrent jurisdiction. Moreover, we cannot determine at this point whether a judgment of the United States court in an amount exceeding the \$1.8 million bond would be enforceable in Korea even if the Korean action were now enjoined. Should plaintiffs prevail, enforcement of any excess amount against Ssangyong in Korea may well require relitigation in the Korean courts of the issue of liability. In these circumstances, we are not persuaded that Ssangyong, the party seeking to litigate in the foreign tribunal, is attempting to evade any important policy of this forum

The reliance on comity in the antisuit analysis likewise raises the questions put above as to whether the comity “element” of these parallel proceedings doctrines must necessarily incorporate the parameters of current recognition statutes rather than just the broad principles articulated over a century ago in *Hilton v. Guyot*, and, if so, can the courts make such prospective determinations. In the Korean context, the comity “balance” might also incorporate the underpinnings of the KORUS FTA and KORUS FCN Treaty.

II. Is The Foreign Action A Proper Resolution That Deserves Deference?

Our second question that seems to necessarily emerge from the abstention and antisuit injunction inquiries is whether the foreign action might properly resolve the dispute such that elements such as comity, efficiency of the use of judicial resources and fairness are satisfied and deference should or should not be afforded. As suggested above, for example, the comity element should perhaps be co-extensive with the recognition statutes if the fundamental, underlying inquiry to how to resolve a parallel proceeding issue is whether the foreign proceeding will or will not most completely resolve the dispute in accordance with proper standards and procedures. But, such analysis is no easier than the balancing required under the abstention or antisuit injunction principles, necessitates the courts to prognosticate about the course of future proceedings and involves differing standards depending on the U.S. venue in which the action is brought.

First, regarding recognition of a foreign country judgment, in the United States, the law governing recognition of a foreign judgment takes one of three forms: (i) a version of the Uniform Foreign Money-Judgments Recognition Act, which was adopted by the National

Id. at 37.

Conference of Commissioners on Uniform State Laws (NCCUSL) in 1962 (the “1962 Act”); (ii) a version of the NCCUSL’s 2005 revision of the 1962 Act, the Uniform Foreign-Country Money Judgments Recognition Act (the “Revised Act”); or (iii) common law principles of comity in jurisdictions that have not adopted one of the statutes.⁴¹ While the 1962 Act would reject a foreign judgment on due process grounds only where the foreign judicial *system* lacked “impartial tribunals or procedures compatible with the requirements of due process of law”; under the Revised Act, a foreign judgment might be subject to non-recognition based on the specific *proceeding* at issue, where “the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment” or “the specific proceeding in the foreign court leading to the judgment was not compatible with the

⁴¹ At present, the Revised Act has been adopted by the following states: California, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, and Washington; with legislation for its adoption having been introduced for its adoption in Alabama, Massachusetts, Mississippi, and Wisconsin. The 1962 Act remains the law in: Alaska, Connecticut, Florida, Georgia, Maine, Maryland, Massachusetts (Revised Act introduced in legislature), Missouri, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Texas, U.S. Virgin Islands, and Virginia.

In contrast to this variability of state laws, the American Law Institute has drafted a proposed federal statute to govern the recognition of foreign country judgments. American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis And Proposed Federal Statute* (2005). At a 2011 Congressional subcommittee hearing, NYU Law Professor Linda Silberman, a ALI Co-Reporter on the ALI recognition and enforcement project, urged that federal legislation be adopted to serve “the needs of a legal and commercial community ever more engaged in international transactions and their inevitable concomitant, international litigation”; while National Conference of Commissioners on Uniform State Laws member Kathleen Patchel countered that “when all factors are considered – the effectiveness and uniformity of the existing state law regime, the federalism issues raised by preemption of that regime, the lack of a distinctive federal interest justifying preemption, and the additional costs to the federal judiciary and enforcement officials from federalization in this area – the case for federalizing the area of recognition and enforcement of foreign country judgments has not been made.” Hearing on Recognition and Enforcement of Foreign Judgments before Subcommittee on Courts, Commercial and Administrative Law of the U.S. House of Representatives Committee on the Judiciary, November 15, 2011 (materials available at http://judiciary.house.gov/hearings/hear_11152011_2.html).

requirements of due process of law.” If we view the potential recognition of the foreign judgment as the test for “comity” or of the efficiency of judicial proceedings in allowing the choosing between the U.S. and the foreign proceedings within the international abstention or antisuit injunction standards, in at least certain jurisdictions, we would need to assess the particular foreign proceeding, *i.e.*, the crystal ball.

Similarly, the application of res judicata and collateral estoppel from a foreign proceeding is inherently subject to question. On the required res judicata element of identity of claims, did the foreign jurisdiction provide for the same cause(s) of action asserted in the U.S. proceeding? With respect to the potential application of collateral estoppel, perhaps a more difficult question (somewhat related to the due process issues), was the finding sought to be applied the subject of a full and fair opportunity to litigate, given limitations in the foreign jurisdiction’s procedures relating to discovery, expert evidence, etc.?

Conclusion

The law concerning how to address parallel foreign proceedings under U.S. law is far from clear, and varies from venue to venue. Moreover, the standards that have been developed involve balancing of multiple factors, many of which compel the courts to look into a crystal ball to determine the events and outcome of future proceedings. One of the inconsistencies in particular is the seeming dissonance between a century-old “definition” of comity and explicit statutes governing the recognition of foreign judgments. We can expect that parallel foreign proceedings will continue to increase in incidence, but refinement of the standards to address these circumstances must be further refined.